



**The Hon David Littleproud MP**  
**Minister for Agriculture, Drought and Emergency Management**  
**Deputy Leader of the Nationals**  
**Federal Member for Maranoa**

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Senator Helen Polley  
Chair  
Senate Standing Committee for the Scrutiny of Bills  
Parliament House  
CANBERRA ACT 2600

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Via email: [scrutiny.sen@aph.gov.au](mailto:scrutiny.sen@aph.gov.au)

Dear Senator

Thank you for your correspondence of 13 May 2021, on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee), concerning a query in relation to exemptions of delegated legislation made under the *Biosecurity Act 2015* (the Act) from the parliamentary disallowance process in Scrutiny Digest 7 of 2021.

The Committee has sought advice as to the exceptional circumstances that are said to justify the exemption from disallowance of each instrument made under the provisions listed at paragraph 4.9 of the report. The Committee has also sought advice as to whether the Act can be amended so that instruments are subject to the usual parliamentary disallowance process.

I have set out my response to both issues in detail below.

**Justification for exemptions from disallowance**

The Act provides the regulatory framework for the management of pests and diseases that may cause harm to human, animal or plant health or the environment, within Australia. The Act also gives effect to Australia's relevant international rights and obligations, including Australia's obligations under the World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures, and under the International Health Regulations (2005).

This framework protects some of Australia's most valuable assets and industries, including a forecasted \$71 billion in gross value agriculture, forestry and fisheries production and \$51 billion in agricultural, forestry and fisheries exports in 2020-21, and an estimated 1.6 million jobs across the agricultural supply chain. It also protects Australia's irreplaceable environmental assets valued at \$5.7 trillion modelled over 50 years.

The security of the Australian community and its protection from the potentially devastating consequences of biosecurity risks, is a priority for the Australian Government. The biosecurity framework is a central pillar of the defence against these threats and underpins Australia's ability to protect the community, environment, economy and our way of life. As the COVID-19 pandemic has demonstrated, emerging and evolving biosecurity threats are putting unprecedented pressure on Australia's borders and create exceptional circumstances that require a rapid and decisive response. Australia's biosecurity system has kept Australia largely free from pests and diseases that have had catastrophic impacts elsewhere, including African swine fever (ASF), foot and mouth disease and brown marmorated stink bug, and has been essential in Australia's successful management of the spread of COVID-19.

The Act contains 30 provisions that enable the making of legislative instruments that are exempt from disallowance. These instruments are critical to the management of biosecurity risks, provide transparency in decision-making and enhance certainty for biosecurity officers and industry. The instruments are critical in emergency situations by allowing for timely identification, containment, monitoring and decision-making. Subjecting these instruments to disallowance would undermine the decision-making and risk management processes. The possibility of disallowance would create considerable uncertainty for impacted industries, the individuals that implement these decisions and the broader community. It would also create delays in urgent decisions and actions, jeopardising Australia's plant, animal and human health. The uncertainty and delays would increase costs to industry, risk damaging relationships with Australia's trading partners and undermine community trust in the government to effectively manage emerging and existing biosecurity risks.

The instruments under the Act cover a range of decisions and broadly fall into the following categories:

- decisions that are scientific and technical in nature
- decisions that are critical to the effective management of human biosecurity and other biosecurity risks
- emergency action to ensure fast and urgent action necessary to manage a threat or harm from a human biosecurity or biosecurity risk.

It is important to recognise that there is no exhaustive list of circumstances in which exemption from disallowance may be appropriate, and an instrument may fall into more than one category.

There are several instruments exempt from disallowance which rely on technical and scientific assessments to determine the human biosecurity risk or biosecurity risk, and whether that risk can be satisfactorily managed. Determinations of this type include determining a listed human disease, or determining that specified classes of goods must not be brought or imported into Australian territory unless specified conditions (including conditions for administrative purposes) are complied with.

It is appropriate for Parliament to delegate the power to make instruments that are required to be based on technical and scientific decisions about the management of human biosecurity risk and biosecurity risk to the Director of Human Biosecurity or the Director of Biosecurity, respectively.

The Act also provides for the making of non-disallowable legislative instruments that are critical to the effective management of human biosecurity and biosecurity risks. These include instruments determining first points of entry for aircrafts and vessels, biosecurity monitoring zones, or determining goods that must not be brought or imported into Australian territory for a specific period. These determinations facilitate the routine movement of goods and humans while managing related biosecurity risks.

Determinations may also be made in response to emergency situations that threaten Australia's human, animal or plant health. Emergency declarations often also rely on technical and scientific assessment and are proportionate to the relevant biosecurity risks posed. Pests and diseases can spread rapidly and the ability to respond quickly to an emerging human biosecurity or biosecurity risk is a critical part of Australia's biosecurity framework. These instruments play a crucial role in that response and the potential for disallowance could lead to inadequate management of biosecurity risks. It is necessary and appropriate that these instruments be exempt from disallowance and should not be vulnerable to political considerations.

It is a testament to the strength and effectiveness of Australia's biosecurity framework that many of these emergency provisions are yet to be enlivened. With the human biosecurity and biosecurity risks facing Australia becoming more complex and harder to manage, it is important that the Commonwealth have these emergency provisions available.

Examples of legislative instruments exempt from disallowance include the following:

- *Conditionally non-prohibited goods determinations*  
Subsection 174(1) of the Act provides that the Director of Biosecurity and Director of Human Biosecurity may jointly determine that specified classes of goods must not be brought or imported into Australian territory unless specified conditions are complied with. These determinations are vital in ensuring that goods that pose an unacceptable biosecurity risk do not enter Australian territory, while facilitating trade through establishing conditions that manage biosecurity risk where appropriate.

In making a determination of this type, the Act requires that the appropriate level of protection (ALOP) for Australia be applied to risk assessments conducted for the purpose of deciding to make the determination. These risk assessments consider technical and scientific information to determine conditions necessary to manage biosecurity risk, including how goods are manufactured, prepared or used, or their country of origin.

If these instruments were to be disallowed, there is potential for goods to be able to be brought into Australian territory without conditions, regardless of the risk posed to human, animal or plant health. This would have a significant impact on Australia's local industries, the environment and the economy, and could also lead to restrictions being put on Australia's exports by trading partners.

- *First point of entry determinations*

Subsection 223(1) of the Act provides for the Director of Biosecurity or the Director of Human Biosecurity to determine a specified landing place is a first point of entry for aircraft or specified goods or classes of goods subject to biosecurity control.

Subsection 229(1) similarly provides the power to determine a port as first point of entry for vessels and specified goods or classes of goods subject to biosecurity control. The Act also provides that these first point of entry determinations may be varied or revoked.

When making a determination of this kind, the *Biosecurity Regulation 2016* specifies the technical requirements that must be considered, including adequate facilities and appropriate procedures at the landing place or port to identify and manage biosecurity risks.

Subjecting a decision to determine, vary or revoke a first point of entry determination to disallowance could undermine the technical and scientific assessment as to whether the biosecurity risk is able to be satisfactorily managed at that location, and also cause disruption and potential costs to industry who rely on the availability of the first point of entry and may for example be required to change the destination of the aircraft or vessel after the journey has commenced.

- *Biosecurity emergency determinations*

Section 443(1) of the Act provides for the Governor-General to declare a biosecurity emergency. In recognition of the seriousness of such a declaration, the Agriculture Minister must first be satisfied that the relevant disease or pest is posing a severe and immediate threat, or is causing harm to animal or plant health, the environment or economic activities relating to animals, plants or the environment on a nationally significant scale.

A hypothetical example of where a determination of this type may be required is if ASF were to spread to Australia. ASF is a contagious viral disease that kills about 80 per cent of the domestic and wild pigs it infects. While it has never occurred in Australia, ASF's changing distribution makes it a significant biosecurity threat. An outbreak of ASF would pose a severe and immediate threat to Australia's animal health, and an emergency declaration would be a vital component of the emergency action to prevent the spread of the disease, including through restricting movement between premises.

During such emergencies, there is a time-limited opportunity to contain the spread of a biosecurity risk. The government needs the ability to take urgent, decisive action using technically and scientifically based decisions to reduce the potential damage caused by a biosecurity risk. If this instrument were to be disallowed, and a new instrument unable to be made for six months, Australia's ability to control and eradicate ASF would be severely compromised, with consequential devastating effects on Australia's \$1.2 billion pork industry, economy and favourable plant and animal health status with trading partners.

