SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

TENTH REPORT

OF

2011

14 September 2011

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M Fifield (Chair)
Senator C Brown (Deputy Chair)
Senator M Bishop
Senator S Edwards
Senator G Marshall
Senator R Siewert

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TENTH REPORT OF 2011

The Committee presents its Tenth Report of 2011 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Australian Energy Market Amendment (National Energy Retail Law) Bill 2011

Introduced into the House of Representatives on 6 July 2011
Portfolio: Resources and Energy

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2011*. The Minister responded to the Committee's comments in a letter dated 23 August 2011. A copy of the letter is attached to this report.

Alert Digest No. 8 of 2011 - extract

Background

This bill is part of the Council of Australian Governments' energy reform program, under which non-economic distribution and retail regulation of gas and electricity will come under the national energy institutional framework and regulatory arrangements.

The bill amends:

- the *Australian Energy Market Act 2004* to apply the new National Energy Retail Law and the National Energy Retail Regulations in Australia's offshore areas as laws of the Commonwealth. The National Energy Retail Law is part of a cooperative Commonwealth, State and Territory regime for the regulation of non-economic distribution and retail regulation of gas and electricity known as the National Energy Customer Framework. The new National Energy Retail Law will have the Australian Energy Regulator (AER) as regulator and the Australian Energy Market Commission (AEMC) will be responsible for changes to the new National Energy Retail Rules made under the National Energy Retail Law;

- the *Australian Energy Market Act 2004* to provide for the conferral of functions and powers under the National Energy Retail Law and the National Energy Retail Regulations on the AER, the AEMC, the Australian Competition Tribunal (ACT), and the Commonwealth Minister by the new National Energy Retail Law;

- the *Competition and Consumer Act 2010* to address technical issues with the conferral of functions and powers on the AER by the new National Energy Retail Law and also under local energy instruments made under State application Acts for

the three national energy laws (the National Energy Retail Law, the National Electricity Law and the National Gas Law); and

- the *Administrative Decisions (Judicial Review) Act 1977* to provide for judicial review of decisions under the new National Energy Retail Law regime.

Incorporating material by reference
Insufficient parliamentary scrutiny
Schedule 1, item 10

Item 10 of Schedule 1 of the bill inserts New Division 2A to the *Australian Energy Market Act 2004* (Cth). The proposed section 11T applies laws 'as amended from time to time' by and under the *National Energy Retail Law (South Australia) Act 2011* (SA) as laws of the Commonwealth. This enables Commonwealth law to, in effect, be determined by another Parliament. The explanatory memorandum explains that this is because the bill implements a cooperative State and Territory/Commonwealth scheme. The explanatory memorandum also notes that the relevant laws which will apply as a law of the Commonwealth may only be amended with the unanimous agreement of the Ministerial Council for Energy (which includes the Commonwealth Minister) and, thus, that they may only be 'amended with the consent of the relevant Commonwealth Minister' (see the explanatory memorandum at page 17). Further, mechanisms through which the Commonwealth has the power to influence or modify the relevant laws are also noted in the explanatory memorandum (see the explanatory memorandum at page 17, paragraph 42).

While the Committee understands the arrangements through which cooperative schemes are often implemented and the arguments in favour of a uniform national approach, it is concerned to ensure that legislation is subject to appropriate legislative scrutiny. The Committee would welcome an opportunity for it to consider and comment on an exposure draft of any proposed amendments prior to their adoption. **The Committee therefore requests the Minister's advice about whether any proposed changes will be referred to it prior to their adoption.**

Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Minister's response - extract

I note the Committee has requested advice about whether any proposed changes to the South Australian *National Energy Retail Law (South Australia) Act 2011* will be referred to it prior to their adoption. The Alert Digest expresses concern at page 3 that the applied law regime '... enables Commonwealth law to, in effect, be determined by another

Parliament'. The Digest goes on to note that as a result the Committee 'would welcome an opportunity for it to consider and comment on an exposure draft of any proposed amendments prior to their adoption'.

The *Australian Energy Market Amendment (National Energy Retail Law) Bill 2011* is necessary to give effect to co-operative energy market reform agreed through the Ministerial Council on Energy (MCE).

Section 11T specifically operates to 'pick up' the National Energy Retail Law (Retail Law), which is part of an Act of South Australia, and apply it (along with the Regulations and Rules made under it) as Commonwealth law in the offshore areas which fall outside state or territory jurisdiction. In this sense, the Commonwealth applied Retail Law is expected to have little practical operation.

In the interests of consistency, section 11T gives effect to the relevant agreed nationally harmonised approach to the application of national laws in the energy sector, which are legislated through the South Australian Parliament (given South Australia is the lead legislator for MCE agreed legislation). Other participating jurisdictions will include equivalent provisions to section 11T in their application Acts for the National Energy Retail Law.

This legislative approach is consistent with the approach taken to the Commonwealth's application of the National Electricity Law that was previously agreed by the Commonwealth Parliament when it enacted the *Australian Energy Market Act 2004* (AEM Act). It is also consistent with the approach taken to the Commonwealth's application of the National Gas Law, when the AEM Act was amended for that purpose in 2007. Like the National Energy Retail Law, the National Electricity Law and the National Gas Law are both set out in an Act of the South Australian Parliament.

There are checks and balances in place - specifically, MCE agreed proposals being legislated in South Australia will be subject to proper scrutiny by the South Australian Parliament, and must be agreed to by the Commonwealth Government through MCE processes.

The Commonwealth Parliament always retains the right to amend or repeal Commonwealth legislation, including the AEM Act, at a future date.

Accordingly, I advise I do not propose to provide the Committee with future proposed amendments to the applied Law prior to their enactment by the South Australian Parliament.

Committee Response

The Committee thanks the Minister for this response. The Committee is disappointed that the Minister has declined the opportunity to obtain its technical expertise in scrutiny matters at an early stage in the development of future laws and remains willing to be consulted in future.

Competition and Consumer Legislation Amendment Bill 2011

Introduced into the House of Representatives on 27 May 2010 and reintroduced on 15 June 2011
Portfolio: Treasury

This bill is substantially similar to a bill introduced in the previous Parliament.

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2011.* The Minister responded to the Committee's comments in a letter dated 8 September 2011. A copy of the letter is attached to this report.

Alert Digest No. 6 of 2011 - extract

Background

This bill amends the *Competition and Consumer Act 2010* to clarify the operation of the provision relating to mergers and acquisitions.

The bill also amends the unconscionable conduct provisions of the Australian Consumer Law and the *Australian Securities and Investments Commission Act 2001.*

The bill also corrects minor drafting errors made in the *Trade Practices Amendment (Australian Consumer Law) Act (No.2) 2010.*

Retrospective commencement
Schedule 3

Schedule 3 of the bill corrects drafting errors in the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010.* These corrections are to apply with retrospective effect from 1 January 2011, the date on which the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* commenced. The justification for the proposed approach is that the amendments correct only 'typographical drafting errors' and 'to ensure that the amendments in that Act have always applied as intended' (see the explanatory memorandum at page 25). **The Committee notes this information and the implication that these are minor amendments of a machinery nature, but seeks the Treasurer's confirmation that the amendments do not have potential to cause any detriment.**

Pending the Treasurer's reply, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Minister's response - extract

The Alert Digest notes the retrospective effects of proposed paragraph 21 (3)(b) of the *Australian Consumer Law* (ACL) and proposed paragraph 12CB(3)(b) of the *Australian Securities and Investments Commission 2001* (ASIC Act). These provisions are identical and allow a Court to consider conduct that was engaged in or circumstances that existed before the commencement of the respective sections.

The Bill amends the unconscionable conduct provisions of the ACL and ASIC Act to insert interpretative principles and to unify the consumer and business-related unconscionable conduct provisions of each law. Section 21 of the ACL and 12CB of the ASIC Act would replace similar provisions of the ACL and the ASIC Act that prohibited unconscionable conduct. As the Explanatory Memorandum states, the intention is not to change the meaning of the law, but to provide businesses, consumers and the Courts with greater clarity around the pre-existing meaning of the relevant provisions.

Section 51AB of the *Trade Practices Act 1974* (TPA), which is the predecessor provision to section 21 of the ACL, was inserted into the TPA by the *Trade Practices Revision Act 1986.* Section 51AB of the TPA included a provision identical to proposed paragraph 21(3)(b) of the ACL and 12CB(3)(b) of the ASIC Act, to allow a court to consider conduct that was engaged in or circumstances that existed before the commencement of that section. Accordingly, limited retrospective application of the unconscionable conduct provisions has been a feature of the law since 1986. Further, proposed paragraph 21(3)(b) of the ACL and proposed paragraph 12CB(3)(b) of the ASIC Act are not applied retrospectively in a substantive sense, given that the new paragraphs would not create any new rights or obligations.

As indicated in the Explanatory Memorandum, this approach also ensures that there is no gap, whereby conduct engaged in or circumstances that existed prior to the commencement of the amendments would not be able to be considered under the amended provisions.

The Committee has asked for confirmation that the minor amendments in Schedule 3 of the Bill do not have the potential to cause any detriment, as they would commence retrospectively. I can confirm that all amendments in Schedule 3 are to correct typographical errors that do not alter the effect of the relevant provisions.

Committee Response

The Committee thanks the Parliamentary Secretary for this response, which addresses its concerns.

Excise Legislation Amendment (Condensate) Bill 2011
Excise Tariff Amendment (Condensate) Bill 2011

Introduced into the House of Representatives on 6 July 2011
Portfolio: Treasury

Introduction

The Committee dealt with these bills in *Alert Digest No. 8 of 2011*. The Minister responded to the Committee's comments in a letter dated 25 August 2011. A copy of the letter is attached to this report.

Alert Digest No. 8 of 2011 extract – Excise Legislation Amendment (Condensate) Bill 2011

Background

The bill amends the *Petroleum Excise (Prices) Act 1987* to clarify that failure to provide petroleum producers with written notification setting out the terms of a Volume Weighted Average of Realised (VOLWARE) prices determination does not affect the making of the determination.

The bill also provides for producers to seek a review within 28 days of receiving written notice of a final VOLWARE price determination.

Retrospective operation
Schedule 1, Part 2, item 4

The purpose of this bill and the related Excise Tariff (Condensate) Bill 2011 is to address uncertainties which have arisen in relation to policy changes made in 2008. The effect of the 2008 changes was to remove the Crude Oil Excise exemption so that the Crude Oil Excise regime would apply to condensate production from the North West Shelf project area. These changes were implemented on 13 May 2008. It is intended that the amendments proposed by these bills will apply from that date. Thus, the bills clearly have retrospective operation.

The intention of the proposed amendments in the Excise Legislation Amendment (Condensate) Bill is 'to clarify that failure to provide petroleum producers with written notification setting out the terms of a Volume Weighted Average of realised prices determination does not affect the making of the determination' (see page 3 of the explanatory memorandum).

The intention of the proposed amendments in the Excise Tariff Amendment (Condensate) Bill is 'to clarify and confirm the area encompassed by the 'Rankin Trend' condensate production area, located within the North West Shelf project area' (see page 3 of the explanatory memorandum). The relevant area was prescribed in a 2008 by-law as the Rankin Trend, but doubts have arisen as to whether the Rankin Trend encompasses an area which is larger than was intended. The amendments insert a statutory definition of the Rankin Trend and also allow for additional reservoirs to be added to the Rankin Trend condensate production area in the future (where the Minister is satisfied of particular matters).

The explanatory memorandum for these bills, at page 3, states that the measures will have no revenue impact as they 'affirm the current application of the Crude Oil Excise regime' and, at page 10, that the amendments 'affirm the current operation application of Crude Oil Excise to condensate production'. However, the explanatory memorandum does not squarely address the justification of the retrospective operation of the proposed amendments. The suggestion appears to be that as the amendments conform to the original policy intention of the changes made in 2008 the retrospective operation of the amendments is well justified. Nevertheless, clarification of the law constitutes legal change (even if it is in line with what are considered to be the original policy intentions of the legislation) and the Committee expects changes to the law that are given retrospective operation to be fully justified. In particular, the Committee is attentive to the potential for such changes to adversely affect the rights or interests of affected individuals. It is disappointing that these matters (particularly as they relate to Schedule 1, Part 2, item 4 of this Bill and Schedule 1, Part 2, item 5 of the Excise Tariff Amendment (Condensate) Bill) are not directly addressed in the explanatory memorandum. In these circumstances, the Committee **seeks the Minister's further explanation of the changes in both bills, and particularly whether they will give rise to detriment to any person.**

> *Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.*

Alert Digest No. 8 of 2011 extract – Excise Tariff Amendment (Condensate) Bill 2011

Background

This bill amends the *Excise Tariff Act 1921* to:

- clarify and confirm the area encompassed by the 'Rankin Trend' condensate production area, located within the North West Shelf project area; and

- make regulations to extend the area of the Rankin Trend to include additional reservoirs or groups of reservoirs.

Retrospective operation
Schedule 1, Part 2, item 5

See comments for the related Excise Legislation Amendment (Condensate) Bill 2011 above seeking the Minister's comments on this provision.

> *Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.*

Minister's response - extract

The Committee has requested further explanation of the changes in both Bills, and particularly whether they will give rise to detriment to any person. In relation to this, please find attached my response to the Committee.

I trust this information addresses the concerns raised by the Committee.

Excise Tariff Amendment (Condensate) Bill 2011
Schedule 1, Part 2, item 5

Excise Legislation Amendment (Condensate) Bill 2011
Schedule 1, Part 2, item 4

Concern

The Committee seeks the Minister's further explanation of the changes in both Bills, and particularly whether they will give rise to detriment to any person.

Response

In the 2008-09 Budget, the Government announced the removal of the longstanding Crude Oil Excise exemption that had applied to condensate production, with effect from midnight 13 May 2008. The intention of the measure was to increase the return to the Australian community for allowing private interests to extract non-renewable energy resources

located in the North West Shelf project and onshore Australia, and was estimated to raise around $2.5 billion in revenue over the four years to 2011-12.

Doubts have subsequently been raised by the North West Shelf joint venture (NWSJV) regarding two elements that are essential to the imposition of Crude Oil Excise. These are:

- the area encompassed by the 'Rankin Trend' prescribed condensate production area; and

- the validity of Volume Weighted Average of Realised Prices (VOLWARE) prices, which are the prices used to calculate excise liability.

In relation to the first issue, in November 2008, the Tax Commissioner prescribed the 'Rankin Trend' through by-law as a condensate production area with effect from 13 May 2008. The Rankin Trend is located in the North West Shelf project area and encompasses a number of closely located reservoirs. It was prescribed as a single condensate production area on the basis that the reservoirs comprised a single field.

The NWSJV have suggested that the area encompassed by the Rankin Trend prescribed condensate production area is uncertain, on the basis that the term, 'Rankin Trend', is normally used by geologists to refer to a very large region of the subsurface in the North West Shelf, and not the discrete condensate production area intended.

With regard to the second issue, it has also been suggested that a failure to provide a notice to relevant producers regarding a VOLWARE determination, within the time allowed for such determinations to be made under the *Petroleum Excise (Prices*) *Act 1987*, invalidates the determination itself.

The Excise Tariff (Condensate) Amendment Bill and the Excise legislation (Condensate) Amendment Bill address these issues. The amendments apply from 13 May 2008 to remove any uncertainty regarding the operation of the law since it came into effect.

Similarly the Excise Legislation (Condensate) Amendment Bill amends the *Petroleum Excise (Prices) Act 1987* to clarify that a failure to provide a notice to producers setting out the terms of a VOLWARE price determination does not affect the validity of the determination itself.

While the amendments take effect at a time prior to their introduction, they are not retrospective in the sense that they do not result in an additional impost on the NWSJV. Rather, they confirm and clarify the application of Crude Oil Excise to condensate produced from the North West Shelf as intended under the original 2008-09 Budget measure, and consistent with how excise has been applied to that area since the removal of the excise exemption.

Were the amendments not to apply from the commencement of the original measure, then the operation of the law over the intervening period between the original measure and the

amendments would be open to challenge, and the significant amount of revenue already collected would remain at risk.

As noted, prescribed condensate production areas and VOLWARE determinations are necessary for the imposition of crude oil excise. Were either the Rankin Trend condensate production area, or the related VOLWARE price determinations found to be invalid, then no crude oil excise would be payable during the intervening period, contrary to the intent of the 2008-09 measure.

Committee Response

The Committee thanks the Minister for this response and **leaves the question of whether the proposed approach is appropriate to the Senate as a whole**.

Tobacco Plain Packaging Bill 2011

Introduced into the House of Representatives on 6 July 2011
Portfolio: Health and Ageing

Introduction

The Committee dealt with these bills in *Alert Digest No. 8 of 2011*. The Minister responded to the Committee's comments in a letter dated 7 September 2011. A copy of the letter is attached to this report.

Alert Digest No. 8 of 2011 - extract

Background

This bill prohibits manufacturers from any form of advertising or promoting tobacco products on tobacco product packaging.

Possible inappropriate delegation
Clause 27

Clause 27 of the bill allows for the regulations to prescribe additional requirements (i.e. in addition to those set out in the bill) in relation to the retail packaging of tobacco products and the appearance of tobacco products 'to further the objects of this Act'. It is unfortunate that the explanatory memorandum does not explain why it is necessary for additional requirements to be prescribed in the regulations, particularly given that, as Note 2 states, there are offences and civil penalties which 'apply to the supply, purchase and manufacture etc of tobacco products that do not comply with the requirements'. The Committee prefers that important matters are included in primary legislation whenever possible and **therefore seeks the Minister's advice as to why any further requirements cannot be identified in the primary legislation, particularly as offences and civil penalties may apply.**

> *Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.*

Minister's response - extract

The Committee has noted that clause 27 of the Bill allows for regulations to prescribe requirements, in addition to those set out in the Bill, in relation to the retail packaging of tobacco products and the appearance of tobacco products.

The information I set out below explains that the regulation making power is intended to allow for the detailed and technical requirements for plain packaging to be set out in regulations, consistent with current practice for packaging regulation, to enable efficiency in ongoing administration of the plain packaging requirements.

Chapter 2 of the Bill sets out the general requirements in relation to the packaging of tobacco products and the products themselves. These are intended as broad, although quite comprehensive, prohibitions on features of tobacco packaging that could be taken to be decorative or promotional, including limitations on the appearance of trade marks and on the colour and finish of retail packaging of tobacco products.

In formulating the structure of the Bill, I intended any regulations made under clause 27 of the Bill to be used to specify the detailed and technical requirements for retail packaging, and for the appearance of tobacco products. I have enclosed the draft Regulations, which were tabled at the time of introduction of the Bill, to assist in the Committee's consideration of how clause 27 is intended to be used. The draft Regulations currently specify details such as the dimensions for retail cigarette packaging, the particular colour of packaging, the types of marks that *may* appear on packaging and the way those marks can be displayed.

The Bill and the draft Regulations are intended to work together to regulate tobacco packaging, to ensure that packaging has the lowest appeal to consumers, and to make clear the effects that tobacco consumption has on human health.

Research shows that plain packaging will:

- increase the noticeability, recall and impact of health warning messages;
- reduce the ability of packaging to mislead consumers to believe that some products may be less harmful than others; and
- reduce the attractiveness of the tobacco product, for both adults and children.

In order for plain packaging to continue to have these effects in the long-term, it is desirable that the process for updating the regulatory arrangements be administratively efficient and provide sufficient flexibility to respond to the need for adjustments to the requirements when they arise. For example, should the post-implementation evaluation of the impacts of plain packaging show that some changes are required to the specific details

of plain packaging, such updates will most efficiently be achieved through the use of regulations, rather than by requiring the Parliament to consider detailed requirements.

In relation to penalties, under the Bill offences and civil penalties will apply to certain types of conduct in relation to tobacco products that do not comply with regulations made under the Bill. However, this approach is consistent with the way in which other requirements for packaging of tobacco products are mandated. For example, the requirements for graphic health warnings are specified in an information standard made under the *Competition and Consumer ACI 2010* (formerly the *Trade Practices Act 1974*), while the enabling legislation contains the offences for failing to comply with those requirements.

The Committee's concern appears to be that the regulation-making power may be inappropriate because it confers a broad legislative power on the executive. However, the requirements specified in the Bill are already broad and comprehensive and do not leave scope for the regulations to prescribe extensive additional requirements. In addition, the scope of clause 27 is significantly limited by the fact that any additional requirements may only relate to retail tobacco packaging and the appearance of tobacco products. Therefore, it is unlikely that anyone will be subject to prosecution in circumstances that are beyond the contemplation of the Parliament at the time of its consideration of the Bill.

I trust the above explanation is sufficient to reassure the Senate Standing Committee for the Scrutiny of Bills about the intended use of the new regulation making power.

Committee Response

The Committee thanks the Minister for this comprehensive response and notes that draft regulations have been tabled.

Senator Mitch Fifield
Chair

THE HON MARTIN FERGUSON AM MP

MINISTER FOR RESOURCES AND ENERGY
MINISTER FOR TOURISM

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C11/2703

23 AUG 2011

Senator Mitch Fifield
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Fifield Mitch,

Thank you for your letter of 18 August 2011 concerning the Standing Committee for the Scrutiny of Bills' comments on the *Australian Energy Market Amendment (National Energy Retail Law) Bill 2011*.

I note the Committee has requested advice about whether any proposed changes to the South Australian *National Energy Retail Law (South Australia) Act 2011* will be referred to it prior to their adoption. The Alert Digest expresses concern at page 3 that the applied law regime '...enables Commonwealth law to, in effect, be determined by another Parliament'. The Digest goes on to note that as a result the Committee 'would welcome an opportunity for it to consider and comment on an exposure draft of any proposed amendments prior to their adoption'.

The *Australian Energy Market Amendment (National Energy Retail Law) Bill 2011* is necessary to give effect to co-operative energy market reform agreed through the Ministerial Council on Energy (MCE).

Section 11T specifically operates to 'pick up' the National Energy Retail Law (Retail Law), which is part of an Act of South Australia, and apply it (along with the Regulations and Rules made under it) as Commonwealth law in the offshore areas which fall outside state or territory jurisdiction. In this sense, the Commonwealth applied Retail Law is expected to have little practical operation.

In the interests of consistency, section 11T gives effect to the relevant agreed nationally harmonised approach to the application of national laws in the energy sector, which are legislated through the South Australian Parliament (given South Australia is the lead legislator

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for MCE agreed legislation). Other participating jurisdictions will include equivalent provisions to section 11T in their application Acts for the National Energy Retail Law.

This legislative approach is consistent with the approach taken to the Commonwealth's application of the National Electricity Law that was previously agreed by the Commonwealth Parliament when it enacted the *Australian Energy Market Act 2004* (AEM Act). It is also consistent with the approach taken to the Commonwealth's application of the National Gas Law, when the AEM Act was amended for that purpose in 2007. Like the National Energy Retail Law, the National Electricity Law and the National Gas Law are both set out in an Act of the South Australian Parliament.

There are checks and balances in place – specifically, MCE agreed proposals being legislated in South Australia will be subject to proper scrutiny by the South Australian Parliament, and must be agreed to by the Commonwealth Government through MCE processes.

The Commonwealth Parliament always retains the right to amend or repeal Commonwealth legislation, including the AEM Act, at a future date.

Accordingly, I advise I do not propose to provide the Committee with future proposed amendments to the applied Law prior to their enactment by the South Australian Parliament.

A copy of this response has also been emailed to scrutiny.sen@aph.gov.au.

Yours sincerely

Martin Ferguson

The Hon David Bradbury MP
Parliamentary Secretary to the Treasurer

Senator Mitch Fifield
Chair
Senate Scrutiny of Bills Committee
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CANBERRA ACT 2600

Dear Senator Mitch, Fifield

Thank you for the Senate Standing Committee for the Scrutiny of Bills' letter of 23 June 2011 in relation to *Alert Digest No. 6 of 2011* (22 June 2011) (Alert Digest) concerning the Competition and Consumer Legislation Amendment Bill 2011 (the Bill). The Committee's letter requests a response to issues identified in the Alert Digest. The Deputy Prime Minister has asked me to respond to you as I have portfolio responsibility for this matter.

The Alert Digest notes the retrospective effects of proposed paragraph 21(3)(b) of the *Australian Consumer Law* (ACL) and proposed paragraph 12CB(3)(b) of the *Australian Securities and Investments Commission 2001* (ASIC Act). These provisions are identical and allow a Court to consider conduct that was engaged in or circumstances that existed before the commencement of the respective sections.

The Bill amends the unconscionable conduct provisions of the ACL and ASIC Act to insert interpretative principles and to unify the consumer and business-related unconscionable conduct provisions of each law. Section 21 of the ACL and 12CB of the ASIC Act would replace similar provisions of the ACL and the ASIC Act that prohibited unconscionable conduct. As the Explanatory Memorandum states, the intention is not to change the meaning of the law, but to provide businesses, consumers and the Courts with greater clarity around the pre-existing meaning of the relevant provisions.

Section 51AB of the *Trade Practices Act 1974* (TPA), which is the predecessor provision to section 21 of the ACL, was inserted into the TPA by the *Trade Practices Revision Act 1986*. Section 51AB of the TPA included a provision identical to proposed paragraph 21(3)(b) of the ACL and 12CB(3)(b) of the ASIC Act, to allow a court to consider conduct that was engaged in or circumstances that existed before the commencement of that section. Accordingly, limited retrospective application of the unconscionable conduct provisions has been a feature of the law since 1986. Further, proposed paragraph 21(3)(b) of the ACL and proposed paragraph 12CB(3)(b) of the ASIC Act are not applied retrospectively in a substantive sense, given that the new paragraphs would not create any new rights or obligations.

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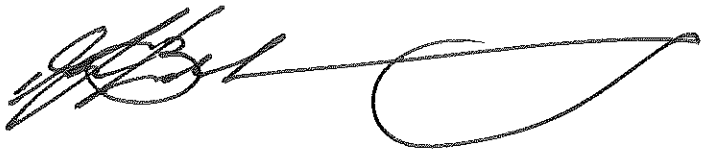
As indicated in the Explanatory Memorandum, this approach also ensures that there is no gap, whereby conduct engaged in or circumstances that existed prior to the commencement of the amendments would not be able to be considered under the amended provisions.

The Committee has asked for confirmation that the minor amendments in Schedule 3 of the Bill do not have the potential to cause any detriment, as they would commence retrospectively. I can confirm that all amendments in Schedule 3 are to correct typographical errors that do not alter the effect of the relevant provisions.

Yours sincerely



DAVID BRADBURY

08 SEP 2011

ASSISTANT TREASURER
MINISTER FOR FINANCIAL SERVICES AND SUPERANNUATION

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25 AUG 2011

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Senator Mitch Fifield
Chair
Senate Scrutiny of Bills Committee
S1.11
Parliament House
CANBERRA

Dear Senator

I refer to the letter of 18 August 2011 from the Secretary of the Standing Committee for the Scrutiny of Bills to the Deputy Prime Minister concerning the Excise Legislation Amendment (Condensate) Bill 2011, and the Excise Tariff Amendment (Condensate) Bill 2011. As this matter has been referred to me by the Deputy Prime Minister, I am responding on his behalf.

The Committee has requested further explanation of the changes in both Bills, and particularly whether they will give rise to detriment to any person. In relation to this, please find attached my response to the Committee.

I trust this information addresses the concerns raised by the Committee.

Yours sincerely

BILL SHORTEN

Excise Tariff Amendment (Condensate) Bill 2011

Schedule 1, Part 2, item 5

Excise Legislation Amendment (Condensate) Bill 2011

Schedule 1, Part 2, item 4

Concern

The Committee seeks the Minister's further explanation of the changes in both Bills, and particularly whether they will give rise to detriment to any person.

Response

In the 2008-09 Budget, the Government announced the removal of the longstanding Crude Oil Excise exemption that had applied to condensate production, with effect from midnight 13 May 2008. The intention of the measure was to increase the return to the Australian community for allowing private interests to extract non-renewable energy resources located in the North West Shelf project and onshore Australia, and was estimated to raise around $2.5 billion in revenue over the four years to 2011-12[1].

Doubts have subsequently been raised by the North West Shelf joint venture (NWSJV) regarding two elements that are essential to the imposition of Crude Oil Excise. These are:

- the area encompassed by the 'Rankin Trend' prescribed condensate production area; and
- the validity of Volume Weighted Average of Realised Prices (VOLWARE) prices, which are the prices used to calculate excise liability.

In relation to the first issue, in November 2008, the Tax Commissioner prescribed the 'Rankin Trend' through by-law as a condensate production area with effect from 13 May 2008. The Rankin Trend is located in the North West Shelf project area and encompasses a number of closely located reservoirs. It was prescribed as a single condensate production area on the basis that the reservoirs comprised a single field.

The NWSJV have suggested that the area encompassed by the Rankin Trend prescribed condensate production area is uncertain, on the basis that the term, 'Rankin Trend', is normally used by geologists to refer to a very large region of the subsurface in the North West Shelf, and not the discrete condensate production area intended.

With regard to the second issue, it has also been suggested that a failure to provide a notice to relevant producers regarding a VOLWARE determination, within the time allowed for such determinations to be made under the *Petroleum Excise (Prices) Act 1987*, invalidates the determination itself.

The Excise Tariff (Condensate) Amendment Bill and the Excise Legislation (Condensate) Amendment Bill address these issues. The amendments apply from 13 May 2008 to remove any uncertainty regarding the operation of the law since it came into effect.

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[1] Crude oil excise – condensate, 2008-09 Budget Paper 2, page 19

The Excise Tariff (Condensate) Amendment Bill amends the *Excise Tariff Act 1921* to address the first issue by inserting a statutory definition of the Rankin Trend within the Act that clarifies that the Rankin Trend prescribed condensate production area is the area encompassing the reservoirs identified as forming a single field, and upon which the prescription of the condensate production area in 2008 was based.

Similarly the Excise Legislation (Condensate) Amendment Bill amends the *Petroleum Excise (Prices) Act 1987* to clarify that a failure to provide a notice to producers setting out the terms of a VOLWARE price determination does not affect the validity of the determination itself.

While the amendments take effect at a time prior to their introduction, they are not retrospective in the sense that they do not result in an additional impost on the NWSJV. Rather, they confirm and clarify the application of Crude Oil Excise to condensate produced from the North West Shelf as intended under the original 2008-09 Budget measure, and consistent with how excise has been applied to that area since the removal of the excise exemption.

Were the amendments not to apply from the commencement of the original measure, then the operation of the law over the intervening period between the original measure and the amendments would be open to challenge, and the significant amount of revenue already collected would remain at risk.

As noted, prescribed condensate production areas and VOLWARE determinations are necessary for the imposition of crude oil excise. Were either the Rankin Trend condensate production area, or the related VOLWARE price determinations found to be invalid, then no crude oil excise would be payable during the intervening period, contrary to the intent of the 2008-09 measure.

THE HON NICOLA ROXON MP
MINISTER FOR HEALTH AND AGEING

Senator Mitch Fifield
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Fifield

I refer to a letter of 18 August 2011 from Ms Toni Dawes, Committee Secretary of the Senate Standing Committee for the Scrutiny of Bills. Ms Dawes sought my response to comments in the Senate Standing Committee for the Scrutiny of Bills Alert Digest No. 8 of 2011, regarding the use of regulation making powers in the Tobacco Plain Packaging Bill 2011 (the Bill).

The Committee has noted that clause 27 of the Bill allows for regulations to prescribe requirements, in addition to those set out in the Bill, in relation to the retail packaging of tobacco products and the appearance of tobacco products.

The information I set out below explains that the regulation making power is intended to allow for the detailed and technical requirements for plain packaging to be set out in regulations, consistent with current practice for packaging regulation, to enable efficiency in ongoing administration of the plain packaging requirements.

Chapter 2 of the Bill sets out the general requirements in relation to the packaging of tobacco products and the products themselves. These are intended as broad, although quite comprehensive, prohibitions on features of tobacco packaging that could be taken to be decorative or promotional, including limitations on the appearance of trade marks and on the colour and finish of retail packaging of tobacco products.

In formulating the structure of the Bill, I intended any regulations made under clause 27 of the Bill to be used to specify the detailed and technical requirements for retail packaging, and for the appearance of tobacco products. I have enclosed the draft Regulations, which were tabled at the time of introduction of the Bill, to assist in the Committee's consideration of how clause 27 is intended to be used. The draft Regulations currently specify details such as the dimensions for retail cigarette packaging, the particular colour of packaging, the types of marks that *may* appear on packaging and the way those marks can be displayed.

The Bill and the draft Regulations are intended to work together to regulate tobacco packaging, to ensure that packaging has the lowest appeal to consumers, and to make clear the effects that tobacco consumption has on human health.

Research shows that plain packaging will:

- increase the noticeability, recall and impact of health warning messages;
- reduce the ability of packaging to mislead consumers to believe that some products may be less harmful than others; and
- reduce the attractiveness of the tobacco product, for both adults and children.

In order for plain packaging to continue to have these effects in the long-term, it is desirable that the process for updating the regulatory arrangements be administratively efficient and provide sufficient flexibility to respond to the need for adjustments to the requirements when they arise. For example, should the post-implementation evaluation of the impacts of plain packaging show that some changes are required to the specific details of plain packaging, such updates will most efficiently be achieved through the use of regulations, rather than by requiring the Parliament to consider detailed requirements.

In relation to penalties, under the Bill offences and civil penalties will apply to certain types of conduct in relation to tobacco products that do not comply with regulations made under the Bill. However, this approach is consistent with the way in which other requirements for packaging of tobacco products are mandated. For example, the requirements for graphic health warnings are specified in an information standard made under the *Competition and Consumer Act 2010* (formerly the *Trade Practices Act 1974*), while the enabling legislation contains the offences for failing to comply with those requirements.

The Committee's concern appears to be that the regulation-making power may be inappropriate because it confers a broad legislative power on the executive. However, the requirements specified in the Bill are already broad and comprehensive and do not leave scope for the regulations to prescribe extensive additional requirements. In addition, the scope of clause 27 is significantly limited by the fact that any additional requirements may only relate to retail tobacco packaging and the appearance of tobacco products. Therefore, it is unlikely that anyone will be subject to prosecution in circumstances that are beyond the contemplation of the Parliament at the time of its consideration of the Bill.

I trust the above explanation is sufficient to reassure the Senate Standing Committee for the Scrutiny of Bills about the intended use of the new regulation making power.

In order to assist the Committee's consideration of my response, I have also copied this letter to the Committee secretariat at scrutiny.sen@aph.gov.au

Yours sincerely

NICOLA ROXON

7 SEP 2011

Encl

Tobacco Plain Packaging Regulations 2011[1]

Select Legislative Instrument 2011 No.

I, QUENTIN BRYCE, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following Regulations under the *Tobacco Plain Packaging Act 2011*.

Dated 2011

Governor-General

By Her Excellency's Command

[DRAFT ONLY – NOT FOR SIGNATURE]
Minister for Health and Ageing

DRAFT ONLY

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Contents

Part 1 Preliminary

1.1 Name of Regulations

These Regulations are the *Tobacco Plain Packaging Regulations 2011*.

1.2 Commencement

These Regulations commence on the commencement of item 2 of the table in subsection 2 (1) of the Act.

1.3 Definitions

In these Regulations:

Act means the *Tobacco Plain Packaging Act 2011*.

bar code means a mark containing information about a product in the form of a series of bars of varying thickness designed to be read by an optical scanner.

calibration mark means a mark or trade mark used only for the purpose of the automated manufacture of retail packaging.

lowered permeability band — see subregulation 3.1 (2).

origin mark means a mark on the retail packaging of tobacco products to distinguish the origin of the tobacco products and does not include a date by which it is recommended that the product be used.

tear strip — see subregulation 2.7 (2).

Note Several other words and expressions used in these Regulations have the meaning given by section 4 of the Act, for example:

- cigarette carton
- cigarette pack
- health warning
- imitation cork tip
- measurement mark
- relevant legislative requirement
- retail packaging
- tobacco advertising and promotion
- tobacco product
- trade description
- variant name.

1.4 Purpose

These Regulations prescribe requirements for the retail packaging and appearance of tobacco products for Part 2 of Chapter 2 of the Act.

1.5 Exemption from *Trans-Tasman Mutual Recognition Act 1997*

For subsection 109 (2) of the Act, the Act is exempt from the operation of the *Trans-Tasman Mutual Recognition Act 1997*.

Note This exemption operates for 12 months from the commencement of these Regulations.

Part 2 Requirements for retail packaging of tobacco products

2.1 Physical features of retail packaging

(1) The dimensions of a cigarette pack must not be smaller than [x by x by x] or larger than [x by x by x].

(2) A cigarette carton may include a perforated strip for opening the carton that leaves serrations on the edge of a surface of the carton when the carton is opened.

Note Subsection 18 (1) of the Act sets out general requirements for the physical features of retail packaging for all tobacco products. Subsections 18 (2) and (3) of the Act set out additional requirements relating to the physical features of cigarette packs and cigarette cartons.

2.2 Colour and finish of retail packaging

(1) This regulation applies to the following things:

(a) all outer surfaces and inner surfaces of the retail packaging of tobacco products (within the meaning of paragraph (a) or (b) of the definition of ***retail packaging*** in section 4 of the Act);

(b) both sides of any lining of a cigarette pack.

(2) The things mentioned in subregulation (1) must be the colour known as [XXX].

Note Section 19 of the Act sets out other requirements relating to the colour and finish of retail packaging.

2.3 Trade marks or marks appearing on retail packaging

(1) The following are permitted to appear on the retail packaging of tobacco products:

(a) an origin mark in accordance with regulation 2.4;

(b) a calibration mark;

(c) a measurement mark and trade description in accordance with regulation 2.5;

(d) a bar code in accordance with regulation 2.6;

(e) a fire risk statement in accordance with regulation 2.9.

(2) However, only a tear strip in accordance with regulation 2.7, and no other trade mark or mark, may appear on a plastic or other wrapper that covers:

(a) the retail packaging of tobacco products (within the meaning of paragraph (a) or (b) of the definition of ***retail packaging*** in the Act); or

(b) a tobacco product that is for retail sale.

(3) The trade mark or mark mentioned in subregulation (1) or (2) must not:

(a) obscure any relevant legislative requirement; or

(b) constitute, or be able to be taken to constitute, tobacco advertising and promotion; or

(c) provide access to tobacco advertising and promotion.

2.4 Origin mark

(1) An origin mark must be:

(a) an alphanumeric code; or

(b) a covert mark that is not visible to the naked eye.

(2) If an origin mark is an alphanumeric code, it must:

(a) appear only once on the retail packaging; and

(b) for a cigarette pack or cigarette carton — appear on either:

(i) the side outer surface of the pack or carton that does not bear a health warning; or

(ii) the bottom outer surface of the pack or carton; and

(c) be printed:

(i) in the typeface known as Lucida Sans; and

(ii) no larger than 10 points in size; and

(iii) in a normal weighted regular font; and

(iv) in the colour known as [XXX].

2.5 Measurement mark and trade description

(1) A measurement mark or trade description must be printed:

(a) in the typeface known as Lucida Sans; and

(b) no larger than 10 points in size; and

(c) in normal weighted regular font; and

(d) in the colour known as [XXX].

(2) For a cigarette pack or cigarette carton:

(a) the name and address required by Division 4.3 of the *National Trade Measurement Regulations 2009* must:

(i) appear only on the side outer surface of the pack or carton that does not bear a health warning; and

(ii) appear only once on that surface; and

(b) the statement of measurement required by Division 4.4 of the *National Trade Measurement Regulations 2009* may appear once on no more than 2 of the front, side and bottom outer surfaces of the pack or carton; and

(c) the trade description must:

(i) appear only on the side outer surface of the pack or carton that does not bear a health warning; and

(ii) appear only once on that surface.

2.6 Bar code

(1) A bar code must:

(a) for a cigarette pack or cigarette carton — appear only on the side outer surface of the pack or carton that does not bear a health warning, and only once on that surface; and

(b) be printed in black and white; and

(c) be rectangular in shape.

(2) The bar code must not form a picture, symbol or design.

2.7 Tear strips on wrappers

(1) A tear strip on a plastic or other wrapper that covers a cigarette pack or cigarette carton must be:

(a) black or not coloured; and

(b) not wider than [xxmm].

(2) In this regulation:

tear strip means a strip of plastic incorporated into a plastic or other wrapper to enable the wrapper to be opened quickly.

2.8 Brand, business, company, and variant, names

A brand, business or company name, or any variant name, appearing on retail packaging for tobacco products must be printed:

(a) in the typeface known as Lucida Sans; and

(b) for a brand, business or company name — no larger than 14 points in size; and

(c) for a variant name — no larger than 10 points in size; and

(d) in upper-case and lower-case letters in a normal weighted, regular font; and

(e) in the colour known as [XXX].

Note Subsections 21 (2) and (3) of the Act set out additional requirements for the appearance of brand, business, company, and variant, names on cigarette packs and cigarette cartons.

2.9 Fire risk statement

(1) The following requirements apply to a fire risk statement:

(a) the text of the statement must be in the colour known as [XXX];

(b) the background to the statement must be in the colour known as [XXX];

(c) for a cigarette pack or cigarette carton — the statement must be placed beneath the health warning on the back outer surface of the pack or carton.

(2) The fire risk statement may be included on an adhesive label as an onsert on retail packaging of tobacco products (other than an insert or onsert) if the adhesive label is permitted by:

(a) regulation 14 of the *Trade Practices (Consumer Product Safety Standard) (Reduced Fire Risk Cigarettes) Regulations 2008*; or

(b) a safety standard made under section 104, or declared under section 105, of Schedule 2 to the *Competition and Consumer Act 2010*, to the extent that the standard relates to fire risk; or

(c) an information standard made under section 134, or declared under section 135, of Schedule 2 to the *Competition and Consumer Act 2010*, to the extent that the standard relates to fire risk.

Part 3 Requirements for appearance of tobacco products

3.1 Appearance of cigarettes

(1) The paper casing, and lowered permeability band (if any), of cigarettes must be:

(a) white; or

(b) white with an imitation cork tip.

(2) In this regulation:

lowered permeability band means a concentric band of paper or other material that is included in, or applied to, cigarette paper in order to inhibit the burning of the cigarette.

Note

1. All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See http://www.frli.gov.au.