STANDING COMMITTEE ON
UNIFORM LEGISLATION AND STATUTES REVIEW

INQUIRY INTO THE NATIONAL ENERGY BILLS 2016

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
MONDAY, 1 AUGUST 2016

Members

Hon Kate Doust (Chair)
Hon Phil Edman
Hon Mark Lewis
Hon Amber-Jade Sanderson

Hearing commenced at 12.57 pm

Dr RAY CHALLEN
Deputy Director General, Department of Finance, sworn and examined:

Mr REX VINES
Assistant State Solicitor, State Solicitor's Office, sworn and examined:

Mr ROGER JACOBS
Senior Assistant Parliamentary Counsel, Parliamentary Counsel's Office, sworn and examined:

The CHAIR: Thank you very much for coming in and thank you for the very substantial pieces of legislation that we are going to be working through over the next few weeks. Today is really about the committee getting a briefing from you, and we have got a number of questions, so we can gain a better understanding of what these bills are about in the context of what our committee will be inquiring into. Before we start I would like to introduce you to the committee members Hon Amber-Jade Sanderson, Hon Phil Edman and Hon Mark Lewis. We just have some formalities we need to go through, but having been in front of committees, you have probably done this all before. Could you please state the capacity in which you appear before the committee?

Mr Vines: I am currently seconded to the Department of Finance Public Utilities Office and have been for the last couple of years.

[Witnesses took the oath or affirmation.]

The CHAIR: These proceedings are going to be recorded by Hansard. A transcript of your evidence will be provided to you. To assist both the committee and Hansard, if you would please quote the full title of any document you refer to during the course of this hearing for the record and if you would also please be aware of the microphones and try to talk into them and ensure that you do not cover them with papers or make noise near them. Please speak in turn if you can. I also remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public or media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

Those are the formalities out of the way. We do appreciate your time and we understand that these bills are quite complex. I am wondering whether, before we proceed into asking specific questions about each of the bills, you might want to provide us with an opening statement or a briefing that you may have prepared.

Dr Challen: I can actually talk generally to the purpose of the bills and here I will refer generally to information that has been provided to you by Minister Nahan, and the paper was actually called "Briefing Paper for Uniform Legislation Committee" and it was provided to you by Minister Nahan on 23 June 2016. The purpose of the legislation generally is to do two things. One, to adopt what is known as the national energy laws in respect of the south west electricity network and regulated gas pipelines in the state. The second purpose is to change the identity of appeals bodies in respect of various functions under state legislation. But the main purpose of the bills deals with the adoption of the national energy legislation framework. The primary matter there is actually dealing with

electricity. Gas is sort of coming along on the coat tails, if you like, of this legislation, albeit for related reasons. So I will talk mainly to the electricity legislation and regulatory framework.

The CHAIR: Perhaps if that is the case, we really only have one question around the gas bill, so shall we do that first and get it out of the way? It might be a bit easier.

Dr Challen: That is fine with me.

The CHAIR: The only thing we really want to know was whether you could confirm whether the national gas bill was drafted as a result of any substantive changes to the NEL framework, and if it was, if you are able to outline what the substantive changes were.

Dr Challen: It was not drafted as a result of any substantive change. The main purpose of the adoption of the national gas law as an applied law scheme is to adopt the Australian Energy Regulator as the agency responsible for the regulatory function. The reason for that, as we have described in some of the background papers, is largely a housekeeping matter of good regulatory practice. Partly in response to the desired move of electricity regulation to the national regulator, the Economic Regulation Authority that currently has that regulatory responsibility is left, we regard, as subscale in its regulatory function. The Australian Energy Regulator, which is a specialist regulatory agency established for the economic regulation of energy networks, currently regulates in the order of 40 pieces of regulated infrastructure—a combination of gas pipelines, distribution systems and electricity networks. The Economic Regulation Authority here only deals with one electricity network and three regulated gas pipelines, and therefore there is an issue of, firstly, regulatory scale: do they actually do enough in the regulatory space to develop and maintain the expertise that is required and to, I guess, develop and keep pace with the best practice in regulation? Also related to scale is simply having the ability to develop staff and having continuity of expertise from one regulatory decision to another over five-year periods. The purpose of moving gas pipeline regulation to the national regulator is simply to have a regulatory agency doing that function that is purpose-built, if you like, and better able to perform that function.

The CHAIR: I suppose the only other question we would ask before getting to the other areas is that having had a look at the agreement that was part of this bundle of documents and looking at the time frame from when discussions first commenced back to when this legislation was crafted and brought into the Parliament, the question the committee had is: Why has it taken so long? We know that COAG bills do take in some cases an extended period of time, but is there any reason why it has taken, as I understand it, since the 1990s to get it to this point or is it just simply down to the complication of the nature of this type of system?

Dr Challen: I think that needs to be answered differently in respect of gas and electricity. For electricity the issue was that the Western Australian network is of course not connected to what is known as the national electricity network. A wire across the Nullarbor is a little bit too long with current technology. So the way that most of the national electricity legislative framework was developed was around the interconnected network in the eastern seaboard, whereas Western Australia, with its separate electricity network, back in the mid-2000s developed its own legislative framework for access regulation. So in terms of the access regulation regime, Western Australia actually developed their regime later than the eastern states' regime, and at the time developed it separately because of the disconnected nature of our network. The gas was a little bit different. With gas, Western Australia did adopt the national access framework right from when the framework started, so there was a previous generation of pipeline access regulation, which was the Third Party Access Code for Natural Gas Pipeline Systems developed from the late 1990s, and Western Australia was part of that. Indeed, at that time all jurisdictions had their own state jurisdictional based regulators plus the ACCC dealing with some pipelines, and Western Australia followed that example with its own jurisdictional regulator, which was first the Office of Gas Access Regulation and then the Economic Regulation Authority.

[1.10 pm]

In the late 2000s, when the National Gas Law came into being, Western Australia adopted the National Gas Law, but under a mirror legislation approach rather than an applied legislation approach. The primary reason for that was a decision by government at the time that it wanted the Economic Regulation Authority as its regulator, rather than at that time moving to the national regulator.

The CHAIR: Just before we get to the questions, you have already talked about the current capacity of the ERA, the skill set that is currently available and, perhaps, changing times. Aside from looking at an expanded skill set for managing the pipelines and the gird, what are the other benefits to the state for having these bills brought through?

Dr Challen: Basically, the access legislation or the electricity network legislation regulatory framework that we have at present was brought into being in 2004, and it departs substantially from regulatory best practice at the current time. It was a good piece of legislation at the time and a good regulatory framework, but it has not kept pace with good regulatory thinking and regulatory expertise. At same time, the nature of the electricity systems themselves have changed; it has gone from, I suppose, a relatively boring, passive infrastructure or asset business to a business that is facing substantial technological change and changes in business models as a result. There is actually a need to substantially revise the regulatory framework that applies in Western Australia to the network. When we look at that, it would be a case of either, effectively, starting with a clean page on state-based legislation, but the opportunity is there to adopt a piece of legislation or regulatory framework for electricity networks that is pretty close to international best practice and which already exists in the east. As well, it also has other advantages that it has institutional structures in place to develop that framework over time and ensure that it meets the needs of a fairly rapidly changing electricity sector.

The CHAIR: Thanks for that. Before we kick off, have members any general questions to ask?

Hon PHIL EDMAN: No.

Hon MARK LEWIS: No.

The CHAIR: We thought we would work our way through each of the bills. We are not looking at the policy behind this bill; that is not part of our requirement on this committee. We are really looking at whether or not these bills will have any impact upon the sovereignty of our Parliament and the decision-making involved for any future changes. That is our primary concern in terms of what we report back. Hopefully, that will assist you as well.

Dr Challen: Sure.

The CHAIR: We have broken the questions down into the various bills. I do not know whether we actually have a copy of these that we can give you that might assist you as well.

Dr Challen: We do actually have a copy of the legislation here.

The CHAIR: Have you been given a copy of the questions I am going to ask you?

Dr Challen: No, we have not.

The CHAIR: The first one is that we are looking at clause 2(b) of the national electricity bill. I will take my time as we go through this. This is around commencement. The question I have is that the commencement dates for many of the provisions in the other bills are already stipulated: why was the same approach not taken with this commencement clause?

Dr Challen: Basically, when we adopt the national electricity framework we are actually moving from our existing legislative structure to the national framework, and the reasons why different parts of the act commence on different dates reflects the need for transitional arrangements in doing so. The main point there is that the national regulatory framework will actually only have effect in regulating Western Power, or Western Power's network, from 1 July 2018, at which time it is

anticipated that a first regulatory decision by the Australian Energy Regulator will come into effect. But what we actually have to do is actually create the powers for the Australian Energy Regulator to be making that decision beforehand. So it actually has to have the powers to go through its decision-making process and the obligation on Western Power to make its regulatory submission and the like, even though that does not come into effect. The existing regulatory regime actually has to stay in effect until 1 July because Western Power has to remain regulated under an existing regulatory determination and under a transitional regulatory determination before the Australian Energy Regulator actually makes its decision. For reasons that we actually have to have that transitional period, different parts of the act come into effect on different dates. Actually, I might get Mr Vines, who understands the structure of it a little better than I do, to also comment on that.

Mr Vines: Because we are not an interconnected region, and for other reasons that Dr Challen mentioned before, the National Electricity Law, in its unabridged form, is not suitable to be applied in Western Australia. We have had to make some changes to it so that it functions properly in the desired way in Western Australia. There are parts of the application bill—part 2—that says the National Electricity Law has effect in Western Australia. Then there is another part of the bill—part 4—that says the National Electricity Law, yes, it applies, but with this set of changes that will be brought into effect by part 4. Together with those two parts of the bill, we separately have enabling provisions to allow some subordinate instruments and regulations to be made. Those subordinate instruments and regulations are necessary to be able to address the changes needed to the National Electricity Rules, which are a subordinate instrument created by the National Electricity Law. The reason for having a date fixed or different times fixed or proclaimed for different dates is because we need the National Electricity Law, the modifications to the National Electricity Law and the regulations to be made all to commence at the same time. It would not have worked if everything had commenced right from the get-go, because then we would be in a circumstance where regulations could be made, those powers to make regulations would have commenced but no regulations would have actually been made or gazetted, and we could not commence the National Electricity Law without actually also commencing these subordinate instruments. It is a need to manage the simultaneous commencement of the different legislative instruments that together make up the national electricity regime in WA. We just need to keep in mind that it is not just the law; it is the law, regulations and rules, and those three things all have to work together at the same time.

The CHAIR: These instruments that you refer to, are they disallowable?

[1.20 pm]

Mr Vines: The instrument to —

The CHAIR: I suppose if you could perhaps provide some detail about what form they would come in. We have had reference in other types of bills to notes or directions, or other language if you like—other types of, I suppose, instruments that are not necessarily public in some cases, nor disallowable.

Mr Vines: The application bill provides for the creation of regulations and those regulations will be disallowable. Before they can have effect they will also need to be approved by the Energy Council because they modify the application of this uniform scheme in Western Australia. Before they can have effect there are two things that have to happen: it has to be approved by the Energy Council—that is what has to happen; it has to be gazetted and it would be subject to the disallowance. The instrument that will separately be created—in the bill it is just referred to as a ministerial instrument or an instrument to be created by the minister, whose creation is provided for by those regulations that will be made. That ministerial instrument will be subject to whatever constraints are intended or are imposed through these regulations, and that ministerial instrument and the changes it will make to the National Electricity Rules will also need to be approved by the Energy Council before it could have an effect in changing the National Electricity Rules. At the moment the

legislative framework leaves open what happens to that ministerial instrument in terms of a requirement to be gazetted, tabled, subject to disallowance, to those regulations. Is that right, Roger?

Mr Jacobs: Correct.

Mr Vines: So there is no express mechanism for the disallowance of that ministerial instrument that is yet in the framework; it could be introduced if regulations were so made to provide for that. The nature of the ministerial instrument —

The CHAIR: Why would there not be some reference in the bill to enable that to happen, rather than a regulation? You might be able to clarify for me whether this ministerial instrument is simply a clarification of an element of a regulation or whether it is a direction from the minister to, you know, go down a certain pathway or to tighten up or to amend a part of a regulation. I think we need some clarity around that.

Mr Vines: The ministerial instrument under the electricity application bill is intended to be a means to implement a transitional arrangement for what is called Western Power's first regulatory control period, and that is the first four years during which Western Power will be operating under a decision, an economic regulatory decision, made by the Australian Energy Regulator. That period commences in mid-2018, as Dr Challen indicated, and will finish in 2022. That is the first period—the first regulatory control period. That is not the complete part of the picture, though, because it takes quite a long period of time just to make that decision for those four years. Before mid-2018 the Australian Energy Regulator and Western Power are going to spend about 18 or 20 or so months working out the detail of what the first economic regulatory decision to apply during that four-year transition period will be. The content of how Western Power will be governed by the national framework during that first regulatory control period for those four years, and the decision-making process that the Australian Energy Regulator will go through in the 18-month period before that commences, they have been modified to manage the transition from Western Power under its current economic regime to get to a full transition to the national regime. Now, the specifics of that quickly descend into matters of a fairly substantially technical and economic regulatory detail, but the easiest way to understand it is that the National Electricity Law, which sits at the summit of the framework, if you like, provides for and allows for the substantive technical and operative matters to happen through a subordinate instrument—the National Electricity Rules. It is those National Electricity Rules that need to be modified, adapted and changed for the purposes of allowing this transitional regulatory determination period and then the application of this first regulatory control period for four years. It is the changes and modifications to those National Electricity Rules that will be effected and managed by this ministerial instrument for that—well, it will be a five and a half or six-year period. So the subject matter that they deal with, as I have mentioned, is at a technical level of detail, that during the process of designing these reforms, in consultation with Parliamentary Counsel, we decided was not the sort of subject matter that you typically expect to see in regulations; it is not the sort of subject matter that Parliamentary Counsel would draft in the usual course. With the time frames in which we are working to try to develop these reforms and have the legislation passed by the Parliament and the rest of it, as a practical matter, the drafting resources that Parliamentary Counsel were able to make available to us were already significantly committed to the development of the bills that you already have got and the regulations to be made under it and there would not have been an opportunity to do the substantial drafting of those instruments as well.

Perhaps just by way of comparison, in case you feel uneasy or it seems unusual that you would leave the substantive detail of how the national regime works to these subordinate instruments, it is noteworthy that the Western Australian energy sector is similarly regulated under a structure that has principal legislation—in Western Australia's case the Electricity Industry Act for electricity—which provides for the creation of regulations that then also provides for the creation of market

rules, which is what they are called in Western Australia. But it is those market rules that set out the detailed technical and economic running of the machinations of the wholesale electricity market here. Those instruments, the changes to them, are made not by the Governor in Council; they are made by an independent rule-making body. They do not get tabled in Parliament. They are not subject to disallowance. So, in that sense, what is happening in the transition to the national framework, through the use of a ministerial instrument for this long transitional period, it is complementary or similar to the way in which the delegation of legislative authority happens in existing WA instruments.

The CHAIR: The market rules will no longer be determined by the IMO under this regime?

Mr Vines: The market rules govern the operation of the wholesale electricity market here, which has some unique features that exist only in Western Australia. Western Australia is keeping its wholesale market; that is not changing. The wholesale market is going to be one part of the electricity industry regime that stays in place and is going to be the economic regulation of electricity networks. Getting connection and access to electricity networks under the national regime is going to sit alongside WA's existing wholesale market and be adopted in such way as to make those two things compatible to coexist.

Mr Jacobs: If I may add something: the power to modify the National Electricity Rules—that is going to be provided when the regulations in which power may be given to the minister—is not a power that can be used to modify the wholesale electricity market rules; that is a completely separate regime.

Mr Vines: At present the wholesale market rules, the Western Australian ones, the responsibility for the ongoing making of rule changes in that market is the responsibility of the Independent Market Operator. However, one of the other reforms being pursued by the current government is a transfer of the market operator's functions to other agencies. The function of operating the Western Australian wholesale market has already been transferred to the Australian Energy Market Operator, who performs the same task under the same regulatory arrangements. The rule-making function that currently resides with the Independent Market Operator is slated to be transferred to a more specific, standalone rule-making body so that you have a separation of function of responsibility for making and creating the legislative environment from the function of operating the environment that you have created. Those functions were merged if you like at the IMO; there is no separation of powers that way.

[1.30 pm]

The CHAIR: We might come back and have a further discussion around these instruments at a later stage. I accept what you are saying about rules and other changes there, but there might be things that are outside that that Parliament should have the right to know that are not picked up via regulation and made public in the normal way. We might come back and talk about that. So, we will move on to clause 6, which is around the application of the National Electricity Law. Again, we just want to come back and focus on the Parliament's engagement here and the question I have around that clause is that any future amendments or modifications to the NEL which are initiated by WA will first require unanimous agreement from the COAG Energy Council, and the question is: how is this not constraining the WA Parliament to legislate on NEL matters?

Dr Challen: I guess in response to that, I think we have actually, just to refer to the document, responded to that in a submission that I made back to the committee. But there are actually two matters and I will just briefly address them before I get Mr Vines to address them in more detail. But, firstly, there is always a power subject to COAG Energy Council agreement for the Western Australian government to modify how the National Electricity Law applies in Western Australia. Indeed, that is the purpose of some of the clauses in the legislation that is before the committee at the moment to do exactly that in some respects, and that is done by either

legislation change or by regulations in Western Australia that enable that to occur. But on that I might pass to Mr Vines, who can talk about those mechanisms in more detail.

The CHAIR: I suppose the other question we have that follows on from that, and you might want to consider this with your answer, is: how would the Western Australian public and the Parliament be notified of any future amendments to the National Electricity Law?

Mr Vines: The way in which the National Electricity Law applies in Western Australia and the way in which changes to it are effected happens in accordance with the commitments given by each of the jurisdictions under the Australian Energy Market Agreement, which is the Council of Australian Governments agreement that sets the scene for the creation of this legislation. The way that the Australian Energy Market Agreement envisages or contemplates jurisdictions will give effect in legislation to the national energy regimes is through a form of cooperative law scheme, an applied law scheme, where you have the legislation of a lead jurisdiction, a host jurisdiction, in this case South Australia, that applies the law in its jurisdiction and other jurisdictions agree to pass legislation that applies the law of the host jurisdiction as law of that jurisdiction as in force from time to time. That is the way in which you end up being able to get uniformity across jurisdictions and that particular mechanism, the applied law scheme, is the one that the Australian Energy Market Agreement contemplates or asks jurisdictions to use. That is why the framework is the way that it is and it has not, for example, been established by each of the participating jurisdictions making a referral of power to the commonwealth, for example, so that the commonwealth could legislate. There are other historical reasons around why that applied law scheme was taken, but it is probably for the moment just sufficient to note that is why it is the way it is.

The way in which changes to the National Electricity Law are made occur through the Council of Australian Governments process, more specifically the Energy Council, whose unanimous agreement is required before changes to the National Electricity Law can be made, and that means both Western Australia's adoption of the National Electricity Law at all in any form is subject to that approval process and any subsequent changes made to that law either by Western Australia just to apply in Western Australia or by Western Australia or any other jurisdiction in making changes to the National Electricity Law more generally.

So that process is—anyone who is interested is able to see such changes as do get proposed from time to time.

The CHAIR: Are they posted on a website or?

Mr Vines: The council of energy and some of the bodies that support that agency publish quite a lot of information. Dr Challen is a part of Western Australia's involvement in that Energy Council and related processes and he can probably speak to the detail of that, how Western Australia participates in that Energy Council process, better than I can. But, I guess, from the legal point of view, the important bit to note is that the changes to the national electricity regime cannot occur unless there is that Energy Council agreement, and it is intentionally made that way to be able to preserve the uniformity of the scheme. Or, if it is not going to be uniform in one or other of the jurisdictions, as it will not be in Western Australia and it is not in the Northern Territory, then all participating jurisdictions can be satisfied that whatever changes a particular jurisdiction is making for its own ends—in Western Australia's case because we are not interconnected, because we are not adopting the wholesale market—that those changes are able to be given effect in a way that is not going to have any adverse impact on those other jurisdictions.

The experience of the Energy Council process and talking with other jurisdictions to date is that where other jurisdictions are comfortable that there is not going to be any adverse impact, particularly adverse financial impact, on them, it is a lot easier to ask for things to be done differently or for particular arrangements to apply in Western Australia. It is where Western Australia tried to do things that had some implications for the way in which the scheme

operated in the rest of Australia that you would end up with a lot more resistance from the Energy Council.

The CHAIR: So the next question was really about clause 7, which deals with regulations and it is the same type of question. You have already said that information may be available about potential changes to the law on a website. Would the same apply to any proposed changes to regulations?

Mr Vines: The South Australian Parliament is also involved in changes to both changes to the National Electricity Scheme and regulations made or the national electricity regulations as they are called. In terms of the publicly available information, you would see on the South Australian State Law Publisher website or Parliament website the same proposals for bills such as you would see here. Regulations are a bit different. Like Western Australia's own regulations, there would not typically be a lot of publicly available information about the proposed or draft regulations before they get made and gazetted.

[1.40 pm]

It is usual practice to engage in consultation before that happens. The National Electricity Regulations perform an important but very minor part in the national electricity framework. They identify those parts of the National Electricity Rules that are civil penalty provisions, for example. They also set the liability thresholds for the Australian Energy Market Operator in the way that if it were to negligently perform some of the functions. But, in terms of the substantive and detailed technical operation of the regime, that happens under the National Electricity Rules and not the regulations.

Dr Challen: I will just add to that. There is actually greater scrutiny of those regulations referred to in clause 7 than indeed might apply if it was solely the Western Australian government making regulations, because there is actually scrutiny by the entire Energy Council —

The CHAIR: Before they are signed off?

Dr Challen: — before they are actually signed off, rather than it being an individual government.

The CHAIR: Can I ask you, Mr Challen: the Energy Council is made up of the respective ministers from each state —

Dr Challen: That is correct.

The CHAIR: — and public servants?

Dr Challen: The Energy Council itself is made up by the ministers in each jurisdiction with responsibility for the energy portfolio as it exists in each jurisdiction. Beneath the Energy Council sits a senior committee of officials. That is where Mr Vines mentioned that I have a role, which is in effect the senior bureaucrat supporting the minister in that role. It is that committee of officials that actually manages the consultation processes and the actual, I suppose, project processes for developing legislation and changes in the legislation that apply on a national basis.

The CHAIR: Can you just clarify something for me? Our take from the national electricity bill is that the National Electricity (WA) Regulations will not be disallowable instruments because the Interpretation Act 1984 of WA does not apply to it and that the NE(WA)L does not provide for the disallowance?

Dr Challen: I might have to, on that matter, get Mr Jacobs to comment.

Mr Jacobs: That is correct, but I think you deserve just a bit of an explanation.

The CHAIR: Yes; that would be very helpful.

Mr Jacobs: In the ordinary course regulations are made under a delegation of power from Parliament, so the capacity to table and scrutinise and disallow is an exercise or incident of that delegation to the Governor, in the case of regulations. In the case of these regulations here, they are

not made by our Governor; indeed, they do not become a law until section 7 takes what is, in effect, a text and applies it as a set of regulations in Western Australia. I should add that is the same for the National Electricity Law. From a legal point of view it exists as a text and the Western Australian Parliament takes that text and applies it, and then it becomes a law. So for both the National Electricity Law and for the National Electricity Regulations, in both cases Parliament has taken a text set out in South Australia and applies it as a law. The first one is called a National Electricity Law and the second one is called a set of regulations, so there is actually no delegation in Western Australia to make those regulations; so there is no capacity for you to sort of supervise that delegation.

Dr Challen: I will just add to that: except through the Energy Council apparatus under COAG, is where the Western Australian government actually gets the ability to have visibility and a decision-making role in those regulations.

Mr Vines: We do need to distinguish between those regulations made under the National Electricity Law, which are not subject to scrutiny, and those regulations which are made under the application act later on in clause 12; those regulations are subject to disallowance.

The CHAIR: I am sure we will deal with that with when we get to clause 12. Have you got anything else to ask in relation to that?

Hon MARK LEWIS: I am just trying to work out how that regulation comes before, say, the delegated legislation committee.

The CHAIR: It does not.

Hon MARK LEWIS: So the bottom line is that there is no scrutiny?

Mr Vines: Not of the national—the regulations that are made under the National Electricity Law are not scrutinised by the Western Australian Parliament; they are created through the Energy Council process and the ministers of each participating jurisdiction giving their assent at that time point. And then they are actually made through the South Australian Parliament.

Hon MARK LEWIS: I understand that.

Mr Jacobs: I think, in a strict legal analysis, the National Electricity Law applied under clause 6 and the National Electricity Regulations applied under clause 7 are the same. We have called them regulations so that it is much easier to understand that there is actually a hierarchy, but the mechanism by which they become a law of Western Australia is exactly the same. The Parliament has said there is a text over there that exists in South Australia and it becomes a law of Western Australia.

Hon MARK LEWIS: But there is no head power in the bill.

Mr Jacobs: Clause 7 is the power. It is the act by which Parliament says that thing over there which is known as the South Australian regulations, becomes a law of Western Australia. And to allow, I think, everybody to understand the scheme, we call it the National Electricity (Western Australia) Regulations. I do not think it makes them regulations as we ordinarily understand them in Western Australia as the Interpretation Act sees these things as regulations.

The CHAIR: That is true; they are applied as though they were regulations, rather than as an act.

Mr Jacobs: Yes.

The CHAIR: Even though you do not see them to be regulations in the traditional sense.

Mr Jacobs: Correct. And I think that is largely because we have said two things: they apply as a law of Western Australia; they apply as if they were regulations—not "as"; we also say, if there was any argument, that the Interpretation Act does not apply to them.

The CHAIR: We will move on, looking at clause 11(3)(a), under part 3 "Local provisions", which does hopefully deal with regulations as we know them. We have just got a couple of questions around this area, and I suppose these questions flow on from what we have already asked. In relation to clause 11(3)(a), where it talks about how the regulations may "confer functions, or authorise the National Electricity (WA) Rules to confer functions on a person;" and then it goes on to talk about "the relationship between the Minister, or another Minister". Why is this sub-delegation necessary?

Mr Jacobs: I did not understand this to be a sub-delegation in the way a Parliamentary Counsel will understand a sub-delegation. The way I understand a sub-delegation is the legislative capacity of the Parliament, to the Governor, is then delegated to another person. In this case what the Parliament has delegated to the Governor is the capacity to make regulations that will give functions, but that, I do not think, is read as a legislative capacity; it is a capacity for the Governor via the regulations to give functions to people, and that is a relatively standard provision.

The CHAIR: I know we have already talked about instruments, but I am thinking they might have been different to what I am going to ask next. Will the National Electricity (WA) Rules be disallowable instruments; and, if yes, why? And, if not, why not?

[1.50 pm]

Dr Challen: The National Electricity (WA) Rules is really a term used for convenience. It is actually the National Electricity Rules as they apply in Western Australia because there are certain derogations from those rules that are Western Australia–specific. Those rules are actually determined under the National Electricity Law. In that sense, they actually exist as part of the body of the national rules. So the national rules contain a whole lot of text that says, "These are the National Electricity Rules" and then there are some elements of those rules that say, "When these rules are being read in respect of Western Australia, they are slightly different in one respect or another." But, nevertheless, they are actually still made through the mechanism by which those national rules are established. So Western Australia is not actually the rule maker for the National Electricity Rules and therefore, by definition, the National Electricity (WA) Rules. As I say, that is a term used for convenience to refer to the National Electricity Rules as they apply in Western Australia.

The CHAIR: Did you say to me at the beginning of this hearing that this is all about making it a lot simpler?

Dr Challen: It is all about making it a lot simpler.

The CHAIR: I am not sure which part.

Dr Challen: As Mr Vines said earlier, the actual fundamental architecture of the regulatory framework is still very similar in terms of the roles of legislation, regulations and then subsidiary instruments. There are actually changes made to who are the makers of the National Electricity Rules and that sits with the Australian Energy Market Commission in this model. But the actual legislative apparatus is still very similar.

The CHAIR: The key issues for us as we go through each of these clauses are around the role of the Western Australian Parliament and its oversight capacity. Whilst these questions may start to sound a bit monotonous and repetitive, it is really about saying, "At what point will the Western Australian Parliament be made aware of any changes to rules or regulations or elements of the actual legislation? How will people access that information and what capacity does the Western Australian Parliament have to either make comment, I use the word "interfere" loosely, or to stop?" Those are the things that we are interested in as we go through in terms of what we are looking at. Bear with us; I think some of these things will start to sound the same.

I suppose then the NEWA rules will not be disallowance either, will they, under this regime?

Dr Challen: No, they are not disallowable. That is correct.

Mr Vines: They have a similar status to the existing WA wholesale market rules, which are also not tabled and not subject to disallowance.

The CHAIR: But they are published, are they not?

Mr Vines: They are published, yes, and the National Electricity Rules are published as well.

The CHAIR: Again, in relation to any of these rules, will they be made public? How will people access them, for those who are interested?

Dr Challen: Basically, the party responsible for the making of the rules is the Australian Energy Market Commission. They have always published the current National Electricity Rules or the rules as they exist from time to time.

Mr Vines: They are also the body that runs the rule-making process and the consultation process for the making of rules, which can take anywhere from a couple of months to a couple of years, depending on the scale of the rule changes that they are working through. The consultation process and draft decisions on rule changes and such—that information also gets published on the Australian Energy Market Commission's website.

The CHAIR: We will move on to clause 12, looking at the regulations modifying the National Electricity Law. The committee is of the view that this is a Henry VIII clause. I do not know whether you have watched debate in the house from time to time, but the upper house takes a very strong position about Henry VIII provisions in legislation and usually would seek to strike them out. We know that you have talked about this clause in your briefing paper and your submission. Just so that it is on the record, can you perhaps put your views about this particular clause?

Dr Challen: When I first became aware of this term, the Henry VIII clause, I really thought I should have pursued a career as a lawyer when we deal with such interesting matters. There is specific reason for this type of clause in respect of this legislation. I do not know whether Mr Vines or Mr Jacobs might want to comment on that.

Mr Vines: For the record, I would refer to the submissions that the Public Utilities Office made to the committee. The title of the document is "Public Utilities Office Submission on Uniform Legislation and Statutes Review Committee Inquiry into the National Energy Bills". On page 9 of that document, the Public Utilities Office made a number of submissions about the Henry VIII issues that clause 12 of the bill and the regulation-making powers and other powers in that clause raised. The necessity for those provisions was identified during the drafting process as being highly desirable and necessary to be able to ensure the effective operation of the National Electricity Law in Western Australia. What we really wanted to be able to do was two things: to make sure that the law as it applied in Western Australia from time to time did not end up including anything by way of, say, an inadvertent change that happened to the National Electricity Law in the host jurisdiction, South Australia, that somehow had some unintended perverse effect in Western Australia that rendered the application of that national regime unworkable or deeply problematic. The inclusion of a regulation-making power to alter the effect of the national law exists as a protection for Western Australia as much as anything else, to be able to cure something in the implementation or ongoing effect of the National Electricity Law that was unworkable. Any regulation of that kind made by Western Australia would still need to go through the energy council process.

The other reason we included that ability was to manage the complex transitional arrangements that are going to be brought into effect to move Western Power from the regime administered by the Economic Regulation Authority to the regime administered by the Australian Energy Regulator. We were very mindful during the drafting process of the committee's approach to clauses of this kind. The inclusion of those clauses was not made without regard to the committee's views on those provisions. As the Public Utilities Office mentioned in its submissions, we sought to strike what we thought was the best balance between the inclusion of a really broad Henry VIII clause that was

expressed in what is called "bare" terms, which is an ability to do anything and everything through regulations, which we specifically considered and stepped back from, although I might say that Parliamentary Counsel are of the view that we might be much better placed to manage this reform process if we did have something expressed in the broadest of terms. But we decided not to do that so the approach that was taken was to say, "What kind of constraints could we reasonably impose on this regulation-making and other subordinate instrument-making power so that we could have a better chance of persuading yourselves and the Parliament that we got the right balance?" The result is what you now see in clause 12 of the bill, which curtails the regulation-making power by reference to only those regulations that enable the proper operation of the National Electricity Law in Western Australia.

In terms of the ability for subordinate legislation to allow the minister to create an instrument, we went further than that and put a constraint on that power that is effectively time limited to clearly identify that the ability of the minister to do these things is very much a transitional measure to be exercised in the near and medium term future. It finishes on 1 July 2019 and will then effectively end up not being able to be exercised any further.

To come back to the start of that discussion, there were two main purposes for the inclusion of those provisions. One of them is to manage the implementation of the national electricity regime on an ongoing basis to cure anything inadvertent or something that had unforeseen consequences that was not able to be identified during the process of the law being made through the Energy Council process. That is the first thing—implementation. The other thing is to manage the transition. Roger, do you have anything?

[2.00 pm]

Mr Jacobs: Yes, briefly. I think clause 12(1)(a) is, in the classic and narrow sense, a Henry VIII clause. I am mindful that Parliamentary Counsel have a de facto function here in pointing these things out and resisting them. I note that Mr Stephen Argument is very strongly of that view. We actually squirmed over this one.

The CHAIR: I might say you might have squirmed over it, but there is absolutely no reference to it in the explanatory memorandum, where normally there usually is some reference either in the second reading speech or in the EM that there is a Henry VIII clause. I have just been going back over it again and there is no reference to it. You might have squirmed over it, but there is no reference. So, if you would like to continue.

Mr Jacobs: I do not prepare the EMs. I will add that.

The CHAIR: No. I take that on board.

Mr Jacobs: I note that the Northern Territory has the same capacity for the regulations, but it is a bare capacity to amend the modifications in part 4. I should explain that a little bit more. Part 4 of the application bill sets out modifications to the National Electricity Law and in part that is because, as has been mentioned already, we are not part of the interconnected system and a lot of the language in the National Electricity Law talks in terms of interconnectedness and the national electricity market.

The CHAIR: It is a bit hard when you are an isolated body, is it not?

Mr Jacobs: Yes. Textually, it just does not work. Hopefully, part 4 covers off all of that. I am not sure whether we can be confident that that is indeed the case. So that is, I think, to my mind the first justification for having a capacity to amend part 4. The other thing is, I understand, the National Electricity Law may be amended in the future to take account of both the Northern Territory and Western Australia, which are not interconnected jurisdictions, which means that there are a whole lot of linguistic changes that are going to be applied to the National Electricity Law.

The CHAIR: So we may have another tranche of legislation at some point, or not?

Mr Jacobs: If Western Australia applies the National Electricity Law as in force from time to time, those amendments will just flow through. But linguistically that actually might not work with our modifications in part 4. So, if for no other reason, I thought that we needed a capacity to straighten out those modifications so the latter version of the National Electricity Law could work with those modifications.

The CHAIR: I just want to be really clear in my own mind. If there are going to be modifications at some point to the National Electricity Law, they will just occur and there is no requirement for a new bill or any notification to be placed in front of the Western Australian Parliament about those changes?

Mr Jacobs: In terms of the mechanism of clause 6?

The CHAIR: Yes.

Mr Jacobs: That applies on an ongoing automatic basis; it just applies the version of the National Electricity Law as in force from time to time. Mr Vines might want to address the notification point. I am not clear on that.

Mr Vines: The bill does not include a requirement for changes to the National Electricity Law to be tabled in Parliament. There are applied law schemes where a tabling requirement has been included, but the —

The CHAIR: Was there any consideration given to that here in WA?

Mr Vines: There was some consideration given to that. However, we thought that information is available through the Energy Council website and, from a policy point of view, a tabling requirement in addition to something that was already publicly available did not seem to add anything to that process.

The CHAIR: Other than perhaps acting as a trigger or an alert that a change has occurred.

Mr Vines: Yes.

The CHAIR: When we look further down in that clause 12(1)(c), and I think you referred to that date of 1 July 2019, can you explain why that date is significant—why that date was chosen, I suppose?

Mr Vines: The date was chosen as being a period of time that was sufficiently after the transition had substantively commenced. There are two principal dates for the transition. The first of those is on commencement of the National Electricity Law if the bills were to pass later this year—the proclamation of the relevant parts, as we spoke about earlier, which it is envisaged would happen right near the end of this year. That is the first date. The second significant date is 1 July 2018 when the first regulatory control period, or revenue control period, for Western Power would occur. On and from that point in time, the transitional arrangements were intended—have been created; have been given effect—to be set on course for the continuation of that first period out to 2022. However, if, in commencing that transitional arrangement, it was found that there was some further transitional measure that needed to be addressed and had not in managing that commencing of things on 1 July 2018, the sunset date of July 2019 was a period of time after the transition had substantially commenced. That would seem to allow for any of those early transitional difficulties to have been identified and provide a means for them to be addressed. There is not any more significance to the July 2019 date as that. It could have easily been July 2020. However, the longer that you push out the sunset date, the less it looks like a transitional measure and the more it looks like an ongoing ability for the minister to be able to make instruments of that kind, which is not what we intended. But we did want the ability to be able to do some further transitional measures if for some reason something was not properly or sufficiently addressed from the get-go on 1 July 2018.

The CHAIR: Just looking at that clause 12(1)(c), if there were going to be modifications, who would actually be responsible for drafting the ministerial instrument modifications at a state level? Would that come under the utilities office?

Dr Challen: In the Public Utilities Office role in assisting the Minister for Finance, we would, I guess, manage the process of that, but in the normal course of events those instruments would be drafted by either the State Solicitor's Office or Parliamentary Counsel's Office, depending upon the nature of the instrument.

Mr Vines: I can add, from a practical point of view, on the subject matter that the ministerial instrument is going to deal with, as well as the resources that were available in the Parliamentary Counsel's Office and in the State Solicitor's Office, those instruments have been prepared by the state's legal advisers assisting the Minister for Energy in the transition of these reforms under instruction from the State Solicitor's Office and the Department of Finance's Public Utilities Office.

The CHAIR: Now we move on to clause 14, looking at transitional matters for the regulations. The question we have around this particular clause is: why could the matters that are canvassed in this clause not have been prescribed in the proposed act rather than in transitional regulations?

Mr Jacobs: From a drafter's point of view, which is a relatively narrow point of view, there was not enough time. The second thing is it is a relatively standard approach to deal with the significant matters in the bill and the less significant, more detailed matters by way of the power to make transitional regulations. That is sometimes because there are known matters that need to be dealt with and matters of detail and there are unknown matters, at least from the drafter's point of view. So we provide capacity for those things to be accommodated by way of transitional regulations.

[2.10 pm]

The CHAIR: When you say there was not enough time, given there has been quite a lengthy history from the commencement of this legislation to where we are now, what sort of timetable are you talking about in terms of there was not enough time to deal with that? Are we talking weeks, months or longer?

Dr Challen: Just a matter of clarification there, it was only in early 2015 that the government actually made the decision to go to the national electricity regime so it is not as if we have been working on a transition to the national electricity regime since the late 1990s. That decision was made by government only in, I think, April 2015.

The CHAIR: Okay, that makes it a bit clearer for us then. There is a discussion about the need for the bill to be through the Parliament by the end of this year. Is there any particular reason for that?

Dr Challen: It is for practical and pragmatic reasons. The regulatory determinations for the Western Power network operate on a five-year cycle. Western Power's current regulatory determination reaches its end on 30 June 2017. What we want to do is actually to have a new regulatory determination or to move that regulatory process to the Australian Energy Regulator as soon as possible after that. The earliest that can practically be achieved, allowing time for the Australian Energy Regulator to make its decision, is for that decision to come into effect on 1 July 2018, which does allow for that one year, which you would have seen referred to in documents as a gap year. That is manageable from a practical perspective, but to have a longer period between the two regulatory regimes so that would create some practical difficulties in actually setting those regulatory prices and parameters for the network. So it is a case of practicality of working around the periods of regulatory determination.

The CHAIR: Thank you. Just moving down to clause 14(2)(d), again, we appear to have, in the committee's view, another Henry VIII provision. I am just wondering why these matters again need to be addressed in regulation.

Mr Vines: Without considering the possibility of that clause giving a Henry VIII–type effect, I note that it is an example of how the regulation-making power might be exercised. There were some things that we specifically wanted to put beyond doubt that transitional regulations would be able to do. In that sense, they provide examples of, or clarify how, the transitional power might be exercised. The purpose of that particular provision in subclause (2)(d) is to assist in addressing the way in which the national regime for regulation of poles and wires and connecting to those poles and wires interfaces with the wholesale market regime which happens locally in Western Australia. By necessity, with the way the infrastructure is set up and the way the market operates using that infrastructure, there is a necessary interface between those connecting to the poles and wires and operating that wholesale market, so the national framework needs to be able to identify and recognise things in Western Australia's wholesale market that need to have meaning for the purposes of that national regime. Ordinarily, the national regime has its own wholesale market and it has a relationship with that part of the regime but that will not have effect in Western Australia. We have our own market, so there needs to be something of a knitting together, if you like, of the poles and wires bit with the wholesale market operation bit.

The CHAIR: Thank you for that. We will move on to clause 20(2), which is in that part 4. These are dealing with definitions. I have a couple of questions around a couple of those definitions just to get some clarification. The first one is around the local electricity system. The question is: what other systems are likely to be prescribed as a local electricity system?

Mr Vines: The only other electricity system in Western Australia that you would ever consider prescribing would be the north west interconnected system. Really, in the drafting process, this came down to the recognition that it is the south west interconnected system that this body of law is intended to apply to. However, from a futureproofing or a future perspective, the decision was made to leave open the possibility of prescribing another system, which would be Horizon's north west interconnected system. I should add that there would be some fairly far-reaching or extensive additional changes needing to be made if it were ever decided by a government of the day to extend the operation of the National Electricity Law to that north west interconnected system. You would need some additional changes specific to that system because of its unique physical characteristics and the nature of the market up there.

The CHAIR: The tyranny of distance or the mix of resources?

Dr Challen: It is more the size of the system. The north west interconnected system is a very small electricity system. As Mr Vines has pointed out, there is more of a sort of futureproofing of the legislation than any contemplation of rolling out the National Electricity Law to apply to that very small electricity system in the north west. Indeed, it is not contemplated at this point in time.

The CHAIR: The current regime as we have in WA would still apply to Horizon?

Dr Challen: The current regime as exists in WA does not apply to the Horizon Power north west interconnected system at the moment. It could potentially. It would rely on the party making application to have the existing Western Australian regime.

The CHAIR: Sorry; I was thinking about the ERA and other factors.

Dr Challen: At the moment, the Horizon Power network is not a regulated electricity network.

Mr Jacobs: In terms of the scope of the application of the National Electricity Law, prescription of an additional local electricity system is by local regulations, which are disallowable.

The CHAIR: The next definition we want some clarity on is that of a wholesale exchange. What other markets are likely to be described as a wholesale exchange?

Mr Vines: Just to clarify, is that the definition of "wholesale electricity market"?

The CHAIR: Yes.

Mr Vines: That definition is the current Western Australian wholesale electricity market. I am sorry; is this in clause 20(3)?

The CHAIR: It is, yes.

Mr Vines: The reference to wholesale exchange there comes from the text of the National Electricity Law, which includes a prohibition on any person, except for the Australian Energy Market Operator, running a wholesale exchange for the trading of electricity, which, in the national space, is more commonly known as the national electricity market. It is just not referred to as such in the National Electricity Law. It is referred to more as a wholesale exchange. What we have done is said that it is not the wholesale exchange in the national electricity market sense. In Western Australia, it is the market referred to in our Electricity Industry Act.

[2.20 pm]

Mr Jacobs: In terms of the absence of a definition of wholesale exchange, I would have to say that it was not necessary for us to have a definition; there was not one at present. The only time we used that term was to say that is not relevant for Western Australia.

The CHAIR: Thank you for that. We have already dealt with the gas bill and so we now move on to the other bill, the Energy Legislation Amendment and Repeal Bill. Our first question on the Energy Legislation Amendment and Repeal Bill 2016 is on clause 9. This deals again with a number of definitions and the question that we have is: why are the definitions of these terms not simply inserted into the proposed section rather than linking them to another law?

Mr Jacobs: Just for clarification, are you referring in particular to proposed section 59A(2)?

The CHAIR: Yes.

Mr Vines: I think they reflect the policy position in the design of the new regime that is to apply to the relationship between distributors and customers, which looked substantially to the National Energy Retail Law as something of a model for the way in which that type of regime could be established. Ultimately, the government decided—it considered, but decided—not to adopt the National Energy Retail Law in Western Australia, which is another uniform legislation scheme. It is the complete answer for the relationship between the poles-and-wire business and the energy retailer, whether it is gas or electricity, and the end-use customer, and how they interact with each other and the extent to which there are legal and contractual rights and obligations between those parties. Western Australia decided not to adopt the National Energy Retail Law. But parts and features of the national electricity regime that we are adopting do contemplate the existence of a relationship between customers and poles-and-wire businesses, the distributors and retailers that is set out in the National Energy Retail Law. The whole of that part, new part 3A to be inserted by clause 9 of this bill, and those definitions are a Western Australian reflection or modification of the sort of regime that exists in the National Energy Retail Law. The meanings given to those expressions, like customer connection service, de-energisation and re-energisation, were already something that the government decided that the way in which they are given meaning in the National Energy Retail Laws was satisfactory.

The CHAIR: The next area that we wanted to look at is still in clause 9, but on page 12 it is proposed section 59D(4), where it talks about giving the WA minister the capacity to make a code. We are just wondering if you can explain why the code deals with arrangements and credit support by retailers and other matters. We are just wondering why is this ministerial code necessary and why could these matters not have been prescribed in regulations.

Dr Challen: There is a regulatory framework that actually deals with the retail end of the electricity market and, as Mr Vines has just mentioned, we are actually intending to retain that under a Western Australian regulatory framework rather than adopting the National Energy Retail Law. It is already the case that most of the detail of that retail framework and customer protection framework and the like is dealt with in codes—that level of instrument of codes—rather than in

regulation or in primary legislation. We are actually just continuing that practice, where the detail of the regulatory framework is actually in codes. What we are actually doing here, because we are actually contemplating a different contractual framework at the retail end, is we just had to contemplate the need for customer protection measures and the like to be further dealt with in codes, the same as the existing customer and retail measures at present.

Mr Vines: Those particular enabling provisions reflect the unique way in which Western Power poles-and-wires businesses get paid, which is they do not send out invoices to their retail customers as such; they have the retailer collect it on their behalf. So, we all receive a bill from Synergy; we do not receive bills from Western Power. Western Power is dependent upon, in this case, Synergy collecting those moneys so that Western Power can be paid. Western Power has a keen interest in the way in which those amounts are collected and also Western Power has a potential exposure not so much to Synergy, but to other electricity retailers who do come in and sell electricity to other larger use customers. If those retailers were to become insolvent or to have cash flow problems, then Western Power would not get paid and would have potentially significant exposures that way. The billing arrangements and the credit support arrangements that those enabling provisions speak to are intended to address and provide the means to ensure that Western Power or an electricity network business is going to be able to keep getting paid. It is these credit support arrangements that secure Western Power's interest in the amounts collected by these electricity retailers on behalf of Western Power. That arrangement is something that exists in the other electricity jurisdictions as well. They all have similar arrangements.

The CHAIR: Thank you for that. How will the Western Australian Parliament be notified of any of these ministerial codes?

Mr Jacobs: The code in subsection (5) is said to be subsidiary legislation, which means that certain provisions in the Interpretation Act apply, which means it needs to be gazetted before it can come into effect.

The CHAIR: Thank you.

Hon MARK LEWIS: But is it disallowable?

Mr Jacobs: No.

[2.30 pm]

The CHAIR: The next one we are moving on to is clause 17(1), and we are dealing with section 132(1), which moves to delete the word "prescribe" and insert the word "specified". Why was the word "prescribe" replaced with the word "specified" when the former already had a well understood meaning in legislative interpretation in WA? And, if the proposed amendment is passed, section 131 of the EI act—the general regulation-making power—will continue to use the word "prescribed" while section 132 will use "specify"; will this create any confusion?

Mr Jacobs: I had not intended for it to create any confusion. The amendment there is for the sake of consistency. At present some of the some regulation-making powers say that something is prescribed. Sorry; it may not actually be in the regulation-making power, but certain provisions in the Electricity Industry Act refer to "specified" and some refer to "prescribed". I prefer "specified", and I actually put a definition in at the front of "specified", meaning specified in regulations made under this act. So, I did a search, and for the sake of consistency across the act I chose to go with "specified". The primary power, though—I think this is what you are talking about—is in section 132 —

The CHAIR: Yes.

Mr Jacobs: Let me just look at that if I may. I saw no reason to disturb what was there.

The CHAIR: Thank you. We are moving on to clause 18 and looking at section 136(1), which talks about a gap year instrument. Gap years are a very favourable subject in my house at the moment,

but I am sure they take on a different connotation when you are talking about this type of legislation. We have a couple of questions around this area. First of all, why was it necessary to exempt gap year instruments from the requirement of parliamentary tabling and the disallowance process established for amendments to the electricity network access code amendments? Amendments can still commence operation while undergoing tabling in the disallowance process, and how will the WA Parliament be notified of any gap year instruments? While you are having a think about that, you might just want to put on the record an explanation of a gap year in this context.

Dr Challen: The gap year refers to the period of time that I alluded to previously between which the existing regulatory determination for Western Power's prices and terms of access to its network is due to end or to be superseded by new regulatory determination on 1 July 2017 and the earliest practical date at which the Australian Energy Regulator could make a determination under the national regime. Ideally, I suppose, we would have had no gap year at all, but from the period at which government made a decision to transfer regulation to the national framework the earliest we could actually have that take effect is on 1 July 2018. So there is necessarily that year. The purpose of the gap year arrangements and the nature of the gap year arrangements is actually something that is, I suppose, a decision-making apparatus that is fit for purpose for something that actually only applies for a one-year period. We do not want some greatly elaborate decision-making and regulatory process for something that is really only to see us over for a transitional period of one year. But to refer to the detail of how those instruments actually operate, I will defer to Mr Vines.

