



Delegated Legislation Monitor Tabling Statement

Wednesday 28 September 2022

I rise to speak to the tabling of the Senate Standing Committee for the Scrutiny of Delegated Legislation's *Delegated Legislation Monitor 6 of 2022* and the Committee's *Annual Report 2021*.

This monitor reports on the committee's consideration of 138 legislative instruments registered on the Federal Register of Legislation between 27 July and 31 August 2022. This includes 120 disallowable legislative instruments and 18 instruments exempt from disallowance. It also details the committee's ongoing consideration of instruments registered in previous periods, and concludes its engagement with the relevant minister in relation to four instruments.

I would first like to draw the chamber's attention to the committee's concluding comments on the Australian Renewable Energy Agency Amendment (Powering Australia) Regulations 2022. These regulations prescribe 'energy efficiency technologies' and 'electrification technologies' as functions of the Australian Renewable Energy Agency (ARENA).

As I noted in my comments on *Delegated Legislation Monitor 5*, it was unclear to the committee whether these functions fell within the scope of the *Australian Renewable Energy Agency Act 2011*, the ARENA Act, under which the instruments are made. The committee also sought advice about the extent consultation undertaken in making the instrument.

Since the committee reported, the objects of the ARENA Act has been amended to expand its objects and include a note clarifying the types of functions which can be prescribed by regulation.

The minister's response to the committee outlined these amendments and provided additional, useful information about the degree of connection between the functions prescribed by the instrument and the scope of the ARENA Act. The minister also provided further information as to the consultation undertaken in making the information.

On the basis of the minister's advice, and noting the recent amendments to the ARENA Act, the committee has resolved to conclude its examination of the instrument.

The committee thanks the minister and departmental officers for their constructive engagement on this matter.

This monitor also contains the committee's requests for further information from the relevant minister in relation to three instruments:

- the Bankruptcy Amendment (Service of Documents) Regulations 2022;
- the Financial Framework (Health Measures No. 9) Regulations 2021; and
- the Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet Measures No. 11) Regulations 2021.

The Health Measures No. 9 Regulations authorise spending on the development and maintenance of Australia's onshore capability to manufacture mRNA products. The committee had sought the minister's advice as to why it was considered appropriate to address such significant matters in delegated legislation. The committee also asked whether the funding amount could be disclosed to promote appropriate parliamentary oversight of Commonwealth expenditure.

The Minister for Health and Ageing has since provided additional information about the need to use delegated legislation for this purpose and has also outlined some of the complexities relating to disclosing the funding amount. Despite these complexities, he has advised that his department is working with the funding recipient to provide the required transparency expected by Parliament. The committee is therefore

seeking an undertaking to update the explanatory statement to the instrument with further information about the relevant expenditure once this work is complete.

The Prime Minister and Cabinet Measures No. 11 Regulations amends the Financial Framework (Supplementary Powers) Regulations to authorise spending on the Territories Stolen Generations Redress Scheme. The committee had sought the minister's advice on several issues, including the need to use delegated legislation to address such significant matters and the availability of merits review. In light of the minister's response, the committee has resolved to seek further advice about the availability of merits review for decisions made under the Scheme.

Finally, I would like to speak to the tabling of the committee's *Annual Report 2021*. The report documents a significant year in the committee's history. In 2021, the committee examined 1712 instruments, of which 420 raised scrutiny concerns. This was a significant increase from the 240 instruments raising concerns in 2020. In 2021, most concerns raised by the committee at the ministerial level related to inclusion in delegated legislation of matters more appropriate for parliamentary enactment, and instruments modifying primary legislation. Chapter 2 of the report provides further detailed information about the committee's scrutiny work over the year.

The increase in the number of instruments raising scrutiny concerns is partly due to amendments to the committee's standing orders in mid-2021. Amongst other matters, these amendments empowered the committee to scrutinise instruments in relation to exemptions from disallowance and sunseting. These amendments arose from the recommendations of the committee's Inquiry into the exemption of delegated legislation from parliamentary oversight. Chapter 1 of the Annual Report outlines this important inquiry.

Chapter 3 of the report contains case studies of some of the most significant scrutiny issues identified by the committee in 2021. These include the committee's extensive engagement with the Treasurer in relation to instruments made in the Treasury portfolio which modified or created exemptions to the operation of primary legislation. Following this engagement, the committee was pleased to note the more

frequent inclusion of limitations on the duration of instruments modifying the operation of primary legislation. The committee thanks the former Treasurer and departmental officers for their constructive engagement with the committee on this matter.

Chapter 3 of the report also identifies ongoing scrutiny issues that committee will continue to monitor, including the exemption of delegated legislation from disallowance in the absence of an adequate justification.

Finally, I would like to take this opportunity to thank previous committee members, the committee's legal adviser, Associate Professor Andrew Edgar and the secretariat for their work in 2021 on these significant matters.

With these comments, I commend the committee's *Delegated Legislation Monitor 6 of 2022* and *Annual Report 2021* to the Senate.