

**Senate Standing Committee on Environment and Communications
Legislation Committee**

Answers to questions on notice
Environment and Energy portfolio

Question No: 278
Hearing: Additional Estimates
Outcome: Agency
Programme: Clean Energy Regulator
Topic: *Renewable Energy (Electricity) Act 2000*
Hansard Page: 57
Question Date: 27 February 2017
Question Type: Spoken

Senator Leyonhjelm asked:

Senator LEYONHJELM: Well, you might see it as noncompliance, but it seems to me that they are complying with the act. But anyway. I will just pursue that a little further. The *Renewable Energy (Electricity) Act of 2000* is the legislation that applies to this. Isn't the constitutional head of power for this act the Commonwealth taxing power?

Ms Swirepik: I would refer to our general counsel.

Mr Purvis-Smith: I think the short answer is that there is a charges act, which applies to the charges. That is a separate piece of legislation. And from memory that is a 2010 act. I think that is the act that you are referring to as relying on the constitutional head of power in relation to taxation. But they are two separate acts.

Senator LEYONHJELM: What head of power does the other act rely on?

Mr Purvis-Smith: I would have to go back and refresh my memory. I was not around when the legislation came in in 2000 and certainly not within the portfolio. I would have to go back and check. Perhaps we can take that on notice.

Answer:

The two relevant Acts are the *Renewable Energy (Electricity) Act 2000* (the REE Act) and the *Renewable Energy (Electricity) (Large - scale Generation Shortfall Charge) Act 2000* (the Charge Act). The shortfall charge was increased from \$40 per MWh to \$65 per MWh via the *Renewable Energy (Electricity) (Charge) Amendment Act 2010* (the Charge Amendment Act).

The REE Act was passed in 2000 without reference to the constitutional head of power. However, the following provision was inserted by amendment in 2009:

7B Constitutional basis

To the extent that this Act applies in relation to a constitutional corporation, the operation of this Act is based on the following legislative powers:

- (a) the legislative power that the Commonwealth Parliament has under paragraph 51(xx) of the Constitution;
- (b) any other legislative power that the Commonwealth Parliament has under the Constitution.

It appears from the relevant Explanatory Memorandum and the Bills Digest (No. 182, 2008–09), that section 7B was introduced to support the immunity (set out in section 7C), for constitutional corporations, from the operation of State laws that were substantively similar to the REE Act. There is no further guidance in relation to the operation of section 7B(b).

Neither the Charge Act nor the Charge Amendment Act expressly state the constitutional head of power the Parliament relied upon in passing the legislation.

However, the Explanatory Memorandum to the Charge Amendment Act and the relevant Bills Digests for the Charge Act and the Charge Amendment Act provide further information.

The Explanatory Memorandum to the Amendment Act states (**emphasis added**):

*The RECs, once registered, are able to be traded and sold to liable parties who may surrender them to the Renewable Energy Regulator to demonstrate their compliance under the scheme and avoid paying the shortfall charge. **The Charge Act sets the level of the shortfall charge for non-compliance.***

The Bills Digest (No. 15, 2000-01) for the Charges Act states (**emphasis added**):

The Renewable Energy (Electricity) (Charge) Bill is a very short Bill of 7 clauses. It prescribes the dollar amount for the 'rate of charge' which is used to calculate how much an electricity buyer must pay if they fail to buy sufficient electricity from renewable sources. This penalty payment is called the renewable energy shortfall charge. ...

The reason that [the] Renewable Energy (Electricity) (Charge) Bill is separate from the Renewable Energy (Electricity) Bill is that the rate of charge set by [the] former Bill is effectively a tax. Section 55 of the Constitution requires any law imposing a tax cannot deal with any other matter. The Renewable Energy (Electricity) Bill covers non-tax issues.

The Bills Digest (No. 179, 2009-10) for the Amendment Act states (**emphasis added**):

*Item 3 repeals section 5 replacing it with a reference to large-scale generation shortfall charge. **It correspondingly imposes the tax liability assessed under Subdivision B of Division 1, Part 4 of the Renewable Energy (Electricity) Act 2000.***