

2004

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

ELECTRICITY (GREENHOUSE GAS EMISSIONS) BILL 2004

REVISED EXPLANATORY STATEMENT

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Electricity (Greenhouse Gas Emissions) Bill 2004

Overview of Bill

The *Electricity (Greenhouse Gas Emissions) Bill 2004* is a bill to reduce greenhouse gas emissions associated with the production and use of electricity and to encourage participation in activities to offset the production of greenhouse gas emissions.

The bill achieves these objectives by:

- (a) establishing Territory greenhouse gas benchmarks and individual greenhouse gas benchmarks for certain participants in the electricity industry and large users of electricity;
- (b) establishing a scheme for the recognition of activities that reduce or promote the reduction of greenhouse gas emissions and to enable trading in, and use of, certificates created as a result of those activities for the purpose of meeting greenhouse gas benchmarks; and
- (c) imposing a penalty on persons who fail to meet greenhouse gas benchmarks in any year.

The ACT Greenhouse Gas Abatement Scheme provides electricity retailers with the flexibility to choose the most cost-effective and efficient method to reduce emissions. The initial and on-going costs of implementation and regulation can be managed in a low-cost planned structure.

The scheme will reduce greenhouse gas emissions, resulting in sustainable and positive outcomes. The introduction of this scheme executes a key platform of the *ACT Greenhouse Strategy (2000)*. The introduction of this scheme is consistent with national and international efforts to combat climate change.

The ACT Government recognises that global warming is a problem that requires efforts by all levels of government and that it has a social responsibility to protect the ongoing health and welfare of ACT residents.

The ACT Scheme is modelled on the NSW Scheme. The implementation of this Scheme promotes regulatory consistency with NSW and will allow ACT transition to a national emissions management scheme in due course.

Penalties

Strict Liability Offences

Two offences in sections 17 and 54 are strict liability offences. A strict liability offence under section 23 of the Criminal Code means that there are no fault elements for any of the physical elements of the offence. That means that

conduct alone is sufficient to make the defendant culpable. However, under the Criminal Code, all strict liability offences will have a specific defence of mistake of fact. Clause 23(3) of the Criminal Code provides that other defences may still be available for use in strict liability offences. Strict liability offences do not have a mental element, termed 'mens rea'. However, the 'actus reus', the physical actions, do have a mental element of their own, for example, voluntariness. For that reason, the general common law defences of insanity and automatism still apply as they go towards whether a person has done something voluntarily, as well as whether they intended to do the act.

Under this Bill strict liability offences are only applied to two core administrative functions under the scheme, failing to put forward a greenhouse gas benchmark statement (section 17) and failing to provide information and documents to the regulator (section 54). The provisions are intrinsic to the practical working of the scheme and have low penalties attached to them (50 penalty units).

High Level Penalty Provisions

The Bill also contains a number of large maximum penalty provisions. Section 27 (2000 penalty units) protects the integrity of the emissions trading scheme by ensuring that abatement certificate providers (the participants who create the tradable certificates) cannot abuse the conditions of their accreditation.

Sliding-scale penalty provisions are also included in the Bill in sections 35 and 37. These provisions also protect the functioning of the scheme by ensuring that participants who fail to surrender certificates following an accreditation contravention, or who falsely create certificates, have a base number of penalty units but ensure that the court has the option to extend this penalty base on a sliding scale of 1 penalty unit per abatement certificate that has been misused.

These penalty provisions are quite innovative in that they are seeking to protect the trading platform that this scheme will create. The high level maximum penalties are also not unique in the energy sector, for example the *Utilities Act 2000* contains maximum penalties of 3000 penalty units. These high penalties are an acknowledgement of the monetary strength of utility companies. The ACT Scheme seeks to fit as seamlessly as possible into the NSW Scheme, which will assist in the day-to-day administration of the scheme. Therefore cross-border harmonisation and integrated approaches to issues of enforcement are crucial to the successful implementation of the scheme.

Details of the Electricity (Greenhouse Gas Emissions) Bill 2004

Outline of provisions

This explanatory note relates to this Bill as introduced into the Legislative Assembly.

Part 1 Preliminary

Section 1 sets out the name of the Bill. **Section 2** provides for the commencement of the Bill on the day after its notification. **Section 3** sets out the objects of the Bill.

Section 4 provides for the dictionary at the end of the Bill and defines certain words and expressions used in the Bill. **Section 5** explains that a note in this Bill is explanatory and is not part of this Bill. **Section 6** sets out that other legislation applies in relation to offences against this Bill.

Part 2 Greenhouse gas benchmarks

Section 7 sets out the Territory's greenhouse gas benchmarks for the years commencing 2005 and ending in 2012. These benchmarks have been derived from the *NSW Electricity Supply Amendment (Greenhouse Gas Emission Reduction) Act 2002*. It is vital to the practical implementation of the scheme that the two jurisdictions mirror one another; the ACT has therefore adopted the benchmarks of NSW.

The first Territory greenhouse gas benchmark is 7.96 tonnes of carbon dioxide equivalent of greenhouse gas emissions per head of Territory population for the year commencing 2005. The last benchmark is 7.27 tonnes of carbon dioxide equivalent of greenhouse gas emissions per head of Territory population for the years commencing 2007 and ending 2012. The carbon dioxide equivalent of greenhouse gas emissions attributable to gas emissions is a measure of their equivalence to a mass of carbon dioxide that has the same global warming potential.

Section 8 imposes a greenhouse gas benchmark on each benchmark participant. The greenhouse gas benchmark of a participant is to be calculated in accordance with the Bill.

Section 9 specifies the persons who are to be benchmark participants. They are retail suppliers of electricity, electricity generators or other persons prescribed by the regulations who supply electricity on a retail basis but are exempt from being licensed as retail suppliers, market customers and customers who use large quantities of electricity that elect to be subject to a greenhouse gas benchmark.

Section 10 sets out the principles for calculating a benchmark participant's greenhouse gas benchmark for a year. It is to be calculated by multiplying the Territory population for a year by the Territory greenhouse gas benchmark per head of population to determine the electricity sector benchmark, then determining the proportion of the total electricity demand in the Territory that is applicable to the participant for that year and applying that proportion to the electricity sector benchmark to calculate the number of tonnes of carbon dioxide equivalent of greenhouse gas emissions that is the participant's benchmark.

Section 11 sets out the principles for determining whether a benchmark participant has complied with the participant's greenhouse gas benchmark for a year. Compliance is measured by subtracting the benchmark from the number of tonnes of carbon dioxide equivalent of greenhouse gas emissions for which the participant is responsible. If the result is zero or less, compliance has been achieved. If not, there is a greenhouse shortfall and a greenhouse penalty will be payable for that year.

The number of tonnes for which a participant is responsible is determined by multiplying the total amount of electricity supplied or purchased or used by the participant in that year by the ACT pool coefficient for greenhouse gas emissions and subtracting from that figure the number of tonnes of carbon dioxide equivalent of greenhouse gas emissions abated by the participant.

Abatement is measured by the total number of tonnes attributable to any abatement certificates (created under the proposed Act) surrendered by the participant for that year and any renewable energy certificates (created under the *Renewable Energy (Electricity) Act 2000* of the Commonwealth) counted for that year.

Section 12 enables an amount of greenhouse shortfall (not exceeding 10% of a benchmark participant's greenhouse gas benchmark for a year) to be carried forward to the next year, with the payment of the applicable greenhouse penalty or abatement taking place at the end of that year. This may not be done for the year commencing 1 January 2007.

Section 13 requires the regulator to determine in a notifiable instrument, the Territory pool coefficient, the Territory electricity demand, the Territory population and the electricity sector benchmark. The matters so determined are to apply to the calculation of benchmark participants' greenhouse gas benchmarks, and to assessing compliance with them, for the following year. As such these benchmarks should be determined, if practicable before the end of November each year.

Section 14 provides for the use of certificates relating to benchmark participants and benchmarks under the Bill as evidence of those matters in court or tribunal proceedings.

Part 3 Enforcement of greenhouse gas benchmarks

Section 15 imposes a condition on each retail supplier's licence requiring compliance with its greenhouse gas benchmark and this Bill. The proposed section makes it clear that it does not limit any powers of the Minister under the *Utilities Act 2000* to impose licence conditions. However, a monetary penalty may not be imposed for breach of a licence condition, or other action taken against a retail supplier's licence, in respect of a greenhouse shortfall for which a greenhouse penalty is payable under the proposed Part.

Section 16 makes a benchmark participant who fails to meet the participant's greenhouse gas benchmark for a year liable for a civil penalty for the year concerned. The amount (currently \$10.50 per tonne of carbon dioxide equivalent of greenhouse shortfall) is to be set out in the Regulations and will be adjusted in accordance with the movements of the Sydney consumer price index. The reason for the adoption of the Sydney consumer price index is to ensure that cross-border penalties remain the same to promote harmonisation between schemes.

Section 17 requires a benchmark participant to lodge an annual greenhouse gas benchmark statement with the Regulator not later than 1 March in each year or any later day permitted by the Regulator. The statement is to contain an assessment of the participant's greenhouse gas benchmark and liability (if any) for greenhouse penalty, including any liability relating to a greenhouse shortfall carried forward from the previous year. The statement must be accompanied by details of certificates surrendered or sought to be counted towards compliance with the benchmark. It will be an offence to fail to lodge a greenhouse gas benchmark statement in accordance with the proposed section.

Section 18 prohibits an abatement certificate from being surrendered by a benchmark participant (and used towards compliance with a greenhouse gas benchmark) if it is not registered, is created in respect of an activity that took place after the end of the relevant year or the participant is not registered as the owner of the certificate. The Regulator may refuse to accept the surrender of a certificate that is prohibited from being surrendered or surplus to compliance with the benchmark.

Section 19 enables regulations to be made for or with respect to renewable energy certificates that may not be counted, the circumstances in which renewable energy certificates may or may not be counted and the number of renewable energy certificates that may be counted. The Regulations are to contain provisions restricting the number of renewable energy certificates that may be counted by reference to the Australian Capital Territory's electricity acquisitions. Regulations may also be made for or with respect to assessments of greenhouse shortfall and liability for greenhouse penalty and related matters.

Section 20 makes it clear that an assessment of liability to pay greenhouse penalties is *not invalid only because* a provision of the Principal Act, the regulations or the greenhouse gas benchmark rules has not been complied with. This provision makes it clear on its face that the legislature does not intend an assessment to be invalidated merely because a statutory requirement has not been complied with.

Section 21 enables the Minister, by written order, to waive or suspend obligations to comply with greenhouse gas benchmarks if it appears that compliance is not possible because of a systems or other failure of the register of abatement certificates or because of an emergency affecting the integrity of the register or the abatement certificate system established under this Part.

Part 4 Accreditation of abatement certificate providers

Part 4 (sections 22 to 28) provides for the accreditation of persons as abatement certificate providers. Accredited abatement certificate providers may create abatement certificates under the proposed provisions. The regulations and the greenhouse gas benchmark rules are to provide for the eligibility of persons to be accredited as abatement certificate providers and the activities in respect of which a person may be accredited as an abatement certificate provider. Those activities may include any activities, or class of activities, that promote the reduction of greenhouse gas emissions, such as the following activities:

- (a) the generation of electricity in a manner that results in reduced emissions of greenhouse gases;
- (b) activities that result in reduced consumption of electricity; and
- (c) activities of elective participants, associated with production processes that use electricity in this Territory, that result in reduced emissions of greenhouse gases.

Accreditation may also be made available in respect of carbon sequestration activities. The accreditation scheme is to be administered by the Scheme Administrator (who is to be Independent Pricing and Regulatory Tribunal). Provision is made for applications for accreditation, the suspension or cancellation of accreditation by the Scheme Administrator, and conditions of accreditation. Accreditation is not transferable.

Part 5 Creation of abatement certificates

Part 5 (sections 29 to 37) makes provision for the creation of abatement certificates by accredited abatement certificate providers. Each abatement certificate represents 1 tonne of carbon dioxide equivalent of greenhouse gas emissions abated by the activity in respect of which it was created. The regulations and greenhouse gas benchmark rules may make provision for or with respect to the entitlement of an accredited abatement certificate provider to create abatement certificates, including the number of certificates that may be created in respect of an activity and other matters.

Abatement certificates may be created in respect of an activity after the activity in respect of which it is created takes place, but no later than 6 months after the end of the year in which the activity takes place.

The Part makes provision for the registration of the creation of an abatement certificate by the Scheme Administrator. An abatement certificate has no effect until it is registered by the Scheme Administrator. Once registered, an abatement certificate remains in force until cancelled by the Scheme Administrator. Abatement certificates may be cancelled by the Scheme Administrator only if surrendered to the Regulator for the purposes of compliance with a greenhouse gas benchmark or greenhouse shortfall or surrendered to the Scheme Administrator for the purposes of compliance with an order of the Scheme Administrator.

The Scheme Administrator may order the surrender of abatement certificates by a person only if abatement certificates have been created improperly by the person or a person has contravened the conditions of the person's accreditation as an abatement certificate provider. It is an offence to improperly create abatement certificates.

Part 6 Transfers and other dealings in abatement certificates

Part 6 (sections 38 to 43) provides for the types of abatement certificates that may be created. Transferable and non-transferable abatement certificates may be created by accredited abatement certificate providers. Entitlement to create those types of certificates is to be determined in accordance with the regulations and the greenhouse gas benchmark rules.

Transferable certificates may be transferred to any person. Non-transferable certificates may be transferred only to a person to whom the business of the holder of the certificate is proposed to be sold or in other circumstances authorised by the regulations.

The Part provides for the registration of transfers of abatement certificates by the Scheme Administrator. A transfer has no effect until registered by the Scheme Administrator. The Part also sets out the right of a registered owner of a certificate to deal with the certificate as its absolute owner if the person was a purchaser in good faith for value and without notice. The regulations may make provision for the registration of other dealings in abatement certificates. The Scheme Administrator is not concerned as to the legal effect of any transaction registered under this scheme.

Part 7 Registers

Part 7 (sections 44 to 48) requires the Scheme Administrator to keep and maintain the following registers:

- (a) a register of accredited abatement certificate providers; and
- (b) a register of abatement certificates.

It also makes provision for the form in which the registers are to be kept, the information to be included in the registers, and public availability of the registers.

Part 8 Functions of Regulator and Scheme Administrator

Section 49 sets out that the Minister may appoint a body as the regulator. If the Minister does not appoint another body the ICRC is the Regulator.

Section 50 sets out functions of the Regulator under this Part. They include determining certain matters related to greenhouse gas benchmarks and assessing and determining greenhouse gas benchmarks for benchmark participants and compliance with benchmarks, assessing and determining greenhouse shortfall and liability for a greenhouse penalty, conducting or requiring the conduct of audits and reporting to the Minister on compliance with licence conditions under this Part.

Sections 51 and 52 set out the functions of the Scheme Administrator under this Part. They include monitoring, and reporting to the Minister on, the compliance of accredited abatement certificate providers with the Principal Act, regulations, greenhouse gas benchmark rules and conditions of accreditation and conducting or requiring the conduct of audits and functions relating to the abatement certificate scheme. The Scheme Administrator may also delegate functions.

Section 53 enables regulations to be made for or with respect to the conduct of audits by the Regulator or Scheme Administrator or other persons under this Part.

Section 54 enables the Regulator or the Scheme Administrator to require an officer of a benchmark participant or an officer of an accredited abatement certificate provider or any other person to provide information or documents or to attend a meeting of the Regulator to give evidence.

Section 55 makes it clear that the Regulator or Scheme Administrator may not make a requirement under the proposed Part that relates to any information or documents relating to confidential Cabinet proceedings or Cabinet documents.

Section 56 sets out the obligations of the Regulator or Scheme Administrator to ensure that information provided to the Regulator or Scheme Administrator on the understanding that it is confidential and will not be divulged or is not divulged, except with the consent of the person who provided the information or (in the case of the Regulator) to the extent that the Regulator is satisfied that it is not confidential in nature or to a member or officer of the Regulator or an officer of the Scheme Administrator or if such a disclosure is required by law. An example of a disclosure required by law is the *Freedom of Information Act 1989*.

Section 57 requires the Regulator to report to the Minister annually on benchmark participants who have complied, or failed to comply, with greenhouse gas benchmarks.

Part 9 Reviews

Part 9 (sections 58 to 60) enables a benchmark participant or former benchmark participant or a person who is accredited as an abatement certificate provider under this Part, or who applies for accreditation, and who is aggrieved by certain decisions by the Regulator or Scheme Administrator under this Part, to apply to the Administrative Appeals Tribunal for review of those decisions.

Part 10 Miscellaneous

Section 61 enables the Minister to approve greenhouse gas benchmark rules relating to the methodology for calculating certain matters, including the number of tonnes of carbon dioxide equivalent of greenhouse gas emissions of a gas or activity, the greenhouse gas benchmark for a benchmark participant and whether a participant has complied with the benchmark, the ACT pool coefficient for greenhouse gas emissions, the estimated Territory demand for electricity, the Territory population for a year and the value of renewable energy certificates. Rules may also be made for or with respect to other matters specified in the proposed Part or prescribed by regulations. Rules are a notifiable instrument.

Section 62 makes it an offence to contravene a greenhouse gas benchmark rule and also makes it a condition of a retail supplier's licence that the supplier must comply with greenhouse gas benchmark rules.

Section 63 makes an executive officer criminally liable if an executive officer commits an offence, was reckless about whether the contravention would happen, was reckless about whether the contravention would happen and the officer was in a position to influence the conduct of the corporation in relation to the contravention.

Section 64 enables the Minister to determine fees for this Bill.

Section 65 enables the Minister to approve forms for this Bill.

Section 66 enables the Executive to make regulations for this Bill.