



26 August 2021

Senator the Hon Michaelia Cash
Attorney-General
Parliament House
CANBERRA ACT 2600

Via email: attorney@ag.gov.au

CC: DLO@ag.gov.au

Dear Attorney-General,

**Legislation (Exemptions and Other Matters) Amendment (2021 Measures No. 1) Regulations 2021
[F2021L00859]**

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to this matter.

Matters more appropriate for parliamentary enactment

Parliamentary oversight – exemption from disallowance

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment. In addition, Senate standing order 23(3)(k) requires the committee to scrutinise each legislative instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes whether an instrument limits parliamentary oversight.

The instrument amends the Legislation (Exemptions and Other Matters) Regulation 2015 (LEOM Regulation) to update references to provisions that are out of date. This has the effect of extending exemptions to disallowance or sunseting in relation to certain legislative instruments.

In particular, item 1 of Schedule 1 to the instrument has the effect of extending an exemption from disallowance for instructions given under subsection 7(3) or (4) of the Air Services Regulations 2019 (Air Services Regulations). These instructions may be given by Airservices Australia in relation to the use of a controlled aerodrome or a specified class of airspace, including the use of airspace above a restricted or danger area.

As you are aware, the committee has significant concerns about the use of delegated legislation to set out exemptions to parliamentary oversight mechanisms, such as disallowance or sunseting. Such measures can undermine parliamentary oversight and subvert the appropriate relationship between the Parliament and the executive. The committee's significant concerns about these matters were most recently set out in detail in the committee's final report of its inquiry into the

exemption of delegated legislation from parliamentary oversight, which was tabled in the Senate in March 2021. It is particularly concerning to the committee that following the tabling of this report, which set out the problems with the LEOM Regulation, exemptions from sunseting and disallowance processes are being further extended with this instrument. The committee also notes with concern that it has not yet received the government's response to this report.

As set out in the final inquiry report, it is the committee's longstanding view that laws made by the executive pursuant to powers delegated by the Parliament should be subject to stringent parliamentary oversight, with very limited exemptions. Where it is nevertheless considered necessary to exempt delegated legislation from disallowance or sunseting, those exemptions should be set out in primary, rather than delegated legislation, and a rigorous justification should be provided in the explanatory materials.

In this instance, the explanatory statement to the instrument notes that 'the reason for this exemption was that disallowance would adversely impact on the orderly management of the aviation industry and air traffic safety management'. The explanatory statement also notes that the item does not substantively change the scope of the existing exemption from disallowance.

However, while noting this explanation, the committee does not consider that consistency with an existing legislative framework or scheme to be an adequate justification for the inclusion of such significant matters in the instrument. In this regard, the explanatory statement does not appear to address why it is considered necessary and appropriate to provide for this exemption from disallowance via delegated legislation, rather than primary legislation.

The committee's concerns with regard to this issue are heightened, noting that instructions given under subsection 7(3) or (4) of the Air Services Regulations are also exempt from sunseting under table item 4 of section 12 of the LEOM Regulation.

In light of the matters outlined above, the committee requests your more detailed advice as to:

- **why it is considered necessary and appropriate for instructions given under subsection 7(3) or (4) of the Air Services Regulations 2019 to be exempt from disallowance; and**
- **why it is considered necessary and appropriate to provide for this exemption from disallowance in delegated, rather than primary, legislation.**

Matters more appropriate for parliamentary enactment

Parliamentary oversight – exemption from sunseting

Additionally, the instrument has the effect of continuing or extending certain exemptions from sunseting in relation to particular legislative instruments. In particular, item 2 of Schedule 1 to the instrument has the effect of exempting statements approved under section 34AF of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) from sunseting. These statements relate to the procedures that officers must follow when exercising authority under a questioning warrant. Under subsection 34AF(5) of the ASIO Act, such statements are also exempt from disallowance. The explanatory statement justifies the exemption from sunseting by noting 'the provision is subject to a statutory review process and it provides legal certainty for the status of the instruments'. The explanatory statement also notes that section 34AF of the ASIO Act will sunset on 7 September 2025, although this sunset date may be extended or repealed by the Parliament in the future.

In addition, item 3 of Schedule 1 to the instrument has the effect of extending exemptions from sunseting in relation to standards made under section 12 of the *Road Vehicle Standards Act 2018*.

The explanatory statement to the instrument notes that it is appropriate to continue the exemption as 'the instruments form part of an intergovernmental scheme and they provide commercial certainty due to the fact that they remain relevant for the life of the vehicle'.

The committee considers that the sunseting framework provides an important opportunity for Parliament to maintain effective and regular oversight of delegated legislative powers, and, in particular, ensure that the content of legislative instruments remains lawful.

As noted above, the committee generally considers that exemptions from parliamentary oversight mechanisms should be outlined in primary, rather than delegated, legislation and soundly justified in the explanatory materials.

In this instance, the explanatory statement states that items 2 and 3 are consistent with your established criteria for assessing whether it is appropriate to exempt an instrument or classes of instruments from sunseting. However, while noting this explanation, the committee remains concerned that the explanatory statement does not explain why it is necessary and appropriate to provide for these exemptions in delegated legislation.

In light of the matters outlined above, the committee requests your more detailed advice as to:

- **why it is considered necessary and appropriate for statements approved under section 34AF of the *Australian Security Intelligence Organisation Act 1979* and standards made under section 12 of the *Road Vehicle Standards Act 2018* to be exempted from the sunseting regime in Part 4 of Chapter 3 of the Legislation Act; and**
- **why it is considered necessary and appropriate to provide for these exemptions to sunseting in delegated, rather than primary, legislation.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **9 September 2021**

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation