SENATOR THE HON JANE HUME
ASSISTANT MINISTER FOR SUPERANNUATION,
FINANCIAL SERVICES AND FINANCIAL TECHNOLOGY

Ref: MS20-001852

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Suite S1.111
Parliament House
CANBERRA ACT 2600

7 SEP 2020

Dear Senator Fierravanti-Wells

I am writing in response to your letter of 27 August 2020, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation, requesting further information in relation to:

- the *ASIC Corporations (Foreign Financial Services Providers – Foreign AFS Licensees) Instrument 2020/198;* and

- the *ASIC Corporations (Foreign Financial Services Providers – Funds Management Financial Services) Instrument 2020/199* (the FFSP Instruments).

The Committee has requested further detailed advice as to whether these instruments could be amended to specify that they cease to operate five years after they commence. I have again raised the Committee's concerns with the Australian Securities and Investments Commission (ASIC), and their advice has been incorporated into this response.

ASIC'S response to the Committee

ASIC remains of the view that the standard 10-year sunsetting period for legislative instruments provided for under the *Legislation Act 2003* is appropriate for the FFSP instruments, considering:

- the two-year transition period under the instruments; and
- the three major rounds of public consultation on the instruments undertaken over three years.

Early sunsetting of these instruments will likely create undue regulatory burden for industry. ASIC proposes to review the operation of the FFSP instruments prior to the 10-year sunsetting if regulatory developments in overseas jurisdictions or market developments suggest a review is required.

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Benefits for Australian wholesale clients from the relief

ASIC considers that if the FFSP instruments were to sunset in less than 10 years, some entities would consider leaving the Australian market altogether to the detriment of Australian wholesale clients who access the services and financial products from these foreign entities. ASIC considers that this may have particular implications for superannuation funds and other wholesale Australian clients such as larger corporates involved in fundraising activities.

In relation to Instrument 2020/198, ASIC understands that there are often circumstances where Australian wholesale clients have built long-term relationships with foreign entities that rely on ASIC relief. ASIC advised that maintaining these ongoing relationships assists Australian wholesale clients to effectively manage their investments and risk management strategies, particularly for longer term strategies that may have been developed between the foreign service provider and the Australian wholesale client.

In relation to Instrument 2020/199, ASIC advises that Australian investors may not be able to access more diversified investment holdings if some FFSPs providing services to Australian entities involved in funds management activity, were to withdraw from the Australian market. This is particularly relevant for Australian superannuation funds that are increasingly looking at diversified investments, including offshore investments to generate appropriate returns for Australian investors in order to manage investment risk associated with their investment portfolios.

In facilitating the provision of these financial services to Australian clients, the instruments are deregulatory in nature.

ASIC considers that a large exodus of these foreign entities from the Australian market may also negatively affect competition in Australia's financial services industry. Australian wholesale clients are in effect at a price and product disadvantage compared to the global markets. The ability to readily access financial products and services in a competitive environment is valuable. Uncertainty about how the Australian regulatory regime applies would mean fewer products or services may be made available to Australian wholesale clients. This could result in increased costs of financial services for Australian wholesale clients.

Regulatory uncertainty if instruments were to sunset after five years for Australian clients and foreign entities

ASIC have provided an extensive transition period of two years to allow foreign entities providing services to Australian clients to conduct a holistic assessment of their global and Australian business arrangements and if appropriate, to apply for a licence, have the application assessed and issued by ASIC. These foreign entities require regulatory certainty about whether to continue their operations in Australia and how they can structure their services to Australian clients.

Relevant to this issue of certainty is ASIC's statutory objective requiring them to 'maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs and the efficiency and development of the economy' under paragraph 1(2)(a) of the *Australian Securities and Investments Commission Act 2001*.

If the FFSP instruments were required to sunset five years after commencing, ASIC believes that some foreign entities may consider it uneconomic to review their operations or to make substantial changes to their business for a regulatory framework that would last only three years after the transition period. Uncertainty about what follows at the end of the 5-year period may push these entities to consider withdrawing from the Australian market.

Industry has highlighted to ASIC the significance of cost benefit considerations in deciding whether to continue to provide services into Australia. Some foreign entities are taking active steps now to apply for a foreign AFS licence e.g. obtaining legal advice, building IT systems and processes and developing compliance frameworks. This assessment generally requires a significant investment.

Given the nature of the exemptions ASIC is providing through the FFSP instruments and the need for regulatory certainty for foreign entities and Australian wholesale clients, ASIC considers the exemptions will be necessary for the maximum 10-year period.

Disallowance could disrupt Australian markets

If the FFSP instruments were disallowed, ASIC anticipates that some FFSPs would use the two-year transition period to wind down their Australian operations instead of maintaining or increasing their activity in Australia. ASIC advises that this could cause significant disruption to our financial markets and add a possible impediment to Australia's path to economic recovery from the effects of the coronavirus.

Some entities, including a number of the global investment banks, have established significant onshore operations, employ a substantial number of Australian employees and use Australian infrastructure.

The Australian market and economy also use some of these large financial institutions and their balance sheets to underwrite equity and debt capital market activity for Australian entities. Another example of an important activity undertaken in Australia is market making. Market makers quote prices and provide depth and liquidity to Australian markets. A number of foreign market makers rely on ASIC's relief to operate in Australia. These market makers could exit the Australian market if the FFSP instruments were disallowed. This could lead to potentially increasing volatility and greater spreads in pricing of traded financial products. The overall effect is that Australian markets have the potential to become more inefficient if foreign entities were to withdraw.

I trust this information will be of assistance to you.

Yours sincerely

Senator the Hon Jane Hume

Senator the Hon Anne Ruston

Minister for Families and Social Services
Senator for South Australia
Manager of Government Business in the Senate

Ref: MB20-900037

Senator the Hon Concetta Fierravanti-Wells
Chair Senate Standing Committee
for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear ~~Senator~~

Thank you for your letter of 3 September 2020 on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation requesting an update on the Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019 (the Bill).

As outlined in my letter of 1 September 2020, the Morrison Government remains committed to scheduling legislation to extend the operation of the Cashless Debit Card (CDC) for debate as soon as practicable.

The 2020-21 Budget confirms the Government's commitment to the CDC and announces funding to support its operation as an ongoing measure. To support the Parliament to fully consider this new measure, a new Bill incorporating the 2020-21 Budget measure as well as amendments currently provided for in the Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019, (which passed through the House of Representatives on 27 November 2019) will be introduced in the House this week.

The new Bill will provide an opportunity for Parliament to debate the ongoing operation of the CDC. I therefore ask that consideration of the disallowance motion for the Coronavirus Economic Response Package (Deferral of Sunsetting – Income Management and Cashless Welfare Arrangements) Determination 2020 (the Determination) be postponed or the motion be withdrawn.

Pending Parliament's consideration of the new Bill, the extension to the operation of the Cashless Debit Card and Income Management in the Cape York region of Queensland for six months under the Determination continues to provide certainty to stakeholders and participants. Without this extension, participants would have experienced significant disruption to their financial arrangements, such as scheduled payments and transfers, at a time where access to on-the-ground support can be challenging for participants due to travel restrictions and social distancing requirements.

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If the Determination is disallowed, there would be immediate and potentially serious impacts on around 13,000 CDC participants. Longstanding financial arrangements put in place by participants would be invalidated, leading to declined payments for scheduled payments (including rent payments).

Furthermore, if legislation to extend the CDC is subsequently passed, the cessation and subsequent reapplication of restrictions on participants within a short period of time is likely to create difficulties and confusion for participants.

I encourage the Committee to speak to stakeholders to better understand the impact on participants and communities before pressing for disallowance of the Determination.

I trust this information demonstrates the Government's commitment to consider the Bill as early as is practicable and the impact of a potential disallowance of the Determination.

Yours sincerely

Anne Ruston

6 /10 / 2020

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

MC20-028480

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
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sdlc.sen@aph.gov.au

Dear ~~Senator~~

I refer to the committee's request in relation to the **Fair Work Amendment (Variation of Enterprise Agreements No.2) Regulations 2020** (the repeal instrument). The committee has noted that the explanatory statement for the repeal instrument does not appear to provide information about consultation that was undertaken in relation to the instrument, as required by paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003*.

The repeal instrument repealed temporary measures introduced by the Fair Work Amendment (Variation of Enterprise Agreements) Regulation 2020 (the regulations) introduced in the context of the COVID-19 crisis. The regulations temporarily reduced the minimum access period before employees may be asked to vote on a variation to their enterprise agreement, and would have automatically ceased to have effect six months after commencement.

I consulted the trade union movement prior to making the regulations, and publicly committed to review the measure at two months. This review found a majority of employers had continued to provide a notice period well in excess of the minimum timeframe permitted by the regulations and that a reduced timeframe was rarely necessary.

Taking this into account, along with the views publicly and privately expressed to me by representatives of the union movement and the business community about the measure, the Government considered it appropriate to bring forward the repeal date of the regulations.

I am satisfied that appropriate consultation was undertaken prior to the making of the repeal instrument.

I trust this information will assist the committee.

Yours sincerely

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

The Hon Greg Hunt MP
Minister for Health
Minister Assisting the Prime Minister for the Public Service and Cabinet

Ref No: MC20-036905

Senator the Hon Concetta Fierravanti-Wells
Chair
Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

29 SEP 2020

Dear Chair

I refer to your letter of 3 September 2020 on behalf of Senate Standing Committee (Committee) for the Scrutiny of Delegated Legislation regarding the Narcotic Drugs (Licence Charges) Amendment (2020 Measures No. 1) Regulations 2020 [F2020L00901].

My advice in response to the matters raised by the Committee is set out at Attachment A.

Thank you for writing on this matter.

Yours sincerelv

Greg Hunt

Encl (1)

ATTACHMENT A

Response to the Senate Standing Committee for the Scrutiny of Delegated Legislation regarding the Narcotic Drugs (Licence Charges) Amendment (2020 Measures No. 1) Regulations 2020

Narcotic Drugs (Licence Charges) Amendment (2020 Measures No. 1) Regulations 2020

Levying of taxation in delegated legislation

The Committee notes that Section 6 of the Narcotic Drugs (Licence Charges) Act 2016 provides for the levying of taxation in relation to narcotic drug licences. The Committee has requested advice on why the instrument imposes a charge that may be more properly regarded as taxation and why there is no limit on the amount that may be charged.

