2017

LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY

ELECTRICITY FEED-IN (LARGE-SCALE RENEWABLE ENERGY GENERATION) AMENDMENT BILL 2017

EXPLANATORY STATEMENT

Circulated by authority of
Mr Shane Rattenbury MLA
Minister for Climate Change and Sustainability

EXPLANATORY STATEMENT

This explanatory statement relates to the *Electricity Feed-in (Large-scale Renewable Energy Generation) Amendment Bill 2017* (the Amendment Bill). It has been prepared to assist the reader of the Amendment Bill and to help inform debate on it. It does not form part of the Amendment Bill and has not been endorsed by the Legislative Assembly.

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

Background

The Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011 (the Act) provides feed-in tariff (FiT) support payments for large-scale electricity generators, greater than 200kW in capacity, that have a renewable energy source of solar, wind or another source declared by the Minister under the Act.

Part 3 of the Act allows for the creation of FiT entitlements which are the right of the FiT entitlement holder to receive FiT support payments in return for its generation of eligible electricity. Section 14 of the Act allows a FiT entitlement holder to surrender its entitlement by giving written notice to the Minister who must confirm the surrender by written notice (a surrender notice) to the entitlement holder. The surrender becomes effective on the day and at the time stated in the surrender notice. The Territory has a target (renewable electricity target) of sourcing 100 per cent of electricity in the ACT from renewable energy by 2020 under the Climate Change and Greenhouse Gas Reduction (Renewable Energy Targets) Determination 2016 (DI2016–38). At present, the Act does not allow the Minister to take into account the impact that an entitlement surrender might have on the Territory's ability to meet its renewable electricity target when issuing a surrender notice.

Part 4 of the Act defines FiT support payments and section 18 of the Act obliges the ACT electricity distributor to pay FiT support payments to the holder of FiT entitlement. However, the Act does not grant the Minister any oversight of the amount(s) that the ACT electricity distributor passes on to the ACT's electricity retailers to compensate it for the FiT support payments. The Act also does not grant the Minister the power to require an audit of the FiT support payment information provided by the ACT electricity distributor.

Overview

As noted above, section 14 of the Act allows a FiT entitlement holder to surrender its entitlement by giving written notice to the Minister who must confirm the surrender by written notice (a surrender notice) to the entitlement holder. The surrender becomes effective on the day and at the time stated in the surrender notice. These provisions do not permit the Minister to take into account the impact that an entitlement surrender might have on the Territory's ability to meet its renewable electricity target when issuing a surrender notice. An immediate surrender could have the effect of disrupting the ability of the Territory to meet this target if the Territory is not able to obtain an alternative source of renewable electricity within the required timeframe.

Several options were considered to address the potential impact of a FiT entitlement surrender on the Territory's ability to meet its renewable electricity target. These included the status quo and a new provision to allow the Minister to reject a FiT entitlement surrender. The status quo option was rejected because it did not resolve the risk that an entitlement holder might surrender its FiT entitlement and inhibit the achievement of the Territory's renewable electricity target. The option of allowing the Minister to reject a FiT entitlement surrender was not pursued as it would amount to a potentially inequitable impost on the FiT Entitlement holder and also because there was conceivably some potential for such actions to amount to property acquisition on unjust terms contrary to s23 of the *Australian Capital Territory (Self Government) Act 1988* (Commonwealth).

The Amendment Bill addresses the potential impact of a FiT entitlement surrender by creating a new regulation under the Act that introduces matters the Minister must consider when confirming a FiT entitlement surrender under s14(2) of the Act. These matters include the objectives of the Act, any other FiT entitlements that have been executed under the Act, as well as how long it would take the Territory to obtain an alternative source of renewable electricity that is equivalent in quantity to the source being surrendered.

