THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS20-002561

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

Via email: sdlc.sen@aph.gov.au

Dear Senator Fierravanti-Wells

Thank you for your letter dated 12 November 2020, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee), requesting further advice in relation to:

- *ASIC Corporations (Amendment) Instruments 2020/721* [F2020L01064] (the Amendment Instrument)
- *ASIC Corporations (IPO Communications) Instrument 2020/722* [F2020L01066] (the IPO Instrument), (together, the Instruments).

The Committee has requested advice in relation to exemptions from primary legislation, modification of primary legislation and parliamentary oversight. Specifically, the Committee has requested advice as to whether the Instruments could be amended to specify that the Instruments cease to operate three years after they commence. I understand that the Committee agreed to provide an extension to 2 December 2020 to receive a reply on this matter.

The purpose of the Instruments is to reduce the costs for issuers undertaking an initial public offer (IPO) of securities. The relief provided under the instruments removes the need for issuers to seek the following types of relief from the *Corporations Act 2001* (the Act):

- relief to disregard the relevant interests of the issuer, underwriter or lead manager for the purposes of the takeover provisions in Chapter 6 of the Act where those relevant interests arise because of voluntary escrow arrangements with security holders (voluntary escrow relief); and
- relief from the advertising restrictions in the Act to enable issuers to communicate certain limited information about a planned IPO to their security holders, and current and former employees, before the disclosure document is lodged with ASIC (pre-prospectus communications relief).

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7340 | Facsimile: 61 2 6273 3420

The relief in the Instruments has been given by ASIC on a case by case basis routinely since 2013. It is not expected that any developments in the next three years would cause the relief provided under the Instruments to become redundant.

That said, the Government shares the Committee's concerns that there be sufficient Parliamentary oversight. We will continue to engage with ASIC to stress that the period of operation of Instruments made by them should be consistent not only with the policy intent of the underlying primary legislation and the need to minimise any regulatory burden imposed on individuals or entities, but also importantly with the need for Parliamentary oversight of instruments that modify the operation of the primary legislation.

We will engage with ASIC as they monitor the operation of the Instruments and ensure that they take steps to amend the Instruments in the unlikely event they become unfit for purpose.

I trust this information will be of assistance to the Committee.

Yours sincerely

THE HON JOSH FRYDENBERG

2 / 12 / 2020

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS20-002561

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

Via email: sdlc.sen@aph.gov.au

Dear Senator Fierravanti-Wells

Thank you for your letter dated 12 November 2020, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee), requesting further advice in relation to *ASIC Corporations (Hardship Withdrawals Relief) Instrument 2020/778* [F2020L01069] (the Instrument). I understand that the Committee Secretariat agreed to provide an extension to 2 December 2020 to reply.

The Committee requested advice in relation to exemptions from primary legislation and parliamentary oversight. Specifically, the Committee has requested advice as to whether section 8 of the Instrument could be amended to specify that sections 5, 6 and 7 of the Instrument cease to apply three years after the date the Instrument commences.

The Instrument provides conditional class relief to responsible entities of frozen registered managed investment schemes (the Schemes) from certain provisions of the *Corporations Act 2001*. The Instrument is intended to respond to the possible effects of the COVID-19 pandemic on managed investment funds, and the resulting hardship on investors who are unable to withdraw from frozen funds. The impact of a financial crisis on managed funds may persist beyond a three-year term.

That said, the Government shares the Committee's concerns that there be sufficient Parliamentary oversight. We will continue to engage with ASIC to stress that the period of operation of Instruments made by them should be consistent not only with the policy intent of the underlying primary legislation and the need to minimise any regulatory burden imposed on individuals or entities, but also importantly with the need for Parliamentary oversight of instruments that modify the operation of the primary legislation.

We will engage with ASIC as they monitor the number of Schemes which have become frozen and the number of responsible entities which intend to rely, or do rely, on the relief under the Instrument to ensure they continue to assess the appropriateness of the relief provided by the Instrument.

I trust this information will be of assistance to the Committee.

Yours sincerely

THE HON JOSH FRYDENBERG

2 / 12 / 2020

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS20-002561

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

Via email: sdlc.sen@aph.gov.au

Dear Senator Fierravanti-Wells

Thank you for your letter dated 12 November 2020, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee), requesting further advice in relation to *ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787* [F2020L01045] (the Instrument). I understand that the Committee Secretariat agreed to provide an extension to 2 December 2020 to receive a reply on this matter.

