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Committee Secretary
Senate Standing Committee for the Scrutiny of Delegated Legislation
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Dear Committee Secretary,

Thank you for extending time to give me an opportunity to make a written submission in relation to the inquiry by the Senate Standing Committee for the Scrutiny of Delegated Legislation (the 'Committee') to inquire into and report on the exemption of delegated legislation from parliamentary oversight.

I am an academic at the Law School of the University of Western Australia. My primary research area is the legislative process and statutory interpretation. The views expressed in this submission are my own. The legislative regime governing legislative instruments is complex, and the legislative process generally is an intricate and multi-layered process given its political context. My comments are made as a matter of principle and generality.

This submission is divided into four parts. The *first* part places the discussion about exemption from disallowance in the broader context of what constitutes a legislative instrument. The *second* part addresses parliamentary scrutiny of legislative instruments exempt from disallowance. The *third* part recognizes the practical reality that in exceptional circumstances some legislative instruments will need to be exempt from disallowance, and so addresses the transparency and accountability for an exemption. The *fourth* part makes some brief final comments.

A. Legislative Instruments

Delegated legislation may be defined as a 'legislative instrument made by a body to which (or a person to whom) the power to legislate has been delegated. This description necessarily involves being able to identify two things: first, a form of delegation; and, second, an instrument that can be described as 'legislation' or as being 'legislative' in effect.'[1]

[1] DC Pearce and S Argument, *Delegated Legislation in Australia* (LexisNexis, Butterworths, 5th ed, 2017) 1.

As further explained in the Senate Practice Book, delegated legislation:

> '…is *law* made by the executive government, by ministers and other executive office-holders, without parliamentary enactment. This situation has the appearance of a considerable violation of the principle of the separation of powers … The principle has been largely preserved, however, by a system for the parliamentary control of executive law-making. This system, which has been built up over many years, principally by the efforts of the Senate, is founded on the ability of either House of the Parliament to disallow, that is, to veto, such laws made by executive office-holders.' (emphasis added)[2]

As can be seen, the rationale for the disallowance mechanism as a form of parliamentary scrutiny for delegated legislation is based on the premise that the delegated instrument has legislative effect. That is, it 'determines the content of a law as a rule of conduct or a declaration as to power, right or duty' as opposed to a non-legislative or administrative instrument, which 'applies the law in particular cases.'[3]

However, the legislative developments of the past 2 decades have arguably diluted this rationale. The current statutory definition of a 'legislative instrument' that must be tabled in Federal Parliament goes beyond that of merely an instrument of legislative effect. A brief explanation follows.

Prior to the enactment of the *Legislative Instruments Act 2003* (Cth), only 'regulations' and instruments made pursuant to a legislative provision that expressly provided that the instrument was disallowable, were required to be presented to parliament and be subject to disallowance.[4] There were no provisions in the then governing *Acts Interpretation Act 1901* (Cth) about 'exemption' from disallowance.

This situation was essentially reversed with the enactment of the *Legislative Instruments Act 2003* (Cth) (the 'LIA'). It established the notion of a 'legislative instrument', which determined the instruments that were to be tabled in parliament and subject to disallowance. Whether something was a legislative instrument was determined by whether it was of legislative character and made in the exercise of a power delegated by parliament; as well, certain instruments were declared to be 'legislative instruments.'[5]

Section 44 of the LIA then provided that certain legislative instruments would be exempt from disallowance. It included a specific exemption for instruments relating to intergovernmental or national schemes, and contained a table that listed 44 particular

[2] Rosemary Laing (ed), *Odgers' Australian Senate Practice – As Revised by Harry Evans* (Department of the Senate, 14th ed, 2016) 429.
[3] *Commonwealth v Grunseit* (1943) 67 CLR 58, 82 (Latham CJ).
[4] *Acts Interpretation Act 1901* (Cth) ss46A – 48 (compilation at 18 July 2002)
[5] *Legislative Instruments Act 2003* (Cth) ss 5, 6.

legislative instruments not subject to disallowance. Item 44 of the table included instruments prescribed by the regulations for the purposes of the table.

The definition of 'legislative instrument' was then consolidated and expanded through the changes made by the *Acts and Instruments (Framework Reform) Act 2015*.[6] A legislative instrument under the re-named *Legislation Act 2003* (Cth) ('*Legislation Act*'), under the new s 8, was no longer *necessarily* focussed on or linked to being an instrument 'legislative in character.'[7]

The intergovernmental instrument exception to disallowance was retained, as were the provisions allowing an Act to declare that an instrument is exempt, and providing that regulations may be made that exempt a legislative instrument from disallowance (s 44). But, as explained in the Explanatory Memorandum:

> The table of exemptions in existing section 44 will be transferred to the new Regulations and consolidated with other exemptions from disallowance already prescribed by regulation, making it easier for users to find exemptions.[8]

The 'new Regulations' are the Legislation (Exemptions and Other Matters) Regulation 2015 (the 'Exemption Regulation').

A 'legislative instrument' the subject of the disallowance regime is therefore no longer confined to an instrument of legislative character. Indeed, the *Legislation Act* itself recognizes that neither the fact of an instrument being a 'legislative instrument' nor the prescribing by regulation of an instrument as exempt from disallowance, implies that the instrument is of legislative character.[9] This is despite an apparent perception otherwise.[10]

The expansion of the instruments to be tabled in parliament and subject to scrutiny, and the simultaneous enactment of provisions about disallowance exemptions makes it open to suggest that there may be a correlation. This is a matter requiring more substantial research. My point in raising it in this submission is simply to invite the Committee to be mindful of the concept of 'legislative instrument' within the *Legislation Act*, which is no longer *necessarily* linked to having a legislative character, when considering the appropriate framework for exempting such instruments from disallowance.

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[6] Replacement Explanatory Memorandum, Acts and Instruments (Framework Reform) Bill 2014, 25.
[7] DC Pearce and S Argument, *Delegated Legislation in Australia* (LexisNexis, Butterworths, 5th ed, 2017) 31.
[8] Replacement Explanatory Memorandum, Acts and Instruments (Framework Reform) Bill 2014, 54.
[9] *Legislation Act 2003* (Cth) ss 9, 44(3).
[10] For example, in his second reading speech for the Acts and Instruments (Framework Reform) Bill, the Minister explained the difference between legislative instruments and the newly created 'notifiable instruments' as between those instruments of legislative character and those that are not: Commonwealth, *Parliamentary Debates*, House of Representatives, 22 October 2014, 11667 (Mr Keenan, Minister for Justice). See also Replacement Explanatory Memorandum, Acts and Instruments (Framework Reform) Bill 2014, 29.

B. Parliamentary Scrutiny of Exempt Instruments

My understanding is that this inquiry stems in part from the Committee's 2019 Report on parliamentary scrutiny of delegated legislation (the 2019 Report),[11] but that it is also driven (given the terms of reference) by a consideration of the appropriateness of exempting legislative instruments from disallowance in times of emergency, including in response to the current COVID-19 pandemic. In relation to the parliamentary scrutiny of exempt instruments, I make the following comments.

1) The *Legislation Act* requires that 'each registered legislative instrument' be tabled in each House of parliament.[12] Instruments exempt from disallowance are not exempted from this tabling requirement. Tabling itself has scrutiny value. As noted in a United Kingdom joint parliamentary committee report on delegated legislation, '[l]aying before Parliament is not a meaningless formality, but an important part of access to justice and the rule of law…' as it at least ensures 'publicity'.[13]

2) While review and reporting on exempt legislative instruments is currently not within the function of the Committee, exempt instruments are not entirely exempt from parliamentary committee scrutiny. The Parliamentary Joint Committee on Human Rights is required to examine all legislative instruments (including exempt instruments), as part of its scrutiny function.[14]

3) Following on from the Committee's 2019 Report, a number of changes to the Senate Standing Orders were agreed by the Senate in November 2019.[15] One was to expand the Committee's powers and functions under SO 23. Another was to amend SO 25 to expressly permit Senate legislation standing committees to inquire into and report on legislative instruments the subject of their portfolio. I note the valuable suggestion has been made that SO 23 be amended further to provide the Committee with the express power to scrutinise instruments exempt from disallowance. An alternative suggestion is for there to be a standing reference by the Senate of legislative instruments exempt from disallowance to the relevant legislation standing committee. First, as a matter of principle, this may be the more appropriate course given that the issue of exemption appears to be a policy driven one, rather than a technical matter. Second, this would not increase the already expanded workload of the Committee following the changes to SO 23.

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[11] Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (3 June 2019).
[12] *Legislation Act 2003* (Cth) s 38.
[13] Joint Committee on Statutory Instruments, *Transparency and Accountability in Subordinate Legislation*, First Special Report of Session 2017–19 (12 June 2018) 5.
[14] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s 7. Though do not appear to require a statement of compatibility – s 9.
[15] < https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Changes_to_committee_standing_orders >

There have been suggestions made about the potential for the Federal Parliament to sit remotely rather than in person, particularly in the circumstances of a pandemic. This has been a method adopted by some other parliaments during the COVID-19 pandemic.[16] To the extent that difficulties with parliamentary members sitting in person is a reason for an instrument to be exempt from disallowance, it has merit (and may well have merit on other grounds). However, in times of emergency where matters are rapidly evolving, this is unlikely to ameliorate a need for an exemption. It can be accepted that, as a matter of principle, the time needed for the disallowance process to run its course will sometimes be inappropriate and cast uncertainty on urgent measures required in exceptional circumstances. This is the reason why the next portion of this submission focusses on the transparency and accountability of disallowance exemptions.

