Chapter 2

Issues raised in the inquiry

Introduction

2.1 All stakeholders supported the development of a national greenhouse gas reporting scheme. The Australian Industry Greenhouse Network (AIGN), representing industry associations and corporations, stated that:

> AIGN members have long supported the need to develop a rigorous, transparent, nationally consistent, energy and greenhouse reporting system, underpinned by purpose built Commonwealth legislation.[1]

2.2 Environmental groups were also supportive. The Australian Network of Environmental Defender's Offices (ANEDO) stated that '[it] has consistently supported proposals for comprehensive and transparent public reporting of greenhouse gas emissions'.[2] State governments also indicated their support. The Victorian government for example stated that:

> The implementation of a national mandatory emissions reporting system is a critical building block in the introduction of a national emissions trading scheme. The Victorian Government supports the development of the most efficient emissions reporting system that imposes the least cost and least regulatory burden on business. [3]

2.3 However, several significant specific issues were raised by a range of groups and these are discussed below.

Clause 5

2.4 A number of submissions raised concerns regarding clause 5 of the bill, which, according to submitters, appears to provide the Commonwealth with the power to override and exclude existing state and territory greenhouse and energy measurement and reporting programmes for the purposes of the Act. Clause 4 of the bill sets out the constitutional bases of the bill as paragraphs 51(xi), (xx), (xxix) and (xxxix) of the Constitution.

2.5 In his second reading speech, the minister stated that the bill would 'eliminate duplicative reporting and reduce red tape currently imposed by the patchwork of separate state, territory and national reporting schemes'.[4] Clause 5 of the bill states

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1 AIGN, *Submission 7*, p. 2.

2 ANEDO, *Submission 22*, p. 1.

3 Victorian Government, *Submission 11*, p. 1.

4 *Second Reading Speech*, p. 1.

that, at a date to be proclaimed, the Act would exclude the operation of some state and territory laws. Subclause 5(2) sets out the scope of the exclusion, being all laws of a state or territory which provide for reporting or disclosure of information related to:

(a) greenhouse gas emissions: or

(b) greenhouse gas projects; or

(c) energy consumption; or

(d) energy production;

so far as they apply in relation to a constitutional corporation.

2.6 Subclause 5(3) allows the minister to determine, by legislative instrument, that a state or territory law is not excluded by the operation of clause 5.

2.7 State and territory reporting schemes will be excluded from operation so long as they fall within the categories set out in clause 5, regardless of whether they require different or more detailed information from the scheme set out in the bill. To help offset the transfer of the management of a national scheme to the Commonwealth and move reporting obligations away from the states and territories, subclause 19(9) of the bill stipulates that regulations made for the purposes of a report or part of a report may specify information that a state or territory has requested the Greenhouse and Energy Data Officer to collect. This clause provides the opportunity for the states and territories to request that reports to the Commonwealth include certain information, such as that currently required by their existing reporting schemes. The inclusion of such information at a state or territories' request is ultimately decided by the minister, and the minister is not bound by the bill to fulfil such requests. The explanatory memorandum states that:

> The Government's intention is to apply this subclause judiciously and to work cooperatively with states and territories to ensure that programme needs can be met in the most efficient way.[5]

2.8 State governments highlighted some specific concerns about the impact of clause 5 upon their activities. The submission from the South Australian government was concerned that clause 5 of the bill had far-reaching consequences for the states and territories. They stated:

> Taken in isolation, clause 5 can be viewed as the implementation of the streamlining agreed by all jurisdictions as being desirable and necessary. However, when considered in the context of the rest of the legislation, it has the potential to disrupt legitimate activities being undertaken by other jurisdictions, which were never intended to be prohibited by this legislation.[6]

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5 *Explanatory Memorandum*, p. 184.

6 South Australian Government, *Submission 10*, p. 4.

2.9 The South Australian government also concluded that clause 5 could affect the relationship between the state governments and incorporated entities, that the regulatory role of some corporations might be adversely affected, as would the state government's ability to acquire information from its own corporations to make decisions about its own emissions profile.[7]

2.10 Other governments had similar concerns. The Western Australian government suggested that the bill was in contravention of the spirit of the Intergovernmental Agreement because:

> Clause 5 …gives the Commonwealth Minister complete control over all reporting of greenhouse gas emissions and projects, energy consumption and energy production by constitutional corporations to the exclusion of existing and future State laws that enable or require the collection of emissions and energy information.[8]

2.11 The State Government of Victoria went further and argued that:

> Clause 5 of the legislation has the potential to impact more widely than just the reporting of greenhouse and energy data from business to Government. This clause potentially impinges on States' abilities to efficiently provide essential services such as the safe and reliable provision of energy. References in clause 5 to the dissemination of energy use and production information raise serious questions about possible impacts to the operation of the national electricity market.[9]

2.12 The Queensland government specifically drew attention to the potential for clause 5 to restrict the government's capacity to 'implement its own legislation, policy and programs to combat climate change'[10], while the Tasmanian government pointed out that:

> The device of providing for the reinstatement of State legislation at the discretion of the Commonwealth Minister has the perverse effects of giving the Federal Minister power of veto over State programs and functions ranging from resource development, planning and development controls, energy regulation, energy planning, infrastructure planning, and climate change policy and programs.[11]

2.13 Similarly, the NSW government was concerned that clause 5 unreasonably excluded state and territory legislation, leaving state and territory governments'

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7 South Australian Government, *Submission 10*, p. 4.