The Committee requested advice in relation to exemptions from primary legislation and parliamentary oversight. Specifically, the Committee has requested advice as to whether the Instrument could be amended to specify that the Instrument ceases three years after it commences.

In the case of the Instrument, ASIC is seeking to provide regulatory relief to support the transition to the new regulatory regime for litigation funding schemes applicable from 22 August 2020. That said, the relief itself is not transitional, or interim, in nature. The matters addressed by the Instrument will have ongoing application and relevance to litigation funding schemes.

That said, the Government shares the Committee's concerns that there be sufficient Parliamentary oversight. We will continue to engage with ASIC to stress that the period of operation of Instruments made by them should be consistent not only with the policy intent of the underlying primary legislation and the need to minimise any regulatory burden imposed on individuals or entities, but also importantly with the need for Parliamentary oversight of instruments that modify the operation of the primary legislation.

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Telephone: 61 2 6277 7340 | Facsimile: 61 2 6273 3420

We will engage with ASIC as they monitor the appropriateness of the relief provided by way of the Instrument.

I trust this information will be of assistance to the Committee.

Yours sincerely

THE HON JOSH FRYDENBERG

2 / 12 / 2020

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS20-002561

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

Via email: sdlc.sen@aph.gov.au

Dear Senator Fierravanti-Wells

Thank you for your letter dated 12 November 2020, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee), requesting further advice in relation to *ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98* [F2020L00962] (the Instrument). I understand that the Committee agreed to provide an extension to 2 December 2020 to receive a reply on this matter.

The Committee has requested further advice in relation to the modification of primary legislation and parliamentary oversight. Specifically, the Committee has requested advice as to:

- whether it would be appropriate to include the modifications, which are made in Part 3 of the Instrument, in primary legislation rather than delegated legislation; and
- if the modifications are not able to be set out in the primary legislation, whether the Instrument could be amended to specify that Part 3 of the Instrument ceases to operate 5 years after its commencement.

Part 3 of the Instrument is intended to assist in providing certainty about the durability of systems, and procedural and training changes that firms are currently making to comply with the new internal dispute resolution standards and requirements which take effect from 5 October 2021.

That said, the Government shares the Committee's concerns that there be sufficient Parliamentary oversight. We will continue to engage with ASIC to stress that the period of operation of Instruments made by them should be consistent not only with the policy intent of the underlying primary legislation and the need to minimise any regulatory burden imposed on individuals or entities, but also importantly with the need for Parliamentary oversight of instruments that modify the operation of the primary legislation.

We will engage with ASIC as they monitor the operation of the Instrument and ensure that they take steps to amend the Instrument in the unlikely event it becomes unfit for purpose.

I trust this information will be of assistance to the Committee.

Yours sincerely

THE HON JOSH FRYDENBERG

2 / 12 / 2020

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

PAUL FLETCHER MP

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

MS20-000855

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

Dear Chair

Thank you for your letter of 12 November 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 2020.

The Committee has requested a further update on the progress of consultation, including any issues raised during the consultation, and any outcomes of action taken as a result of the consultation.

In my letters to you of 27 June, 30 July and 3 October 2020, I indicated that the Government would review the effect of the temporary arrangements before the end of the year and that this review will be informed by consultation with key stakeholders. The review will determine whether the temporary arrangements continue until 30 June 2021.

As advised in my letter of 3 October, I wrote to 33 stakeholders seeking their views on the temporary regulatory relief, including representatives of Australia Post's workforce, Licenced Post Office franchisees, large and small businesses and the print industry. I have received 18 representations as part of this consultation, with a range of views put forward. Australia Post has also been consulting consumers on the temporary changes, and will provide the results of its surveys to Government.

In addition to considering the views of stakeholders, the review is considering:

- letter and parcel volumes and delivery speeds, including whether Australia Post has met its prescribed performance standards under the relief;
- the impact on the Australia Post workforce; and
- other dependencies, such as developments in the aviation sector.

I will advise the Committee of the outcomes of the review at the earliest opportunity.

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You also requested the government's response to the Senate Environment and Communications Legislation Committee report on the inquiry into the Future of Australia Post's service delivery. The report was tabled on 25 August 2020 and the government is considering its response. I expect to table the response shortly and I will provide the Committee with a copy at that time.

