Chapter Four

Provisions for liability

4.1 In requesting the bills be referred to the Economics Committee, the Selection of Bills Committee specifically referred to a particular concern that the bills shift liability for leakage of CO_2 from geological storage from the large greenhouse gas emitters to the public.

4.2 The Scrutiny of Bills Committee has also drawn attention to the provisions that create offences of strict liability.[1]

4.3 The proposed legislation, like the arrangements relating to petroleum, is silent on the question of long-term liability. Once the licensee's statutory obligations cease when the closing certificate is issued, future issues of liability would be in the domain of the common law.

4.4 As the Department of Resources, Energy and Tourism put it:

> The bill does not ascribe liability. This is left to common law. Following the existing offshore petroleum model, the proposed amendments will neither extinguish nor limit the common-law liability, including long-term liability, of participants in greenhouse gas projects. Under the contents of the bill as currently drafted, the Commonwealth will therefore not take over long-term liability from nor provide any indemnity to project participants in respect of any liability they may incur.[2]

4.5 The Department argued it would be undesirable to include an explicit provision for the government to assume long-term liability from the project participants or provide indemnity to project participants in respect of any liability they might incur. The Department explained:

> …basically, the assumption of liability by the Commonwealth would be quite contrary to site closure processes as required under activities otherwise regulated by the Commonwealth. The emphasis in the bill and in the approach taken to allocating sites for storage has been to minimise the liability risk all the way through.[3]

4.6 An alternative view, mostly expressed by industry representatives, was that the government needs to accept long-term liability:

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1 Strict liability is a legal doctrine that makes a person responsible for the damage and loss caused by his/her acts and omissions regardless of culpability (or fault in criminal law terms).

2 Ms Margaret Sewell, Department of Resources, Energy and Tourism, *Proof Committee Hansard*, 29 August 2008, p. 9.

3 Ms Margaret Sewell, Department of Resources, Energy and Tourism, *Proof Committee Hansard*, 29 August 2008, p. 9.

> …we would expect that that injector of carbon dioxide would be required to meet certain standards in the injection process and then also certain standards in what we would term the closure process. It is our view that once those standards have been met they should be relieved from the long-term obligation on liability. It would be unreasonable for those companies to retain that liability long term, because we are talking about decades, if not centuries…unless the government or a statutory body is willing to take on this obligation, there will not be enough incentive for companies to go in and undertake these sorts of operations. We believe that it is important to provide that clarity to encourage companies to go in and undertake this.[4]

> …after a suitable period of assessment and with appropriate monitoring, the liability should return to the state.[5]

> …at that point in time that industry, given that it has tenure and can actually do something about it, has demonstrated to the satisfaction of government that all is as well as it can be—'risks are as low as reasonably practicable' is the industry term. We are submitting that at that point liability would transfer to the Commonwealth.[6]

> The failure to transfer post closure liability to the Commonwealth is an impost on embryonic greenhouse gas storage activities.[7]

> WWF submits that the Bill be amended to…provide that upon the issue of the site closure certificate liability and ownership of the carbon dioxide pass to the Commonwealth…[but that] the GHG injection operator remains liable under common law.[8]

> …long-term stewardship (and therefore liability) should rest with a long-term entity such as the State.[9]

4.7 Monash Energy and BP Australia argued the government should assume responsibility so as to encourage offshore CCS:

> The viability of greenhouse gas injection and storage is at an embryonic stage. The placement of longer term liability with the Commonwealth should be considered in the context of the public's interest in the mitigation of greenhouse gas through offshore storage.[10]

> As the Bill is drafted, it asks the GHGS proponent to accept a liability that is quantified neither in time, scale or scope. The proponent will weigh this against the alternative liability associated with releasing CO_2 to atmosphere

4 Mr Mark Nolan, ExxonMobil, *Proof Committee Hansard*, 29 August 2008, pp. 29–30.

5 Mr Roger Bounds, Monash Energy, *Proof Committee Hansard*, 29 August 2008, p. 36.

6 Mr Simon Daddo, Woodside Energy, *Proof Committee Hansard*, 1 September 2008, p. 8.

7 Monash Energy, *Submission 3*, p. 5.

8 World Wildlife Fund, *Submission 4*, p. 3.

9 BP Australia, *Submission 6*, p. 1.

10 Monash Energy, *Submission 3*, p. 28.

> and paying the cost of carbon, a liability which can be immediately quantified and discharged.[11]

4.8 Some submissions made a distinction between demonstration projects and later commercial projects. Two joint submissions argued that the government should indemnify demonstration projects against long-term common law liability.[12]

4.9 The industry position received some support in the recently published report from the House of Representatives Standing Committee on Primary Industries and Resources, which recommended:

> …that a process for the formal transfer of long tem liability from a GHG operator to the Government be established within the proposed legislation, such transfer to be conditional upon strict adherence to prescribed site closure criteria.[13]

4.10 Some submissions were doubtful about this argument:

> It will take time to establish whether this complexity and ongoing liability will be a disincentive to investment in the scheme and compromise the efforts to reduce GHG emissions.[14]

4.11 Others clearly rejected the idea of the government assuming the long-term liability. Greenpeace argued:

> This effectively transfers responsibility and liability to the Commonwealth. This is unacceptable, as the agent responsible for storing the CO_2 must be responsible for its long-term monitoring and liable for any adverse environmental impacts, including failure of the site to effectively store the CO_2.[15]

4.12 Even some who thought government might eventually assume liability wanted this to be in a distant period:

> …given the uncertainty around CO_2 storage and the lack of current demonstration, a fixed time period for monitoring by operators is necessary to ensure environmental integrity and public confidence…there would be a minimum 30-year period during which the company is responsible for

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11 BP Australia, *Submission 6*, p. 1.

12 Australian Coal Association and Minerals Council of Australia, *Submission 12*, p. 7; Australian Coal Institute, Climate Institute, Construction, Forestry, Mining and Energy Union and World Wildlife Fund, *Submission 13*, p. 2. In their submission, the Cooperative Research Centre for Greenhouse Gas Technologies explained that they were able to obtain insurance cover for the construction and operational phase of their project but were not able to obtain cover beyond 10 years after closure. *Submission 15*, p. 4.

13 Recommendation 14 House of Representatives Standing Committee on Primary Industry and Resources, *Down Under: Greenhouse Gas Storage*, August 2008, pp. 74–9.

14 Western Australian Department of Industry and Resources, *Submission 8*, p. 6.

15 Greenpeace Australia, *Submission 10*, p. 4.

> monitoring and verification and also holds the liability…common law liability still remains in place so that, if there is any negligence, companies could still be sued.[16]

4.13 One senator noted the incongruity of companies being unwilling to bear a liability they were assuring the community was negligible:

> If you are confident that it is not going to leak…why would you not take liability for it and why would you want to shift that to the community?[17]

4.14 Whichever way the argument is resolved there were calls for more clarity. The Australian Network of Environmental Defenders' Offices (ANEDO) thought the bill should:

> …more clearly define the long term liability of operators and the Commonwealth;[18]

4.15 This call was prompted by their concern that:

> Whilst the issuing of a SCC may provide industry with the confidence to invest in CCS, it simultaneously increases the potential of public liability. Once a SCC is granted, the recipient is no longer responsible for the ongoing monitoring, measurement and verification and so provides the operator with a limitation point for further statutory liability and financial responsibility…by providing industry such assurances, the Bill establishes a framework that operates counter to the public interest of ongoing monitoring and site stability to ensure effective long-term GHG storage…[and] may reduce incentives for project operators to design and implement projects in a safe and reliable manner.[19]

4.16 The question of liability is complicated by the fact that potential liabilities for a carbon storage project run for centuries, far longer than the lifespans of most companies or the length of insurance contracts. If the company who had conducted the storage is long gone, implicitly the liability may be seen to rest with the government. This point was conceded by the Department:

> …the natural progression of time could well mean that there may be nobody to pursue under common law…the passage of time would

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16 Ms Kellie Caught, World Wildlife Fund, *Proof Committee Hansard*, 29 August 2008, pp. 15–6.

17 Senator Christine Milne, *Proof Committee Hansard*, 1 September 2008, p. 7. In a similar vein, Greenpeace noted 'the industry has viewed liability as a barrier to wider deployment of CCS and has only accepted liability over timescales of years rather than the indefinite period that CO_2 must remain underground to be safe. Perhaps this can be seen as a vote of no-confidence in CCS from the industry itself.'; Ms Helen Oakey, Greenpeace Australia, *Proof Committee Hansard*, 29 August 2008, p. 3.

18 Australian Network of Environmental Defenders' Offices, *Submission 2*, p. 3.

19 Australian Network of Environmental Defenders' Offices, *Submission 2*, p. 3.

inevitably pass some of that responsibility back to the community in that way, but…It is not a legislated thing.[20]

4.17 One response to this problem is a suggestion that while the storage is taking place the company should contribute to a fund which could be drawn on much later (even after the company no longer exists) in the event that a problem arises. This could be like a 'bond' tenants provide to a landlord, relating to a specific project, in which case the return on the assets provided might be returned to the company. Alternatively, it could take the form of a contribution to a pooled fund covering many projects, something like insurance, from which claims could be made in the event of a leak.

4.18 Two environmental groups submitted:

> …the Bill should introduce an industry funded, Commonwealth held trust to ensure funds are available for future remediation works in the event that the party liable are no longer in existence.[21]
>
> …long-term monitoring, measurement and verification operations should be paid for from an industry fund accumulated by either a levy, fee on injection or the sale of carbon credits equal to a (relatively small) percentage of the CO_2 stored in the relevant geological formation.[22]

4.19 This was also supported by the Cooperative Research Centre for Greenhouse Gas Technologies:

> There is clearly a public benefit in mitigating the extent to which CO_2 enters the atmosphere and therefore it may be appropriate that the Government shares liability with industry proponents; with industry carrying liability up to the closure/early post closure stage and Government beyond that point, perhaps with a bond and/or specific closure requirements to ensure that there will be no major cost on the public purse.[23]

4.20 This would represent a larger scale version of the provision in the bill (Section 249CZGAA) setting out conditions relating to arrangements for long-term monitoring which are required before a closing certificate can be issued. These arrangements include a requirement for the company to lodge a security that covers the estimated cost of long-term monitoring and other operations proposed to be carried out by the government. A similar provision is required in legislation proposed by the Victorian government which:

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20 Ms Margaret Sewell, Department of Resources, Energy and Tourism, *Proof Committee Hansard*, 29 August 2008, p. 10.

21 Australian Network of Environmental Defenders' Offices, *Submission 2*, p. 8.

22 World Wildlife Fund, *Submission 4*, p. 9.

23 Cooperative Research Centre for Greenhouse Gas Technologies, *Submission 15*, p. 4.

> …requires CCS operators pay to the state the estimated cost of long-term monitoring and verification prior to the surrender of an injection title.[24]

24 Ms Anna Beesley, Victorian Department of Primary Industries, *Proof Committee Hansard*, 29 August 2008, p. 23.