Monitor 15 of 2021 – Ministerial responses

Contents

The Hon Greg Hunt MP
Minister for Health and Aged Care

Ref No: MC21-033759

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

19 OCT 2021

Dear Chair Connie

Thank you for your correspondence of 30 September 2021 seeking additional information about the Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 1) Determination 2021 (Amendment Determination).

The emergency determinations made under subsection 477 of the *Biosecurity Act 2015* (Cth), which includes the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 (Overseas Travel Ban) enacted on 25 March 2020, aim to control and prevent the entry, emergence, establishment and spread of COVID-19 in Australian territory.

The Overseas Travel Ban Determination prevents Australian citizens and permanent residents from leaving Australian territory, with the exception of direct travel to New Zealand when quarantine-free travel arrangements are in place, unless an exemption applies.

On 11 August 2021, the Amendment Determination removed the automatic exemption for Australian citizens and permanent residents ordinarily resident in a country other than Australia contained in Para 6(a) of the Overseas Travel Ban Determination. At the time of amendment, the severe and immediate threat to human health from COVID-19 was evident in the increasing global cases and we were particularly concerned to manage capacity within, and preventing transmission from, hotel quarantine.

The processes under the Biosecurity Act

I acknowledge the important role that the parliamentary disallowance process plays in ensuring oversight of Commonwealth law. I also acknowledge the Committee's concern that the human biosecurity emergency powers are not subject to disallowance. However, the *Biosecurity Act 2015* (Act) progressed following extensive community consultation and robust debate through both Houses of Parliament. It was subject to rigorous parliamentary scrutiny processes.

As we have seen throughout the pandemic, emergency determinations have been critical in managing human biosecurity risks. Subjecting these determinations to disallowance would undermine the decision-making and risk management processes. The possibility of disallowance would create considerable uncertainty for government, industry and individuals. Disallowance would also undermine the urgent response required to effectively manage emerging biosecurity risks. It is necessary and appropriate that these instruments be exempt from disallowance and not vulnerable to political considerations.

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7220

The Act allows the Australian Government to quickly respond to emerging and continuing human biosecurity threats. Existing accountability controls include:

- emergency determinations can only be made during the period set by the Governor-General
- emergency determinations are only made after I consider the best public health advice available, which is provided to me either by the Australian Health Protection Principal Committee or by the Director of Human Biosecurity, who is also the Commonwealth Chief Medical Officer (CMO).

Public scrutiny of the Government's response to COVID-19 is available through a range of means, including regular Senate Estimates and Senate Select Committee hearings on the Australian Government's response to the COVID-19 pandemic. The Act also sets a number of specific legal tests that must be met for emergency determinations, including that they are:

- necessary to prevent or control the entry, emergency, establishment or spread of a listed human disease into Australia
- likely to be effective in, or to contribute to, achieving the purpose for which it is to be determined
- no more restrictive or intrusive than is required in the circumstances
- to be applied in a manner which is no more restrictive or intrusive than is required in the circumstances
- applied only as long as is necessary.

These specific legal tests ensure decisions are proportionate, particularly noting that consultation beyond Government is not always possible where there is an immediate need to give effect to public health measures. When circumstances permit, however, consultation is undertaken with relevant stakeholders, as was the case with the relevant land councils for the now repealed Biosecurity (Human Biosecurity Emergency (Human Coronavirus with Pandemic Potential) (Emergency Requirement for Remote Communities) Determination 2020.

The Government also allowed for a transition period before the automatic exemption was removed from the Overseas Travel Ban, which was widely advertised via various media sources and Australian Government websites (including Smartraveller), to allow those who fell into the category time to decide which country they would like to remain in.

I understand the Committee is interested in whether that amendment trespassed unduly on personal rights and liberties, including the freedom of movement. As mentioned above, I must be satisfied that the requirement is no more intrusive than is required in the circumstances. As I noted in my recent letter to the Parliamentary Joint Committee for Human Rights, the recent COVID-19 outbreaks of the Delta variant were introduced into Australia by travellers returning from overseas. The amendment to the Overseas Travel Ban Determination was necessary to reduce the risk of bringing overseas-acquired cases of COVID-19 until such a time that the vaccination rates allow for reopening Australia's borders, as outlined in the National Plan.

Decision making under subsection 7(1) of the Overseas Travel Ban Determination

At the beginning of the COVD-19 pandemic, the automatic exemption for residents of another country was included in the Overseas Travel Ban Determination to allow Australian citizens and residents ordinarily a resident in another country to leave Australian territory to return to their usual country of residence.

Given the length of time that the automatic exemption operated (over 18 months), sufficient time was provided for persons falling into this category wishing to return to their usual place of residence, to do so.

Those who fall into the now removed category can still apply for an exemption to leave Australia, as can other Australians. Information on situations which may be assessed and the officers making decisions is available on the Home Affairs website at: www.homeaffairs.gov.au/covid-19/Documents/outward-travel-restrictions-operation-directive.pdf.

Exemptions to the Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 1) Determination 2021

Information on travel exemptions is available on the Department of Home Affairs website at: https://covid19.homeaffairs.gov.au/leaving-australia. This includes the circumstances under which a discretionary exemption may be made, and the types of evidence that is required to support the claim for an exemption. The Department of Home Affairs (including the Australian Border Force) was consulted on these questions.

Updates to the Explanatory Statement

As I consider that the exemptions from the disallowance process for emergency determinations are appropriately justified, I do not consider it necessary to amend the Act or the current explanatory statement as suggested. However, I will ask the department to take the committee's views into consideration when making any further changes to these instruments.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

Senator the Hon Michaelia Cash
Attorney-General
Minister for Industrial Relations
Deputy Leader of the Government in the Senate

Reference: MC21-043925

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

By email: sdlc.sen@aph.gov.au

Dear Chair

Thank you for your letter of 26 August 2021 regarding the *Legislation (Exemption and Other Matters) Amendment (2021 Measures No. 1) Regulations 2021*.

The Committee has requested further advice as to:

- why the instructions given under subsection 7(3) or 7(4) of the *Air Services Regulations 2019* are exempt from disallowance;
- why this exemption from disallowance is in delegated, rather than primary, legislation;
- why statements approved under section 34AF of the *Australian Security Intelligence Organisation Act 1979* and standards made under section 12 of the *Road Vehicle Standards Act 2018* are exempted from the sunsetting regime in Part 4 of Chapter 3 of the *Legislation Act 2003*; and
- why these exemptions to sunsetting are in delegated, rather than primary, legislation.

I have enclosed additional information in response to the matters raised by the Committee, which I trust will be of assistance.

I have copied this letter to Deputy Prime Minister and Minister for Infrastructure, Transport and Regional Development, the Hon Barnaby Joyce MP, who has responsibility for the *Air Services Regulations 2019* and the *Road Vehicle Standards Act 2018*, and to the Minister for Home Affairs, the Hon Karen Andrews MP, who has responsibility for the *Australian Security Intelligence Organisation Act 1979*.

Yours sincerely

Senator the Hon Michaelia Cash
15 / 09 / 2021

Perth
44 Outram Street, West Perth WA 6005
Ph 08 9226 2000

Canberra
Parliament House, Canberra ACT 2600
Ph 02 6277 7300

Air Services Regulations 2019

Item 1 of Schedule 1 to the *Legislation (Exemption and Other Matters) Amendment (2021 Measures No. 1) Regulations 2021* provides an exemption from disallowance for an instruction given under subsection 7(3) or 7(4) of the *Air Services Regulations 2019* (Air Services Regulations).

Subsection 7(3) of the Air Services Regulations enables Airservices Australia (Airservices) to give directions or instructions to aircraft involved in either Instrument Flight Rules (IFR) or Visual Flight Rules (VFR) flights about the use of a controlled aerodrome or in a specified class of airspace. Airservices may use this power to establish the procedures IFR or VFR aircraft are to follow at controlled aerodromes or in a specified class of airspace.

Subsection 7(3) allows Airservices to run its strategic flow management system (including a ground delay program and the long range air traffic follow management program), which aims at achieving a balance between forecast air traffic capacity and actual air traffic demand. Instructions given by Airservices pursuant to subsection 7(3) generally relate to information under Part 175 of the *Civil Aviation Safety Regulations 1988* (CASR Part 175), which concerns aeronautical information management. Industry benefits from these instructions by way of fewer airborne delays.

Subsection 7(4) of the Air Service Regulations enables Airservices to give specified instructions about the use of airspace above a restricted or danger area which vary from, and prevail over, instructions given to aircraft under subsection 7(3).

Instructions made under subsections 7(3) and 7(4) of the Air Services Regulations directly relate to the safety of air navigation and are technical in nature. They give specific form and substance to Airservices' functions and powers as set out in subsection 8(1) of the *Air Services Act 1995.* Subsection 7(4) is relied upon by Airservices in a number of scenarios concerning the safety of aircraft. Airservices has agreements with Defence and other authorities that permit Airservices to stop the activity in the restricted airspace if an aircraft is entering the airspace without approval. The other scenario in which subsection 7(4) is relied upon is in relation to the use of restricted areas when Airservices is unable to provide a service in that area. In these instances, CASA will declare the area to be 'restricted,' which then permits Airservices to issue instructions to aircraft to manage the issue.

The management of air navigation and Australia's airspace is subject to rapid technological development and change. Including these technical instructions in the subordinate legislation gives Airservices the flexibility necessary to react to technological developments through the management and amendment of the regulation, rather than the through the more protracted pathway of seeking amendments to the primary legislation. Accordingly, it is appropriate that these instructions remain in the subordinate legislation.

As indicated in the explanatory statement to the *Legislation (Exemption and Other Matters) Amendment (2021 Measures No. 1) Regulations*, disallowance of the directions and instructions made under subsections 7(3) and 7(4) of the Air Services Regulations would adversely impact on the orderly management of the aviation industry. It would also increase uncertainty for commercial aircraft operators, providers of air traffic services and aviation regulators. The exemption improves certainty in regulation of the aviation industry, and reduces commercial and safety risks for the industry and the public.

It is therefore necessary and appropriate that this exemption is provided for in delegated legislation in accordance with the framework provided by section 44 of the *Legislation Act 2003*.

Australian Security Intelligence Organisation Act 1979

Item 2 of Schedule 1 to the *Legislation (Exemption and Other Matters) Amendment (2021 Measures No. 1) Regulations 2021* provides an exemption from sunsetting for a statement approved under section 34AF of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act).

An exemption from sunsetting will give effect to the note following subsection 34AF(5) of the ASIO Act, which was inserted by the *Australian Security Intelligence Organisation Amendment Act 2020* (ASIO Amendment Act) and which provides that Part 4 of Chapter 3 of the *Legislation Act 2003* (concerning sunsetting) does not apply to the statement.

An exemption from sunsetting is necessary and appropriate on the basis that the statement of procedures under section 34AF of the ASIO Act is subject to a rigorous statutory review process that is equivalent to the sunsetting regime set out in the Legislation Act. In particular, section 34JF of the ASIO Act provides that Division 3 of Part III (including the power to make the statement of procedures under section 34AF) will cease to have effect on 7 September 2025. It would be duplicative and unnecessary to also apply the sunsetting regime under the Legislation Act to these provisions, particularly as the statutory review process would take place sooner than any automatic sunsetting that ordinarily applies to legislative instruments under the Legislation Act.

It is not appropriate for the statement of procedures to be subject to a separate sunsetting arrangement outside of this legislated arrangement, as the statement of procedures forms a core component of ASIO's questioning powers, which are critical to Australia's national security. It is a condition precedent for the issue of a questioning warrant that the Attorney-General be satisfied that there is a statement of procedures in force (paragraphs 34BA(1)(e) and 34BB(1)(f) of the ASIO Act). The prospect of the statement of procedures not being exempted from the sunsetting regime under the Legislation Act, and thereby being subject to multiple sunsetting regimes, creates a risk that the compulsory questioning framework under the ASIO Act may be rendered inoperable. This would create an unacceptable risk of ASIO being unable to exercise its powers and missing out on critical intelligence.

Division 3 of Part III of the ASIO Act is also subject to review by the Parliamentary Joint Committee on Intelligence and Security, if it resolves to do so, before 7 September 2023 (paragraph 29(1)(ce) of the *Intelligence Services Act 2001*).

Section 16 of the statement of procedures approved under section 34AF of the ASIO Act provides that the operation and suitability of the instrument will be reviewed on a recurring basis to coincide with the review of the Minister's Guidelines made under section 8A of the ASIO Act. Paragraph 1.14 of those Guidelines provides that an initial review must be completed within three years after the commencement of the Guidelines, and that a further review must be completed every three years thereafter.

It is therefore necessary and appropriate for statements approved under section 34AF of the ASIO Act to be exempted from the sunsetting regime.

Providing this exemption in delegated legislation is consistent with the approach to the sunsetting exemption that applied to the statement of procedures before Division 3 of Part III was reformed in 2020.

The prior sunsetting exemption for a statement of procedures made under the former subsection 34C(1) of the ASIO Act was in the *Legislation (Exemptions and Other Matters) Regulation 2015*.

The ASIO Amendment Act amended the ASIO Act to expand the scope of activities to which questioning warrants may apply from only terrorism to include foreign interference and espionage, as well as politically motivated violence (which includes terrorism).

Section 34AF of the ASIO Act, as inserted by the ASIO Amendment Act, includes a Note following subsection 34AF(5) that the statement of procedures will not be subject to the sunsetting provisions in the Legislation Act (by virtue of the regulations in force at that time, and as subsequently amended).

It is appropriate that this exemption is provided for in delegated legislation in accordance with the framework provided by section 54 of the Legislation Act.

Road Vehicle Standards Act 2018

Item 3 of Schedule 1 to the *Legislation (Exemption and Other Matters) Amendment (2021 Measures No. 1) Regulations 2021* provides an exemption from sunsetting for a standard made under section 12 of the *Road Vehicle Standards Act 2018* (RVS Act).

It is necessary and appropriate that standards made under section 12 of the RVS Act, also known as Australian Design Rules (ADRs), are exempt from sunsetting to ensure they remain effective to regulate the ongoing roadworthiness of vehicles throughout their useful life. While the ADRs are regularly updated to reflect changes in vehicle technology, it is not possible to apply these new standards retrospectively to vehicles that are already in use.

Rather than repeal old ADRs, they are kept on the register of legislation so that State and Territory regulators can use them to ensure vehicles continue to comply with the standards that were in force when they were first supplied to the market. Additionally, the Government regularly keeps older ADRs in force for new vehicles as a means to grandfather the requirements that apply to existing vehicle models. This reduces the regulatory burden placed on vehicle manufacturers to redesign existing models to comply with new standards and allows them to put more effort into making sure new models comply.

While the RVS Act and associated Acts relating to consequential and transitional provisions passed Parliament in late 2018, the commencement of the RVS Act was phased in. As part of that phased-in commencement, on 1 July 2021 the ADRs were continued in force as if they were standards under section 12 of the RVS Act: see item 2 of Part 2 of Schedule 3 to the *Road Vehicle Standards (Consequential and Transitional Provisions) Act 2018*.

In keeping with the phased-in commencement approach for the ADRs - as continuing in force under the RVS Act - it is appropriate that this exemption is provided for in delegated legislation in accordance with the framework provided by section 54 of the Legislation Act.

THE HON KAREN ANDREWS MP
MINISTER FOR HOME AFFAIRS

Ref No: MC21-029155

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
sdlc.sen@aph.gov.au.

Dear Chair

Thank you for your correspondence of 5 August 2021 in which you requested advice with respect to the Aviation Transport Security Amendment (Screening Information) Regulations 2021 (the Amendment).

You asked whether a screening notice given by the Secretary under new subregulation 4.17A(2) of the *Aviation Transport Security Regulations 2005* will be subject to any parliamentary or public oversight. Screening notices are developed by the Department of Home Affairs in consultation with screening authorities. A screening notice sets out the detailed requirements for security screening measures to protect aviation against unlawful interference. This includes how to screen persons, their baggage and goods to prevent weapons, explosives or other prohibited items from being taken into secure areas of an airport or onto an aircraft. A screening notice also outlines the record keeping obligations and screening-related performance measures to the screening authority. Due to the operational details contained in a screening notice, the content can be both security sensitive and commercial-in-confidence. Screening notices are therefore, by necessity, not public documents. To make the details of a screening notice public or to open it to parliamentary oversight would expose sensitive security screening information that may be exploited by those wishing to do harm.

Screening notices are developed in consultation with screening authorities to ensure that the notices take into account their individual operational circumstances. Screening authorities are also provided with a draft notice for review before it is formally served. This ensures transparency, given the strict liability and potential significant penalty associated with non-compliance. It is also important to note that the requirements, and any penalties for non-compliance, are imposed on a screening authority, usually an airport or airline operator, and not on an individual screening officer.

You also asked if further guidance about the types of requirements that may be specified by the Secretary in a written notice can be included on the face of the instrument, or in the explanatory statement. As described above, a screening notice specifically details, on its face, the measures with which a screening authority must comply.

In regards to whether the explanatory statement can be amended to provide guidance about the 'other matters' that the Secretary may consider under paragraph 4.17A(4)(g), subregulation 4.17A(4) provides the matters to which the Secretary may have regard in giving a screening notice to a screening authority. These matters (including 4.17A(4)(g)) are limited to the conduct of security screening for the purposes of safeguarding against threats of unlawful interference with aviation.

The definitions establishing security screening in the *Aviation Transport Security Act 2004* (the Act) (subsections 41(1 to 3), 42(1 to 3) and 44(1 to 4)) and the prescription of things to be detected by screening (regulation 4.04) provide a strict limitation on the powers conferred to the Secretary. Security screening is limited to detecting weapons, explosives and prohibited items, on persons, in a person's belongings, in checked baggage, in a vehicle, or in goods. While the Secretary may consider other matters when issuing the screening notice, these considerations must be relevant to the conduct of security screening and more broadly to the purposes of the Act and Regulations.

Examples of other matters the Secretary may consider relevant include: significant changes to national security; changes to the aviation security threat environment; and other serious events that could impact screening operations. For example, the Secretary may take into consideration the safety of security screening staff during the COVID-19 pandemic, by providing a screening notice that allows for COVID-19 safe adjustments to screening processes. I propose to amend the explanatory statement to specify these examples.

Thank you for raising this matter.

Yours sincerely

KAREN ANDREWS

22/ 9 /2021