The Amendment Bill addresses the absence in the Act of any oversight granted to the Minister of the amount(s) that the ACT electricity distributor passes on to the ACT's electricity retailers to compensate it for the FiT support payments. It also addresses the absence of any ability to require an audit of the FiT support payment information provided by the ACT electricity distributor. The Amendment Bill amends part 4 of the Act to allow the Minister to require the ACT electricity distributor to apply for an annual determination of reasonable costs of FiT support payments that will set the maximum amount that it can pass on to ACT electricity retailers for FiT support payments, including the cost of administering the FiT support payments, in the forthcoming financial year.

The Amendment Bill also amends s21 of the Act to permit the Minister to require an audit of large FiT cost information provided to the ACT Government by the ACT electricity distributor in accordance with requirements to be determined by the Minister in a Disallowable Instrument. The audit provisions make the Act consistent with the *Electricity Feed-in (Renewable Energy Premium) Act 2008*.

Scrutiny of Bills Committee Principles

The following addresses the Scrutiny of Bills Committee principles.

(a) unduly trespass on personal rights and liberties;

The Amendment Bill does not unduly trespass on personal rights and liberties because it only applies to business organisations being the ACT electricity distributor and renewable electricity companies that hold ACT large FiT entitlements.

(b) makes rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

The Amendment Bill does not make rights, liberties and/or obligations that are unduly dependent on insufficiently defined administrative powers.

With respect to the potential surrender of FiT entitlements, new section 14(4) (clause 4) requires the Minister, when fixing the day and time that the surrender of a FiT entitlement takes effect, to consider any matters prescribed by regulation. A new regulation made under the Act, that forms part of the Amendment Bill (clause 11), prescribes the matters to be considered as: the objects of the Act; and deed of FiT entitlement that has been executed; and the period of time the Territory is likely to take to obtain another source of electricity that is generated from a renewable energy source, and is equivalent in quantity, to the sources to which the surrendered FiT entitlement relates. These requirements indicate that this new power is sufficiently defined.

New section 20C(2) (clause 6) permits the Minister to make a determination of the reasonable costs for the next financial year of the ACT electricity distributor meeting its obligations under the Act. New section 20C(2) (clause 6) requires that, when the Minister makes the determination, the Minister must consider the application of any determined methodology in estimating reasonable costs and must also consider the need to ensure that neither ACT electricity consumers, nor the ACT electricity distributor, are unreasonably financially disadvantaged by the determination. These requirements indicate that this new administrative power is sufficiently defined.

Under new section 21A(2)(c) (clause 7) the Minister may require the electricity distributor to conduct an audit of information given to the Minister by the distributor. The audit must be done in accordance with procedures determined by the Minister. New section 21A(4) (clause 7) does not allow the Minister to commission more than one audit in any 12 month period. The audit procedures determined by the Minister are a disallowable instrument and must be prepared following consultation with the electricity distributor. This provision is necessary to permit the Minister to check the accuracy of information provided as might be considered necessary from time to time.

The restriction on the number of audits and the requirement as to procedures indicates that this new administrative power is sufficiently defined.

(c) makes rights, liberties and/or obligations unduly dependent upon nonreviewable decisions;

The Amendment Bill does not make rights, liberties and/or obligations that are unduly dependent upon nonreviewable decisions. New section 20B (clause 6) requires the electricity distributor, each financial year, to apply to the Minister for a determination of the reasonable costs for the next financial year (the upcoming financial year) of the distributor meeting its obligations under the Act. New section 20C(3) (clause 6) provides for the Minister to determine the reasonable costs for the coming financial year taking into account the application and related matters. New section 21B (clause 8) makes the Minister's determination of reasonable costs of the ACT electricity distributor's compliance with the Act a reviewable decision i.e. subject to ACAT merit review. New section 21D (clause 8) allows the ACT electricity distributor to apply to ACAT for review of this reviewable decision. This is essentially the key substantive decision of the Minister with respect to reasonable costs and this decision is appropriately subject to ACAT merit review. .

