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Legal warning for Dutton's 'unconstitutional' gas plan

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Legal warning for Dutton's 'unconstitutional' gas plan

Nick Toscano, Mike Foley

Opposition Leader Peter Dutton's "Australian gas for Australians" scheme risks violating the Constitution and provoking an expensive High Court battle with fossil fuel giants as prominent legal experts warn the Coalition policy appears to be a discriminatory tax regime.

In a direct pitch to voters struggling with the cost of living, Dutton has vowed to bring down energy bills by putting a levy on Queensland's liquefied natural gas (LNG) shippers to force them to keep more fossil fuel supplies in Australia.

The plan does not affect LNG tied to long-term export deals to buyers in Asia but would impose a "gas security charge" on surplus cargoes of LNG shipped overseas from Gladstone instead of being sold locally.

Anne Twomey, one of Australia's leading constitutional law experts, said it met the basic definition of a tax and therefore risked violating a constitutional rule that federal taxes must be applied evenly between states.

"It looks and smells and sounds like a tax because it is," said Twomey, a constitutional law professor at the University of Sydney.

The Constitution forbids Commonwealth taxes that discriminate between states or parts of states. The inherent problem with the Coalition's proposal, Twomey said, was that it applied solely to the eastern Australian gas market and would not be imposed on the LNG industry in Western Australia, where the state government already has a 15 per cent gas-reservation rule.

"If it is a tax, then it's a tax that doesn't apply across the whole of Australia," she said.

"When big money is in play, you'll definitely end up in the High Court. But honestly, I don't think the Coalition would actually enact the law in this form that they are proposing now anyway – if they get into government, the government lawyers are going to tell them, 'no, you can't do it this way, it's unconstitutional'."

Emma Aisbett, an associate professor at the ANU School of Law, said it was likely that gas producers' multibillion-dollar investments in Queensland projects were covered by an investment treaty that would allow them to sue the government for lost profits.

Rosalind Dixon, a professor of law and director of the Gilbert + Tobin Centre of Public Law at UNSW, also issued a warning about the legality of the scheme.

The Coalition could attempt to convince the High Court to reconsider the legality of such a scheme based on the "effective economic impact" it would have on WA and east coast LNG companies, Dixon suggested.

"But that is not the current law – the current law doesn't look at effective economic impact, it looks at formal discrimination, and this is formally discriminatory," she said.

Queensland is the only eastern state where gas is super-chilled down to a liquid and sold overseas as LNG.

The state's three LNG ventures sell most of their supplies under long-term contracts to buyers in Asia. Their "uncontracted" gas is carved up between one-off deliveries on the international LNG spot market and sales in Australia.

The Coalition's levy is intended to force them to go further by reserving another 50-100 petajoules a year of surplus gas – enough to cover an extra 20 per cent of the entire east coast market – by making it uneconomic to sell spare gas overseas.

Modelling by Frontier Economics, released by the Coalition, claimed this could cut the wholesale gas price by about 15 per cent to $10 a gigajoule, which would in turn lower household gas bills by 7 per cent a year, and electricity bills by 3 per cent.

The policy has been welcomed by large manufacturing companies, including BlueScope Steel and Brickworks, which rely on affordable gas.

Dutton and Coalition resources spokeswoman Susan McDonald were contacted for comment.