Parliament of New South Wales

Legislation Review Committee

Correspondence received in response to the Legislation Review Committee Digest No. 35 – 19 October 2021

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The Hon. Matt Kean MP
Treasurer
Minister for Energy and Environment

Your ref: LAC21/035.11
Our ref: MD21/6950

Mr David Layzell MP
Chair
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

By email: Legislation.Review@parliament.nsw.gov.au

Dear Mr ~~Layzell~~ David,

Thank you for the opportunity to address issues raised by the Legislation Review Committee about the Energy Legislation Amendment Bill 2021.

I have considered the Committee's comments in the Digest about the Bill. The Department of Planning, Industry and Environment's response is summarised below. For additional detail, please see the attached table (Response to Digest No. 35/57).

The Department notes the Committee's comment that the amendment to the *Electricity Supply Act 1995* provides compliance officers with broad powers to enter private property without a warrant when investigating compliance in relation to the energy security safeguard scheme. The Department considers the impacts of the powers of entry in the Bill on an individual's right to privacy and property to be proportionate to the level of risk.

The Scheme Administrator currently has no power to inspect energy upgrades carried out under the schemes in the Energy Security Safeguard. This makes it difficult to investigate cases where it appears that Accredited Certificate Providers (ACPs) have claimed energy savings in excess of what they are entitled to claim. There have been some instances of this in the past, including cases where the ACP has claimed energy savings for upgrades where there were no savings.

With the addition of the new Peak Demand Reduction Scheme and the expansion of the Energy Savings Scheme (to 2050), the Scheme Administrator considers issues of this nature will continue to arise. With no explicit power to enter premises and inspect upgrades, it would not be possible for the Scheme Administrator to identify upgrades which have been incompetently or fraudulently implemented in breach of the requirements. The Department considers the proposed powers of entry in the Bill are proportionate to the need for entry of compliance officers.

The Committee also commented on the amendment under Schedule 4A of the *Electricity Supply Act 1995* in relation to the time limit for proceedings for an offence to be commenced. I note that the text of these provisions is similar to the provisions in the following:

- Section 364(3), (4) and (5) of the *Water Management Act 2000*
- Section 43(2), (3) and (4) of the *Dams Safety Act 2015*
- Section 9.57(5A) and (5B) of the *Environmental Planning and Assessment Act 1979*.

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The limitations under the current framework has caused significant problems for the Scheme Administrator in relation to enforcement decisions under the Energy Savings Scheme.

The Scheme Administrator relies on information which may be collected a significant period of time after an offence has been committed. The Scheme Administrator has been prevented from taking enforcement action in some matters due to the identification of a possible offence too late to permit investigation and evidence gathering ahead of the statutory cut-off date.

Further, the Scheme Administrator may not become aware of an offence until after the completion of an audit, which can occur later than the current two-year statutory limit. The existing time limitation undermines the existing penalty notice and new civil penalty regimes.

This is because a person who receives a penalty notice may not be inclined to pay the applicable fine if prosecution is no longer available due to expiration of the statutory time limit. The Department considers the time limits provided in the Bill are appropriate to ensure compliance. An effective compliance framework is essential to maintaining public confidence in the scheme.

The Department also notes the Committee's views about declaration of an electricity supply emergency without publication or public notice. It may not be in the public's interest to provide notification that one of the critical infrastructure assets is being subject to a cyber security attack. Public notification will broadcast that there are weaknesses to the security systems of critical energy infrastructure and might invite attack by foreign actors on all of NSW's critical energy infrastructure.

The provisions are not intended to exclude review and public oversight but rather to prevent aggravating the emergency by inviting further cyber-attacks to NSW's critical energy infrastructure. The Department considers the provisions are appropriate in the context of the real and serious risks cyber-attacks pose to NSW's critical energy infrastructure.

Thank you again for taking the time to bring these matters to the Government's attention.

