

1983

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

LIQUID FUEL EMERGENCY BILL 1983

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister representing
the Minister for Resources and Energy,
the Honourable Barry O. Jones MP)

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OUTLINE

This Bill provides the Commonwealth Government with the powers to enable it, in consultation with the State and Territory Governments, to effectively coordinate the management of a national liquid fuel emergency.

The Bill is based on the cooperative approach between Commonwealth, State and Territory Governments recommended by the National Petroleum Advisory Committee (NPAC). All Governments have endorsed the NPAC report. The Bill will enable an effective response to a national liquid fuel emergency to be made. The powers in the Bill are complemented by powers in existing or prospective State and Territory legislation.

The effective management of a national liquid fuel emergency requires certain preparations to be undertaken prior to the onset of the supply shortage. This is provided for in Part II - Contingency Planning Powers. These are standing powers, available to the Commonwealth as soon as the legislation is proclaimed, and include powers to require relevant fuel industry corporations (and persons) to maintain minimum levels of reserve stocks, develop certain emergency procedures, and maintain and provide statistical information.

In contrast, the Emergency powers in Part III can only be used after the formal declaration of the existence of a national liquid fuel emergency by the Governor-General.

The Bill provides for the allocation of scarce liquid fuels on a national basis, whereby the burden is shared uniformly as far as possible throughout Australia. This includes allocation on a uniform percentage basis to bulk customers, supplemented by extra allocations to certain "essential" or "high priority" users. In accordance with the NPAC recommendations most essential and high priority users are to be identified by the State and Territory Ministers who will also be responsible for calculating their allocation quantities.

The Bill identifies certain areas of specific Commonwealth responsibility in relation to essential or high priority users. These include fuel required for defence, ships and aircraft, export and for other activities determined by the Commonwealth Minister to be of national significance. The Bill also provides for the Commonwealth to allocate fuel to essential and high priority users in the Australian Capital Territory, the External Territories and the Australian Antarctic Territory.

During an emergency, under Part III of the Bill, the Commonwealth has specific powers in relation to the maintenance of reserve stocks (and therefore of stocks release), the physical transfer of stocks, the sale of specified liquid fuels to certain designated customers and the regulation of refinery operations. These powers are intended to be applied as necessary to the major oil refining/marketing companies in order to balance supplies and demands between companies and regions. In addition, the Bill provides the powers necessary to regulate the supplies which are available to bulk customers, and to retail customers.

An important aspect of the Bill is its requirement that consultation occur between the Commonwealth, State and Territory Energy Ministers before declaration by the Governor-General of a national liquid fuel emergency. Consultation is also required before making certain determinations or issuing certain directions. These include the identification of essential or high priority users under the national significance category and the making of any directions under Parts II or III of the Bill.

Where appropriate, it is intended that the Commonwealth Minister would delegate powers to the State and Territory Ministers and the Bill allows for this to occur in all cases except the making of certain instruments of a legislative nature.

A major feature of the Bill is the requirement that the Minister determine guidelines in relation to making certain directions. These guidelines must be approved by the Parliament and will provide certain constraints on the nature of the Minister's directions, will provide a consistent national framework for the assessment of essential and high priority users, and will also provide the basis for review of certain decisions made prior to an emergency. These "reviewable decisions" include the identification of bulk customers and those essential and high priority users identified by the Commonwealth, directions on strategic stock levels and approval of bulk allocation procedures.

The Bill also contains enforcement provisions - Part IV. These provide for pecuniary penalties in relation to offences under most clauses of the Bill. In some cases however, for example in the provision of information, offences are criminal. In addition, the Bill provides that a court may grant an injunction restraining a person from engaging in certain conduct, or requiring a person to undertake certain action. These enforcement provisions are based on, and consistent with, recent precedents.

