



Delegated Legislation Monitor No. 9 of 2020

Tabling Statement

Thursday 27 August 2020

I rise to speak to the tabling of the Scrutiny of Delegated Legislation Committee's *Delegated Legislation Monitor 9 of 2020*.

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

The first instrument that I draw to the Senate's attention 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 from 30 June 2020 to 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. The government has justified the use of delegated legislation in this instance on the basis that the disruptions to the parliamentary sittings caused by COVID-19 prevented Parliament from considering the extension before the arrangements expired on 30 June 2020.

As Parliament has now resumed a regular sitting pattern, the committee considers that there is no longer a reasonable justification for this matter to be included in delegated legislation. Accordingly, the committee calls on the minister to introduce the necessary bill without delay, and advises the chamber of its intention to seek to disallow the instrument if the bill is not listed for consideration in the next sitting week.

The second instrument I wish to highlight is the Competition and Consumer (Industry Codes—Dairy) Regulations 2019. This instrument creates the Dairy Code of Conduct, which sets enforceable minimum conduct standards for businesses practices between dairy farmers and corporations that buy and sell milk.

Since February this year, the committee has engaged extensively with the government about the imposition of significant civil penalties in section 11 of the instrument for failure to comply with an undefined term, 'good faith'. As a matter of technical legislative scrutiny, the committee strongly considers that civil penalty provisions should be drafted with sufficient clarity to enable persons and entities to understand their obligations and the consequences of non-compliance. In particular, the committee considers that it is important for farmers on the ground to be able to understand their rights and obligations by reading the text on the face of the instrument, without the need to also understand nebulous common law concepts of good faith.

Examples provided by the Attorney-General, Treasurer and Minister for Agriculture, Drought and Emergency Management of good faith obligations in other Commonwealth laws raise broader concerns about the pursuit of regulatory flexibility via the imposition of broadly drafted good faith provisions at the expense of legal clarity and certainty.

Noting that the instrument raises complex, systemic issues relevant to both delegated and primary legislation, the committee has requested that the Attorney-General refer the codification of good faith obligations in Commonwealth legislation to the Australian Law Reform Commission for inquiry.

The Attorney-General's response will assist the committee in determining whether to withdraw the notice of motion to disallow the instrument, which must be considered by the Senate by 3 September 2020.

The third instrument is the Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020. This instrument has the effect of requiring the majority of

actions relating to foreign investment in Australia to be notified to the Treasurer for review to assess whether they are contrary to the national interest. The instrument does not specify an end date to the measures.

The committee is concerned that the failure to specify an end date in the instrument could mean that this COVID-19 response measure becomes an ongoing part of the law without appropriate parliamentary scrutiny and debate.

The committee has resolved to recommend that the Senate disallow the instrument and will therefore give a notice of motion to disallow the instrument on 1 September for consideration and debate in the Senate 15 sitting days after that date. If there are any further developments in relation to this matter the committee may reconsider its recommendation and will report to the Senate in a future Monitor.

Whilst these instruments raise significant scrutiny concerns, I am pleased to advise the chamber that Monitor 9 also documents some positive developments regarding undertakings to address committee concerns.

For example, I am pleased to note that the Health Minister has amended the National Health (Take Home Naloxone Pilot) Special Arrangement 2019 in response to the committee's concerns about the delegation of the Secretary's powers and functions to third party administrators, and the availability of public accountability measures in relation to the actions of third party administrators.

Three other instruments have been amended in response to technical scrutiny concerns raised by the committee since the committee last reported. These undertakings are recorded in the Monitor. The committee thanks the Minister for Education and the Department of Health for their constructive engagement on these matters, and notes that this approach sets a positive precedent for the future.

With these comments, I commend the committee's Delegated Legislation Monitor 9 of 2020 to the Senate.