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

Ref: MS20-002269

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

20 OCT 2020

Dear Senator Fierravanti-Wells,

I am writing in response to your letter of 8 October 2020, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee). In your letter you have sought advice about the operation of the *ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98* (the Instrument).

The Instrument was made on 30 July 2020 and operates alongside the ASIC Regulatory Guide 271, *Internal dispute resolution* (RG 271). Under the *Corporations Act 2001* (Corporations Act) and the *National Consumer Credit Protection Act 2009* (Credit Act), financial firms are required to have internal dispute resolution (IDR) procedures that meet standards and requirements made or approved by ASIC.

The Instrument was made following a significant program of work undertaken by ASIC to review IDR standards and requirements. This program included consumer research, deep-dive onsite visits at 5 large banks and extensive industry and consumer consultation. ASIC understands that financial firms are currently making changes to their systems and procedures in order to comply with the new IDR standards and requirements set out in RG 271 that commence on 5 October 2021. ASIC advises that the current IDR Regulatory Guide (RG 165) has been in place for around 20 years.

Part 2 of the Instrument specifies the new enforceable IDR standards and requirements by reference to RG 271.

Part 3 of the Instrument modifies the Corporations Act and Credit Act in relation to two specific cases:

- the definition of small business in the Corporations Act for the purposes of IDR (the small business modification); and
- modification of the Corporations Act and the Credit Act to provide clarity on the face of the law that financial firms comply with the IDR standards and requirements (the clarification modification).

During consultation, ASIC was transparent to stakeholders about its intention to make both the small business and the compliance modifications.

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The intention of the small business modification is to ensure an effective transition between IDR and AFCA for Australian small businesses that have a complaint about a financial firm. ASIC notes that the definition of small business under the AFCA Rules was approved by the then Minister as part of the authorisation of the AFCA scheme in April 2018. It is worth noting that there is no corresponding modification to the Credit Act as that legislation does not cover business lending.

ASIC understands that in practice this will have little material impact on the scope of IDR offered by many financial firms, but it will provide small businesses with certainty about their rights. ASIC expects that financial firms will now ensure that their procedures are updated with this definition.

In relation to the clarification modification, the financial sector legislation imposes an obligation on financial firms to have an IDR procedure that complies with the standards and requirements made or approved by ASIC and which covers complaints made by retail clients in relation to the financial services provided or the credit activities engaged in by the firm or its representatives. The clarification modification is intended to clarify the law, and to remove any doubt, that financial firms must not only have IDR procedures that meet ASIC's standards and requirements, they must also comply with those procedures. As contraventions of the primary IDR obligations may give rise to civil penalty consequences or constitute an offence under the existing legislation, the same civil penalty consequences or offences will flow through to the new modified clarificatory obligations.

ASIC believes that it would not be desirable to amend the Instrument to specify that it expires 3 years after commencement. ASIC believes that selecting these parts of the Instrument to operate for a shorter duration will increase financial firm uncertainty about their ongoing obligations. This includes uncertainty about the durability of systems and training changes that these financial firms are making now. Instead, Part 3 of the Instrument reflects an appropriate and efficient application of ASIC's powers.

In addition to this, the Instrument was registered and commenced on 30 July 2020. However, ASIC has confirmed, that the new IDR standards and requirements in RG 271, as well as the modifications that accompany them, do not effectively commence until 5 October 2021 because the instrument only applies to complaints received by financial firms on or after that date. ASIC published both the Instrument and RG 271 in June 2020 in order to give industry an effective transition period of more than 15 months.

I trust this information will be of assistance to you.

Yours sincerely

Senator the Hon Jane Hume

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

PAUL FLETCHER MP

Federal Member for Bradfield
Minister for Communications,
Cyber Safety and the Arts

MS20-000671

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

Dear Senator Fierravanti-Wells

Thank you for your letter of 3 September 2020, on behalf of the Senate Standing Committee for Scrutiny of Delegated Legislation (the Committee), regarding the Australian Postal Corporation (Performance Standards) Amendment (2020 Measures No. 1) Regulations (the Amending Regulations).

In your letter, you note that the Committee remains concerned about the adequacy of consultation undertaken in relation to the Amending Regulations.

In my letter of 30 July, I advised the Committee of the consultation that had been undertaken at that time and the additional consultation the Morrison Government will carry out during its review of the Amending Regulations to determine whether they should continue to be in place until 30 June 2021.

Consistent with my commitment to the Committee, I have written to representatives of the Australia Post workforce, Licensed Post Office franchises, large and small businesses, and the print industry. I have asked these key stakeholders for their views on the impacts of the temporary changes, whether the changes should remain until 30 June 2021, and the impact should the relief end earlier than planned.

The Government will consider the views of the above stakeholders, as well as feedback Australia Post receives during its consultations with the community and businesses about the temporary changes, in determining whether the regulatory changes should continue to 30 June 2021.

I can also advise that on 25 August 2020, the Senate Environment and Communications Legislation Committee's Report on the *Future of Australia Post's servery delivery* recommended that the Senate oppose the disallowance of the Amending Regulations. Opposing the disallowance would reflect the intention of the Memorandum of Understanding (MoU) signed between Australia Post and the Communications, Electrical and Plumbing Union on 7 July 2020. The MoU contains a commitment from the Union to actively and constructively support the temporary

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changes set out in the Amending Regulations. This reflects that the Union, a major stakeholder to previously take issue with the Amending Regulations, no longer harbours concerns about the changes.

Moreover, the Committee noted that the majority of the more than 60 submissions received were supportive of the Amending Regulations. The Government will respond to that Committee's Report including the two separate minority reports later this year and I will provide a copy of the response to you.

I thank you and the Committee for raising this matter with me.

Yours sincerely

Paul Fletcher

) 10/ 2020

SENATOR THE HON RICHARD COLBECK
Minister for Aged Care and Senior Australians
Minister for Youth and Sport

Ref No: MS20-001201

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

28 OCT 2020

Dear Chair Concetta,

Thank you for your correspondence of 8 October 2020 regarding the Senate Standing Committee for the Scrutiny of Delegated Legislation (Committee) concerns with the *Continence Aids Payment Scheme 2020* (CAPS Instrument).

I have considered the Committee's request and agree to amend the CAPS Instrument to provide for internal merits review for the decisions in sections 21 and 22.

The Department of Health, in consultation with the Australian Government Solicitor considers the possibility of any request for reviews under section 21 and 22 of the CAPS Instrument to be of such low risk that it does not require independent merits review by the Administrative Appeals Tribunal (AAT). The eligibility for CAPS is very clear, all applications must be supported by a GP and no further assessment is made by the Department of Health and any eligibility questions arising from an applicant's concession card status are determined by the Department of Social Services before an application to the CAPS program can be made.

I would also like to advise the Committee that Services Australia, who administer the CAPS payments on behalf of the Department of Health, has confirmed that the Secretary to date has never been required to make a decision under sections 21 and 22 of the CAPS Instrument.

Finally, Section 14 and 15 of the *National Health Act 1953* limit the types of decisions under the CAPS Instrument that may be subject to AAT review, and that without an express power for the CAPS Instrument to provide for this, the instrument cannot otherwise confer power on the AAT to review decisions under the scheme.

If you wish to discuss this response to the Committee's questions then please contact Chris Carlile, Assistant Secretary, Hearing and Disability Interface Branch on (02) 6289 2727.

Yours sincerely

Richard Colbeck

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

MC20-031229

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21 OCT 2020

Dear ~~Senator~~ Chair

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) and the further information I recently provided to the committee on the consultation undertaken in respect of this instrument.

The repeal instrument brought forward the repeal of temporary measures introduced to reduce the minimum access period before employees may be permitted to vote for a variation to their enterprise agreements with the effect that the measure ceased to operate on 13 June 2020. In the absence of the repeal instrument the measure would have automatically sunset six months after commencement, on 17 October 2020.

I do not consider it necessary to amend the explanatory statement as the consultation undertaken in respect of the measure, including bringing forward the repeal, is already on the public record.

Thank you for raising this matter with me. I trust this information is of assistance.

Yours sincerely

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

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

REF: MS20-001035

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the
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Dear Senator Fierravanti-Wells

I refer to your letter dated 8 October 2020 seeking further information about the *Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2020*.

The Minister for Agriculture, Drought and Emergency Management, the Hon David Littleproud MP, who is responsible for the 'Coronavirus economic response – pandemic leave disaster payments' item in this instrument, has provided the attached response to the Committee's request for information. The explanatory statement to the instrument has also been amended to specify the amount of funding allocated to this program, and will be published on the Federal Register of Legislation shortly. I trust this advice will assist the Committee with its consideration of the instrument.

I have copied this letter to the Minister for Agriculture, Drought and Emergency Management.

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

Kind regards

Mathias Cormann
Minister for Finance

26 October 2020

Attachment

Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2020

Response provided by the Minister for Agriculture, Drought and Emergency Management

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) requests the minister's advice as to why it is considered necessary and appropriate to include a significant element of the government's policy response to COVID-19 in delegated legislation.

The Pandemic Leave Disaster Payment (the Payment) was required as a matter of urgency in response to the escalating public health emergency in Victoria. The Payment was introduced to encourage workers to comply with a direction to self-isolate or quarantine and prevent any financial hardship experienced by the individual in complying with that health directive. The Payment was to replace the Victorian Government's existing worker support payment.

The Australian Government needed to act quickly to transfer responsibility for the delivery of the Payment from the Victorian Government to Services Australia to prevent any further exacerbation of the crisis. On the day the instrument was made (6 August 2020), Victoria recorded 421 cases. In the days immediately preceding this (3-5 August), Victoria recorded a total of 1,535 cases. Once the transfer occurred, Services Australia used the agency's extensive service delivery capability to deliver the Payment immediately. This action helped to reduce the risk of the virus spreading in workplaces and the community more broadly.

Initially, the Payment was to be a measure restricted to the state of Victoria and for a limited period (operating for the period Victoria was in a state of disaster). As such, government spending was to be time-limited. The Payment bestowed a benefit and did not impact on an individual's personal rights and liberties.

To promote compliance by all affected workers with public health requirements, the Payment was made available to both Australian residents[1] and temporary visa holders with working rights (with state governments to reimburse the Australian Government for any payments made to temporary visa holders). Given the escalating health emergency in Victoria and the need to implement a rapid solution, as well as the absence of another readily available legislative mechanism for administering payments, providing legislative authority for making the Payment in delegated legislation was considered the most appropriate mechanism. In addition, Parliament was not sitting at the time the Payment was being considered, and therefore primary legislation was not at that time a viable option to deliver a rapid Australian Government response. In any event, it was considered that delegated legislation was more appropriate, given the inherent nature of the program and the need for flexible response capacity. The time limited and ad hoc (rather than recurrent) and non-regulatory nature of the government expenditure, which has a limited purpose and eligibility criteria which are capable of being clearly described, were additional factors which supported the establishment of legislative authority for the Payment in delegated legislation.

As set out in the explanatory statement for the instrument, the model developed for Victoria provided the framework for Commonwealth assistance to other jurisdictions as

[1] As defined in the *Social Security Act 1991*

the need arose. Once the grant mechanism was in place for Victoria, it was considered appropriate to extend the Payment to other states to incentivise compliance with health directions to self-isolate and help prevent further outbreaks.

The committee requests the minister's advice as to:

- *why it is considered necessary and appropriate to set out significant elements of the grants program, including the eligibility criteria for pandemic payments, the amount of grants provided and the duration of the grants program, in grant opportunity guidelines, rather than in a legislative instrument;*
- *why a cap on the amount that may be expended under the grants program has not been specified; and*
- *whether the explanatory statement to the instrument could be amended to specify how much is forecast to be expended under the grants program.*

The *Commonwealth Grants Rules and Guidelines* (CGRGs) is a legislative instrument made under section 105C(1) of the *Public Governance, Performance and Accountability Act 2013*, which provides the policy framework for administering grants programs. A mandatory requirement under the CGRGs is that officials must develop grant opportunity guidelines for all new grant opportunities and revised guidelines where significant changes have been made to a grant opportunity.

The CGRGs provide that officials should consider that a single reference source for policy guidance and other documentation (for example, administrative procedures, eligibility and assessment criteria, appraisal processes, monitoring requirements, evaluation strategies and standard forms) helps to ensure consistent and efficient grants administration. Consistent with this, it is appropriate that grant opportunity guidelines include the amounts of grants available and the duration of the grants program, as well as inform potential grant recipients of the terms and conditions they will need to meet during the life of the grant, such as financial and performance reporting.

The CGRGs also mandate that grant opportunity guidelines must be made publicly available on GrantConnect, to aid accountability and public transparency.

Apart from this, providing elements of the grants program – such as the eligibility criteria – in grant opportunity guidelines rather than in a legislative instrument also addressed the need for a sufficiently flexible response to ensure that payments could be extended to other states and territories quickly to promote compliance with public health directives.

Funding of $34.3 million in 2020-21 for one-off payments of $1,500 to eligible workers in states that have agreed to partner with the Commonwealth under the Pandemic Leave Disaster Payment arrangements was included in the 2020-21 Budget under the measure 'COVID-19 Response Package – Pandemic Leave Disaster Payment'. Details are set out in *Budget 2020-21, Budget Measures, Budget Paper No. 2 2020-21* at page 107.

There is no effective cap on the expenditure as payments are demand driven. However, any further funding is subject to Government decision (and Parliamentary scrutiny through the budget process).

The explanatory statement to the instrument will be amended to reflect funding information for this grants program.

The committee requests the minister's more detailed advice as to the rationale for not providing for merits review of discretionary decisions made under the instrument, including what other characteristics of the decisions relating to pandemic payments justify the exclusion of independent merits review, by reference to the established grounds set out in the Administrative Review Council's (ARC) guidance document, What decisions should be subject to merit review?.

Chapter 3 of the ARC guidance document outlines decisions that are considered to be unsuitable for merits review, which include decisions that may be described as automatic or mandatory. That is, decisions made where there is a statutory obligation to act in a certain way upon the occurrence of a specified set of circumstances (paragraph 3.8 of the ARC guidance document).

The qualification criteria for the Payment are set out in the grant opportunity guidelines which under the mandatory requirements of the CGRGs must be made publicly available on GrantConnect (section 5, Public Reporting, paragraph 5.2). The qualification criteria can be classified as mandatory in nature as the criteria are based on objective circumstances such as the state where a person lives and works, whether they have or have not received certain disqualifying payments or are subject to a direction to self-isolate or quarantine. These circumstances are largely factual in nature and do not invite subjective deliberation.

Decisions to reject a person's claim for the Payment are subject to review processes within Services Australia at a customer's request. This review provides an effective means of addressing any mistakes made in the decision making process. I consider that the review process undertaken by Services Australia, and outlined in the grant opportunity guidelines, provides a robust and accountable mechanism for review of a customer's claim.

