

The Senate

Standing
Committee for the
Scrutiny of Bills

Second Report: Review of exemption
from disallowance provisions in the
Biosecurity Act 2015

Extract from Scrutiny Digest 1 of 2022

4 February 2022

Chapter 4

Review of exemption from disallowance provisions in the *Biosecurity Act 2015*

Purpose of this chapter and background

4.1 This chapter comprises commentary on the appropriateness of provisions within the *Biosecurity Act 2015* (**Biosecurity Act**) that allow for delegated legislation to be exempt from parliamentary disallowance. This follows the committee's initial commentary on this issue, published in [Scrutiny Digest 7 of 2021](#). As part of those initial comments, the committee requested advice from both the Minister for Agriculture and Northern Australia and the Minister for Health and Aged Care in relation to the committee's scrutiny concerns.¹ The committee has since received responses from both ministers.²

4.2 The committee subsequently held a private briefing with senior officials from the Department of Agriculture, Water and the Environment (**DAWE**) and the Department of Health (**DoH**), to discuss the committee's ongoing scrutiny concerns in relation to exemption from disallowance provisions within the Biosecurity Act. Questions on notice put to each department are published on the committee's website.³

4.3 This review was undertaken following a recommendation from the Senate Standing Committee for the Scrutiny of Delegated Legislation (**Delegated Legislation Committee**) in its *Interim report: Exemption of delegated legislation from parliamentary oversight*.⁴

The committee's default position on exemptions from disallowance

4.4 The committee's default position on exemptions from disallowance is set out in Chapter 4 of *Scrutiny Digest 7 of 2021*. A relevant extract is set out below:

Section 1 of the Constitution vests legislative power in the Federal Parliament. Legislative scrutiny, including scrutiny of delegated legislation made by the Executive, is a core component of this central law-making role

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- 1 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2021*, p. 44, para 4.42.
 - 2 Senate Standing Committee for the Scrutiny of Bills, [Ministerial responses to the committee's review in Scrutiny Digest 7 of 2021](#), December 2021.
 - 3 Senate Standing Committee for the Scrutiny of Bills, [Private briefings](#).
 - 4 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020.

of Parliament. Moreover, the system of responsible and representative government established by the Constitution requires the Parliament, as the representative branch of government, to hold the Executive to account. Exemptions from disallowance undermine the ability of Parliament to properly undertake its scrutiny functions and, therefore, have significant implications for both the system of responsible and representative government established by the Constitution and for the maintenance of Parliament's constitutionally conferred law-making functions. While it is well-established that Parliament may delegate its legislative functions to the Executive, and that this delegated legislation may be exempt from disallowance in certain exceptional cases, any exemption from disallowance should be considered in the context of its interaction with these twin considerations.

As a result, and in accordance with the committee's remit set out in standing order 24, the committee has consistently drawn attention to bills that seek to limit or remove appropriate parliamentary scrutiny. The committee considers that the default position should be that parliamentary oversight remains available for all delegated legislation unless there is a very strong reason for exempting a particular instrument or class of instruments from scrutiny.

The usual parliamentary disallowance process allows a House of the Parliament to disallow delegated legislation within 15 sitting days of it being tabled in that House. As this process is one of the primary means by which Parliament exercises control of its delegated legislative power, the committee expects the explanatory memorandum to a bill which includes an exemption from the usual disallowance process to address the exceptional circumstances that justify that exemption.⁵

4.5 The committee's scrutiny concerns will be heightened when an exempt instrument deals with significant matters, such as impacting upon an individual's personal rights or liberties, or confers a broad discretion on the decision-maker. Where there is an absence of alternative parliamentary scrutiny mechanisms or an absence of protections of individual rights, such as access to merits review or judicial review, the committee's significant concerns in relation to exemptions from disallowance will be further heightened.

4.6 The committee's scrutiny concerns will not be as acute when an instrument which is exempt from disallowance is subject to alternate parliamentary scrutiny processes, such as a requirement that the instrument does not come into effect until it has been approved by resolution of each House of the Parliament,⁶ or is subject to other safeguards which limit discretion or protect against undue trespass to individual rights or liberties. Whether these alternative mechanisms or safeguards are sufficient

5 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2021*, p. 34.

6 See, for example, subsection 10B(2) of the *Health Insurance Act 1973*.

will depend upon the individual circumstances of the case at hand, taking into account the appropriateness of the justification that is provided for the exemption, the type and scope of alternative mechanisms, and the extent of the limitation on Parliament's constitutional scrutiny role.

