

The Senate

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Standing  
Committee on  
Regulations and  
Ordinances

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Delegated legislation monitor

Monitor 9 of 2017

14 August 2017

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ISSN 2201-8689 (print)

ISSN 1447-2147 (online)

This document was prepared by the Senate Standing Committee on Regulations and Ordinances and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

# Membership of the committee

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# Contents

<b>Membership of the committee .....</b>	<b><i>iii</i></b>
<b>Introduction.....</b>	<b><i>vii</i></b>
<b>Chapter 1 – New and continuing matters</b>	
<b>Further response required</b>	
Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897] .....	1
Migration Amendment (Review of the Regulations) Regulation 2016 [F2016L01809] .....	1
<b>Chapter 2 – Concluded matters.....</b>	<b>21</b>



# Introduction

## Terms of reference

The Senate Standing Committee on Regulations and Ordinances (the committee) was established in 1932. The role of the committee is to examine the technical qualities of all disallowable instruments of delegated legislation and decide whether they comply with the committee's non-partisan scrutiny principles of personal rights and parliamentary propriety.

Senate Standing Order 23(3) requires the committee to scrutinise each instrument referred to it to ensure:

- (a) that it is in accordance with the statute;
- (b) that it does not trespass unduly on personal rights and liberties;
- (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
- (d) that it does not contain matter more appropriate for parliamentary enactment.

## Nature of the committee's scrutiny

The committee's scrutiny principles capture a wide variety of issues but relate primarily to technical legislative scrutiny. The committee therefore does not generally examine or consider the policy merits of delegated legislation. In cases where an instrument is considered not to comply with the committee's scrutiny principles, the committee's usual approach is to correspond with the responsible minister or instrument-maker seeking further explanation or clarification of the matter at issue, or seeking an undertaking for specific action to address the committee's concern.

The committee's work is supported by processes for the registration, tabling and disallowance of legislative instruments under the *Legislation Act 2003*.<sup>1</sup>

## Publications

The committee's usual practice is to table a report, the *Delegated legislation monitor* (the monitor), each sitting week of the Senate. The monitor provides an overview of the committee's scrutiny of disallowable instruments of delegated legislation for the

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1 For further information on the disallowance process and the work of the committee see *Oggers' Australian Senate Practice*, 14th Edition (2016), Chapter 15.

preceding period. Disallowable instruments of delegated legislation detailed in the monitor are also listed in the 'Index of instruments' on the committee's website.<sup>2</sup>

## Structure of the monitor

The monitor is comprised of the following parts:

- **Chapter 1 New and continuing matters:** identifies disallowable instruments of delegated legislation about which the committee has raised a concern and agreed to write to the relevant minister or instrument-maker:
  - (a) seeking an explanation/information; or
  - (b) seeking further explanation/information subsequent to a response; or
  - (c) on an advice only basis.
- **Chapter 2 Concluded matters:** sets out matters which have been concluded following the receipt of additional information from ministers or relevant instrument-makers, including by the giving of an undertaking to review, amend or remake a given instrument at a future date.

## Ministerial correspondence

Correspondence relating to matters raised by the committee is published on the committee's website.<sup>3</sup>

## Guidelines

Guidelines referred to by the committee are published on the committee's website.<sup>4</sup>

## Acknowledgement

The committee wishes to acknowledge the cooperation of the ministers, instrument-makers and departments who assisted the committee with its consideration of the issues raised in this monitor.

## General information

The Federal Register of Legislation should be consulted for the text of instruments, explanatory statements, and associated information.<sup>5</sup>

The Senate Disallowable Instruments List provides an informal listing of tabled instruments for which disallowance motions may be moved in the Senate.<sup>6</sup>

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2 Parliament of Australia, Senate Standing Committee on Regulations and Ordinances, *Index of instruments*, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Index).

3 See [www.aph.gov.au/regords\\_monitor](http://www.aph.gov.au/regords_monitor).

4 See [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Guidelines](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines).

5 See Australian Government, Federal Register of Legislation, [www.legislation.gov.au](http://www.legislation.gov.au).



The Disallowance Alert records all notices of motion for the disallowance of instruments, and their progress and eventual outcome.<sup>7</sup>

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- 6 Parliament of Australia, *Senate Disallowable Instruments List*, [http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/leginstruments/Senate\\_Disallowable\\_Instruments\\_List](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List).
- 7 Parliament of Australia, Senate Standing Committee on Regulations and Ordinances, *Disallowance Alert 2017*, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Alerts](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts).



## Chapter 1

### Further response required

The committee requests further explanation or information from relevant ministers or instrument-makers with respect to the following concerns.

Correspondence relating to these matters is published on the committee's website.<sup>1</sup>

<b>Instrument</b>	<p><b>Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897]</b></p> <p><b>Migration Amendment (Review of the Regulations) Regulation 2016 [F2016L01809]</b></p>
<b>Purpose</b>	Amends the Legislation (Exemptions and Other Matters) Regulation 2015 to insert new exemptions from the sunsetting and disallowance schemes under the <i>Legislation Act 2003</i> ; and amends the Migration Regulations 1994 to introduce a new statutory review process
<b>Authorising legislation</b>	<i>Legislation Act 2003; Migration Act 1958</i>
<b>Department</b>	Attorney-General's; Immigration and Border Protection
<b>Disallowance</b>	<p>15 sitting days after tabling (tabled Senate 7 February 2017 and 29 November 2016 respectively)</p> <p>The time to give a notice of motion to disallow expired on 31 March 2017 and 28 March 2017 respectively</p> <p>The committee gave notices of motion to disallow on 31 March 2017 and 28 March 2017 respectively</p> <p>The committee withdrew the notice of motion to disallow [F2016L01809] on 22 June 2017<sup>2</sup></p>
<b>Scrutiny principle</b>	Standing Order 23(3)(a) and (d)

1 See [www.aph.gov.au/regords\\_monitor](http://www.aph.gov.au/regords_monitor).

2 See Parliament of Australia, *Disallowance Alert 2017*, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Alerts](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts) (accessed 14 August 2017).

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Previously reported in

*Delegated legislation monitors 1, 3, 7 and 8 of 2017*

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### **Exemption from sunseting**

The committee previously commented as follows:

Migration Amendment (Review of the Regulations) Regulation 2016 [F2016L01809] (review regulation) amends the Migration Regulations 1994 (Migration Regulations) to introduce a new statutory review process. The process requires the Department of Immigration and Border Protection to conduct periodic reviews of the Migration Regulations and to:

- commence the initial review within one year after 1 July 2017 and finish it within two years after the day the review begins; and
- commence a subsequent review every 10 years after 1 October 2017 and finish each review within two years after commencement of the review.

The ES to the review regulation states:

The purpose of the review requirement is to ensure that the Migration Regulations are kept up to date and provisions are in force for so long as they are needed. In this way, the Regulation provides a rigorous integrity measure to ensure the Migration Regulations are examined, and determined fit for purpose, on a regular and ongoing basis. Specifically, this ensures that the Migration Regulations remain subject to ongoing monitoring for their impact and relevance, while also benefitting from appropriate deregulation, including the removal of unnecessary, confusing or outdated provisions.

Item 10 of the Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897] (exemption regulation) amends the Legislation (Exemptions and Other Matters) Regulation 2015 to exempt the Migration Regulations from the sunseting scheme under the *Legislation Act 2003*.

The committee notes that pursuant to section 50 of the *Legislation Act 2003*, but for the exemption regulation, the Migration Regulations would have been required to be re-made due to sunseting on or before 1 October 2018.

The ES for the amending regulation states:

The Migration Regulations contain an alternative statutory review mechanism inserted by the Migration Amendment (Review of the Regulations) Regulation 2016, which requires the Department of

Immigration and Border Protection to conduct periodic reviews of the Migration Regulations, including to:

- commence the initial review within one year after 1 July 2017 and finish it within two years after the day the review begins; and
- commence a subsequent review every 10 years after 1 October 2017 and finish each review within two years after commencement of the review.

For this reason, it is appropriate to provide an exemption from sunseting for the Migration Regulations.

Neither the ES to the review regulation nor the exemption regulation provides information on the broader justification for the exemption of the Migration Regulations from sunseting.

The committee also notes that the process to review and action review recommendations for instruments can be lengthy, and the committee expects departments and agencies to plan for sunseting well in advance of an instrument's sunset date.<sup>3</sup>

The committee is concerned that neither the ES to the review regulation nor the exemption regulation provides information about whether a review of the Migration Regulations had commenced in light of the sunseting date of 1 October 2018 and why, in effect, an additional year is required to conduct the initial review.