Mr Vines: The way in which this gap year instrument is going to have effect or the way in which the gap year arrangements, if I can just call them that, will have effect is through modifications to the existing Electricity Networks Access Code, which is not tabled in Parliament; it is not subject to disallowance. The gap year instrument will be able to make changes to that code that, effectively, allow Western Power's existing access arrangement to live on for another year. It will extend the date out to mid-2018 instead of 2017, and will set the way or the structure or the process by which the economic regulatory decisions to apply to Western Power during that year, in terms of how much revenue it can earn and the prices it can charge for its services, will be set to apply during that gap year. That is why there is reference to both a gap year instrument and then the secondary determinations. The gap year instrument itself will just make changes to the code to extend the time period of operation of Western Power's access arrangement for that one year. It is the secondary determinations that will set out in detail the types of services that Western Power offers; they can change from year to year. So it will be the types of services and a decision on the types of services that Western Power can offer, the tariffs or the prices applicable to those services and how much money or revenue Western Power can earn during that year. Mr Jacobs has brought to my attention that the Electricity Networks Access Code is in fact subsidiary legislation, and under section 107 of the Electricity Industry Act it is subsidiary legislation for the purposes of the Interpretation Act and does get tabled. I need to qualify that. I think it is the interim nature of the decision that is being made in this instance. From the point of view of the certainty for Western Power, having a decision on their prices and revenues subject to a period of disallowance would not be something they would be terribly attracted to.

The CHAIR: No, I am sure not. Thank you for that. I am looking at, further down, clause 18 and section 136(3) that is still looking at the gap year instrument. I have a couple of questions around this particular section. What is the legislative status of access arrangement 3? Is it a law and who makes it?

Mr Vines: Access arrangement 3 is the name given to a document that has status both under the Electricity Industry Act and the electricity network access code made under the Electricity Industry Act. I will just refer to it as "the act" and "the code" because it is a bit of mouthful to say the long way around. Briefly, the act includes enabling provisions that allow for the creation of the code.

It says that in broad terms the code is to provide for a number of matters, and those matters include the preparation by Western Power of an arrangement for access to its electricity network that it prepares and then lodges with the Economic Regulation Authority. It lodges that proposal with the Economic Regulation Authority, and the authority goes through a process of determining and approving that arrangement for access. It is the lodging of the proposal and the ERA's decision on that proposal that becomes the access arrangement. So, it is not directly itself a piece of legislation, but it is a document whose creation is directly contemplated by the act, and more specifically by the code that speaks to the detail of what the access arrangement is to include.

Mr Jacobs: If I may to add that, it is a law. I doubt it is subsidiary legislation because I doubt it has legislative effect, which is what is required by the definition in the Interpretation Act.

The CHAIR: Thank you for that. This section makes reference to a secondary determination. The question we have around that is: why were secondary determinations considered necessary; and, was there another way to achieve the outcomes sought?

Mr Vines: The legal architecture chosen through the secondary determination exists to give effect to the policy decisions made about the form of economic controls to apply to Western Power for that 12-month period. So, if the complete picture of what the decision for Western Power or what the economic regulatory arrangements for Western Power should be during that year were known, you would have them spelt out directly in the act or the regulations made under it.

[2.40 pm]

But the process that exists in section 136, in keeping with economic regulation practices, is a more flexible process that is designed to allow Western Power, and in this case the minister advised by the Public Utilities Office, to be able to go through a process of looking at what Western Power proposes its economic regulatory arrangements ought to be for that 12-month period and for the minister, advised by the Public Utilities Office, to make a decision on what those elements should be. Dr Challen could perhaps speak to some of the alternative ways in which the financial decisions for Western Power to apply to that year could have been—the form that they could have taken. But the result, the one that we have, is one that is more about a process with several decisions rather than just a CPI index increase or something like that.

Dr Challen: If you want me to speak to that, what we wanted was to make sure that we did not just roll forward the existing terms and prices of access from the current access arrangement for this gap year, because to do so may not actually achieve the objectives of regulation, which is to make sure that we have terms and prices of access that ultimately benefit users of the network. Just as one example there, the finance costs have declined significantly with lower interest rates since the last regulatory determination was made for Western Power back in 2012. What we wanted to make sure is that Western Power did not get sort of free run with pricing for a year, but that where Western Power actually has lower costs, such as lower finance costs, those are actually taken into account in the prices for network services that apply in that year.

The CHAIR: Again, coming back to the main theme of our inquiry, why was it considered necessary to exempt those secondary determinations from the disallowance procedure and the consultation requirements for code amendments, and also why was it necessary to exempt the secondary determinations from parliamentary tabling and the disallowance process established for amendments to the networks access code?

Mr Vines: I think it has to do with primarily the character of the subject matter that these secondary determinations deal with, being decisions on revenue—how much revenue Western Power can earn, the prices it can charge and what services it can offer are substantially similar to the subject matter that is set out in Western Power's access arrangement determined by the Economic Regulation Authority, which sets out similar things but over a five-year period, not just a one-year period. The access arrangement is not itself something that is tabled or subject to disallowance; the code, as

I clarified before, is. I think there was not any more science to the absence of a tabling requirement for the gap year instrument than the efficacy of doing so for a one-year transitional arrangement that is not intended to have any ongoing effect; it is meant to be a gap year transitional measure to bridge Western Power between the existing WA regime and the national regime.

The CHAIR: Will the Western Australian Parliament be notified of the secondary determinations at all when they occur?

Mr Vines: There is not provision for that to be done. The act does not require that, but from a practical point of view, Western Power itself publishes details of its access arrangement on its website, any revisions to it made by the Economic Regulation Authority, the prices that apply under it and so on. I assume that is similar —

Dr Challen: Those will actually stay in place, so that under the provisions of the access code that will actually remain in place, Western Power is required to publish those documents.

The CHAIR: We are still on clause 18 but looking at section 138 about the RCP1 transition instrument. The question we have around this is: why are the RCP1 transition instruments not disallowable? They can still commence operation while undergoing parliamentary tabling and the disallowance process. Again, how will the Western Australian Parliament be notified of any RCP1 transition instruments?

Mr Vines: The purpose of the RCP1 transition instrument is to allow for the Economic Regulation Authority to make certain final decisions and determinations about Western Power's state of affairs and then to provide that information to the Australian Energy Regulator, who can then use it for its own purposes in making decisions on Western Power in the new world order. I guess the subject matter that we would intend that that instrument will deal with are in the nature of requirements to provide information and sharing, so that it is a function of the ERA to be able to provide that information to the Australian Energy Regulator and for it to be able to get the cooperation of Western Power to be able to get hold of that information for that purpose; otherwise, there would be complications with confidentiality requirements and the ERA doing things that it has no specific authorisation to do. That explains the purpose of what that RCP1 transition instrument is. I think that the decision not to include tabling or disallowance provisions for that instrument were no more than a reflection of the subject matter of that instrument not being something that is of a kind that would in the usual course attract the scrutiny of Parliament in that way.

Mr Jacobs: If I may add to that, the access arrangement that applies to Western Power is an instrument that applies to a particular person. So I think on that basis alone it probably would not be legislation—have legislative effect. The modifications to that access arrangement again are modifications that deal with the rules for a particular person. The RCP1 transition instrument is also intended to deal with the regulation of Western Power—that is, again, a particular person. So I am not certain that any of these instruments would fall into the category of subsidiary legislation.

The CHAIR: Again, we are still on clause 18 but looking at section 140. Again, these are regulations about transitional instruments. There are a number of matters canvassed under that subclause (2). Why would these matters not have been prescribed by the proposed act instead of being left to regulation?

Mr Vines: From a practical point of view, they reflect the tight time frame within which this bill has developed. The drafting instructions for the bill were settled in around about September–October 2015. The drafting process for the bills commenced in December 2015 and was completed in, I think, May–June this year. In the meantime, work continued to be able to identify and address the detail of the sorts of matters that are going to be addressed in regulations, but those details were not known in October last year when the drafting instructions were finalised and approved by cabinet.

They are consistent with the scheme of energy regulation in Western Australia more generally, which already operates at a high level of delegated legislative authority. The type of subject matter that these regulations will deal with and the subject matter that the transitional instruments will deal with is consistent with the subject matter that our delegated energy legislative or energy instruments already address, being of that technical, financial and economic regulatory nature.

[2.50 pm]

The CHAIR: Thank you. The next section we are looking at under clause 18 is section 145(2). This subsection provides that the minister using the instrument can modify retail contracts and contracts affected by section 143. We may have covered this in our earlier discussion around ministerial instruments, so it may very well be the same sort of answer. The questions I have around this are: What is the legislative status of these instruments? Will they be disallowable instruments? Again, how will the Western Australian public or the Western Australian Parliament be notified of the making of the ministerial instruments in this case?

Mr Vines: The particular changes to be effected by the ministerial instrument referred to there in proposed section 145(2) are to allow changes to be made to certain parts of existing contracts between electricity retailers and Western Power that address, among other things, the credit support arrangements between Western Power and its retailer customers, which are intended not to—at the moment, the way in which Western Power manages the credit support provided by retailers is through contractual arrangements with its customers. That is where its retailer customers provide Western Power with credit support. Under the new part 3A, those credit support arrangements will not be left to Western Power's individual negotiation of things with particular retailers but will operate as a single set of rules to be established in a code that will apply evenly to all electricity retailers. In order to be able to give that effect, it is necessary to be able to modify those existing electricity access contracts for that purpose.

Mr Jacobs: Can I add to that?

The CHAIR: Yes, please.

Mr Jacobs: Part 3A rearranges the relationship between Western Power, Synergy and a retail customer, and I am just talking about, sort of, the ordinary case, the one to which I am subject. At present, there is a linear relationship—Western Power, Synergy and the retail customer. Part 3A rearranges that into a sort of triangular relationship. There is going to be a contract between Western Power and the retail customer, Synergy and the retail customer. So, part 3A, in terms of the act and regulations under it, will set up that regime and will say what the nature and the incidence largely of these contracts and these relationships are. This provision is there in case some of the provisions of existing contracts do not actually work properly in that context. I took the view that Parliament in setting out 3A had actually said this is how these relationships are to be set up and this is largely the nature of them. The regulations are going to fill in the details, but some of the existing contracts, to the extent that they remain, might not in terms of their text actually work properly. Some of the contracts cover more than just the supply of electricity and so some of the contracts that we modify actually remain to deal with other matters, and whether textually that actually works or not, I am not sure. So it may be that we need to provide for the modification of them. In terms of whether the instrument is disallowable, the answer is no.

The CHAIR: The last area is still on clause 18 but looking at section 146(2). This proposed section gives the minister the capacity using an instrument to amend a code issued under section 39, a small use customer code and the Electricity Networks Access Code. Again, it is the same types of questions that we have been asking but pertaining to this area. Why was it necessary for the ministerial instruments to be exempted from the consultation measures already established for each of the codes?

Mr Vines: I think it did no more than reflect the intent of the minister's ability to make those changes to be for a transitional purpose and not an ongoing purpose. Having a transitional measure subject to a consultation process, whether that was done before or after the change, would not assist in giving certainty to the transitional measure if it was able to be—running a consultation process before the change, it did not look like there was going to be enough time to be able to do that. Given the very confined nature of just being made for a transitional purpose and not for some ongoing purpose, having a consultation process after that when these changes have already been subject to a broader consultation with industry as part of the reforms being pursued more generally by government did not seem to be something of necessity.

The CHAIR: Thank you. The next question is around why it was necessary for the instruments amending the Electricity Networks Access Code to be exempted from the established parliamentary tabling and disallowance process? I think it is actually picked up, is it not?

Mr Vines: I think under proposed section 146(4), a minister may, by instrument, amend any of those codes that you referred to just before. It is to be made before 1 January 2019 and then under subsection (5) "is subsidiary legislation for the purposes of the *Interpretation Act*".

The CHAIR: Does that make it disallowable?

Mr Jacobs: No. To be disallowable, it needs to come within the terms of section 43, I believe, which is regulations, which include rules, by-laws and local laws.

The CHAIR: The final question is: how will the Western Australian Parliament be notified of any ministerial instruments, particularly those amending the Electricity Networks Access Code? I suppose the answer to that question would be no.

Mr Vines: The intention is that they be published in the *Gazette*.

The CHAIR: Thank you. Have you got any other questions?

Hon MARK LEWIS: Not really, but it is more of a general question. I think you have mentioned it a number of times that you have got to a point after about five years and then worked out there were some Henry VIII clauses and then you had to work out what a Henry VIII clause was, and you said that the whole thing was a best practice legislative framework. When there are so many issues coming through here which would offend the terms of reference of this committee, I am just trying to work out how come it is such a best practice legislative framework when it is obviously going to have some issues around this table. It is becoming more of an issue for this committee over time in that IGAs and the like are being developed by the executive and then retrofitted back into the Parliament, rather than the other way around. You should be aware of the issues that are actually going to offend the parliamentary process in the development and design of the legislative framework right up-front at COAG, not coming back down here and trying to again retrofit and explain why these things do not offend the terms of reference of a range of committees—this committee and probably delegated legislation as well. I am just interested in a general comment, because it does not seem to be the right way around to me.

[3.00 pm]

Dr Challen: I can see the point you make. I guess, to start on that, it is very unfortunate in electricity that the physics is complex, and unfortunately the economics has to follow the physics and the law has to follow the physics as well, so the legislation and the regulatory frameworks around the electricity sector are extraordinarily complex. If you ever want a good read, go to the Australian Energy Market Commission's website and pick up the National Electricity Rules. It is a very, very large document, extremely technically complex, because once you are dealing with regulation of access to the electricity network, of course, it has to tie in with the actual operation of that network and operation of the electricity system, so there is an extraordinary degree of technical complexity there. We then come back to the point that the access regime and access regulatory framework that we have in Western Australia at the present is far from best practice. Regardless of

whether we adopt the National Electricity Law and the regulatory framework there or have our own legislation—if we have our own legislation, we would have to engage in a very substantial exercise in rewriting our regulatory framework here. And not only that, but we would have to constantly maintain that regulatory framework into the future in an area that has rapidly changing technology and rapidly changing commercial models within the electricity sector and the network sector. If we were to maintain Western Australian legislation, that would place an enormous burden on the Western Australian government to maintain that regulatory framework when, in any case, there is a regulatory framework being maintained nationally in any case that addresses these matters. I cannot overstate what an enormous burden that would actually be. When we talk about best practice, we are actually saying that, yes, there is there are bodies in place under national regulatory framework whose job it is to maintain that regulatory framework.

Hon MARK LEWIS: But to be best practice, it should not offend the range of Parliament's principles. So it cannot be best practice if it does offend.

Dr Challen: That offence comes because we are saying that we want to pick up a national framework and we want to apply it to the specific circumstances of Western Australia. In that sense, that is when that degree of imperfection in process comes in, insomuch as we want to take this very good best practice technical framework for regulating networks and we want to apply that to Western Australia. The Western Australian network has specific circumstances and the Western Australian government has particular policy objectives with respect to the Western Australian network; therefore, that national framework requires some modification to apply in Western Australia for technical reasons and for other policy reasons of the government. It is there we have to sort of compromise, if you like, legislative principles and parliamentary principles to find the mechanisms to modify the national framework around the edges—not at its core, but around the edges—to how it applies in Western Australia. My colleagues might like to comment as well, but we do not see the alternative or better mechanism to doing it to those that we have established in the act.

Mr Vines: The committee has previously recognised in one of its open reports, and I refer to the sixty-third report of this committee, which is titled "Information Report: Scrutiny of Uniform Legislation".

Hon MARK LEWIS: We understand that it is an old report.

Mr Vines: Yes.

Hon MARK LEWIS: Sorry, there have been new standing orders by the Council since then.

Mr Vines: I think that for the purposes of bills being referred to this committee, I do not think the standing orders materially affect what I was about to bring the committee's attention to, which is that the committee has recognised—in the past at least—that strict compliance with the fundamental legislative principles that the committee has identified as being associated with the preservation of parliamentary sovereignty, that strict compliance is not necessary in every case; it is more a question of looking at the proposed bill and legislation before it. The committee, at least at that point in time, had indicated that it was open to considering whether appropriate regard had been had to those fundamental legislative principles.

The CHAIR: I appreciate those comments, Mr Vines. That was a previous incarnation of this committee with a totally different set of MPs. We find that over this last term in particular there has been a higher incidence of—I suppose, the word "abuse" is too strong—but we are trying to tighten up our position on the role of the Parliament in terms of applying scrutiny to bills, so we probably take a stronger position than perhaps previous committees did.

Hon MARK LEWIS: And I think our terms of reference have changed.

The CHAIR: And our terms of reference have changed, yes. We appreciate your comments though.

We do not have any other questions and I certainly appreciate the information you provided to us today. This is our starting point for dealing with this bill. We may, as we go through the next few weeks, have a few other additional questions that we might require some clarification with. We will probably send those questions to you rather than calling you back in, if that helps. We certainly do appreciate the information you have given to the committee today and we thank you for your time.

The Witnesses: Thank you.

Dr Challen: Thank you for the opportunity to do so.

Hearing concluded at 3.06 pm

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