



MEDIA RELEASE

Senate takes decisive action to reassert parliamentary control over executive lawmaking

Parliament's fundamental role is to legislate on behalf of the people.

Outside parliamentary and legal circles it is a little-known fact that many of our laws are not made by the Parliament but are instead made by ministers and the bureaucracy. These laws, known as legislative instruments, are not subject to any debate or a vote in the Parliament before they are made.

There are over 31,000 legislative instruments currently in force. They make up the law on minor and substantial matters in every field.

The only effective parliamentary oversight of these executive-made laws is the disallowance mechanism. Disallowance gives the Parliament the opportunity to examine such legislation and potentially veto it. However, last year 17.4 per cent of legislative instruments were exempt from disallowance.

Yesterday, the Senate adopted three recommendations of the final report of the Senate Scrutiny of Delegated Legislation Committee's inquiry into the exemption of delegated legislation from parliamentary oversight. The adoption of these recommendations is an important step in reasserting parliamentary control over executive lawmaking.

The first resolution adopted by the Senate emphasises the importance of the disallowance mechanism to parliamentary scrutiny. It sends a strong message to ministers and the bureaucracy that the Senate considers legislative instruments should be subject to disallowance to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances.

The second resolution requires the Attorney-General to table a statement in the Senate setting out the rationale for current exemptions from disallowance. The provision of such a statement will allow the Parliament to consider whether there are genuinely exceptional circumstances to justify the significant number of current exemptions.

To effectively exercise control over executive lawmaking the Parliament must be informed. The third resolution therefore amends the Senate's standing orders to allow the committee to scrutinise instruments that are exempt from disallowance. These changes empower the committee to report its scrutiny concerns about legislative instruments exempt from disallowance to the Senate, a function it is currently unable to perform.

Committee Chair, Senator the Honourable Concetta Fierravanti-Wells, said:

As elected representatives and lawmakers we must not allow the executive to make laws without subjecting that lawmaking to rigorous scrutiny. I thank the Senate for taking these vital steps to restore parliamentary supremacy and reassert the Parliament's role as lawmaker-in-chief.

Committee Deputy Chair, Senator the Honourable Kim Carr, added:

The Senate's adoption of these significant resolutions should serve as a warning to ministers and the bureaucracy that the Parliament will no longer stand by and allow its delegated legislative power to be exercised without oversight.

A copy of the resolutions adopted by the Senate is attached.

Further information about the inquiry, including the interim and final reports, is available on the [committee's website](#).

17 June 2021

For further information: Please visit the committee's website:

https://www.aph.gov.au/senate_sdjc or contact the committee secretariat on (02) 6277 3066 or by email to sdjc.sen@aph.gov.au.

Resolutions adopted by the Senate on 16 June 2021 relating to the exemption of delegated legislation from parliamentary oversight

Delegated legislation—Disallowance and sunseting

- (1) That the Senate notes:
 - (a) the Constitution vests the legislative power of the Commonwealth in the Federal Parliament;
 - (b) if the Parliament is to satisfy this constitutionally mandated role, it must have the ability to scrutinise all legislation made by the executive; and
 - (c) exemptions from disallowance and sunseting undermine the ability of the Parliament, and particularly the Senate, to undertake this scrutiny.
- (2) That the Senate resolves:
 - (a) delegated legislation should be subject to disallowance and sunseting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances; and
 - (b) 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.

Legislation (Exemptions and Other Matters) Regulation 2015—Parts 2, 4 and 5—Statement—Order for production of document

That there be laid on the table, by the Attorney-General, by no later than 5 pm on Tuesday, 31 August 2021, a statement setting out:

- (a) the rationale for specifying that each class of instrument and each particular instrument in Part 2 of the Legislation (Exemptions and Other Matters) Regulation 2015 are not legislative instruments; and
- (b) the exceptional circumstances that justify each exemption from disallowance or sunseting currently set out in Parts 4 and 5 of the Legislation (Exemptions and Other Matters) Regulation 2015.

Standing order 23—Scrutiny of Delegated Legislation—Amendment

That standing order 23 be amended as follows, with effect from 1 July 2021:

Subparagraph (3)(j), omit 'and'.

Omit subparagraph (3)(k), substitute:

- (k) in the case of an instrument exempt from sunseting, it is appropriate for the instrument to be exempt from sunseting;
- (l) in the case of an instrument that amends or modifies the operation of primary legislation, or exempts persons or entities from the operation of primary legislation, the instrument is in force only for as long as is strictly necessary; and
- (m) it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate.

After paragraph (4), insert:

- (4A) The committee may, for the purpose of reporting on its terms of reference, consider instruments made under the authority of Acts of the Parliament that are not subject to disallowance. For such instruments the committee may also consider whether it is appropriate for the instrument to be exempt from disallowance.