8 Government of Western Australia, *Submission 21*, p. 4.

9 State Government of Victoria, *Submission 11*, p. 2.

10 Queensland Government, *Submission 30*, p. 1.

11 Tasmanian Government, *Submission 29*, p. 3.

climate change policy developments exposed to the discretion of the Commonwealth minister and the Greenhouse and Energy Data Officer (GEDO).[12]

2.14 It was not only the state and territory governments that were concerned about the effects of clause 5 of the bill. The Chamber of Commerce and Industry of Western Australia submitted in relation to clause 5 that:

> Whilst CCI strongly supports the intent of the bill to eliminate overlap, duplication, inconsistency and conflicts in greenhouse emissions and energy reporting, we caution against any unintended consequences, such as the preclusion of states from regulating their own energy markets or developing policy.[13]

2.15 Concern was also raised that clause 5 could slow down the deployment of low emission and renewable energy technologies, by stymieing state or territory schemes designed to facilitate such innovation.[14]

2.16 Constitutional law expert Professor George Williams remarked:

> that by denying an effective operation to state and territory laws providing for reporting and disclosure this will prevent those jurisdictions from enacting carbon trading or other schemes. Section 5 may strike at the heart of such schemes and prevent them from being put into place. The Commonwealth may well not wish to operate such a scheme, but until it actually establishes its own regime it should not provide legislation denying the states information vital to their own.
>
> Section 5 should be removed from the Bill. Section 109 of the Constitution… regulates where a federal law cannot operate consistently with a state law. It provides a sufficient mechanism for dealing with such conflicts without needing a Commonwealth Bill to cover the field so widely as to undermine any related state laws.[15]

WWF-Australia was of the same view.[16]

2.17 Professor Williams described the clause as unusual and inconsistent with a cooperative approach to federalism. He noted that an effect of the clause could be actually to prevent state governments gathering information from their own entities, such as state-owned power generators, where they are corporations. He raised the prospect of significant uncertainty resulting in expensive legal advice and possible

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12 Government of NSW, *Submission 19*, p. 1.

13 Chamber of Commerce and Industry of Western Australia, *Submission 25*, p. 2.

14 Hydro Tasmania, *Submission 8*, pp 1–2; Western Australian Sustainable Energy Association, *Submission 18,* p. 1.

15 Professor George Williams, *Submission 2*. Section 109 of the Constitution states 'when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.

16 WWF-Australia, *Submission 27*, p. 1.

litigation in the High Court.[17] Tasmania also expressed concern that the current design of clause 5 was undesirable because any oversight in Commonwealth exemptions under clause 5(3) might only emerge in subsequent legal proceedings.[18]

2.18 Professor Williams noted that one of the advantages of taking an alternative cooperative approach is that it could allow inclusion of entities other than constitutional corporations that could and should report.[19] These might include local governments, non-trading corporations, large non-government organisations that might be significant energy consumers, as well as partnerships and sole traders, including many businesses in the agricultural sector.

2.19 Professor Williams, while favouring the deletion of clause 5, also suggested that an alternative formulation of it would allow the exclusion of state laws only when they fell within the scope of regulations made under the bill. This would effectively involve 'reversing the operation 180 degrees', so that regulations would be made to exclude state laws, rather than having to exempt them under clause 5(3).[20] The Tasmanian, South Australian and Western Australian governments also supported this approach.[21]

2.20 The Nature Conservation Council of NSW expressed concern that the clause might have the capacity to actually inhibit environmental reporting initiatives:

> It appears this will provide the Environment Minister with the power to stop the operation of valuable schemes like the NSW Renewable Energy Target and the Greenhouse Gas Abatement Scheme. Without the ability to require reporting it is difficult to see how these schemes could continue operation or measure whether they are being successful.
>
> We believe it is a highly inappropriate use of Federal Government powers to stop the operation of State based schemes aimed at reducing greenhouse gas emissions and protecting our environment for future generations. This is particularly true given the Mandatory Renewable Energy Target has not been extended and the proposed Federal Emissions trading Scheme would not commence operation for 4 to 5 years. We are very concerned that this Bill would stop programs that have shown some success given the scale of rapid action needed to prevent dangerous climate change. Section 5 should therefore be removed from the Bill.[22]

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17 Professor George Williams, *Proof Committee Hansard*, 3 September 2007, pp 23, 25.

18 Mr Jamie Bayly-Stark, Tasmanian Government, *Proof Committee Hansard*, 3 September 2007, p. 40.

19 Professor George Williams, *Proof Committee Hansard*, 3 September 2007, p. 26.

20 Professor George Williams, *Proof Committee Hansard*, 3 September 2007, p. 25.

21 Mr Jamie Bayly-Stark, Tasmanian Government, *Proof Committee Hansard*, 3 September 2007, p. 30; South Australian Government, *Submission 10*, p. 7; Mr Higham, Western Australian Government, *Proof Committee Hansard*, 3 September 2007, pp 28, 41.

22 The Nature Conservation Council of NSW, *Submission 20*, p. 1.

2.21 ANEDO and a number of environment groups warned against clause 5 resulting in a 'lowest common denominator approach that weakened existing schemes.[23] States indicated that the bill would have the capacity to slow down greenhouse gas abatement programs, though this could depend on the details of the regulations, and how clause 5 was implemented.[24] South Australia expressed concern that giving the current clause 5 effect could, for example, present a challenge to implementing recent South Australian legislation on greenhouse targets.[25] In contrast, the intention that had been expressed in the COAG Plan on climate change was that a possible national reporting system would 'strengthen emissions reporting approaches'.[26]

2.22 While there were concerns about clause 5, the committee emphasises that these were expressed in the context of widespread desire (including from state governments) to see removal of regulatory duplication. The Waste Management Association of Australia (WMAA) supported 'the Bill's exclusion of similar regulatory reporting obligations'.[27] Others generally supported the removal of duplicative reporting requirements.[28] State governments indicated that a number of issues raised by them could potentially be dealt with in regulations, but expressed concern that clause 5 was not tenable in its current form.[29]

Clause 5 and the limits of Commonwealth power

2.23 The Constitution gives the Commonwealth power to make laws in many areas, including in respect of corporations. At the same time, the Constitution clearly envisages the ongoing independent capacity of both Commonwealth and the states to exist and exercise powers. The extent to which each level of government may be immune from each other's laws is referred to as intergovernmental immunity.[30] The

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23 ANEDO, *Submission 22*, pp 1–2; ACF, Greenpeace Australia Pacific and the Total Environment Centre, *Submission 31*, p. 1.

24 Mr Jamie Bayly-Stark, Tasmanian Government, *Proof Committee Hansard*, 3 September 2007, p. 32; Mr Andrew Higham, Western Australian Government, *Proof Committee Hansard*, 3 September 2007, p. 32.

25 Mr Tim O'Loughlin, South Australian Government, *Proof Committee Hansard*, 3 September 2007, p. 31.

26 Council of Australian Governments, *Council of Australian Governments' Plan for Collaborative Action on Climate Change*, 10 February 2006, p. 7.

27 WMAA, *Submission 26*, p. 2.

28 See for example Australasian Slag Association, *Submission 1*, p. 1; Shell Company of Australia, *Submission 5*, p. 1; Australian Industry Greenhouse Network, *Submission 7*, p. 2.

29 Mr Tim O'Loughlin, South Australian Government, *Proof Committee Hansard*, 3 September 2007, p. 36; Mr Jamie Bayly-Stark, Tasmanian Government, *Proof Committee Hansard*, 3 September 2007, pp 36–37.

30 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (4th edition), Federation Press, 2006, p. 1139.

resolution of conflict between state and Commonwealth laws is a matter of inconsistency of laws.[31] The committee recognises that constitutional issues, particularly in relation to intergovernmental immunities and inconsistency of laws, must be taken into account in the drafting of the current bill. The extent of the Commonwealth's powers in these respects has been discussed in numerous High Court cases, including *Melbourne Corporation v Commonwealth* (the *Melbourne* case),[32] *Queensland Electricity Commission v Commonwealth*[33] and *Austin v Commonwealth*.[34]

2.24 The committee received no direct evidence in relation to the implications of the *Melbourne* case and intergovernmental immunities in relation to the current bill. However the committee did receive evidence on some of the issues to which case law in this field speaks. Professor Williams noted that clause 5 may impact on state utilities:

> It is true that certain state agencies can be constitutional corporations, particularly utilities, water authorities and the like, and this might prevent the states collecting information from their own bodies where those bodies are engaged in the energy industry. That itself seems to be me to be clearly overbroad.[35]

2.25 Some states echoed this concern:

> Some government instrumentalities are also constitutional corporations, and so you could have a situation where the state government needed to go to the Commonwealth government to ask about greenhouse gas emissions from its own instrumentalities.[36]
>
> …we are concerned that the bill contains certain provisions that could effectively restrict the ability of the state and territory governments to take action to address climate change and energy related matters. In particular, the Victorian government is concerned that the bill in its current form may limit important state functions, particularly those where we have powers to provide essential services. An example of that would be the operation of energy markets as set out in Victorian legislation under the Electricity Industry Act 2000 and the Gas Industry Act 2001 and other matters that are currently being progressed through the national energy reform agenda. It also limits, we believe, state functions in respect of environmental assurance processes such as the Environment Protection Authority's works

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31 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (4th edition), Federation Press, 2006, p. 375.

32 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; [1947] HCA 26.

33 *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192.

34 *Austin v Commonwealth* (2003) 215 CLR 185.

35 Professor George Williams, *Proof Committee Hansard*, 3 September 2007, p. 23.

36 Mr Tim O'Loughlin, South Australian Government, *Proof Committee Hansard*, 3 September 2007, p. 31.

> approvals and licensing system and sustainability covenants, and also environmental effects statements as required under relevant Victorian state statutes for major projects and other activities.[37]

2.26 State utilities reporting to state governments are likely to be constitutional corporations, and thus potentially subject to clause 5. The possibility that a state-controlled entity might be prevented from reporting to its state government may be a circumstance in which intergovernmental immunity, as expressed in the *Melbourne* case, might be an issue. A cooperative approach to the law in this area could obviate such concerns.

