

The Senate

Standing
Committee for the
Scrutiny of Bills

First Report: Review of exemption from
disallowance provisions in the
Biosecurity Act 2015

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Chapter 4

Review of exemption from disallowance provisions in the *Biosecurity Act 2015*

4.1 In 2020 and 2021 the Senate Standing Committee for the Scrutiny of Delegated Legislation (SDLC) conducted an inquiry into the exemption of delegated legislation from parliamentary oversight. This inquiry had a particular focus on delegated legislation made in response to the COVID-19 pandemic, including instrument-making provisions within the *Biosecurity Act 2015* (**Biosecurity Act**).

4.2 As a result of that inquiry, the SDLC tabled the *Interim report: Exemption of delegated legislation from parliamentary oversight*¹ (**Interim Report**) in December 2020 and the *Final report: Exemption of delegated legislation from parliamentary oversight*² (**Final Report**) in March 2021.

4.3 One of several recommendations within the Interim Report was that:

... the Senate Standing Committee for the Scrutiny of Bills or another independent body or person conduct a review of the appropriateness of the delegation of legislative powers in the *Biosecurity Act 2015*, including the appropriateness of provisions which exempt delegated legislation made pursuant to these powers from parliamentary oversight.³

4.4 This chapter takes up the recommendation of the SDLC and comprises commentary on the appropriateness of provisions within the Biosecurity Act which provide powers to make delegated legislation that is not subject to parliamentary disallowance. The committee draws these provisions to the attention of senators pursuant to Senate Standing Order 24(1)(a)(iv).

1 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020, available at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Interim_report>.

2 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Final report: Exemption of delegated legislation from parliamentary oversight*, March 2021, available at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Final_report>.

3 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020, p. ix.

Exemption from disallowance – constitutional context and the importance of parliamentary scrutiny

4.5 Section 1 of the Constitution vests legislative power in the Federal Parliament. Legislative scrutiny, including scrutiny of delegated legislation made by the Executive, is a core component of this central law-making role of Parliament. Moreover, the system of responsible and representative government established by the Constitution requires the Parliament, as the representative branch of government, to hold the Executive to account.⁴ Exemptions from disallowance undermine the ability of Parliament to properly undertake its scrutiny functions and, therefore, have significant implications for both the system of responsible and representative government established by the Constitution and for the maintenance of Parliament's constitutionally conferred law-making functions. While it is well-established that Parliament may delegate its legislative functions to the Executive, and that this delegated legislation may be exempt from disallowance in certain exceptional cases, any exemption from disallowance should be considered in the context of its interaction with these twin considerations.

4.6 As a result, and in accordance with the committee's remit set out in standing order 24, the committee has consistently drawn attention to bills that seek to limit or remove appropriate parliamentary scrutiny. The committee considers that the default position should be that parliamentary oversight remains available for all delegated legislation unless there is a very strong reason for exempting a particular instrument or class of instruments from scrutiny.

4.7 The usual parliamentary disallowance process allows a House of the Parliament to disallow delegated legislation within 15 sitting days of it being tabled in that House.⁵ As this process is one of the primary means by which Parliament exercises control of its delegated legislative power, the committee expects the explanatory memorandum to a bill which includes an exemption from the usual disallowance process to address the exceptional circumstances that justify that exemption.

Exemptions from disallowance within the Biosecurity Act

4.8 The Biosecurity Act provides the regulatory framework to manage the risk of pests and diseases entering Australian territory and causing harm to animal, plant and human health. The committee commented on the Biosecurity Bill 2014 when it was before Parliament,⁶ as well as on an earlier iteration of the bill in 2013.⁷ The committee

4 See, for example, *Williams v Commonwealth* (2012) 248 CLR 156 and *Williams v Commonwealth* (2014) 252 CLR 416.

5 *Legislation Act 2003*, section 42.

6 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 2 of 2015*.

