



## Delegated Legislation Monitor Tabling Statement

Wednesday 18 October 2023

I rise to speak to the tabling of the Senate Standing Committee for the Scrutiny of Delegated Legislation's *Delegated Legislation Monitor 12 of 2023*.

*Delegated Legislation Monitor 12* reports on the committee's consideration of **51** legislative instruments registered between **9 September 2023** and **18 September 2023**. This includes **46** disallowable instruments, and **5** instruments exempt from disallowance.

I would first like to draw the Chamber's attention to the National Anti-Corruption Commission Regulations 2023. The committee first raised scrutiny concerns in relation to this instrument in September, regarding issues such as the conferral of discretionary powers and availability of independent merits review.

I thank the Attorney-General and his Department for their constructive engagement with the committee on these matters. Further, the committee welcomes the Attorney's undertaking to update the instrument's explanatory statement to address the issues raised. I am pleased to advise that the committee has resolved to conclude our examination of this instrument and intends to withdraw its notice of motion to disallow this instrument.

Additionally, I would like to draw the Chamber's attention to two instruments, the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023 and the Competition and Consumer (Gas Market Code) Regulations 2023.

These instruments raise a number of similar scrutiny concerns, including:

- the availability of independent and judicial review;

- the use of significant penalties in delegated legislation; and
- the inclusion of strict liability offences.

The committee raised concerns that both instruments contain significant penalty provisions that are higher than the committee's expectations for what is appropriate for inclusion in delegation legislation.

The committee's longstanding view is that significant penalties should be included in primary, rather than delegated, legislation. The committee's guidelines state that the usual expectation is that penalties in delegated legislation should not exceed 50 units for individuals and 250 for bodies corporate. These expectations align with the Attorney-General's General's Guide to Framing Commonwealth offences.

For both these instruments, the committee had previously sought advice as to why it was appropriate, as a matter of principle, to include significant penalties in delegated legislation. I thank both ministers for their constructive engagement with the committee on this matter and for providing detailed responses to the committee's requests for information.

However, the committee reiterates its expectations in relation to the inclusion of significant penalty provisions in delegated legislation. As such, the committee will continue its engagement with relevant ministers about this issue in the future.

Regarding these instruments, the committee had also raised concerns about the inclusion of 'no-invalidly' clauses, which have the potential to limit judicial review. In particular, the Offshore Petroleum Instrument contains four no-validity clauses relating to the requirement for NOPSEMA to make decisions within a set timeframe.

Following the committee's first request for information about this matter, the minister advised that the main intent of the clauses is to increase regulatory certainty for titleholders and to ensure the validity of NOPSEMA's decisions. Further, the no-invalidity clauses only impact a person's review rights to the extent that NOPSEMA

fails to meet their decision-making timeframe. The minister concluded that the provisions are therefore necessary.

While I thank the minister for her advice, it remains unclear to the committee why the no-invalidity clauses are necessary as there are existing provisions in the instrument which allow NOPSEMA to extend decision-making timeframes.

No-invalidity clauses are a serious matter as they can restrict an applicant's capacity to seek review of relevant acts or decisions. For this reason, the committee expects that these should only be used when necessary and appropriate. Further, they should be accompanied by safeguards to ensure that a person's right to seek judicial review is not unduly limited.

As such, the committee will continue its engagement with the minister on this issue.

Finally, I would like to draw the Chamber's attention to the Higher Education Support (Other Grants) Amendment (National Priorities Pool Program and Regional Partnerships Project Pool Program) Guidelines 2023.

This instrument amends the Higher Education Support (Other Grants) Guidelines 2022 to remove the annual spending cap for the National Priorities Pool Program.

This instrument appears to significantly broaden the minister's discretionary power to determine grant amounts under this Program. For this reason, the committee requested the minister's advice as to why this step was necessary and appropriate.

The minister advised that removal of the spending cap was in response to the reprofiling of uncommitted funds, which resulted in more funding being available for the program. Further, the minister clarified that his discretionary powers remain limited by the general maximum payment determinations made under the enabling Act.

I thank the minister for his advice on this matter and for clarifying why this instrument was considered necessary and appropriate.

Noting the importance of ensuring appropriate parliamentary oversight of the expenditure of public money, the committee requests the minister amend the instrument's explanatory statement to include further information on these matters.

With these comments, I commend the committee's *Delegated Legislation Monitor 12 of 2023* to the Senate.