2.27 The committee notes that the bill has clauses explicitly designed to allow the gathering of data at the request of state or territory governments (clause 19), and the conveying of that information to governments once gathered (clause 27). Whether the discretionary nature of these clauses (discussed separately by the committee below) could have a bearing on the validity of clause 5 is not something that was discussed during this inquiry.

2.28 The committee does not wish, and is not qualified, to explore the constitutional law in any detail. However it notes that the basic principle enunciated in the *Melbourne* case is that the Commonwealth's power to legislate with respect to the states is limited by the 'federal system of government which requires the existence of separate governments exercising independent functions'.[38] The committee notes that amendment of clause 5 of the bill so that certain state laws might be excluded from operation, rather than its current construction which would exclude a whole class of laws unless exemptions were provided, would surely be a construction that has the potential to intrude less into the operations of states than the current wording. The committee therefore does not see intergovernmental immunity as a barrier to considering the alternative construction of clause 5 advocated by many witnesses to this inquiry. The priority should be to ensure a legislative foundation upon which cooperation regarding streamlining greenhouse and energy reporting can continue to be built.

The committee's view

2.29 The committee noted the Commonwealth's intention regarding clause 5, expressed in the Explanatory Memorandum, 'is to work cooperatively with State and Territory governments to transition towards a single reporting system across all jurisdictions'.[39] The committee supports the continuing cooperation between

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37 Mr Mick Bourke, Environment Protection Authority Victoria, *Proof Committee Hansard*, 3 September 2007, p. 29.

38 Anne Twomey, 'Federal Limitations on the Legislative Power of the States and the Commonwealth to Bind One Another', *Federal Law Review*, Vol. 31, No. 3, 2003, http://www.austlii.edu.au/au/journals/FedLRev/2003/13.html, accessed 4 September 2007.

39 *Explanatory Memorandum*, p. 179.

governments in implementing a national greenhouse reporting scheme. It is pleased to note that all parties remain committed to making progress with this initiative, and believes that some fine tuning of clause 5 may help ensure that this cooperation continues.[40]

Recommendation 1

2.30 The committee recommends that clause 5 be re-drafted along the lines proposed by Professor Williams and others, to have the effect that the minister may by regulation exclude the operation of a state or territory law that duplicates reporting under the national reporting scheme.

Interaction with existing Commonwealth laws

2.31 The WMAA sought clarification of how the bill would interact with the Commonwealth's *Energy Efficiency Opportunities Act 2006*.[41] The Western Australian government noted that the bill appeared not to exclude duplicative Commonwealth laws, despite excluding state laws.[42]

2.32 The committee notes the Commonwealth's intention is to streamline its reporting requirements under the new bill:

> Senator MILNE—…Speaking of energy efficiency, how does this bill interact with the Energy Efficiency Opportunities Act, which requires reporting on energy efficiency opportunities and on measurement? How do these two pieces of legislation overlap?
>
> Mr Carter—We have sought to be consistent with the thresholds and definitions of companies in the EEO legislation and we are looking also to streamline that program into this reporting over time as well.
>
> Senator MILNE—How will that operate? Can you explain what you mean by that?
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> Mr Carter—In terms of the integration of it, all the reporting requirements of EEO would eventually be met through the reporting requirements under this legislation.[43]

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40 See for example Mr Jamie Bayly-Stark, Tasmanian Government, *Proof Committee Hansard*, 3 September 2007, p. 30; Mr Tim O'Loughlin, South Australian Government, *Proof Committee Hansard*, 3 September 2007, p. 38; Mr Mick Bourke, Environment Protection Authority Victoria, *Proof Committee Hansard*, 3 September 2007, p. 42.

41 WMAA, *Submission 26*, p. 2.

42 Mr Andrew Higham, Western Australian Government, *Proof Committee Hansard*, 3 September 2007, p. 28.

43 *Proof Committee Hansard*, 3 September 2007, p. 49.

Thresholds

2.33 The bill provides for certain thresholds for greenhouse and energy reporting (clause 13), which were outlined in chapter 1.

2.34 Some submissions commented on the complexity of the threshold arrangements. The Australian Petroleum Production & Exploration Association (APPEA) argued that a simpler threshold methodology should be applied. The Association argued that the threshold be set at >125 kilotonnes carbon dioxide equivalent or 500 TJ energy (reducing to > 50 kilotonnes carbon dioxide equivalent over three years) and that this be set at a company level (with no facility level threshold equivalent).[44]

2.35 The Australian Industry Group (AI Group) argued that the provisions dealing with reporting triggers are 'confusing' with respect to the interaction between different thresholds. The AI Group raised the following concerns:

> Will the facility threshold also trigger the company-wide threshold where the company falls below the company threshold? AI Group's view is that it should not. Will companies that trigger the facility and/or corporate level energy threshold be required to report on their greenhouse emissions even if they not they meet the threshold for direct emissions? AI Group's view is that they should not. Where a company triggers the corporate-wide threshold but has 98% of its energy consumption on one site, is it required to conduct audits of a number of small sites that are part of the corporate group?[45]

