HOUSE OF COMMONS

Business, Energy and Industrial Strategy Committee

Oral evidence: Downstream Oil Resilience Bill (Legislative scrutiny), HC 384

Tuesday 14 September 2021

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Watch the meeting

Members present: Darren Jones (Chair); Alan Brown; Richard Fuller; Paul Howell; Mark Jenkinson; Mark Pawsey.

Questions 49 - 83

Witness

I: Daniel Greenberg, Counsel for Domestic Legislation, House of Commons.

Examination of witness

Witness: Daniel Greenberg.

Q49 **Chair:** Welcome to this morning's session of the Business, Energy and Industrial Strategy Committee for our second and final hearing providing pre-legislative scrutiny on the Downstream Oil Resilience Bill. We are delighted to welcome Daniel Greenberg to the Committee this morning, Speaker's Counsel, to answer our questions on the drafting of the Bill.

Mr Greenberg, I am going to start. We have had an explanation from Government Ministers and officials that one of the intentions of this Bill is to provide Ministers with the power to deal with problems as we transition away from fossil fuels to renewable sources of energy generation in the country; they need these powers in order to provide that stability. Do you agree, or do you think that there are existing powers that give Ministers the scope they need?

***Daniel Greenberg*:** I have two comments on that. The first is that, if that is the fundamental justification for the new powers and the way in which they are framed, it might be quite a good thing to see that expressed in some way on the face of the Bill. If the purpose of replacing the earlier powers, which I will adumbrate briefly in a moment, is to include economic and industrial issues that were not around in 1976, you want these powers to be treated by the courts, by other readers and particularly by the stakeholders at whom the powers are potentially aimed in the light of that statutory objective. That seems a perfectly sensible objective for Ministers to articulate, but it would not be a bad idea to see it somewhere on the face of the legislation.

The second point is to give you a little bit of a feel for how the structure of the 1976 Act and the instruments under it worked, and whether it is therefore correct that they just are not apt for the purpose you have just referred to. The Energy Act 1976 starts off with a system of general controls by orders. Those were cast in wide terms; they are about regulation and prohibiting production, supply, acquisition, use and so on, but they were aimed at the conservation of energy. That was section 1(2).

Then there were reserve powers. In section 3 of the 1976 Act, you have powers that are required either to implement international obligations—obviously this is back in 1976—or where you have actual, imminent emergencies. Under section 4, you had a general power, which I want to come back to, because I am not sure of the extent to which that is reflected in the replacement Bill.

The section that a number of your witnesses have already drawn attention to is section 6. That allowed the giving of directions. Those are primarily about maintaining stock levels and ensuring that stocks do not fall below particular levels. They are blunt tools and do not address the wider policy issue that you referred to, which the Minister has

underscored as the primary policy driver for the Bill. One starts from it being entirely reasonable for those new purposes to be reflected in new legislation, but, as I say, one wonders whether that could not be made more clear on the face of the legislation itself. Does that cover what you wanted?

Q50 **Chair:** It does, thank you. You refer to section 6 of the Energy Act, the power to maintain minimum levels of fuel stock and the existing powers of direction. Do you know how often those emergency powers have actually been used since the legislation came in in 1976?

***Daniel Greenberg*:** No, I do not. I do not think anybody does. There is quite a lot to say about this because the degree of commercial confidentiality that needs to attach to the way these powers are deployed is something that possibly needs a little bit more thought in the context of the present Bill.

Broadly speaking, the 1976 powers were prepared for exercise in a range of orders. There were reserve powers orders. There were designated filling stations and fuel depots orders. There indeed was a series of five orders at one point, culminating in 2000, that were all statutory preparations for the exercise of the powers.

If you have a look at some of the Government's literature about the 1976 regime, one finds references to something that is very important. You do not necessarily expect to see an audit trail of how these powers were used because one of the purposes of these powers is for them not to need to be used. The main thrust of this sort of power is to underpin negotiations and discussions between Government and industry. If industry knows that you have reserve powers of a certain kind, the negotiations take place in a slightly different way.

For example, if you look at the 2015 Department of Energy and Climate Change, as it was, audit and enforcement policy for compulsory oil stocking obligations and you look at paragraph 23,which deals with the approach and frequency of the audit, you see there that it says, "In addition, DECC may request ad hoc audit meetings with the option of physical inspection of stocks … Typically this may result from significant insoluble anomalies … Such meetings are not compulsory and aim to allow DECC to explore solutions with the company". That is a very telling phrase that would be equally apt for the Bill you are considering today.

There are two parts to the answer to that question. There is evidence that statutory preparation was made for the use of the power. There is certainly a lot of evidence that the power was a player in the negotiations, in discussions, and important. There is no suggestion at all that it was a dead letter. The extent to which it and its successor powers should be evidenced where they are actually used is something that I do not think you have yet had discussions about.

It is very important, because there may be questions of commercial confidentiality and competition law that impinge on this. There are lots of reasons why, for example, a company might say, "We are happy to have a direction, but we either insist on it not being published or insist on it being published".

