

Chapter 2

The bill

Purpose and objectives of the bill

2.1 According to the Explanatory Memorandum, the bill will make a number of changes to the *Liquid Fuel Emergency Act 1984* (the Act) to improve the administrative and economic efficiency of the Government's national liquid fuel emergency response arrangements.

2.2 The Act and its associated guidelines provide the Government with a range of powers to prepare for and manage a prospective liquid fuel supply emergency. The Act is not intended to be used to manage minor or intermittent supply shortages, and does not enable the Government to override the powers of state and territory authorities for the purpose of dealing with a localised liquid fuel emergency.¹

2.3 In 2004 the Government engaged consultancy firm ACIL Tasman to conduct a review of the Act to test its economic efficiency and effectiveness. ACIL Tasman reported its findings on 16 December 2004.² The majority of the changes that will be given effect by this bill were identified in the course of the review. ACIL Tasman made 31 recommendations over a range of matters, including several proposed legislative changes to improve the operation of the Act. The recommendations were intended to encourage all parties in the liquid fuel market to undertake their own contingency planning, on the basis that market mechanisms will generally be the most economically efficient and effective means of allocating supplies in a national liquid fuel emergency.

2.4 The changes outlined in the bill are intended to facilitate two outcomes:

- to encourage the more effective management of fuel supply risks by those persons or organisations that have the capacity to do so; and
- to ensure that the Act's administrative arrangements remain efficient, effective and sufficiently flexible to deal with the many different circumstances that could require the exercise of the Government's powers under the Act.

2.5 According to the Explanatory Memorandum, the bill has no financial impact.³

1 Explanatory Memorandum, p. 2.

2 Department of Industry, Tourism and Resources, *Fuel Supply: Australian Government Liquid Fuel Emergency Planning*, 3 April 2007, p. 1 of 2, <http://www.industry.gov.au/content/itrinternet/cmscontent.cfm?objectID=2F839F11-A9EA-1F33-8E77D585728027CE> (accessed 18 April 2007).

3 Explanatory Memorandum, p. 2.

2.6 In its submission the AIP generally supported the bill, stating that it has 'been actively consulted throughout the public consultation process around the review of the liquid fuel emergency legislation'.⁴ The AIP noted that the proposed amendments to the Act provide:

- a better balance between the need for governments and consumers generally to be aware of emergency supply arrangements, and the need for non-essential fuel users to take appropriate action to look after their interests;
- increased clarity about who would have priority access to available fuel supplies in an emergency;
- an increased level of certainty about the nature and extent of directions that ministers might issue to the petroleum industry, as reflected in the planning and preparedness processes; and
- greater ministerial flexibility to respond quickly to changing supply and demand circumstances across the very extensive fuel supply network in Australia.⁵

Changes introduced by the bill

2.7 The bill proposes a number of significant changes to the operation of the Act. These proposed changes include:

- the removal of the concept of 'high priority' users and the narrowing of the definition of 'essential' users;
- an increased capacity to delegate and sub-delegate the powers and functions conferred or imposed by the Act;
- changes to the compensation provisions of the Act;
- changes to legal immunities provided for in the Act; and
- exemptions from some sections of the *Legislative Instruments Act 2003* for certain provisions of the Act.

'High priority' and 'essential' users⁶

2.8 The concept of 'high priority' users will be removed to provide a clearer indication of the types of activities that are going to receive priority access to fuel in the event of a fuel supply disruption. The change will send a clear signal to fuel users that, unless they clearly fall within the definition of an 'essential' user, they will not be

4 Dr John Tilley, Executive Director, AIP, *Committee Hansard*, 23 April 2007, p. 1.

5 Australian Institute of Petroleum, *Submission 1*, p. 5.

6 These changes are discussed in detail in the Explanatory Memorandum (pp 14–21).

given priority access to liquid fuels and should take whatever steps they deem necessary to mitigate a future supply disruption.⁷