The Payment is a one-off set amount of $1,500. It is not subject to pro-rata conditions and there is no discretion exercisable concerning the amount of payment.

The committee requests the minister's advice as to whether persons likely to be affected by the instrument, such as employers, employees and relevant peak organisations, were consulted in relation to the instrument, and if not, why not.

The Payment mirrors the Victorian Government's worker support payment (which preceded and was replaced by the Pandemic Leave Disaster Payment), with eligibility criteria developed based on existing cases and feedback from stakeholders. Services Australia also receives feedback from potential claimants.

In light of the escalating health crisis in Victoria, there was a need to implement a sufficiently flexible response to ensure that the Payment could be delivered quickly in order to promote compliance with public health directives to reduce the spread of COVID-19.

Furthermore, the Payment (being a benefit paid to individuals) imposed no regulatory burden on businesses, therefore broader consultation was not required in this instance.

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS20-002313

Senator the Hon Concetta Fierravanti-Wells
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Via email: sdlc.sen@aph.gov.au

Dear Senator Fierravanti-Wells

Thank you for the opportunity to provide an update to the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) regarding the *Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020* [F2020L00435] (the Regulations).

Since our last correspondence, regulations have been made which reinstate the monetary thresholds where a foreign person is renewing a lease over non-sensitive commercial property. This change was in response to feedback from stakeholders.

Between 18 September 2020 and 2 October 2020 draft amendments to the *Foreign Acquisitions and Takeovers Regulation 2015* were also released for consultation. Amongst other things, the amendments propose reinstating the monetary thresholds from 1 January 2021 indexed at the rates the thresholds would have otherwise been had the amendments in response to the Coronavirus not been made. These amendments are part of the broader amendments to the foreign investment framework announced on 5 June 2020.

A final decision as to whether the monetary thresholds will be reinstated from 1 January 2021 will depend on the impact of the Coronavirus on the economy and whether there is an ongoing risk that foreign investment in Australia could occur in ways that would be contrary to the national interest.

Yours sincerely

THE HON JOSH FRYDENBERG MP

30 / 10 / 2020

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The Hon Nola Marino MP

Assistant Minister for Regional Development and Territories
Federal Member for Forrest

Ref: MS20-001687

Senator the Hon Concetta Fierravanti-Wells
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22 OCT 2020

Dear Senator Bonnie

Thank you for your letter of 8 October 2020 regarding the *Norfolk Island Continued Laws Amendment (Employment) Ordinance 2020* (the Ordinance) [F2020L00870].

Delegation of administrative powers and functions

I advise I have approved an amendment to the explanatory statement to the Ordinance. The Employment Liaison Officer (ELO) must be satisfied a person possesses qualifications and expertise before the ELO delegates a power or function under section 47H to that person. This amendment specifies these qualifications and expertise. The revised explanatory statement will be available on the Federal Register of Legislation within the next 2 weeks. I have enclosed an extract of the revised statement, with the additional content highlighted, for the Committee's reference.

Immunity from civil liability

In my response of 11 September 2020, I explained why extending civil liability immunity to persons delegated a power or function, by the ELO, is necessary. This ensures people making decisions about claims for workers' compensation are able to do their jobs effectively. I offer the following explanation in relation to the Commonwealth as an entity for the purposes of the Norfolk Island Workers' Compensation Scheme (the Scheme).

It is necessary and appropriate to extend immunity from civil liability to the Commonwealth, as to not do so may have an inhibiting effect on its agents who make decisions, on its behalf, about claims for workers' compensation. Under the *Employment Act 1988* (NI), as amended by the Ordinance, the Commonwealth remains ultimately responsible for the administration of the Scheme and any liabilities that are incurred under this Scheme.

If civil immunity was not extended to the Commonwealth with respect to acts done in good faith by its agents under this Act there remains the risk that its agents, who hold the genuine belief they are acting correctly and who are acting in good faith, are not able to do their jobs without fear of incurring liability for the Commonwealth for their actions. Not extending this immunity to the Commonwealth may diminish the ability of the Australian Government to obtain the services necessary to discharge key functions, ultimately disadvantaging the community.

In the context of the Scheme, as explained in my previous response, the ELO and their delegates, as agents of the Commonwealth, 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, as agents of the Commonwealth, must act on the assumption the information provided to them is a true and correct representation of the circumstances surrounding the injury. With this comes the risk that if vital information is omitted or circumstances misrepresented by any party 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, Commonwealth immunity also provides them with assurance they can exercise their powers and functions with confidence that the Commonwealth 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, as agents of the Commonwealth, 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. These review arrangements are preferable to these decisions being subject to potential collateral challenge in costly civil litigation in the courts.

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

Yours sincerely

Nola Marino

Enc

EXPLANATORY STATEMENT

Issued by the authority of the Assistant Minister for Regional Development and Territories Parliamentary Secretary to the Deputy Prime Minister and Minister for Infrastructure, Transport and Regional Development.

Norfolk Island Act 1979

Norfolk Island Continued Laws Amendment (Employment) Ordinance 2020

Authority

The *Norfolk Island Act 1979* (Norfolk Island Act) provides for the government of the Territory of Norfolk Island (Norfolk Island). Section 19A of the Norfolk Island Act provides that the Governor-General may make Ordinances for the peace, order and good government of Norfolk Island.

The *Norfolk Island Continued Laws Amendment (Employment) Ordinance 2020* (the Ordinance) is made under section 19A of the Norfolk Island Act.

The Ordinance amends the *Norfolk Island Continued Laws Ordinance 2015* (the Continued Laws Ordinance) with the effect of amending the *Employment Act 1988* (NI) (the Employment Act) and the *Employment Regulations 1991* (NI) (the Employment Regulations).

Under section 17 of the Norfolk Island Act, Norfolk Island laws continued in force under either section 16 or 16A of the Norfolk Island Act may be amended or repealed by an Ordinance made under section 19A.

Purpose and operation

The primary purpose of the Ordinance is to amend the Employment Act to allow for a new service provider to administer the Norfolk Island Workers' Compensation Scheme (the Scheme) established under the Employment Act.

In 2018, the Norfolk Island Regional Council (NIRC) advised the Department of Infrastructure, Transport, Regional Development and Communications (the Department) it was not in a position to continue administering the Scheme. As the largest employer on Norfolk Island, there is potential for conflicts of interest to arise if NIRC continues to deliver this service.

The Department has since engaged a nationally recognised workers' compensation service provider with experience managing workers' compensation schemes across multiple jurisdictions to take over administration of the Scheme. The Ordinance makes the following amendments to the Employment Act and repeals the Employment Regulations to enable the new service provider to start delivering this service.

Employment Liaison Officer

Under the Employment Act, the Employment Liaison Officer (ELO) is responsible for the management and control of the Scheme. To allow a new service provider to administer the Scheme, the Ordinance amends provisions relating to the ELO's appointment, powers and functions.

Prior to amendment, the ELO was appointed by the Chief Executive Officer of the NIRC and is an employee of the NIRC. The amendments instead allow the Commonwealth Minister with responsibility for Norfolk Island to appoint an SES employee in the Department as the ELO.

Revised delegation provisions provide for the ELO to delegate functions or powers relevant to the day-to-day administration of the Scheme to relevant staff of the new service provider if satisfied the person has appropriate qualifications or expertise. An ELO could be satisfied in this regard if the relevant person has:

- 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 ELO who, prior to the amendments, was an employee of the NIRC, was also responsible for the management and control of inspectors and had some functions under Part 4 of the Employment Act relating to safe working practices. To ensure these powers and functions remain with the NIRC (which employs inspectors and is responsible for work health and safety regulation) these powers and functions have been transferred to the Chief Executive Officer.

Compensation

The Ordinance also amends the Employment Act to allow for easier interpretation of provisions relating to eligibility for compensation and to improve the way claims for compensation are assessed.

Under the Employment Act, employers are required to have an insurance policy for the full amount of their liability to pay compensation unless they are members of the public scheme. Amendments to existing provisions relating to this requirement make this requirement clearer and update the offence provision to comply with modern drafting standards. The substance of the offence and the penalties imposed have not changed.

While there are normally limitations on the use of penalties in delegated legislation, the special legislative framework applying to Norfolk Island permits these provisions as they relate to an existing penalty relevant to a state-level matter. More information about this can be found in the section titled 'Special legislative framework' below.

Amendments to the Employment Act also allow for the powers and functions of the Medical Superintendent to be performed by any registered medical or health practitioner or by the ELO. This gives employees greater flexibility when seeking medical treatment for a work-related accident and makes the assessment of claims for compensation simpler.

Under rewritten provisions relating to compensation for medical treatment, the ELO will be responsible for approving any costs relating to medical treatment payable as compensation.

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

REF: MC20-002897

Senator the Hon Concetta Fierravanti-Wells
Chair
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Dear Senator

I refer to your letter of 8 October 2020 seeking further information on the *Public Governance Performance and Accountability Amendment (2020 Measures No. 3) Rules 2020* [F2020L00782] (Amendment Rule).

Your letter requested additional detailed advice as to:

1. why the prescription of certain consultants and independent contractors as officials cannot be set out on the face of primary legislation, noting that officials can exercise significant delegated statutory powers on behalf of the Commonwealth, including the allocation of public money;
2. whether persons who are prescribed as officials of non-corporate Commonwealth entities are subject to independent accountability mechanisms, including obligations under the *Freedom of Information Act 1982* and *Privacy Act 1988* and oversight by the Commonwealth Ombudsman and Auditor-General; and
3. whether decisions made by those officials are subject to independent merits review.

The technical appendix to this letter provides my response to your questions, including examples of a current prescribing practice and an arrangement that would benefit from 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.

Kind regards

Mathias Cormann
Minister for Finance

22 October 2020

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

SUMMARY

The recent *Public Governance, Performance and Accountability Amendment (2020 Measures No. 3) Rules 2020* is operational in nature. The concept of an official as being a person who is in, or forms part of, the entity, is a significant element of the Commonwealth resource management framework and this definition is included in primary legislation. The ability to prescribe certain consultants and contractors when they are forming part of the entity is subsidiary to the concept of an official and can be addressed in delegated legislation. This follows the intended design of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) as setting out the fundamental elements of a coherent resource management framework for all Commonwealth entities, underpinned by detailed rules issued by the Finance Minister.

Examples are provided at the end of this discussion to illustrate why contracted service providers are currently prescribed as officials where the circumstances of their engagement make it appropriate that they should be prescribed. The first example covers the scenario under the current prescribed officials Rule where insurance services are provided to the Commonwealth through Comcover. The second example describes circumstances in which, if allowed to under the amended rule, the Department of Education, Skills and Employment has proposed to prescribe contractors as officials to exercise powers under the *Financial Framework (Supplementary Powers) Act 1997* (FF (SP) Act) to assist jobseekers.

Consultants and contractors who are prescribed as officials of non-corporate Commonwealth entities are subject to the same accountability measures that apply to all Commonwealth officials.

QUESTION 1: SIGNIFICANT MATTERS IN DELEGATED LEGISLATION

The Committee asked: *Why the prescription of certain consultants and independent contractors as officials cannot be set out on the face of primary legislation, noting that officials can exercise significant delegated statutory powers on behalf of the Commonwealth, including the allocation of public money.*

The PGPA Act sets out the fundamental elements of a coherent resource management framework for all Commonwealth entities. This principles-based legislation is underpinned by detailed rules issued by the Finance Minister to clarify the requirements of, or give detail to, the primary legislation. The rules are disallowable instruments; either the House of Representatives or the Senate may disallow them.

The PGPA Act, and the FF (SP) Act, include the power for accountable authorities of non-corporate Commonwealth entities to enter arrangements and commit relevant money. The Acts also include the power of delegation so that accountable authorities can empower officials to undertake this function. Accountable authorities are responsible for maintaining appropriate systems of internal control that regulate how officials undertake such functions (section 16 of the PGPA Act). These include directions attached to the delegations (section

110 of the PGPA Act) and instructions issued to officials on any matter relating to finance law (section 20A of the PGPA Act). Through these internal control mechanisms, it is open to the accountable authority to limit the value, time period and nature of an arrangement that a particular official or group of officials can be delegated to enter into on behalf of the Commonwealth. These limitations necessarily vary by entity, according to their activities.

Section 13 of the PGPA Act defines who is an official of a Commonwealth entity. Consistent with the principles-based nature of the PGPA Act, section 13(2) outlines in broad terms that an official of a Commonwealth entity (other than a listed entity[1]) is a person who is in, or forms part of, the entity. Section 13(3) goes on to clarify that:

- the accountable authority, or members of the accountable authority, are officials of the entity; and
- an officer, employee or member of the entity, is an official of the entity.

Section 13(3) also recognises that this is not exhaustive and that other persons may be officials of the entity if prescribed as such by an Act or the rules. This is consistent with the approach to defining officials for listed entities (section 13(5) of the PGPA Act) which describes officials as persons prescribed by an Act or the rules to be an official of the entity. For example, Schedule 1 of the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule) lists consultants for entities such as the Australian National Preventative Health Agency, the Australian Taxation Office, and the Fair Work Ombudsman and Registered Organisations Commission Entity as officials of those entities.

The PGPA Rule is important in providing a necessary mechanism to apply the principles of the PGPA Act. It would be impractical and inconsistent with the principles-based nature of the PGPA Act for it to detail in all cases who is to be considered to be an official for all 187 Commonwealth entities and the range of contracted arrangements that they may enter into. For this reason the legislation envisages other categories of persons who may be defined as officials, such as those for listed entities, being defined in the rules.

This approach to prescribing officials for entities recognises that there may be specific circumstances where persons who are consultants or contractors are engaged in a way that is consistent with the definition of an official, that is, they are 'in, or form part of, the entity' (section 13(2)) and are required to exercise PGPA Act (or in this case FF (SP) Act) powers in the course of their duties.

As persons prescribed as officials, they are subject to the controls set by the accountable authority, the same way other officials are, including directions on the use of the delegated power, instructions issued by the accountable authority under section 20A of the PGPA Act, and the duties on accountable authorities under sections 25 to 29 of the PGPA Act.

The design of the PGPA Act and Rule is consistent with the Legislation Handbook issued by the Department of the Prime Minister and Cabinet and the Committee's Scrutiny Principle (j). The broad concept of an official, 'being in, or forming part of, the entity' is significant, and therefore contained in the PGPA Act, as they undertake an important role in the stewardship of public resources and carry the trust of the Australian taxpayer. However, since 2015 it has been recognised in the PGPA Rule that, in limited circumstances, a consultant or contractors'

[1] See Attachment A to this appendix for the definition of a listed entity.

role may make them more akin to an official and require them to exercise powers under the PGPA Act. Therefore they may be prescribed as an official when the services provided require the exercise of a particular power, the performance of a particular function or the discharge of a particular duty conferred by the PGPA Act or PGPA Rule, and they are capable of being identified by name by the accountable authority of the entity. This current amendment would now include similar situations under the FF (SP) Act. This matter is subsidiary to the main definition of an 'official' and correctly resides in the PGPA Rule. It is not intended to apply to all consultants and contractors, but only in those limited circumstances and for the duration in which where their role is more like that of an official and they are required to exercise delegated powers.