Q51 **Chair:** I suppose the issue, from a scrutiny perspective, is that, if the idea is to have a wide-ranging power of direction that is essentially a statutory threat to impose the will of Ministers on businesses to do something, which is then a conversation in commercial confidence in Whitehall, Parliament, this Committee, will have no idea of the contents of those conversations or why that is happening, or what Ministers at any given time are asking companies to do. Are there other examples in other areas of law that you might know of where that approach is used, or is there a more appropriate way that it has been done to give adequate scrutiny of those soft powers?

***Daniel Greenberg*:** No. By definition, you cannot give scrutiny of what you describe as soft powers. It is not that they are soft powers. There is soft discussion in anticipation of avoiding the use of the powers. As one of the protocols or pieces of internal Government guidance that could support the enactment of this legislation, you might want to consider as a Committee whether there should be a protocol on the publication of directions.

I do not think the Department is terribly clear, if I may say so, as to the difference between directions under clause 3 and regulations under clause 8. One of the distinctions in practice is that regulations will be published in the ordinary way, as legislation, and clause 3 directions may not be.

One of the things you may want to discuss is having a protocol around publicity to be given or not given to directions, when it is appropriate, when it is not appropriate, and what criteria are to be applied. That would then allow you to explore the possibility of this Committee or other appropriate Select Committees being able to be given information about negotiations leading up to a public direction, where the protocol provides for those negotiations to be above the surface of the water. Then you could get involved in scrutiny of that.

Chair: That is useful. Thank you.

Q52 **Richard Fuller:** Picking up on what you said, what is the difference in effect of a Government giving a direction and instituting a regulation? As pertains to this Bill, is there a fundamental difference between a direction and a regulation, in terms of the impact? Given you have just said that the scrutiny of regulations by Parliament is clear and the scrutiny of directions is different, I am wondering if there is a difference in terms of the power and effect of the Government issuing a direction.

***Daniel Greenberg*:** The answer to that is mostly no, with a little bit of yes. The "mostly no" is that a direction is law and the offences of failing to comply are, effectively, the same. The simplest answer to your question is that they are both binding.

There is a little bit of difference and that is one of the things that need to be brought out of it a little bit. Directions will be quasi-legislation; they will not be legislation. They will not, for example, be promulgated in the manner of regulation or subordinate legislation. There will be interpretation issues that apply to regulations but do not apply to directions. The Interpretation Act, for example, does not automatically apply to directions under clause 3, whereas it applies to regulations under clause 8.

This gives them, inevitably, a different nuance. Whether that will reflect in compliance or attitude before these are made remains to be seen. That is one of the things you should be teasing out a little bit more.

Q53 **Richard Fuller:** As part of teasing it out a little bit more, could you advise the Committee whether, in your experience of the use of directions versus regulations, as far as it is the way in which a Government wish to have an effect on a sector of the economy, there are other precedents so this Bill could say, "It is a mirror of what we have done in that particular sector or that particular sector"? Is this new?

***Daniel Greenberg*:** I do not know of any precedent, but I cannot tell you that I have scoured the statute book to look for one, so I am not going to promise you that it is novel. There certainly are other examples of situations where there are general direction-making powers and, if those failed, there are some subordinate legislation powers that the Government could use.

For example, these are not exact parallels, but there are cases where there are statutory corporations—regulators—and the Minister has a power to give directions of a general nature to the regulator. There are also powers in the Bill that allow the Government to make subordinate legislation, which could be used not to replace directions but where directions were working to some extent.

What I cannot think of a precedent for, but, again, this is not promising there ain't one, is something where you have a direct alternative. In clause 8 it is entitled "Corresponding powers to make regulations". I do not remember seeing that ever before, that you can do this by directions, by quasi-legislation, or you can do it by actual subordinate legislation, and it is not absolutely clear why you might choose to do one and not the other.

The Government have suggested a reason as to why you might to choose the one and not the other. I am quoting from, I believe, a letter sent to the Committee in response to questions raised by the Committee. I think that letter is already in the public domain; I am looking at the clerk. Yes.

I am quoting from paragraph 5.1, where the Government say, "The primary distinction between resilience directions under clause 3 and resilience regulations under clause 8 is that the former will be made in respect in of particular, identified persons, while the latter are intended to apply to a class of persons".

I am not quite sure why that should be necessary in that way. As I have just said in response to your question, you can have general directions and you can have specific directions. I know of many Acts that give powers to do both, or one and not the other. But, if that is the intention, it is nowhere apparent from the face of the Act. It is quite strange that the Government should be advancing that as the primary distinction. There is nothing about the legislative structure that suggests that should be the case. If that is the primary distinction, it should be clearly on the face of the Bill.

Q54 **Chair:** My concern here is that the directions are much easier for Ministers to use. They can tell a company, an individual, or a number of companies and individuals to do something. Are the reserve powers to make regulations not just an ability for Ministers to quickly pass legislation to do something broader than a direction, instead of following a normal process of bringing legislation before the House.

***Daniel Greenberg*:** The fair answer to that is no, because clause 8(1) says that the parameters of the regulation-making power in clause 8(1) are requiring a person to do anything that a person to whom section 3 applies could be required to do by a direction under section 3. They have linked it. That particular suspicion, if you like, is addressed by the clause. What is not addressed is, in that case, if they are completely overlapping, why you need them both and what the distinction is between the two.

Chair: Maybe we will ask and, hopefully, get some clarity.