The Committee has also noted the levying of taxation in delegated legislation as a systemic matter.

Cost recovery charges and levies

The Australian Government Charging Framework (the Charging Framework), which incorporates the Australian Cost Recovery Guidelines (the CRGs) www.odc.gov.au/publications/cost-recovery-implementation-statement-regulation-medicinal-cannabis-march-2020 - fn1, covers activities where the Government charges the non-government sector for a specific government activity such as regulation, goods, services, or access to resources or infrastructure.

The characteristics of a government activity determine the type of cost recovery charge used. Cost recovery fees are charged when a good, service or regulation is provided directly to a specific individual or organisation. Cost recovery levies are imposed when a good, service or regulation is provided to a group of individuals or organisations (e.g. an industry sector) rather than to a specific individual or organisation. A cost recovery levy is a tax and imposed via a separate taxation Act. Unlike general taxation, such levies are earmarked to fund activities provided to the group that pays the levy.

The annual charges relating to the provision of a cannabis licence, inspection of a relevant site, and the hourly charge for cannabis related compliance activities, were calculated to reflect the administrative costs associated with the regulation of cannabis licences and compliance activity and were set in accordance with the CRGs.

Detailed consultation with the Department of Finance and stakeholders, including industry representatives, regulatory consultants and State and Territory government officials was undertaken before prescribing the amount of annual charges in respect to cannabis licences and compliance activity. The medicinal cannabis industry sector acknowledged that a more robust cost recovery framework provides the appropriate level of resources to regulate the scheme.

To further facilitate transparency and accountability, a Cost Recovery Implementation Statement published on the Office of Drug Control's website will be updated in relation to the amended charges.

The Instrument does not include a maximum amount of charge, as the charges have been set in accordance with the CRGs. Any such limit prescribed would be arbitrary and would need to be substantially in excess of the amount proposed to be charged, which would likely result in confusion for, and criticism by, stakeholders.

Matters of interest to the Senate

Setting the amount, or the method for calculating the amount, of annual charges in the regulations, rather than the principal legislation, is designed to provide the appropriate level of flexibility to:

- impose different charges, or have different methods of calculation, to reflect the differentiation in effort arising from:
  - whether the licence holder is undertaking construction of facilities or is operational under a permit, and/or
  - the cost for inspections based on the compliance history of a licence holder;
- set the amount of annual charge, or its method of calculation, to accurately reflect the cost of regulation as the scheme evolves, and to adjust the amount over time to avoid over or under recovery.

This approach prevents the need to amend primary legislation whenever there are changes to cost recovery arrangements, and is also consistent with the approach taken in relation to existing annual charges imposed on the medicinal cannabis industry sector under the *Narcotic Drugs (Licence Charges) Act 2016*.

The Hon Nola Marino MP

Assistant Minister for Regional Development and Territories
Federal Member for Forrest

Ref: MC20-007670

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
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CANBERRA ACT 2600

Dear Senator

Thank you for your letter of 3 September 2020 regarding the *Norfolk Island Continued Laws Amendment (Employment) Ordinance 2020* (the Ordinance).

The Ordinance makes amendments to the *Employment Act 1988* (NI) (the Employment Act) to enable a private, third party workers' compensation scheme administrator (scheme administrator) to deliver the Norfolk Island Workers' Compensation Scheme (the Scheme). It also makes a number of improvements to the Scheme (for example, giving people better access to rehabilitation programs), bringing it closer into line with workers' compensation schemes in the rest of Australia.

In relation to the concerns raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) about some aspects of the Ordinance, I offer the following responses.

The committee requests your advice as to what qualifications or expertise persons authorised to perform the functions and exercise the powers of the Employment Liaison Officer (ELO) under subsection 47H(1) are required to possess.

The Department of Infrastructure, Transport, Regional Development and Communications (the Department) will engage a scheme administrator with extensive experience managing workers' compensation claims to deliver the Scheme.

For the ELO to authorise employees of the scheme administrator to perform functions and exercise powers relevant to the administration of the Scheme, they must be satisfied those employees have:

- Experience managing claims for compensation under other Australian workers' compensation schemes.

- Knowledge and understanding of the Norfolk Island Scheme.
- The ability to work effectively with claimants, employers and medical practitioners.
- Time management and communication skills and the ability to work autonomously and as part of a team.

No specific qualifications are needed to manage workers' compensation claims. However, the fields of study which are relevant to these roles include allied health, public administration, business management and law.

The committee requests your advice as to the application of the *Privacy Act 1988* and *Freedom of Information Act 1982* to persons authorised to perform functions and exercise powers of the ELO under subsection 47H(1).

The *Privacy Act 1988* (Privacy Act) and the *Freedom of Information Act 1982* (FOI Act) applies to persons authorised to perform functions and exercise powers of the ELO under subsection 47H(1) of the Employment Act as outlined below.

'Constructive possession' of documents

With respect to any person authorised by the ELO to exercise powers and functions relevant to the administration of the Scheme, any documents created or otherwise obtained by that person as a result of this power will remain in the 'constructive possession' of the ELO and hence remain subject to the provisions of the Privacy Act and the FOI Act as it applies to the ELO. Under section 47F of the Employment Act, the Commonwealth Minister may only appoint a Senior Executive Service (SES) employee, or acting SES employee, of the Department as the ELO. The Department is an agency for the purposes of both the Privacy Act and the FOI Act and hence its APS employees are subject to its provisions. This would mean, for instance, that the ELO has a right to possession of any documents created by the authorised person when exercising their delegated powers, and enables the ELO to comply with their obligations under the FOI Act.