7 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 1 of 2013*.

also provided comments on the Biosecurity Act in a submission to the SDLC's inquiry into the exemption of delegated legislation from parliamentary oversight.⁸ A number of subsequent amendments to the Biosecurity Act have also attracted committee comment.⁹

4.9 The committee has identified 30 provisions which exempt delegated legislation made under the Biosecurity Act from the usual parliamentary disallowance process. The following provisions provide that various legislative instruments made under the Biosecurity Act are non-disallowable:

- subsection 42(3);
- subsection 44(3);
- subsection 45(3);
- subsection 49(2);
- subsection 50(2);
- subsection 51(4);
- subsection 110(3);
- subsection 112(3);
- subsection 113(7);
- subsection 173(5);
- subsection 174(5);
- subsection 182(6);
- paragraphs 228(a) and (b);
- paragraphs 234(a) and (b);
- subsection 256(3);
- subsection 365(4);
- subsection 384(4);
- subsection 395(4);
- subsection 398(1);
- subsection 443(2);
- subsection 444(2);

8 Senate Standing Committee for the Scrutiny of Bills, Submission 4: Inquiry into exemption of delegated legislation from parliamentary oversight, June 2020.

9 See, for example, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2020*, pp. 1-2.

- subsection 445(2);
- subsection 475(2);
- subsection 476(2);
- subsection 477(2);
- subsection 524A(4);
- subsection 543(1); and
- subsection 618(7).

4.10 Non-disallowable instruments to which these provisions relate deal with either human biosecurity risks or other forms of biosecurity risk. Human biosecurity risks are the responsibility of the Health Minister, while other biosecurity risks are managed by the Agriculture Minister. Each instrument-making power identified above can be further categorised into instruments dealing with emergency biosecurity situations and other more 'routine' instruments. Provisions exempting these instruments from disallowance are justified on a variety of grounds. Some provisions also raise scrutiny concerns in addition to exemptions from disallowance.

Instruments which deal with significant matters, confer broad discretion, or interact with personal rights and liberties

4.11 The committee will generally have heightened concerns in relation to provisions exempting instruments from disallowance where the effect of those instruments would be to confer broad discretion on a decision-maker, would deal with significant matters, or would unduly impact on an individual's personal rights or liberties.

4.12 The committee considers that a number of provisions within the Biosecurity Act raise these issues. As a result, the committee considers that the circumstances in which it may be appropriate to constrain parliamentary scrutiny in relation to these provisions is even further limited than outlined in the 'default position' above.

4.13 Several provisions within the Biosecurity Act would allow for instruments to be made which may place limitations on personal rights and liberties. For example, the implications of a biosecurity emergency being declared under section 443 include that a biosecurity officer may, in certain circumstances, enter a premises without a warrant or without consent.¹⁰ Another implication of such a declaration is that a person is not entitled to seek merits review of certain decisions, including decisions relating to the destruction of goods, conveyances or premises.¹¹

4.14 A number of other provisions within the Biosecurity Act are broadly framed and provide a high level of discretion to the decision-maker. For example, section 51

10 *Biosecurity Act 2015*, section 470.

11 *Biosecurity Act 2015*, section 469.

allows the Health Minister to ban or restrict a ‘behaviour or practice’, require a ‘behaviour or practice’, require a specified person to provide a report or keep specified records, or require a person to conduct specified tests on specified goods. Similarly, sections 44 and 45 allow the Health Minister to determine requirements for individuals entering Australian territory at a prescribed point of entry or to determine requirements for individuals leaving Australian territory. There is no limit on the requirements that the Health Minister may set out in a determination under sections 44 or 45, other than that it must not include measures that may be included in a human biosecurity control order.

4.15 In a number of cases, the making of certain instruments is a precondition to enliven other provisions which may attract significant penalties, including imprisonment. For example, determinations made under sections 173, 174 and 182 may variously set out that goods are prohibited, conditionally non-prohibited or suspended from being brought or imported into Australian territory. Under section 185, a person who brings or imports suspended or prohibited goods into Australian territory may be subject to a penalty, including imprisonment of up to ten years. Similarly, a person who contravenes a condition applied to a conditionally non-prohibited good may be subject to imprisonment of up to ten years. Other provisions within the Biosecurity Act allow for the making of instruments that may directly provide for higher penalties, including within infringement notices.¹²

4.16 Where the implications of the making of an instrument include such significant matters as imprisonment, limiting rights to review, the abrogation of a person's right to consent, or else provide broad discretionary powers to the Executive, the committee considers that the default position is that Parliament should have full scrutiny over the instrument. The circumstances in which parliamentary scrutiny should be restricted in relation to such provisions are limited.

4.17 The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021 provides a recent example of an instrument which the committee considers would be more appropriately subject to parliamentary scrutiny. The instrument is made under subsection 477(1) of the Biosecurity Act and is exempt from disallowance as per subsection 477(2). The instrument provides that passengers, including both citizens and non-citizens, cannot enter Australia if they have been in India within the previous 14 days. A failure to comply with a requirement in relation to subsection 477(1), or a direction given under section 478 for the purposes of giving effect to such a requirement, is an offence punishable with up to 5 years imprisonment or 300 penalty units, or both.¹³ Subsection 477(5) provides that a requirement determined under subsection 477(1) applies despite any provision of any other

12 *Biosecurity Act 2015*, section 524A.

13 *Biosecurity Act 2015*, section 479.

Australian law. The making of this instrument demonstrates the kind of significant matters which may be prescribed in non-disallowable instruments made under the Biosecurity Act, including impacting upon personal rights and liberties. The committee considers that significant requirements such as preventing citizens from entering Australian territory should be subject to the usual disallowance process and an appropriate level of parliamentary scrutiny.

4.18 The remainder of this chapter considers the appropriateness of provisions allowing for the exemption of delegated legislation from disallowance in light of the justifications provided in the explanatory memorandum to the Biosecurity Bill 2014 and in other relevant explanatory material.

Justification 1: Disallowance would be inappropriate because the relevant considerations are scientific and technical

4.19 The exemption of instruments made under the Biosecurity Act from disallowance has been justified on the grounds that they are based on technical or scientific decisions and therefore need to be shielded from the political process. For example, the explanatory memorandum to the Biosecurity Bill 2014 provides the following general justification for provisions in the bill which exempt legislative instruments from disallowance:

[Exemption from disallowance] is justified because it is more appropriate for Parliament to delegate the power to make determinations that involve technical and scientific decisions about the management of biosecurity risk to the Director of Biosecurity. An implication of these decisions being disallowed is that political considerations will play a role in what should be a technical and scientific decision making process. This has the potential to frustrate the risk management processes and lead to the inadequate management of biosecurity risks. This approach is consistent with the current arrangements in the *Quarantine Proclamation 1998*.¹⁴

4.20 In addition to this general explanation, the majority of exemption provisions are specifically justified on similar grounds. For example, in relation to section 45 of the Biosecurity Act, which empowers the Health Minister to determine requirements for individuals or operators of overseas passenger vessels or aircraft exiting Australia, the explanatory memorandum states:

The decision to determine, vary or revoke an exit requirement determination is a technically and scientifically based decision making process incorporating whether the human biosecurity risk is able to be satisfactorily managed. Subjecting these determinations to disallowance could undermine the technically and scientifically based decision making process and frustrate risk management processes. In addition, disallowance

14 Explanatory memorandum, p. 17.

of a determination made under this clause could lead to inadequate management of risks to human health.¹⁵

4.21 The committee agrees with the position of the SDLC, as expressed in the Final Report, that the mere fact that a decision may be based on scientific and technical grounds is not, of itself, a sufficient justification for an exemption.¹⁶ As noted above, parliamentarians are the directly elected representatives of the people and parliamentary scrutiny is a key aspect of this democratic element of government. An exemption from the disallowance process must therefore be justified on the basis of significant and exceptional circumstances, over and above the fact that the decision is of a scientific or technical nature.

4.22 It is not clear to the committee why parliamentarians would be unable to properly take into account scientific and technical evidence in considering the appropriateness of a particular instrument. The committee does not agree that subjecting an instrument to disallowance, and therefore to a higher degree of parliamentary scrutiny, would necessarily undermine decision-making or frustrate risk management processes.

4.23 Moreover, the committee considers that decisions which can be characterised as purely scientific and technical are rare. More often, decisions which are made on a scientific or technical basis will also be influenced by non-scientific or non-technical considerations. As noted in the Final Report, it is rare that a matter of great public importance has no political implications.¹⁷ Even when a decision may be said to be of a purely scientific or technical nature, the potential consequences of the decision will often have more expansive implications. In cases where the consequence of a decision will have a significant impact on the rights or liberties of individuals, the decision-making process itself may be influenced by political factors as a result.

4.24 In light of the above, it is not clear to the committee why instruments made under each provision listed at paragraph 4.9 of this chapter should be exempt from disallowance simply because a decision is based on scientific or technical grounds.

15 Explanatory memorandum, p. 100.

16 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Final report: Exemption of delegated legislation from parliamentary oversight*, March 2021, pp. 43–46.

17 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Final report: Exemption of delegated legislation from parliamentary oversight*, March 2021, p. 46.

Justification 2: Exemptions are appropriate because they are consistent with existing arrangements

4.25 The explanatory memorandum to the Biosecurity Bill states that exempting certain instruments from disallowance is consistent with the *Quarantine Proclamation 1998*.

4.26 Similarly, the explanatory memorandum to the Biosecurity Amendment (Traveller Declarations and Other Measures) Bill 2020 states in relation to section 524A that the exemption from disallowance is similar in nature to other provisions within the Biosecurity Act.¹⁸

4.27 The committee does not consider that consistency with existing provisions is a sufficient justification for exempting an instrument from disallowance. Rather, each exemption must be justified on its own merits.

Justification 3: Disallowance would be inappropriate because it would prevent the Commonwealth from taking fast and urgent action

4.28 Many of the exemptions from disallowance in the Biosecurity Act are justified on the basis that urgent action is needed to adequately manage biosecurity risks. For example, the explanatory memorandum states in relation to section 443, which empowers the Governor-General to declare that a biosecurity emergency exists, that:

If an emergency declaration was disallowed, nationally significant biosecurity risks could go unmanaged and the Commonwealth would be unable to take the fast and urgent action necessary to manage a threat or harm to Australia's local industries, economy and the environment.¹⁹

4.29 In relation to the declarations by the Governor-General of a biosecurity emergency under section 443 or a human biosecurity emergency under section 475, the committee is particularly concerned that the emergency periods can be extended for up to three months, with no limit on the number of extensions, and that such extensions are not subject to disallowance. In this regard, the committee notes that the current human biosecurity emergency period relating to the COVID-19 pandemic has been in force since 18 March 2020 without the opportunity for parliamentary oversight through the disallowance process.

4.30 The explanatory memorandum continually emphasises the importance of adequate and timely management of biosecurity risks and that failure to properly

18 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2020*, pp. 1–2.

19 Explanatory memorandum, pp. 274–275.

manage these risks could have a significant impact on the economy,²⁰ or to human, plant, animal, or environmental health.²¹

4.31 The committee does not consider that a need for urgency is a sufficient justification for the removal of the usual parliamentary disallowance process. In this regard the committee notes the observations of the SDLC in the Interim Report that:

...the disallowable status of delegated legislation does not impede the commencement of a legislative instrument, with legislative instruments made by the executive able to commence the day after they are registered. The subsequent disallowance of a legislative instrument (which may only occur after the instrument has been tabled in the Parliament) does not invalidate actions taken under the instrument prior to the time of disallowance. Consequently, the committee does not consider that the disallowable status of a legislative instrument would, of itself, prevent the government from taking immediate and decisive action in response to a significant emergency... ...the instances of the disallowance procedure resulting in disallowance by the Parliament is very low...In practice, the disallowance procedure serves to focus the Parliament's attention on a small number of legislative instruments by providing opportunities for parliamentary debate, and promoting dialogue between the executive and legislative branches of government about the manner in which legislative powers delegated to the executive have been exercised. Consideration of the risks and opportunities of subjecting emergency-related delegated legislation to disallowance must be assessed with this in mind.²²

4.32 The committee agrees with the SDLC's statement in the Interim Report that:

delegated legislation made during emergencies must be subject to parliamentary oversight with minimal exceptions. This approach ensures respect for Parliament's constitutional role as the primary institution responsible for making law and scrutinising possible encroachments on personal rights and liberties.²³

4.33 As such, the committee does not consider that a need to take urgent regulatory action is a sufficient justification for exempting disallowance.

20 See, for example, explanatory memorandum, p. 244.

21 See, for example, explanatory memorandum, p. 355.

22 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020, pp. 61–62.

23 See Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim Report: Exemption of Delegated Legislation from Parliamentary Oversight*, December 2020, p. xiii.

Justification 4: Disallowance would be inappropriate because it would have a significant impact on decision-making and the management of regulatory risks

4.34 The explanatory memorandum justifies exempting instruments from disallowance on the basis that the disallowance of an instrument would have a significant impact on decision-making, the risk management process and the broader management of biosecurity risk. For example, in relation to section 618, which allows the Director of Biosecurity and Director of Humans Biosecurity to jointly make declarations in relation to goods moving between parts of Australian territory, the explanatory memorandum states that:

disallowance of a declaration made under this clause could lead to inadequate management of the biosecurity risks posed to human, plant and animal health, Australia's local industries, the environment and the economy. If these declarations were to be disallowed, goods and conveyances that pose a biosecurity risk would be able to move freely to all parts of Australian territory.²⁴

4.35 The committee acknowledges the importance of the regulatory function of the Biosecurity Act and the significant implications of failure to adequately manage biosecurity risks for the Australian economy and for environmental and human health. However, the committee does not consider that the potential for 'significant impacts' is a sufficient justification for exemption of an instrument for disallowance.

4.36 Far from presenting a circumstance in which exemptions from disallowance are justified, the committee considers that legislation which is intended to deal with emergency situations will more often require parliamentary scrutiny, due to the increased chance that emergency related legislation will impact on personal rights or liberties, or have other significant implications. The following comment from the SDLC in the Interim Report is particularly relevant in this regard:

...arguments against making emergency related delegated legislation disallowable must be balanced with the need to ensure adequate checks and balances on the limitation of the personal rights and liberties of individuals who may be subject to such delegated legislation. This need is particularly pronounced in times of emergencies, where legislative measures implemented in response to emergencies may be more likely to trespass on personal rights and liberties than those implemented in nonemergency periods.²⁵

4.37 As noted above, many of the provisions listed at paragraph 4.9 may allow for legislative measures which have the potential to trespass on personal rights and liberties and include such significant matters as imprisonment, limiting rights to

24 Explanatory memorandum, p. 357.

25 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020, p. 62.

review, and the abrogation of a person's right to consent. The committee's concerns in relation to these provisions are heightened, rather than diminished, due to the significance of the regulatory matters at hand.

4.38 Moreover, it is not clear how providing for the usual disallowance process to apply would 'have a significant impact on decision-making, the risk management process and the broader management of biosecurity risks'. In this regard, the committee notes that disallowances rarely occur, and that the risk that the Parliament would disallow a determination well-supported by technical and scientific advice is extremely low. In addition, the committee notes that instruments made under the Biosecurity Act could come into effect immediately after the instrument is registered on the Federal Register of Legislation.

Concluding remarks

4.39 It is important to remember that exempting an instrument from disallowance directly interferes with democratic oversight of Commonwealth law and with the constitutionally conferred role of Parliament as the seat of legislative power. Any exemption from disallowance should be weighed against these twin considerations of representative government and parliamentary supremacy. The committee's consistent scrutiny view, that exemptions from disallowance are only justified in exceptional and limited circumstances, must be understood in this context.

4.40 This default position will be further reinforced in circumstances where the effect of exempted delegated legislation would be to confer broad discretion on a decision-maker, would deal with significant matters, or would interact with an individual's personal rights or liberties. Emergency-related legislation is more likely to attract these concerns than legislation which deals with more 'routine' regulatory matters.

4.41 Justifying exempting delegated legislation from disallowance on the basis that the relevant decisions are of a scientific or technical nature, are consistent with current arrangements, that urgent action needs to be taken, or that significant consequences would result from disallowance is not sufficient to ensure the automatic justification of these exemptions. Rather, the committee expects the explanatory memorandum to a bill which includes an exemption from the usual disallowance process to address the exceptional circumstances that justify that individual exemption, noting that an assessment of those circumstances must include consideration of the significance of abrogating or limiting Parliament's fundamental scrutiny role.

4.42 In light of the above, the committee requests the minister's detailed advice as to:

- the exceptional circumstances that are said to justify the exemption of each of the instruments made under the provisions listed at paragraph 4.9 from disallowance; and
- whether the Act can be amended so that instruments made under the provisions at paragraph 4.9 are subject to the usual parliamentary disallowance process.

Senator Helen Polley

Chair