Q55 **Mark Jenkinson:** Thank you, Mr Greenberg. In justification, the Government have told us that existing powers under the Energy Act, the Civil Contingencies Act and the Offshore Safety Act can be used only in emergency or crisis scenarios, and would therefore require them effectively to call a national emergency prior to using them, rather than being able to take pre-emptive action. Do you agree with that?

***Daniel Greenberg*:** Yes, pretty much. I have mentioned the way in which section 6 of the Energy Act 1976 is cast. It is enabling stocks to be kept to a specified level. It does not say in terms that that has to be reacting to a threat or a diminution of stocks, but standard principles of administrative law and judicial review would tell you that you do not go round telling people to maintain stocks at a particular level unless there is a reason why they might not be. There are hints of that.

Obviously, the Civil Contingencies Act is exactly that. I wrote the Civil Contingencies Act and we spent a lot of time when we crafted it making sure that, because the powers in it are extraordinarily wide, they are

linked to an appropriate class of emergency, and the same for the offshore safety. Clearly, that is about safety.

The Government have clearly identified for the Committee that the existing powers are narrower than what they are granting themselves in this Bill. The parameters of the new powers go beyond reacting to an imminent emergency. There is some discussion in the Government's explanatory notes and in the Department's delegated powers memorandum about this. If there is to be a broader framework that goes beyond the existing powers, and not aimed at a particular emergency, the parameters need to be clearly set out in some way on the face of the Bill.

I say this in part because paragraph 10 on page 7 of the delegated powers memorandum on this draft Bill says, "These powers are intended to allow Government to give directions to industry where necessary for resilience purposes". I skip a few words. "It is intended to be used only as a backstop or last resort, where Government considers industry has not taken proportionate measures to mitigate resilience risks". There, the Government are relating these new powers straight back to risks and suggesting that there is a direct link between a resilience risk and the powers they have taken.

Yet they are also, rightly, saying to you that the old powers, the powers you have identified in your question, are all related directly to risk, safety and emergency, and are therefore not broad enough. I would like to know what the new gap is. If this is still about risk, you expect it to be created by some threat that creates the risk. If it is more than that, what more is it and how far does that more extend?

Q56 **Mark Jenkinson:** That maybe explains to some degree why Professor Paul Stevens told us that, in his assessment, there was little in the draft Bill the Government could not already do through existing powers. That view was shared by the petroleum industry association. It is interesting to me that no one really seems to know the answer. That is maybe because I am new to this place, but it really strikes me that we cannot seem to bottom that. The Government's own documentation suggests that they are still reliant on that threat of risk.

***Daniel Greenberg*:** Yes. One can say there are two specific differences between the draft new powers and the tranche of old powers. The first is that there is a different trigger, quite simply. As I have said, under civil contingencies, there is certainly a very high threshold for triggering the power. I have discussed the trigger under the Energy Act 1976.

The trigger here is very broad and it is a concept of resilience that is a necessarily broad concept. It is defined, in particular, in clause 2 of the draft Bill. I find there are aspects of that definition, that trigger, that are less clear than the Committee might wish to see them in due course. This is slightly parenthetical, Chair, but, while my mind is on this, I will give

an example, because this is one of the two differences between the new powers and the old powers.

If you look at clause 2(3), you find that this is about not dropping below normal levels. It is a resilience power to prevent supply dropping below normal levels. We are then told, "What does normal level mean?" Normal level means levels that are not substantially below those that are normal. I do not find that incredibly helpful. Circularity in legislation is always a bit easy to poke fun at. Generally, one can work out that there was something. It was not that the drafter was completely mad; one can sort of get a feeling for what they were on about, but they have not done it properly yet. They need to go back. Once it is circular, you have to go back to the drawing board.

To finish the point while we are on that, normal levels are levels that are consistent with a reasonable balance between supply and demand. That is really tricky in this area, particularly having regard to what the Chair was talking about before about discussions between industry and Government. What I think is reasonable, as the industry, may be very different from what you think is reasonable as the Government, or what the sector regulator may think is reasonable, having regard to the interests of consumers. That is the first clear difference, a trigger difference, and this is clearly a much broader trigger that needs to be clarified a little bit more.

The other difference is that the powers you mention in your question have more specific results mandated. I have already taken you through the Energy Act powers under section 6, which has been quoted to you by other witnesses as the direct parallel with clause 3. Of course, the aim there is to bring stocks up to a specified level. It is not only a more specific trigger; it is also a more specific set of outcomes that you are aiming at. I do not know whether that amounts to very little or not in practical terms. The problem is that nor do you.

Q57 **Paul Howell:** We are moving on to a similar sort of area really. It is about proportionality and whether the powers are appropriate to the stated policy objectives. It seems to be about being pre-emptive, rather than reactive. Do you think that the powers are proportionate? How do you define "proportionate" in this sort of situation?

***Daniel Greenberg*:** Can I take the second part of your question first? Proportionality now is a separate, freestanding legal concept of the law of this country. We obviously acquired it to a large extent from the European Union, but it is now regarded as a separate, freestanding administrative law test. There is never a single answer—"Yes, this is proportionate"; "No, this is not"—but there are established ways that you use to test.

There is the impact assessment obviously. The development of impact assessments now is quite an advanced science in Government. You perform an impact assessment. You project the impact. You set it against

the benefit and then you conduct a risk-benefit and impact-benefit analysis. Are there ways of doing proportionality analysis in quite a controlled and almost scientific way? Yes, there are. I do not think stakeholders will find it difficult to carry out proportionality analysis of proposed directions.

The answer to your first question has to be as follows. There is nothing in the Bill that prevents Ministers from exercising these powers in a proportionate way. The powers are lawful. If this was in a subordinate legislation, I would say it is perfectly lawful, because it is possible to exercise it in a proportionate way. There is nothing on the face of the Bill that sets out the criteria of proportionality, or the other criteria of legality and propriety, in relation to the exercise of these powers.

I am sorry to be boring, Chair, to keep coming back to this, but, as you have already found in your discussions, this is the area where, in full support of the Government's stated objectives, more clarity needs to be brought to the face of legislation. There is no reason why proportionality criteria should not be set out on the face of the Bill. I will try to change the burden of my song slightly; I do not want to make it too boring. That would support a raft of quasi-legislative documents, including guidance—we may come on to the use of guidance later—protocols, as I have mentioned, and memorandums of understanding with the industry. All these things are very useful but they are useful only when they lock in to concepts that are found on the face of the Bill.

Q58 **Paul Howell:** In my simple world, if I try to paraphrase that back to you, the Bill has the capacity to be proportionate, to be used proportionately, but potentially, the way it is written, it also has the capacity to be used disproportionately.

***Daniel Greenberg*:** Yes, correct. That is always true of a statutory discretion. You do not look for ways of preventing the power ever being exercised in an improper way, because that is not possible. You look for ways of making sure that everybody understands what the parameters of propriety are.

Perhaps I could bounce off from that question, with the Chair's permission, to explain that it is something that those who do not have particular cause to be looking at legislation all the time sometimes, quite reasonably, misunderstand. That is the assumption that, the broader a power, the more it must allow you to do. That is actually an assumption that the Government also shared until quite recently, until the Supreme Court, in the R (Public Law Project) v Lord Chancellor case, referred to things that I and others had been saying for many years, that it is actually the reverse.

The broader a power is, the less you can assume that it allows you to do specifically extreme things. There is a presumption from the courts that you, as Parliament, are not mandating, for example, expropriation—very relevant here. If I want to be able to expropriate, I have to say so

expressly. The extraordinarily broad language of "do anything" is the core language in this Bill. You can tell anybody to do anything.

You could say, as you just did, "That is so broad it allows you to be proportionate. It allows you to be disproportionate". The danger from the Government's side is that it actually will not allow them to do some of the things they might want to do, precisely because of its breadth. That means the courts have to come in and supply the criteria and parameters that are missing from the face of the Bill.

If I may trespass on your patience for one moment, I said I wanted to come back to section 4 of the Energy Act. This would be a good place to bring it in as a specific example in answer to Mr Howell's question. Section 4 of the Energy Act is quite an extreme power. It says that, if the Secretary of State allows suppliers in particular—there are others as well—and users, they can act in accordance with the Secretary of State's authority so as to disregard or fall short in discharging obligations under an enactment or a contractual obligation relating to the supply and use of that substance.

That is very extreme. We can immediately see why it is necessary in this field. You must not be able to say, "I cannot comply with your direction because I have contracted to deliver this" or "I have contracted not to deliver the other". One can see the purpose of it, but it is a very specific and extreme example of something that the power might need to be used for. In the 1976 Act, the Government saw that that was very extreme, so they covered themselves expressly. If the Government wish to be able to do similarly extreme kinds of interference—remember that it mentioned enactment and contractual obligations—for the Government's security, for their peace of mind, as well as the stakeholders' understanding of what the legislation does, I would expect that to be set out.

The proportionality is not just an issue of breadth. It is an issue of certainty, knowing how that proportionality calculation is to be made, by reference to which criteria. That is what gives you, as Parliament, your reassurance that these powers are being taken in an appropriate way. Does that help?

Q59 **Paul Howell:** Yes. It has been an interesting interpretation, because I did not think of it that way at all. Moving the discussion on slightly, talking about specifically the power of direction, and its proportionality and specificity, the original question I was asking you was whether it was too all-encompassing. It seems, from what you are saying, that it is a double-edged sword. If they do not get it more specific in terms of what is there, they actually run the risk of not being able to do any of the things that they are wanting to do.

***Daniel Greenberg*:** That is exactly the danger and it puts the courts in quite a difficult position. Breadth of this kind can be one of the pressures that lead to potential politicisation of the judiciary, because they have to come in and make bricks without straw in fashioning limitations on the

power because of its apparent breadth. Again, the more the Government can give the courts guidance as to what the parameters of propriety are and what the criteria of proportionality are in this context, the easier it is for the judges to know that they are not making policy; they are enforcing the legislative intent of Parliament.

Q60 **Paul Howell:** To take that a little bit more specific, you have mentioned a few times that things should be more on the face of the Bill. I was going to ask you about narrowing the scope of the power, but probably a more appropriate question is to create the appropriate powers that are required. What textual changes do you think should actually be made on the face of the Bill?

***Daniel Greenberg*:** Leading up to your second question by responding to your introduction, there is a reference at some point in one of the Government papers to the aim being to provide light-touch regulation. I cannot put my finger on it immediately, but if I find it later on I will give you the specific reference. I remember thinking at the time, "It is not light-touch regulation that industry requires, as much as clear touch". Industry needs certainty. It needs to be able to plan. It needs to know what sort of circumstances and conditions will trigger particular kinds of event.

In my experience of other regulatory areas, one does not tend to find resistance simply to extreme powers of regulation. One tends to find strong resistance to vague and uncertain powers of regulation. To bring that to answer your specific question, what could be done? The first thing I said to the Committee this morning was that the Government have articulated an underlying purpose for the Bill. That could be set out in a purpose clause. Purpose clauses are not always appropriate, but they can be of enormous help to the courts and stakeholders, because they flavour the entirety of the rest of the Bill: "In exercising the powers, the Secretary of State must have regard to the importance of this".

These are not just aspirational mere puffs. They sound in administrative law and they add to certainty and predictability. They also add to control by the courts without, as I say, politicising or turning the courts into policymakers. A purpose clause is something I would like the Government to think seriously about. That is a specific takeaway that you could be offering them to think about.

Also, I think of criteria: desirable outcomes, undesirable outcomes, criteria for proportionality, the sort of thing that you and I have just been discussing. Those can all find statutory expression. I am sure the Committee will not accept this, but I do not want you to be told, "Yes, that is fine. That will all be done by non-statutory guidance in due course". I quote from page 19 of the delegated powers memorandum on the draft Bill. Paragraph 84 says, "It is Government policy that guidance should not be used to circumvent the legal rules set out in primary and secondary legislation, which are themselves subject to parliamentary scrutiny". No, that is not Government policy; that is the law.

The law is that you, Parliament, make the law through Acts. You delegate powers to Ministers to make the law through subordinate legislation. You sometimes delegate powers to give guidance or to enact quasi-legislation that flavours the implementation and application of the law, but the law is made by Parliament and by Ministers under controlled subordinate legislation powers. I would not expect you to regard it as a reasonable reply. "Yes, that is okay. We can write that on the back of an envelope. We can give you lots of criteria, lots of things". We want them off the back of the envelope and on the face of the Bill.

Q61 **Paul Howell:** Having spent a bit of time in industry, I absolutely agree with you that the certainty is much more important than the vagueness and that we need to move in that direction. You are absolutely right on that.

***Daniel Greenberg*:** Before you move to your question, with apologies, I have just been very helpfully handed this, just for the record. The reference is in the letter from BEIS responding to the Committee's questions. The reference to light touch compared to certain touch is at paragraph 2.3: "The Government is now seeking to implement the lighter touch measure set out in the draft Bill".

Q62 **Paul Howell:** The Department has said there are to be five checks on the direction power. Is there anything you would see differently about the checks that should be required? Are they sufficient? Should there be more? Should there be less? Should there be anything further?

***Daniel Greenberg*:** Again, at the risk of being boring, the first thing is to get them out in the open, but then, fundamentally, no. This is a question of industry-appropriate balance of risk management and supply management. It is not for a legislative technician to say that they are not sufficient.

One of the reasons for getting this sort of thing on the face of a Bill is that I would expect you to be able to examine the industry consultation that gave rise to it. These are things that, again, the courts would like to see: that the criteria that are expressed are ones that the stakeholders have been involved in developing. Then the courts can see that they are realistic and meet industry expectations.

The other thing I may say, on the back of that, is that, when I train people in legislative policymaking, I always emphasise that we used to be told that you have to think about enforcement before you start. That is a rather old-fashioned way of looking at things. Enforcement of legislation is when things are going wrong. I like to think about ownership of the legislation by the stakeholders, generally leading ultimately to self-regulation.

One of the reasons for getting this sort of check and balance consulted on, agreed with industry and on the face of the legislation is that, if the industry is satisfied that it contributed, it owns the legislation, it engaged

with it and it reflects its concerns properly, it will implement it itself in a way that makes real enforcement, which is always tricky and difficult to achieve, unnecessary. I mentioned in my answer to the Chair on the use of the 1976 Act that these are powers that are designed not to be used. They will be used much less if the parameters for them have been agreed upon and feel owned by the stakeholders at whom they are aimed.

Paul Howell: Thank you, Mr Greenberg. That was an education.

Q63 **Mark Pawsey:** I do not want to follow up Mr Howell's line of questioning on safeguards, but do you mind if we go back to first principles? What is absent in the existing legislative framework that gives rise to the need for this Act?

***Daniel Greenberg*:** As I said before, the two primary changes are the trigger and the outcomes. The Government would say the triggers in the three other tranches of legislation we discussed are insufficient and the outcomes are too limited.

Q64 **Mark Pawsey:** You have told us that there are number of ways in which you would like to see certain information on the face of the Act. In the way it is written and the way we have it before us now, does the Act do what it sets out to do?

***Daniel Greenberg*:** Yes, in the sense that it is broader. The trigger is broader and the outcomes are at large. There is a tinge of possible no, if the parameters are so broad that they cannot be reliably used for the things they want to do.

Q65 **Mark Pawsey:** Will our constituents see any benefits? Will there be positive outcomes for our constituents by virtue of us passing this legislation?

***Daniel Greenberg*:** There could be. I am the wrong person to give you an answer as to whether there will be, but I can explain, from a technical, legislative perspective, how those benefits could accrue. If there are presently resilience risks that are not pure supply risks, they are broader aspects of resilience and sustainability, and they are not presently capable of being covered by the powers, the Government are not presently capable of negotiating with the industry in relation to those risks with the back-up of the statutory powers. That would change if this were brought in. Could there be eventual changes on the ground? Yes.

Q66 **Mark Pawsey:** In terms of the powers, you have said they are intended not to be used. They are a backstop. They are not sufficiently specific. How would you like to see the Bill amended to make those powers clearer?

***Daniel Greenberg*:** Let me give you an example from provisions we have not mentioned so far, trying not to just repeat myself. Let us look, if you will, at clause 15 relating to restriction on making qualifying acquisitions. Clearly, that is an enormously broad and penetrating power

in relation to this entire commercial sector. The specific thing that I would like to see, or I would like at least you to be inviting the Government to consider, is a criterion that you cannot make a qualifying acquisition without the written consent of the Secretary of State. Let us have, somewhere, the criteria that the Secretary of State is going to use.

Later on, in clause 22, we have something about the decisions. Clause 23 requires the Secretary of State to issue a statement about how it is proposed the Secretary of State's functions be exercised. You are given some parliamentary control over that. Surely, we know already what class of criteria will be relevant to a consent decision. Those criteria could be adumbrated on the face of the Bill and then their application could be tightened in the statement under clause 22.

Q67 **Mark Pawsey:** You have given that as a "for instance" and you have given a number of other "for instances". In your view, is the Act as we see it adequate, or does it need substantially rewriting. You are going quite some way to saying that there is an awful lot here that needs to change.

***Daniel Greenberg*:** When you say substantial rewriting, I do not think it needs structural destruction. The structure is fine. I get the trunks of the Bill. You tell people what to do. You pinch their assets if you need to. You give them assistance. That is all fine. The story of the Bill is a coherent story and it runs fine. I would like to see it fleshed out in a lot more places with the criteria and parameters. As you say, I have given you plenty of examples of that. It is not that this is a bad structure; it is that I think it could be improved by the introduction of lots more detail in lots of places.

Q68 **Richard Fuller:** Lots more details in lots more places may be particularly relevant to part 5, which relates to financial assistance. For the record, can you confirm whether there are any limitations in the Bill for the amount of financial support or the number of times the financial support can be provided to the sector under this Bill?

***Daniel Greenberg*:** The simple answer is no. Could I explain something about clause 40 that may not have been immediately apparent to the Committee? Clause 40 has no legal content. Clause 40 is what we call a Baldwin agreement clause. The Baldwin agreement was an agreement with the Public Accounts Committee a number of decades ago that the Government would not incur significant recurring public—I apologise if I am teaching the Committee what it already knows more about than I do, Chair.

Richard Fuller: It is unlikely on that topic.

***Daniel Greenberg*:** You would be in good company if you did not entirely spot the difference between a Baldwin clause, a sink clause and operative legislation. The High Court also got this wrong in the Friends of the Earth case, where it assumed that this means something. A sink clause is put in

for parliamentary procedural purposes and a Baldwin convention clause is put in purely to satisfy this convention.

The reason for it is this. The Government can spend whatever money they like. They get their money through the supply procedure and that is franked annually by the Appropriation Act. In the Appropriation Act, of course the House of Commons has complete control over the estimates, but the reality is that it is a nuclear button option. If you blow the estimates out of the water, the whole budget falls, so you do not do that. Therefore, if the Government incur significant expenditure without any cover other than the supply procedure, the estimates and the Appropriation Act, there is no real parliamentary control over the expenditure.

The reason why this is genuinely in answer to your question and not just a digression is that there are two aspects to that. There is the control on the face of the clause. That is what section 40 does. Clause 40 honours the Baldwin convention by having a specific statutory power that mandates expenditure of that kind.

The second component, which is not present on the face of this legislation, is direct parliamentary control over the use of that power. You asked whether there are any limits. There are not. Is there any procedure? There is not. You would not necessarily expect that, but the fact that it is not there shows that this is a pure Baldwin convention proposition. All it does is it gives the supply permission for the Government to incur expenditure of this kind.

Q69 **Richard Fuller:** Is that without limit?

***Daniel Greenberg*:** There is no limit.

Q70 **Richard Fuller:** Is that without limit on quantity or iterations?

***Daniel Greenberg*:** Yes. As I say, that is not unreasonable in one sense, because you will get that through the supply procedure. They will have to lay estimates. This does not grant them any money from the consolidated fund.

Q71 **Richard Fuller:** No, it does not, but in combination with part 3, or section 3, and schedule 1, this Bill includes quite a significant amount of detail on the types of intervention that a Government may be wishing to undertake, including the provision of grants and the taking of shares. There are descriptions of what a controlling interest may be. When it is in so much detail about the potential actions they might take, should there not, within this Bill, be some sort of, if not control over the amounts or iterations, at least clear review of the expenditures that are contained within this Bill?

***Daniel Greenberg*:** You may feel so. It is not for me to agree or disagree, but I can see why you feel that. What is for me to do is to remind you that the words in clause 41, "There may be paid out of

money provided by Parliament", do not give you any kind of control or supervision. You have the ordinary supervision of the estimates under the Appropriation Act, but you have nothing more.

Q72 **Richard Fuller:** From your review of this and other similar types of legislation, would there be other forms of parliamentary scrutiny that this committee may want to consider as part of this Bill?

***Daniel Greenberg*:** I would be very surprised if you thought it would be necessary or appropriate to have direct parliamentary scrutiny over a particular grant. That would not be unprecedented, but it would be unusual. You might say, "We would like to have ongoing scrutiny over these grants"—or "this financial assistance", because, remember, it is much broader than grants. One of the things that you might particularly want to look at relates to guarantees and indemnities. The potential liability is very difficult to quantify at the time the guarantee is given sometimes, particularly in case of indemnities.

To try to answer your question specifically, you might say, "We would like to have a regulation-making duty"—not just a regulation-making power but a regulation-making duty. "Those regulations are to set out again the criteria by reference to which eligibility and quantum"—because you are worried about both—"are to be determined". That could be done, and that would be a compromise. It is not seeking direct control over a specific grant, but it is registering parliamentary interest in how this clause is used and giving you a degree of control over the parameters.

Richard Fuller: Thank you. That is very helpful.

Q73 **Alan Brown:** The draft Bill applies to individuals who work in the downstream oil sector, rather than the responsible companies, in terms of some of the responsibilities and actions that can be taken against them. Why is that, and is that appropriate?

Daniel Greenberg: Let me start by saying I find it slightly troubling to work out exactly the extent to which that is and is not true. If I can direct the Committee to the Government's responses to your questions on 15 July, you asked the question relating exactly to that point on the penalties for individuals. The Government's response starts by saying that "persons" includes a body of persons, corporate or unincorporate, so that could apply to individuals, corporate entities or unincorporated associations, and it refers to the Interpretation Act.

Yes, okay, that is true up to a point, although the Interpretation Act is, in this respect, subject to contextual contraindication. If we look at clause 7(1) itself, it says that any person who, without reasonable excuse, fails to comply with a direction given to the person commits an offence. The problem there is that we do not know whether these directions are going to be given entirely to the overarching corporate entity or whether they are going to be given to individuals within them. The reason why we do not know that is that the wording of clause 3 would be capable of

including either or both, partly because of the breadth of the definition of "relevant activities".

The Government go on to say, under clause 3(6), that directions can only be given to persons carrying on downstream oil sector activities". That is in paragraph 4.2. Taken together, I find paragraphs 4.1 and 4.2 slightly muddled and needing greater clarity, and that is, again, the answer to your question. There is nothing wrong with specific individuals working in the industry being put at risk of committing criminal offences if they do or fail to do particular things. Indeed, that is something that one expects where a direction impinges on safety, for example. It is appropriate for individuals to have personal liability.

What needs to be established here and, once again, on the face of the Bill with greater clarity is to what extent it is appropriate for individuals within a commercial sector organisation to be found personally liable for failures that are likely to be attributable, in many cases, to the management chain and the management structure.

Q74 **Alan Brown:** In terms of clause 7, you did mention that it has the wording "without reasonable excuse". How accurate is that in terms of drafting? How realistic is it? Given what you said there about the juxtaposition with some clauses talking about companies and some talking about individuals, does that further muddy the water there?

Daniel Greenberg: It does. "Without reasonable excuse" as a defence to a criminal offence is very common, and it works sometimes and it does not work at other times. When it works is where the context is absolutely clear. It is an offence without reasonable excuse to sell a knife to someone under the age of 18, and it is clear that it would be a reasonable excuse that I entirely reasonably thought this person was over 18. That is an absolutely reasonable excuse if the excuse is believed.

Here, it does not resonate with me. I cannot start to conjure up obvious examples in my mind—"Yes, that would be reasonable and that would not be reasonable"—because the essence of this Bill is intervention by the Government in a sector that presumably already thinks it is behaving reasonably, which is why you have had to intervene. As we said before, you have had your negotiations. They have said what they think is right. You have said, "No, we are going to intervene. We are going to use our powers", so the reason why they were opposing the use of powers will appeal to them as a reasonable excuse for not obeying the powers. What do the courts do? It is very hard.

I mentioned the risks of the politicisation of the judiciary. It is very hard. Here, the courts will have to decide what amounts to a reasonable excuse for failure to comply with the direction. That could include everything from an unreasonable direction all the way through to a perfectly reasonable direction but an unexpected reason why it could not comply with it. I would expect more clarity on the face of the Bill, and, again, I

would not expect the Government, despite paragraph 3.5 of their response to the Committee on 15 July, to say, "We will produce guidance on the enforcement of offences". That is unacceptable. To suggest that the Government will informally tell the courts what does and does not amount to a reasonable excuse is objectionable in legislative terms.

Q75 **Alan Brown:** I hear you loud and clear. If we move on from that and assume that will be sorted out, and penalties are applied in due course down the line to somebody deemed not to have had a reasonable excuse, clause 34(4) actually highlights that there can be a fine of up to £10 million. Could you give a wee bit of information on how appropriate that is? If I read clause 34 correctly, sub-clause 1 says, "The Secretary of State may impose one or more discretionary requirements on a person". Is this in the gift of the Secretary of State? There are two key questions: how reasonable is that, and how reasonable is a fine of up to £10 million?

