Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)

SCRUTINY REPORT 51

8 SEPTEMBER 2020

THE COMMITTEE

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ROLE OF COMMITTEE

The Committee examines all Bills and subordinate legislation presented to the Assembly. It does not make any comments on the policy aspects of the legislation. The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation. These traditions have been adopted, without exception, by all scrutiny committees in Australia. Non-partisan, non-policy scrutiny allows the Committee to help the Assembly pass into law Acts and subordinate legislation which comply with the ideals set out in its terms of reference.

RESOLUTION OF APPOINTMENT

The Standing Committee on Justice and Community Safety when performing its legislative scrutiny role shall:

(1) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):

(a) is in accord with the general objects of the Act under which it is made;

(b) unduly trespasses on rights previously established by law;

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

(d) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;

(2) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee;

(3) consider whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly:

(a) unduly trespass on personal rights and liberties;

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

(c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(d) inappropriately delegate legislative powers; or

(e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;

(4) report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act 2004*; and

(5) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

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BILL

BILL—COMMENT

The Committee has examined the following bill and offers these comments on it:

ELECTRICITY FEED-IN (LARGE-SCALE RENEWABLE ENERGY GENERATION) AMENDMENT BILL 2020

This Bill amends the *Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011* to displace certain provisions that would otherwise delay the granting of feed-in tariff (FiT) entitlements to give effect to the outcomes of the renewables Auction 5.

Do any provisions of the Bill insufficiently subject the exercise of legislative power to parliamentary scrutiny?—Committee terms of reference paragraph (3)(e)

DISPLACEMENT OF SECTION 65 OF THE *LEGISLATION ACT 2001*

The Electricity Feed-in (Large-scale Renewable Energy Generation) Act provides for large renewable energy generators who hold what are termed FiT entitlements to receive support payments up to the value of the entitlement's feed-in tariff. Under section 10, the Minister may make a determination allowing FiT entitlements to be granted, whether by a competitive process or by direct grant to any person the Minister considers appropriate. A determination is a disallowable instrument, and subject to disallowance by the Assembly within six sitting days of being tabled after notification under section 65 of the *Legislation Act 2001*. Any grant of a FiT entitlement is delayed until after the Assembly has had the opportunity to consider disallowance (section 11).

The Bill will remove the ability of the Assembly to disallow the determination under section 65 of the Legislation Act and the requirement to wait for the possibility of disallowance. However, it only acts in relation to a particular determination, namely the Electricity Feed-in (Large-scale Renewable Energy Generation) FiT Capacity Release Determination 2020 (No 1) (DI2020-250), which was notified on 24 August 2020 (the relevant determination). This determination releases 250 megawatts of capacity to be released in the form of a competitive process, for 10 or 14 years, applies to large renewable energy generators located with the Territory or participating jurisdiction, and is for a minimum of 20MW. As a result of the passage of the Bill, the FiT entitlements provided for in the relevant determination will be able to be granted without waiting for six sitting days or any motion for disallowance to be resolved.

The Committee notes that the displacement of section 65 of the Legislation Act and the delay on grant of the entitlements will mean that there is limited capacity for the Assembly to subject the determination to independent scrutiny. The explanatory statement accompanying the Bill states that scrutiny of the determination by the Assembly will be retained through the scrutiny that is applied to this Bill. However, the Committee notes that the Bill was introduced in the Assembly on 27 August 2020, the final sitting day of this Assembly, and passed on that same day. The Bill was therefore not subject to scrutiny by this Committee prior to debate on the Bill, and any concerns that may have been raised by this Committee were not therefore available to the Assembly in considering the Bill.

The Committee therefore considers that the Bill, particularly in the circumstances in which it was presented to the Assembly, provides for a determination by the Minister to be given legislative effect without sufficient parliamentary scrutiny.

Whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee—Committee terms of reference paragraph (2)

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—Committee terms of reference paragraph (3)(a)

RETROSPECTIVE OPERATION

The Bill will amend the Act so that the relevant determination will be taken to have commenced on 11 November 2019. The Bill further provides for the Act to be amended so that (in proposed subsection 22A(4)):

> any act done on or after the deemed commencement day and before the notification day of the relevant determination in reliance on the relevant determination having been validly made, is taken to have been validly done.

There is no discussion of these provisions in the explanatory statement nor justification for their inclusion.

The Committee notes that, in presenting the Bill to the Assembly on 27 August 2020, the Minister refers to an administrative error in not registering the determination at the time at which it was signed on 10 November 2019. The provisions and urgency in passing the Bill was therefore:

> the combination of an administrative error, election timing, our current health emergency, and the special circumstances of the legislation affected. I do not anticipate that we will ever see this combination of issues in future.[1]

The Committee acknowledges the urgency of the Bill, but is concerned that the explanatory statement did not acknowledge the circumstances in which the Bill arose and set out the justification for the retrospective commencement and validation of any actions taken since 11 November 2019. That justification should have included a detailed explanation of what actions were taken that would be validated by the Bill, the extent to which those actions, in the absence of the validation provision included in the Bill, may have been unlawful, and the extent to which those actions may have prejudiced the interests of persons outside of government.

