2016

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Planning, Building and Environment Amendment Bill 2015 (No 2)

Amendments to be moved by the

Minister for Planning and Land Management

SUPPLEMENTARY EXPLANATORY STATEMENT

Presented by
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Minister for Planning and Land Management

Introduction

This explanatory statement relates to the Government amendment to the Planning, Building and Environment Legislation Amendment Bill 2015 (No 2) (Bill). It has been prepared in order to assist the reader of the amendment and to inform debate. It does not form part of the amendment and has not been endorsed by the Assembly.

The statement is to be read in conjunction with the amendment. It is not, and is not meant to be, a comprehensive description of the amendment. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision: this is a task for the courts.

Under s 6 of the *Electricity Feed-in (Renewable Energy Premium) Act 2008* (the Act)a NERL retailer must pay a prescribed sum for the electricity generated by eligible entities from renewable energy generators such as rooftop solar panels. Section 6 of the Act defines the amount of the sum by reference to section 8. Section 8 determines the amount that must be paid as a percentage of a "premium rate".

The "premium rate" is determined by the Minister under section 10 of the Act taking into account the advice of the Independent Competition and Regulatory Commission and the priorities and factors set out in section 10. The current determination of the premium rate under section 10 was set out in a 2011 determination, that is, the *Electricity Feed-in (Renewable Energy Premium) Rate Determination 2011 (No 1)* DI2011-48 (determination).

The percentage prescribed under section 8 of the Act varies according to specified circumstances including whether the renewable energy generator is a "micro" or "medium" renewable energy generator. A "micro renewable energy generator" means a renewable energy generator that has a total capacity of not more than 30kW (see s 5D of the Act). A medium renewable energy generator means a renewable energy generator that has a total capacity that is more than 30kW but is not more than 200kW (s 5D).

Overview – correction of determination on payments for renewable energy generators

The purpose of the Government amendment is to correct an error in the 2011 determination of the premium rate for renewable energy. The determination refers to *micro* renewable energy generators and as such it mistakenly omits to cover m*edium* renewable energy generators. Government policy was that the premium rate for renewable energy would apply to both micro and medium renewable energy generators, that is, all compliant renewable energy generators. To date the scheme has been administered and payments have been made in accordance with understood government policy that is as though the determination applied to all renewable energy generators and not just micro renewable energy generators.

The proposed government amendment to clause 3 of the bill is to correct the error in the 2011 determination so that it is consistent with government policy, that is, so that it applies to all compliant renewable energy generators and not just micro renewable energy generators.

Overview – retrospective operation of correction

The amendment has retrospective effect. In summary the Act will have the result that the determination will be taken to have applied to all compliant renewable energy generators from the date the determination originally took effect on 1 July 2011 as well as into the future. This retrospective effect is made clear in the express wording of proposed new section 30 in new Part 10 of the *Electricity Feed-in (Renewable Energy Premium) Act 2008*. New section 30(1) states that:

> "[the determination] is taken to have had effect on and after 1 July 2011 until it is revoked, for all purposes as if the references in the determination, section 4, to Micro Renewable Energy Generators were references to compliant renewable energy generators. "

New section 30(2) states that:

> "Without limiting subsection (1) and to remove any doubt, any payment made by an NERL retailer under section 6 (3) (Feed-in from renewable energy generators to electricity network) in accordance with section 8 (Payment for electricity from renewable energy generators) using the premium rate determined under the determination is taken to be, and always have been, a valid payment. "

It is necessary for the correction to be made through an Act amendment rather than through subordination legislation. This is because s 76 of the *Legislation Act 2001* prohibits subordinate legislation from having retrospective effect if the retrospective provision is a "prejudicial provision" i.e. a provision that operates to the disadvantage of a person by adversely affecting the person's rights or imposing liabilities on the person. The proposed correction in this case could be considered to be prejudicial in that prior to the amendment the premium rate in the determination applied to micro renewable energy generators only and not to medium renewable energy generators with the effect that there was no premium rate for medium renewable energy generators. In the absence of a premium rate for renewable energy generators, the amount that a NERL retailer must pay for energy generated by a medium renewable energy generator under s 6 of the Act is effectively zero. The proposed correction will change this zero amount to an amount based on the premium rate set out in the determination effective from 1 July 2011.