Daniel Greenberg: Civil penalties are very, very tricky for lots of reasons. I suspect your appetite for a lengthy discourse may be limited, so I shall try to fillet it.

Q76 **Alan Brown:** Short and simple, for my understanding.

Daniel Greenberg: I will do my best. There has been an explosion in civil sanctions and civil penalties. They are terribly common now. "Okay, pay this amount and you do not have to go to court". It is all very simple. The main reason why they are a threat to rule of law is that they effectively make compliance with the law optional if you are happy to pay the amount. That is not what control or regulation should be about.

If I am told, "You must not park on a double yellow line, and if you do you go to court and you might go to prison", I know what I am being told. If I am told, "There is a car park, and to park there costs £5 an hour", I know what I am being told. If I am told, "There is a single yellow line. You should not park there, but if you do it will only cost you 40 quid and you will not need to go to court", it looks like a special law that only applies to people who do not want to pay £40 to park there. That is always the difficulty of civil penalties. This is effectively an arrangement for circumvention of the regulatory regime based on the payment of money.

The second problem goes to the second part of your question: £10 million sounds like a lot of money, but we are dealing with oil companies here. We are dealing with all sorts of companies. You probably all know more about this than I do, but even I know that a good accountant department of a reasonably large conglomerate can hide a million pound penalty in the accounts by lunchtime. You just have to find something with a loss to balance it against.

It is a very blunt tool, this kind of thing. I would have expected the Committee to be telling the Government, "This is about influence. These are discretionary requirements. It is about discussion, influence and

changing behaviour. What are the kind of pressures you might need to be able to exert in order to get engagement with this kind of influence, and what sort of ultimate penalties might achieve that degree of traction?" The answer to that is not a single figure. It is not £10 million, £20 million or £50 million. It is an approach.

Q77 **Alan Brown:** I understand what you are saying about companies, and that they can make £10 million disappear, or, depending on their turnover, £10 million is nothing anyway. Does that not come back to absolute clarity as to whether this penalty is imposed on an individual or on the company? Clause 34(1) says "discretionary requirements on a person", so is it possible that is a maximum £10 million fine that could be put on a single person? Obviously that is then not recoverable either, unless that person is extremely wealthy.

Daniel Greenberg: Yes. As I said before, I believe that there is a lack of clarity as to the cases in the Bill where "person" could and could not include "individual", to your first question, and that directly relates to this.

Q78 **Chair:** You earlier referenced R (Public Law Project) v Lord Chancellor, and the judgment on that at the Supreme Court. Am I right in saying that judgment was laid down after the drafting of this Bill was presented to the House? If so, presumably those drafting this Bill want to reflect that judgment in their broad powers.

Daniel Greenberg: No.

Q79 **Chair:** It came before they presented the Bill to the House.

Daniel Greenberg: Yes. I will look up the precise reference and write to the clerk.

Q80 **Chair:** All right, because surely a judgment of that kind would result in a memo being circulated to drafters of legislation, in that they may want to reconsider broad powers without explicit provisions.

Daniel Greenberg: It did have some influence. I have seen it referred to in internal Government guidance and discussions, yes.

Q81 **Chair:** We have referenced delegated powers a little today, and the scrutiny procedure around delegated powers. We have received your written submission, which was very helpful, but is there anything you wanted to submit today about the delegated powers memorandum that the Government submitted to us, which, I should just note, took a little while to receive?

Daniel Greenberg: You will be relieved to hear that I am not going to say anything much on this. There are one or two places in the delegated powers memorandum where useful examples are given. I would actually like to see more of that, but there are some useful examples. Those examples should be considered for translation to the kind of provision that we have been talking about before, or the kind of guidance material

that we have discussed before as well. Other than that, there are a few small points that caught my eye, but I have mentioned one or two of them already and we have covered the main themes. I am nervous of wearying the Committee.

Q82 **Chair:** What is the benefit to Ministers of keeping specificity in the delegated powers memorandum and not translating it on to the face of the Bill?

Daniel Greenberg: Let me slightly sidestep that question and talk about what the advantage to them is of bringing it into the explanatory notes and into guidance. They can be given legal effect, and that is advantageous to the Government. Let me put it in this way. We have talked about protocols and guidance, which I am in favour of, not overriding the law but supporting it in an appropriate way. Using the explanatory notes, which have a specific resonance in administrative law, to give examples can be very helpful for the courts, when taking relatively broad powers, in understanding what the legislative intent was. I am going to reverse your question and explain how it is useful for the Government if they do it in that way.

Q83 **Chair:** So it is not correct to say that the approach they are taking would, in their view, give them broader scope by being less specific on the face of the Bill.

Daniel Greenberg: I would hope not. You can see why I want to avoid, entirely reasonably, expressing any view as to the motives of the Government. I want to put the point positively that your pressure for more detail and explanation of how the thing is going to be used in documents that can be understood as part of the law is not against the Government's interest. It is in the Government's interest, and that is very important.

I have been very helpfully handed the reference. It was a 2016 case. It is R (Public Law Project) v Lord Chancellor in 2016, and it did resonate through Government legal circles. I have seen references to it in a number of places.

Chair: Just not with the officials working on this particular Bill, it seems. Unless there are any further questions, thank you, Mr Greenberg, for your time and your help in assisting the Committee. I will bring today's session to an end.