As the accountable authority is responsible for the prescribed officials' use of delegated powers, through directions and instructions, a consultant or contractor is not exercising powers outside the framework set for officials – they are subject to the same requirements as officials.

Various examples from across Government demonstrate how these processes are used for exercising delegated powers under the PGPA Act and Rule, and how they can be used through the extension in the proposed amendment to the PGPA Rule to include the exercise of delegated powers under the FF (SP) Act.

To illustrate the way this process is currently used, Finance is responsible for providing insurance services to the Commonwealth, through Comcover. Fund member services are delivered through a combination of in-house staff and outsourced service providers. Due to the high volume of low value claims requiring assessment and settlement, staff of the private sector claims management provider are required, in limited circumstances, to enter into arrangements on behalf of the Commonwealth, using PGPA powers to do so. To enable this, staff of the provider are prescribed as officials of Finance and are required to comply with the requirements and specific limitations of the Finance Secretary's delegation and Accountable Authority Instructions in exercising their powers.

An example of how this process can be applied under the FF (SP) Act is in the Department of Education, Skills and Employment, which operates a Contact Centre dealing with calls and inquiries to assist job seekers. The FF (SP) Act provides legislative authority for this program. The staff in this contact centre are required to exercise powers under the FF (SP) Act in discharging these functions. Some of the staff in the contact centre are contractors and are engaged because of their particular expertise in relation to employment and national labour markets. This expertise is not generally found among APS officials. The proposed amendment to the PGPA Rule would permit the accountable authority of the Department to delegate FF (SP) Act powers, with controls, to selected contractors where required, to permit more efficient management of this process.

Arrangements for consulting and contracted services across Government vary and a homogenous approach to delegation using primary legislation could introduce risk to operational flexibility (by being too prescriptive and un-timely) or to Commonwealth resources (by being too generic).

Finance has issued guidance on the process and requirements of prescribing officials – this is available on the Finance website (Resource Management Guide 212, *Prescribing officials for non-corporate Commonwealth entities*).

QUESTION 2: INDEPENDENT ACCOUNTABILITY MECHANISMS FOR PRESCRIBED OFFICIALS

The Committee asked: *Whether persons who are prescribed as officials of non-corporate Commonwealth entities are subject to independent accountability mechanisms, including obligations under the Freedom of Information Act 1982 and Privacy Act 1988 and oversight by the Commonwealth Ombudsman and Auditor-General.*

Persons who are prescribed as officials of non-corporate Commonwealth entities are subject to the same accountability measures that apply to all Commonwealth officials. The *Privacy Act 1988* (Privacy Act) and the *Freedom of Information Act 1982* (FOI Act) contain specific provisions that capture the activities of contracted individuals to ensure they remain transparent and accountable. Other mechanisms apply to all officials in the Government regardless of whether they are a consultant or contractor, including employees of Commonwealth entities.

PRIVACY ACT

Section 95B of the Privacy Act requires a 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 standard contracts non-corporate Commonwealth entities use to engage consultants and contractors apply this basic requirement.

FOI ACT

Section 6C of the FOI Act requires a Department to take contractual measures to ensure that 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 person engaged as a consultant or contractor, who is then prescribed as an official under the PGPA Act, will also be a contracted service provider of the entity for which they are exercising powers. The existing contracts non-corporate Commonwealth entities have with consultants and contractors will be consistent with this requirement.

OTHER MECHANISMS

In addition to the Privacy Act and the FOI Act, there are other independent accountability mechanisms which apply to prescribed officials. As outlined above, prescribed officials are subject to the duties of officials in the PGPA Act, which applies a code of conduct to their behaviour. Breaches of this code of conduct are dealt with by individual accountable authorities in a manner that is consistent with their internal practices to regulate the conduct of officials.

In addition to mechanisms imposed by the accountable authority themselves, the Commonwealth Ombudsman and the Auditor-General have oversight of the actions of prescribed officials. Both the Commonwealth Ombudsman and the Auditor-General have broad powers of review that will apply to the actions of prescribed officials.

The Commonwealth Ombudsman has scope to investigate the administrative actions of Australian Government departments and Commonwealth service providers following complaints or on their own motion. Any member of the public can bring a complaint to the Commonwealth Ombudsman, provided the complaint has been raised with the agency first. This process is not hindered because decisions were made by a consultant or contractor as a prescribed official, and actions taken by a prescribed official are not listed as one of the matters the Ombudsman is not authorised to investigate under section 5(2) of the *Ombudsman Act 1976*.

The Auditor-General has broad scope to conduct a wide range of audits of Commonwealth entities and of individuals. Section 8(4) of the *Auditor-General Act 1997* states that the Auditor-General has complete discretion over their actions and is not subject to direction from anyone in relation to whether an audit is conducted. This means the Auditor-General is not prevented from auditing a prescribed official and ensures those consultants and contractors can be held accountable for their actions while representing the Commonwealth.

QUESTION 3: MERITS REVIEW

The Committee asked: *Whether decisions made by those officials are subject to independent merits review.*

Independent merits review of decisions made by any official is not provided for by the PGPA Act, PGPA Rule or the FF (SP) Act. However, judicial review of decisions under these acts could be sought in accordance with general administrative law principles.

Attachment A

PGPA Act – section 8 The Dictionary

listed entity means:

(a) any body (except a body corporate), person, group of persons or organisation (whether or not part of a Department of State); or

(b) any combination of bodies (except bodies corporate), persons, groups of persons or organisations (whether or not part of a Department of State);

that is prescribed by an Act or the rules to be a listed entity.

Privacy Act – section 95B Requirements for Commonwealth contracts

(1) This section requires an agency 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 agency.

(2) The agency must ensure that the Commonwealth contract does not authorise a contracted service provider for the contract to do or engage in such an act or practice.

(3) The agency must also ensure that the Commonwealth contract contains provisions to ensure that such an act or practice is not authorised by a subcontract.

(4) For the purposes of subsection (3), a ***subcontract*** is a contract under which a contracted service provider for the Commonwealth contract is engaged to provide services to:

(a) another contracted service provider for the Commonwealth contract; or

(b) any agency;

for the purposes (whether direct or indirect) of the Commonwealth contract.

(5) This section applies whether the agency is entering into the Commonwealth contract on behalf of the Commonwealth or in the agency's own right.

FOI Act – section 6C Requirements for Commonwealth contracts

(1) This section applies to an agency if a service is, or is to be, provided under a Commonwealth contract in connection with the performance of the functions or the exercise of the powers of the agency.

(2) The agency must take contractual measures to ensure that the agency receives a document if:

(a) the document is created by, or is in the possession of:

(i) a contracted service provider for the Commonwealth contract; or

(ii) a subcontractor for the Commonwealth contract; and

(b) the document relates to the performance of the Commonwealth contract (and not to the entry into that contract); and

(c) the agency receives a request for access to the document.

Ombudsman Act 1976 – section 5(2) Functions of Ombudsman

(2) The Ombudsman is not authorized to investigate:

(a) action taken by a Minister; or

(aa) action that constitutes proceedings in Parliament for the purposes of section 16 of the *Parliamentary Privileges Act 1987*; or

(b) action taken by a Justice or Judge of a court created by the Parliament; or

(ba) action by the chief executive officer of a court or by a person who, for the purposes of this Act, is to be taken to be a member of the staff of the chief executive officer of a court:

(i) when exercising a power of the court; or

(ii) when performing a function, or exercising a power, of a judicial nature; or

(c) action taken by:

(i) a magistrate or coroner for the Australian Capital Territory, Norfolk Island, the Territory of Christmas Island or the Territory of Cocos (Keeling) Islands; or

(ii) a person who holds office as a magistrate in a State or the Northern Territory in the performance of the functions of a magistrate conferred on him or her by or under an Act; or

(d) action taken by any body or person with respect to persons employed in the Australian Public Service or the service of a prescribed authority, being action taken in relation to that employment, including action taken with respect to the promotion, termination of appointment or discipline of a person so employed or the payment of remuneration to such a person; or

(g) action taken by a Department or by a prescribed authority with respect to the appointment of a person to an office or position established by or under an enactment, not being an office or position in the Australian Public Service or an office in the service of a prescribed authority.

Auditor-General Act 1997 – Section 8(4) Independence of the Auditor-General

(4) Subject to this Act and to other laws of the Commonwealth, the Auditor-General has complete discretion in the performance or exercise of his or her functions or powers. In particular, the Auditor-General is not subject to direction from anyone in relation to:

(a) whether or not a particular audit is to be conducted; or

(b) the way in which a particular audit is to be conducted; or

(c) the priority to be given to any particular matter.

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

Ref No: MC20-040141

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

27 OCT 2020

Dear Chair Concetta

I refer to your letter of 8 October 2020 concerning the Therapeutic Goods Legislation Amendment (2020 Measures No.1) Regulations 2020.

You have sought advice as to why it is necessary and appropriate to use delegated rather than primary legislation to specify the periods of time within which a sponsor of a medical device must give information to the Secretary about problems with their device, for the purposes of the criminal offence and civil penalty provision in sections 41MP and 41MPA of the *Therapeutic Goods Act 1989* (Act), rather than specifying these in the Act.

The principal reason that these periods are set out in regulations, rather than the Act, is to ensure flexibility and the ability to respond to changed circumstances in an agile fashion, e.g. if a particular safety concern were to arise.

Regulation 5.7 of the Therapeutic Goods (Medical Devices) Regulations 2002 sets out a number of different periods for the purposes of sections 41MP and 41MPA, depending on the seriousness of the information - e.g. within 48 hours after the person becomes aware of information relating to an event that represents a serious threat to public health, and within 30 days for an event that might lead to death or a serious deterioration of a person's health if it were to happen again.

Setting these periods out in regulations ensures that any changes to these, or any new such circumstances, may be made without delay.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

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