



Delegated Legislation Monitor 15 of 2021

Tabling Statement

Thursday, 21 October 2021

I rise to speak to the tabling of the committee's *Delegated Legislation Monitor 15 of 2021*.

The first instrument I would like to draw to the Senate's attention is the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 3) Instrument 2021.

As senators would be well aware, the emergency declaration in relation to COVID-19 was first made on 18 March 2020. This instrument extends the human biosecurity emergency period for a further three months until 17 December 2021. This means the emergency period has now been extended on six separate occasions with no opportunity for parliamentary oversight through the disallowance process.

The effect of this declaration is that the Minister for Health can continue to determine emergency requirements and give directions that he deems necessary to prevent or control COVID-19. The committee is extremely concerned that significant measures at the Commonwealth level such as the ban on Australian citizens travelling overseas and the India Travel Pause have not been subject to parliamentary oversight.

During the committee's hearings last year, evidence was provided regarding the cascading effects of the declaration of a Commonwealth pandemic emergency on state and territory laws. Whilst there are differing laws the continued presence of the pandemic emergency period has given succour to the imposition of harsh and draconian measures, which similarly have had little or no scrutiny by state and territory parliaments.

Moreover, the continued extension of the emergency period at the Commonwealth level signals to the states that it remains appropriate for restrictive state public health orders to remain in force. Conversely, an end to the Commonwealth emergency period would send a strong message that it is time to return to some level of normality.

It is the committee's view that emergency delegated legislation must be subject to appropriate parliamentary oversight. Continuing to make instruments under the *Biosecurity Act* which are exempt from disallowance undermines Parliament's constitutional role as the primary institution responsible for making law.

The committee appreciates that during an emergency, urgent and decisive action must be taken. However, we are now well into the second year of this pandemic and that excuse is no longer valid. Parliament needs oversight over these critical decisions now and into the future.

In the committee's previous Monitor, the committee sought Minister Hunt's advice about whether the government will consider amending the *Biosecurity Act* to provide that any future emergency determinations and extensions to the emergency period will be subject to disallowance.

Yesterday, Minister Hunt advised that he considers that such amendments are not necessary. For these reasons, not only will the committee be seeking the minister's advice about this instrument's exemption from disallowance, but the committee also intends to move amendments to the *Biosecurity Amendment (Enhanced Risk Management) Bill 2021* that is currently before the Parliament to reflect the committee's unanimous view that any future determinations and extensions should be subject to disallowance.

I would like to further note that in December last year, the committee tabled its interim report of its inquiry into the exemption of delegated legislation from parliamentary oversight, which detailed the concerns that I have raised again today.

It is with deep concern that I advise the chamber that the government has still not responded to this report, ten months later, despite the urgent and significant concerns detailed in this report. On this note, I thank the chamber for agreeing to an order for production of documents earlier today requiring this response to be tabled on the next sitting day.

The second instrument I raise is the Legislation (Exemptions and Other Matters) Amendment (2021 Measures No. 1) Regulations 2021. This instrument amends the Legislation (Exemptions and Other Matters) Regulation 2015 to extend exemptions to disallowance and sunseting in relation to certain legislative instruments.

This includes extending an exemption from disallowance for instructions given under the Air Services Regulations 2019, and exempting motor vehicle standards made under the *Road Vehicle Standards Act 2018* from sunseting.

The committee considers that exemptions from essential parliamentary oversight mechanisms such as disallowance and sunseting should be outlined in primary, rather than delegated legislation and soundly justified in the explanatory materials. Further, as acknowledged by this chamber in June, exemptions from these crucial oversight mechanisms should only be made in the most limited circumstances.

The committee has previously raised these concerns with the Attorney-General. However, the committee considers that the Attorney-General's response did not sufficiently address these concerns, particularly about the justification for these exemptions and their inclusion in delegated legislation.

It is unsatisfactory that the committee's detailed scrutiny concerns and recommendations in this report about the inappropriateness of most existing exemptions from disallowance appear to have been wholly disregarded in the making of this instrument. For this reason, the committee is seeking the Attorney-General's further advice regarding why these exemptions from parliamentary oversight are appropriate and necessary, and if they truly are necessary, whether they can at least be included in primary legislation.

On the issue of disallowance, I note that since the changes to the committee's standing orders came into effect on 1 July, the committee has so far considered 35 instruments which are exempt from disallowance. Of these 35, only one has met the committee's standards and is appropriately exempt. That is less than 3% and it is not good enough. This is an issue that the committee will continue to rigorously pursue into the future.

Finally, I would like to mention the Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021. The chamber will recall disallowing a similar instrument on 22 June this year.

In this Monitor the committee draws the Senate's attention to a third instrument made under the ARENA Act, the Australian Renewable Energy Agency (General Funding Strategy) Determination 2021. Concerningly, this is yet another significant instrument that is exempt from disallowance.

The committee has the same concerns in relation to all three ARENA instruments, noting that all three are made under the ARENA Act, the object of which is to improve the competitiveness and supply of renewable energy in Australia.

The committee is recommending that the Senate disallow the Technology Investment Roadmap Regulations for two primary reasons. First, on the basis that it may be expanding the remit of the Australian Renewable Energy Agency beyond the power of its enabling legislation. Secondly, the committee is also concerned that the regulations deal with the significant matter of expanding the jurisdiction of ARENA from investing in renewable energy technologies to programs relating to energy efficiency and low-emissions technology.

It is therefore the committee's strong view that the measures set out in the regulations are more appropriate for parliamentary enactment.

Before concluding, I would like to briefly update the Senate on the committee's consideration of the Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021. The Committee is very cognisant of the concerns that have been raised in relation to these regulations, including with the committee directly. I expect many colleagues also share these concerns.

The instrument amends the Australian Charities and Not-for-profits Commission Regulation 2013 to alter certain governance standards relating to charities' engagement in, or promotion of, unlawful activities.

The committee's most significant outstanding scrutiny concerns centre on a provision of the instrument which requires charities to maintain reasonable internal control procedures to ensure that its resources are neither used, nor continued to be used, to actively promote another entity's unlawful acts or omissions.

The committee is concerned that this provision appears to enable the ACNC Commissioner to exercise a broad discretion in determining compliance with the governance standards. In addition, the lack of clarity on what will constitute 'reasonable internal control procedures' may inhibit charities' ability to understand their obligations under the instrument.

Due to these substantive scrutiny concerns, the committee is recommending that the Senate disallow the instrument.

With these comments, I commend the committee's *Delegated Legislation Monitor 15 of 2021* to the Senate.