CHAPTER 2

The Bill

Background

2.1 In its Energy White Paper, the Government outlined its intention to require large energy users to undertake assessments of energy efficiency opportunities every five years starting in 2006.[1] The Energy Efficiency Opportunities Bill 2005 implements this policy by establishing the framework for mandatory assessment of energy efficiency opportunities; reporting publicly on the outcomes of the assessment; and introducing compliance and enforcement arrangements. The measures are aimed at large energy consumers who each use more than 0.5 petajoules of energy a year.

Energy use

2.2 According to the Explanatory Memorandum, business use accounts for over 80 per cent of Australia's primary energy consumption. A relatively small number of businesses are responsible for the majority of this energy use. That is, approximately 250 of the largest business energy users account for around 60 per cent of all energy used by business.

2.3 Consequently, small improvements in the efficiency of energy use by the largest energy users are likely to have much greater impacts on total energy use than changes of a similar magnitude among smaller industry energy users or the household sector.

The Bill

2.4 The Bill contains definitions of 'holding company', 'controlling corporation', 'group, and 'members' of a group. These definitions are important because a controlling corporation's obligations under the Bill depend on the amount of energy used by it and its subsidiaries, rather than just the controlling corporation alone. Corporations whose activities are mainly in the electricity generation, electricity and gas transmission, or electricity and gas distributions sectors do not fall within the scope of the Bill. The Bill provides the means to exempt additional classes of corporations from the Bill and these may be specified in regulations.

2.5 A controlling corporation must register under the Bill if its group collectively meets the energy use threshold for a financial year of more than 0.5 petajoules. The Secretary of the Department of Industry, Tourism and Resources may cause the contents of the Register of Corporations for the Energy Efficiency Opportunities Scheme to be made public. The Secretary must only include the name of the corporation and any other matters required by the regulations in the register.

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1 Australian Government, *Securing Australia's Energy Future*, 2004, pp 112-113.

2.6 Every five years, registered corporations must give the Secretary an energy efficiency assessment plan that sets out the particular actions that the company will take to assess opportunities for improving its energy efficiency. The Bill (clause 18) sets out the requirements for an assessment plan which the Secretary must approve.

2.7 The Bill requires the registered corporation to carry out its plan for assessing the opportunities for improving the energy efficiency of its group. It must then prepare and make available to the public a report about the way in which it carried out the proposal in its assessment plan. It must also prepare a report for the Secretary which contains both the public information as well as any further information required in regulations.

2.8 There is no obligation on the controlling corporation to implement any of the energy efficiency improvements that it identifies through its assessment process.

2.9 Part 8 of the Bill provides for powers of inspection in relation to obligations under the Act. Authorised officers will be allowed to enter premises by consent of the occupier or by obtaining a monitoring warrant from a magistrate. An authorised officer or person assisting that officer may operate electronic equipment at the premises and may also secure the equipment for up to 24 hours. (This period may be extended on application to a magistrate by a further 48 hours.)

2.10 Schedule 1 sets out the consequences of contravening civil penalty provisions of the Bill which include a potentially large fine (up to 1000 penalty units, or $110,000).

Discussion

2.11 The Committee finds the Energy Efficiency Opportunities Bill 2005 to be a curious mixture of what appear to be relatively innocuous provisions in combination with others of a more draconian nature that are difficult to justify when the nature of breaches of the Act are considered. Equally worryingly, this Bill continues a trend that has concerned the Committee for some time. That is, drafters are placing many requirements in subordinate legislation rather than in the statute itself. These regulations are not available for perusal by those that will be affected by the legislation, nor by the Committee during its inquiry, prior to the parliamentary consideration of the Bill.

2.12 Other issues of concern raised by submitters include the following:

- the potential for information of a commercially sensitive nature to be published;
- sign-off arrangements for the public report;
- the duplication of effort required to comply with not only a federal energy efficiency scheme but also two state based ones as well; and
- unduly severe penalties for contravening the legislation.

2.13 The Committee briefly explores these issues below.

Use of subordinate legislation

2.14 The Committee was advised that the Department of Industry, Tourism and Resources consulted extensively with organisations that will be affected by this legislation. Therefore it is curious that witnesses reported their surprise at some of the provisions of which they had no expectation. The majority of these provisions relate to requirements that are to be specified in regulations still to be drafted.

2.15 Regulations are appropriately used to include matters of detail and matters liable to frequent change. The Committee has no quibble with the essential theory of delegated legislation that while the Parliament deals directly with general principles, the executive, or other body empowered to make subordinate legislation, attends to matters of administration and detail.[2] In this way, the Parliament can debate the broad principles contained in bills and still retain control over the detailed implementation of that policy by judicious use of its powers of disallowance.

2.16 Rather, what concerns the Committee is an apparent trend by drafters to include general principles in delegated legislation rather than in the primary statute and, as in this Bill, to not include guidance in the Bill about the scope of the regulations. In the second case it may well be entirely appropriate for detailed provisions to be included in regulations. However, without a general outline in the Bill, the regulations are potentially open-ended. Furthermore, the potential for future regulations to be altered in unspecified and unlimited ways is an additional concern.

2.17 Mr Wall, General Manager, Energy Futures Branch, Department of Industry, Tourism and Resources told the Committee that the heavy reliance on regulations in the Bill is to provide flexibility because the legislation needs to cover a variety of situations and companies in a variety of industries. It must also fit in with the requirements of the state-based schemes that also operate in the area:

> So the power to make regulations in this instance is in fact to be able to accommodate what are different schemes in different companies—what are different schemes in different states—so that where people are doing assessments already, the scheme does not impose a new or different burden on them to one that they are already meeting satisfactorily.[3]

2.18 The Committee understands the difficulty in tailoring a program that will be appropriate to diverse organisations, but the Bill as it currently stands, gives little indication about the requirements for satisfying the energy efficiency opportunities assessment scheme. This goes to the heart of the legislation. The Committee is reminded of the words of Sir Carleton Allen:

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2 *Odgers' Australian Senate Practice*, 11th edition 2004, p. 321.

3 Proof Committee Hansard, 28 October 2005, p. 29.

> We are constantly told that Parliament should be concerned only with "broad principles" and should leave "details" to the journeymen. But what is principle and what is detail? "Broad principles" may be very attractive in theory, but may lose their charm if unworkable in practice, just as a grand strategic plan is valueless unless practicable in tactics. It is not good government to pass an Act first and think about it afterwards.
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> There are a good many examples of leaving to delegated legislation "sticky details" which are not really details at all but turn out to matters of essential principle.[4]

2.19 There are a number of areas in the Bill where regulations may place additional requirements on companies. In some cases the Bill or the Explanatory Memorandum provides additional information about what the regulations may contain but this is not universally the case. Regulations are required for the following clauses:

- clause 12 — The Register;
- clause 14 — Corporation may apply for deregistration;
- clause 18 — Requirements for an assessment plan;
- clause 20 — Requirements to carry out energy efficiency opportunities assessments;
- clause 22 — Reporting to the public; and
- clause 23 — Reporting to the Secretary.

2.20 The Committee considers that many of the machinery provisions in the clauses outlined above should legitimately be included in regulations. However, the fact that in some cases no limits have been placed on what is to be included in the regulations, as well as the fact that the regulations are not yet available for perusal, has contributed to uncertainty about how the provisions will operate as well as their potential to be amended in the future. Mr John Daley, Chief Executive of the Australian Industry Greenhouse Network, told the Committee that:

> It smacks to us of either a belts and braces approach to regulation or may just be laziness. The department or a future government should not be given carte blanche to take this program anywhere it likes. That is the opinion of all our people.[5]

2.21 The Bill also presents problems for companies that are trying to assess the impact that the legislation is likely to have on them:

> We note a vast majority of the detail regarding how the Bill will operate in practice has been left to the Regulations. Accordingly, it is difficult, if not

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4 Sir Carleton Kemp Allen, *Law and Orders An Inquiry into the Nature and Scope of Delegated Legislation and Executive Powers in English Law*, Third edition, 1965, p. 154.

5 Proof Committee Hansard, 28 October 2005, p. 13.

> impossible, to properly understand and comment on how the Bill will impact our business until this information is released.[6]

2.22 Furthermore, there is some disquiet among those affected that attempts will be made to 'micro-manage' their businesses.[7]

2.23 The Committee understands that the Department is continuing to consult with people about the contents of the regulations. Notwithstanding this approach, a more satisfactory outcome would be for the passage of the Bill to be delayed until the regulations are available and the package of measures can be assessed together, both by the Parliament and those affected by it.

2.24 Additionally, the Committee considers that provisions need to be added to the Bill to specify the scope of the requirements that will be in the regulations.

Commercial-in-confidence information

2.25 Submissions raise concerns that companies will be required to publish information of a commercially sensitive nature.[8] Furthermore they suggest that limitations should be set on the information that may be required to be made public under the program and on the nature of the extra requirements that might be called for by regulation.

2.26 In addition, witnesses were also concerned about the monitoring powers of authorised officers and their access to confidential information. Clause 25 deals with the appointment of authorised officers who are given monitoring powers and powers to ask questions and seek production of documents. While an officer or employee of a Department is subject to secrecy obligations under Section 70 of the *Crimes Act 1914*, no specific provision is made for confidentiality requirements to be imposed on authorised officers who are not Commonwealth Officers. Submissions raise concerns that because of the high level of access to confidential company information that authorised officers will have under the Bill, equivalent confidentiality requirements should be specified in the Act.[9]

2.27 Mr Lewis, Assistant Manager, Energy Efficiency Opportunities, Energy Futures Branch, Department of Industry, Tourism and Resources told the Committee that it was difficult or impossible to define the term 'commercially confidential information' meaningfully in the Bill.[10] Additionally, the Australian government

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6 BlueScope Steel Limited, *Submission 8*, p. 1.

7 BlueScope Steel Limited, *Submission 8*, p. 2; Energy Users Association of Australia, *Submission 5*, p. 2.

8 Cement Industry Federation, *Submission 2*, p. 3; Australian Industry Greenhouse Network, *Submission 3*; Australian Aluminium Council, *Submission 4*.

9 Cement Industry Federation, *Submission 2*, p. 4.

10 Proof Committee Hansard, 28 October 2005, p. 28.

solicitor advised the Department that the secrecy obligations under the Crimes Act that apply to departmental officers will extend to any person appointed as an authorised officer.

Sign-off arrangements for the public report

2.28 Several submissions and witnesses drew the Committee's attention to clause 22(4)(b) which specifies that the registered corporation's public report must be signed by the chair of the board of directors (or equivalent officer). The Explanatory Memorandum says that this requirement is to ensure that senior executives give due consideration to the identified opportunities.[11]

2.29 Submissions consider that this obligation would be outside the normal functions of a Chairman of a Board of Directors and it would be more appropriately the responsibility of the operational management of the company. The Australian Aluminium Council suggests that the arrangements for sign-off be made consistent with the Greenhouse Challenge Plus where the Chief Executive is responsible for signing off such reports.[12] Mr Morris, Senior Director, Minerals Council of Australia, told the Committee about potential difficulties in meeting the requirement in the Bill:[13]

> …for multinational corporations, which will be caught by this legislation, it becomes quite difficult if it is required that the chairman of the corporation will sign. The chairman for very large companies may live overseas and he has other responsibilities, and it will lead to companies having to do quite a lot of gymnastics in order to be able to comply with the requirements, which they would of course do. In addition to that, our understanding of the intent here is that investment decisions that are signed off by boards do include consideration of energy efficiency, but we would make a point that companies also look at energy efficiency as an operational practice. Companies such as BHP Billiton have multibillion dollar businesses run by senior managers and they are responsible for operational practices. It would seem more logical that the chief executive of a company sign off, rather than the chairman.

2.30 The Committee notes the advice from most submitters that it would be more appropriate for the Chief Executive Office to sign this report. However, it also notes the comments from the Energy Users Association of Australia:

> It is also likely that the scheme will require "high level" sign off of assessments within companies. This would seem to be desirable if the measure and its implementation by affected organisations is to be taken seriously.[14]

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11 Explanatory Memorandum, p. 104.

12 Australian Aluminium Council, *Submission 4*.

13 Proof Committee Hansard, 28 October 2005, p. 14.

14 Energy Users Association of Australia, *Submission 5*, p. 2.

Duplication of schemes

2.31 The Committee was told that the Commonwealth Energy Efficiency Opportunities scheme is being established in addition to similar schemes in Victoria and New South Wales.[15] Some companies will incur obligations under all three schemes which may place an undue regulatory burden on them.

