



COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



**THE SENATE**

**PROOF**

**COMMITTEES**

**Scrutiny of Delegated Legislation Committee**

**Delegated Legislation Monitor**

**SPEECH**

**Wednesday, 11 September 2024**

BY AUTHORITY OF THE SENATE

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## SPEECH

<b>Date</b> Wednesday, 11 September 2024	<b>Source</b> Senate
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<b>Questioner</b>	<b>Responder</b>
<b>Speaker</b> O'Neill, Sen Deborah	<b>Question No.</b>

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**Senator O'NEILL** (New South Wales) (17:24): I present the *D e l e g a t e d l e g i s l a t i o n m o n i t o r N o . 10* of 2024 of the Senate Standing Committee for the Scrutiny of Delegated Legislation. I also table ministerial correspondence relating to the *D e l e g a t e d l e g i s l a t i o n m o n i t o r N o . 11* of 2023. I move:

That the Senate take note of the report.

This monitor reports on the committee's consideration of 122 legislative instruments registered between 28 June and 22 July 2024. In this monitor, the committee has commented on three new instruments, including the Therapeutic Goods Legislation Amendment (Vaping Reforms) Regulations 2024. This instrument supports the vaping reforms introduced by the Therapeutic Goods and Other Legislation Amendment (Vaping Reforms) Act, which was recently passed by the parliament. The instrument amends two sets of regulations to specify commercial quantities of vaping goods for the purposes of new offences and civil penalty provisions in the act. The instrument also introduces conditions applying to existing exemptions in the regulations that allow sponsors to lawfully handle therapeutic vaping devices and goods where they were imported or manufactured before 1 March 2024.

In this monitor, the committee has raised scrutiny concerns about the broad discretionary powers in the instrument. These powers also appear to be coercive in nature, as they require the production of documents and allow entry to premises. For example, a number of conditions introduced by the instrument require sponsors of vaping devices or goods to allow authorised officers to enter any premises at any reasonable time and enable such officers to make recordings on those premises. While broad discretionary, coercive powers can seriously impact on an individual's rights and liberties, the committee expects these powers will not ordinarily be included in delegated legislation. Where an instrument does include coercive powers, the committee expects that the explanatory statement will explain why this is considered necessary and appropriate. Further, where instruments confer broad discretionary powers, the committee expects the explanatory statement to set out several matters, including the factors the decision-maker will consider in exercising the discretion, who will exercise the discretion, their qualifications or skills, how the public interest is served by including the powers in the instrument and whether independent merits review is available for decisions and actions in connection with these powers.

In this monitor, the committee is requesting the Minister for Health and Aged Care's advice about these matters, as they are not addressed in the instrument's explanatory statement. The committee is also raising privacy concerns about several conditions introduced by the instrument. Some of these conditions require sponsors of therapeutic goods and devices to produce documents to an authorised officer and allow them to make copies, enter premises or make recordings. However, the explanatory statement does not explain the nature and scope of the information that might be collected, used or disclosed, whether it may contain personal information or whether any safeguards are in place to protect personal information. Accordingly, the committee is requesting the minister's advice on these matters.

The committee has also commented on the Therapeutic Goods (Vaping Goods—Possession and Supply) Determination 2024 as amended by the Therapeutic Goods Act 1989, including a number of offences and civil penalties for the importation, manufacture and commercial supply of therapeutic vaping goods. These instruments are made pursuant to that act and set out vaping goods or classes that may be supplied or possessed in Australia, the persons or classes of persons that may possess or supply the goods and the circumstances and conditions on the possession or supply. The committee is raising scrutiny concerns, as, in doing so, the instruments create exemptions to offence provisions in primary legislation. The committee's longstanding view is that provisions which create exemptions to primary legislation or include significant elements of a regulatory scheme should ordinarily be included in the primary legislation instead of delegated legislation. However, where these provisions are nonetheless included in delegated legislation, the committee expects the explanatory statement to comprehensively justify the nature and scope of the exemptions and explain why it is appropriate

to include them in delegated legislation. The committee is therefore requesting the minister's advice as to why it's necessary and appropriate to include the exemptions in the instrument, as this is not detailed in the relevant explanatory statements.

Similarly, the committee is concerned that these instruments also confer broad discretionary coercive powers—which enable the production, seizure and inspection of documents or information—and that many of the conditions in the instrument require the collection and disclosure of information which may contain personal information.

The committee looks forward to engaging with the minister on these matters and its other concerns as detailed in *Delegated legislation monitor* 10. The committee has also resolved to lodge protective notices of motion to disallow three instruments examined in this monitor. However, the committee wishes to emphasise that these protective notices of motion are being given to facilitate the committee's consideration of the instruments, and this is prior to the minister having the opportunity to respond to the committee's comments.

The timing of these protective notices of motion to disallow are a reflection of the significant number and the complexity of legislative instruments registered in June, at the end of the financial year, and the time taken by the committee and its secretary to scrutinise the high volume of instruments. The protective notices to which I've just referred will be lodged on 17 and 19 September—the last day on which these notices can be lodged—to facilitate the maximum amount of additional time to engage with the minister and resolve the committee's scrutiny concerns.

The committee would also like to thank the agencies and ministers that have provided updates to the committee secretariat on the progress of implementing outstanding undertakings in line with the committee's new practice. I'm pleased to advise the chamber that the number of undertakings that have been outstanding for more than 90 days has decreased to 24 matters, and that 12 undertakings have been implemented since 16 August. I reiterate the committee's expectation that undertakings are implemented in a timely manner and that the committee will continue to closely monitor the implementation of outstanding undertakings. With these comments, I commend the committee's *Delegated legislation monitor* 10 of 2024 to the Senate.

Question agreed to.