Under new section 21A(2)(c) (clause 7) the Minister may require the electricity distributor to conduct an audit of information given to the Minister by the distributor. The decision to require an audit is not subject to ACAT merit review. This is appropriate because such a decision does not directly affect the substantive obligation of the electricity distributor i.e. in relation to the application for and determination of reasonable costs under new sections 20B, 20C (clause 6). The audit requirement is rather a procedural process to facilitate the assessment of the accuracy of reasonable costs estimates. Further, the requirement and its exercise is limited as follows. The audit must be done in accordance with procedures determined by the Minister. The audit procedures determined by the Minister are a disallowable instrument and must be prepared following consultation with the electricity distributor. New section 21A(4) (clause 7) does not allow the Minister to commission more than one audit in any 12 month period. The particular nature of this decision and the limitations on its import and exercise indicate that it is appropriate that this decision not be subject to ACAT merit review.

(d) inappropriately delegates legislative powers; and

The Amendment Bill does not delegate legislative powers.

(e) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

The Amendment Bill does not insufficiently subject the exercise of legislative power to parliamentary scrutiny.

New section 20D provides for the Minister to determine the methodology that must be applied by the electricity distributor in preparing an estimate of reasonable costs for the purpose of a reasonable costs application under section 20B. The determination is a notifiable instrument that must be prepared in consultation with the electricity distributor. This determination is of a procedural nature consistent with the framework of the reasonable costs system in the Act and, as such, does not insufficiently subject the exercise of legislative power to parliamentary scrutiny. The provision is a notifiable instrument and is not disallowable. This is consistent with the fact that this instrument is of a mechanistic, detailed nature and has a limited, technical function and must be prepared in consultation with the electricity distributor.

New section 21A(2)(c) (clause 7) provides for the Minister to determine the procedures that must be followed by the electricity distributor in undertaking an audit that may be required by the Minister under new section 21A(2). The determination is a disallowable instrument that must be prepared in consultation with the electricity distributor. This determination is also of a procedural nature intended to support the framework in the Act in relation to the assessment of reasonable costs. Further, the instrument is disallowable. For these reasons the provision does not insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Retrospectivity

The commencement clause of the bill (clause 2) provides that clause 4 and clause 11 of the bill are taken to have commenced on 14 September 2017, that is they have retrospective effect.

Clause 4 of the bill inserts new section 14 (4) into the Act which requires the Minister to take into account the prescribed matters set out in the regulation when considering the time at which a proposed surrender will take effect. The bill includes a regulation setting out these matters (clause 11, new section 3 of the Electricity Feed-in (Large-scale Renewable Energy Generation) Regulation 2017). The prescribed matters are the objectives of the Act; any deed of FiT entitlement in place; and the time that is likely to be required for the Territory to obtain another source of electricity that is generated from a renewable energy source and is of the same quantity as the source to which the FiT entitlement that is the subject of a surrender application relates. As noted above, these provisions are put in place to permit the Minister to take into account the impact that an entitlement surrender might have on the Territory's ability to meet its renewable electricity target when issuing a surrender notice. An immediate surrender could have the effect of disrupting the ability of the Territory to meet this target if the Territory is not able to quickly obtain an alternative source of renewable electricity.

The retrospective operation of commencement clause 2 is a precautionary measure. The purpose is to ensure that the effectiveness of the provisions on the timing of surrender of FiT entitlements is not able to be reduced by actions prior to the commencement of the bill. There is a possibility that, following presentation of the Amendment Bill in the Assembly, a holder of a FiT entitlement may elect to progress a surrender of the FiT entitlement under existing section 14 before the Amendment Bill commences operation. This action may be taken to effect a relatively quick surrender under the current legislation without the potential for delay that may arise under new section 14 (4) (clause 4) and new section 3 of the *Electricity Feed-in (Large-scale Renewable Energy Generation) Regulation 2017* (clause 11). Such an action would remove the ability of the Minister to take into account impacts on the renewable electricity target of the relevant surrender.

It is considered important to remove the potential for such an action to ensure the effectiveness of the Amendment Bill provisions on surrender of FiT entitlements. It is also necessary to ensure a 'level playing field'. This measure will mean that the regulatory framework on surrender is the same for all FiT entitlement holders from the moment the new surrender provisions are tabled in the Assembly (14 September 2017), irrespective of whether the holder is in a position to apply for an early surrender prior to the subsequent commencement of the bill.

The Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) and its predecessors (legislative scrutiny committee) have provided analysis and comment on several occasions on bill and instrument provisions that have a retrospective operation. In the case of bill provisions of a retrospective nature, the following reports are noted by way of example:

- Standing Committee on Justice and Community Safety (incorporating the duties of a Scrutiny of Bills and Subordinate Legislation Committee) Scrutiny Report No 2 of 9 March 1999 (refer to page 1 of section on Bills – comments on Dangerous Goods (Amendment) Bill 1999) (1999 Report); (website: https://www.parliament.act.gov.au/__data/assets/pdf_file/0004/376762/scrutiny9902.pdf)
- Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee) Scrutiny Report No 31 of 23 August 2006 (refer to page 2, comments on Remuneration Tribunal Amendment Bill 2006) (2006 Report) (website: https://www.parliament.act.gov.au/__data/assets/pdf_file/0005/371678/6scrutiny31.pdf).

In the above reports the legislative scrutiny committee expressed concerns with provisions in proposed laws that have retrospective effect based in part on a common law principle that legislation should be interpreted as not having retrospective effect subject to express provision to the contrary.

The 1999 report also noted that this common law principle is a guide to the interpretation of statutes and not a limitation on the power of the Legislative Assembly. The 1999 Report indicates that matters considered by the courts in applying this interpretation principle could assist the consideration of whether a retrospective provision is justified. The 1999 Report summarised this approach as follows (under heading "Retrospectivity – an introduction"):

> "The principle of the common law is a principle to guide the interpretation of statutes. It is not a limitation of the power of the law-making body. The High Court of Australia has made it clear that no such limitation may be found in the Constitution of the Commonwealth, and it is unlikely that there is any such limitation on the powers of the Legislative Assembly (leaving aside Bills of Attainder): see *Polyukhovich v Commonwealth* (1991) 101 ALR 545.
>
> The effect of the principle of the common law is that the courts will give an interpretation to a statute which will avoid the statute having retrospective effect. Of course, the interpretation given must be one which is consistent with the purpose of the law. That interpretation must also be one which can be accommodated to the words of the statute. If it is clear that the statute is intended to have a retrospective operation, the courts must respect that intention and give effect to the statute.
>
> The Legislative Assembly is not a court of law which is called upon to apply the principle that a statute should be construed as not having a retrospective operation. What the Assembly needs to consider is whether a law which conflicts with this principle should be enacted. The Assembly may, however, be guided by the approach of the courts."

In examining this principle of interpretation, the 1999 Report emphasised issues such as whether the relevant laws impose retrospective criminal liability or affect substantive rights as opposed to mere regulation of procedural matters. The 2006 Report emphasised the extent to which a law may affect past events and transactions which people at the time understood to be valid and would reasonably expect that they remain so. The 2006 Report also pointed to the desirability of informing the public prior to the retrospective commencement date of the proposed retrospective law.

In regard to these matters, it is important to note that the retrospective provision in this case does not impose any retrospective criminal or civil liability. The provisions do not alter the effect of transactions already made. The provisions have no effect on a current or recent tribunal or court action.

Further, the new provisions themselves have a limited effect. The provisions do not remove the substantive right of the holder of a FiT entitlement to surrender the entitlement by notice to the Minister. The change is that the new provisions (clause 4, 11) make clear the matters that the Minister must take account of in determining the timing of the date on which the applied for surrender takes effect.

Industry and the general public will be aware of the 14 September commencement date from the moment the bill is presented to the Assembly. Announcement of the measure prior to this presentation date could risk the effectiveness of the new measures in the manner indicated above.

For these reasons, the retrospective provisions in this bill are reasonable and justified.

Human Rights

The Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) terms of reference requires consideration of human rights, among other matters. In this case, no human rights are impacted.

Outline of Provisions

Clause 1 Name of Act

This clause names the Amendment Bill as the *Electricity Feed-in (Large-scale Renewable Energy Generation) Amendment Act 2017*.

Clause 2 Commencement

Clause 2(1) provides that clause 4 and part 3 of the bill (clause 11) are deemed to have commenced on 14 September 2017. These are the clauses related to the surrender of FiT Entitlements. This means that clauses 4 and 11 have retrospective effect. The reasons and justification for this are set out in the overview to this bill.

Clause 2(2) provides that the remaining provisions of the Amendment Bill commence on the day after the notification day of the Act.

Clause 3 Legislation amended

This clause states the Amendment Bill amends *the Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011* and the *Electricity Feed-in (Large-scale Renewable Energy Generation) Regulation 2017*.

Clause 4 FiT entitlement–surrender

This clause inserts a new section 14(4) into the Act that says that, when fixing the days and time for the surrender of a FiT entitlement to take effect, the Minister must consider any matters prescribed by regulation.

Clause 5 New division 4.1 heading

This clause inserts a new heading into the Act before section 17: Division 4.2 Calculation and payment of FiT support payments.

Clause 6 New division 4.2

This clause inserts three new sections into the Act: 20A, 20B, 20C and 20D.

Section 20A says that the ACT electricity distributor may pass on to electricity retailers the cost of meeting its obligations under the Act including the cost of FiT support payments and the cost of administering FiT support payments. It also says that the amount passed on to electricity retailers must not exceed the amount determined under section 20C of the Act for the financial year.

Section 20B requires that the ACT electricity distributor must apply each year to the Minister for a determination of the amount it can pass on to electricity retailers for costs defined in s20A of the Act. The section defines the time by which an application must be made by and what it must contain. It also empowers the Minister to require further information from the ACT electricity distributor.

Section 20C defines the time within which the Minister must make a reasonable costs determination and issues the Minister must consider in making the determination. It also says that, if the Minister does not make a determination within the required timeframe, then the amount in the ACT electricity distributor's reasonable cost application will be deemed to be the reasonable cost.

Section 20D allows the Minister to determine a methodology to be applied by the ACT electricity distributor in estimating the cost of the FiT support payment.

Clause 7 New section 21A

This clause allows the Minister to require the ACT electricity distributor to commission an audit of the information it provides under section 21 of the Act. It also establishes a maximum frequency of the audits, requires the Minister to consult with the ACT electricity distributor about the scope of such an audit and determines non-compliance penalties.

Clause 8 New part 5A

This clause inserts three new sections into the Act: 21B, 21C and 21D.

Section 21B defines a reviewable decision.

Section 21C requires that, if the Minister makes a reviewable decision, the Minister must give a reviewable decision notice to the ACT electricity distributor.

Section 21D allows the ACT electricity distributor to apply to the ACT Civil and Administrative Tribunal (ACAT) for a review of a reviewable decision.

Clause 9 Dictionary, note 2

This clause inserts new entries into the Act's dictionary for definitions of ACT and penalty unit.

Clause 10 Dictionary, new definition of *reasonable costs determination*

This clause inserts a new entry into the Act's dictionary for reasonable cost determination.

Clause 11 New section 3

This clause creates a new regulation under the Act that prescribes matters the Minister must consider when determining the day and time that a surrender takes effect in a surrender notice. These matters include the objectives of the Act, any other FiT entitlements that have been executed under the Act, and how long it would take the Territory to obtain an alternative source of renewable electricity that is equivalent in quantity to the source being surrendered.