The Bill is based on a number of the heads of power available to the Commonwealth under the Constitution. These include "national" purposes such as the defence of Australia, or protecting its existence as a nation, as well as the trade and commerce powers and providing for the supply of goods and services by or to the Commonwealth.

The Bill also specifies its inter-relation with the operation of other Commonwealth, State and Territory legislation. Clauses 50 and 51 provide that a direction under this Act would prevail, to the extent of the inconsistency, over any inconsistent direction made under another Act, but other legislation continues in force provided there is no conflict.

Finally, the Bill includes a 3 year "Sunset" clause. This has been included at the request of some of the States who consider that alternative Commonwealth legislation would be preferable. The "Sunset" clause provides for the automatic expiry of this legislation - on the assumption that it will be replaced or amended in the light of further Commonwealth/State discussions. In the event that these discussions were unsuccessful an amendment could extend or delete the "Sunset" clause.

NOTES ON CLAUSES

PART I - PRELIMINARY

Clause 1 - Citation

Clause 2 - Commencement

Clause 3 - Interpretation

Definitions of the Bill (3(1)) extend its coverage to crude oil, naphtha, bitumen, lubricants and greases, methanol, and ethanol, as well as more obvious refined petroleum "liquid fuels" such as motor spirit and diesel, and can be extended by regulation to include petroleum products not specified in the Bill.

"Relevant Corporations" covered in the Bill include those engaged in importation, recovery, refining or sale of liquid fuels. "Relevant persons" are those engaged in importation or sale of liquid fuels.

"Energy Ministers" are defined for each State and Territory (including the Northern Territory, Australian Capital Territory, the external Territories and the Australian Antarctic Territory).

Clause 4 - Extension of Act to external Territories

Clause 5 - Act to bind Crown

Clause 6 - Operation of the Act

This identifies the constitutional bases of the Bill and the purposes for which actions may be taken under the Bill.

These include matters of national concern and specific Commonwealth responsibilities, eg defence and protecting the existence of Australia as a nation; Australia's rights and obligations as a member of the International Energy Agency; supplies to the Territories and to the Commonwealth or its authorities; as well as ensuring that trade or commerce may be carried on without obstruction or hinderance, and to the extent that the Constitution permits, in an efficient, competitive and profitable manner.

Clause 7 - Additional operation of Act in relation to relevant fuel industry corporations

Clauses 12, 13, 17, 18 and 20 of the "notional Bill" created by sub-clause 7(1) are an exercise of the legislative power of the Commonwealth Parliament under paragraph 51(xx) of the Constitution (the "corporations power") and deal with the non-trading activities of corporations. Sub-clause 7(2) creates a further severable 'notional Bill' that will enable the continued operation of the legislation in the event of successful challenge to aspects of the corporations power, arising from the recent Tasmanian Dam case.

Clause 8 - Additional operation of Act in relation to relevant persons

Similarly to sub-clause 7(1), if there was a successful challenge to powers regulating the activities of relevant persons, then the rest of the Act stands.

Clause 9 - Minister may determine Planning Periods

A period of a national fuel emergency is subdivided into planning periods (typically expected to be of one month's duration) for management purposes. Supply and demand assessments, and decisions about allocations would be made for each planning period.

Clause 10 - Bulk customers of relevant fuel industry corporations or of relevant persons

"Bulk" customers are those who are normally account customers of oil companies or independent suppliers. Their identification is necessary to enable supplies to be made available to them in accordance with bulk allocation procedures. This identification would be delegated to the States and Territories and would generally be done in advance of an emergency.

The Minister is required to specify guidelines to be used in identifying bulk customers and these guidelines must be approved by the Parliament (clause 41).

The identification of bulk customers is expected to be a routine activity with little dispute but the Bill provides for a reconsideration by the Minister (under 44(2)) and a review by the Administrative Appeals Tribunal (under 44(6)).

Clause 11 - Essential users, or high priority users of refined liquid petroleum products

"Essential" and "high priority" users are to be generally identified by the State and Territory Energy Ministers, before the declaration of a national liquid fuel emergency.

The Commonwealth Minister is restricted to identifying such users in limited areas of activity ie to defence, ships and aircraft, export and "national significance" (11(3)).

Essential and high priority users may be identified only by reference to "guidelines" which in turn must be approved by the Parliament (clause 41).

Essential and high priority users are identified only in relation to a specific planning period although successive identification for subsequent periods may occur.

Decisions by the Commonwealth Minister under 11(3) are subject to reconsideration by the Minister (44(2)) and review by the Administrative Appeals Tribunal (44(6)).

PART II - CONTINGENCY PLANNING POWERS

The Minister must consult with his State and Territory colleagues before making a direction under any clause in Part II.

Clause 12 - Minister may direct relevant fuel industry corporations to maintain reserves etc

This clause enables the Minister to direct that relevant fuel industry corporations accumulate or acquire reserve stocks for use in an emergency.

The Minister must specify "guidelines" (12(1)) which must be approved by the Parliament, and these constrain the nature and scope of his direction under 12(2).

The clause also allows for a reduction in stock holdings to meet a temporary situation (12(6)).

Directions on stock levels are subject to reconsideration by the Minister (44(2)) and review by the Administrative Appeals Tribunal (44(6)).

During a declared emergency, the authority to determine the quantities, composition and location of stocks passes to clause 17.

Clause 13 - Minister may direct relevant fuel industry corporation to develop bulk allocation procedures

This clause enables the Minister to direct relevant fuel industry corporations to develop procedures for controlling fuel supplies to bulk users, (as identified under 10(3)) in accordance with directions issued during an emergency under 21(2).

Such directions on the development of procedures are constrained by guidelines (13(1)) which must be approved by the Parliament.

The developed procedures are subject to the approval of the Minister (13(3)) and (13(4)) and may be reconsidered by the Minister (44(2)) and reviewed by the Administrative Appeals Tribunal (44(6)).

Clause 14 - Minister may direct relevant fuel industry corporations and others to main statistical information

The clause enables the Minister to direct corporations and relevant persons to maintain specified statistical information and make this available to the Minister and to those State and Territory Ministers (if any) as are specified.

This statistical information is required to assess supply and demand levels and to make decisions in relation to management of the emergency:

Clause 15 - Minister may enter into arrangements for carrying out measures to enable the implementation of directions under sections 23 and 24

This clause authorises the Minister to arrange, as appropriate, with State or Territory Ministers, or with Commonwealth, State and Territory authorities to carry out preliminary measures to enable the implementation of directions issued under clause 23 and 24. This would enable the development of a national system of rationing to retail customers. The Commonwealth may reimburse authorities concerned with respect to costs.

PART III - DECLARATION OF, AND POWERS FOR DEALING WITH,
NATIONAL LIQUID FUEL EMERGENCY

The Minister is required to notify States and the Northern Territory of his intention to give directions under any clause of this Part of the Bill, and allow opportunity for consultations.

Clause 16 - Declaration of national liquid fuel emergency

This clause provides for the proclamation by the Governor-General of a national liquid fuels emergency if, and only if, he is satisfied that the Minister has consulted with States and the Northern Territory Energy Ministers and he is of the opinion that there is a shortage, or the likelihood of a shortage, of liquid fuels which will require directions under the emergency sections of the Bill, ie Sections 17-24.

There is a maximum of three months on the term of a declared emergency but successive declarations are possible. The Governor-General may also terminate a declared emergency. This may occur if he is satisfied that it is no longer in the public interest that it should continue, or if there is a need to declare another emergency, perhaps as a result of the shortage spreading to different liquid fuels.

Clause 17 - Minister may direct relevant fuel industry corporations to maintain reserves etc during a national liquid fuel emergency

The powers to direct oil industry corporations to hold or to accumulate specified quantities of particular petroleum products or crude oil during an emergency are similar to the contingency powers in clause 12, except that in this case directions by the Minister are not constrained by guidelines.

Any pre-emergency directions under 12(2) remain in force during an emergency and such directions continue after the emergency. In order to meet temporary circumstances, the Minister may authorise the maintenance of a lesser quantity of stocks (17(3)).

Clause 18 - Minister may direct transfer of liquid fuel

This enables the Minister to direct a fuels corporation to transfer liquid fuels from one location in Australia to another. These powers are required to ensure the availability of fuel in all locations in Australia. Intra-State transfers are limited to those activities of specific Commonwealth interest identified in 11(3).

Clause 19 - Minister may direct release or sale of liquid fuel

This enables the Minister to direct a fuels corporation to effect the sale of liquid fuel to another fuel corporation or "specified person". This enables the Minister to ensure a reasonable balance between supply and demand for each oil company.

Sub-clause 19(2) enables price to be determined, if necessary, by a person nominated by the Minister for that purpose.

Clause 20 - Minister may give directions as to output from refineries

This clause enables the Minister to direct refineries to produce specified quantities of particular liquid fuels in order to ensure that the production of essential refined petroleum products is maximised.

Clause 21 - Minister may give directions with respect to allocation by corporations of liquid fuel to bulk customersClause 22 - Minister may give directions with respect to allocation by relevant persons of liquid fuel to bulk customers

These two clauses enable the Minister to require that all supplies to bulk customers are made available only in accordance with bulk allocation procedures approved under 13(3) or 13(4) and to specify the manner of calculation of the allocation quantities to each class of user. The authority of

the Minister is expressed under two separate clauses in this way in order to provide separate powers in respect of bodies corporate and persons.

The allocation quantities must be calculated in a "manner" which accords with guidelines (21(1) and 22(1)), which must be approved by the Parliament.

The "guidelines" provide a uniform national basis for the calculation of allocation quantities. The "manner of calculation" specified in the instrument enables each user to have its allocation quantity calculated in a consistent manner. This provides some flexibility in the calculation of quantities for essential, high priority and other users without involving the Commonwealth in a breach of s.99 of the Constitution.

Paragraphs 21(2)(a), 21(2)(b) and 21(2)(c) (and similarly for clause 22) provide for a division of responsibility between the Minister and State and Territory Ministers for the calculation of allocation quantities. State and Territory Ministers will determine the allocation quantities for those essential or high priority users who are identified by them (21(2)(a)) while the Minister determines the allocation quantities for Commonwealth-identified essential or high priority users eg defence purposes (21(2)(b)), and for other (ordinary) users (21(2)(c)).

Clause 23 - Minister may give directions to Corporations regulating or prohibiting the supply of liquid fuel

Clause 24 - Minister may give directions to relevant persons regulating or prohibiting the supply of liquid fuel

In contrast to clauses 21 and 22 which apply only to bulk customers, clauses 23 and 24 are intended primarily to cover retail sales although certain classes of bulk customers may be included. Similarly to the distinction between clauses 21 and 22, clause 23 relates to corporations which supply liquid fuel while clause 24 relates to persons who supply liquid fuel.

Clauses 23 and 24 would be used by the Commonwealth Minister to implement a national scheme to ration fuel to retail users.

The powers provided in these clauses do not refer specifically to rationing, but simply enable the Minister to give directions regulating or prohibiting supply to certain classes of customers. These directions are constrained by the guidelines which the Minister is required to make under sub-clauses 23(1) and 24(1). These guidelines must be approved by the Parliament.

Clause 25 - Directions under Section 21, 22, 23 and 24 not to regulate price

This clause precludes the setting of prices by the Commonwealth in any direction given in relation either to allocation to bulk customers or regulating supply to retail customers. The clause also makes clear that the Act does not constrain the States from applying their own legislation in this field.

Clause 26 - Certain directions to be published

Clause 27 - Directions to cease to be in force when Proclamation ceases to be in force

Clause 28 - Ancillary contraventions of relevant provisions of the Act

This clause constrains a person from in any way contravening a relevant provision of this Act or in any way aiding or inducing or being directly or indirectly a party to a contravention by another person.

Clause 29 - Appointment of authorised persons

This clause includes provision for the appointment of State and Northern Territory officers.

Clause 30 - Power to require persons to furnish information and produce documents

This clause provides that an authorised person may require another person to provide information or produce documents. A person is not excused from being required to produce information or documents on the grounds that this may tend to incriminate the person or render him liable to a penalty. The clause includes protection against disclosure by persons holding confidential information provided under other Commonwealth legislation.

Clause 31 - Inspection

An authorised person may seek entry to, and search, land or premises, or stop, board, search a vehicle, ship or aircraft, with the consent of the occupier (or person in charge), or on a warrant signed by a Justice of the Peace, or an authorised person may enter, stop, board, search without a warrant and without the consent of the person in charge if he believes on reasonable grounds that this is necessary to prevent the concealment, loss or destruction of evidence and that the situation is of such seriousness and urgency as to require an immediate entry without the authority of a warrant.

Clause 32 - Seizure

An authorised person may seize any matter or thing on the grounds that it will provide evidence of the contravention of a relevant provision of the Bill.

Clause 33 - Persons to assist authorised persons

An authorised person shall be assisted by the owner, or person in charge of any vehicle, ship or aircraft boarded or entered, and by the owner or occupier of any land or premises entered by the authorised person.

Clause 34 - Pecuniary penalties

The Bill provides for substantial pecuniary penalties in the event of a contravention of certain provisions. Following recent precedents in other legislation related to the oil industry, the penalties are substantially larger for bodies corporate than for persons. The maximum penalties apply in relation to the stock holding and refinery operation provisions - in this case up to \$250 000 for a body corporate. Similarly, provisions relating to sale or release of fuel provide for a penalty of up to \$150 000 for a body corporate. In a situation of a contravention of the allocation to bulk customers, or rationing to retail customers (clauses 21, 22, 23 and 24) the penalty is substantially lower - \$15 000 in the case of a supplier who is a body corporate.

Clause 35 - Civil action for recovery of pecuniary penaltiesClause 36 - Criminal proceedings not to be brought for contraventions of relevant provisions of this ActClause 37 - Injunctions

The court may grant an injunction restraining a person from engaging in certain conduct, or requiring the person to do a particular act or thing. This provides a second sanction to enforce the provisions of the Bill. It is envisaged that the injunction power would be used in the event that the pecuniary penalty was not effective.

Clause 38 - Forfeiture

The court is empowered to order the forfeiture of articles used or involved in an offence, and the Minister may direct the disposal of such forfeited articles.

Clause 39 - Indictable offences

The provision of false or misleading statistical information (required under clause 14) by fuel industry corporations (14[4]) or by relevant persons (14[5]) is an indictable (criminal) offence.

Clause 40 - Conduct by servants or agents of bodies corporate

The intentions, and conduct, of a director, servant or agent of a body corporate on behalf of the body corporate are deemed to be the intentions or conduct of the body corporate.

Clause 41 - Parliament may disallow certain instruments made under this Act

Certain instruments made by the Minister shall be subject to the approval of the Parliament. These are the guidelines for identifying bulk customers, and essential and high priority fuel users, for issuing directions in relation to the maintenance and accumulation of liquid fuel reserves, for the development of bulk allocation procedures, for the calculation of bulk allocation quantities and for directions related to the regulation or prohibition of sales of liquid fuel.

These guidelines ensure that the Commonwealth is not subject to a breach of Section 99 of the Constitution in relation to the identification of bulk customers, essential and high priority users and in the calculation of allocation quantities. They also provide a basis for review by the Administrative Appeals Tribunal in relation to the identification of bulk customers and certain essential and high priority users, the maintenance and accumulation of stocks, and the approval of bulk allocation procedures. Finally, the guidelines provide Parliament with an opportunity to limit the scope for Ministerial direction to certain specified circumstances.