Yours sincerely

Matt Kean MP
Treasurer
Minister for Energy and Environment

23.11.21

Encl. Response to Digest No. 35/57 from the Department of Planning, Industry and Environment

Department of Planning, Industry and Environment's response to Digest No. 35/57

Issue	Reform	Department comment/Response
Trespasses on personal rights and liberties		
Risk of arbitrary search	Energy Security Safeguard	The comments of the Committee are noted. However, the Department does not consider the powers of entry prescribed in the Bill unjustly impede on an individual's right to privacy and property. The proposed amendments do not seek to override existing national and state privacy and information laws, including the *Privacy and Personal Information Protection Act 1998*. The Department considers the impacts of the powers of entry in the Bill on an individual's right to privacy and property to be proportionate to the level of risk. The Scheme Administrator currently has no power to inspect energy upgrades carried out under the schemes in the Energy Security Safeguard. This makes it difficult to investigate cases where it appears that Accredited Certificate Providers (ACPs) have claimed energy savings more than what they are entitled to claim. There have been some instances of this in the past, including cases where the ACP has claimed energy savings for upgrades where there were no savings. With the addition of the new Peak Demand Reduction Scheme and the expansion of the Energy Savings Scheme (to 2050), the Scheme Administrator considers issues of this nature will continue to arise. With no explicit power to enter premises and inspect upgrades it would not be possible for the Scheme Administrator to identify upgrades which have been incompetently or fraudulently implemented in breach of the requirements. The integrity of the energy savings claimed under the Safeguard schemes is essential to support public trust. Comparable regulators, such as the Victorian Essential Services Commission, have significant statutory powers to address these issues. The Department considers the proposed powers of entry in the Bill are proportionate to the need for entry of compliance officers.

Issue	Reform	Department comment/Response
Reversal of onus of proof	Energy Security Safeguard	The comments of the Committee are noted. The reasons for including section 185 (3A)-(3C) are explained below. The Department also notes these provisions are similar to provisions in the following: • Section 364(3), (4) and (5) of the *Water Management Act 2000* • Section 43(2), (3) and (4) of the *Dams Safety Act 2015* • Section 9.57(5A) and (5B) of the *Environmental Planning and Assessment Act 1979*. Section 185(3) of the *Electricity Supply Act 1994* provides that proceedings for an offence "may be instituted at any time within two years after the commission of the offence". This limitation has caused significant problems for the Scheme Administrator in relation to enforcement decisions under the Energy Savings Scheme. The Scheme Administrator relies on three main sources of information to identify offences under the Act: audits, intelligence from market sources and incidental information gathering. These typically result in information being identified a significant period of time after an offence has been committed. The Scheme Administrator has been prevented from taking enforcement action in some matters due to the identification of a possible offence too late to permit investigation and evidence gathering ahead of the statutory cut-off date. There are several factors contributing to this. Audits under the Safeguard are sample-based, conducted on a reasonable assurance basis, and are generally permitted to occur after the certificates under audit have been created. These features represent a compromise, designed to represent a reasonable level of scrutiny without over-burdening businesses with onerous compliance costs. However, using a sampling approach means that many upgrades will only be subject to desktop review and, as such, audits can never be conclusive of the validity of a certificate. Because of the system of post-registration auditing, audits will typically occur months or years after an offence has been committed. The Scheme Administrator may not become aware of an offence until after the completion of an audit, which can be later than the current two year statutory limit. The existing time limitation undermines the existing penalty notice and new civil penalty regimes. This

Issue	Reform	Department comment/Response
		is because a person who receives a penalty notice may not be inclined to pay the applicable fine if prosecution is no longer available due to expiration of the statutory time limit. There is also considerable opportunity for the recipient of a penalty notice to run the clock down by exercising review rights under the *Fines Act 1996*. If the two year limitation period runs from the date on which the Scheme Administrator becomes aware of an offence, there should be sufficient time to undertake thorough investigation, issue a penalty or bring proceedings. The Department considers the time limits provided in the Bill are appropriate to ensure compliance. An effective compliance framework is essential to maintaining public confidence in the scheme.
Insufficiently subjects the exercise of legislative power to parliamentary scrutiny		
Declaration by the Premier	Cyber Security	**Public notice of declaration** It may not be in the public's interest to provide notification that one of the critical infrastructure assets is being subject to a cyber security attack. This will notify other actors that there are security loopholes in one of NSW's critical electricity assets and would act as an invitation for these actors to also seek to attack NSW electricity assets. The Department considers the provisions are appropriate in the context of the real and serious risks cyber-attacks pose to NSW's critical energy infrastructure.