2.9 The concept of 'essential' users will also be narrowed.⁸ Under the proposed changes, the minister will only be able to identify a user as 'essential' where the minister is satisfied that the user undertakes activities which are essential to the health, safety and welfare of the community. The minister must make guidelines to assist in the identification of an essential user, and these guidelines must be followed before a fuel user can be identified as being 'essential'.⁹

2.10 The AIP supports these changes, noting that 'essential' groups within the community will be able to be:

...identified in advance and their fuel supply requirements more clearly identified by industry. At the same time, those groups not identified as essential will be aware at an early stage of their status for access to fuel during an emergency, and will be able to better plan strategies to manage their fuel needs during an emergency. Governments will also be better placed to consider alternative strategies to assist non-essential users. AIP believes these changes will also assist with the development of better fuel access arrangements for essential users and for service stations during an emergency.¹⁰

2.11 The AIP also stated that 'discussions are well advanced between Commonwealth and state/territory governments to develop an agreed schedule of essential users'.¹¹

Delegations

2.12 The capacity to delegate and sub-delegate the powers and functions conferred or imposed by the Act will be extended to facilitate a more devolved emergency response.¹² The minister will be able to:

...delegate, in writing, any or all of their powers or functions under the Act except:

- the power to make guidelines under the Act;
- the power to direct a fuel industry corporation to provide the Minister with bulk allocation procedures;

7 Explanatory Memorandum, p. 38.

8 Explanatory Memorandum, p. 2.

9 Explanatory Memorandum, p. 38.

10 Australian Institute of Petroleum, *Submission 1*, p. 6.

11 Australian Institute of Petroleum, *Submission 1*, p. 6.

12 Explanatory Memorandum, p. 3.

- the power to direct a fuel industry corporation to maintain statistics and to provide those statistics to the Minister and Energy Ministers; and
- the power to agree to a further delegation of the Minister's powers or functions.¹³

2.13 Amendments proposed by the bill will also enable the further delegation of powers and functions if this is done with the minister's agreement.¹⁴

2.14 In his evidence, Dr John Tilley, Executive Director of the AIP, informed the committee that he understood that the Government would 'provide a series of guidelines to all persons who have delegated powers about how they might exercise those delegations for further sub-delegations'.¹⁵ Furthermore, he stated that he understood that '...there is a draft available of which ministers are likely to be the recipients of delegations...and which officials at federal and state levels would hold delegations'.¹⁶

2.15 According to the Government, the power to refuse a sub-delegation and/or revoke a delegation will continue to provide the minister with a significant degree of control over the exercise of the powers and functions of the Act.¹⁷

Compensation¹⁸

2.16 The Explanatory Memorandum states that:

The Australian Government Minister has powers under Parts II and III¹⁹ of the LFE Act to issue Directions to certain fuel industry participants to achieve the objectives of the Act. These Directions can, for example, require an oil refinery to maximise its production of particular fuels, or can require a fuel distributor to transfer its products from one location to another. In these and many other cases, the directed party is likely to incur costs that they otherwise would not have incurred but for the Direction.

The LFE Act recognises that this may occur, and makes provision for compensation (or protection from liability) in a variety of circumstances:

13 Explanatory Memorandum, p. 59.

14 Explanatory Memorandum, p. 59.

15 Dr John Tilley, Executive Director, AIP, *Committee Hansard*, 23 April 2007, p. 2.

16 Dr John Tilley, Executive Director, AIP, *Committee Hansard*, 23 April 2007, p. 2.

17 Explanatory Memorandum, p. 3.

18 Changes to the compensation provisions are discussed in detail in the Explanatory Memorandum (pp 22–29).

19 Part II - Contingency planning powers
Part III - Declaration of, and powers for dealing with, national liquid fuel emergency

- an acquisition of property otherwise than on just terms is specifically compensated under section 45;
- compensation for any loss, injury or damage sustained whilst complying with a Part II or Part III Direction where that damage is greater than the loss suffered by the community at large and can not (or is unlikely to) be recouped from the market is available under section 46; and
- if a contract is breached by a party as a direct result of complying with a Part III Direction, the breaching party is exempted from legal claims under section 47.

