

Standing Committee for the Scrutiny of Delegated Legislation

Answers to questions on notice

Agriculture, Water and the Environment Portfolio

Question No: IQ21-000090
Briefing Date: 17 November 2021
Division/Agency: Legal Division G7
Topic: Private Briefing - Biosecurity Act 2015
Question Date: 18 November 2021
Question Type: Written

Senate Standing Committee for the Scrutiny of Bills asked:

QoN 01

Could the department please provide more detailed advice as to the exceptional circumstances that are said to justify the exemption of relevant instruments made under the Biosecurity Act from disallowance?

QoN 02

Is it the department's contention that any instrument made under the Biosecurity Act which has a scientific or technical element should be exempt from parliamentary oversight, even if there are other considerations involved? Could the department please provide an example of an instrument which is purely scientific and technical in nature?

QoN 03

Does the department agree that as a pandemic evolves, and public trust in government action has the potential to decline, there is a need for greater parliamentary scrutiny over delegated legislation? Could you please provide examples of instruments made under the Biosecurity Act 2015 that have been recalibrated and become more targeted and narrower in their scope as the current pandemic has continued?

QoN 04

In Scrutiny Digest 15 of 2021 the committee asked the Minister for Agriculture and Northern Australia for advice as to whether the Biosecurity Amendment (Enhanced Risk Management) Bill 2021 could be amended such that information about human biosecurity group directions, such as the total number of directions made in a year and high-level details as to the nature and contents of each direction, must be set out in the department's annual report prepared under section 46 of the Public Governance, Performance and Accountability Act 2013. The minister advised that amendments were not appropriate as new publication requirements would be inconsistent with the current approach taken in the Biosecurity Act 2015 and may impact on privacy. The committee strongly considers that such amendments should be made and requests more detailed advice as to why these amendments are not possible.

Answer:

QoN 01.

The justification for the exemption of relevant instruments made under the *Biosecurity Act 2015* from disallowance is set out in the Explanatory Statement for the relevant legislative instrument.

For example, see:

- Biosecurity (Conditionally Non-prohibited Goods) Determination 2021 set out under the Details / Operation heading of the Explanatory Statement;
- Biosecurity (First Point of Entry—Port of Brisbane) Amendment (2021 Measures No. 1) Determination 2021 set out on page 5.

We also refer the Committee to the Minister's letter dated 16 June 2021 which provides detailed advice about the various justifications for exempting relevant instruments under the Biosecurity Act from disallowance. This letter emphasises the need to be able to take urgent, decisive and certain action based on technical and scientific assessments in order to effectively manage biosecurity risks to Australia and avoid potential damage to trade relationships.

QoN 02.

a. The Department of Agriculture, Water and the Environment has not made this contention and operates pursuant to the provisions of the *Biosecurity Act 2015*. Instruments made under the Act are subject to disallowance unless otherwise provided for under the Act.

b. The list of human diseases made under Section 42 of the *Biosecurity Act 2015* (administered by the Department of Health).

QoN 03.

The manner or breadth of Parliamentary scrutiny is a matter for the Parliament. The department does not make legislative instruments specifically about human biosecurity emergencies and has not made any instruments under the *Biosecurity Act 2015* specifically in relation to the ongoing pandemic. As human biosecurity matters are managed by the Department of Health, this question would be best directed to that department.

QoN 04.

As the proposed provisions to enable Human Biosecurity Group Directions provisions contained in the Biosecurity Amendment (Enhanced Risk Management) Bill 2021 fall under Health portfolio responsibilities, the Department of Health is best placed to respond to this question, noting the privacy issues mentioned in the Minister's response to the Committee of 3 November 2021.

Standing Committee for the Scrutiny of Delegated Legislation

Answers to questions on notice

Agriculture, Water and the Environment Portfolio

Question No: IQ21-000091
Briefing Date: 17 November 2021
Division/Agency: Legal Division G7
Topic: Private Briefing - Additional Questions - Biosecurity Act 2015
Question Date: 24 November 2021
Question Type: Written

Standing Committee for the Scrutiny of Delegated Legislation asked:

Additional QoN 1

Is it the department's contention that any instrument which deals with significant issues, or where disallowance could lead to significant impacts should be exempt from parliamentary oversight as a matter of course? Would this not exclude a large proportion of Commonwealth legislation from parliamentary oversight?

- As a general principle, the committee considers that Parliament's oversight of Commonwealth law should be greater, not lesser, when the consequences of that law are significant. This is particularly so when the law will impact on individual rights or liberties.
- If this justification was accepted as a general proposition, then any matter which could be considered to be of an emergency nature, or any measure designed to protect against significant consequences, could be routinely exempt from parliamentary scrutiny. This could conceivably include, for example, all legislation relating to matters of national defence, customs, intelligence, and emergency services. Parliament's position as lawmaker-in-chief implies that not only is it appropriate for Parliament to deal with these significant matters, but that it is Parliament's fundamental constitutional role to do so.

Additional QoN 2

Is it the department's contention that exemptions from disallowance should be put in place in any circumstance in which disallowance could lead to regulatory uncertainty for industry?
Would

this not exclude a large proportion of Commonwealth legislation from parliamentary oversight?

- If this justification was accepted as a general proposition, then any matter which regulates industry in any significant way could be routinely exempt from parliamentary scrutiny. This could conceivably include, for example, all legislation relating to matters of taxation, corporations law, imports, exports, workplace relations or customs. Parliament's position as lawmaker-in-chief implies that not only is it appropriate for Parliament to deal with these significant matters, but that it is Parliament's fundamental constitutional role to do so.
- The risks identified in relation to certainty are in many ways the risks associated with law-making within a democratic system, and are the same risks associated with primary legislation which is subject at any time to amendment or repeal by the Parliament.

Additional QoN 3

The potential for disallowance leads to increased scrutiny and deliberation and can result in improvements to instruments through amendments or significant administrative changes. In recent years, some non-disallowable instruments made under the Biosecurity Act have had technical issues. For example, it was recently necessary to retrospectively validate the

Biosecurity (Clarifying Conditionally Non-prohibited Goods) Determination after it was invalidly made. Does the department recognise the extrinsic benefits of parliamentary scrutiny over an instrument, noting that this increased scrutiny may improve the quality of instruments made under the Biosecurity Act?

Additional QoN 4

Does the department accept that, in some contexts, regulatory certainty in relation to delegated legislation can be ensured in ways other than exempting an instrument from disallowance? For example, by providing that an instrument does not take effect until it receives positive acceptance by a House of the Parliament or providing that an instrument does not take effect until the day immediately after the last day upon which such a disallowance resolution could have been passed by a House of Parliament, or a later day specified in the instrument.

Additional QoN 5

Many of the provisions within the Biosecurity Act confer a broad discretion on the decision-maker in terms of what they may consider in making the decision, or what requirements they may set. Does the department agree that, as a general principle, the threshold for exempting provisions which confer a broad discretion from disallowance should be higher?

Additional QoN 6

Many of the provisions within the Biosecurity Act have the potential to impact on individual rights and liberties, for example, by prescribing offences which carry penalties of imprisonment.

What is the department's view on the general principle that the threshold for justifying an exemption from disallowance should be higher in cases where the relevant instrument has the potential to impact on individual rights and liberties?

Answer:

Additional QoN 1

The Department of Agriculture, Water and the Environment has not made this contention and applies the exemptions provided for in legislation. Whether or not to exempt an instrument from disallowance in primary legislation is a matter for the Parliament.

Additional QoN 2

The department has not made this contention and applies the exemptions provided for in legislation. Whether or not to exempt an instrument from disallowance in primary legislation is a matter for the Parliament.

Additional QoN 3

While the department recognises the importance of parliamentary scrutiny, whether or not a particular instrument should be subject to disallowance is a matter for the Parliament. The department would act to correct technical issues relating to an instrument if they arise.

Additional QoN 4

The department accepts as a general principle that in some contexts there may be regulatory certainty through other ways. However, a delay in having certain instruments come into effect until the next parliamentary sitting or the expiry of the disallowance period would significantly impair the Commonwealth's ability to respond quickly to biosecurity threats and events, as

pests and diseases can spread and establish themselves within a very short period of time. For example, if foot-and-mouth disease (FMD) entered Australia, it could spread rapidly within the susceptible livestock population to multiple jurisdictions in a matter of weeks.

Establishment could occur if the outbreak is not appropriately addressed. The cost of a FMD outbreak in Australia has been estimated at \$51.8 billion over 10 years.

Additional QoN 5

The threshold for exemption from disallowance in particular circumstances is a matter for the Parliament to determine.

Additional QoN 6

The threshold for exemption from disallowance in such matters is a matter for the Parliament to determine.