These guidelines may be made prior to an emergency.

Clause 42 - Consultation between Ministers concerning emergency procedures

This is an important provision which reflects the agreement reached in the NPAC discussions between the Commonwealth and the States, which envisaged that consultation would take place with the States on all major matters during the management of a national fuel supply emergency. This clause provides that the Minister will give notice of his intention to make certain determinations or give certain directions, and that he will offer a reasonable opportunity to the State and Territory Energy Ministers to consult with him.

This consultation provision applies to the determination of planning periods, the identification of certain essential or high priority users within the "national significance" category, and before giving any direction under Part II (Contingency powers) or Part III (Emergency powers) of the Bill.

Clause 43 - Application of other Acts to certain instruments under this Act

This clause specifies the form in which evidence that the Minister has made certain directions under the Bill will be demonstrated in a Court.

Certain instruments under this Bill are given the status of regulations within the meaning of the Acts Interpretation Act 1901.

Clause 44 - Reconsideration and review of decisions

This clause identifies certain decisions as being "reviewable". These include the identification of bulk customers, the identification of certain essential or high priority users, a requirement to accumulate and maintain reserve stocks of liquid fuel, and approval of bulk allocation procedures.

The clause provides for a reconsideration of any one of these decisions by the Minister (44[2]) as well as a review by the Administrative Appeals Tribunal (44[6]).

Clause 45 - Compensation for the acquisition of property

Any compensation shall be on just terms. It is envisaged that the Commonwealth would not generally be involved in compensation.

Clause 46 - Exemption from suit

During an emergency, where compliance with a direction results in a breach of contract, such compliance provides protection against possible consequential action or proceedings.

Clause 47 - Jurisdiction of Courts

This clause identifies the jurisdiction of the Federal Court of Australia and the Supreme Court of each State in relation to the Bill.

Clause 48 - Delegation

This provides for the Minister to delegate his powers to others, including the State and Territory Energy Ministers and officials. However, certain instruments of a legislative nature, for example the various sets of guidelines, are not subject to delegation.

Clause 49 - Service

This clause provides that a document may be served on a natural person or on a body corporate.

Clause 50 - Operation of State and Territory Laws

This clause provides that any State and Territory laws are to continue to operate, provided that they can do so concurrently.

Clause 50 - Directions to prevail over inconsistent Commonwealth, State or Territory Law

This clause provides that in the event of an inconsistency or conflict between a direction issued under this Bill and any other Commonwealth, State or Territory law, then this Bill will prevail.

Clause 52 - Act not to confer powers on State or Northern Territory Energy Ministers by implication

This clause clarifies that the Bill shall not be taken to imply the conferring of a power on the Energy Minister for a State or Territory.

Clause 53 - Cessation of Operation of Act

This "sunset" clause automatically terminates the legislation 3 years after it is proclaimed. This provision is included to meet the concern of some States that the proposed legislation is not wholly consistent with their own emergency management legislation, while at the same time recognising the necessity of having in place Commonwealth legislation that will provide for the emergency needs of other States and enable the Commonwealth Government to adequately fulfill its role during a liquid fuel supply emergency. During the 3 years currency of this legislation, the Commonwealth will work with the States and the Northern Territory on the development of alternative legislation as a replacement for the present Bill and existing States and Territory Acts.

As a safeguard, the clause includes provision for the legislation to remain in force if, at the "sunset" time, a declared liquid fuel supply emergency exists.

Clause 54 - Repeal of "Liquid Fuel (Defence Stocks) Act" 1949

The Bill supersedes the outdated Liquid Fuel (Defence Stocks) Act 1949.

Clause 55 - Regulations

The Governor-General may make regulations.