An alternative option for clarifying the rate would have been to remake the determination through a Disallowable Instrument. However, this would only have had effect from its commencement date onwards and would not have had the desired effect of validating past payments. A legislative amendment is therefore the only way to achieve this outcome.

There are no specific human rights in the Human Rights Act which are infringed by the amendment. Section 25 of the *Human Rights Act 2004* refers to retrospectivity in the context of criminal guilt and this is not an issue in this case.

A number of potential issues with retrospective laws have been raised by the Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee) (Committee) of the 6th Assembly in *Scrutiny Report No 12* of 27 June 2005 and *Scrutiny Report No 38* of 26 February 2007.

In the abovementioned *Scrutiny Report No 38* of 26 February 2007, the Committee emphasised the common law principle that laws should be interpreted as having prospective effect only and not retrospective effect. The proposed amendment will be able to operate consistent with this principle in that it makes it expressly, unambiguously clear that the provision is to have retrospective effect.

In its *Scrutiny Report No 38* of 26 February 2007 the Committee affirmed its approach taken in the abovementioned 2005 report and in so doing stated as follows:

> "In *Scrutiny Report No 12* of the *6th Assembly*, concerning the Children and Young People Amendment Bill 2005, the Committee said:
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> > The essential idea of a legal system is that current law should govern current activities. … Retrospective legislation 'is contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the existing law': F A R Bennion, *Statutory Interpretation* (3rd ed, 1997) 235, citations omitted.
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> Bennion's statement points to one way in which a retrospective law is unfair – that is, that it disappoints the expectations of those who assumed that the quality of their past acts would be assessed on the basis of the law as it then stood. It is important to keep this in mind when assessing whether a particular law having retrospective effect is unfair
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> ... "

This amendment does have retrospective effect unlike most laws which have prospective effect only. As noted in the abovementioned Committee reports, retrospectivity can operate to create unfairness by changing the legal quality of past acts. However, in this instance the retrospectivity operates to confirm and validate previous payments already made by NERL retailers to operators of medium renewable energy generators, payments which were based on existing Government policy. In this way, the amendment is not unfair because it validates past acts which were conducted in the expectation that they were valid. It confirms the expectations of those who are impacted. Essentially, the amendment corrects an error and to restore an accepted and understood position.

PROVISIONS IN DETAIL

The following sets out in detail the effect of the following two Government amendments to the Planning, Building and Environment Amendment Bill 2015 (No 2).

1
Clause 3
Proposed new dot point
Page 2, line11–

Amendment 1 amends clause 3 of the Bill by inserting into page 2, line 11 the new dot point:

- *Electricity Feed-in (Renewable Energy Premium) Act 2008*

This is added to make the list of Acts amended by the Bill complete.

2
Proposed new part 2A
Page 3–

Amendment 2 inserts new part 2A into the Bill.

New part 2A contains new clause 4A. New clause 4A amends the *Electricity Feed-in (Renewable Energy Premium) Act 2008*. New clause 4A inserts into this Act new part 10, which contains new ss 30 and 31.

New s 30(1) amends the *Electricity Feed-in (Renewable Energy Premium) Rate Determination 2011 (No 1)* (determination) so that it refers to 'compliant renewable energy generators' rather than 'Micro Renewable Energy Generators.' The original policy intention of the determination was that it would apply to both micro and medium renewable energy generators. This is how the scheme was administered and payments have been made on this basis. However, due to an error of wording the determination did not apply the premium rate to medium renewable energy generators. This amendment corrects this error to give effect to the original intention of the determination.

This section has retrospective effect from the date of the original determination. The result of this is that the premium rate set in this determination under s 10 of the Act applies to medium renewable energy generators, and is taken to have so applied from 1 July 2011, when the original delegation commenced.

New s 30(2) validates any previous payments which have been made under the determination. This is to provide certainty about the administration of the scheme prior to the amendment.

New s 31 provides that part 10 expires on the day it commences. This is merely procedural and the effect of part 10 continues through the changes it makes to the determination.