



AUSTRALIAN
SENATE

Senate Standing Committee for the
Scrutiny of Delegated Legislation

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17 June 2021

The Hon Angus Taylor MP
Minister for Energy and Emissions Reduction
Parliament House
CANBERRA ACT 2600

Via email: DLOTaylor@environment.gov.au

CC: legislation@environment.gov.au


Dear Minister,

Australian Renewable Energy Agency Amendment (2020-21 Budget Programs) Regulations 2021 [F2021L00590]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to this matter.

Compliance with authorising legislation

Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act.

The instrument amends the Australian Renewable Energy Agency Regulation 2016 to allow the Australian Renewable Energy Agency (the ARENA) to provide financial assistance in relation to the following programs announced in the 2020-21 Budget:

- Freight Energy Productivity Program;
- Future Fuels Fund;
- Industrial Energy Transformation Studies Program;
- Regional Australia Microgrid Pilots Program; and
- Technology Investment Roadmap.

The instrument is made under the *Australian Renewable Energy Agency Act 2011* (the Act). Section 74 of the Act provides the Governor-General with the power to make regulations under the Act. Section 8 prescribes the functions of the ARENA. These functions relate to research and development of renewable energy technologies.

Paragraph 8(f) provides that further functions can be prescribed via regulations made under the Act. The explanatory statement to the instrument notes that the legislated functions of the ARENA are limited to supporting renewable energy technologies and that the instrument "provides ARENA with the necessary authority to deliver any non-renewable elements of the programs, supporting emissions reductions through broader clean energy technologies such as energy efficiency and non-renewable low-emission technologies."

From a scrutiny perspective, the committee is concerned that the instrument is expanding the remit of the ARENA beyond what was envisaged by Parliament when the Act was passed. The committee notes that the object of the Act is to improve the competitiveness and supply of renewable energy in Australia. The committee further notes that there is nothing in the explanatory memorandum to the bill preceding the Act to suggest that it was contemplated that the ARENA would have the ability to foster anything other than renewable energy technologies.

The committee's view is that statutory provisions must be read in context¹ and that the terminology used in section 8 to provide the ARENA's functions in relation to renewable energy indicates there are limits on the power to prescribe further functions by regulation. In addition, the committee considers that in general, delegated legislation can fill out the detail of an Act but cannot extend it. Where the power to extend the operation of an Act is claimed, it would need to be clear that the enabling provision is a Henry VIII power. In this instance, it does not appear to the committee that this is the case.

In light of the above, the committee would appreciate your advice as to how sections 8 and 74 of the *Australian Renewable Energy Agency Act 2011* authorise regulations to extend the jurisdiction of the Australian Renewable Energy Agency to include functions that relate to the non-renewable elements of the above programs, noting that section 8 and the object of the Act appear to limit such functions to those relating to renewable energy.

Significant matters in delegated legislation

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment, which should be included in primary, rather than delegated, legislation.

As a matter of technical scrutiny, the committee is required to scrutinise each legislative instrument as to whether it contains matters more appropriate for parliamentary enactment.

The committee is concerned that the instrument deals with the significant matter of expanding the jurisdiction of the ARENA from investing in renewable energy technologies to programs relating to energy efficiency and low-emissions technology. Given the scope and impact of the measures, from a scrutiny perspective, it is the committee's view that they are more appropriate for parliamentary enactment.

In this regard, the explanatory statement does not indicate why it is considered necessary and appropriate to leave these matters to delegated legislation, rather than primary legislation.

The committee therefore requests your advice as to why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to expand the remit of the Australian Renewable Energy Agency to include non-renewable energy technologies.

Consultation with persons affected

Senate standing order 23(3)(d) requires the committee to scrutinise each instrument as to whether persons likely to be affected by the instrument, including relevant experts, were adequately consulted in relation to the specific instrument.

Section 17 of the *Legislation Act 2003* (Legislation Act) requires that, prior to an instrument being made, the rule-maker must be satisfied that appropriate consultation was undertaken. In determining whether any consultation undertaken is appropriate, the rule-maker may have regard to the extent to which the consultation ensured that persons likely to be affected by the instrument had an adequate opportunity to comment on its proposed content, as per paragraph 17(2)(b) of the Legislation Act.

1 As per *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28, para [69].

The committee therefore expects explanatory statements to instruments to provide details of any consultation undertaken with persons likely to be affected by the instrument. If no consultation was undertaken with persons likely to be affected, the committee expects the explanatory statement to explain why no such consultation was undertaken.

In this instance, the explanatory statement to the instrument states that exposure drafts of the instrument were circulated for consultation with government stakeholders including the Department of Finance, the Department of Prime Minister and Cabinet, and the ARENA. The explanatory statement further explains that "public consultation was not necessary, as the Regulations only addresses machinery issues relating to the administration of announced Government programs. ARENA will undertake appropriate consultation on the implementation of the programs consistent with its statutory framework and responsibilities."

While noting this explanation, the committee considers that the measures provided for in the instrument are more than machinery in nature, given that they substantially expand the jurisdiction of the ARENA to invest public funds. As such, from a scrutiny perspective, it is the committee's view that stakeholders and experts should have been consulted in relation to the instrument.

The committee would therefore appreciate your advice as to whether any consultation was undertaken in relation to the instrument with relevant stakeholders and experts outside of government and, if not, further detail on how the measures in the instrument can be considered machinery in nature.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **1 July 2021**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation