

No Oversight, No Debate

The Details of Labor's
Housing Policy

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Parliamentary Oversight Missing in Help to Buy Directions

The *Help to Buy Act 2024* (Cth) is a flagship policy of the Government designed to respond to the current housing crisis by improving the accessibility of housing by low and middle income earners by reducing the hurdle of the upfront deposit. It establishes a Commonwealth shared equity scheme, administered by Housing Australia, which can provide eligible participants an equity contribution of between 30-40 per cent of the price of a home.

The Help to Buy Program Directions 2025 (the instrument) are made under section 24 of the Act, and provide Directions from the Minister to Housing Australia in relation to the administration of the program. The Directions set out key matters, such as: initial eligibility and ongoing participation requirements, entry, variation and exit from the program, monitoring of compliance, allocation of places in the program, and other administrative arrangements.

These represent important policy choices with repercussions for individuals and government resources.



The Help to Buy Directions represent an improper use of delegated legislation and an undesirable exemption from disallowance.

The Senate’s Committee on the Scrutiny of Delegated Legislation was scathing in its initial technical assessment of the Directions. This was for a number of reasons, including lack of clarity around terms and the exercise of discretion, the incorporation of intergovernmental agreements into legislation, lack of justification for no independent merits review, and, importantly in relation to parliamentary oversight:

- **that the Directions relate to substantive policy matters and should have been set out in primary legislation.**

The Committee said:

Significant elements of a regulatory scheme include key definitions central to the operation of a program or scheme of national significance or of a regulatory scheme. The committee considers that such matters should generally be contained in primary, rather than delegated, legislation.

The Committee asked the Minister to advise:

... why it is considered necessary and appropriate to include significant elements of a regulatory scheme, being key definitions central to the operation of the Help to Buy program, in delegated, rather than primary legislation.

In the Committee’s monitor report released yesterday, the Minister’s response noted the urgency of addressing the housing issue and the fact that the delegation of these matters had been made under recently passed legislation - the Help to Buy Act - and thus represented Parliament’s will. The Committee was not impressed, and continued to express its concerns, and drew the matter to the

attention of the Senate for its consideration.

- **that the Directions should have been subject to full parliamentary scrutiny through the disallowance procedure**

The Help to Buy Program Directions 2025, because they are directions from a Minister — like the many directions and orders issued during the COVID-19 pandemic — not subject to full oversight by the Parliament (see further Regulation 9 of the Legislation (Exemptions and Other Matters) Regulation).

The Department of Treasury has previously argued that such Directions are ‘intended to remain within executive control’, which the Senate’s Scrutiny of Delegated Legislation Committee in its 2021 Report into Exemptions from Disallowance referred to as ‘a broadly drawn and ambiguous rationale that could potentially exempt large numbers of instruments.’

The Centre for Public Integrity has previously expressed its concern regarding overuse of exemptions from disallowance, removing Parliament’s important law-making oversight role particularly where significant questions of policy are being delegated. In its 2020 Submission to the Senate Standing Committee for the Scrutiny of Delegated Legislation, it argued that exemptions must be in primary legislation, and there should be clear criteria for when exemption is justified, with a focus on ensuring democratic oversight. Any delegated legislation that deals with questions of policy should not be able to be exempt from disallowance.

Similar concerns are shared by other experts in the field. For example, in her submission to the 2019 inquiry of the Senate Standing Committee on Regulations and Ordinances, Professor Anne Twomey described the exclusion of legislative instruments from disallowance as 'a very serious limitation upon the scrutiny role of the Senate'. In their 2020 submission to the Committee, Professors George Williams, Gabrielle Appleby and Drs Janina Boughey and Sangeetha Pillai argued:

The current approach to exempting legislative instruments from disallowance lacks clear guiding principles and risks diminishing the Senate's function of providing democratic accountability over delegated legislation.

Two reports of the Senate Standing Committee for the Scrutiny of Delegated Legislation have agreed with these views. In 2019, the Committee conducted a review into the Parliamentary Scrutiny of Delegated Legislation, expressing concern about delegated legislation exempting instruments from disallowance, and recommending that appropriate guidance be produced by the government on when exemptions are appropriate (recommendation 15). The 2021 Report recommended (recommendation 6):

*[L]egislation 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.* (emphasis added)

CPI view on the Help to Buy Program Directions

The CPI shares the concerns of the Senate Committee on the Scrutiny of Delegated Legislation. The Help to Buy Program Directions provide important details on how a significant - indeed a flagship - policy of the government in relation to the housing crisis will operate. These details should have been included in primary legislation and subject to full parliamentary consideration. At the very least, they should have been included in a disallowable instrument. The exemption of these Directions highlights that the broad exemption for directions issued by a Minister continues to exist in the Regulation 9 of the Legislation (Exemptions and Other Matters) Regulation, despite many, including the Senate Committee, the CPI, and other experts, questioning this unjustified carve out.



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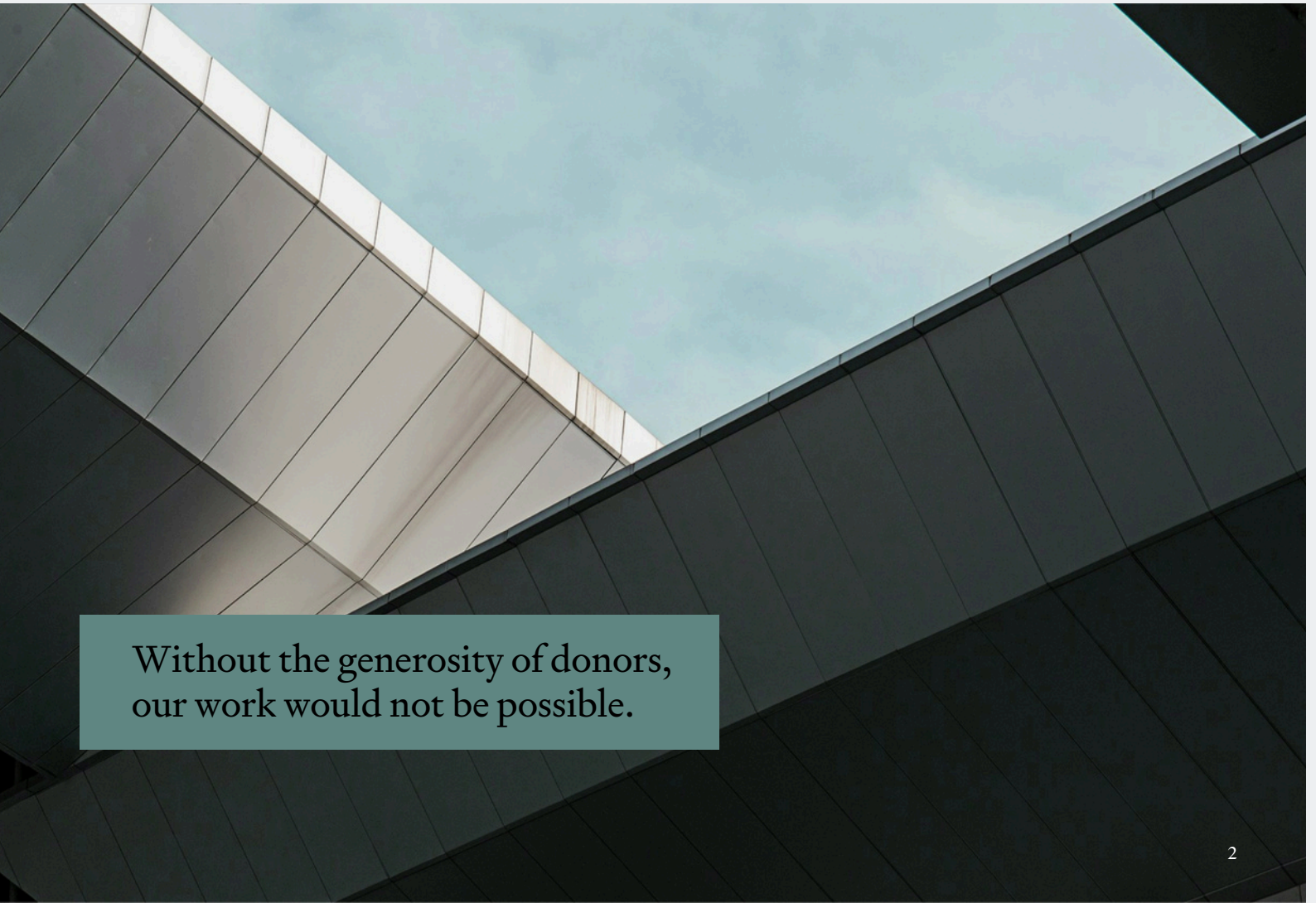
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