Privacy Act

I also note that section 95B of the Privacy Act requires the Department, when entering into a Commonwealth contract, to take contractual measures to ensure that a contracted service provider for the contract does not do an act, or engage in a practice, that would breach an Australian Privacy Principle if done or engaged in by the Department. The delegation of any of the ELO's powers and functions to employees of the scheme administrator will therefore be complemented by the Department's contract with the scheme administrator, consistent with this requirement.

The scheme administrator itself may also be subject to additional requirements under the Privacy Act (for instance, if it is an 'organisation' for its purposes).

FOI Act

Similarly, section 6C of the FOI Act requires the Department to take contractual measures to ensure that the Department receives a document from a 'contracted service provider' if the:

- Department receives an FOI request for access to the document,
- document relates to the performance of a 'Commonwealth contract', and
- document is created by, or is in the possession of, the contracted service provider.

Any employee of a scheme administrator exercising these delegated powers will also be a contracted service provider of the Department. The Department's contract with any private third party scheme administrator will be consistent with this requirement.

The committee requests your advice as to whether decisions made under the instrument by the ELO, or persons authorised to perform functions and exercise powers of the ELO under subsection 47H(1), are subject to independent merits review by the Tribunal.

Yes, these decisions are subject to independent merits review. Subsection 82(1) provides for the Tribunal to consider any matter arising under Part 3 of the Employment Act which concerns the administration of the Scheme, including decisions made by the ELO or a person authorised under subsection 47H(1) to perform functions or exercise powers relevant to the administration of the Scheme.

Paragraph 83(b) provides that for the purposes of an inquiry, the Tribunal shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.

The committee requests your advice as to why it is considered necessary and appropriate to extend immunity from civil liability to the Commonwealth and persons to whom the ELO may delegate a power or function under subsection 47(H)(1).

It is necessary and appropriate to extend immunity from civil liability to the Commonwealth and persons to whom the ELO may delegate a power or function because it ensures people making decisions about claims for workers' compensation, who hold the genuine belief they are acting correctly, and who are acting in good faith, are able to do their jobs without fear they will incur liability for their actions. Not offering such immunities would likely lead to an inability for the Government to obtain the services necessary to discharge key functions, ultimately disadvantaging the community.

In the context of the Scheme, the ELO and their delegates must rely on information provided to them by claimants, employers and medical practitioners in order to assess claims for compensation. In this sense, the ELO and their delegates must act on the assumption the information which has been provided to them is a true and correct representation of the circumstances surrounding the injury. With this comes the risk that if a vital piece of information is not provided or the circumstances have been misrepresented by one of the parties, the ELO or their delegates may make an error when assessing a claim.

To avoid the unintended consequence that people assessing compensation claims will be driven to act with excessive caution, perhaps seeking copious amounts of supporting information from claimants and employers, or taking an undue amount of time to reach a decision, immunity provides them with assurance they can exercise their powers and functions with confidence they will not be the subject of legal action if they make a mistake.

This is not to say the decisions made by the ELO or their delegates are beyond scrutiny. Decisions made by the ELO or their delegates when assessing claims for compensation can be subject to internal review and merits review by the Tribunal. In the course of these review processes, errors made by the ELO and their delegates can be picked up and the outcome of the assessment of the claim can be revised.

The committee requests your advice as to:

- **why it is considered necessary and appropriate to prescribe custodial penalties in new subsection 39(2); and**

I note the committee does not generally consider consistency with an existing regime alone to justify the inclusion of significant matters, such as custodial penalties, in delegated legislation. However, as the committee has also acknowledged, a special legislative framework applies in Norfolk Island and it is this framework which makes it both necessary and appropriate to do so.

Workers' compensation insurance is compulsory in every state and territory in Australia to ensure all workers who suffer a work-related injury or disease are protected. As workers' compensation schemes are administered by the states and territories, penalties for not having workers' compensation insurance are contained in legislation made by state or territory parliaments.

In Norfolk Island, legislation which is equivalent to the legislation made by state and territory parliaments are laws made by the former Legislative Assembly of Norfolk Island. These laws can be amended by virtue of section 19A of the *Norfolk Island Act 1979* (Norfolk Island Act) which provides that the Governor-General may, subject to the Norfolk Island Act, make Ordinances 'for the peace, order and good government of the Territory'.

In this case, the Employment Act requires an employer to either hold an appropriate insurance policy or be a member of the Scheme. Given the seriousness of not having workers' compensation insurance an employer commits an offence under the Employment Act if they fail to have an insurance policy or are not a member of the Scheme.

Maintaining the penalty provisions in the Employment Act is appropriate on two counts: firstly, because penalties are designed to act as a deterrent to employers who may consider not complying with the law; and secondly, because they are included within a body of law which, if it existed outside of the special legislative framework applying in Norfolk Island, operates on a level which is equivalent to the laws in other jurisdictions and which underpin the administration of similar schemes.

- **whether the Attorney-General was consulted in relation to the inclusion of custodial penalties in accordance with paragraph 3.3 of the *Guide to Framing Commonwealth Offences.***

The Attorney-General's Department was not consulted in relation to the inclusion of custodial penalties, because no new penalties were included in the instrument. The instrument revises the existing penalty provisions to make them consistent with modern drafting requirements, and therefore easier to interpret and apply.

The committee requests your advice as to whether the ELO and any persons to whom they may delegate their power to issue evidentiary certificates to under subsection 47H(1), are sufficiently independent of the prosecution so as to comply with the requirements of paragraph 5.3 of the *Guide to Framing Commonwealth Offences.*

Subsection 39(2) provides that an employer commits an offence if they do not have a workers' compensation insurance policy. As this is a Commonwealth offence, for a prosecution to occur the ELO would refer a brief to the Commonwealth Director of Public Prosecutions (CDPP) and, after this information has been assessed, the CDPP would decide whether or not to prosecute.

The CDPP is an independent authority which makes its decisions about whether to prosecute in accordance with the Prosecution Policy of the Commonwealth. That Policy is a public document based on the principles of fairness, openness, consistency, accountability and efficiency which the CDPP seeks to apply in prosecuting offences against the laws of the Commonwealth. The CDPP both decides whether charges should be laid and runs the prosecution process. The ELO and any persons to whom their power has been delegated are therefore not part of the prosecution process.

In terms of evidentiary certificates, the certificate would likely state the defendant was not a member of the Scheme. As records relating to membership of the Scheme will be managed and held by the scheme administrator, the evidentiary certificate would be issued by an employee of the scheme administrator. These employees would not be part of the prosecution process.

For the defendant, the evidence provided by the certificate may be rebutted by providing documents which demonstrate they held an insurance policy. These could include a copy of the employers' application to become a member, correspondence from the insurer and/or copies of bank statements showing payment of membership fees or premiums.

While I acknowledge the ELO and their delegates might provide information to inform a prosecution, such a model is not uncommon where a state-funded administrator (such as a motor vehicle registry) might provide evidence to support the prosecution of offences under state laws (e.g. driving an unregistered vehicle) by that state's police force or Director of Public Prosecutions.

Thank you for bringing your concerns to my attention and I trust this is of assistance.

Yours sincerely

Nola Marino

11 SEP 2020

SENATOR THE HON MATHIAS CORMANN
Minister for Finance
Leader of the Government in the Senate

REF: MC20-002594

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee
for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to your letter of 3 September 2020 seeking further information on the *Public Governance Performance and Accountability Amendment (2020 Measures No. 3) Rules 2020* [F2020L00782] (Amendment Rule).

Your letter requested detailed advice as to why it was considered necessary and appropriate to use delegated legislation, rather than primary legislation, to allow consultants and independent contractors of non-corporate Commonwealth entities, and their employees, to exercise powers, perform functions and discharge duties under the *Financial Framework (Supplementary Powers) Act 1997*.

The technical appendix to this letter provides my response and additional information providing context and further clarification on the operation of the Amendment Rule.

I trust this information addresses the Committee's concerns.

Thank you for bringing the Committee's views to the attention of the Government.

Mathias Cormann
Minister for Finance

23 September 2020

RESPONSE BY THE MINISTER FOR FINANCE TO THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF DELEGATED LEGISLATION

The Senate Standing Committee for the Scrutiny of Legislation (the Committee) has sought a response to the question below:

> The committee requests your detailed advice as to why it was considered necessary and appropriate to use delegated legislation, rather than primary legislation, to allow consultants and independent contractors of non-corporate Commonwealth entities (and their employees) to exercise powers, perform functions and discharge duties under the *Financial Framework (Supplementary Powers) Act 1997*.

SUMMARY

The practise of permitting consultants and independent contractors of non-corporate Commonwealth entities to exercise certain powers is of long-standing.

The recent *Public Governance Performance and Accountability Amendment (2020 Measures No. 3) Rules 2020* (amending rule) is operational in nature.

The amending rule puts in place a more restrictive set of arrangements than previously applied, while remaining consistent with the intent of primary legislation and the *Public Governance, Performance and Accountability Rule 2014 (PGPA Rule)*.

INTRODUCTION

This paper provides detailed advice in response to the Committee.

The paper provides historical context and outlines the technical reasoning that led to the current process prescribing consultants and independent contractors of non-corporate Commonwealth entities (and their employees) (referred to as contractors) as officials through delegated rather than primary legislation.

HISTORICAL CONTEXT -THE PREVIOUS APPROACH UNDER THE FMA ACT

Prior to the introduction of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), non-corporate Commonwealth entities were governed by the *Financial Management and Accountability Act 1997* (FMA Act). In turn, the FMA Act derived from the *Audit Act* of 1901.

Under the FMA Act, the *Financial Management and Accountability Regulations 1997* was designed to 'allocate' persons who were not officials as officials of the relevant agency by default, whenever they performed a 'financial task'[1] – even if their services did not specifically require them to exercise a particular power. Under this approach, it was possible for a contractor to be classed as an official without their knowledge.

[1] 'financial task' was very broadly defined under the FMA Act framework. Essentially, it meant any task that involved the expenditure of money – including the entering of arrangements for the allocation of resources.

By contrast, the current framework is based on the idea that a contractor is not an official, unless they are specifically required as part of their services to exercise powers. They also must be able to be identified by name to be prescribed as an official.

The current framework is therefore more specific in relation to who is an official, and how they are designated as officials, than the previous framework. This has also enabled a more rigorous accountability framework to be put in place than under the FMA framework.

CLASSIFYING CONTRACTORS AS OFFICIALS UNDER PRIMARY LEGISLATION

The PGPA Act contains the concept of an 'official' in order to identify that group of persons who:

- can be delegated powers, functions and duties under the PGPA Act and who can receive binding instructions from accountable authorities of Commonwealth entities; and
- will be subject to the PGPA Act's code of conduct on officials, the duties of officials, at sections 25 to 29 of the PGPA Act[2].

Officials under the PGPA Act do not need to be APS employees or Commonwealth employees. An official can be any person, or group of persons, that an Act or the PGPA Rules defines as an official.

Section 13 of the PGPA Act[3] defines officials of Commonwealth entities. The definition in section 13 primarily focuses on defining officials by classes of persons. The definition captures entire groups of persons in the identified class.

Contractors are generally not classed as officials of Commonwealth entities.[4] This is intentional as contractors are rarely required to exercise powers, discharge duties or perform functions and therefore do not need to be subject to the code of conduct on officials at sections 25 to 29 PGPA Act. It would not be appropriate to extend the coverage of the PGPA Act over particular classes of persons when the need is not there.

However, the PGPA Act supports the principles of devolved management, operational independence and efficiency in the use of resources by accountable authorities to achieve Commonwealth objectives. Through the delegated legislation of the PGPA Rule, the PGPA Act permits the prescribing of contractors as officials in a targeted and selective manner.

The current amending rule builds upon the existing capacity to prescribe contractors as officials at subsection 9(1), item 1A of the PGPA Rule, when their services:

> "require the exercise of a particular power, the performance of a particular function, or the discharge of a particular duty, conferred on any person [by the PGPA Act or a rule made under it, or the *Financial Framework (Supplementary Powers) Act 1997*]".

This approach is intended to enable the selective targeting of certain contractors for prescription when it is operationally necessary for them to be classed as officials. It enables them to exercise delegated statutory power as part of the efficient conduct of Commonwealth

[2] See Attachment A for these sections.
[3] See Attachment A for this section
[4] Refer to PGPA Act paragraph 13(4)(c).

functions, while subject to the code of conduct on officials at sections 25 to 29 of the PGPA Act.

Primary legislation could not as effectively adopt such a selective approach. Attempting to define contractors as officials through the PGPA Act would likely result in all contractors in the Commonwealth being captured by the definition of official, even when their role does not require them to exercise statutory powers and make decisions in respect of the allocation of Commonwealth resources.

THE CURRENT OPERATION OF PGPA RULE SUBSECTION 9(1) ITEM 1A

Since 1 July 2015, sub section 9(1), item 1A of the PGPA Rule has permitted contractors, where the requirements of the Rule are met, to exercise powers, perform functions and discharge duties under the PGPA Act and PGPA Rule.

This means that contractors, as prescribed, can exercise powers, with a written delegation such as, though not limited to, the powers in section 23 of the PGPA Act, permitting the entering of arrangements and approval of a commitment of relevant money.

This power is comparable to the power in section 32B of the *Financial Framework (Supplementary Powers) Act 1997* FF (SP) Act, as both powers result in the allocation of Commonwealth resources.

THE RELATIONSHIP BETWEEN THE FF (SP) ACT AND THE PGPA ACT

The FF (SP) Act is a separate Act from the PGPA Act but the two Acts have a close relationship to one another in the Commonwealth's resource management framework, as evidenced by section 6 of the FF (SP) Act.[5]

The FF (SP) Act relies on concepts and definitions provided by the PGPA Act for its operation.

One of those definitions is 'official' and, like the PGPA Act, in terms of the FF (SP) Act, being an official (or a Minister) is a prerequisite to exercising statutory power.

Under the FF (SP) Act where officials are not themselves accountable authorities, authority is provided through the written delegation of relevant statutory power by accountable authorities or Ministers.

EXERCISING POWERS UNDER THE FF (SP) ACT WITH PARTICULAR REFERENCE TO DEPARTMENTS OF STATE

The FF (SP) Act contains powers to enter into arrangements on behalf of the Commonwealth, where the arrangement is specified in the FF (SP) Regulations 1997.[6] This legislative mechanism provides the necessary legislative authority for a range of Commonwealth activities and functions, such as Grants and other programs.

[5] See Attachment A for this section.
[6] Refer to section 32B FF (SP) Act.

Departments of State rely upon the legislative authority provided by the FF (SP) Act to carry out significant functions, which would not otherwise be possible.

Under the FF (SP) Act only the following persons can exercise powers in that Act:

- Ministers;
- Accountable authorities of non-corporate Commonwealth entities (as defined by the PGPA Act); and
- Officials of non-corporate Commonwealth entities, when delegated power by either of the above.[7]

Departments of State do not have establishing legislation and must rely entirely upon the definition of official provided by the PGPA Act at section 13.

By contrast, statutory bodies have establishing legislation, usually in primary legislation. Statutory bodies that are non-corporate Commonwealth entities often use their establishing legislation to define who is an official of the entity.

THE OPERATIONAL REQUIREMENT TO PERMIT CONTRACTORS TO EXERCISE POWERS, DISCHARGE DUTIES OR PERFORM FUNCTIONS UNDER THE FF (SP) ACT

The Commonwealth engages consultants, independent contractors, and their employees because they have particular expertise in areas that are not otherwise available to the relevant entity.

At times, it is operationally necessary to permit contractors to exercise delegated statutory powers on behalf of the Commonwealth.

A targeted control mechanism is therefore necessary to give entities the flexibility to take advantage of the skills and expertise of contractors in exercising certain statutory powers. This supports the principles of devolved management, operational independence and efficiency in the use of resources by accountable authorities to achieve Commonwealth objectives.

The Committee has expressed a concern that contractors are not APS employees subject to codes of conduct.

While it is true that contractors are not APS employees, not all officials under the PGPA Act are APS employees under the Public Service Act. The PGPA Act covers many officials who are employed under arrangements outside the Public Service Act.

For example officials can be;

- statutory office-holders;
- board appointees; or
- employees of a State or Territory.

As officials, not under the Public Service Act, these persons can exercise powers, discharge duties and perform functions, including in relation to the allocation of Commonwealth resources.

[7] See sections 32B and 32D FF (SP) Act.

To ensure high standards of conduct across the Commonwealth with respect to governance, performance and accountability for resource allocation, including for those persons not in the APS, the PGPA Act imposes a code of conduct on all officials. The code imposed is similar to those set out in the Public Service Act, through the duties set out at section 25 to 29 of the Act.

This is an important safeguard to regulate the conduct of all officials subject to the PGPA Act, including those who would be prescribed as officials by the amending Rule.

THE SAFEGUARDS UPON PRESCRIBED OFFICIALS UNDER THE AMENDING RULE

The amendments made by the amending Rule to subsection 9(1) item 1A, PGPA Rule will allow the accountable authorities of relevant entities to determine if it is operationally necessary for contractors, rather than an existing official, to exercise particular powers, perform particular functions, or discharge particular duties under the FF (SP) Act.

When the legislative criteria of the Rule are fulfilled, the Rule, by operation of law, prescribes that individual, who must be identifiable by name for a clear line of accountability, as an official of the relevant non-corporate Commonwealth entity.

Contractors will not be prescribed unless their services, specifically:

> "require the exercise of a particular power, the performance of a particular function, or the discharge of a particular duty, conferred on any person [by the PGPA Act or a rule made under it, or the *Financial Framework (Supplementary Powers) Act 1997*]".

Contractors prescribed in this way will be officials of the relevant non-corporate Commonwealth entity and will have the statutory obligations of officials upon them, such as the duties of officials at sections 25 to 29 of the PGPA Act.

In addition, they will be required, as part of the finance law[8], to comply with instructions and directions from the relevant accountable authority. They will not be able to exercise any statutory power without a written delegation to do so.

Further, accountable authorities have an obligation, under section 16 of the PGPA Act, to establish and maintain systems relating to risk and control. This includes managing contractors who work for the entity.

When a contractor is prescribed as an official, this arrangement is likely to be subject to change, including to expire at some future time. The current arrangement allows for delegations to be withdrawn. The contractor would therefore no longer be able to exercise powers, nor be prescribed, under the Rule as an official. The current mechanism is therefore much more flexible than if it had been embedded in primary legislation.

[8] See section 8 PGPA Act.

ATTACHMENT A

PGPA Act – section 13 definition of officials

Section 13 Officials

(1) Each Commonwealth entity has officials.

Officials of Commonwealth entities (other than listed entities)

(2) An ***official*** of a Commonwealth entity (other than a listed entity) is a person who is in, or forms part of, the entity.

(3) Without limiting subsection (2), an ***official*** of a Commonwealth entity (other than a listed entity) includes:
   (a) a person who is, or is a member of, the accountable authority of the entity; or
   (b) a person who is an officer, employee or member of the entity; or
   (c) a person, or a person in a class, prescribed by an Act or the rules to be an official of the entity.

(4) Despite subsections (2) and (3), each of the following is not an ***official*** of a Commonwealth entity (other than a listed entity):
   (a) a Minister;
   (b) a judge;
   (c) a consultant or independent contractor of the entity (other than a consultant or independent contractor of a kind prescribed by an Act or the rules for the purposes of paragraph (3)(c));
   (d) a person, or a person in a class, prescribed by an Act or the rules not to be an official of the entity.

Officials of listed entities

(5) An ***official*** of a Commonwealth entity that is a listed entity is a person who is prescribed by an Act or the rules to be an official of the entity.

PGPA Act – sections 25 to 29 Duties of officials

Section 25 Duty of care and diligence

(1) An official of a Commonwealth entity must exercise his or her powers, perform his or her functions and discharge his or her duties with the degree of care and diligence that a reasonable person would exercise if the person:
   (a) were an official of a Commonwealth entity in the Commonwealth entity's circumstances; and
   (b) occupied the position held by, and had the same responsibilities within the Commonwealth entity as, the official.

(2) The rules may prescribe circumstances in which the requirements of subsection (1) are taken to be met.

Section 26 Duty to act honestly, in good faith and for a proper purpose

An official of a Commonwealth entity must exercise his or her powers, perform his or her functions and discharge his or her duties honestly, in good faith and for a proper purpose.

Section 27 Duty in relation to use of position

An official of a Commonwealth entity must not improperly use his or her position:

(a) to gain, or seek to gain, a benefit or an advantage for himself or herself or any other person; or

(b) to cause, or seek to cause, detriment to the entity, the Commonwealth or any other person.

Section 28 Duty in relation to use of information

A person who obtains information because they are an official of a Commonwealth entity must not improperly use the information:

(a) to gain, or seek to gain, a benefit or an advantage for himself or herself or any other person; or

(b) to cause, or seek to cause, detriment to the Commonwealth entity, the Commonwealth or any other person.

Section 29 Duty to disclose interests

(1) An official of a Commonwealth entity who has a material personal interest that relates to the affairs of the entity must disclose details of the interest.

(2) The rules may do the following:

(a) prescribe circumstances in which subsection (1) does not apply;

(b) prescribe how and when an interest must be disclosed;

(c) prescribe the consequences of disclosing an interest (for example, that the official must not participate at a meeting about a matter or vote on the matter).

FF (SP) Act – Section 6

Section 6 Relationship with the finance law

This Act and the regulations are to be read together with the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*).

THE HON MICHAEL SUKKAR MP

Minister for Housing and Assistant Treasurer

Ref: MS20-002038

Senator the Hon Concetta Fierravanti-Wells
Chair
Suite S1.111
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Senator Fierravanti-Wells

I refer to correspondence from the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) requesting my advice with respect to the *Treasury Laws Amendment (Acquisition as Consumer—Financial Thresholds) Regulations 2020*. The Committee has sought my advice as to why it was considered necessary and appropriate to use delegated legislation, rather than primary legislation, to increase the monetary threshold in the definition of 'consumer' for the purpose of the Australian Consumer Law (the ACL).

Small companies can be as time poor as ordinary consumers and lack knowledge and expertise about the products that they buy. The monetary threshold in the definition of "consumer" of $40,000 was included in the ACL as a 'bright-line standard'. It provides consumers and businesses with a figure that is easy to recall and comply with, when compared with regular indexation. The *ACL Review Final Report 2017*, a joint product of Commonwealth, State and Territory consumer affairs officials, found that the level of protection afforded to consumers, particularly small business, has been eroded due to inflation in the cost of goods and services over time, and the original threshold amount is now not fit-for-purpose.

The changes to the monetary threshold restore the effective value of the threshold to the level originally set by the Parliament. Therefore, I consider the changes to be consistent with Parliament's intent for how the law should operate, rather than a departure.

This change ensures that the ACL remains fit for purpose, but I also note that its significance should not be overstated. The bulk of transactions protected by the law involve individual consumers purchasing goods for personal, domestic and household use and no monetary threshold applies to these transactions. The increase in threshold applies to a much more limited subset of transactions involving consumers (including individuals, small businesses, farmers etc.) purchasing commercial goods under $100,000. The increase, although aimed at protecting small businesses, has a flow-on benefit to capture ordinary consumer purchases of commercial products above the current $40,000 threshold, such as commercial glass for installation in a home.

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Your letter notes that the increases to the threshold relevant to the definition of consumer by way of regulation is already contemplated by the primary legislation.

As a general approach to law design, delegated legislation such as regulations should be used for detailed technical provisions or for setting thresholds that require periodic revisions. The primary law that creates the power to change the threshold in the ACL is clear and unambiguous in the scope of the power, and has been used in accordance with that provision.

I note that the Government has an ambitious legislative agenda, driven by our response to the Coronavirus pandemic. The Government is keenly focussed on prioritising Parliament's sitting time for Bills that have national significance. I also note that these regulations are subject to the disallowance process which accords them a proper amount of Parliamentary scrutiny.

The change to the monetary threshold has been contemplated for an extended period of time and has been the subject of public consultation on a number of occasions. Consultation on the policy underlying this change has taken place since 2016, starting with the *ACL Review Issues Paper*.

Similarly, comprehensive consultation occurred as part of the regulatory impact assessment process in 2018 and Commonwealth, State and Territory consumer affairs Ministers subsequently considered and agreed the change at the meeting of the Legislative and Governance Forum on Consumer Affairs on 26 October 2018.

In submissions, stakeholders have noted the positive impacts of the increased protections on small businesses. This is because it will restore ACL protections to a range of goods purchased by businesses, particularly goods such as farm equipment and machinery. Generally, businesses that buy these kinds of products would have to ordinarily rely on existing remedies which may be more complex, slow, costly and resource-consuming. Therefore, the increased ACL protection is likely to lead to increased small business confidence in purchasing decisions and assist in stimulating investment in the form of refurbished facilities and new equipment.

In addition, consumer groups and other stakeholders have been aware and supportive of the contemplated increase to $100,000 since 2017 when the ACL Final Report was released.

Whilst I accept that this instrument is the first such change to the threshold in a considerable period of time, given the amount of consultation as outlined above, the supportive feedback from consumers and the general approach that threshold-type changes be made by way of regulation, this change is appropriately made by subordinate legislation.

I trust this information will be of assistance to you.

Yours sincerely

The Hon Michael Sukkar MP