The committee requests the advice of the minister in relation to the above.

### **Attorney-General's initial response**

The Attorney-General advised:

The Committee has sought further advice on the broader justification for the exemption of the Migration Regulations 1994 from sunseting and information about the review process for the Migration Regulations.

The purpose of the sunseting regime established by the *Legislation Act 2003* is to ensure that legislative instruments are kept up to date and only remain in force for as long as they are needed.

The Legislation Act does not specify any conditions or legal criteria that I am required to consider in granting a sunseting exemption. However,

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3 Attorney-General's Department, *Guide to Managing Sunseting of Legislative Instruments* (2016), <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/guide-to-managing-sunseting-of-legislative-instruments-april2014.doc> (accessed 2 February 2016).

there is a long standing 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 rigorous statutory review process.

I am satisfied that the review requirement inserted in the Migration Regulations provides a rigorous review process that meets the objective of ensuring that the Migration Regulations are kept up to date and are only in force for as long as they are needed. It enables the objectives of the Legislation Act to be met without incurring the significant systems, training and operational costs associated with remaking the Migration Regulations.

The Committee has also sought information about whether a review of the Migration Regulations had commenced in light of the sunseting date of 1 October 2018 and why, in effect, an additional year is required to conduct the initial review.

I am advised by the Minister for Immigration and Border Protection that the Department has not commenced the review. According to regulation 5.44A of the Migration Regulations, the review is now to commence between 1 July 2017 and 30 June 2018.

Considering the width and breadth of the Migration Regulations, which currently consists of 1478 pages, these timeframes for the initial review were put in place to ensure that adequate resources and time are allocated.

The Committee may be interested to know that the Migration Regulations are amended numerous times each year to update policy settings for the Australian immigration programmes. This has been the case since the Migration Regulations commenced in September 1994. Redundant provisions were removed from the Migration Regulations in 2012. The amendment history of the Migration Regulations is set out in the endnotes and now runs to more than 400 pages.

### **Committee's first response**

The committee thanks the Attorney-General for his response.

The committee notes the advice of the Attorney-General and Minister for Immigration and Border Protection that the Department of Immigration and Border Protection has not commenced the review, and that timeframes for the initial review under the new process were put in place to ensure that adequate resources and time are allocated. However, the Attorney-General's response does not provide information as to why, in effect, an additional year is required to conduct the initial review under the new process, noting that the sunseting date for the Migration Regulations would have been 1 October 2018.

Recognising that the process to review and action review recommendations for instruments can be lengthy, the committee reiterates its expectation that departments and agencies plan for sunseting well in advance of an instrument's sunset date. The committee remains concerned that the effect of the introduction of the new process for review of the Migration Regulations is that the timeframes set in place by the sunseting regime under the *Legislation Act 2003* are avoided.

The committee requests the further advice of the ministers in relation to the above.

### **Minister's subsequent response**

The Minister for Immigration and Border Protection advised:

The Committee requested further advice about why, in effect, an additional year is required to conduct the initial review under the new process, noting that the sun-setting date for the Migration Regulations 1994 (the Regulations) would have been 1 October 2018.

The Government's agenda includes a substantial reform of Australia's migration and citizenship framework, necessitating associated legislative change. As part of the Budget, an announcement was made in relation to improving technologies to manage our visa processing platform, and the Prime Minister and I have since made announcements about changes to Australian citizenship.

I am advised by the Attorney General that the *Legislation Act 2003* provides the flexibility for sunseting to be delayed. Relatively short delays such as 1 year are not inconsistent with the objective of the sun-setting regime, which is to ensure that legislative instruments are kept up to date and remain in force for only as long as they are needed.

### **Committee's second response**

The committee thanks the Minister for his response.

The committee's request for advice in relation to these regulations arose from concerns about possible implications of the exemption of the Migration Regulations from the sunseting requirements of the *Legislation Act 2003* (LA).

The purpose of sunseting is to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed. To achieve this goal, the LA provides that legislative instruments are automatically repealed after a fixed period of time (subject to some exceptions). This automatic repeal is called sunseting and section 50 of the LA provides for the sunseting of all instruments around the tenth anniversary of each instrument's registration on the Federal Register of Legislation. This means that every ten years, if, after a review, it is assessed that an instrument is still required, an instrument is usually remade (with or without amendments). This process provides greater opportunity for Parliament to ensure the content of instruments is current and to ensure Parliament maintains effective and regular oversight of legislative instruments (including the possibility of parliamentary disallowance of the remade instrument).

In light of the above, where a regulation provides an exemption from sunseting for a particular instrument or a class of instruments, the committee is concerned about the potential implications of the exemption and why it is appropriate for such an exemption to be provided.

The committee acknowledges the Attorney-General's advice that the LA provides the flexibility for sunseting to be delayed and that short delays such as one year are not inconsistent with the objective of the sunseting regime. The committee also notes that the alternative statutory review mechanism inserted by the review regulation requires the Department of Immigration and Border Protection (the department) to conduct periodic reviews of the Migration Regulations, similar to the 10-year sunseting cycle.

The committee further notes the justification provided by the minister for the exemption of the Migration Regulations from sunseting:

The Government's agenda includes a substantial reform of Australia's migration and citizenship framework, necessitating associated legislative change. As part of the Budget, an announcement was made in relation to improving technologies to manage our visa processing platform, and the Prime Minister and I have since made announcements about changes to Australian citizenship.

The committee also notes the Attorney-General's advice that he was:

...satisfied that the review requirement inserted in the Migration Regulations provides a rigorous review process that meets the objective of ensuring that the Migration Regulations are kept up to date and are only in force for as long as they are needed.

However, it remains unclear to the committee why an extension was not sought to delay the sunseting of the Migration Regulations for an additional year to allow time for the initial review of the Migration Regulations to be conducted as part of the



sunsetting scheme of the LA rather than introducing the new sunsetting scheme contained in the review regulation.

In particular, the new process for review of the Migration Regulations introduced by these regulations does not include a statutory requirement to re-make the Migration Regulations after each review to ensure the Parliament maintains effective and regular oversight of the Migration Regulations.

The committee gave a protective notice of motion to disallow the Migration Amendment (Review of the Regulations) Regulation 2016 [F2016L01809] on 28 March 2017. This motion to disallow must be resolved or withdrawn within 15 sitting days after it was given otherwise the regulation will be deemed to be disallowed. Noting the information provided by the minister and Attorney-General to date, the committee has resolved, on this occasion, to withdraw the protective notice of motion for this regulation.

However, in light of the committee's concerns regarding the exemption of the Migration Regulations from the sunsetting requirements of the *Legislation Act 2003* (as implemented by the Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897]);<sup>4</sup> and the absence of a statutory requirement to re-make the Migrations Regulations after each review, the committee requests the further advice of the ministers in relation to the above.

### **Minister's further response**

The Minister for Immigration and Border Protection advised:

Formal consultations between the Department of Immigration and Border Protection, the Office of Parliamentary Counsel and the Attorney-General's Department began in February 2016 in relation to the sunsetting of the Migration Regulations 1994 (the Migration Regulations). As a result of these discussions, and the briefing provided to me, I wrote to the Attorney-General seeking an exemption from the sunsetting regime.

The Attorney-General agreed to this proposal, on the condition that a review requirement was incorporated into the Migration Regulations. This requirement was inserted by the Migration Amendment (Review of the Regulations) Regulation 2016 in November 2016.

The Committee has queried:

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4 The committee gave a protective notice of motion to disallow the Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897] on 31 March 2017. This motion currently must be resolved or withdrawn by 15 August 2017.

- why an extension was not sought to delay the sunseting of the Migration Regulations for an additional year to allow time for the initial review of the Migration Regulations to be conducted as part of the sunseting scheme; and
- why the new process for review of the Migration Regulations introduced by these regulations does not include a statutory requirement to re-make the Migration Regulations after each review.

The answers to both these questions are inter-related, since the decisions to introduce a review process into the Migration Regulations, and to exempt these regulations from sunseting, were not taken because there was insufficient time available to conduct a review of the Migration Regulations. Instead, these decisions were made because – for the reasons outlined below – it was considered inappropriate for the Migration Regulations to sunset.

The Migration Regulations are large and complex, and underpin Australia's visa framework. This framework supports the Government's international priorities and obligations by facilitating:

- temporary entry of people into Australia to undertake education, tourism, working holidays or skilled work (more than 7.7 million temporary visas were granted in 2015-16); and
- permanent migration.

Remaking the Migration Regulations would incur significant costs, and place a high impost on Government resources, with limited effect on the reduction of red tape, the delivery of clearer law or the alignment of the existing legislation with current Government policy.

In addition, a remake of the Migration Regulations would require complex and difficult to administer transitional provisions. It is likely that this would have a significant impact on any undecided visa and sponsorship applications, as well as causing significant uncertainty for:

- the millions of visa holders whose visa conditions and the grounds on which their visa is held, including when that visa ceases, are determined by the Migration Regulations;
- the millions of current or future visa applicants whose eligibility for an Australian visa is determined by the Migration Regulations;
- sponsors and potential sponsors; and
- industries where the conduct of business is reliant on migrants, either as employees or clients.

The Migration Regulations were exempted from sunseting on the basis that the new review process met the objectives of the sunseting regime set out in Part 4 of Chapter 3 of the *Legislation Act 2003* (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).

There is no question that the Migration Regulations are still needed – as described above, they are in constant use to support Australia's migration programme. There is also no question that the Migration Regulations are kept up to date and fit for purpose; the 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.

In addition, as a deregulation measure, in 2012-2013 the Migration Regulations were comprehensively reviewed and were amended in 2014 to remove redundant provisions and regularise terminology (see the Migration Amendment (Redundant and Other Provisions) Regulation 2014 for further details about these amendments).

The process involved individual consideration of every provision of the Migration Regulations and categorisation as 'still required', 'possibly redundant', and 'redundant'. The relevant policy area was then consulted to provide instructions to repeal, or justification to keep the provisions. The process also involved updating cross references and terminology, and certain drafting practices.

In future, the Migration Regulations will continue to be reviewed and improved to ensure they are up to date and align with Government policy, including the announcements made on 9 May 2017, as part of the 2017-18 Budget, that the Government:

- has committed \$95.4 million in the 2017-18 Budget to support new technologies for my Department to bolster the prosperity of the nation and to protect Australia into the future; and
- will initiate a long-term programme of work to enhance the visa system and deal with the increasing number of movements across Australia's border (more than 700,000 people arrive in or depart from Australia each week, and this number is expected to increase by about 20 per cent over the next few years).

Further information about these changes can be found here: <http://www.minister.border.gov.au/peterdutton/2017/Pages/budget-2017-18.aspx>

In light of the above, I consider that the Migration Regulations currently meet the objectives of Part 4 of Chapter 3 of the Legislation Act, and that the review arrangements inserted by the Migration Amendment (Review of the Regulations) Regulation 2016 formalise, and add to, what is effectively an ongoing review process. I note, moreover, that each time amendments are made to the Migration Regulations the changes are subject to Parliamentary scrutiny, including possible disallowance.

### **Committee's third response**

#### **The committee thanks the minister for his response.**

The committee's request for further information regarding the Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897] arose from concerns regarding the exemption of the Migration Regulations from the sunsetting requirements of the *Legislation Act 2003*; and in particular, the absence of a statutory requirement under the new review arrangements to remake the Migrations Regulations after each review.

The committee notes the minister's advice that a remake of the Migration Regulations would:

- require complex and administratively difficult transitional provisions; and
- this would likely have a significant impact on any undecided visa and sponsorship applications, as well as causing significant uncertainty for visa holders, sponsors and industries where the conduct of business is reliant on migrants.

The committee also notes the minister's advice that 'the Migration Regulations are large and complex, and underpin Australia's visa framework' and that 'remaking the Migration Regulations would incur significant costs, and place a high impost on Government resources'. However, the committee's focus where an exemption from sunsetting is proposed is to ensure that Parliament maintains effective and regular oversight of the legislative power it has delegated (including the opportunity to consider disallowance of instruments that have been remade due to sunsetting).

The committee remains concerned that exemption of the Migration Regulations from the sunsetting requirements of the *Legislation Act 2003*, reduces Parliament's oversight of these regulations as there is no statutory requirement to remake the regulations after each review.

The committee further considers that a review of the Migration Regulations is a significant matter and that the processes and outcomes of such a review should be subject to parliamentary scrutiny.

The committee considers that an exemption from sunseting of a significant piece of delegated legislation (such as the Migration Regulations) could be more appropriately contained in primary legislation (see for example section 54 of the *Legislation Act 2003*). The committee reiterates its view that significant matters should be included in primary legislation unless a compelling justification is provided for their inclusion in delegated legislation.

The committee's notice of motion to disallow the Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897] must be resolved or withdrawn within 15 sitting days after it was given.

The committee considers that the information provided by the Minister for Immigration and Border Protection and the Attorney-General does not adequately address the committee's request for a justification for the exemption of the Migration Regulations from the sunseting requirements of the *Legislation Act 2003*.

Therefore, the committee requests that the minister provide detailed advice as to:

- why it is appropriate for the Migration Regulations to be exempt from the sunseting requirements of the *Legislation Act 2003*;
- 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 sunseting).

### **Attorney-General's second response (11 August 2017)**

The Attorney-General advised:

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 sunseting 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 sunseting).

**Why it is appropriate for the Migration Regulations to be exempt from the sunseting 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 sunseting on the basis that the new review process met the objectives of the sunseting 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 sunseting under that instrument. This includes two instruments that have already passed their scheduled sunseting 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 committee thanks the Attorney-General for his prompt response and acknowledges the cooperation of both the Attorney-General and the Minister for**

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**Immigration and Border Protection in assisting the committee with its consideration of the issues raised in this monitor.**

The committee's request for advice in relation to these regulations arose from concerns about possible implications of the exemption of the Migration Regulations 1994 (Migration Regulations) from the sunseting requirements of the *Legislation Act 2003* (Legislation Act).

Scrutiny principle 23(3)(a) of the committee's terms of reference requires the committee to ensure that an instrument is made in accordance with statute. This principle requires that instruments are made in accordance with their authorising Act as well as any other applicable legal requirements.

With reference to this scrutiny principle, the committee acknowledges that:

- section 62 of the Legislation Act delegates legislative power to the Governor-General to make regulations prescribing matters required or permitted by the Legislation 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; and
- the Legislation Act does not specify any conditions that must be fulfilled before the power to make such a regulation may be exercised.

In this respect, the committee considers that the Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897] (the exemption regulation) has been made in accordance with statute.

However, scrutiny principle 23(3)(d) of the committee's terms of reference requires that the committee seek to ensure that instruments do not contain matter more appropriate for parliamentary enactment. In accordance with this principle, the committee has had a longstanding interest in the balance of what matters should be dealt with in primary as opposed to delegated legislation.

In this regard, the committee's requests to the Attorney-General sought a justification for exempting the Migration Regulations from the sunseting regime set out in primary legislation (Part 4 of Chapter 3 of the Legislation Act). These requests were made noting that the committee's focus where an exemption from sunseting is proposed is to ensure that Parliament maintains effective and regular oversight of the legislative power it has delegated (including an opportunity to consider the

disallowance of an instrument as a whole, which is the process that applies where disallowable legislative instruments are remade due to sunseting).

The committee notes the Attorney-General's advice that the exemption from sunseting was granted because the new statutory review process inserted by the Migration Amendment (Review of the Regulations) Regulation 2016 [F2016L01809] (migration review regulation) met the objectives of the sunseting regime 'to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed'.

The committee also notes the Attorney-General's advice that he does not consider that Parliament's oversight of the Migration Regulations is reduced by the exemption regulation 'because the Migration Regulations are regularly reviewed and updated'.

The committee acknowledges that the Migration Regulations are regularly amended, and that those amendments are subject to parliamentary scrutiny and disallowance. However, the committee considers that removing the requirement to remake the Migration Regulations every 10 years after a significant review does reduce Parliament's oversight of those regulations. This is because a requirement to remake the Migration Regulations every 10 years provides greater opportunity for the Parliament to ensure the content of the regulations is current as well as the possibility of parliamentary disallowance of the remade regulations.

In this regard, the committee again notes the previous advice provided by the Minister for Immigration and Border Protection that a remake of the Migration Regulations would:

- require complex and administratively difficult transitional provisions; and
- that this would likely have a significant impact on any undecided visa and sponsorship applications, as well as causing significant uncertainty for visa holders, sponsors and industries where the conduct of business is reliant on migrants.

The committee also notes the minister's previous advice that 'the Migration Regulations are large and complex, and underpin Australia's visa framework' and that 'remaking the Migration Regulations would incur significant costs, and place a high impost on Government resources'.

The committee further acknowledges the Attorney-General's advice that the Minister for Immigration and Border Protection has advised 'that the Migration Regulations are in constant use to support Australia's migration program, and are unquestionably still needed'.

As noted above, as a direct result of the migration review regulation and the exemption regulation, Parliament will not have the opportunity every 10 years to

undertake a review of the Migration Regulations as a whole (including the outcomes of the new review process for the Migration Regulations). The committee also notes that no other form of Parliamentary oversight has been introduced to replace the Legislation Act sunseting process. The committee considers that a review of the Migration Regulations as a whole is a significant matter and that the processes and outcomes of such a review should be subject to parliamentary scrutiny (as provided for in the sunseting framework of Legislation Act).

The committee therefore considers that a legislative requirement should be inserted into the Migration Regulations to require the minister to table in Parliament the review documentation (including the final report) that is prepared for the purposes of new regulation 5.44A of the Migration Regulations. The committee's expectation is that the review and its report will be thorough and, at a minimum, will reflect the principles outlined in the Attorney-General's Department *Guide to Managing Sunsetting of Legislative Instruments*.<sup>5</sup>

**The committee accepts that the Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897] has been made in accordance with statute. However, the committee's focus where an exemption from sunseting is proposed is to ensure that Parliament maintains effective and regular oversight of the power it has delegated (including an opportunity to consider the disallowance of an instrument as a whole, which is the process that applies when disallowable legislative instruments are remade due to sunseting).**

**The committee considers that it is essential for Parliament to retain direct oversight of the outcomes of the review process of significant pieces of delegated legislation, including the Migration Regulations 1994. The committee therefore requests that a legislative requirement be inserted into the Migration Regulations to require the minister to table in Parliament the review documentation (including the final report) that is prepared for the purposes of new regulation 5.44A of the Migration Regulations.**

**The committee requests the further advice of the minister in relation to the above.**

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**The committee gave a protective notice of motion to disallow the Legislation Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897] on 31 March 2017. This motion to**

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5 See, Attorney-General's Department, *Guide to Managing Sunsetting of Legislative Instruments* (2016), <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/guide-to-managing-sunseting-of-legislative-instruments-december-2016.pdf> (accessed 2 February 2016), p. 13.

disallow must be resolved or withdrawn within 15 sitting days after it was given otherwise the regulation will be deemed to be disallowed.

In this instance, noting the information provided by the Minister for Immigration and Border Protection and Attorney-General to date and that the Attorney-General will report on the review of the Sunsetting Framework under the *Legislation Act 2003* on 1 October 2017, the committee has resolved to:

- draw to the attention of the Senate its concerns regarding:
  - (a) the use of delegated legislative power to exempt such a significant piece of delegated legislation from the sunsetting framework of the *Legislation Act*; and
  - (b) the removal of effective parliamentary oversight of the outcomes of the review process for the Migration Regulations (as is provided for under the sunsetting regime); and
- withdraw the protective notice of motion to disallow the *Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016* [F2016L01897].

Notwithstanding the committee's resolution to withdraw its protective notice of motion on this occasion, the committee remains concerned about the executive use of delegated legislative power to exempt significant pieces of delegated legislation from the sunsetting framework of the *Legislation Act*.

The committee expressly notes its view that an exemption from the sunsetting requirements of the *Legislation Act* is a significant matter. The committee's position in relation to the exemption of the Migration Regulations from sunsetting is based on the circumstances in this particular case, and should not be seen to constitute a general acceptance of exemptions from the sunsetting framework. The committee considers that the circumstances in which an exemption will be appropriate are limited, and will continue to analyse any such proposal carefully.

If future exemptions from sunsetting are proposed in delegated legislation, the committee will expect the accompanying justification to take its expectations into account and to provide a detailed justification of the need for an exemption from the existing sunsetting requirements of the *Legislation Act*. In particular, this should address how Parliament will retain oversight of the review process of such delegated legislation.



## **Chapter 2**

### **Concluded matters**

There are no concluded matters.

**Senator John Williams (Chair)**