



## Delegated Legislation Monitor 11 of 2021

### Chair's Tabling Statement

Wednesday 4 August 2021

I appreciate this opportunity to speak to the tabling of Scrutiny of Delegated Legislation Committee's *Delegated Legislation Monitor 11 of 2021*.

In Monitor 11 of 2021, the committee has drawn particular attention to the Australia's Foreign Relations (State and Territory Arrangements) Rules 2020. These rules relate to the Foreign Arrangements Scheme which commenced on 10 December 2020. As senators would be aware, the purpose of the Scheme is to ensure that arrangements between state or territory governments and foreign entities do not adversely affect Australia's foreign relations and are not inconsistent with Australia's foreign policy.

The rules, however, provide that certain arrangements are exempt from the notification and approval requirements of the Scheme. The committee is concerned that the instrument therefore deals with significant matters that go to the scope of the Scheme as a whole. This concern is heightened by the fact that a number of concepts within the rules appear to have a wide interpretation. For example, the rules provide that foreign arrangements solely dealing with minor administrative or logistical matters are exempt from the Scheme, however the scope of this exemption is unclear.

The committee considers that the scope of regulatory schemes should be clearly defined and be set out on the face of the primary legislation. Where significant details as to the scope of a scheme are nevertheless included in delegated legislation, the committee considers that such matters should be subject to regular parliamentary scrutiny. In this instance, the rules are subject to a regular ten-year sunset period, which significantly limits the ability of this chamber to scrutinise the instrument.

The committee has been engaging with the minister in relation to these substantive concerns since March this year.

Last week, the minister advised that the Department of Foreign Affairs and Trade had sought the advice of the Attorney-General's Department in relation to the sunset regime set out in the Legislation Act. The Attorney-General's Department advised that the default ten-year sunset period set out in the Legislation Act should be maintained unless there are clear policy reasons justifying a shorter sunset period. The minister advised the committee that, in her view, there are insufficiently clear policy reasons to justify a shorter sunset period for the rules.

The minister also reiterated her previous advice that the rules will be subject to regular review to ensure they reflect the intention of the Act and support the effective administration of the Scheme. Further, the minister assured the committee that the three-year statutory review of the Act will ensure timely and appropriate parliamentary scrutiny of the rules.

Nonetheless, the committee remains concerned that the instrument deals with significant matters that go to the scope of the Foreign Arrangements Scheme as a whole and that it appears that it is intended to remain in force for ten years.

The committee considers that in the system of representative and responsible government established by the Constitution there are often important scrutiny reasons for providing for shorter sunseting of instruments made by the executive under legislative power delegated by the Parliament. Therefore, the committee does not agree that it is always good legislative practice to apply the default sunseting period of ten years unless there are clear policy reasons to justify a shorter sunseting period.

Indeed, the committee regularly scrutinises instruments which include self-repeal provisions.

It is the committee's view that a five-year duration is the most appropriate mechanism for ensuring timely parliamentary scrutiny of the measures set out in these rules.

The committee's scrutiny concerns are heightened in relation to this particular instrument, given that this matter was discussed in detail with the department at a public hearing of the Foreign Affairs, Defence and Trade Legislation Committee's inquiry into the enabling bill.

Further, Senators will recall that in the last sitting period the Senate resolved to amend standing order 23 to reinforce the committee's scrutiny principles regarding delegated legislation which amends or modifies the operation of primary legislation. The committee therefore intends to rigorously pursue this type of scrutiny concern in accordance with the mandate provided by the Senate.

The committee gave a notice of motion to disallow the rules on 11 May 2021 as a precautionary measure to allow additional time for the committee to correspond with the minister and to seek a resolution to the committee's scrutiny concerns. This has not yet happened. The committee has therefore resolved to retain the disallowance notice until a satisfactory response to our concerns is received. In this regard, I note that this matter needs to be resolved urgently as the Senate must consider the disallowance notice by Wednesday next week or the instrument will be deemed to have been disallowed under subsection 47(2) of the Legislation Act. The committee looks forward to receiving the minister's response to its views set out in the monitor as a matter of urgency.

With these comments, I commend the committee's *Delegated Legislation Monitor 11 of 2021* to the Senate.