Monitor 1 of 2023 – Ministerial Responses

Contents

Chapter 2: Concluded matters

The Hon Kristy McBain MP

Minister for Regional Development, Local Government and Territories
Member for Eden-Monaro

Ref: MS22-002595

Senator Linda White
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Senator Linda,

I refer to the Senate Standing Committee for the Scrutiny of Delegated Legislation and its further questions on the Australian Capital Territory National Land (Lakes) Ordinance 2022 (the Lakes Ordinance), as detailed in Delegated Legislation Monitor 9 of 2022 (the Monitor). I appreciate the opportunity to respond to the matters raised by the Committee.

Coercive powers and significant penalties

At paragraphs 1.18 and 1.26 of the Monitor, the Committee requested further advice on the limitations that prevent the inclusion of coercive powers and significant penalties in primary legislation – the *Seat of Government (Administration) Act 1910* (SGA Act).

The SGA Act, introduced in 1910, establishes the legislative framework for the Commonwealth's governance of the Australia Capital Territory (ACT). As made, subsection 12(1) of the SGA Act provided for the making of ordinances by the Governor-General having the force of law in the ACT. This ordinance-making power was purposefully wide to allow for the effective administration and governance of the ACT. It has been held that 'the grant by Parliament to the Governor-General of the power to make Ordinances having the force of law in the Australian Capital Territory is beyond question' (*Esmonds Motors Pty Ltd v Commonwealth* (1970) 120 CLR 463, 476 (Menzies J)). Between 1910 and 1988, the provision facilitated the making of ordinances dealing with a range of matters, including criminal offences, children's services, policing, the judiciary, and the provision of utilities. Such ordinances often included significant matters, such as coercive powers and penalties of imprisonment (see for example, the Police Ordinance 1927).

The intention of Parliament as expressed through the SGA Act was that the laws of the ACT would primarily be expressed through ordinances made by the Governor-General. If the SGA Act was itself amended to include all laws of the ACT, then this basic framework for legislation applicable to the Territory would be detrimentally impacted. The ordinance-making power has historically been used by the Australian Government to make laws for the ACT to deal with 'state-type' matters, including those relating to the protection of life, which are not normally dealt with in other types of Commonwealth delegated legislation.

To balance the Governor-General's broad powers, the SGA Act expressly requires ordinances to be presented to Parliament and subject to disallowance. In accordance with section 12(2)(c), each ordinance must be laid before each House of Parliament within 15 sitting days after the day on which the ordinance is made. In accordance with section 12(3), if an ordinance is not laid before each House in accordance with section 12(2)(c), it ceases to have effect. Further, section 12(4) provides that if either House passes a resolution disallowing the ordinance, the ordinance ceases to have effect.

The SGA Act also includes a range of 'anti-avoidance' style provisions, such as section 12AC which prevents the re-making of an ordinance that has been disallowed. In this way, Parliament has direct scrutiny and control over ordinances, giving it adequate opportunity to supervise the terms of ordinances, particularly where they may involve serious criminal offences and significant penalties.

In 1989, self-government for the ACT was achieved through a package of legislation that included the *Australian Capital Territory (Self-Government) Act 1988* (Self-Government Act). To limit the Australian Government's ability to override the ACT Legislative Assembly, subsection 12(1) of the SGA Act was amended to limit the ordinance-making power to national functions. The amendments constrained the *matters* over which the Governor-General could exercise ordinance making-powers, but did not limit the *nature* of the power itself. As noted in the Bill Digest of the Self-Government Act (88/124): 'the bill does not limit the power of the Governor-General to make ordinances under section 12 of the SGA Act'.

Under subsection 12(1)(d) of the SGA Act, the Governor-General may make ordinances for 'the peace, order and good government of the Territory with respect to... National Land'. This phrasing mirrors the grant of legislative powers to the Commonwealth legislature in the Constitution (sections 51 and 52). It is rare for Commonwealth legislation to confer powers for peace, order and good government to enact delegated legislation. Such conferrals are distinct from general regulation-making powers, which permit the making of regulations as 'required or permitted' or 'necessary or convenient'.

The phrasing is used by Parliament to indicate that, within the relevant subject matter, there is to be few constraints on what can be provided under relevant ordinances. Although some limits apply to such a power, a grant of power in these terms includes the power to prescribe coercive powers and offences that are punishable by imprisonment. As such, the detailed regulatory matters set out in the Lakes Ordinance are entirely consistent with the SGA Act. The inclusion of such matters in the SGA Act itself would be inconsistent with the intention of Parliament when it enacted section 12.

Ordinances made under the SGA Act are intended to provide for the good government of the ACT and are closer in character to a primary source of legislation of the ACT than delegated legislation.

As such, they are distinct from the Commonwealth principles which ordinarily apply to regulations, including those set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Commonwealth Offences Guide). My Department is in discussion with the Attorney-General's Department to consider how the Commonwealth Offences Guide might be updated to reflect the unique territories legislative environment.

Aside from the ACT, ordinance-making powers for peace, order and good government are available in the Commonwealth-administered territories. This includes section 4F of the *Jervis Bay Territory Acceptance Act 1915*, section 9 of the *Christmas Island Act 1968*, section 12 of the *Cocos (Keeling) Islands Act 1955*, and section 19A of the *Norfolk Island Act 1979*. Such powers are regularly relied on to deal with state-type matters that are not normally dealt with in other Commonwealth legislation.

Replacement explanatory statement

At paragraphs 1.52, 1.58 and 1.69 of the Monitor, the Committee requested that I amend the Explanatory Statement to the Lakes Ordinance to include further information on:

- The scope and nature of delegated powers and the specific skills or qualifications the delegate will require in the exercise of such powers.
- The meaning of 'dangerous conduct' in section 60 of the Lakes Ordinance.
- The incorporation of the Australian Standard AS 1799.1-2021 in the Lakes Ordinance (section 49) and information on how the standards may be freely accessed.

I agree with the need to provide the above information in explanatory materials. I have instructed my department to arrange the registration of a replacement Explanatory Statement and to advise the Committee secretariat once this has been registered.

Separately, at paragraph 1.77 the Committee requested that I consider amending the Lakes Ordinance to include information on the regulations under the *Road Transport (Alcohol and Drugs) Act 1977* (ACT) which apply. I agree that the unavailability of this information may result in legal uncertainty and propose instead that this issue is addressed in the revised Explanatory Statement. Including this information in subsection 106(2) the Lakes Ordinance may inadvertently restrict the regulations which are intended to apply.

I trust this information will assist the Committee in its consideration of the Lakes Ordinance.

Yours sincerely

Kristy McBain MP

15 /12/ 2022

cc The Hon Catherine King MP, Minister for Infrastructure, Transport, Regional Development and Local Government

THE HON STEPHEN JONES MP
ASSISTANT TREASURER AND MINISTER FOR FINANCIAL SERVICES

Ref: MS22-002676

Senator the Hon Linda White
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Senator

I am writing in relation to comments of the Senate Standing Committee for the Scrutiny of Delegated Legislation in Delegated Legislation Monitor 8 of 2022. The Committee has requested an amendment to the *Competition and Consumer Amendment (Consumer Data Right) Regulations 2021* (the Amending Regulations) to allow the usual sunsetting regime to apply.

The Amending Regulation's exemption from the consumer data right (CDR) privacy safeguards is necessary on an ongoing basis, as the circumstances that create the need for it are ongoing and not likely to change in any material way in the future.

The *Competition and Consumer Regulations 2010* (the CC Regulations) are exempt from normal sunsetting provisions under the *Legislation (Exemptions and Other Matters) Amendment (Sunsetting Exemptions) Regulations 2017*, on the basis that they are integral to the operation of the various intergovernmental schemes that establish the Australian Consumer Law. The *Legislation (Exemptions and Other Matters) Amendment (Sunsetting Exemptions) Regulations 2017* pre-date the introduction of the CDR, and Parliament was therefore aware of this sunsetting exemption at the time it passed the legislative amendments that established the CDR.

The CC Regulations are also integral to the ongoing operation of the CDR in the energy sector. The Australian Energy Market Operator (AEMO) has a unique and specific role as a secondary CDR data holder because of its statutory functions described in subsection 49(1) of the *National Electricity Law*. The exemption made by the Amending Regulations ensures AEMO can perform this role under the existing CDR and energy legislative settings, and under which it has invested considerable resources to build its data sharing solution. Arbitrarily sunsetting this exemption thus creates uncertainty for AEMO and it would create confusion for CDR consumers.

However, acknowledging the Committee's concerns, I undertake that I will seek to amend the CC Regulations to require a review of the Amending Regulations within ten years of the making of that instrument so that the Government revisits the ongoing need for the Amending Regulations in a timeframe consistent with the usual period for sunsetting.

Yours sincerely

The Hon Stephen Jones MP

Parliament House Canberra ACT 2600 Australia
Telephone: (02) 6277 7230

Julie Collins MP

Minister for Housing
Minister for Homelessness
Minister for Small Business

Ref: MS22-002681

Senator Hon Linda White
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Senator Linda White

I am writing in relation the Senate Standing Committee for the Scrutiny of Delegated Legislation's comments in Delegated Legislation Monitor 8 of 2022.

