

2020

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**ELECTRICITY FEED-IN (RENEWABLE ENERGY PREMIUM)
AMENDMENT BILL 2020**

EXPLANATORY STATEMENT

and

**HUMAN RIGHTS COMPATIBILITY STATEMENT
*(Human Rights Act 2004, s 37)***

Presented by

Mr Shane Rattenbury MLA

Minister for Climate Change and Sustainability

This explanatory statement relates to the Electricity Feed-in (Renewable Energy Premium) Amendment Bill 2020 as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate. It does not form part of the Bill and has not been endorsed by the Legislative Assembly.

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

BACKGROUND

The purpose of this Bill is to implement certain recommendations of the 2018 review of the *Electricity Feed-in (Renewable Energy Premium) Act 2008* (the Act), and the associated 2019 audit of data on the ACT Small and Medium-scale Feed-in Tariff Scheme (the Scheme), which had been provided to the ACT Government for annual reporting purposes.

The recommendations addressed by this Bill relate to seeking further information from the reporting entity for annual reporting purposes, recovery of reasonable administration costs for the ACT electricity distributor (the costs as determined by the Minister), and clarification of existing penalty provisions in the Act, to strengthen requirements around the reliability of reported information.

The amendments are intended to improve the reliability and timeliness of reporting of Scheme data, and ensure that the Scheme continues to provide value to the ACT community.

The Bill is not a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

OVERVIEW OF THE BILL

In summary, the amendments:

- Allow for electricity distributors to pass on reasonable costs of administering the Scheme to eligible entities. Electricity distributors can apply to the Minister for a determination of the maximum amount they can pass on, and the Minister must make a determination for this amount, if a distributor has made an application.
- Introduce a new requirement for reporting entities to give the Minister any other information reasonably required to ensure the accuracy of the information provided for annual reporting purposes.
- Make clear that it is an offence if a reporting entity is required to give the Minister information and either fails to do so, or the information is false or misleading and the reporting entity knows this or is reckless about it.

- Broaden the ability for the Minister to request a reporting entity undertake an audit of information provided for annual reporting purposes if the Minister reasonably believes the information is false, misleading or incomplete, or there is a risk that it is false, misleading or incomplete. The audit must be completed within 3 months of a request being made.
- Clarify the existing offence provision to make clear that a reporting entity commits an offence if the Ministers requests an audit and the reporting entity fails to undertake that audit within three months.

CONSULTATION ON THE PROPOSED APPROACH

Evoenergy has been consulted regarding the audit findings and how it proposes to rectify any data issues. The Human Rights and Criminal Law units at the Justice and Community Safety Directorate were consulted regarding human rights impacts of the Bill and amendments to offence provisions of the Act.

CONSISTENCY WITH HUMAN RIGHTS

Rights engaged

The Bill primarily introduces obligations on a corporate entity; the ACT electricity distributor, and as such the Bill's engagement of human rights contained in the *Human Rights Act 2004* is limited.

However, the Bill does have some impact on eligible entities. An eligible entity, as defined in section 5F of the Act, may include a natural person; a person who owns, leases or occupies premises on which there is a generator.

Right to a fair trial

Section 21(1) of the *Human Rights Act 2004* provides that:

Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

1. Nature of the right and the limitation (s28(a) and (c))

The Bill allows the Minister to make a determination of the maximum costs of administering the Scheme that the electricity distributor may pass on to an eligible entity. Although the Bill merely authorises the passing on of the costs, instead of requiring it, this may still be considered to engage the right to a fair trial: individuals entered the scheme with an expectation of certain rights and obligations, and are now subject to a new scheme, with costs potentially passed on to them.

However, the Bill's engagement with the right to a fair trial is limited; the Minister in making a maximum costs determination must ensure that eligible entities, in addition to ACT electricity consumers and the distributor, are not unreasonably financially disadvantaged by the determination. The Minister's determination is a disallowable instrument, and as such requires an accompanying explanatory statement, and is subject to scrutiny by the Legislative Assembly.

2. *Legitimate purpose (s28(b))*

The Bill seeks to facilitate improvements to administration of the Scheme, including improving reporting processes and the accuracy of data provided by the distributor. One of the means of achieving the Bill's objective is allowing for the distributor to pass on reasonable costs of administering the Act, including the new obligations introduced by this Bill, to eligible entities.

3. *Rational connection between the limitation and the purpose (s28(d))*

Allowing distributors to pass on reasonable administration costs, and as such the associated limitation on the right to a fair trial, is capable of achieving the Bill's objective. The ability for the distributor to recover reasonable administration costs is a key aspect of the Bill's provisions seeking to improve the overall administration of the Act.

4. *Proportionality (s28 (e))*

This approach is the least restrictive means reasonably available to achieve the objective of the Bill of allowing reasonable costs to be passed onto eligible entities. A safeguard has been incorporated into the Bill in providing that the Minister must not unreasonably financially disadvantage eligible entities, and making the determination a disallowable instrument will allow the Legislative Assembly to check the Minister's compliance with this requirement.

It is not practical to build in an administrative review mechanism in section 11D because a ruling of the ACT Civil and Administrative Tribunal setting aside an electricity distributor's decision to pass on the administration costs would impact, particularly financially, other eligible entities and the electricity distributor. To the extent possible, the Bill should not disturb the financial certainty of the eligible entities, electricity consumers and the energy distributors.

APPENDIX A

Electricity Feed-in (Renewable Energy Premium) Amendment Bill 2020

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Electricity Feed-in (Renewable Energy Premium) Amendment Bill 2020**. In my opinion, having regard to the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

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Gordon Ramsay MLA
Attorney-General

CLAUSE NOTES

Clause 1 Name of Act

This clause names this Act as the *Electricity Feed-in (Renewable Energy Premium) Amendment Act 2020*.

Clause 2 Commencement

This clause provides that the Act commences on the day after its notification day.

Clause 3 Legislation amended

This clause provides that the Act amends the *Electricity Feed-in (Renewable Energy Premium) Act 2008*.

Clause 4 Electricity distributors to give information to Minister

Section 11B (4)

This clause introduces a new section 11B (4) to the Act. It relates to the report that the Minister is required to prepare, within 6 months after the end of the financial year, under the existing section 11A. The existing section 11B (3) requires reporting entities to provide certain information to the Minister, to enable preparation of the report.

The new section 11B (4) provides that if requested in writing, a reporting entity must give the Minister any other information the Minister reasonably requires to ensure the accuracy of the information provided under section 11B (3). The additional information must be provided within 10 working days after a request has been made.

Examples of other information that may be required include:

- Information about how required information is recorded
- Information about how the reporting entity ensures the accuracy of the required information
- Information about the experience and training of staff responsible for recording and reporting on the required information

The purpose of this requirement is to provide assurance that the information provided by the reporting entity is accurate and reliable.

The existing section 11B provides that is an offence for a person who is a reporting entity to engage in conduct, the result of which is that the person fails to give the Minister required information. References to both 'conduct' and 'result' in this section create uncertainty about what action by the person may constitute an offence.

New section 11B provides for two offences; section 11B (5) provides it is an offence for a reporting entity to fail to provide information, and section 11B (6) provides it is an offence for the reporting entity to knowingly or recklessly provide information which is false or misleading.

There has been no change to the maximum penalty under section 11B of 30 penalty units.

The purpose of these offences is to provide a strong indication of the importance of reporting entities providing accurate and reliable information.

Clause 5 Audit of information given to Minister

Section 11C (1)

This clause substitutes a new section 11C (1). The existing sub-section 11C (1) provides that the Minister may require a reporting entity to undertake an audit of the information provided under section 11B, if the Minister believes on reasonable grounds the information is untrue, misleading or incomplete.

The new sub-section 11C (1) provides that the Minister may request this audit if they believe on reasonable grounds the information is false, misleading or incomplete, or there is a risk the information is false, misleading or incomplete.

The purpose of this amendment is to address circumstances in which the information may have been received, but there are concerns about the likely accuracy of the information.

Clause 6 Section 11C (2) (aa)

This clause introduces a requirement that an audit requested by the Minister under section 11C (1) must be completed within 3 months after it is requested.

Clause 7 Section 11C (4)

This clause substitutes a new section 11C (4). The existing sub-section 11C (4) provides that a person commits an offence if the person engages in conduct, as result of which they fail to undertake the audit. References to both 'conduct' and 'result' in this section create uncertainty about what action by the person may constitute an offence.

The new sub-section 11C (4) clarifies that a reporting entity commits an offence if the Minister requires it to undertake an audit under subsection 11C (1) and the entity fails to undertake the audit.

A maximum penalty of 400 penalty units is set for this offence, which is consistent with the existing section 11C (4).

Clause 8 New part 3B

This clause introduces a new Part 3B, 'Passing on reasonable administration costs'. This part enables an electricity distributor to pass on reasonable costs for administering the ACT Small and Medium-scale Feed-in Tariff Scheme.

Section 11D enables an electricity distributor to pass on its Scheme administration costs to an eligible entity, up to the maximum amount. 'Administration costs' are defined as costs reasonably incurred by the distributor in meeting its obligations under the Act and 'maximum amount' is that determined by the Minister under new section 11F.

Section 11E allows an electricity distributor, in each financial year, to apply to the Minister for a determination of the maximum amount of administrative costs the distributor may pass on under section 11D. It specifies that the application must be made no later than 6 months before the beginning of the financial year for which the determination is sought, and outlines the information that the application must include.

This section also enables the Minister to require the distributor to provide further information within 1 month of receiving the application, if it does not contain sufficient information for the Minister to make a decision, and allows 10 working days for the distributor to provide this further information.

Section 11F provides that, if the electricity distributor makes an application under section 11E, the Minister must determine the maximum amount that an electricity distributor may pass on to an eligible entity, no later than 2 months after receiving an application. It provides that the Minister must consider the information the distributor has provided, as well ensuring that neither eligible entities nor the electricity distributor are unreasonably financially disadvantaged by the determination.

This section further provides that the Minister may determine the reasonable costs to be the estimated administration costs advised by the distributor in its application, or another amount. If the Minister does not make a determination within the required period, the maximum amount the distributor may pass on is taken to be the estimated administration costs advised in the distributor's application.

A determination by the Minister under this section is a disallowable instrument, subject to scrutiny by the Assembly.