In addition, section 49 provides that a power exercised by a delegate of the Australian Government Minister is deemed to have been exercised by the Australian Government Minister. On this basis, compensation for a loss suffered as a result of complying with a Direction would be payable by the Commonwealth, regardless of whether the Direction was given by the Australian Government Minister or by a State or Territory official who is a delegate under section 49.²⁰

2.17 The bill will amend the compensation provisions of the Act to provide greater assistance to corporations subject to a direction *prior* to the commencement of a national liquid fuel emergency (i.e. a Part II direction).²¹ The requirement to take into account the loss of the community at large when calculating the amount of compensation which is payable will be removed and compensation will only be payable where the loss cannot be recouped from the market.²²

2.18 The compensation provisions will also be amended to remove the right to compensation for all persons or corporations that are the subject of a direction *during* a national liquid fuel emergency (i.e. subject to a direction issued under Part III of the Act).²³

2.19 Compensation, under the amended Act, would therefore be payable under:

- section 45, where compensation for an acquisition of property must be on just terms; and
- section 46, where a fuel industry corporation or person can be compensated if forced to comply with a government direction *prior* to an emergency. A claimant must demonstrate that they have suffered a loss as a result of the direction and that they have been unable to recover that loss from the market.²⁴

20 Explanatory Memorandum, p. 22.

21 Explanatory Memorandum, p. 3.

22 Explanatory Memorandum, p. 58.

23 Explanatory Memorandum, p. 3.

24 Second Reading Speech, *House of Representatives Hansard*, 28 March 2007, p. 2.

2.20 The Government concludes that these amendments to the compensation provisions of the Act would:

...remove the requirement to assess loss by reference to the loss of the community at large, facilitate a more efficient allocation of resources to enable more effective Government responses during a national liquid fuel emergency and reduce the compensation exposure of the Commonwealth.²⁵

2.21 The AIP considers that the changes would improve the level of certainty in relation to Part II compensation issues, although it notes in its submission that:

While the approach to Part III cost issues appears to be workable, AIP believes the lack of certainty about how some state governments may utilise price capping powers is likely to lead to conservative approaches to emergency fuel supply responses.²⁶

2.22 However, according to the Explanatory Memorandum, the state and territory governments:

...have indicated through NOSEC [the National Oil Supplies Emergency Committee] that the circumstances in which price controls would be exercised are rare, and likely to be limited to preventing fuel industry participants from abusing their market power.²⁷

2.23 Dr Tilley also stated that '...states have indicated that they would only exercise that power if they believed that the fuel prices were out of alignment with a formula which is based on import parity pricing plus reasonable costs of getting the fuel into the Australian markets and to consumers'.²⁸

Legal immunities

2.24 A direction issued during a national liquid fuel emergency may cause a breach of contract. The Act already provides immunity from legal action for breach of contract in these circumstances. The bill would extend the immunity to breaches caused by directions issued *prior* to the declaration of a national liquid fuel emergency.²⁹

2.25 Immunity for officials exercising a power or performing a function under the Act reasonably and in good faith has also been included.³⁰

25 Explanatory Memorandum, p. 29.

26 Australian Institute of Petroleum, *Submission 1*, p. 7

27 Explanatory Memorandum, p. 24.

28 Dr John Tilley, Executive Director, AIP, *Committee Hansard*, 23 April 2007, p. 1.

29 Explanatory Memorandum, p. 3.

30 Explanatory Memorandum, p. 3.

2.26 An exemption from prosecution for breaches of Part IV of the *Trade Practices Act 1974* (dealing with anticompetitive conduct) has been included in the bill where the conduct is required by a direction. The exemption is restricted to conduct which occurs *during* a period of national liquid fuel emergency.³¹ It is the intention that a direction will specify acceptable conduct or arrangements if there is a risk of anticompetitive effect.³²

2.27 The AIP stated that industry is 'quite comfortable' with these arrangements:

The trade-off is that there is no TPA exemption in the preparatory phase of an emergency supply response. But it is clearly recognised by government and the ACCC itself that there would need to be a request from industry during that preparatory stage for industry to be given specific permission to consult amongst themselves and with government as to how to provide effective and efficient supplies to the market.

We would expect the ACCC to be actively monitoring whatever is going on both from a pricing point of view and from a general business practice point of view...From our point of view, we would be abiding by the Trade Practices Act provisions to the maximum extent during an emergency anyway, but having the exemption would mean that timely decisions would be able to be made in order to get the fuel supply out there.³³

Legislative instruments

2.28 Section 41 of the Act, which provides for certain disallowance provisions by Parliament, will be repealed and several provisions of the Act, such as subsection 13(1)³⁴, will be exempted from the operation of section 42 and Part 6 of the *Legislative Instruments Act 2003*. According to the Explanatory Memorandum, this is to provide the government of the day with the capacity to respond as quickly as possible to changing circumstances in preparing for or managing a national liquid fuel emergency. The effect of these amendments will be to enable certain legislative instruments under the Act to take effect prior to their registration and to prevent the Parliament from disallowing or sunsetting certain legislative instruments.³⁵

2.29 However, guidelines made under the Act, while being able to take effect prior to their registration, will be disallowable, providing a measure of parliamentary control. Furthermore, according to the Explanatory Memorandum, it is the

31 Explanatory Memorandum, p. 3.

32 Second Reading Speech, *House of Representatives Hansard*, 28 March 2007, p. 2.

33 Dr John Tilley, Executive Director, AIP, *Committee Hansard*, 23 April 2007, p. 3.

34 Section 13 - Minister may direct relevant fuel industry corporations to develop bulk allocation procedures

35 Explanatory Memorandum, p. 3.

Government's intention that relevant parties will be consulted on the terms of prospective guidelines.³⁶ The AIP notes that:

The amendments establish a clear legislative model which requires guidelines to be established for all major operational actions under the LFE legislation before any Ministerial directions can be issued to industry or fuel consumers. AIP believes this process will strengthen consultation between industry and government on the expected content of directions and enable effective planning and preparation of detailed response activities which meet industry and government needs. The petroleum industry will know in advance how key parts of their operations are likely to be impacted during an emergency. This consultative process also underpins the more effective decision making steps during, and in the lead-up to, an emergency, when Ministerial directions issued in accordance with the guidelines will not be subject to disallowance by the Parliament.³⁷

2.30 Directions issued under sections 18 and 19³⁸ will not be legislative instruments and, perhaps for practical reasons, no guidelines relating to these sections will be made. However, this has the effect of removing any parliamentary oversight of directions given under these sections.

Other proposed amendments

2.31 At the time of the Act's introduction, the Australian Capital Territory had not yet become a self-governing entity. The Australian Capital Territory will therefore be included in the Act in its own right.³⁹

2.32 The enforcement provisions of the Act will be amended to require a search warrant to be issued by a magistrate rather than a justice of the peace. The bill also clarifies the powers of authorised persons appointed under the Act, and includes the requirements for consent when an authorised person exercises their powers.⁴⁰

2.33 Where necessary, the penalty provisions and the archaic or gender-specific language of the Act will be updated to reflect current drafting practices.⁴¹

36 Explanatory Memorandum, pp 37–38.

37 Australian Institute of Petroleum, *Submission 1*, p. 5.

38 Section 18 - Minister may direct transfer of liquid fuel
Section 19 - Minister may direct liquid fuel to be available for purchase

39 Explanatory Memorandum, p. 2.

40 Explanatory Memorandum, p. 3.

41 Explanatory Memorandum, p. 3.

Recommendation

2.34 **The committee recommends that the bill be passed.**

Senator the Hon Michael Ronaldson
Chair