Thank you for raising this matter with me. I trust this information addresses the Committee's concerns.

Yours sincerely

Paul Fletcher

3 /12/ 2020

THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS

Ref No: MS20-002875

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

Connie,

Dear Senator Fierravanti-Wells

I refer to your letter dated 12 November 2020 seeking further information about the Coronavirus Economic Response Package (Deferral of Sunsetting—ASIO Special Powers Relating to Terrorism Offences) Determination 2020 (the **determination**).

This letter responds to your request for my advice as to:

- why it is considered necessary and appropriate to extend the operation of ASIO's compulsory questioning and detention warrant regime by delegated legislation, rather than primary legislation, particularly noting that parliamentary sittings have recommenced and a standalone bill to extend the regime could have been introduced into, and considered by, the Parliament; and
- why it was considered necessary and appropriate to extend the operation of the regime for the full six months permitted under the *Coronavirus Economic Response Package Omnibus Act 2020*, as opposed to a shorter period.

The determination extends the sunset date for the Australian Security Intelligence Organisation's (**ASIO**) existing questioning, and questioning and detention powers in Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (**ASIO Act**) from 7 September 2020 to 7 March 2021, or until the provisions in the Australian Security Intelligence Organisation Amendment Bill 2020 (the **Bill**) come into force.

The Bill was introduced into Parliament on 13 May 2020, and referred to the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) for review. The Bill repeals ASIO's existing questioning, and questioning and detention, warrant framework in Division 3 of Part III of the ASIO Act and introduces a reformed compulsory questioning and apprehension framework.

The Bill implements the Government's response to the PJCIS's 2018 review of Division 3 of Part III of the ASIO Act, in which it recommended that ASIO retain a compulsory questioning power, and that ASIO's current detention powers be repealed. Consistent with this recommendation, the Government does not intend to retain ASIO's questioning and detention powers any longer than is necessary. The Government intends to pass the Bill as soon as possible after carefully considering any recommendations from the PJCIS's current review of the Bill.

Extension through delegated legislation rather than primary legislation

Schedule 16 of the *Coronavirus Economic Response Package Omnibus Act 2020* (the **Economic Response Act**) introduced a mechanism to extend the operation of provisions in primary legislation and legislative instruments due to sunset on or before 15 October 2020. This mechanism is intended to ensure that there are no gaps in Australia's legislation while Parliament's attention is focussed on high priority and urgent measures arising from the COVID-19 pandemic.

The Bill is the primary legislation through which the Government intended to address the 7 September 2020 sunset date. However, this was not possible due to disruptions to Parliamentary sittings resulting from the COVID-19 pandemic. As a result, the sunset date was extended by the deferral determination to provide Parliament with sufficient time to consider passage of the Bill.

In this light, extending the operation of ASIO's questioning and detention warrant powers through the determination, as opposed to further primary legislation, was an appropriate and proportionate exercise of the authority provided by the Economic Response Act to ensure ASIO continues to have the powers it needs to gather information relevant to the investigation of a terrorism offence, while enabling Parliament to focus on responding to the unprecedented circumstances presented by the COVID-19 pandemic.

It would not have been appropriate to introduce an additional bill into the Parliament to defer the sunset date when the Bill was already before Parliament for this very purpose. In addition to this, given the uncertainty surrounding the Parliamentary sittings during this time, it was not clear whether a further bill to defer the sunset date would have been delayed in the Parliament due to disruptions resulting from the COVID-19 pandemic. If this were to occur, ASIO may have lost a vital intelligence collection power which may assist in the prevention of a terrorist attack. This would have presented an unacceptable risk to the Australian community.

Importantly, the determination will cease to operate when the provisions in the Bill come into force. While the Bill remains under consideration by the PJCIS, the Government's intention is to pass the Bill as soon as possible. The determination will only remain in force while the PJCIS and the Parliament consider the reforms to ASIO's compulsory questioning powers brought forward in the Bill.

Extension for six months as opposed to a shorter period

Extending ASIO's existing powers for six months, as opposed to a shorter period, ensured that the powers did not sunset while the PJCIS and the Parliament consider the reforms in the Bill. The extension was a temporary mechanism to provide certainty that ASIO's existing powers will not sunset in circumstances of uncertainty regarding the duration of the COVID-19 pandemic and any further disruptions to the Parliament.