2.32 Witnesses argued that if companies incurred obligations under multiple schemes their compliance with provisions under one scheme should constitute compliance with both or all schemes.[16] However, the schemes apparently vary in their requirements. For example, witnesses told the Committee that the Victorian scheme was the most onerous of the three schemes.

2.33 The Committee considers that at first brush it seems sensible that if a company complies with a more rigorous scheme it should also be compliant in a lesser one if both schemes are essentially equivalent in their goals. The Committee was not provided with information about how many companies would be affected in this way but it notes that the Department is currently consulting on the issue:[17]

> Those pilots and trials will identify where more than one jurisdiction imposes a burden on a company and map those differences. We will then work through a process about whether those differences, those burdens, can be changed at an administrative level or whether they need to be raised at a political level and work through those changes. Our intention when going into consultations with industry stakeholders is that we are looking for one set of actions to meet all requirements in Australia, and that is clearly our objective to the extent we can achieve that.

Penalty provisions and powers of inspection

2.34 The penalties contained in the Bill seem to be unduly severe given the nature of the offences. For example, clause 29(3) imposes a penalty of 6 months imprisonment if a person refuses to answer questions or produce documents as outlined under section 23. Schedule 1, item 3 allows for a pecuniary penalty of up to 1000 penalty units (currently this amounts to $110,000) if a declaration of a contravention has been made in relation to certain subsections.

2.35 In relation to the powers of inspection given to authorised officers in the bill, the Committee agrees with the submission of BlueScope Steel that these too seem to be excessive:

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15 Protocol for Environmental Management: Greenhouse Gas Emissions and Energy Efficiency in Industry (Victoria, 2002); *Energy Administration Amendment (Water and Energy Savings) Act 2005* (NSW).

16 Proof Committee Hansard, 28 October 2005, p. 23. [Domanski]

17 Proof Committee Hansard, 28 October 2005, p. 30. [Wall]

> We note that authorised officers have extremely broad powers of entry onto premises, search and securing of evidential material, issue and use of warrants and the conditional ability to compel the answering of questions and/or the production of documents. Given the objectives of the Act, namely to compel large energy users to assess the potential to improve their energy efficiency and report publicly on that assessment, BlueScope Steel submits that these powers are excessive and unnecessary. These types of powers are typically applicable to legislation that regulates at the operational and functional level such as the OHS Act and environmental legislation. We submit it is inappropriate for an Act that is essentially regulating data production to grant broad powers to its watchdog to essentially come onto a large industrial site such as ours and do as they may.[18]

2.36 Mr Wall from the Department of Industry, Tourism and Resources advised the Committee that the sanctions are those that have been applied in like legislation relating to business, such as the Automotive Competitiveness and Investment Scheme and the *Environment Protection and Biodiversity Conservation Act 1999*.[19]

Conclusion

2.37 The Committee is of the view that this Bill requires further work before it can be passed by the Senate. In particular, the Committee is concerned about the testimony of a number of witnesses that they were surprised about its contents, despite an extensive consultation process. The Committee is also concerned that a number of substantive issues in relation to the Bill are to be introduced by regulation instead of being incorporated in the body of the Bill. This need to rely on as yet unseen regulations indicates that the Bill is being introduced before many substantive issues have been resolved.

2.38 Further, the Bill provides for what appear to be excessively severe penalties for compliance breaches, and inappropriately wide powers to conduct inspections, in what is intended to be an essentially co-operative approach to improving energy use efficiency. There are also unresolved issues about the treatment of commercially sensitive information. For these reasons, the Committee considers that the Government should withdraw the bill for re-drafting.

Recommendation 1

2.39 **The Committee recommends that the Bill not proceed unless amended:**

(i) to give a clear indication to corporations and individuals affected by it of the extent of their obligations and liabilities on the face of the Statute itself, rather than delegating them to regulations;

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18 BlueScope Steel Limited, *Submission 8*, p. 3.

19 Proof Committee Hansard, 28 October 2005, pp 29 and 30.

(ii) to change the penalty provisions in clause 29(3) to a level more appropriate to the nature of a regulatory statute, and in particular, by removing the custodial penalty;

(iii) to provide that the signing obligation in clause 22(4)(b) of the Bill be placed on the Chief Executive Officer, or some other suitable senior executive officer, not the Chairman of the Board; and

(iv) to provide more appropriate and stronger protection for commercially sensitive and confidential information.

Senator George Brandis
Chair