



Delegated Legislation Monitor 2 of 2022

Tabling Statement

Wednesday, 9 February 2022

I rise to speak to the tabling of the committee's *Delegated Legislation Monitor 2 of 2022*.

Before commenting on the Monitor I have just tabled, I would like to draw the chamber's attention to an instrument which the committee raised in Monitor 1 of 2022, which was presented out of sitting in January. The Treasury Laws Amendment (Greater Transparency of Proxy Advice) Regulations 2021 impose new obligations on financial services licensees who provide proxy advice.

These obligations include requiring proxy advisers to provide their advice to entities that are the subject of that advice and requiring relevant licensees be independent of their clients. Importantly, these measures will be achieved by the regulations modifying the Corporations Act without the need for amending legislation to be passed.

Ordinarily, the Corporations Regulations are limited to imposing penalties of \$11,100 on individuals and \$111,000 on body corporates. This is an important safeguard to ensure significant penalties are only imposed after careful consideration by the Parliament.

However, as this instrument modifies the Corporations Act individuals will be subject to civil penalties of up to \$1.11 million and body corporates will be subject to civil penalties of up to \$11.1 million. Individuals will also be subject to criminal offences that could see them imprisoned for up to five years. The committee is concerned that these significant penalties are being imposed without full parliamentary consideration.

Adding to the committee's concern in relation to these substantial penalties is the lack of clarity of drafting of key terms. For example, further clarity could be provided in relation to the requirement for proxy advisers to be 'independent' of the entities which they advise.

This lack of clarity could leave licensees unsure of what is required of them and may lead to inconsistent application by regulators.

The committee is particularly concerned that delegated legislation is being utilised to implement these significant new obligations which may have a major impact on the business model and operation of existing businesses that provide proxy advice. While the committee does not comment on the policy merit or otherwise of these changes, the committee considers that it would be more appropriate for such significant matters to be dealt with by way of primary legislation so that these matters can receive full parliamentary scrutiny.

The committee has written to the Treasurer seeking his advice regarding these significant matters.

Turning to the Monitor I have just tabled, I would like to draw the chamber's attention to the Financial Framework (Supplementary Powers) Amendment (Health Measures No. 6) Regulations 2021. This instrument establishes legislative authority for government spending on the COVID-19 vaccine compensation scheme.

At the outset I wish to emphasise that the establishment of a compensation scheme for those who suffer adverse effects of a vaccine is not at issue. What is at issue is there is no parliamentary oversight whatsoever of crucial aspects of the scheme, such as the eligibility criteria or the level of compensation that may be provided.

The committee expects that a scheme of such national significance would ordinarily be established through primary legislation. Instead, the crucial aspects of the scheme are not even included in delegated legislation. In fact, the provision in the instrument which sets out authority for the entire vaccine compensation scheme is a mere 93 words! All of the detail in relation to the operation of the scheme is provided for by guidance material which is beyond parliamentary scrutiny and can be changed at any time and without any oversight.

The committee is concerned about instruments which do the bare minimum of establishing a program and then leave the substantive content to be provided for by guidance material. Such instruments not only fail to meet what we as senators should expect technically sound and robust instruments to be, but they diminish our ability to provide scrutiny. We should

be vigilant in relation to this trend going forward as it undermines our role of providing proper parliamentary oversight over the executive government.

In addition to these concerns, the instrument provides no indication as to the anticipated cost of the scheme. The Senate is being asked to waive through a program with potentially unlimited spending that is supported by a legislative provision of less than 100 words. The committee considers this completely unacceptable.

The committee has previously written to and received advice from the Minister for Finance and the Minister for Health and Aged Care on these issues and will now write again seeking the Ministers' further advice. The committee will emphasise in this correspondence that, although the scheme is already in operation, there is a serious possibility that the committee will recommend that the Senate disallow the instrument if its scrutiny concerns are not resolved.

To this end I advise the chamber that tomorrow I will give a protective notice of motion to disallow the instrument on behalf of the committee.

Finally, I would like to take the opportunity to highlight the committee's significant concerns in relation to the failure of ministers to respond to the committee's scrutiny concerns in a timely manner. This includes a response from the Minister for Industry, Energy and Emissions Reduction in relation to the Australian Renewable Energy Agency (General Funding Strategy) Determination 2021.

Another significantly overdue response is a response from the Minister for Health and Aged Care in relation to the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 3) Instrument 2021. Both responses were due in November last year.

I would like to take this opportunity to remind ministers of the resolution of the Senate of 23 February last year concerning the engagement of ministers and agencies with the committee. In this resolution, the Senate calls on all ministers and agencies to respond to the committee's requests for information within the timeframes set by the committee.

The committee works on a non-partisan basis to resolve its scrutiny concerns and relies on timely and constructive engagement from all ministers and agencies in order to fulfil its mandate.

With these comments, I commend the committee's *Delegated Legislation Monitor 2 of 2022* to the Senate.