



DAVID MORRIS MP
Member for Mornington

Energy Legislation – No protection from Ministerial Overreach

Posted on 11 November 2020

Mr MORRIS (Mornington) (18:29): I am pleased to have the opportunity to make some comments on the Energy Legislation Amendment (Licence Conditions) Bill 2020, because this is a bill that confirms what appears to be a rather dangerous trend, and that is the transfer of operational decision-making to the Minister for Energy, Environment and Climate Change.

Setting conditions on individual licences is not the role of a minister, particularly one who apparently “does not sweat the small stuff”.

The role of a minister is to set policy, determine the strategy and then allow the established delivery mechanisms to get it done, to implement it.

No requirement for accountability is contained in this bill beyond that generally imposed on ministers, and as we know there has been very little accountability from this government.

If I was the Secretary of the Department of Environment, Land, Water and Planning—that is something that is never going to happen, but if I was—I would be looking over my shoulder, because it is clear that the Westminster ministerial accountability tradition does not extend to ministers in the current government.

When things go wrong in the energy sector, as they inevitably will when the minister decides to place conditions on particular licences, they are going to be looking around for a scapegoat. And we have seen in recent weeks that scapegoats generally come from the public service, so the secretary will be thrown overboard or one of the deputy secretaries will be thrown overboard. No accountability is required of the minister and there will be no ministerial responsibility taken.

The bill is intended to allow the minister to vary, add or revoke conditions placed on licensed gas and electricity retailers. That power was previously the sole reserve of the Essential Services Commission.

This bill has a singular purpose, and that is to establish a process so the minister for energy can override the Essential Services Commission. There is no evidence presented in the minister’s speech to suggest that these drastic steps—and they are drastic steps—are in any way necessary.

There is no evidence to suggest the Essential Services Commission has been insufficiently diligent in overlooking the energy market. There is no evidence even of perceived shortcomings in the current arrangements, let alone actual shortcomings that would perhaps justify concentrating power like this in the hands of the minister.

In fact, when you look at the minister's commentary in the second-reading speech, it suggests that the process is actually working pretty well, because the minister says:

Energy licensees are subject to a stringent compliance and enforcement regime overseen by the ESC ...

The Victorian government has committed to ... strengthening the ESC's enforcement powers so it is able to more effectively regulate the energy sector ... In May 2019, the ESC was given a \$27.3 million funding boost over four years to enable it to take strong action against wrongdoing by energy companies.

Now, I certainly would not use the sort of language that the minister is using in what appears to be a premeditated slur directed at the energy industry, but her comments do suggest that the Essential Services Commission is more than capable of doing the job.

So again I say: how can ministerial intervention, particularly on the scale proposed by this bill, be justified? How can the government justify allowing a minister to intervene directly to determine the conditions of an individual licence? Because these are sweeping powers.

When you look at pages 6 and 8 of the bill, the minister can specify as a condition to a licence anything the minister thinks fit, and similarly vary and revoke. But the key point there is anything the minister thinks fit. The minister can as a licence condition:

apply, adopt or incorporate wholly or partially or as amended by a Ministerial licence condition, the provisions of any document, standard, rule, specification or method formulated, issued, prescribed or published by any authority or body ...

Basically any piece of paper that comes out of a public agency. A little bit further down the page:

confer powers and functions on, and leave any matter to be decided by, the Commission.

Which is currently identified in the Essential Services Commission Act 2001 and the energy act.

What we are doing is effectively delegating the power of the Parliament within that clause. I would say to members on all sides: just think about what those words mean. Just think about it: the power to specify conditions as the minister thinks fit and to vary conditions similarly as the minister thinks fit.

Those conditions can be applied in the words of the legislation to 'a particular licence'—not just a class of licences, but particular licences. The bill gives the minister absolute discretion to place any condition on a licence—absolute discretion. There is no requirement even for consistency in the way the rules are applied, and in fact there is no opportunity to contest the imposition of that condition.

The bill actually gives the minister power to place a condition on a licence that could potentially place that licensee at a competitive disadvantage. It could force a licence-holder, for example, to operate in a manner that is contrary to prudent financial practice.

In other words, the bill gives the minister power to place conditions on a licence which could essentially force the licensee out of business, and—this is the real sin as far as I am concerned—without placing similar conditions on a competitor.

Effectively this bill gives the minister the power to decide who succeeds and who fails in the industry, and there is no avenue of appeal.

Now, I am sure the government will say that is an extreme interpretation. They will say the power would never be exercised in this manner. But I would say if that is the case, why have it there in the first place? It does not need to be there.

The other point I want to cover is that the bill gives the minister the capacity to second-guess the Essential Services Commission. The fact is, as we know and as we have heard from the member for Tarneit amongst others, the energy market is a complex environment.

These are complex matters, and the complexity is the very reason the Essential Services Commission was created in the first place.

So where is the minister going to turn to for advice? Who will be tasked with effectively second-guessing the Essential Services Commission? Will it be the department? Will it be the minister's office?

Will it be outside political advice or someone in the Premier's private office? Or will it be a ministerial advisory group of Labor cronies?

Independent quality advice is essential, and there is nothing in this bill to ensure that the advice the minister will receive will be independent and will be quality advice.

The other comment I want to make is around consultation.

The bill provides that the minister has to consult the Premier, the Treasurer, the minister administering the Essential Services Commission Act 2001 and affected licensees. But in no case is there an obligation to respond to any submissions that the minister might receive.

Now, clearly it would be foolish to ignore the advice of the Premier, the Treasurer and even a colleague administering the Essential Services Commission Act, but there is no obligation to consider in any way beyond the necessary full form process submissions that might be put in by the licensees.

There is no safeguard, no protection from ministerial overreach and no appeal mechanism. Licensees can like it or lump it.

I do not argue that we should have an unregulated market. I certainly do not argue for a second that this market is perfect.

You have only got to look at the way power prices have gone up since 2014 particularly. I think we also need to accept that we are in the midst of tumultuous change in the way our energy is sourced and distributed.

Whatever some may wish to think, coal is on the way out, fossil fuels are on the way out, and the rate of change in that regard accelerates every single day. I think there is great opportunity in that change but there are great risks as well.

Is the market perfect? No, it is not. Do we need to make sure the consumers are protected? Of course we do. Do we need to make sure the strategic interests of the country are

protected? Of course we do.

But we need to know who is best placed to consider the complexities of the market. What are the strategic risks? How can they be managed? Clearly the minister's office is not the place to do that.

The Essential Services Commission has the expertise. They have the experience. They can deal with this issue appropriately. This is incredible power that needs to be exercised in a responsible way and it is not appropriate to hand this sort of power to a minister.