

Gaming Machine (Emergency Community Purpose Contribution—Local Live Performance Industry) Declaration 2021 (No 2)

Disallowable Instrument DI2021-273

made under the

Gaming Machine Act 2004, s166A (Emergency community purpose contribution declaration)

EXPLANATORY STATEMENT

Overview and Purpose of this Declaration

The *Gaming Machine (Emergency Community Purpose Contribution—Local Live Performance Industry) Declaration 2021 (No 2)* 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 coronavirus disease 2019 (COVID-19) emergency.

In light of the outbreak of COVID-19 in the Australian Capital Territory (the Territory) in 2021, and the associated restrictions introduced by the public health emergency directions, the declaration extends the period of time for which clubs can claim contributions made to or for the local live performance industry as community purpose contributions. The declaration has been extended until 30 June 2022 to assist economic recovery for clubs and the local live performance industry.

Retrospectivity

Notwithstanding this instrument's notification date, it is taken to have commenced on 1 December 2021.

Section 76 of the *Legislation Act 2001* (the Legislation Act) provides that non-prejudicial provisions may commence retrospectively. Section 76 (4) of the Legislation Act notes that a provision is “prejudicial” if it operates adverse to the rights of individuals or if it imposes liabilities on individuals. Section 76 (4) further provides that retrospectivity that is prejudicial to the Territory or to a territory authority or instrumentality is permitted.

Retrospective commencement of the provisions in the Declaration will have a non-prejudicial effect. The Declaration extends the period of time for which clubs can claim contributions made to or for the local live performance industry as community purpose contributions and this will not adversely affect any person's rights or impose liabilities.

Background

Part 12 of the *Gaming Machine Act 2004* (the Act) provides for community contributions. A club is required to make community purpose contributions of at least eight per cent of the net gaming machine revenue that the club receives in a reporting year.

The *COVID-19 Emergency Response Act 2020* inserted new section 166A into the Act, under which the Minister may make an *emergency community purpose contribution declaration*.

Under an emergency community purpose contribution declaration, the Minister may declare that a contribution by a club is a community purpose contribution, despite anything else in the Act. In accordance with section 104 of the *Legislation Act 2001*, a reference to an Act includes a reference to statutory instruments made or in force under the Act, including any regulation. Part 9 of the *Gaming Machine Regulation 2004* (the Regulation) includes provisions relating to community purpose contributions. As a result, the making of a declaration under section 166A of the Act has the effect that the declared contribution is an emergency community purpose contribution, even where the Act or Regulation provides otherwise.

A declaration may only be made if a COVID-19 emergency is in force or was in force at any time in the previous 12 months. Under section 164 of the Act, a COVID-19 emergency means:

- (a) a state of emergency declared under the *Emergencies Act 2004*, section 156 because of the coronavirus disease 2019 (COVID-19); or
- (b) an emergency declared under the *Public Health Act 1997*, section 119 (including any extension or further extension) because of the coronavirus disease 2019 (COVID-19).

The definition of community purpose in section 166 of the Act has been amended to include ‘providing relief or assistance to the community in relation to a COVID-19 emergency.’ Under section 165 of the Act, the *community* includes people living in the Territory or surrounding region. Section 166 (2) of the Act sets out contributions that are not community purpose contributions. The *COVID-19 Emergency Response Legislation Amendment Act 2020* inserted new section 166 (2A) into the Act, which disapplies these limitations in relation to an emergency community purpose contribution.

An emergency community purpose contribution declaration may apply to anything that happens at any time during the reporting year in which the declaration is made. A reporting year for community contributions purposes is defined in section 164 of the Act. Clubs do not all report on a standard (July-June) financial year.

A declaration has effect for the period stated in the declaration and may be subject to any conditions declared by the Minister.

Under section 172 (2A) of the Act, clubs must include in their annual report the percentage of net gaming machine revenue that was contributed for the purpose of providing relief or assistance to the community in relation to a COVID-19 emergency. This includes any emergency community purpose contributions. This requirement applies to annual reports for reporting years that end after 23 March 2020.

Where a club with gross gaming machine revenue of less than \$200,000 per annum does not prepare an annual report, community purpose contribution information must be set out in a written statement attached to the club's certified income and expenditure statement (section 172 (3) of the Act). For clubs with gross gaming revenue of \$200,000 per annum or more, this information must be set out in an audited community purpose contribution statement included in a club's annual report (section 74A of the Regulation).

A declaration under section 166A is a disallowable instrument and must be tabled in the Legislative Assembly. Section 3A of the *COVID-19 Emergency Response Act 2020* requires that a disallowable instrument made under a power given under a COVID-19 measure is presented not later than the second sitting day after its notification day or it is taken to be repealed.

This Declaration

This *Gaming Machine (Emergency Community Purpose Contribution—Local Live Performance Industry) Declaration 2021 (No 2)* 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.

A COVID-19 emergency is currently in force under the *Public Health (Emergency) Declaration 2020 (No 1)* [NI2020-153].

In response to the 2021 COVID-19 outbreak in the Territory, the Territory Government ordered a lockdown between 12 August 2021 and 14 October 2021. The local live performance industry has been, and continues to be, affected by public health restrictions on certain activities as a result of the COVID-19 emergency. The relevant public health emergency direction at the time of this declaration is the *Public Health (Restricted Activities) Emergency Direction 2021 (No 7)* [NI2021-694]. The direction sets out restrictions to limit the spread of COVID-19 in the Territory, including that density limits for individual club industry venues will vary based on the activities undertaken at the venue.

Under the Regulation, the following contributions are not community purpose contributions:

- expenditure on professional entertainment or social or entertainment activities of a club, for members or patrons) (section 67 (1) (c)); and
- a contribution for remuneration, allowances or other entitlements for people employed by a club or a recipient unless otherwise allowable as a community purpose contribution (section 69 (1) (c)).

The restriction on entertainment claims under section 67 (1) (c) is made under section 166 (2) (c) of the Act, as it is expenditure on the club's business activities prescribed by regulation.

The restriction on employee remuneration claims under section 69 (1) (c) is made under section 166 (2) (j) of the Act, being any other contribution prescribed by regulation not to be a community purpose contribution.

As noted above, section 166 (2A) of the Act disapplies the limitations in section 166 (2) of the Act, and therefore the limitations in section 67 (1) (c) and section 69 (1) (c) of the Regulation, in relation to an emergency community purpose contribution declared under section 166A.

In addition, as noted above, section 166A provides that under an emergency community purpose contribution declaration, the Minister may declare that a contribution by a club is a community purpose contribution, despite anything else in the Act.

Local Live Performance Industry

The contributions must be made to, or for the benefit of, a member of the local live performance industry.

For the purposes of this declaration, a *member of the local live performance industry* means a person performing or working in the local live performance industry.

The *local live performance industry* means those people in the community who—

- (a) perform music or other live entertainment (other than sport) before an audience; or
- (b) are employed in 1 or more of the following areas in relation to the performance of music or other live entertainment (other than sport):
 - (i) producing, including pre-production and post-production;
 - (ii) staging;
 - (iii) lighting;
 - (iv) crewing;
 - (v) providing audio or audiovisual equipment;
 - (vi) administering;
 - (vii) programming;
 - (viii) manufacturing sets or props;
 - (ix) otherwise assisting with the performance of music or other live entertainment (other than sport).

As noted above, under section 165 of the Act, the term *community* includes people living in the Territory or surrounding region.

The dictionary of the Act provides that the term *employ* includes engage. This means that contractors as well as employees in the local live performance industry are included under this declaration.

Contributions

As with other contributions made under the scheme, contributions made to, or for the benefit of, a member of the local live performance industry can be either monetary or in-kind.

For clubs or club groups that are not a small or medium club or small or medium club group (as defined under section 157A of the Act), a minimum percentage of the club's net revenue must be a contribution of money.

This minimum percentage is 5 per cent for each reporting year that ends after 30 June 2019 and before 1 July 2021, and 6 per cent otherwise. As noted above, clubs do not all report on a standard (July-June) financial year.

Division 9.5 of the Regulation provides for working out of the value and timing of community purpose contributions. These requirements are made under section 167 (7) of the Act and are not disapplied by section 166 (2A) of the Act.

Section 69I requires the club to deduct from a community purpose contribution a fee or other amount charged in relation to an activity or event held by a club or at a facility owned by a club. This requirement applies where the fee or other amount charged is received by the club or an associated organisation of the club. It does not apply, for example, where an entry fee is paid to the performer rather than the club.

Where the club has a clear written record of the amount received by the club or an associated organisation, the value of the contribution must exclude that amount.

If the club does not have a clear written record of the amount received, the contribution is taken to have a value of \$0. This provision encourages clubs to keep proper records of amounts received in relation to events and activities.

Section 69J establishes that a monetary community purpose contribution is made when the money is given and not when the thing for which the money is given is provided or agreed to.

Section 69K sets out that clubs must work out the value of in-kind community purpose contributions using either the cost of providing the contribution or the market value of the contribution, and that the club must keep records of its workings and evidence of its costs and market valuations.

Other Requirements of this Declaration

Only contributions that are made after on or after the instrument's commencement day and on or before 30 June 2022 are community purpose contributions under this declaration.

The club must reduce the amount of a community purpose contribution claimed by the amount of any other assistance or relief the club has received from the Commonwealth or the Territory, however described, for the local live performance industry. As it is the club that has an obligation to make community contributions under the Act, this requirement is limited to assistance received by the club and does not extend to assistance provided directly to performers or industry workers.

The club must keep a record of any amount paid, or the value of any in-kind contribution made, to, or for the benefit of, a member of the local live performance industry that is claimed as a community purpose contribution.