- *Suspended goods determinations*

A determination made under subsection 182(1) of the Act specifies goods, or classes of goods, that must not be brought or imported into Australian territory for a specific period which must not be longer than six months.

A hypothetical example of where a determination of this type may be required is if *Xylella fastidiosa* were to be detected on imported plants or planting material such as budwood or cuttings. *Xylella fastidiosa* is a bacterial disease that causes scorched leaves and kills crops Australians rely on for food. There is no treatment, making it top of Australia's National Priority Plant Pests.

If the Director of Biosecurity determined that the import conditions and risk management measures relating to budwood or cuttings existing at the time were insufficient to reduce the biosecurity risk to an acceptable level, the temporary suspension through a suspended goods determination allows for a review of the risk management conditions and compliance arrangements. This determination must be based on a risk assessment and the application of the ALOP for Australia.

If this instrument were to be subject to disallowance this would undermine the technical and scientific assessment as to whether the biosecurity risk related to imported goods is able to be satisfactorily managed and creates uncertainty for importers and Australia's trading partners.

Subjecting any of these instruments to disallowance, including those crucial to Australia's response to emerging human biosecurity risks and biosecurity risks, and which rely on technical and scientific assessment, has the potential to frustrate risk management and lead to inadequate management of biosecurity risks posed to human, plant and animal health. It also risks undermining certainty for industry, potentially damaging trading relationships.

### **Advice on potential amendments to the Biosecurity Act**

I acknowledge the important role that the parliamentary disallowance process plays in ensuring oversight of Commonwealth law. As you are aware, Parliament has delegated certain legislative functions to the Executive under the Biosecurity Act, and that some instruments are exempt from disallowance in limited circumstances.

As noted above, exemptions from disallowance in the Act are intended to provide certainty and consistency in decision making that ensures that government, industry, and other participants can act confidently and with necessary urgency to prevent, contain and manage human biosecurity and biosecurity risks.

I note the Committee's views on the perceived low likelihood of disallowance; however, this cannot mitigate against the risk of disallowance and its disruption to the confidence in, and effectiveness of, Australia's biosecurity framework. It therefore remains appropriate for these instruments to be exempt from disallowance due to the uncertainty that the risk of disallowance may cause in relation to a decision that affects human, plant and animal health, undermining Australia's local industries, the environment and the economy.

Indeed, the *Biosecurity Bill 2014* progressed following extensive community consultation and robust debate through both Houses of Parliament. It was also subject to rigorous parliamentary scrutiny processes. The Bill was considered by the Senate Standing Committee for the Scrutiny of Bills and referred to the Senate Rural and Regional Affairs and Transport Legislation Committee, which concluded that the legislation reflected a comprehensive modernisation of Australian biosecurity legislation. Similarly, amendments to the Act that have introduced non-disallowable instruments have themselves been subject to debate and the parliamentary scrutiny process.

Many Australian businesses and individuals make decisions in reliance on these instruments. A 15 sitting day disallowance period would give rise to considerable uncertainty about business requirements, among other things, as disallowance would take effect immediately upon the passing of the motion.

Importantly, if an instrument were to be disallowed, no instrument that is the same in substance may be made within six months after date of disallowance, unless either House of Parliament rescinds its resolution of disallowance. This would not only create uncertainty but would significantly undermine the ability of the Commonwealth to respond to and effectively manage the evolving human biosecurity and biosecurity risk environment. For example, disallowance of emergency declarations in response to a biosecurity risk of national significance, or a determination suspending specified goods, would leave a substantial gap in Australia's biosecurity framework, and the relevant pest or disease may well be established in Australia before the six-month period has elapsed and a new instrument is able to be made.

Australia's favourable biosecurity status, underpinned by the biosecurity legislation framework, provides industries, including agriculture and tourism with a competitive advantage in global markets. Several instruments that are exempt from disallowance are crucial to preventing threat or harm to Australia's human, plant and animal health. The introduction of pests and diseases to Australia would lead to production losses, jeopardise exports and have a significant impact on the environment and the economy. Irreversible damage could occur if decision makers, as well as those implementing the decision, are not able to act quickly and urgently to manage a biosecurity risk.

