



Delegated Legislation Monitor 5 of 2022

Tabling Statement

Wednesday 7 September 2022

I rise to speak to the tabling of the Senate Standing Committee for the Scrutiny of Delegated Legislation's Delegated Legislation Monitor 5 of 2022.

This committee is one of the Senate's oldest and most respected standing committees. It performs the important role of examining all instruments made under the authority of Acts of the Parliament which are of a legislative character.

The committee engages in the technical scrutiny of delegated legislation in accordance with the scrutiny principles set out in standing order 23. These principles focus on compliance with statutory requirements, principles of parliamentary oversight and the protection of individual rights and liberties.

Importantly, the committee does not consider the policy merits of delegated legislation. As a result of this approach, the committee has a strong and longstanding commitment to non-partisanship.

This Monitor reports on the committee's consideration of 825 legislative instruments registered on the Federal Register of Legislation between 26 February and 26 July 2022. This includes 656 disallowable instruments, and 169 instruments exempt from disallowance. It also details the committee's ongoing consideration of instruments registered in previous periods.

In this Monitor, the committee is seeking advice from ministers in relation to 13 instruments. The committee is raising initial concerns in relation to eight instruments, and seeking further advice in relation to 5 instruments previously considered. I wish to particularly highlight the committee's comments in relation to four of these instruments.

The first instrument is the Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet's Portfolio Measures No. 2) Regulations 2022. This instrument amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for government spending on the Australian Future Leaders Program.

The scrutiny of instruments made under the *Financial Framework (Supplementary Powers) Act 1997* is a key aspect of parliamentary scrutiny and control of Commonwealth expenditure.

In this instance, the explanatory statement to the instrument specifies the amount that will be spent on the program but does not appear to include the eligibility criteria for the program, and it is unclear to the committee if the criteria will be made public. The status of both the relevant expenditure, and of the grant recipient who will deliver the program, is also unclear.

The committee has therefore resolved to seek advice from the new Minister for Finance as to whether the eligibility criteria can be made publicly available, whether the funding authorised by the instrument has been expended on the program, the status of the entity to which funding is being provided, and whether this information can be included in the explanatory statement to promote parliamentary oversight of Commonwealth expenditure.

The Australian Renewable Energy Agency Amendment (Clean Energy Technologies) Regulations 2022 were made and registered prior to prorogation of the previous Parliament. This instrument has since been superseded by the Australian Renewable Energy Agency Amendment (Powering Australia) Regulations 2022, made under the new government.

Both instruments seek to prescribe additional functions of the Australian Renewable Energy Agency, ARENA. The most recent instrument seeks to prescribe 'electrification technologies' and 'energy efficiency technologies' as functions of ARENA.

On the information provided in the explanatory statement, it remains unclear to the committee whether the prescribed functions fall within the scope of the Australian Renewable Energy Agency Act 2011, under which the instruments are made.

The Senate has previously disallowed instruments which sought to prescribe ARENA's functions due to related concerns. The committee has therefore resolved to seek the minister's further advice about this matter and the extent of consultation undertaken in drafting the most recent instrument.

Finally, the committee has resolved to seek further advice about the Financial Sector Reform (Hayne Royal Commission) Response (Hawking of Financial Products) Regulations 2021. The instrument amends the Corporations Regulations to create an exemption to the prohibition on hawking financial products in the *Corporations Act 2001*. The Corporations Regulations are not subject to sunseting. Consequently, the exemption to primary legislation made by the instrument will remain in place indefinitely, unless later amended.

The committee engaged in extensive correspondence with the former Treasurer about this instrument. The committee's longstanding view is that delegated legislation should not be used to create exemptions to primary legislation. Where it is absolutely necessary to use delegated legislation for this purpose, the committee considers that the relevant exemption should be time-limited, to facilitate regular parliamentary scrutiny.

Despite the previous committee's engagement with the former Treasurer, it was unable to resolve its concerns and recommended the Senate disallow the instrument. As the disallowance motion was unresolved when the previous Parliament was prorogued, the instrument was deemed to be tabled again in the Senate on the first sitting day of the new Parliament and the disallowance period now expires on 25 October 2022.

The committee has therefore resolved to seek the new Treasurer's advice in relation to whether the relevant exemptions can be time limited.

With these comments, I commend the committee's Delegated Legislation Monitor 5 of 2022 to the Senate.