



## Standing order 23(4A): Instruments exempt from disallowance

### Overview

Standing order 23(4A) empowers the committee to scrutinise instruments which are exempt from disallowance to determine whether the exemption from disallowance is appropriate.

The Senate recognised in June 2021 that if the Parliament is to satisfy its constitutionally mandated law-making role, it must have the ability to scrutinise legislation made by the executive. In this regard, the Senate resolved that:

- delegated legislation should be subject to disallowance and sunseting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances; and
- any claim that circumstances justify exemption from disallowance and sunseting will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases.<sup>1</sup>

In practice, this means that the committee considers most of the existing exemptions from disallowance are not justified.

The committee expects explanatory statements to all exempt instruments to identify the source of the instrument's exemption from disallowance. In addition, the explanatory statement should set out in detail the exceptional circumstances that are said to justify the exemption of the instrument.

Standing order 23(4A) also empowers the committee to consider exempt instruments against the scrutiny principles set out in standing order 23(3). The committee's scrutiny concerns under standing order 23(4A) will be heightened where an instrument also engages the committee's scrutiny concerns under principles (a) to (m) of standing order 23(3).

### Identification of the source of the exemption from disallowance

The committee expects explanatory statements to exempt instruments to identify the source of the instrument's exemption from disallowance. This includes identifying the specific provision of the Act or instrument which provides for the exemption (including the relevant table item, where applicable). The committee does not consider general statements identifying that an exemption is provided under the *Legislation Act 2003* or under the *Legislation (Exemptions and Other Matters) Regulation 2015* to be sufficient.

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1 Senate resolution 53B: Delegated legislation—disallowance and sunseting, 16 June 2021, [https://www.aph.gov.au/Parliamentary\\_Business/Chamber\\_documents/Senate\\_chamber\\_documents/standingorders/d00/Resolutions\\_expressing\\_opinions\\_of\\_the\\_Senate/](https://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standingorders/d00/Resolutions_expressing_opinions_of_the_Senate/).

## **Justification for exemption from disallowance**

The committee considers that delegated legislation should be subject to disallowance unless there are exceptional circumstances. Any claim that circumstances justify an exemption from disallowance will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases. This is in recognition of the important role that the disallowance process plays in maintaining parliamentary oversight of delegated legislation made by the executive.

Exemptions from disallowance are not appropriate where instruments adversely affect rights, liberties, duties and obligations, and should not be made unless there is an alternative form of parliamentary oversight, such as a requirement that the instrument does not come into effect until it has been approved by resolution of each House of the Parliament. The committee does not consider other accountability mechanisms, such as the ability of senators to ask questions on notice or at Senate estimates in relation to an instrument, to be a sufficient alternative form of parliamentary oversight.

The committee expects explanatory statements to exempt instruments should set out in detail the exceptional circumstances that are said to justify the exemption of the instrument.

### ***Common justifications likely to be insufficient***

#### *The instrument is made for the purpose of an intergovernmental scheme*

The committee does not generally consider the fact that an instrument is made for the purpose of an intergovernmental scheme to be a sufficient justification to exempt an instrument from disallowance. While, in some instances, such an instrument may be a product of significant negotiation in the process of obtaining agreement from all government parties, this is not necessarily the case. Moreover, the committee does not consider the fact that a number of executive governments have reached an agreement in relation to a particular matter precludes the need for parliamentary oversight of the laws resulting from such an agreement.

#### *The need to take urgent and decisive action*

The committee does not generally consider that the need for urgent and decisive action to be a sufficient justification to exempt an instrument from disallowance. This is because the disallowable status of delegated legislation does not prevent the executive from acting quickly and decisively as it does not impede the immediate commencement and enforceability of an instrument. Moreover, 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.

#### *The potential for the disallowance process to create uncertainty*

The committee does not generally consider that the potential for the disallowance process to create uncertainty to be a sufficient justification to exempt an instrument from disallowance. While the disallowance process does introduce the possibility that relevant measures will be disallowed during the disallowance period, it is well established that the instance of instruments being disallowed by the Parliament is very rare. Moreover, senators and members, as elected representatives, would be well aware of any impact that disallowance would have and would consider such matters as part of their deliberations and their accountability to their electors.

The committee considers that, instead, the disallowance process is an opportunity to work in a constructive manner with the executive to enhance delegated legislation to ensure that it operates and functions within the boundaries placed upon it by the Parliament. In relation to instruments made during times of emergency, the committee considers that the disallowance process would facilitate appropriate debate and scrutiny of the use of emergency powers and would operate to ensure that such powers are not misused.

While, as noted above, the committee does not consider that arguments against providing for disallowance on the basis that it may undermine certainty are persuasive, the committee considers that in many contexts any uncertainty can be overcome by having delegated legislation commence after the disallowance period has passed, or by providing that an instrument does not come into effect until it has been approved by resolution of each House of the Parliament.

### **Explanatory statement checklist**

The following checklist summarises the types of information which should be included in an explanatory statement.

- Identification of source of exemption from disallowance**      Where an instrument is exempt from disallowance the explanatory statement should identify the specific source of the exemption.
  
- Justification for exemption from disallowance**      Where an instrument is exempt from disallowance, the explanatory statement should set out in detail the exceptional circumstances that are said to justify the exemption of the instrument.