I have attached a detailed response to the Committee's enquiries about the *Competition and Consumer (Industry Codes—Franchising) Amendment (Franchise Disclosure Register) Regulations 2022*.

I trust that the information attached assists with the Committee's deliberations.

Thank you for your letter.

Yours sincerely

Julie Collins MP

14/12/2022

Enc:
Attachment A

CC: The Hon Jim Chalmers MP, Treasurer

ATTACHMENT A

The *Competition and Consumer (Industry Codes—Franchising) Amendment (Franchise Disclosure Register) Regulations 2022* (the instrument) amends the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* (the Franchising Code) to introduce a public register of information on the operation and structure of franchise systems.

Section 53J of the instrument requires a review of the operation of the register provisions to occur, with a written report of the review given to the Minister by 30 June 2024.

I understand the Committee's view is that the report is a significant issue of interest to the Parliament and that the instrument should include a requirement to table the review report in Parliament.

I previously advised the Committee that I did not intend to seek amendments to the instrument, but would be arranging for publication of the report online to promote transparency, accountability and accessibility.

While I do not consider it necessary to include a requirement for tabling of the report in Parliament for the reasons outlined in my previous responses to the Committee, I appreciate the Committee has concerns about this approach. In particular, I acknowledge the Committee's view that the instrument responds to recommendations of a Parliamentary inquiry, and thus review of its operation may be of interest to Parliament.

Accordingly, and in recognition of the work of the Committee, while I do not propose to amend the instrument I will arrange for tabling of the report in Parliament. I hope the Committee finds my proposed expeditious approach addresses its concerns.

Attorney-General

Reference: MS22-002519

Senator Linda White
Chair of Standing Committee for the Scrutiny of
Delegated Legislation
Parliament House
CANBERRA ACT 2600

By email: sdlc.sen@aph.gov.au

Dear Senator White

I write to the Committee to provide advice on the technical scrutiny concerns raised in *Delegated Legislation Monitor 8 of 2022*, tabled in the Senate on 23 November 2022. Specifically, that the delegation levels with powers determined by sections 187B(2), 187K, 192, and 203 of the *Telecommunications (Interception and Access) Act 1979* (TIA Act) should be amended so that only SES level officers can exercise these powers.

Thank you for taking the time to review the Instrument and raising your concerns. I appreciate the importance of robust and well considered controls. As such, I requested further advice from my Department to make an informed decision.

I agree that it is appropriate for decisions under sections 203, 187K and 187B (2) to be made at the SES level and I intend to make a new Instrument shortly to ensure these delegations are exercised at the SES level.

In regard to section 192, I have considered the Department's advice (enclosed for your reference) and believe there are appropriate mechanisms in place to refer decisions to SES level officers when required. As such, I will not seek to amend this delegation in the new Instrument.

Thank you again for bringing your concerns to my attention.

Yours sincerely

THE HON MARK DREYFUS KC MP
12 / 12 /2022

Encl *Attorney-General's Department – Advice on delegations under Section 192 of the Telecommunications (Interception and Access) Act 1979*

Attorney-General's Department – Advice on delegations under Section 192 of the Telecommunications (Interception and Access) Act 1979

Section 192 – Interception obligation exemptions

Under section 192 the CAC may exempt carriage service providers from their obligation to be able to intercept communications on their network. Decisions are made in consultation with law enforcement and national security agencies to take their interests into account, as well as accounting for the objects of the *Telecommunications Act 1997*. These decisions are generally made by an EL1 officer with contentious or complicated decisions made in consultation with an EL2 officer or above.

Most section 192 exemptions relate to carriers with absent or inactive services, or technological barriers that make interception impossible. All exemption decisions are made in consultation with law enforcement and national security agencies, and are subject to conditions (such as expiry dates and reservation of revocation rights) as appropriate on a case-by-case basis.

There are 114 section 192 exemptions in force, with 37 considered between 1 May 2022 and 30 September 2022 – the peak period for processing Interception Capability Plans (ICPs). In the department's view, the same decision-maker who considers ICPs should also consider the section 192 exemption requests, placing decisions in their proper context among the approximately 348 ICPs processed around the same time. If these decisions are restricted to SES officers, that person's attention will be significantly diverted for a substantial period around the middle of the calendar year, without the benefit of context provided by the breadth of ICPs and frequent operational consultation with law enforcement and national security agencies.

Applications for exemptions under section 192 are considered alongside ICPs and are submitted in the same document. The majority of ICPs are due on 1 July each year and Section 198 of the TIA Act requires that the CAC consider and respond within 60 days. Raising the delegation for section 192 to SES level officers will impact the ability of the department to consider and respond to ICPs within the legislated timeframe.