



Delegated Legislation Monitor Tabling Statement

Wednesday 11 August 2021

I appreciate this opportunity to speak to the tabling of Scrutiny of Delegated Legislation Committee's *Delegated Legislation Monitor 12 of 2021*.

I would like to highlight three instruments outlined in Chapter 1 of the Monitor which raise significant technical scrutiny concerns.

The first instrument is the **Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021**. These regulations amend the Australian Charities and Not-for-profits Commission Regulation 2013 to alter the governance standards relating to charities engagement in, or promotion of, unlawful activities.

Failure to comply with these governance standards may result in revocation of a charity's registration or the exercise of other enforcement powers under the *Australian Charities and Not-for-profits Commission Act 2012* (the ACNC Act).

As set out in the Monitor, the committee has significant outstanding scrutiny concerns about the instrument. These concerns are heightened by the high level of correspondence and concerns the committee has received from members of the public and charitable groups.

In particular, the committee is concerned about the obligations the instrument imposes on charities to maintain reasonable internal control procedures to prevent the use of their resources to promote another entity's unlawful actions. The committee considers this will require the ACNC Commissioner to make a subjective judgement, noting that they must have regard to the individual circumstances of each

charity. This appears to enable the ACNC Commissioner to exercise broad discretionary powers without any clear guidance or limitations on the face of the primary legislation or regulations.

In addition, the committee is concerned about the instrument's potential impact on the implied freedom of political communication. It appears that the instrument may restrict a charity's ability to support or promote certain types of political protest, without having committed an unlawful act themselves. In the absence of further information, it is unclear whether this requirement impermissibly burdens the implied freedom in its terms, operation, or effect. Unfortunately, the Assistant Treasurer has not yet provided a clear explanation as to how the instrument as a whole does not impermissibly restrict the implied freedom.

The committee looks forward to receiving further advice from the Assistant Treasurer in relation to the committee's ongoing scrutiny concerns.

The second instrument is the **Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021**. This instrument expands the operating remit of the Australian Renewable Energy Agency to permit it to invest in a wider range of technologies, including low emissions technologies. The chamber will recall a similar instrument was disallowed on the 22 June.

The committee thanks the Minister for Energy and Emissions Reduction for his comprehensive response to the committee's scrutiny concerns in relation to the disallowed instrument. However, we remain concerned that the instrument is expanding the remit of ARENA beyond what was envisaged by Parliament when the enabling Act was passed. The committee also maintains its view that these measures go beyond filling out the detail of the Act and that they therefore appear more appropriate for parliamentary enactment.

In addition, it is unclear to the committee whether the new regulations may be considered to be the 'same in substance' as the disallowed regulations and therefore invalid.

The committee is seeking the minister's advice in relation to these concerns.

The third instrument is the **Australia's Foreign Relations (State and Territory Arrangements) Rules 2020**.

The committee has corresponded with the Foreign Minister in relation to this instrument on numerous occasions since March this year. I note that it took several rounds of correspondence and substantial committee resources before the committee's scrutiny concerns were resolved.

The rules set out significant matters that go to the scope of the newly established Foreign Arrangements Scheme – specifically, it provides that certain arrangements are exempt from the notification and approval provisions of the enabling Act.

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.

Yesterday, the minister advised that she would progress an amendment to the instrument to provide that it repeals within five years from commencement. The committee thanks the minister for her engagement in relation to this instrument and welcomes the minister's undertaking as this will allow for appropriate parliamentary oversight of the measures set out in instrument.

In light of the minister's undertaking, earlier today I withdrew the committee's notice of motion to disallow the instrument.

With these comments, I commend the committee's *Delegated Legislation Monitor 12 of 2021* to the Senate.