



Delegated Legislation Monitor Tabling Statement

Wednesday 23 November 2022

I rise to speak to the tabling of the Senate Standing Committee for the Scrutiny of Delegated Legislation's *Delegated Legislation Monitor 8 of 2022*.

This Monitor details matters relating the committee's scrutiny of 77 disallowable legislative instruments and 9 instruments exempt from disallowance. It also details the committee's ongoing consideration of instruments registered in previous periods and concludes its engagement with the relevant minister in relation to three instruments.

In tabling the Monitor, I draw the chamber's attention to the committee's longstanding concern about exemptions from parliamentary oversight in delegated legislation.

The committee has consistently raised scrutiny concerns about the exemption of delegated legislation from disallowance and its impact on parliamentary oversight, including holding an inquiry into this issue in the last Parliament. It has been particularly concerned with instruments exempt from disallowance under the *Biosecurity Act 2015* (the Biosecurity Act), including those made in response to the COVID-19 pandemic. I note the Senate Standing Committee for the Scrutiny of Bills has raised similar concerns in its reports.

The Biosecurity Amendment (Strengthening Biosecurity) Bill 2022 was introduced into the Senate on 28 September 2022. This Bill amends the Biosecurity Act, including to introduce three new provisions which are exempt from disallowance, some of which may trespass on personal rights and liberties.

When this Bill was introduced in the Senate, the committee wrote to the Minister for Agriculture, Fisheries and Forestry and the Minister for Health and Aged Care requesting that they move amendments to remove all of the exemptions from disallowance in the Biosecurity Act to facilitate appropriate parliamentary scrutiny over these matters.

Unfortunately, both ministers advised they would not progress amendments to remove the exemptions.

Disallowance is the most important tool that the Parliament has at its disposal to maintain control of delegated legislation.

The committee appreciates that during an emergency it is necessary for governments to take urgent and decisive action. However, Parliament must have effective oversight of these decisions.

The committee has considered this issue since the start of the pandemic and particularly as part of its inquiry into the exemption of delegated legislation from parliamentary oversight. It has found that delegated legislation, including emergency-related delegated legislation, should not be exempt from disallowance, except in exceptional circumstances.

In coming to this conclusion, the committee has carefully considered the arguments justifying why it is appropriate for instruments made under the Biosecurity Act to remain exempt from disallowance.

The common justifications for these exemptions were the need to act urgently, to avoid uncertainty, that the instruments were solely scientific or technical, and that disallowance would put at risk human health or undermine Australia's agriculture sector.

The committee does not accept these justifications for exemptions from disallowance.

The disallowance process does not inhibit the immediate commencement of instruments and does not invalidate actions taken under instruments prior to disallowance, therefore potential disallowance would not prevent the government from taking critical or emergency action to respond to biosecurity risks and threats. Further, the committee does not accept the argument that measures in delegated legislation are so scientific or technical that Parliament should not have oversight over the measures being introduced. Lastly, the instances where an instrument is disallowed by the Senate are rare and only occur after careful consideration, but nevertheless a crucial check on executive power.

The risk that a law will be repealed is simply the risk associated with the system of democratic lawmaking established by the constitution. Moreover, such justifications are framed by a pejorative view of the parliamentary process which assumes that parliamentary law-making is necessarily less rational than executive law-making.

The disallowance process is intended to facilitate appropriate debate and scrutiny of the use of emergency powers to help ensure such powers are not misused.

For this reason, the committee asks the ministers to reconsider their decision not to progress amendments to remove the exemptions from disallowance in the Biosecurity Act. Taking this action would address this longstanding, significant scrutiny concern held by the committee, and the Scrutiny of Bills committee.

With these comments, I commend the committee's *Delegated Legislation Monitor 8 of 2022*.