2.36 The Australian Conservation Foundation (ACF) argued that the facility level threshold has been set 'unnecessarily high' and should be reduced to 10 kilotonnes.[46] The Nature Conservation Council of NSW also argued that the thresholds should be lowered to capture more reporting by facilities, arguing that only approximately 20 per cent of the facilities that report under the NPI will be required to report under the proposed bill.[47] The South Australian government also expressed concern that the thresholds set by the bill are too high, pointing out that:

> We are concerned about the companies that do not cross the threshold—less than 50,000 tonnes a year still makes you a significant emitter. It is roughly equivalent to spending $5 million a year on energy. So, a company that is spending $4 million a year on energy is someone in our jurisdiction that we would regard as worth bringing into the fold. We are concerned at the

44 APPEA, *Submission 17*, p. 5.

45 Australian Industry Group, *Submission 23*, p. 2.

46 ACF, *Submission 31*, p. 3. See also Moreland Energy Foundation, *Submission 32*, p. 1.

47 Nature Conservation Council of NSW, *Submission 20*, pp 1–2.

> ability that might be there in the final legislation for companies to use this as a shelter to protect them from scrutiny.[48]

2.37 Victoria indicated that it hoped to work toward thresholds lower than those in the bill in the area of energy efficiency programs.[49]

2.38 The Explanatory Memorandum noted that the proposed model introduces a 'greater level of complexity' to the threshold design than has been considered in previous consultations, however, the different elements are intended to address the aims of maintaining a robust data set and minimising costs to business:

> The company-level threshold is intended to exclude companies with relatively low total emissions/energy use or production, while the lower, facility-level threshold is intended to capture large facilities operated by companies that do not trigger the company-level threshold, recognising the significance of facility-level data to existing data collections.[50]

2.39 The Investor Group on Climate Change argued that phasing in of reporting under the bill should be accelerated so that all facilities report in the second financial year.[51] The ACF also argued that the staged implementation of reporting obligations has the potential to 'undermine' the timely introduction of a national emissions trading scheme.[52]

2.40 The committee notes that reporting under the new national scheme appears not to preclude the gathering of data for existing schemes, either through parallel reporting during a transition period, or through ensuring relevant data is gathered under regulations made under clause 19.

Reporting obligations

2.41 The Australian Industry Greenhouse Network expressed concern about the reporting obligations under clause 19(1). While supportive of reporting responsibilities under the bill, they sought greater clarity about the scope of emissions captured by the clause. The clause requires reporting of greenhouse gas emissions, energy production and energy consumption:

> from the operation of facilities under the operational control of the corporation and entities that are members of the corporation's group, during that financial year (emphasis added).

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48 Mr Tim O'Loughlin, South Australian Government, *Proof Committee Hansard*, 3 September 2007, p. 31.

49 Mr Mick Bourke, Environment Protection Authority Victoria, *Proof Committee Hansard*, 3 September 2007, p. 40.

50 *Explanatory Memorandum*, p. 23.

51 IGCC, *Submission 9*, p. 2.

52 ACF, *Submission 31*, p. 3.

2.42 AIGN were concerned to get further clarification of this clause:

> Senator WORTLEY—I was interested in this comment in your submission:
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> > AIGN has concerns about the lack of clarity of Section 19(1)—
>
> and you touched on that—
>
> > which requires a registered corporation to report in respect of emissions, production and consumption from facilities (defined) under its control "and entities that are members of the corporation's group".
>
> Would you be able to elaborate on that perceived lack of clarity and shed some light on why you believe the reporting on those entities to be unreasonably burdensome, given that your members supported the need for a vigorous and transparent reporting system?
>
> Mr Dwyer—To put it briefly, the concern is: do the thresholds that are in the bill apply to all of the reporting by those controlled entities? If you read that clause in one particular way, you can interpret it to mean a situation where every single piece of information related to all facilities under the control of that entity, regardless of their size, might be captured, in which case you are getting down into potentially some very small facilities with very burdensome reporting requirements. If it relates only to those entities that breach the thresholds, whatever the thresholds may be in the bill—and there are thresholds in there—and all of the reporting relates to those facilities, then that is an outcome that we are supportive of.[53]

2.43 They advised the committee that DEW had provided them with some reassurance.[54]

2.44 The Explanatory Memorandum and the second reading speech both describe the scheme as based on emissions from facilities (defined in clause 9), including when there is company-wide reporting.[55] The department indicated that it was the intention of the bill to apply to both facilities of corporations and facilities of entities that are members of the corporation's group:

> CHAIR—Is it the intention of clause 19(1) that corporations that have met the threshold under clause 13 will report on emissions from facilities under the operational control of the corporation and facilities under the operational control of entities that are members of the corporation's group? If they meet the threshold, do they have to report on everything in the group?
>
> Ms Barclay—Yes. Clause 19(1) allows for both facilities under the control of a corporation and entities that are members of a corporation's group;

53 Mr Damian Dwyer, AIGN, *Proof Committee Hansard*, 3 September 2007, p. 2.

54 Mr Damian Dwyer, AIGN, *Proof Committee Hansard*, 3 September 2007, p. 3.

55 See, for example, *Explanatory Memorandum*, pp 22–23, 184.

> 19(8) also allows for regulations to specify different requirements for registered corporations that only meet one of the thresholds.[56]

2.45 The committee notes the capacity to modify the detail of reporting requirements through regulations under clause 19(8).

