



Australian Government

Australian Government response to the
Standing Committee for the Scrutiny of
Delegated Legislation:

Inquiry into the exemption of delegated legislation from
parliamentary oversight: Final report

NOVEMBER 2021

On 30 April 2020, the Senate Standing Committee for the Scrutiny of Delegated Legislation resolved to inquire into and report on the exemption of delegated legislation from parliamentary oversight, with particular regard to:

- a. the appropriateness and adequacy of the existing framework for exempting delegated legislation from parliamentary oversight, including:
 - i. the amount and nature of delegated legislation currently exempt from parliamentary oversight;
 - ii. the grounds upon which delegated legislation is currently made exempt from parliamentary oversight;
 - iii. the manner in which delegated legislation is currently made exempt from parliamentary oversight; and
 - iv. the appropriateness of exempting delegated legislation made in times of emergency, including in response to the COVID-19 pandemic, from parliamentary oversight; and
- b. whether the existing framework for exempting delegated legislation from parliamentary oversight should be amended, and if so, how, including:
 - i. the grounds upon which it is appropriate to exempt delegated legislation from parliamentary oversight; and
 - ii. the options available to ensure appropriate and adequate parliamentary oversight of delegated legislation in times of emergency.

The Committee tabled an interim report for this inquiry on 2 December 2020, and a final report on 16 March 2021.

The Australian Government has considered the recommendations of the Committee's final report and has provided the following response. This response has been developed through input from the following departments:

- Department of the Prime Minister and Cabinet
- Attorney-General's Department
- Department of Finance

Recommendation 1

7.15 The committee recommends the *Legislation Act 2003* be amended to require all exemptions from disallowance and sunseting to be in primary legislation.

The Government **notes** this recommendation.

The statutory review of the *Legislation Act 2003* provides an opportunity for issues raised by the Committee in this report to be considered. Section 59 of the Legislation Act provides for the Attorney-General to appoint persons to a body to review all aspects of the operation of the Act, and any related matters that the Attorney-General specifies. The body must give the Attorney-General a written report on the review by 5 June 2022.

The review follows the fifth anniversary of the commencement Schedule 1 to the *Acts and Instruments (Framework Reform) Act 2015*. That Act implemented a number of recommendations of the *2008 Review of the Legislative Instruments Act 2003* and made other amendments to improve the operation and clarity of legislative frameworks for Commonwealth Acts and instruments. To reflect these changes the Legislative Instruments Act was renamed the *Legislation Act 2003*. The report of the 2008 Review is available at [Report on the Operation of the Sunseting Provisions in the Legislation Act 2003 | Attorney-General's Department \(ag.gov.au\)](https://www.ag.gov.au/legislation/operating-and-maintaining-legislation/review-of-the-legislation-act-2003).

The Government undertakes that the terms of reference for the Legislation Act review will allow the review body to cover the operation of the entirety of the Legislation Act; and will require the review body to have regard to relevant reviews and reports, including this report.

Recommendation 2

7.16 The committee recommends the Legislation (Exemptions and Other Matters) Regulation 2015 be repealed and any exemptions in the regulation that remain appropriate instead be set out in a schedule to the *Legislation Act 2003*. In so doing, the current broad exemptions relating to ‘an instrument that is a direction by a Minister to a person or body’, ‘an instrument (other than a regulation) relating to superannuation’, and ‘an instrument made under an annual Appropriation Act’ should be excluded from the new schedule.

The Government **notes** this recommendation.

As noted in the response to recommendation 1 the statutory review of the Legislation Act provides an opportunity for this recommendation to be considered in more detail.

Recommendation 3

7.50 The committee recommends the *Legislation Act 2003* be amended to repeal the blanket exemption of instruments facilitating the establishment or operation of an intergovernmental body or scheme from disallowance, and sunseting.

The Government **notes** this recommendation.

As noted in the response to recommendation 1 the statutory review of the Legislation Act provides an opportunity for this recommendation to be considered in more detail.

Recommendation 4

7.57 The committee recommends that Advance to the Finance Minister determinations be disallowable legislative instruments.

The Government **does not support** this recommendation.

The Minister for Finance provided the Government response to an equivalent recommendation (recommendation 10) in the Committee's interim report in his letter of 10 March 2021 to the Chair of Committee including a detailed explanation why it would be seriously adverse to the public interest to make Advance determinations under annual Appropriation Acts disallowable (refer attached). That letter explained why the Committee is mistaken in concluding that disallowance would have little effect and highlighted how disallowance of these determinations can create shortfalls in appropriation that were previously endorsed in primary legislation.

Recommendation 5

7.78 The committee recommends legislation be introduced to provide that the explanatory memoranda of all bills that delegate legislative power and exempt this delegated legislation from disallowance or sunseting must contain a statement that outlines the exceptional circumstances that justify an exemption from disallowance and/or sunseting.

The Government **notes** this recommendation.

As noted in the response to recommendation 1 the statutory review of the Legislation Act provides an opportunity for this recommendation to be considered in more detail.

Recommendation 6

7.79 The committee recommends the *Legislation Act 2003* be amended to provide that the explanatory statements to instruments exempt from disallowance or sunseting must contain a statement that outlines the exceptional circumstances that justify an exemption from disallowance and/or sunseting.

The Government **notes** this recommendation.

As noted in the response to recommendation 1 the statutory review of the Legislation Act provides an opportunity for this recommendation to be considered in more detail.

Recommendation 7

7.80 The committee recommends that should recommendation 5 and recommendation 6 not be accepted by the government, the Senate agree to an order of continuing effect to provide that:

- the explanatory memoranda of all bills that delegate legislative power and exempt this delegated legislation from disallowance or sunseting must contain a statement that outlines the exceptional circumstances that justify an exemption from disallowance and/or sunseting; and
- the explanatory statements to instruments exempt from disallowance and sunseting must contain a statement that outlines the exceptional circumstances that justify the exemption from disallowance and/or sunseting.

The Government **notes** this recommendation and observes that it is a matter for the Senate.

Recommendation 8

7.96 The committee recommends that the Senate adopt the following resolution in relation to the circumstances where it may be appropriate to exempt delegated legislation from disallowance and sunseting:

- The Senate notes:
 - the Constitution vests the legislative power of the Commonwealth in the Federal Parliament;
 - if the Parliament is to satisfy this constitutionally mandated role, it must have the ability to scrutinise all legislation made by the executive; and
 - exemptions from disallowance and sunseting undermine the ability of the Parliament, and particularly the Senate, to undertake this scrutiny.
- The Senate resolves:
 - delegated legislation should be subject to disallowance and sunseting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances; and
 - any claim that circumstances justify exemption from disallowance and sunseting will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases.

The Government **notes** that this recommendation was adopted by the Senate on 16 June 2021.

Recommendation 9

7.104 Noting that in its response to the committee's 2019 inquiry the government agreed that legislative instruments should only be exempted from disallowance in very limited circumstances, the committee recommends that the Senate adopt the following order for the production of documents:

- That there be laid on the table, by the Minister representing the Attorney-General, by no later than 5 pm on Tuesday, 3 August 2021, a statement setting out:
 - the rationale for specifying that each class of instrument and each particular instrument in Part 2 of the Legislation (Exemptions and Other Matters) Regulation 2015 are not legislative instruments; and
 - the exceptional circumstances that justify each exemption from disallowance or sunseting currently set out in Parts 4 and 5 of the Legislation (Exemptions and Other Matters) Regulation 2015.

The Government **notes** this recommendation, as amended to alter the 3 August 2021 to 31 August 2021, was adopted by the Senate on 16 June 2021.

Recommendation 10

7.116 The committee recommends that standing order 23 be amended as follows, with effect from 1 July 2021:

Omit ‘and’ from the end of subparagraph (3)(j).

Omit subparagraph (3)(k), substitute:

(k) in the case of an instrument exempt from sunseting, it is appropriate for the instrument to be exempt from sunseting;

(l) in the case of an instrument that amends or modifies the operation of primary legislation, or exempts persons or entities from the operation of primary legislation, the instrument is in force only for as long as is strictly necessary; and

(m) it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate.

After paragraph (4), insert:

(4A) The committee may, for the purpose of reporting on its terms of reference, consider instruments made under the authority of Acts of the Parliament that are not subject to disallowance. For such instruments the committee may also consider whether it is appropriate for the instrument to be exempt from disallowance

The Government **notes** this recommendation was adopted by the Senate on 16 June 2021.

Recommendation 11

7.125 The committee recommends that section 11 of the *Legislation Act 2003* be amended to clarify that notifiable instruments must not be legislative in character.

The Government **notes** this recommendation.

As noted in the response to recommendation 1 the statutory review of the Legislation Act provides an opportunity for this recommendation to be considered in more detail.