Exemptions from disallowance within the Biosecurity Act

4.7 A full list of provisions within the Biosecurity Act which exempt instruments from parliamentary disallowance is set out in Chapter 4 of *Scrutiny Digest 7 of 2021*.⁷ The committee draws these provisions to the attention of senators pursuant to Senate standing orders 24(1)(a)(iv) and (v).

4.8 Several justifications have been provided for the exemption of instruments made under the Biosecurity Act from the usual parliamentary disallowance process. These justifications are found in the explanatory memorandum to the Biosecurity Bill 2014 (Biosecurity Bill), in other explanatory material prepared for amending bills and instruments made under the Biosecurity Act,⁸ in correspondence provided to the committee, and during discussions at the committee's private briefing held on 17 November 2021.

4.9 This chapter addresses the following interrelated justifications for exempting instruments from the usual disallowance process:

***Justification 1:** Disallowance would be inappropriate because the relevant considerations are scientific and technical and should be shielded from the political process.*

***Justification 2:** Disallowance would be inappropriate because it would prevent the Commonwealth from taking fast and urgent action to manage biosecurity risks and to prevent significant consequences from occurring.*

4.10 The committee's response to each of these justifications is set out below.

7 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2021*, Chapter 4, para 4.9.

8 See, for example, the explanatory memorandum for the Biosecurity Amendment (Clarifying Conditionally Non-prohibited Goods) Bill 2021; the explanatory statement for the Biosecurity (Conditionally Non-prohibited Goods) Determination 2021; the explanatory statement for the Biosecurity (First Point of Entry—Port of Brisbane) Amendment (2021 Measures No. 1) Determination 2021.

The committee's response to Justification 1—scientific and technical considerations

4.11 A distinction must be drawn between the appropriateness of delegating Parliament's legislative power to the executive and the appropriateness of further limiting parliamentary scrutiny over executive-made law once it has been made. Both departments advised that it was appropriate to delegate legislative power in relation to biosecurity instruments due to their scientific and technical nature. For example, the Minister for Agriculture and Northern Australia advised that:

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.⁹

4.12 While acknowledging this advice, the committee notes that the issue at hand is not whether it is appropriate for Parliament to delegate its law-making power to make instruments that contain scientific or technical subject matter. But, rather, whether Parliament should be precluded from disallowing an instrument on that basis.

4.13 The committee accepts that it may be appropriate to delegate law-making powers to the executive on the basis that the subject matter is technical and that the rule-making process should therefore involve a considerable level of input from experts within the executive. However, it is not clear to the committee from the justifications provided why instruments made by technical experts should subsequently be exempt from parliamentary oversight as a matter of course.

4.14 The committee acknowledges the Minister for Agriculture and Northern Australia's advice that it is appropriate to delegate law-making power to the executive in relation to these matters.

4.15 In relation to exemptions from disallowance, the explanatory memorandum to the Biosecurity Bill repeatedly justifies exemptions on the basis that instruments made under the Act are scientific and technical in nature and should be insulated from political considerations. This argument has subsequently been made in correspondence sent to the committee. For example, in relation to emergency declarations made under sections 443 and 475 of the Act, the Minister for Agriculture and Northern Australia advised that:

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

9 Senate Standing Committee for the Scrutiny of Bills, [Ministerial responses to the committee's review in Scrutiny Digest 7 of 2021](#), December 2021, p. 2.

management of biosecurity risks. It is necessary and appropriate that these instruments be exempt from disallowance and should not be vulnerable to political considerations.¹⁰

4.16 While acknowledging this advice, the committee notes that 'political considerations' undertaken by Parliament are the basis upon which the constitutional system of representative government is upheld. Parliamentarians are the directly elected representatives of the people and political oversight of executive-made law is an important process by which a multiplicity of community views are reflected in Australian law, improving accountability and often the quality of the instrument itself. That the democratic process can improve, rather than detract from, decision-making is demonstrated by the Delegated Legislation Committee's observation that, through debate in the Senate, the disallowance process in recent years has resulted in multiple amendments to instruments or else in significant administrative changes.¹¹ These improvements include changes to technical aspects of instruments as a result of the scrutiny processes undertaken by the Delegated Legislation Committee. Meanwhile, instances of disallowance remain rare.¹²

4.17 It is also not clear to the committee why parliamentarians would be incapable of taking into account scientific and technical evidence when considering the appropriateness of an instrument. As noted above, it is often appropriate to delegate the making of technical instruments to the executive. However, it does not follow that such an instrument should subsequently be removed from parliamentary oversight through exemption to the usual disallowance process. Parliament and parliamentarians have access to considerable specialist expertise and parliamentarians regularly deal with legal, scientific and technical complexity while undertaking their law-making functions. In addition, parliamentarians are accountable to their electors in relation to how they exercise their law-making functions, including the power to disallow a legislative instrument and any resulting outcomes that flow from that disallowance. The committee considers that disallowance of an instrument that was well-supported by scientific and technical evidence is unlikely.

4.18 In addition, although the committee does not consider that scientific or technical decisions should be exempt from disallowance on that basis alone, the committee notes that decisions that can be said to be of a purely scientific or technical nature are rare. More typically, decisions grounded in scientific or technical evidence will also be made based on other factors. This is particularly the case in a law-making context where, even when a decision is purely scientific or technical in nature, the

10 Senate Standing Committee for the Scrutiny of Bills, [Ministerial responses to the committee's review in Scrutiny Digest 7 of 2021](#), December 2021, p. 3.

11 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Final report: Exemption of delegated legislation from parliamentary oversight*, March 2021, p. 44.

12 Between 2010 and 2019, of the thousands of pieces of delegated legislation tabled in the Parliament, only 17 were disallowed.

consequences of that decision may have much wider implications. In cases in which reasonable minds may differ as to the implications of a decision based on scientific or technical advice, it may be inappropriate to label the decision as merely scientific or technical in nature. The breadth contained in the terms 'scientific' and 'technical' demonstrates the ubiquitous nature of political considerations in law-making. 'Technical' in particular is an imprecise term which could be taken to include a wide variety of topics that are appropriate for parliamentary oversight and deliberation. For example, macro-economic considerations are highly technical and yet this is an area which is surely appropriate for parliamentary oversight and scrutiny. When an exemption is justified on the basis that the relevant considerations are scientific and technical in nature it is therefore necessary to examine the extent to which other considerations may be relevant.

4.19 Turning to the Biosecurity Act, the committee notes that in many cases it is not clear that the relevant decisions can be said to be of a purely scientific or technical nature. For example, the Minister for Agriculture and Northern Australia has advised that a determination under subsection 174(1) of the Biosecurity Act relating to conditionally non-prohibited goods relies on a technical and scientific assessment.¹³ The explanatory memorandum similarly states that "the decision to determine ... conditionally non-prohibited goods is a technical and scientific decision based on whether the biosecurity risk is able to be satisfactorily managed."¹⁴ However, while such a decision may be based on scientific or technical evidence, there is nothing on the face of the Act to indicate that these decisions must be made on this basis alone.

4.20 When deciding whether to make a determination under subsection 174(1) the Director of Biosecurity and the Director of Human Biosecurity must conduct a risk assessment. When conducting this risk assessment, the appropriate level of protection (**ALOP**) for Australia must be applied. The ALOP for Australia is defined under section 5 as a "high level of sanitary and phytosanitary protection aimed at reducing biosecurity risks to a very low level, but not to zero".

4.21 In practice, the drafting of subsection 174(1) is such that a risk assessment conducted in relation to a conditionally non-prohibited goods determination may take into account a number of considerations over and above a merely scientific assessment of sanitary and phytosanitary risk. Moreover, a determination as to the appropriate risk level within the spectrum encompassed by the words "high level of sanitary and phytosanitary protection aimed at reducing biosecurity risks to a very low level, but not to zero" is one upon which reasonable minds may differ and, as such, is the kind of decision which should appropriately be exposed to parliamentary scrutiny. Indeed, explanatory statements to instruments amending the Biosecurity

13 Senate Standing Committee for the Scrutiny of Bills, [Ministerial responses to the committee's review in Scrutiny Digest 7 of 2021](#), December 2021, p. 3.

14 Explanatory memorandum, p. 151.

(Conditionally Non-prohibited Goods) Determination 2021 indicate that feedback received as part of consultation undertaken in relation to a determination made under subsection 174(1) is incorporated into the final form of the instrument, demonstrating that scientific and technical considerations may be as contested as other forms of consideration.¹⁵

4.22 When exercising their powers under subsection 174(1), the Director of Biosecurity, themselves not of necessity a technical expert, must have regard to the objects of the Biosecurity Act and must comply with directions given by the Agriculture Minister.¹⁶ The objects of the Biosecurity Act, set out at section 4, comprise a variety of matters including to give effect to Australia's international obligations.¹⁷ As with the application of the ALOP to a subsection 174(1) risk assessment, there is considerable scope within this requirement to encompass purely technical and scientific considerations alongside other considerations. Moreover, the Act does not provide any constraints limiting a ministerial direction to scientific or technical matters. Notably, the minister's broad discretionary power to give a direction is itself a non-disallowable instrument.¹⁸

4.23 In light of the above, the committee reiterates its comments that the mere fact that a decision may be based on scientific and technical grounds is not, of itself, a sufficient justification for an exemption from the usual disallowance process. The committee does not consider that the argument that an instrument should be shielded from political considerations is a convincing one.

The committee's response to Justification 2—fast and urgent action

4.24 Justification 2 is predicated on two main points of contention: that disallowance prevents urgent action from being taken and that permitting the usual disallowance process to apply to an instrument is not appropriate when disallowance may lead to significant consequences. The committee disagrees on both counts.

4.25 The explanatory memorandum to the Biosecurity Bill and subsequent arguments put to the committee focus extensively on the significant consequences that may occur should certain instruments made under the Biosecurity Act be disallowed. For example, in relation to the Governor-General's power to extend a

15 See, for example, the explanatory statement for the Biosecurity (Conditionally Non-prohibited Goods) Amendment (Hitchhiker Pests) Determination 2021.

16 *Biosecurity Act 2015*, subsection 541(4).

17 *Biosecurity Act 2015*, paragraph 4(b).

18 *Biosecurity Act 2015*, section 543; Legislation (Exemptions and Other Matters) Regulation 2015, regulation 9, table item 2.

biosecurity emergency under section 444 of the Biosecurity Act, the explanatory memorandum to the Biosecurity Bill 2014 states:

If an emergency declaration to extend the emergency period was disallowed, nationally significant biosecurity risks could go unmanaged and the Commonwealth would be unable to take the fast and urgent action necessary to manage a threat or harm to Australia's local industries, economy and the environment.¹⁹

4.26 As previously noted, the committee acknowledges the crucial role played by the Biosecurity Act in regulating significant threats to Australia's human, animal, plant, and environmental health.²⁰ However, the committee does not consider that the significance of these threats or their emergency nature is a sufficient justification for exempting an instrument from disallowance as a matter of course.

4.27 Should disallowance of a particular instrument be likely to lead to a particular 'threat or harm' to Australian interests, this is something that the Parliament could take into account in its deliberations. This is particularly so as parliamentarians are directly accountable to their electors in relation to how they exercise their law-making functions. The committee considers that it is unlikely that an instrument would be disallowed by the Parliament in circumstances where doing so would increase biosecurity threats to an unacceptable level. However, by guarding against this unlikely outcome, an exemption from disallowance is also removing the extrinsic benefits attached to the disallowance process and increased parliamentary scrutiny.

4.28 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 as is the case in relation a number of exempt instruments made under the Biosecurity Act.²¹ The committee notes that emergency-related instruments such as these are more likely to impact upon individual rights and liberties than instruments dealing with more 'routine' regulatory matters.

4.29 The risk that disallowance of an instrument may lead to significant consequences is in many ways a risk associated with lawmaking within Australia's system of representative government and applies equally to primary legislation which is subject at any time to amendment or repeal by the Parliament. The committee notes that 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

19 Explanatory memorandum, p. 275.

20 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2021*, p. 42.

21 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2021*, pp. 36-38.

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.

4.30 In relation to the effect of the disallowance process on urgency, the committee reiterates its comments that the disallowable status of an instrument does not prevent urgent action being taken.²² In particular, the committee notes that legislative instruments can commence immediately after they are registered, and that the disallowance of an instrument does not invalidate actions that were taken prior to the time of disallowance.

4.31 DAWE indicated that the disallowance period increases uncertainty for industry and government and that, as a result, an unresolved disallowance notice prevents urgent action being taken regardless of the fact that an instrument may commence immediately after registration. A notice of disallowance must be given within 15 sitting days of an instrument being tabled. The notice must then be resolved or withdrawn within 15 sitting days after the notice was given. In practice, this period may cover several months. DAWE has indicated that the uncertainty as to whether an instrument will be disallowed during this extended period prevents the government from acting decisively while the future of the legislative instrument remains in doubt.

4.32 The committee notes that there are ways of improving certainty over the status of a legislative instrument other than exempting that instrument from disallowance. For example, an instrument may specify that it does not come into effect until:

- it has been approved by resolution of each House of the Parliament; or
- the day immediately after the last day upon which a disallowance resolution could have been passed by a House of the Parliament; or
- a later day specified in the instrument.

4.33 DAWE stated that these alternative approaches are inappropriate in the context of the Biosecurity Act due to the emergency-nature of many of the legislative instruments made under the Act. For example, in response to questions on notice put to the department, DAWE stated that:

... 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

22 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2021*, p. 41.

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.²³

4.34 The committee accepts that the alternative methods of preventing regulatory uncertainty outlined above may not be appropriate in some circumstances. As stated by DAWE, where immediate action is required to prevent the direct threat of a biosecurity risk, it is appropriate that the executive is able to take such immediate action. However, the committee notes that in such pressing circumstances it is unlikely that the government would not take immediate action under an instrument simply because the possibility of disallowance would lead to some measure of uncertainty about the future of the instrument. Where immediate action is not necessary the committee considers that the alternative methods outlined above are an appropriate way to ensure regulatory certainty while still maintaining parliamentary scrutiny over an instrument. Where immediate action is necessary then in most cases it is appropriate for the usual disallowance process to proceed with the degree of uncertainty that this entails.

4.35 While the committee acknowledges that the possibility of disallowance presents some degree of uncertainty for industry and government, the committee considers that this level of uncertainty is in many ways inherent to lawmaking within Australia's system of representative government. Both government and industry regularly deal with legislative and regulatory uncertainty in a multitude of contexts, including those of an emergency nature. In the context of industry, it is difficult to conceive of any legislative measure that does not impact upon commercial certainty in some way. While some degree of uncertainty exists in relation to the disallowance process, it is important not to overstate its significance. In this context the committee reiterates that it is unlikely that the Parliament would disallow an instrument well supported by scientific and technical evidence where the effect of disallowance would be immediate harmful consequences. The number of instruments to which a disallowance notice is attached is low and instances of disallowance themselves are rare. The committee reiterates the view of the Delegated Legislation Committee that:

In practice, the disallowance procedure serves to focus the Parliament's attention on a small number of legislative instruments by providing opportunities for parliamentary debate, and promoting dialogue between the executive and legislative branches of government about the manner in which legislative powers delegated to the executive have been exercised.²⁴

4.36 A balance must be struck between protecting against uncertainty and allowing parliamentary scrutiny over executive made law. As a general principle, the committee

23 Senate Standing Committee for the Scrutiny of Bills, [Responses to Questions on Notice from the Department of Agriculture, Water and the Environment](#), December 2021, pp. 2-3.

24 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020, p. 62.

does not consider that the difficulties associated with the small degree of uncertainty inherent in the disallowance process outweigh the significance of abrogating or limiting parliamentary oversight of executive made law by exempting an instrument from disallowance.

4.37 Finally, the committee notes that many of the non-disallowable instruments that may be made under the Biosecurity Act could not be reasonably classified as relating to emergency situations or requiring the taking of fast and urgent action. For example, section 524A of the Act provides that the Director of Biosecurity may determine a list of goods, or classes of goods, for the purposes of infringement notices. The effect of such a determination is that different payment periods or penalty units may be able to be included on an infringement notice in relation to those goods. While section 524A must relate to goods for which the Director of Biosecurity is satisfied there is a high level of biosecurity risk, it is not clear to the committee why the prescription of penalty unit amounts on infringement notice is of such an urgent nature that it justifies limiting democratic oversight of a law of the Commonwealth.

Concluding remarks

4.38 The committee reiterates its view that exemptions from disallowance are only justified in exceptional and limited circumstances. When an instrument-making power confers a broad discretion on the decision-maker, or where an instrument will, or may, deal with significant matters, such as impacting on an individual's rights or liberties, the committee's concerns in relation to an exemption from disallowance will be heightened.

4.39 This view is longstanding and is also reflected in a recent resolution of the Senate which emphasised the importance of the disallowance process to parliamentary scrutiny, including noting that exemptions from disallowance should be limited to cases where exceptional circumstances can be demonstrated and that any claim that circumstances justify exemption from disallowance will be subjected to rigorous scrutiny.²⁵

4.40 The committee does not consider that the justifications provided in relation to provisions exempting delegated legislation made under the Biosecurity Act from disallowance adequately address the committee's scrutiny concerns.

4.41 Noting the continued emphasis and commitment of this committee, and the Senate as a whole, to ensuring that delegated legislation made by the executive is subject to appropriate parliamentary oversight, the committee's scrutiny view is that the Biosecurity Act should be amended to provide that instruments made under the Act are subject to disallowance.

25 *Journals of the Senate*, 16 June 2021, pp. 3581–3582.

Senator Helen Polley
Chair