



ATTORNEY-GENERAL

CANBERRA

11 AUG 2017

MS17-001893

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Warka

I thank the Senate Standing Committee on Regulations and Ordinances for its letter of 9 August 2017, in which the Committee requested further information about the *Migration Amendment (Review of the Regulations) Regulation 2016* and the *Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016* (the Sunsetting Exemption Regulation).

The Committee has requested further advice as to:

- why it is appropriate for the *Migration Regulations 1994* (the Migration Regulations) to be exempt from the sunsetting requirements of the *Legislation Act 2003* (the Legislation Act);
- why it is appropriate to provide for this exemption in delegated legislation; and
- why it is appropriate to reduce Parliament's oversight of these regulations, noting that there is no statutory requirement to re-make the regulations after each review (including the opportunity to consider disallowance of instruments that have been remade due to sunsetting).

Why it is appropriate for the Migration Regulations to be exempt from the sunsetting requirements of the Legislation Act

As mentioned in the letter to the Committee of 13 July 2017 from the Minister for Immigration and Border Protection, Hon Peter Dutton MP, the Migration Regulations were exempted from sunsetting on the basis that the new review process met the objectives of the sunsetting regime set out in Part 4 of Chapter 3 of the Legislation Act, which are 'to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed' (see section 49).

I am advised by Minister Dutton that the Migration Regulations are in constant use to support Australia's migration programme, and are unquestionably still needed. In addition, the Migration Regulations are regularly reviewed and amended, often extensively, to reflect current Government priorities and to respond to economic and social developments.

Amendments are also made several times each year to address changing policy and administrative requirements.

Further, a longstanding and accepted policy reason for granting an exemption from sunseting is that an instrument is subject to a more stringent review process than is set out in the Legislation Act. Instruments that have already been exempted on this basis have not been required to be remade and subject to parliamentary scrutiny following the review.

For these reasons, the Migration Regulations currently meet the objectives of Part 4 of Chapter 3 of the Legislation Act and it is appropriate that they be exempted from sunseting.

Why it is appropriate to provide for this exemption in delegated legislation

Section 62 of the Legislation Act provides the Governor-General with the power to make regulations prescribing matters required or permitted by that Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to that Act.

Subsection 54(2) of the Legislation Act provides that instruments prescribed by regulation for the purposes of paragraph 54(2)(b) are not subject to sunseting.

The Legislation Act does not specify any conditions that must be fulfilled before the power to make this Regulation may be exercised.

However, there is a longstanding principle that sunseting exemptions should only be granted where the instrument is not suitable for regular review under the Legislation Act. This principle is underpinned by five criteria:

- the rule-maker has been given a statutory role independent of the Government, or is operating in competition with the private sector;
- the instrument is designed to be enduring and not subject to regular review;
- commercial certainty would be undermined by sunseting;
- the instrument is part of an intergovernmental scheme; and
- the instrument is subject to a more stringent statutory review process.

The Migration Regulations were analysed against the above criteria and found to be not suitable for regular review under Part 4 of Chapter 3 of the Legislation Act.

The existence of paragraph 54(2)(b) indicates that, at the time the Legislation Act was enacted, Parliament considered it appropriate to allow certain instruments to be exempted from sunseting in delegated legislation.

The fact that no criteria are set out in the Legislation Act for the purpose of determining when an instrument should be exempted, and no limitations are placed on the power to exempt an instrument from sunseting, indicates this was intended to confer a broad discretion on the rule-maker.

Furthermore, the process of prescribing legislative instruments which are exempt from sunseting is subject to Parliamentary scrutiny, including possible disallowance. For these reasons, it is appropriate to provide for the exemption for the Migration Regulations in delegated legislation, and this is consistent with other exemptions that have been provided.

Whether the exemption would reduce Parliament's oversight of these regulations

The Committee has indicated it is focused on ensuring that Parliament maintains effective and regular oversight of the legislative power it has delegated. However, the purpose of the sunseting regime is only to ensure that legislative instruments are regularly reviewed, and remade or repealed, unless an exemption applies. As indicated above, section 49 of the Legislation Act provides that the purpose of the sunseting regime is to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed. That is, the purpose of sunseting is to ensure that legislative instruments are periodically reviewed and, if they no longer have a continuing purpose, are repealed. The explanatory memorandum for the *Legislative Instruments Act 2003*, which introduced the sunseting regime and the explanatory statement for the *Legislative Instruments Regulations 2004*, which provided the first exemptions by way of legislative instrument, did not refer to the maintenance of parliamentary scrutiny over legislative instruments as a justification for the sunseting regime.

Further, I do not consider that Parliament's oversight of the Migration Regulations is reduced by the Sunseting Exemption Regulation because, as outlined in Minister Dutton's letter of 13 July 2017, the Migration Regulations are regularly reviewed and updated. Indeed, I am advised that the Migration Regulations are one of the most frequently amended in force instruments on the Federal Register of Legislation. Each time such an amendment is made, it is subject to Parliamentary scrutiny and possible disallowance.

I am advised by Minister Dutton that the Migration Regulations will continue to be reviewed and improved in future to ensure they are up to date and align with Government policy. In addition to the reforms referred to in Minister Dutton's previous correspondence, Minister Dutton has recently initiated a public consultation process on a new and modern visa framework to transform Australia's visa system. The intention of this consultation is to consider how to simplify the current visa system and better align it with Australia's economic, social and security priorities.

There are a number of design elements that this process will consider, including:

- the scope for a reduction in the number of visas from 99 at present, to approximately ten visas;
- the delineation between temporary entry and long-term or permanent residence;
- the role a period of provisional residence could play in enhancing the integrity of the visa system and easing the burden on taxpayers; and
- ensuring that our visa system supports Australia as a competitive and attractive destination for temporary and longer-term entrants.

Further information about these changes can be found at:
<http://www.border.gov.au/Trav/visa-reform>.

Transformative simplification will be central to the modernisation process, and it is anticipated that substantial legislative reform will be required. Any changes to the Migration Regulations made as part of this process will, as always, be subject to Parliamentary scrutiny.

There is one other potentially critical consequence of the Committee's deliberations that I must draw to its attention. If the Committee were to proceed with the disallowance motion notwithstanding the above, I ask the scope of the disallowance motion be confined to the exemption in question, that is, to the exemption for the Migration Regulations. If the

disallowance motion continues to apply to the whole of the Sunsetting Exemption Regulation, it will affect all instruments that would otherwise be exempt from sunsetting under that instrument. This includes two instruments that have already passed their scheduled sunsetting date of 1 April 2017. These instruments are:

- *Veterans' Affairs (Australian Participants in British Nuclear Tests (Treatment) – Claims, Applications and Lodgements Procedures) Determination 2006*; and
- Determination that dealings with genetically modified carnation lines be included on the GMO Register (Register 001/2004)

Further, an additional 8 instruments would sunset on 1 October 2017:

- *Seas and Submerged Lands Act 1973 – Proclamation under section 7(1)*, made under the *Seas and Submerged Lands Act 1973*;
- *Seas and Submerged Lands Act 1973 – Proclamation under section 7 (09/11/1990)*, made under the *Seas and Submerged Lands Act*;
- *Seas and Submerged Lands Act 1973 – Proclamation under section 7 (29/08/2000)*, made under the *Seas and Submerged Lands Act*;
- *Seas and Submerged Lands (Limits of Contiguous Zone) Proclamation 1999*, made under the *Seas and Submerged Lands Act*;
- *Gene Technology (Recognition of Designated Areas) Principle 2003*, made under subsection 21(1) of the *Gene Technology Act 2000*;
- *CASA OAR 035/16 – Determination of Airspace and controlled aerodromes etc*;
- *Airspace Regulations 2007*; and
- *Australian Participants in British Nuclear Tests (Treatment) Regulations 2007*

Further information about each of these instruments is set out the Explanatory Statement to the Sunsetting Exemption Regulation.

The responsible adviser for this matter in my Office is Mr Jules Moxon

I trust that this information is of assistance to the Committee.

Yours faithfully

(George Brandis)

Cc: The Hon Peter Dutton MP, Minister for Immigration and Border Protection