Maintenance and dissemination of information

2.46 The bill provides that company-level data will be made publicly available online by the national reporting system. For greenhouse gas emissions, the basic level of disclosure will be a single aggregated total of gross emissions in CO_2-e. Only total energy consumed and produced will be required for public disclosure. Provision is made to publicly disclose additional data where the company had given its consent or requested to do so.[57]

2.47 The ACF noted that the public disclosure of each company's emissions will not necessarily be a specific quantitative value:

> Section 24(3) of the Bill allows the relevant authority either to report specific emissions levels for a corporation, or simply to report that the corporation's emissions fall "within a particular range of values". This kind of disclosure would not be particularly useful.[58]

2.48 Some submissions argued that greenhouse emissions and energy data should be disclosed at the facility level.[59] ANEDO stated that:

> The community 'right to know' principle requires accurate information at a facility level. The Bill must not allow aggregated totals of corporate groups to subvert this principle. The Bill requires only total gross GHG emissions and total energy produced and consumed to be made public. While there is scope for companies to voluntarily provide more specific detail on emissions, offsets, policies and initiatives, this would only be at the company level, and is not mandatory.[60]

2.49 The department explained the rationale for providing that public disclosure should be at a company level:

> Concerning public right to know at a facility level, public right to know generally applies to emissions that might be of the nature that would have a

56 *Proof Committee Hansard*, 3 September 2007, p. 53.

57 *National Greenhouse and Energy Reporting Bill 2007*, clauses 13, 24 and 28.

58 ACF, *Submission 31*, p. 2.

59 ACF, *Submission 31*, p. 2; BCSC, *Submission 15*, p. 5; Nature Conservation Council of NSW, *Submission 20*, p. 2; EBA, *Submission 16*, p. 1.

60 ANEDO, *Submission 22*, p. 2.

> potential local impact on people's health or amenity, and greenhouse gas emissions are a global impact rather than a localised impact.[61]

2.50 The bill provides that confidential data may be exempted from public disclosure under certain circumstances. Some submissions argued that this provision may undermine the quality of the publicly available data set as a whole and undermine the public accountability function of the emissions register.[62] The Australian Business Council for Sustainable Energy (BCSE) argued that where commercially sensitive material is not published, there should be public disclosure to this effect.[63] Industry groups pointed to the importance of rigorous data confidentiality and access protocols to protect the data required to be reported by corporations.[64] DEW also noted that a major issue with disclosure at the facility level:

> is the commercial-in-confidence nature of that. It can go directly to the efficiency of production and their competitiveness with other facilities.[65]

2.51 The Investor Group on Climate Change (IGCC) argued that the information publicly available should be expanded to include disaggregation of different emissions and a list of facilities covered by the emissions inventory.

> The total sum of greenhouse emissions does not provide investors with sufficient information to make accurate and appropriate decisions on the nature of the greenhouse risk or opportunities associated with a particular company. This is particularly the case given the existing uncertainty about both the rules for the emissions trading scheme and the need for investors to understand potential equity exposure of companies.[66]

2.52 DEW explained that it is encouraging a greater scope of reporting with regard to disaggregation and that it could be included in the future once technical issues are resolved:

> In fact there has been quite a bit of interest from some companies in being able to report more precisely on the non-CO_2 emissions from fuel combustion. It is just whether or not it is robust reporting that is a bit of an issue.[67]

2.53 ANEDO argued that the reporting scheme should provide a clear overview of the emission of greenhouse gases by corporation and facility. Both it and state governments believed that if the bill was implemented in its current form it would lead

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61 Mr Peter Brisbane, DEW, *Committee Hansard*, 3 September 2007, p. 49.

62 BCSC, *Submission 15*, p. 5; ACF, *Submission 31*, p. 2; Nature Conservation Council of NSW, *Submission 20*, p. 2.

63 BCSC, *Submission 15*, p. 5. See also ANEDO, *Submission 22*, p. 4.

64 AIGN, *Submission 7*, p. 2; AIP, *Submission 6*, p. 3; APPEA, *Submission 17*, p. 4.

65 Mr Peter Brisbane, DEW, *Committee Hansard*, 3 September 2007, p. 49.

66 IGCC, *Submission 9*, p. 3.

67 Mr Peter Brisbane, DEW, *Committee Hansard*, 3 September 2007, p. 57.

to reduced reporting of information compared to existing reporting schemes.[68] ANEDO suggested that there should be a mandatory provision on submitting a publicly accessible report if significant changes appear in the emissions of a corporation or facility.[69]

2.54 DEW, responding to this issue, noted that:

> There will be the opportunity for companies to provide some contextual information around their emissions. We know there is interest from both the companies themselves and data users…So there are things that companies are interested in reporting—things like offsets and things like actions that they are undertaking to reduce their emissions profile. We will be looking at the voluntary disclosure as an administrative task.[70]

2.55 The committee notes that clause 16, which establishes the National Greenhouse and Energy Register, is complex. Clause 16(5) appears to contain an unnecessary double negative, making it hard to understand, particularly as it has to be read in conjunction with clause 24. The department undertook to raise this issue with the Office of Parliamentary Counsel,[71] and the committee hopes that a more straightforward wording of the clause will be possible.

State access to information

2.56 The bill includes provisions for releasing information to states and territories that has been gathered by the GEDO:

> The Greenhouse and Energy Data Officer, or a person authorised by the Greenhouse and Energy Data Officer, may disclose greenhouse and energy information to a State or Territory or an authority of a State or Territory if:
>
> (a) it is information mentioned in subsection 19(9); or
>
> (b) it is information relating to facilities that are wholly or partly located in the State or Territory.
>
> (2) The Greenhouse and Energy Data Officer may make disclosure of information under this section subject to conditions including:
>
> (a) restrictions on disclosure of the information to other persons; and
>
> (b) security measures required in relation to the confidentiality of the information; and

68 ANEDO, *Submission 22*, pp 1–2; Mr Mick Bourke, Environment Protection Authority Victoria, *Proof Committee Hansard*, 3 September 2007, pp 32–33, Mr Tim O'Loughlin, South Australian Government, *Proof Committee Hansard*, 3 September 2007, p. 33; WA Government, *Submission 21*, pp 8-10.

69 ANEDO, *Submission 22*, p. 2.

70 Mr Peter Brisbane, DEW, *Committee Hansard*, 3 September 2007, p. 57.

71 Mr Ross Carter, DEW, *Proof Committee Hansard*, 3 September 2007, p. 58.

> (c) the State, Territory, or authority not requiring the reporting or disclosure of other information of a kind similar to greenhouse and energy information.[72]

2.57 Clause 19 requires corporations that meet certain criteria under the legislation to provide regular reports to the GEDO on their greenhouse gas emissions, energy production and energy consumption. The bill proposes that:

> (6) A report or part of a report under this section must:
>
> …
>
> (c) include any information specified by the regulations for the purposes of this paragraph;
>
> …
>
> (9) Regulations made for the purposes of paragraph (6)(c) may also specify information that a State or Territory has requested the Greenhouse and Energy Data Officer to collect.[73]

2.58 All state governments objected to the formulation of these clauses.[74] They were all of the view, as expressed by South Australia, that:

> One of the fundamental principles of the original proposal to COAG for the streamlining of mandatory reporting was that state jurisdictions would forego their reporting requirements in return for guaranteed access to the data collected as part of the national scheme. Clause 27 provides the Greenhouse and Energy Data Officer (GEDO) with discretion as to whether or not information is provided to a State or Territory that relates to facilities in that State. The GEDO can make the provision of information subject to conditions including confidentiality and the State or Territory not collecting the same information that is being collected under the legislation.[75]

2.59 State governments reiterated at the public hearing their concerns about clause 27.[76] They sought removal of the GEDO's discretion in providing data, and a narrowing of the conditions that could be placed upon the data when released.[77] The

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72 *National Greenhouse and Energy Reporting Bill 2007*, clause 27.

73 *National Greenhouse and Energy Reporting Bill 2007*, clause 19.

74 South Australian Government, *Submission 10*, p. 7; Victorian Government, *Submission 11*, p. 4; New South Wales Government, *Submission 19*, p. 2; Western Australian Government, *Submission 21*, p. 12; Tasmanian Government, *Submission 29*, p. 2; Queensland Government, *Submission 30*, p. 2.

75 South Australian Government, *Submission 10*, p. 7.

76 Mr Tim O'Loughlin, South Australian Government, *Proof Committee Hansard*, 3 September 2007, pp 31, 36; Mr Mick Bourke, Environment Protection Authority Victoria, *Proof Committee Hansard*, 3 September 2007, pp 29, 37; Mr Andrew Higham, WA Government, *Proof Committee Hansard*, 3 September 2007 p. 28.

77 Mr Mick Bourke, Environment Protection Authority Victoria, *Proof Committee Hansard*, 3 September 2007, p. 29.

South Australian government emphasised the inappropriateness of the release of data being discretionary even where the states have satisfied the conditions laid out in the clause:

> about clause 27…the default is either the minister's discretion or that default is that the states have automatic access. The point in the middle there is about the conditions. What we are saying is that at the moment 27 has got both. If you satisfy the conditions, the data officer may give you access to the data. In our judgement a balanced approach would be that, if you satisfied the conditions, what else have you got to do? You should be given access to the data.[78]

Environmental groups supported the states' position.[79]

2.60 It is clear that the provision of information to states and territories is envisaged to be part of the scheme. The Regulatory Impact Statement (RIS) (which is incorporated into the Explanatory Memorandum) concluded that the preferred option for regulation would involve legislation that would 'require the administrator to make available to each jurisdiction' information gathered under the scheme,[80] to 'ensure that all jurisdictions had access to data'.[81]

2.61 It was proposed that the matter be addressed by replacing the word 'may' in subclause 27(1) with an alternative: either 'will'[82] or 'must'.[83] The department indicated that an alternative formulation such as this would be feasible, but that the intention was to enable providing data subject to conditions.[84]

The committee's view

2.62 The committee notes that the intention of the scheme, as set out in the RIS, was that it 'required' the provision of data to other jurisdictions. It also notes the point emphasised by South Australia that the provision of data is subject to conditions that should meet the needs of participants in the reporting scheme for the protection of sensitive data. The committee can see advantages, discussed earlier, in continuing to ensure a cooperative approach amongst all jurisdictions to greenhouse reporting. In these circumstances, and recognising the department's acknowledgement that an alternative construction of this clause may be feasible, the committee believes that it

78 Mr Tim O'Loughlin, South Australian Government, *Proof Committee Hansard*, 3 September 2007, p. 41.

79 ACF, Greenpeace Australia Pacific and the Total Environment Centre, *Submission 31*, p. 1.

80 *Explanatory Memorandum*, p. 28.

81 *Explanatory Memorandum*, pp 42–43.

82 Victorian Government, *Submission 11*, p. 5.

83 South Australian Government, *Submission 10*, p. 7.

84 Mr Ross Carter; Mr Peter Brisbane, DEW, *Proof Committee Hansard*, 3 September 2007, p. 44.

should be made clear that data will be provided to states and territories on an appropriate basis.

Recommendation 2

2.63 The committee recommends that:

- **subclause 27(1) be redrafted to replace the word 'may' with the word 'must'; and**
- **(for consistency) consideration be given to the deletion of subclause 27(2)(c).**

External audit

2.64 The bill proposes that external audits may be initiated:

> if the Greenhouse and Energy Data Officer has reasonable grounds to suspect that a registered corporation has contravened, is contravening, or is proposing to contravene, this Act or the regulations.[85]

2.65 Concerns were raised about the rigour of the audit process under the bill. The Tasmanian government outlined the problem as it saw it:

> Tasmania supports the inclusion of mandatory validation, so that provision is made in the Bill for a proportion of company reports to be independently verified each year through a random sample. The quality and integrity of data collected under the scheme is vital to build confidence in the carbon market that will be established by a national emissions trading scheme.
>
> The current provision in the Bill requires the regulator to have reasonable grounds to suspect an offence. This is not consistent with good audit practice and does not provide a systematic or sufficiently rigorous approach to verifying data. This would serve to undermine business confidence in the integrity of the data collected under the scheme.[86]

The Victorian government likewise endorsed a less restrictive external audit framework.[87]

2.66 Two proposals were made to modify the external audit provision. Tasmania suggested the bill be amended to include a new provision 'that provides for mandatory independent audit/verification of a randomly selected proportion of companies

85 *National Greenhouse and Energy Reporting Bill 2007*, clause 73(1).

86 Tasmanian Government, *Submission 29*, pp 2–3.

87 Mr Mick Bourke, Environment Protection Authority Victoria, *Proof Committee Hansard*, 3 September 2007, p. 29.

registered with the scheme'.[88] ANEDO made a more modest suggestion that external auditors operating under clause 73 should be accredited by the GEDO.[89]

2.67 CPA Australia commented that:

> A key element influencing the success of the reporting and dissemination of [greenhouse gas emissions] in Australia and an emissions trading scheme is the ability for users to rely on information prepared and disclosed by organisations. An independent and robust verification of emission data will help achieve this.[90]

2.68 While supportive of the bill, CPA Australia appeared concerned that less sustainability reporting is done by major accounting firms in Australia than other countries. Australian firms appear more likely to favour technical or environmental consulting firms.[91]

2.69 The committee notes that the framework for monitoring and auditing companies varies from sector to sector, and from state to state. The audit regulations made under the *NSW Electricity Supply Act 1995* do not confine the scope of audits under that act to those situations where contravention of the law is suspected.[92] On the other hand, the form of the audit provision in the Commonwealth's bill is broadly similar to that contained in Tasmania's *Environmental Management and Pollution Control Act 1994* (s. 30).[93] The external audit provision of the bill should also not be considered in isolation. The committee notes that the powers of Commonwealth officials to enter premises to monitor compliance are governed by Division 4 of the bill. The exercise of these powers is not confined to situations where there is doubt about compliance with the law. The committee believes that, taken together, the compliance powers and the audit provisions are adequate.

Conclusion

2.70 The committee is satisfied with the bill as a whole. The committee believes that the bill lays the foundation for a rigorous, transparent and nationally consistent greenhouse and energy reporting system. This will also help form the vital foundation for any future emissions trading scheme in Australia.

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88 Tasmanian Government, *Submission 29*, p. 3.

89 ANEDO, *Submission 22*, p. 5.

90 CPA Australia, *Submission 24*, p. 2.

91 CPA Australia, *Submission 24*, p. 2.

92 *NSW Electricity Supply Act 1995* s. 97HB; *Electricity Supply (General) Regulation 2001*, reg. 73M.

93 *Environmental Management and Pollution Control Act 1994,* http://www.austlii.edu.au/au/legis/tas/consol_act/emapca1994484/s30.html, accessed 30 August 2007.

2.71 The committee recognises the need, expressed by many stakeholders, for on-going consultation in the development of the regulations that will underpin the proposed system. The committee is confident that the government is committed to processes that will ensure constructive dialogue with stakeholders in the development of these regulations.

Recommendation 3

2.72 The committee recommends that, apart from those recommendations made above, the bill be passed.

Senator Alan Eggleston
Chair