C. Transparency and Accountability for Disallowance Exemptions

One of the concerns raised in the Committee's June 2019 Report of its inquiry into parliamentary scrutiny of delegated legislation was the transparency of the criteria or rationale behind the instruments that are exempt from disallowance. I note that in the Government's response to the Committee's recommendations, the Government has accepted the recommendation to publish guidance on the 'limited circumstances' where it is appropriate for instruments to be exempted. The Government also accepted the Committee's recommendation that the Office of Parliamentary Counsel modify the Federal Register of Legislation to enable instruments that are exempt from disallowance to be readily identified, with an estimated delivery of late 2020.[17] These development are commendable and will go some way to improving understanding, transparency and accessibility of exempt instruments.

It is certainly the case that explanations have been given on a piecemeal basis about the rationale behind exempted documents. For example, the Explanatory Memorandum to the Legislative Instruments Bill 2003 stated that '[s]ome of the rationales' for inclusion of particular types of instrument in the s44 table were:

> '• where there is an **alternate parliamentary role** in relation to that type of instrument. For example, certain broadcasting standards can be directly amended by a House of Parliament, under the *Broadcasting Services Act 1992*;
> • where the **rule-making process has been appropriately depoliticised**. For example, certain instruments made under the *Quarantine Act 1908* may only be able to be justified in the international trade context if they are manifestly divorced from the political process;

[16] For a brief summary, see 'How are parliaments responding to the Coronavirus pandemic?' *Hansard Society*, (Blog post, 8/4/20) < https://www.hansardsociety.org.uk/blog/how-are-parliaments-responding-to-the-coronavirus-pandemic >
[17] Australian Government, Response to the Senate Standing Committee on Regulations and Ordinances Report: Parliamentary Scrutiny of Delegated Legislation (November 2019) 5.

> • where the instrument is an **internal management tool for Government**. For example, the table includes instruments made under the *Public Service Act 1999* which relate to the classification of Government employees;
> • where the exposure of instruments to potential disallowance **would cause problems such as commercial delay or commercial uncertainty**. For example, the table includes instruments made under the *Radiocommunications Act 1992* which relate to the procedures for allocating spectrum licenses; and
> • **where Executive control is intended**. For example, the table includes Ministerial directions. (emphasis added)'[18]

When the list of instruments was moved to the Exemption Regulation in 2015, the Explanatory Statement to the Exemption Regulation provided similar explanations.[19]

Further, there appear to be internal cross-institutional practices that require, or at least encourage, public transparency about the fact that a proposed Act empowering provision will exempt a legislative instrument from disallowance, and to provide publicly accessible reasons for that exemption. For example, if the disallowance regime does not apply to an instrument, the Office of Parliamentary Counsel instructs its drafters to state this clearly in the empowering bill.[20] Drafters of bills are also required to provide guidance to departmental instructors about including an appropriate explanation in the explanatory memorandum to the bill.[21] Another example is that the Instruments Handbook, which provides that 'When an instrument is lodged for registration, the lodging agency is asked to certify a range of information including whether an exemption from disallowance applies and, if so, what legislation authorises the exemption.'[22] The Legislation Handbook indicates that the Scrutiny of Bills Committee will take opportunities to seek information from departments about the reasons for a proposed exemption from disallowance.[23]

A registered explanatory statement must be tabled in each House with a legislative instrument,[24] but there is no clear requirement in the *Legislation Act* that, if applicable, the statement contain an explanation or rationale for a disallowance exemption.[25] Nor is it clear that an explanatory statement is required. Further, it does not appear to be a practice

[18] Explanatory Memorandum, Legislative Instruments Bill 2003 (Cth), 23. For further examples of reasons for disallowance exemptions see Commonwealth of Australia, *2008 Review of the Legislative Instruments Act 2003* (31 March 2009) 65-66.
[19] Explanatory Statement, Legislation (Exemptions and Other Matters) Regulation 2015, 24-34.
[20] Office of Parliamentary Counsel, 'Drafting Direction 3.8: Subordinate Legislation' (Australian Government, June 2020) 17.
[21] Ibid 18. This need for an explanation in the explanatory memorandum to a bill is reiterated in the Department of Prime Minister and Cabinet, *Legislation Handbook* (2017) 34.
[22] Office of Parliamentary Counsel, *Instruments Handbook* (Australian Government, May 2019) 67.
[23] Australian Government, *Legislation Handbook* (Department of Prime Minister and Cabinet, 2017) 34.
[24] *Legislation Act 2003* (Cth) s 39.
[25] Section 15J, which sets out the minimal requirements for an explanatory statement, does not include reasons for exemption from disallowance.

requirement that is evident from the OPC guide[26] (though I accept that it may be a matter of practice in actuality). The explanation for this absence may be that the reasoning behind the exemption is in the explanatory material for the statute that enabled it. While this may be technically appropriate, in the interests of accessibility and transparency, the rationale would be well placed in the explanatory statement itself, even if that involves repetition.

Although I welcome the Government's agreement to publish a guide on the limited circumstances where it is appropriate for instruments to be exempted, it is likely to be difficult to provide comprehensive or definitive prescriptive criteria. A perusal of the rationale given in the explanatory materials quoted above demonstrates that the reasoning is varied and dependent upon the instrument and circumstances. Attempts at a definitive criteria are likely to be overly general at best, or, if too specific, unable to accommodate a future unforeseen development at worst.

Given the above, the Committee may consider the following suggestions.

1) The *Legislation Act* be amended to provide expressly that an explanatory statement for an instrument exempt from disallowance must be provided and that it include an explanation for the rationale behind that exemption (even if that involves a reiteration of an explanation given in the explanatory memorandum of the empowering Act).

2) While it may be accepted that, at the time of making, there are compelling and legitimate reasons for an instrument to be exempt from disallowance, it is unclear why this should not be the subject of a sunset clause, or at least a requirement of regular review. The sunsetting provisions of the *Legislation Act* do not apply to a legislative instrument if it is a regulation made for the purposes of s 44(2)(b) (instruments not subject to disallowance).[27] The Explanatory Memorandum to the *Acts and Instruments (Framework Reform) Act 2015* states that this is for 'certainty' about the application of the Act and instrument.[28] A more fulsome explanation about this lack of review would assist in understanding the rationale behind the need for such longevity of exempt instruments.

3) I support the suggestion made by other submissions that it is preferable for the list of classes of instruments or the list of particular instruments that are exempt from disallowance be contained in a statute, rather than regulation. In order to avoid substantial cost and time, the provision in the *Legislation Act* (s 44(2)(b)) which permits regulations to prescribe disallowable instruments could be grandfathered and any future exempt instruments be provided in statute. If they continue to be contained in regulations, consideration should be given to amending s 61 of the *Legislation Act*,

[26] The Office of Parliamentary Counsel, *Instruments Handbook* (Australian Government, May 2019) 57-59 does not expressly require the rationale for disallowance in its section on explanatory statements.
[27] *Legislation Act 2003* (Cth) s 54(2).
[28] Replacement Explanatory Memorandum, Acts and Instruments (Framework Reform) Bill 2014, 61.

which permits a regulation to amend another regulation, so that it does not apply to regulations exempting instruments from disallowance.

D. Final Comments

As was evident from the issues raised by the inquiry the subject of the Committee's 2019 Report, discussion of parliamentary scrutiny of delegated legislation must include a discussion of scrutiny of the enabling provision. This seems particularly important for legislative instruments exempt from the disallowance mechanism. Such exemptions ultimately stem from a power contained in a statute. It is the enabling statute that sets the parameters for the scope of exempt instruments. By enacting an enabling statutory provision that declares an instrument is exempt from disallowance, or permits an exempt instrument to be made, parliament has entrusted the delegated body or person with that action. This therefore takes us back to the additional scrutiny arrangements that were raised by the 2019 inquiry for statutes enabling delegated legislation generally. Even if not acceptable for all enabling provisions, there is a case to be made by the Committee for them to be considered in relation to scrutiny of Act provisions that exempt, or permit regulations to exempt, instruments from the disallowance regime.

Finally, as to delegated legislation made in response to COVID-19, '[a]s of 16 June 2020, 183 legislative instruments have been made, of which 19.1% are exempt from disallowance and scrutiny by the committee.'[29] While this seems considerable, it would be inappropriate for me to criticise such measures on proportion alone without a considered review of each instrument. However, it does highlight the importance of transparency and of some review of exempt instruments whether by the Committee or, as suggested above, by a legislation standing committee.

Thank you for your consideration.

Yours sincerely,

Jacinta Dharmananda

[29] Department of the Senate, *Scrutiny News* (18 June 2020) 1.