



Australian Government
Department of Home Affairs

Department of Home Affairs submission to the inquiry into exemption of delegated legislation from parliamentary oversight

The Senate Standing Committee for the Scrutiny of
Delegated Legislation

25 June 2020

On 30 April 2020 the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) announced an inquiry into the exemption of delegated legislation from parliamentary oversight. Broadly, the terms of reference are:

1. the appropriateness and adequacy of the existing framework for exempting delegated legislation from parliamentary oversight; and
2. whether the existing framework for exempting delegated legislation from parliamentary oversight should be amended, and, if so, how.

Section 42 of the *Legislation Act 2003* (LA) provides for the parliamentary disallowance of legislative instruments. Section 44 provides that legislative instruments are exempt from being subject to disallowance where an Act expressly provides that section 42 does not apply. Section 44 further provides that legislative instruments are exempt from disallowance if they are prescribed by regulation for the purposes of section 44, and such exemptions are provided for by the *Legislation (Exemptions and Other Matters) Regulation 2015* (LEOMR).

The Department of Home Affairs (the Department) has a number of legislative instruments that are exempt from disallowance. Some of these are exempt by being prescribed by the LEOMR, others by express exemptions in the enabling Act.

The Department notes the Committee's specific reference to scrutiny of delegated legislation during emergency periods, and delegated legislation made in response to the COVID-19 pandemic (the pandemic). To date, seven instruments administered by the Department have been made to implement measures in response to the pandemic - five instruments under the *Migration Regulations 1994* and two under the *Customs Act 1901*. Of these instruments, six are exempt from disallowance in accordance with section 10 of the LEOMR. The fact these instruments were made in response to the pandemic and during an emergency period further strengthens the desirability of their exemption from disallowance, which ensures that the executive government is able to respond to emergency situations rapidly and in a way that creates certainty for affected individuals.

The Attorney-General's Department administers the LA and the LEOMR. The Department understands that the Attorney General's Department, as the Department responsible for administering this legislation, is making a submission to the Committee setting out the general principles underpinning exemptions from the LA disallowance regime. The Department's submission therefore focuses on exemptions in relation to instruments the Department administers where the exemption is provided for in the enabling legislation, and in particular, instruments made in response to emergency situations.

The Department administers a number of legislative instruments that the Minister for Agriculture, Drought and Emergency Management makes during times of emergency, to provide payments and allowances to individuals who are adversely affected by major disasters, including natural disasters. These legislative instruments are expressly exempt from disallowance by their enabling legislation, the *Social Security Act 1991*. These exemptions are appropriate as they reflect the Australian government's commitment to support communities affected by disasters by providing relief without delay to individuals who have suffered as a result of a disaster. The exemptions ensure certainty and preparedness in the event of a major disaster and provide for assistance to be delivered promptly and efficiently. They are necessary to enable the executive to make urgent decisions to respond to major disasters in an appropriate and adequate manner, which may not be achieved if the legislative instruments are subject to disallowance. For these reasons, the Department considers that the exemptions provided under the Act are necessary and should be retained. By their nature, these instruments are very likely to be made during periods of emergency.

The consequence of disallowance of a legislative instrument is that the Department may not have an opportunity to develop and implement transitional measures to enable the continued operation of the frameworks that facilitate immediate relief to individuals adversely affected during an emergency. The Department is prevented by section 48 of the LA from making another legislative instrument the same in substance within 6 months after being disallowed.

All legislative instruments must be tabled before the Parliament within 6 sitting days after the instrument is registered, in accordance with section 38 of the LA. Even for non-disallowable instruments, tabling is itself a scrutiny mechanism, supporting transparency and providing members of Parliament and senators with an opportunity to view and comment on legislative instruments, providing an alternative mechanism ensuring transparency and commentary.

The operation of the instruments made under the *Social Security Act 1991* (the Act) and detailed reasons for their exemption are addressed below.

Delegated legislation exempt from disallowance under the *Social Security Act 1991*

Disaster Recovery Allowance

Qualification for Disaster Recovery Allowance – section 1061KA

Disaster Recovery Allowance (DRA) is a fortnightly payment paid for up to 13 weeks to eligible individuals whose income has been affected by a disaster determined by the Minister to be a 'major disaster' under section 36A of the Act. A major disaster can be a natural or non-natural disaster that occurs in Australia.

Subsection 1061KA(5) of the Act provides that the Minister may determine that a person must not be in receipt of certain payments, to qualify for the DRA. Subsection 1061KA(6) of the Act provides that the Minister may prescribe additional requirements to qualify for the DRA. Subsection 1061KA(7) of the Act provides that section 42 of the LA does not apply to instruments made under subsections 1061KA(5) or (6), meaning that the instruments are not subject to disallowance.

The reason for the exemption from disallowance is to ensure individuals who have been adversely affected due to a major disaster have certainty in whether they will qualify for income support following that major disaster. The exemption from disallowance ensures that the Minister can offer assistance in a responsive and efficient manner, without the uncertainty caused by the potential disallowance of the instrument or disruption to the DRA framework caused by a disallowance. If the determinations made under this provision were subject to disallowance, it could cause administrative complexities and challenges as well as emotional and financial hardship amongst disaster-affected individuals. Further, an inequitable situation may arise where some individuals qualify for DRA and, if the determinations were subsequently disallowed, other individuals may not qualify because their claim was not made or was not finalised prior to disallowance. This would be a particularly difficult situation for disaster-affected individuals.

Australian Government Disaster Recovery Payment

Qualification for Australian Government Disaster Recovery Payment – section 1061K

The Australian Government Disaster Recovery Payment (the AGDRP) provides a one-off payment to Australians adversely affected by a major disaster either in or outside Australia. Section 1061K of the Act specifies the criteria to qualify for the AGDRP. This includes criteria that the person is at least 16 years old, or receiving a social security payment and is adversely affected by a major disaster.

Subsection 1061K(2) of the Act allows the Minister to determine, by legislative instrument, that a specified class of Australian citizens who do not meet the definition of an Australian resident, can qualify for an AGDRP. An Australian resident is defined as a person who resides in Australia and is either an Australian citizen or the holder of a certain visa. As this definition does not encompass Australian citizens who are not currently residing in Australia, including expatriates, this provision allows the Minister to determine that such classes of persons qualify for an AGDRP, provided they satisfy the other criteria. The determination authorised by subsection 1061K(2) of the Act facilitates immediate relief in the form of a one-off payment to persons who are not classed as Australian residents and who are adversely affected by a major disaster and would otherwise not qualify for the payment.

Subsection 1061K(3) of the Act provides that section 42 of the LA does not apply to an instrument made under subsection (2). If a determination is subject to disallowance, this would create uncertainty for non-residents that are negatively impacted by a disaster and cannot qualify for the assistance afforded to others in the same category, only due to the fact that they do not meet the definition of an Australian resident. As with the DRA discussed above, disallowance of the instrument may create inequality between persons who qualify and receive the AGDRP ahead of the disallowance and those who do not apply or whose claim is not finalised before the instrument is disallowed. Such a determination is exempt from disallowance to ensure that the Minister can assist non-residents, who are impacted by a major disaster, including Australian citizens who are residing outside Australia, in a responsive and efficient manner, without the uncertainty caused by a potential disallowance and the disruption to the AGDRP framework if the instrument is disallowed.

Meaning of adversely affected – section 1061L

One of the criteria under section 1061K to qualify for the AGDRP is that the person is adversely affected by a major disaster. Section 36 of the Act empowers the Minister to determine that an event is a 'major disaster' if the Minister is satisfied that an event is a disaster that has such a significant impact on individuals that a government response is required.

Subsection 1061L(1) of the Act provides that, for the purposes of the Act, a person is adversely affected by a major disaster if the person is affected in a way determined by the Minister in relation to the disaster. Subsection 1061L(2) of the Act provides that the Minister may determine the circumstances in which a person is adversely affected in relation to a major disaster.

Some examples of events within Australia that have been declared a major disaster under section 36 of the Act include the Far North Queensland Floods during January 2019 and the recent bushfires affecting various areas of Australia that took place over the period from September 2019 to March 2020. The determinations pursuant to subsection 1061L(2) in relation to these disasters set out circumstances in which a person is adversely affected and qualifies for an AGDRP. These circumstances may include: the person is seriously injured; the person is an immediate family member of an Australian who is killed; and the person's principal place of residence has been destroyed or has sustained major damage. A determination made under subsection 1061L(2) enables the government to provide immediate relief in the form of a one-off monetary payment to affected persons in the circumstances included in the determination and that are a direct result of a major disaster.

Subsection 1061L(3) of the Act provides that section 42 of the LA does not apply to an instrument made under subsection 1061L(2), meaning the determination is exempt from disallowance. The exemption to disallowance ensures that persons adversely affected by a major disaster are able to immediately access financial support to assist with injuries and damage, suffered as a direct result of a major disaster. If the determination were subject to disallowance, it would diminish an individual's certainty whether they are considered to have been adversely affected as a result of a major disaster and consequently, whether they can qualify for an AGDRP. Additionally, if the determination is disallowed, this may cause inequality amongst the Australian public between those who received the AGDRP before disallowance of the instrument and those who qualified and did not receive the AGDRP because they did not apply or their claim was not finalised before disallowance occurred. This can also prolong any adverse effects suffered by persons who are in the circumstances determined by the Minister to qualify for the AGDRP.

Determinations of rates – section 1061P

Subsections 1061P(1) and (4) of the Act provide that the Minister may determine for a major disaster occurring inside or outside Australia, the adult rate in relation to the amount of an AGDRP for a financial year.

Subsections 1061P(2) and (5) of the Act provide that the Minister may determine for a major disaster occurring inside or outside Australia, the child rate in relation to the amount of an AGDRP for a financial year.

Determinations made under section 1061P specify different rates of payment for adults and children and different rates for disasters that occur inside and outside Australia.

Subsection 1061P(6) of the Act provide that section 42 of the LA does not apply to an instrument made under section 1061P, meaning that each determination made under this section is exempt from disallowance. The reason for this exemption is to enable the rates of payment for an adult or a child to be set and commence with certainty in the event of a major disaster inside or outside Australia. If any instruments made under this provision were subject to disallowance, persons who qualify for an AGDRP would not have certainty as to the amount of AGDRP they are entitled to as a result of a major disaster. If disallowance eventuates, this may cause inequality between persons who received an amount of AGDRP before disallowance and those who may receive a different amount after disallowance based on a new determination or no amount at all because they did not apply or their claim was not finalised before the determination was disallowed.