



17 June 2021

The Hon David Littleproud MP
Minister for Agriculture, Drought and Emergency Management
Parliament House
CANBERRA ACT 2600

Via email: minister.littleproud@agriculture.gov.au

CC: DLO-MO@agriculture.gov.au

David

Dear Minister,

Export Control (Wood and Woodchips) Rules 2021 [F2021L00318]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to this matter.

Conferral of discretionary powers

Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers. This includes where instruments confer discretionary powers on a person.

The instrument prescribes that exported Australian wood and woodchips must be sourced in accordance with the *Environment Protection and Biodiversity Conservation Act 1999* and State requirements.

Part 3 of the instrument provides for the Minister's powers in relation to the approval, amendment and revocation of State codes of practice. A code of practice is "the practices adopted in that State for the establishment, management and harvesting of all plantations in that State, whether or not those practices are contained in a single document". Approvals and revocations of State codes of practice under sections 2-7, 2-9 and 2-12 are by notifiable instrument. In addition, section 2-10 provides that the Minister may require a State to amend an approved code of practice. Once the code is so amended, the Minister must approve the amended code of practice by notifiable instrument.

The committee considers that instruments that confer discretionary powers on a person should set out the factors which the person must consider in exercising the discretion. The explanatory statement should also address the purpose and scope of the discretion and why it is necessary. The explanatory statement should further explain the nature and source of any relevant limitations and safeguards, including whether they are contained in law or policy.

In this regard, the committee notes that the instrument requires the Minister to have regard to the findings of a scientific assessment of a State code of practice when determining whether to

approve or revoke the code. The scientific assessment is prepared under the direction of the Secretary and based on the national plantation principles. However, the explanatory statement does not provide any further detail as to how a scientific assessment will be assessed in making such determinations.

Moreover, the committee notes that no guidance is provided in the instrument or the explanatory statement in relation to section 2-10 and the matters that the Minister must have regard to in requiring a State to amend its code of practice.

Additionally, the explanatory statement does not justify why it is necessary for the Minister to have such powers in relation to State codes of practice. The committee therefore considers that these provisions confer broad discretionary powers on the Minister which are not sufficiently justified in the explanatory statement.

The committee therefore requests your advice as to:

- **whether the explanatory statement to the instrument can be amended to provide further guidance and detail as to the process and factors that will be considered in making a decision to approve a State code of practice under subsection 2-7(1), approve an amended code of practice under subsection 2-9(2) and revoke a code of practice under subsection 2-12(1); and**
- **whether the instrument can be amended to include at least high-level guidance in relation to the circumstances in which a minister may require a State to amend its approved code of practice under section 2-10.**

Parliamentary oversight

Senate standing order 23(3)(k) requires the committee to consider whether an instrument complies with any other ground relating to the technical scrutiny of delegated legislation. This include whether an instrument limits parliamentary oversight.

As noted above, approvals and revocations of State codes of practice under sections 2-7, 2-9, 2-10 and 2-12 are by notifiable instrument. The committee is concerned that the instrument provides the power for a Commonwealth minister to make determinations in relation to State codes of practice via notifiable instrument, which is excluded from parliamentary scrutiny. The committee notes that, in contrast to legislative instruments, notifiable instruments are not subject tabling, disallowance, sunseting, or scrutiny by this committee.

The committee addressed the issue of the use of notifiable instruments in its 2020-2021 inquiry into exemptions from parliamentary oversight.

The committee therefore requests your advice as to whether the instrument can be amended to provide that approvals and revocations of State codes of practice under sections 2-7, 2-9, 2-10 and 2-12 are to be by legislative instrument, rather than notifiable instrument.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **1 July 2021**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation