



INFORMATION, ANALYSIS
AND ADVICE FOR THE PARLIAMENT

INFORMATION AND RESEARCH SERVICES

Bills Digest
No. 49 2002–03

Renewable Energy (Electricity) Amendment Bill 2002

ISSN 1328-8091

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Published by the Department of the Parliamentary Library, 2002

I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 49 2002–03

Renewable Energy (Electricity) Amendment Bill 2002

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Law and Bills Digest and the Science, Technology, Environment and
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18 October 2002

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Renewable Energy (Electricity) Amendment Bill 2002

Date Introduced: 27 June 2002

House: House of Representatives

Portfolio: Environment and Heritage

Commencement: The operational aspects of the Bill commence on a day to be fixed by Proclamation, or within six months of Royal Assent, whichever is the sooner.

Purpose

To make various legislative adjustments to the electricity from renewable energy sources scheme. These adjustments include the creation of significant new penalties.

Background

The *Renewable Energy (Electricity) Act 2000* (the Act) requires Australian electricity retailers and other large buyers of electricity ('liable entities') to collectively source an additional 9 500 GWh per annum of electricity from renewable sources by 2010. This measure was designed to push the level of renewables-based electricity generation from 10.7 per cent in the late 1990s to a projected 12.7 per cent by 2010. It was also designed to increase investment in the renewable energy sector and was estimated to potentially reduce greenhouse gas emission by around 7 million tonnes per annum by 2010, through renewable energy electricity generation displacing high emission intensity fossil fuel based power generation.

The scheme requires liable entities to surrender to the Renewable Energy Regulator sufficient tradeable, renewable energy certificates (RECs) to cover their required purchases of electricity generated from renewable sources. The purpose of the RECs is to enable liable entities to avoid or reduce the amount of any renewable energy 'shortfall charge' that they would otherwise have to pay when they acquire electricity from non-renewable sources. Liable entities will generally acquire the RECs by purchasing them. The RECs themselves are created by accredited power stations that generate power from renewable energy sources in excess of a 'baseline' amount. This baseline is set according

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to how much power was generated by the relevant power station from renewable sources in 1997.¹ One REC is generated for every 1 MWh of renewable energy power generated in excess of the baseline.

The number of RECs that must be surrendered in order to avoid the shortfall charge are calculated as a percentage of electricity purchased. In 2002, the 'renewable power percentage' (RPP) was 0.62%. Thus if an electricity retailer buys 100 000 MWh of liable electricity over 2002, it will be required to surrender 620 RECs (0.62% of 100 000) in order to avoid the charge. The RPP increases year by year up to 2010: in 2001, it was 0.24%.² If liable entities do not surrender sufficient RECs, the shortfall charge is \$40 per MWh. Thus if the retailer in the previous example had surrendered only 500 RECs for their 2002 purchases, it would be liable for a charge of \$4 800.

The scheme is an example of demand stimulation with the intention to accelerate the uptake of renewable energy in grid-based electricity supply. A wide range of renewable energy sources has been identified as being eligible for the purposes of this measure. These are: solar, wind, ocean, wave and tidal, hydro, geothermal, biomass, specified wastes, solar water heating, renewable stand alone power systems and renewable fuels when co-fired with fossil fuels.

Further background on the scheme is contained in the Digest to the Act <http://www.aph.gov.au/library/pubs/bd/1999-2000/2000bd198.htm> as well as the website of the Renewable Energy Regulator (the Regulator)³, the administrator of the Act.

The Regulator has indicated that in the Act's first year of operation approximately 600 000 RECs were generated, about twice the 2001 target⁴ and that over one hundred and twenty renewable energy power stations have been accredited. The Regulator has also stated that that accredited stations included those using 'hydro and sugar cane through wind and solar to sewerage gas and waste chip fat' and new renewable energy project proposals included 'wave power, chicken litter, and wastes from weed control operations and even massive solar chimneys'.⁵

Main Provisions

Schedule 1 - Part 1

Amendment of the *Administrative Decisions (Judicial Review) Act 1977*

Item 1 inserts **new paragraph (gb)** to Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (ADJRA). This will mean that the Regulator's assessments as to a liable entity's shortfall and shortfall charge cannot be subject to judicial review under the ADJRA. The objection and appeal procedure set out in existing sections 54-65 of the Act is unaffected. This procedure provides for a review by the Administrative Appeals Tribunal (AAT) or an appeal to the Federal Court.

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Amendment of the *Renewable Energy (Electricity) Act 2000*

Item 21 substitutes a **new subsection 13(1)**. It allows a person to apply for accreditation of the components of an electricity generation system (considered to collectively constitute a single power station) even where they operate those components jointly with others or where they only own some of the components. According to the *Explanatory Memorandum* to the Bill, this amendment, along with related **items 25, 32, 34, and 58** is intended to 'concentrate responsibility and authority for accreditation, REC creation, and reporting in a single person and provide that all other co-owners and co-operators must unanimously agree to this person assuming these powers and responsibilities'.⁶

Existing subsections 14(1)-(2) set out the circumstances under which a power station is eligible for accreditation.⁷ **Item 28** inserts **new subsection 14(2A)** that provides that a 'new' power generation system is *not* eligible for accreditation if the Regulator decides that the system in the application effectively represents an expansion or modification to an already-accredited power station rather than a new, separate power station. Presumably this amendment is designed to prevent 'unwarranted' generation of RECs, based on the possibility that the Regulator may not currently have the legislative power to refuse accreditation as a new power station in cases where a generating system either is actually a refurbished system or replaces an existing system within a power station that has 1997 baseline.⁸ If, under this scenario, the system was accredited as a new power station, no baseline would apply, and RECs could be created for all electricity generated from this system, even if no net additional renewables-based electricity was generated as a result of the system's replacement / refurbishment.

Item 33 substitutes a **new section 17** which makes changes to the list of eligible renewable energy sources under the Act. A number of items in the list have been removed. These include:

- Photovoltaic and photovoltaic renewable stand alone power supply systems
- Wind and wind hybrid renewable stand alone power supply systems
- Micro hydro renewable stand alone power supply systems;
- Solar hot water
- Co-firing, and
- Fuel cells.

The *explanatory memorandum* to the Bill describes these as 'redundant and/or not sources, but rather processes or technologies for transforming energy sources into electricity'.⁹ For example, 'wind and wind hybrid renewable stand alone power supply systems' is removed but 'wind' stays. Fossil fuels and waste products derived from fossil fuels remain excluded from the meaning of eligible renewable energy sources.

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Item 44 and 45 remove the current requirement that installation of a solar water heater must 'displace' non-renewable electricity in order for RECs to be generated. The existing provision was a controversial item in passing the Act because of the dominant role of hydro power (a renewable source of electricity) in Tasmania. Enforcing regulations were the subject of a disallowance motion tabled by Senator Brown, although the motion was defeated.¹⁰ The *explanatory memorandum* to the Bill describes the rationale for **items 44 and 45** thus: 'given the complexity of electricity generation and dispatch in the National Electricity Market and on other state grids, it is generally not possible to establish clearly whether or not electricity displaced by a particular solar water heater is in fact non-renewable electricity. On these grounds the requirement that a solar water heater displace non-renewable electricity is for practical purposes impossible to enforce'.¹¹

Item 50 amends the circumstances under which RECs can be created for small generation units (small-scale solar photovoltaic, wind or hydro electricity). Small generation units are systems not large enough to be classified under the Act as accredited power stations. The existing provision requires such units must 'displace' non-renewable electricity in order for certificates to be generated. The *explanatory memorandum* indicates that this was an 'unintended restriction' in comparison to accredited power stations using eligible renewable energy sources which are not required to displace non-renewable electricity. This discrimination is 'inconsistent with the intent of the Act' and is therefore removed.¹²

Item 57 inserts **new section 30A**. Existing section 30 enables the Regulator to suspend a person's registration for up to 2 years if that person has been convicted under existing subsection 24(3) for the 'improper creation' of a certificate.¹³ **New section 30A** creates additional grounds for suspension by the Regulator. These are

- if the Regulator believes on 'reasonable grounds' that the person has committed an offence against the Act or the Regulations, or
- if registration is 'obtained improperly'.

In the first case (**new subsection 30A(1)**), suspension may be for a maximum of 12 twelve months. In the second case (**new subsection 30A(3)**), it can be permanent. The *Explanatory Memorandum* comments that 'this section enables the Regulator to act to more proactively manage the risk of renewable energy certificates being created contrary to the intent of the Act.' These additional suspension grounds are reviewable by the AAT under section 66 in the same way as existing section 30.

It is notable that, unlike existing section 30, a person does not have to be first found guilty of a criminal offence¹⁴ for the Regulator to suspend registration under either **new subsection 30A(1)** or **new subsection 30A(3)**. This is potentially a significant enhancement of the Regulator's power.

Item 58 adds a number of new sections to existing Part 2 of the Act. **New sections 30D and 30E** allow for a power station's accreditation to be suspended by the Regulator. Potentially, **new section 30D** is the most far-reaching in that it attempts to combat

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collusive behaviour amongst power stations designed (at least in part) to generate certificates without an equivalent increase to the amount of electricity from renewable energy sources. Essentially, the Regulator will be able to suspend accreditation if they are satisfied that a 'gaming arrangement' has occurred. The *Explanatory Memorandum* comments that 'gaming has the potential to significantly dilute the effectiveness of the measure to stimulate the growth of the renewable energy industry and abate greenhouse gas emissions'.¹⁵ The Regulator must 'have regard' to any information available to him or her that demonstrates that level of electricity generation by one or more of the relevant power stations were *not* the result of a gaming arrangement. A **new section 30D** suspension is reviewable by the AAT.

In practice, it is possible that the application of the anti-collusion provisions of **new section 30D** could involve some degree of subjective judgment by the Regulator as to whether certain REC generation is a result of gaming behaviour. Neither the second reading speech nor the *Explanatory Memorandum* provides any evidence on why this provision is required other than a brief reference to maintaining the 'integrity' of the legislation.

New section 30E allows the Regulator to suspend accreditation where the Regulator believes on 'reasonable grounds' that the power station is being operated in contravention of a Commonwealth, State or Territory law or other grounds that may be prescribed by the Regulations. A **new section 30E** suspension is reviewable by the AAT.

New section 30F allows the Regulator to vary the 1997 baseline in the circumstances prescribed in the Regulations. According to the explanatory memorandum, this section addresses 'an inflexibility in the Act' that prevents a 1997 baseline which has been set for an accredited power station from being subsequently amended.¹⁶ **New subsection 30F(2)** provides an indication under what circumstances the Regulator might exercise this proposed power. It states that 'regulations may make provision for the 1997 eligible renewable power baseline for an accredited power station to be varied if an action or policy of the Commonwealth Government reduces the power station's ability to generate electricity for a sustained period'.

Item 92 inserts a **new subsection 54(2)** which specifies that a liable party that has received an assessment of a penalty charge cannot make an objection under the existing section 54-65 process. This means a dispute about the Regulator's decision as to a penalty charge can only be reviewed by the AAT as provided for in existing section 66.

Item 102 amends existing subsection 66(1). This amendment provides that decisions made under the various new provisions contained in **items 58** and **77**¹⁷ are reviewable by the AAT.

Items 125-138 insert a generic series of amendments that allows various existing information-gathering powers contained in the Act to be exercised in relation to ensuring compliance with regulations *as well* as the Act itself. For example, **item 125** inserts a **new subsection 110(1)** which extends the monitoring powers of an authorised officer to enable

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him or her to enter premises under warrant or with the agreement of the occupier to determine whether the regulations have been complied with. Currently they can only enter with the purpose of determining compliance with the Act.

Item 139 adds a **new Part 11A (sections 125A-125F)**. Currently, many information-gathering powers under the Act may only be exercised when premises have actually been entered under warrant or with the agreement of the occupier. For example, under existing section 112, where entry is by warrant, persons may be required to produce documents relevant to compliance matters.¹⁸

New Part 11A extends existing information-gathering powers so the Regulator can use them without having to enter premises. The key provision is **new section 125A** which allows the Regulator to require certain persons to give him or her information and evidence and produce documents 'relevant to the operation of the Act'. As for existing section 113, it creates an offence for failing to comply with a requirement, although in this case it is only a fine - 20 penalty units (\$2 2000) for an individual.

New section 125B deals with self-incrimination. Unlike existing section 113, it provides that an individual is *not* excused from providing information, evidence or documentation under **new Part 11A** on the grounds of self-incrimination, or of exposure of the individual to a penalty. However, the information, evidence or documentation, *or anything obtained as a direct or indirect consequence*¹⁹ of the information, evidence or documentation provided cannot be used in evidence against the individual in *criminal* proceedings except for a prosecution for failing to provide information or giving false or misleading information. Note that the information given could be used to criminally prosecute a company. Of course it could also be used to suspend a person's or company's registration, accreditation etc under the Act.

Item 148 adds a new ground,²⁰ which, if it occurs, the Minister *must* terminate the Regulator's employment. The ground is a failure, without reasonable excuse, to notify the Minister of any conflicts of interest. This is a relatively standard ground for termination in similar Commonwealth legislation dealing with regulatory or advisory bodies. **Item 149** inserts a **new section 147A** which provides that the Regulator must give the Minister written notice of all his or her interests (financial or otherwise) that could conflict 'with the proper performance' of his or her function as Regulator.

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Endnotes

- 1 The baseline is zero for post-1997 power generators.
- 2 The 2003 percentage has not been set as yet.
- 3 See <http://www.orer.gov.au/>. The ORER is a separate statutory authority located within the Commonwealth Environment and Heritage portfolio.
- 4 The target for 2002 is 1.1 million RECs. See *Press Release*, 'First Year Renewable Electricity Targets', 10 January 2002 at <http://www.orer.gov.au/about/mr10jan02.html>
- 5 *ibid.*
- 6 At p. 6.
- 7 These are expanded upon in Division 2.1 of the Renewable Energy (Electricity) Regulations 2001.
- 8 As previously mentioned, RECs are created by accredited power stations that generate power from renewable energy sources in excess of amount they generated in the 'baseline' year of 1997.
- 9 At p. 8.
- 10 See *Senate debates* 27 March 2001, pp. 23112–23126.
<http://www.aph.gov.au/hansard/senate/dailys/ds270301.pdf>
- 11 At p. 10.
- 12 At p. 11.
- 13 The relevant 'fault' element for a subsection 24(3) is *recklessness* - ie there does not have to be an specific *intention* to improperly create a REC.
- 14 That is, convicted under existing section 24(3). Obviously, such a conviction would require a finding of that it was 'beyond reasonable doubt' (the criminal standard of proof) that the person committed the offence.
- 15 At p. 14.
- 16 At p. 14.
- 17 That is, changing the nominated person for an accredited power station, varying what constitutes a power station, suspending the accreditation of a power station and varying 1997 eligible renewable power baselines.
- 18 Failure to produce such documents is punishable by six months imprisonment, although a person is excused from the production obligation if the documents would tend to incriminate them or otherwise expose them to a penalty: existing section 113.
- 19 Thus **new section 125B** provides what is called 'derivative use immunity'.
- 20 The existing grounds are standard provisions dealing with bankruptcy.

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