It is important to note that as exemptions must be set out in primary legislation or regulations that are themselves subject to disallowance, all proposals for exemptions from disallowance are subject to Parliamentary oversight. Parliament retains the ability to re-apply disallowance through express provision in the relevant enabling legislation or modify or overturn provisions made in delegated legislation. For example, this occurred in relation to the *Remuneration and Allowances Act 1990*. There are also other mechanisms available to Parliament to ensure accountability through processes including Senate Estimates, Committee processes, Question Time and Questions on Notice. For example, through these processes, Parliament can provide accountability and oversight in relation to general directions that I may give to the Director of Biosecurity under the Biosecurity Act.

As I consider that the exemptions from the disallowance process for certain instruments made under the Act are appropriately justified as outlined above, I do not consider it necessary to amend the Biosecurity Act at this time.

I trust this information is of assistance to the Committee.

Thank you again for your correspondence

Yours sincerely

**DAVID LITTLEPROUD MP**



**The Hon Greg Hunt MP  
Minister for Health and Aged Care**

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**18 JUN 2021**

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Dear Senator

I refer to your correspondence on behalf of the Senate Standing Committee for the Scrutiny of Bills concerning the *Biosecurity Act 2015* (Act). I regret the delay in responding.

In my response I will address the risks to human health and I understand that the Minister for Agriculture, Drought and Emergency Management, the Hon David Littleproud, MP, will respond separately on biosecurity matters.

*Extension to the human biosecurity emergency*

I note the concerns expressed that the Governor-General's declaration can be extended for up to three months with no limit on the number of extensions, and that such extensions are not subject to disallowance.

On 10 June 2021, the Governor-General agreed to extend the human biosecurity emergency period for a further three months. The extension was informed by specialist medical and epidemiological advice provided by the Australian Health Protection Principal Committee (AHPPC) and the Chief Medical Officer, Professor Paul Kelly. The AHPPC advised that the international COVID-19 situation continues to pose an unacceptable risk to public health, and that the extension of the emergency period is an appropriate response to that risk. The advice also reflects the need for the powers enlivened under Chapter 8 of the Act to protect Australian citizens from the risks posed by COVID-19 at this time.

In addition to protecting Australian citizens, that Act has also been used to protect persons in other nations, as does the *Biosecurity (Exit Requirements) Determination 2020* (Exit Determination). The Exit Determination sets requirements for individuals or any class of individuals exiting Australian territory, to prevent COVID-19 from spreading to those other countries. It is aimed at protecting the public health in Australia's neighbouring Pacific Island Countries and Timor-Leste, and is consistent with Article 12 of the International Covenant on Economic, Social and Cultural Rights.



*Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021 (Instrument)*

This instrument was made on 30 April 2021 and repealed itself at the start of 15 May 2021. In making this determination, I took into account the public health advice of the Chief Medical Officer and the AHPPC. The advice stated that COVID-19 continues to represent a severe and immediate threat to human health and has the ability to cause high levels of morbidity and mortality. It also noted that India had been identified as a high-risk country due to the significant increase in the volume and proportion of COVID-19 positive case numbers in returned travellers from India, and that each new case identified in quarantine increases the risk of leakage into the Australian community through transmission to quarantine workers or other quarantine returnees and subsequently into the Australian community more broadly.

The instrument was challenged in the Federal Court in the matter of *Newman v Minister for Health and Aged Care* 2021 FCA 517. The Federal Court upheld the validity of the travel ban and the decision making process underpinning the determination.

*Amendments to the Act*

The committee seeks my advice on whether the Act can be amended so that instruments made under the provisions are subject to the usual parliamentary process. I do not consider this necessary.

The Act continues to protect Australians during the COVID-19 pandemic. Emergency determinations made under the Act are informed by specialist medical and epidemiological advice provided by the AHPPC and the Chief Medical Officer. The measures have greatly assisted in protecting Australia by preventing and controlling the entry, emergency, establishment and spread of COVID-19, consistent with the objectives of the Act.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt