



Delegated Legislation Monitor Tabling Statement

Wednesday 2 September 2020

I rise to speak to the tabling of the Scrutiny of Delegated Legislation Committee's *Delegated Legislation Monitor 10 of 2020*.

In particular, I wish to draw the Senate's attention to three instruments in Chapter 1 of the Monitor which raise significant technical scrutiny concerns.

The first instrument is the Australian Postal Corporation (Performance Standards) Amendment (2020 Measures No. 1) Regulations 2020. This instrument implements several temporary changes to performance standards for the delivery of letters, and temporarily exempts Australia Post from its retail outlet obligations. The changes aim to respond to the challenges faced by Australia Post during the COVID-19 pandemic.

It appears to the committee that the changes made by the instrument have the potential to affect a broad range of people and entities, including users of Australia Post's services and Australia Post employees. Despite this, the explanatory statement to the instrument states that only Australia Post itself was consulted in the development of the instrument.

After seeking advice from the minister about this matter, the committee understands that the instrument is due to be reviewed later this year, and that the review will include consultation with a range of different stakeholders about the impact and proposed duration of the measures.

Given the significance of the measures and the broad scope of people and entities likely to be affected by them, the committee has asked to be provided with updates on the progress of future consultation. The committee has also resolved to give a

notice of motion to disallow the instrument on 6 October 2020, with a view to reconsidering the notice once the committee is satisfied that appropriate consultation has been undertaken.

The second instrument I wish to highlight is the Coronavirus Economic Response Package (Deferral of Sunsetting—Income Management and Cashless Welfare Arrangements) Determination 2020. This instrument defers the sunsetting of primary legislation to extend the end date for the Cashless Debit Card trial in all existing sites and income management in the Cape York region for a further six months until 31 December 2020.

The committee would ordinarily expect such a significant measure to be included in primary legislation, rather than delegated legislation, consistent with previous extensions to the cashless welfare arrangements. In this instance, the explanatory statement to the instrument stated that delegated legislation was necessary to provide certainty to scheme participants noting that Parliament was unable to consider the bill to extend the end dates as sittings were deferred in response to COVID-19. Noting that Parliament has now resumed a regular sitting pattern, it was unclear to the committee why it was necessary to continue to address this matter in delegated legislation.

On 31 August 2020, the committee lodged a notice of motion to disallow the instrument for consideration and debate in the Senate on 3 September 2020, should the bill not be listed for debate before that time.

The minister has since provided the committee with a more detailed justification as to why the bill could not be listed for debate in the Senate by 3 September, and has reiterated that the government intends to bring the bill on for consideration as early as is practical.

In light of the minister's advice, the committee has resolved to initially postpone the consideration of its notice of motion until 8 October 2020, pending an update from

the minister as to the government's progress towards the scheduling of the bill for debate in the Senate.

The final instrument I draw to the Senate's attention is the Competition and Consumer (Industry Codes—Dairy) Regulations 2019.

The committee has been particularly concerned about section 11 of the instrument, which imposes significant civil penalties on farmers and processors for failing to act in 'good faith'. This term is undefined in the written law.

As a technical scrutiny matter, the committee strongly considers that civil and criminal penalty provisions should be drafted with sufficient clarity to enable persons and entities to understand their obligations and the consequences of non-compliance. Since December 2019, Senate standing order 23(3) has required the committee to scrutinise delegated legislation to determine whether its drafting is defective or unclear.

In considering this instrument, the committee has become aware of several other examples of similarly drafted provisions in both delegated and primary legislation. These examples raise broader, systemic concerns about the pursuit of regulatory flexibility via the imposition of broadly drafted good faith provisions at the expense of legal clarity and certainty.

As section 11 of the instrument is just one example of this much broader and complex issue, the committee considers that the disallowance of that section in isolation would do little to address the systemic issues. Accordingly, the committee considers that this issue would be more appropriately addressed by a broader inquiry into the drafting of good faith obligations in Commonwealth legislation, and consideration by the Australian Competition and Consumer Commission.

I am pleased to report that, following extensive correspondence, the Attorney-General now agrees that the drafting of good faith obligations in

Commonwealth legislation raises complex and systemic issues which warrant further inquiry.

In light of the Attorney-General's undertaking, the committee has resolved to withdraw its notion of motion to disallow the Dairy Code, and instead pursue this significant scrutiny matter by:

- liaising with the Attorney-General about the terms of reference for an inquiry into the drafting of good faith obligations in Commonwealth legislation; and
- requesting that the ACCC consider this issue as part of its ongoing inquiry into bargaining power in supply chains for perishable products.

I thank the Minister for Agriculture, Drought and Emergency, the Treasurer, and the Attorney-General for their assistance with this matter.

With these comments, I commend the committee's *Delegated Legislation Monitor 10 of 2020* to the Senate.