This comment does not require a response from the Minister.

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

The Committee has examined the following disallowable instruments and offers no comments on them:

[1] See Minister's Presentation Speech, *Debates of the Legislative Assembly of the ACT, Daily Hansard*, 27 August 2020, at p 2191.

- **Disallowable Instrument DI2020-217 being the Long Service Leave (Portable Schemes) Interest Rate Guidelines 2020 made under section 53 of the** *Long Service Leave (Portable Schemes) Act 2009* **determines interest rate guidelines for levies payable under the Act.**
- **Disallowable Instrument DI2020-223 being the Official Visitor (Disability Services) Appointment 2020 (No 2) made under paragraph 10(1)(c) of the** *Official Visitor Act 2012* **appoints a specified person as an official visitor for the purposes of the *Disability Services Act 1991*.**
- **Disallowable Instrument DI2020-226 being the Cemeteries and Crematoria (Governing Board) Appointment 2020 (No 1) made under sections 117 and 118 of the** *Cemeteries and Crematoria Act 2020* **and under sections 78 and 79 of the** *Financial Management Act 1996* **appoints specified persons as chair, deputy chair and members of the ACT Public Cemeteries Authority Governing Board.**

DISALLOWABLE INSTRUMENTS—COMMENT

The Committee has examined the following disallowable instruments and offers these comments on them:

DISAPPLICATION OF SUBSECTIONS 47(6) AND (7) OF THE *LEGISLATION ACT 2001*

Disallowable Instrument DI2020-218 being the Energy Efficiency (Cost of Living) Improvement (Eligible Activities) Determination 2020 (No 2) made under section 10 of the *Energy Efficiency (Cost of Living) Improvement Act 2012* **revokes DI2020-32 and describes eligible activities intended to reduce the consumption of energy, in accordance with the Act.**

This instrument determines "eligible activities", for section 10 of the *Energy Efficiency (Cost of Living) Improvement Act 2012*. According to the explanatory statement for the instrument, these are "activities that are intended to reduce the consumption of energy, provided for by the Act".

Subsection 10(4) of the Energy Efficiency (Cost of Living) Improvement Act provides:

> (4) A determination of an eligible activity must include the following:
>
> (a) a description of the activity;
>
> (b) the minimum specifications for the performance of the activity;
>
> (c) the abatement factor for the activity;
>
> (d) the time at which the activity is taken to be completed.

It is important to note that a determination must include each of the things mentioned in paragraphs 10(4)(a) to (d). The Committee notes that the instrument makes no reference to "abatement factors", for paragraph 10(4)(c). However, the Committee also notes that the explanatory statement for the instrument states:

> This Determination differs from earlier versions in that the metric used for quantifying credits awarded to each activity in the schedule to the determination has been revised. Previously, credits took the form of "Abatement Factors" using the metric of tonnes of carbon dioxide equivalent ($tCO_{2\text{-}e}$). Under this determination, the abatement factors have been converted into "Energy Savings Factors" using the metric of Megawatt-hours (MWh). These changes can be

found in subsection 5 of each of the scheduled activities as described in the schedules transition from its current carbon emissions metric to an energy saving metric meaning that the EEIS targets would be expressed in terms of megawatt hours (MWh) of electricity saved (with gas savings converted to MWh).

A table that follows the above statement describes the changes made to the previous determination by this instrument. It indicates that

"Abatement Factors" replaced with references to "Energy Savings Factors"

The Committee notes that the instrument does not commence until 21 January 2021 and that the explanatory statement indicates that this (delayed) commencement is linked to the commencement of amendments to the Energy Efficiency (Cost of Living) Improvement Act made by the *Energy Efficiency (Cost of Living) Improvement Amendment Act 2019* (including amendments to section 10) that are yet to commence. The Committee notes that the amendments made by section 34 of the Amendment Act include an amendment that changes references in subsection 10(4) to "abatement" to "energy savings". This means that the requirement in paragraph 10(4)(c) to include an "abatement factor" in any determination becomes a requirement to include an "energy saving factor". As a result, the determination appears to conform with the formal requirements.

The comment does not require a response from the Minister.

The Committee notes that section 4 of the instrument provides:

4 Disapplication of Legislation Act, s47(5) and 47(6)

The *Legislation Act 2001*, sections 47(5) and 47(6) do not apply in relation to an instrument applied, adopted or incorporated under this instrument.

The disapplication of subsections 47(5) and (6) of the *Legislation Act 2001* is addressed in the explanatory statement for the instrument, which states:

Clause 4 disapplies *The Legislation Act 2001,* sections 47(5) and 47(6). These sections are disapplied because they stipulate that any external text which is to be applied as law in the ACT needs to be republished as a notifiable instrument. It is not possible to republish text contained in Australian Standards documents as they are protected by copyright. It is not practical to republish information in the National Construction Code as it contains over 400 pages of information across 4 volumes.

However, the Committee notes that section 4 would appear to be unnecessary, given that subsections 10(7) and (8) of the Energy Efficiency (Cost of Living) Improvement Act provide:

(7) A determination may apply, adopt or incorporate a law of another jurisdiction or instrument as in force from time to time.

(8) The Legislation Act, section 47(5) or (6) does not apply in relation to the law of another jurisdiction or instrument applied, adopted or incorporated under a determination.

Note Laws of another jurisdiction and instruments mentioned in s(8) do not need to be notified under the Legislation Act because s 47(5) and (6) do not apply (see Legislation Act, s 47(7)).

In any event, the Committee notes (with approval) that section 5 of the instrument provides:

> **5 Referenced documents**
>
> 1) Australian Standards are available for purchase at *www.standards.org.au* and are available for inspection by members of the public between 9am and 4.30pm on business days at the Access Canberra shopfront in Dickson.
>
> 2) A copy of the National Construction Code, which incorporates the Building Code of Australia and the Plumbing Code of Australia, is freely available for inspection at www.abcb.gov.au or for inspection by members of the public between 9am and 4.30pm on business days at the Access Canberra shopfront in Dickson.

The explanatory statement for the instrument also notes that "the Shopfront is scheduled to move to 480 Northbourne Avenue, Dickson later in 2020".

This comment does not require a response from the Minister.

HUMAN RIGHTS ISSUES / APPLICATION OF SECTION 81 OF THE *LEGISLATION ACT 2001*

- **Disallowable Instrument DI2020-219 being the Energy Efficiency (Cost of Living) Improvement (Energy Savings Target) Determination 2020 (No 1), including a regulatory impact statement, made under section 7 of the** *Energy Efficiency (Cost of Living) Improvement Act 2012* **determines the energy savings targets for specified compliance periods.**
- **Disallowable Instrument DI2020-220 being the Energy Efficiency (Cost of Living) Improvement (Energy Savings Contribution) Determination 2020 (No 1), including a regulatory impact statement, made under section 11 of the** *Energy Efficiency (Cost of Living) Improvement Act 2012* **determines the energy savings contribution for specified compliance periods.**
- **Disallowable Instrument DI2020-221 being the Energy Efficiency (Cost of Living) Improvement (Penalties for Noncompliance) Determination 2020 (No 1), including a regulatory impact statement, made under section 22 of the** *Energy Efficiency (Cost of Living) Improvement Act 2012* **determines the penalties for noncompliance for the specified compliance period.**
- **Disallowable Instrument DI2020-222 being the Energy Efficiency (Cost of Living) Improvement (Priority Household Target) Determination 2020, including a regulatory impact statement, made under section 8 of the** *Energy Efficiency (Cost of Living) Improvement Act 2012* **determines the priority household target for the purposes of the Act.**

The instruments mentioned above determine "energy savings targets", "energy savings contributions", "penalties for noncompliance" and "priority households targets", for sections 7, 11, 22 and 8 of the *Energy Efficiency (Cost of Living) Improvement Act 2012*, respectively. The Committee notes that the explanatory statement for the first instrument mentioned above addresses possible human rights implications, arising from the instrument:

> The determination does not engage human rights under the *Human Rights Act 2004*.

The Committee notes that a similar statement appears in the explanatory statements for the other three instruments mentioned above. The Committee also notes that a similar statement appears in the regulatory impact statement for each of the four instruments (noting that DI2020-219, DI2020-220 and DI2020-2021 share a regulatory impact statement).

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statements and regulatory impact statements for these instruments.

This comment does not require a response from the Minister.

The Committee notes that section 4 of the first instrument mentioned above provides:

> **4 Application of section 81(6) of the *Legislation Act 2001***
>
> This instrument declares that subsection 81(6) of the *Legislation Act 2001* applies.

Similar provisions appear in each of the other 3 instruments mentioned above. The Committee notes that the reliance on subsection 81(6) of the *Legislation Act 2001* reflects the fact that the various instruments rely on amendments to the Energy Efficiency (Cost of Living) Improvement Act made by the *Energy Efficiency (Cost of Living) Improvement Amendment Act 2019* (mentioned above) that have not yet commenced. The Committee notes that section 81 of the Legislation Act allows certain things to be done (including the making or relevant instruments, etc) prior to the commencement of empowering legislation and that, in particular, subsection 81(6) allows instruments such as these to commence on the day after their notification day (as each of them are expressed to do), despite the fact that the relevant empowering provisions have not commenced.

The comment immediately above does not require a response from the Minister.

COVID-19-RELATED INSTRUMENTS / RETROSPECTIVITY

- **Disallowable Instrument DI2020-224 being the Planning and Development (Remission of Lease Variation Charges—Construction Sector Recovery) Determination 2020 made under section 278 of the** *Planning and Development Act 2007* **determines the circumstances and the amounts that must be remitted in relation to the reduction of the Leave Variation Charge, as part of the Construction Sector Recovery Package.**
- **Disallowable Instrument DI2020-225 being the Planning and Development (Lease Variation Charge Deferred Payment Scheme) Determination 2020 made under paragraphs 279AA(1)(b) and (c) and subsection 279AC(2) of the** *Planning and Development Act 2007* **revokes DI2019-236 determines the amount of the lease variation charge to be deferred for the purposes of the Act.**

The first instrument mentioned above, made under section 278 of the *Planning and Land Development Act 2007*, determines circumstances in which an amount of a lease variation charge (**LVC**) for a chargeable variation of a nominal rent lease must be remitted. This particular instrument is made in the context of the COVID-19 pandemic. The explanatory statement for the instrument states:

> On 25 June 2020, the Government announced a Construction Sector Recovery Package (Recovery Package) to help construction activity continue in the ACT and support the local economy to recover from the effects of the COVID-19 pandemic. As part of the Recovery Package, the Government is reducing the Lease Variation Charge (LVC) by 50 per cent of the amount payable up to $250,000 for developments requiring a lease variation.

> Reducing the LVC will provide an incentive for builders to begin construction activity that might not have otherwise occurred during the COVID-19 recovery phase and create more jobs for the local industry. This measure aims to encourage projects that are ready to commence construction by 31 March 2021.
>
> The 50 percent reduction (up to $250,000) will be available for LVC amounts deferred (excluding previously paid or deferred amounts) from 25 June 2020 until 23 December 2020 with a requirement that construction must commence by 31 March 2021 regardless of when the development application was lodged or approved.

Section 2 of the instrument provides that the instrument is taken to have commenced on 25 June 2020. This means that the instrument has a retrospective operation. The Committee notes, with approval, that the retrospectivity issue is addressed in the explanatory statement for the instrument, which states:

> **Retrospectivity**
>
> This instrument has retrospective commencement from 25 June 2020 to align with the announcement of the Recovery Package and the criterion requiring LVC to have not been paid or deferred prior to that date.
>
> Section 76(1) of the *Legislation Act 2001* provides that a statutory instrument may commence retrospectively provided it is non-prejudicial, that it does not operate to the disadvantage of a person by adversely affecting the person's rights or imposing liabilities on the person. This instrument provides a concession on the LVC payable for land that is developed in a manner that supports economic recovery from COVID-19. It promotes a purpose which will be of overall benefit to the ACT community.

The explanatory statement for the second instrument mentioned above, made under paragraph 279AA(1)(b) and subsection 279AC(2) of the Planning and Development Act, indicates that it is consequential on the making of the first instrument mentioned above. It determines the minimum amount of LVC applicable to an applicant who seeks to defer payment of a LVC, for paragraph 279AA(1)(b), and also determines conditions to which any deferral arrangement is subject, including the rate of interest charged on the amount payable under the arrangement, for subsection 279AC(2).

Given the intention that the instruments operate together, section 2 of the second instrument mentioned above also provides that the instrument is taken to have commenced on 25 June 2020. The Committee notes, with approval, that the explanatory statement for the second instrument addresses the retrospectivity issue, in similar terms to the explanatory statement for the first instrument.

The Committee also notes that, in addition to what is set out in the explanatory statements for these instruments, the Chief Minister confirmed the non-prejudicial operation of the instruments, in his response to the Committee's comments on the Taxation Administration (Owner Occupier Duty) COVID-19 Exemption Scheme Determination 2020 (DI2020-205),[2] dated 19 August 2020.

This comment does not require a response from the Minister.

[2] https://www.parliament.act.gov.au/__data/assets/pdf_file/0004/1617664/Response-DI2020-205.pdf

WHY HAS IT TAKEN SO LONG TO NOTIFY THIS INSTRUMENT? / HUMAN RIGHTS ISSUES

Disallowable Instrument DI2020-249 being the Electricity Feed-in (Large-scale Renewable Energy Generation) Renewable Energy Source Declaration 2020 made under section 6 of the *Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011* **declares a number of new renewable energy sources, in accordance with the Act.**

This instrument declares a number of new "renewable energy sources", for section 6 of the *Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011*.

The Committee notes that the instrument is dated 10 November 2019, but was not notified on the ACT Legislation Register until 24 August 2020. The Committee cannot identify any explanation for this delay in notification.

In making this comment, the Committee notes that it has not identified, in the *Legislation Act 2001*, a formal requirement that an instrument be notified within a certain time after being made. The only possibly-relevant provision appears to be section 20 of the Legislation Act, which imposes a (general) obligation on the Parliamentary Counsel, in relation to registration:

> **20 Prompt registration**
>
> The parliamentary counsel must ensure that anything the parliamentary counsel is required to do in relation to the register is done promptly.

In making this comment, the Committee notes that there is no issue with retrospective operation of the instrument. Section 2 of the instrument provides that the instrument commences on the day after its notification.

The Committee seeks the Minister's advice as to why there was a delay in notifying this instrument.

This comment requires a response from the Minister.

The Committee notes that the explanatory statement for this instrument discusses potential human rights implications for the instrument. It states:

> **Human Rights**
>
> This instrument does not engage with or limit any human rights.

The explanatory statement goes on to address the instrument's consistency with the scrutiny principles against which the Committee examines legislation:

> **Scrutiny of Bills Committee Principles**
>
> This instrument is consistent with the Scrutiny of Bills Committee Principles in that it:
>
> (a) Does not unduly trespass on personal rights and liberties;
> (b) Does not make rights, liberties, and/or obligations unduly dependent upon insufficiently defined administrative powers;
> (c) Does not make rights, liberties and/or obligations unduly dependent upon nonreviewable decisions;
> (d) Does not inappropriately delegate legislative powers; and

(e) Does not insufficiently subject the exercise of legislative power to parliamentary scrutiny

While the Committee notes that the principles listed in the explanatory statement do not *precisely* correspond to the principles against which the Committee examines subordinate legislation (set out in principle (1) of the Committee's terms of reference), the information provided is, nevertheless, of assistance.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this instrument.

The comment immediately above does not require a response from the Minister.

WHY HAS IT TAKEN SO LONG TO NOTIFY THIS INSTRUMENT? / HUMAN RIGHTS ISSUES

Disallowable Instrument DI2020-250 being the Electricity Feed-in (Large-scale Renewable Energy Generation) FiT Capacity Release Determination 2020 (No 1) made under section 10 of the *Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011* **allows 250 MW to be released in the form of an energy auction to be conducted by the Environment, Planning and Sustainable Development Directorates in 2019 and 2020.**

This instrument, made under section 10 of *the Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011*, determines a "FiT capacity release". "FiT" refers to "feed-in tariffs", which can be granted to renewable energy generators. According to the explanatory statement for this instrument:

> FiTs represent a guaranteed price for the energy created by the generators.

A "FiT capacity release" is made available in order to grant "Fit entitlements" to renewable energy generators. In this particular case, the "FiT capacity release" is determined at 250 MW. The explanatory statement for the instrument indicates that

> The purpose of this disallowable instrument is to determine 250 megawatts of capacity to be released in the form of a competitive process, an energy auction, to be conducted by the Environment, Planning and Sustainable Development Directorate in 2019 and 2020. A FiT entitlement may be granted under the release to a large-scale renewable energy generator using wind, solar or another energy source declared by the Minister to be a renewable energy source, in the ACT or another participating jurisdiction.

The Committee notes that, as with DI2020-49 (discussed immediately above), this instrument is dated 10 November 2019 but was not notified on the ACT Legislation Register until 24 August 2020. Again, the Committee cannot identify, in the explanatory statement for the instrument, any explanation for this delay in notification.[3] Again, however, the Committee notes that (on the face of this instrument) there is no issue of retrospective operation (though the Committee returns to this issue, below).

[3] See, however, discussion of the Electricity Feed-in (Large-scale Renewable Energy Generation) Bill 2020, in the Bills part of this *Scrutiny Report*.

The Committee repeats the comments made, above, in relation to DI2020-249, in relation to the delay in notification.

The Committee seeks the Minister's advice as to why there was a delay in notifying this instrument.

This comment requires a response from the Minister.

The Committee notes that the explanatory statement for this instrument discusses potential human rights implications for the instrument, in similar terms to the discussion in the explanatory statement for DI2020-249. Similarly, the explanatory statement discusses the instrument against this Committee's "scrutiny principles". The Committee re-iterates (in relation to this instrument) its comments (above) in relation to DI2020-249.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this instrument.

The comment immediately above does not require a response from the Minister.

INTERACTION OF INSTRUMENT WITH ELECTRICITY FEED-IN (LARGE-SCALE RENEWABLE ENERGY GENERATION) BILL 2020

The Committee has indicated above that, on the face of this instrument, the delay in notification does not create any issue with retrospectivity, since the instrument did not commence until the day after the day that it was notified on the ACT Legislation Register (ie 24 August 2020). However, this proposition is undermined by the effect of the *Electricity Feed-in (Large-scale Renewable Energy Generation) Bill 2020*, which was presented to the Legislative Assembly on 27 August 2020 and passed by the Legislative Assembly, on that day. The Committee notes that the Bill was notified, on the ACT Legislation Register on 3 September 2020 and is now effective.

The Committee notes that the amendments made by the Bill have particular effect *in relation to the instrument mentioned above*. Section 4 of the Bill inserts a new section 22A into the *Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011* that:

- provides that the instrument is taken to have commenced on 11 November 2019 (meaning that, in fact, it does have a retrospective operation, as a result of the Bill)); and
- disapplies section 65 of the Legislation Act to this instrument, meaning that it is not subject to disallowance by the Legislative Assembly (and, as a result, is also beyond the scrutiny jurisdiction of this Committee); and
- in effect, validates anything done under the instrument, after the "deemed" commencement day (ie after 11 November 2019).

Clearly, these are significant measures, both in terms of the retrospective operation of the instrument and the exclusion of the Legislative Assembly's capacity to disallow (and the exclusion of the Committee's jurisdiction, as a result).

The justification that has been provided for these (quite unusual) measures, in the "overview" of the explanatory statement for the Bill (which is brief), is:

> The Bill disapplies certain provisions in the *Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011* that would otherwise delay the granting of feed-in tariff (FiT) entitlements to give effect to the outcomes of the renewables Auction 5.
>
> By disapplying these sections, the Minister for Climate Change & Sustainability will be able to grant FiT entitlements to the auction winners immediately, rather than waiting for the day after the sixth sitting day after the relevant capacity release is Tabled in the Assembly.
>
> This Bill continues to provide for scrutiny by the Assembly of the capacity release, through the scrutiny that is applied to this Bill.

The Committee notes that the discussion of the Bill in the Bills part of this *Scrutiny Report*, above, refers to additional comments made by the Minister, in presenting the Bill.

The comments immediately above do not require a response from the Minister (ie in addition to any responses required in relation to the comments the Committee has made on the Bill, in the Bills part of this *Scrutiny Report*). However, the Committee reminds the Legislative Assembly of the importance of the disallowance mechanism, in relation to subordinate legislation, and, further, the importance of the scrutiny of the Committee, in relation to subordinate legislation that is subject to disallowance, by the Legislative Assembly.

COVID-19-RELATED INSTRUMENT

Disallowable Instrument DI2020-252 being the Gaming Machine (Emergency Community Purpose Contribution—Local Live Performance Industry) Declaration 2020 section 166A of the *Gaming Machine Act 2004* **provides for contributions made to, or for the benefit of, a member of the local live performance industry for the purpose of providing music or other live entertainment (other than sport) for the club members and patrons, to be community purpose contributions for the purpose of providing relief or assistance to the community in relation to a COVID-19 emergency.**

This instrument is made under section 166A of the *Gaming Machine Act 2004*, which was inserted into that Act as part of the legislative response to the COVID-19 pandemic. Section 166A allows the Minister (while a "COVID-19 emergency" is in force) to make an "emergency community purpose contribution declaration". The effect of such a declaration is that a relevant contribution, by a licensee that is a club, is a "community purpose contribution". Clubs are required, under Part 12 of the Gaming Machine Act, to make "community purpose contributions" in the amount of at least 8% of the net gaming machine revenue that the club receives in a reporting year.

The explanatory statement for this instrument states:

> The *Gaming Machine (Emergency Community Purpose Contribution—Local Live Performance Industry) Declaration 2020* provides for contributions made to, or for the benefit of, a member of the local live performance industry for the purpose of providing music or other live entertainment (other than sport) for club members and patrons, to be community purpose contributions for the purpose of providing relief or assistance to the community in relation to a COVID-19 emergency.

This comment does not require a response from the Minister.

NATIONAL REGULATIONS—COMMENT

The Committee has examined the following national regulation and offers these comments on it:

HUMAN RIGHTS ISSUES

Rail Safety National Law—Rail Safety National Law National Regulations (Fees and Other Measures) Variation Regulations 2020 (2020 No 322).

These national regulations are made under section 264 of the Rail Safety National Law, set out in the *Rail Safety National Law (South Australia) Act 2012* (SA). It applies in the ACT under the *Rail Safety National Law (ACT) Act 2014*. The substantive amendments made by the subordinate law include increases in the fees payable by a rail transport operator, under the Rail Safety National Law, and other, (apparently relatively minor) technical amendments.

The Committee notes, with approval, that a relatively detailed and helpful explanatory statement has been provided, with the national regulations. In relation to the fees increases, the explanatory statement states that the fees have been increased ….

> … in accordance with the cost recovery model agreed by the Transport and Infrastructure Council, to address the capacity of the Office of the National Rail Safety Regulator to undertake regulatory oversight.

If this were an ACT-originated instrument, the Committee would have preferred to also see the fees increases explained by reference to the "old" and "new" fees and the percentage of the increase. However, in the circumstances of national regulations, the Committee does not press the point, at this time.

The national regulations were tabled in the Legislative Assembly on 27 August 2020. The Committee notes that, under section 2 of the national regulations, the substantive amendments made by the national regulations commenced on 1 July 2020. However, there is (technically) no retrospective operation, as (consistent with the relevant requirements of the Rail Safety National Law) the national regulations were published on the NSW legislation website on 22 June 2020, prior to their commencement. Nevertheless, the Committee retains a concern about the extent to which persons in the ACT who are affected by the amendments made by these national regulations are aware of amendments that appear on an other-than-ACT legislation website.

The Committee seeks the Minister's advice on this issue and, in particular, as to what steps were taken to ensure that persons in the ACT who are affected by the amendments made by these national regulations were aware of the making and commencement of the national regulations.

The Committee notes, with approval, that the explanatory statement for these national regulations addresses the particular application of the national regulations the ACT, in relation to potential human rights issues. It states:

> There are no human rights or climate change implications arising from this regulation.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for these national regulations.

The comment immediately above does not require a response from the Minister.

REGULATORY IMPACT STATEMENTS—NO COMMENT

The Committee has examined regulatory impact statements for the following disallowable instruments and offers no comments on them:

- **Disallowable Instrument DI2020-218 being the Energy Efficiency (Cost of Living) Improvement (Eligible Activities) Determination 2020 (No 2).**
- **Disallowable Instrument DI2020-219 being the Energy Efficiency (Cost of Living) Improvement (Energy Savings Target) Determination 2020 (No 1).**
- **Disallowable Instrument DI2020-220 being the Energy Efficiency (Cost of Living) Improvement (Energy Savings Contribution) Determination 2020 (No 1).**
- **Disallowable Instrument DI2020-221 being the Energy Efficiency (Cost of Living) Improvement (Penalties for Noncompliance) Determination 2020 (No 1).**
- **Disallowable Instrument DI2020-222 being the Energy Efficiency (Cost of Living) Improvement (Priority Household Target) Determination 2020.**

RESPONSES

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Chief Minister, dated 27 August 2020, in relation to further comments made in Scrutiny Report 50 concerning the Sexuality and Gender Identity Conversion Practices Bill 2020.
- The Chief Minister and the Attorney-General, dated 27 August 2020, in relation to comments made in Scrutiny Report 41 concerning the COVID-19 Emergency Response Bill 2020.
- The Minister for Mental Health, dated 1 September 2020, in relation to further comments made in Scrutiny Report 50 concerning the Mental Health Amendment Bill 2020.
- The Attorney-General, dated 3 September 2020, in relation to further comments made in Scrutiny Report 48 concerning the Royal Commission Criminal Justice Legislation Amendment Bill 2020.
- The Minister for Police and Emergency Services, dated 4 September 2020, in relation to comments made in Scrutiny Report 50 concerning the Emergencies Amendment Bill 2020.

These responses[4] can be viewed online.

[4] https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/response-to-comments-on-subordinate-legislation.

- The Minister for City Services, dated 26 August 2020, in relation to comments made in Scrutiny Report 44 concerning Disallowable Instrument DI20202-93—Veterinary Practice (Fees) Determination 2020 (No 2).

- The Attorney-General, dated 27 August 2020, in relation to comments made in Scrutiny Reports 46 and 47 concerning the following instruments:

  - Disallowable Instrument DI2020-130—the Gambling and Racing Control (Governing Board) Appointment 2020 (No 2);

  - Disallowable Instrument DI2020-131—the Gambling and Racing Control (Governing Board) Appointment 2020 (No 1);

  - Disallowable Instrument DI2020-132—the Lotteries (Fees) Determination 2020 (No 1);

  - Disallowable Instrument DI2020-171—the Lotteries (Fees) Determination 2020 (No 2); and

  - Subordinate Law SL2020-20—the Court Procedures Amendment Rules 2020 (No 3).

These responses[5] can be viewed online.

The Committee wishes to thank the Chief Minister, the Attorney-General, the Minister for Mental Health, the Minister for City Services and the Minister for Police and Emergency Services for their helpful responses.

GOVERNMENT RESPONSES—COMMENT

SEXUALITY AND GENDER IDENTITY CONVERSION PRACTICES BILL 2020

On 27 August 2020, the Committee received a further response from the Chief Minister responding to comments in *Scrutiny Report 50* on the Sexuality and Gender Identity Conversion Practices Bill 2020. The Committee thanks the Chief Minister for his timely response.

In its comments, the Committee pointed to alternative approaches to the restriction of conversion practices, such as those presented in a report by researchers at La Trobe University (La Trobe University, Gay & Lesbian Health Victorians & the Human Rights Law Centre, *Preventing Harm, Promoting Justice: Responding to LGBT conversion therapy in Australia* (2018)). The Committee asked for a further response from the Chief Minister as to why such alternative approaches were not considered adequate for the purposes of a justification for any human rights limitations.

The Committee notes that the Chief Minister's response does not identify any alternative approaches or set out why they were not considered adequate.

The Committee acknowledges the reference in the Chief Minister's response to the further consultation engaged in by the Government, and the amendment to the Bill which the Government put forward.

The Committee has no further comments.

[5] https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/response-to-comments-on-subordinate-legislation.

DISALLOWABLE INSTRUMENTS DI2020-130, DI2020-131, DI2020-132, DI2020-171 AND SUBORDINATE LAW SL2020-20

The Committee notes that it has received a response from the Attorney-General, dated 27 August 2020, in relation to issues raised by the Committee in relation to various instruments and a subordinate law. In relation to the instruments—DI2020-130, DI2020-131, DI2020-132 and DI2020-171—the Attorney-General has addressed the Committee's concerns and the Committee has nothing to add, in relation to these instruments. However, the Committee has some further comments in relation to the Attorney-General's response in relation to the Committee's comments on the subordinate law—the Court Procedures Amendment Rules 2020 (No 3) (SL2020-20).

The Committee initially considered the subordinate law in question in *Scrutiny Report 46* of the 9th Assembly (21 July 2020). Amendments made by the subordinate law included amendments in relation to fees that can be charged by solicitors, etc in relation to their work. The Committee's concern was that the explanatory statement for the subordinate law did not address the changes in fees in the way that the Committee has always expected of instruments that determine fees. As the Attorney-General has noted, in his response, the Committee indicated that, while there appeared to be no increase in charges involved in the amendments made by the subordinate law …

> … it would have been preferable if this had been made clear, in the explanatory statement for the subordinate law.

In response, the Attorney-General states:

> The Rule-Making Committee (currently comprising the Chief Justice, Justice Elkaim, Acting Chief Magistrate and Magistrate Morrison) makes rules in relation to the practice and procedure of ACT Courts and their registries, pursuant to section 7 of the *Court Procedures Act 2004*. The Courts and the Joint Rules Advisory Committee continuously conduct a consultative review of the rules, which may result in amendments to the *Court Procedures Rules 2006* (the Rules). The Rules are made by the Judiciary and not by the Executive.

The Committee notes that it is aware that the Rules in question are made by the judiciary and not by the Executive. However, the Committee notes that this does not in any way diminish the Committee's expectations, in relation to the explanations, etc provided in relation to subordinate legislation scrutinised by the Committee.

The Committee notes that the Attorney-General's response goes on to state:

> Schedule 4 of the Rules sets out the scale of costs allowed to be charged for tasks upon the taxation of a legal matter. SL2020-20 amends Schedule 4, Part 4.2, Division 4.2.6 of the Rules by collapsing several chargeable items undertaken by a solicitor into one item, allowing for a streamlined process in assessing allowable costs.
>
> I note that this explanation is largely reflected in the Explanatory Statement issued with the authority of the Rule-Making Committee.

The Committee thanks the Attorney-General for providing this further information, which is helpful.

This comment does not require any further response from the Attorney-General.

Giulia Jones MLA
Chair

8 September2020

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

- **Report 28, dated 12 March 2019**
  - Electoral Amendment Bill 2018 (Private Member's amendments).
- **Report 37, dated 19 November 2019**
  - Domestic Animals (Disqualified Keepers Register) Amendment Bill 2019 (PMB).
  - Planning and Development (Controlled Activities) Amendment Bill 2019 (Private Member's amendments).
- **Report 38, dated 4 February 2020**
  - Electoral Legislation Amendment Bill 2019 (Private Member's amendments).
- **Report 39, dated 17 February 2020**
  - Unit Titles Amendment Bill 2019 (Private Member's amendments).
- **Report 44, dated 16 June 2020**
  - Residential Tenancies Amendment Bill 2020 (Private Member's amendments).
- **Report 45, dated 30 June 2020**
  - Disallowable Instrument DI2020-117 Liquor (Fees) Determination 2020.
  - Disallowable Instrument DI2020-119 Liquor (COVID-19 Emergency Response—Licence Fee Waiver) Declaration 2020.
  - Disallowable Instrument DI2020-120 Liquor (COVID-19 Emergency Response—Permit Fee Waiver) Declaration 2020.
- **Report 47, dated 28 July 2020**
  - Disallowable Instrument DI2020-147 Animal Welfare (Advisory Committee) Establishment 2020 (No 1).
- **Report 48, dated 11 August 2020**
  - Disallowable Instrument DI2020-216 Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 2).
- **Report 50, dated 25 August 2020**
  - Education Amendment Bill 2020—Government response.