The Government's priority remains to pass legislation to repeal ASIO's existing questioning, and questioning and detention warrant powers and introduce a reformed questioning framework for ASIO. The Government is working to ensure that the new questioning framework contained in the Bill is in force as soon as possible.

Thank you for bringing your concerns to my attention.

Yours sincerely

03/12/20

PETER DUTTON

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS20-002579

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

Dear Senator Fierravanti-Wells

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) regarding the *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 8) 2020* [F2020L01165] (the Amending Rules).

In that letter, the Committee sought my advice as why it was considered necessary and appropriate to implement significant changes to the JobKeeper scheme via delegated legislation, rather than primary legislation, particularly noting that regular parliamentary sittings have recommenced.

As the Committee has noted, the *Coronavirus Economic Response Package (Payments and Benefits) 2020* (the Act) was enacted on the basis that the details of any payments authorised under the Act would be provided through a subordinate legislative instrument.

This legislative framework means that incorporating the details of the JobKeeper scheme directly into the Act would require significant restructuring of both the Act and the existing provisions that establish the JobKeeper scheme. The necessary redrafting exercise would have significantly delayed the time at which the amendments to the JobKeeper scheme could have been implemented.

A key change introduced by the Amending Rules was the extension of the scheme beyond its scheduled end date of 27 September 2020. This extension was authorised by amendments to the Act that were passed by the Parliament on 1 September 2020. Without those amendments, I, in my capacity as Treasurer, would not have had the authority to make the Amending Rules, which generally apply from 28 September 2020.

The Amending Rules were made and registered on 15 September 2020 after a substantial and complex drafting process which followed other significant amendments that were registered on 25 August 2020.

Notwithstanding the resumption of the parliamentary sittings, it would not have been possible to prepare and implement the changes in the Amending Rules to the JobKeeper scheme through primary law amendments before 27 September 2020. A delay of this kind would have caused significant uncertainty for employers participating in the JobKeeper scheme. A priority of the Government in implementing the changes was to provide employers with certainty about their ongoing entitlements under the scheme. This was particularly important because employers must

first make payments to their employees in order to qualify for the JobKeeper payment (which is paid in arrears).

I also note that the Government's ability to amend the JobKeeper scheme has been fundamental to the success of the program. As the Committee is aware, the JobKeeper scheme has now been amended seven times after it was first implemented in April 2020. These changes have been critical in addressing unforeseen issues and ensuring that the JobKeeper scheme operates as intended.

I trust this information will be of assistance to the Committee.

Yours sincerely

THE HON JOSH FRYDENBERG MP

24 / 11 / 2020

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

MS20-001102 / MC20-034167

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~~ Donna

I refer to your letter dated 12 November 2020 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 committee raised concern that the explanatory statement for the repeal instrument does not include the detail that I have previously provided the committee on the consultation undertaken.

A replacement explanatory statement for the repeal instrument has been prepared (as attached) and I have requested my department arrange for the registration of the replacement statement on the Federal Register of Legislation.

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

Enc: Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020,
Explanatory Statement

FAIR WORK AMENDMENT (VARIATION OF ENTERPRISE AGREEMENTS NO. 2) REGULATIONS 2020

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

under subsection 211(6) of the *Fair Work Act 2009*

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020* (the Repeal Regulations) repeal amendments made by the *Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020* (the Regulations).

The Regulations modified the period that employees must have access to a copy of a proposed variation of an enterprise agreement, and before which employees must be notified of the details of the vote on the variation (the 'access period'), from seven days to one day.

This measure is repealed with the effect that the 'access period' for a proposed variation of an enterprise agreement is no longer modified and will revert to the previous period of seven days.

The repeal of the Regulations follows a review which found that a majority of employers had continued to provide a notice period well in excess of the minimum timeframe permitted by the Regulations and that the reduced timeframe introduced by the Regulations was rarely necessary.

Taking into account the review's findings, and views expressed to the Attorney-General, it is considered appropriate to bring forward the repeal date of the Regulations. The Attorney-General is satisfied that appropriate consultation was undertaken prior to the repeal of the measure.

The repeal of the measure will not affect variations to enterprise agreements made in accordance with the Regulations before the repeal date, including those that have been agreed to by employees before the repeal date but not yet approved by the Fair Work Commission (FWC).

The FWC has a further six months after the repeal date to determine an application to approve a variation of an enterprise agreement made with a shortened 'access period' that occurred before the repeal date.

Details of the Repeal Regulations are set out in the Attachment.

The Repeal Regulations are a legislative instrument for the purposes of the *Legislation Act 2003* and commence the day after they are registered on the Federal Register of Legislation.

REGULATION IMPACT STATEMENT

An exemption from Regulation Impact Statement requirements has been granted by the Prime Minister for measures related to the Australian Government's response to the COVID-19 pandemic.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

The *Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020* (the Repeal Regulations) are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

The Repeal Regulations repeal amendments made by the *Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020*, which modified the period that employees must have access to a copy of a proposed variation of an enterprise agreement, and before which employees must be notified of the details of the vote on the variation (the 'access period'), from seven days to one day. This measure was intended to be a time-limited change to enable employers and their employees to quickly respond to issues that may arise in response to COVID-19.

Human Rights Implications

The Regulations are compatible with human rights as the Regulations do not engage any of the applicable rights or freedoms and do not raise any human rights issues.

Attachment

NOTES ON SECTIONS

Section 1 – Name

This section provides that the title of the instrument is the *Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020*.

Section 2 – Commencement

This section provides that the whole of the instrument will commence the day after it is registered.

Section 3 – Authority

This section provides that the instrument is made under the *Fair Work Act 2009* (the Act).

Section 4 – Schedules

This section provides that each instrument specified in a Schedule to the Regulations is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument will have effect according to its terms.

SCHEDULE 1 – Amendments

Item 1 – Regulation 2.09B

Item 1 repeals regulation 2.09B.

Item 2 –Part 7-4 (heading)

Item 2 repeals and substitutes the heading of Part 7-4 in Chapter 7.

Items 3 and 4 – Subregulation 7.04(2)

Item 3 omits "under subregulation 2.09B(3)" and substitutes it with "by Schedule 1 to the *Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020*".

Item 4 omits "subsection 180(2) and (3) of the Act that starts before that repeal" and substitutes it with "subsections 180(2) and (3) of the Act that starts before the commencement of that Schedule".

These amendments make clear that regulation 2.09B is repealed by Schedule 1 to the proposed Regulations, and ensure that the FWC can determine an application to approve a variation of an enterprise agreement that was made in relation to an access period that started before the commencement of Schedule 1 to the proposed Regulations.

Item 5 – Subregulation 7.04(2)(note)

Item 5 repeals the note at subregulation 7.04(2).

Item 6 – Regulation 7.05

Item 6 makes clear that Part 7-4 is repealed at the end of the period of 6 months starting on the day Schedule 1 to the proposed Regulations commences. This has the effect of providing the FWC with a further six months after the repeal of regulation 2.09B to consider an application to approve a variation of an enterprise agreement made with a one day access period pursuant to regulation 2.09B.

THE HON SUSSAN LEY MP
MINISTER FOR THE ENVIRONMENT
MEMBER FOR FARRER

MC20-018717

01 DEC 2020

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the
Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600
sdlc.sen@aph.gov.au

Dear Chair

Thank you for your correspondence of 12 November 2020 concerning the Heritage Management Plan of the Reserve Bank of Australia Head Office, 65 Martin Place, Sydney [F2020L01031].

I note that under section 341S of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), the responsibility for making a written plan to protect and manage the Commonwealth Heritage values of a Commonwealth Heritage place lies with the Commonwealth agency which owns or controls the place. In this instance, the responsible agency is the Reserve Bank of Australia (RBA).

A Commonwealth agency may ask me to endorse a plan (subsection 341T(1) of the EPBC Act). My endorsement of the plan is made on the basis only of my considerations with respect to the conservation of the Commonwealth Heritage values of the place concerned. Accordingly, I believe that in this instance, the RBA would be more appropriately placed to assist you with the matters raised in your letter.

To assist the Committee, the Department of Agriculture, Water and the Environment has sought advice from the RBA. The RBA has advised it will promptly take steps to address the concerns raised in your letter by amending the instrument.

Thank you for writing on this matter. I have copied this letter to the Treasurer, the Hon Josh Frydenberg MP.

Yours sincerely

SUSSAN LEY

CC: The Hon Josh Frydenberg MP, Treasurer

Senator the Hon Anne Ruston

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

Ref: MC20-017618

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

Dear Senator Fierravanti-Wells

Thank you for your letter dated 12 November 2020, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation, regarding the Social Security (Coronavirus Economic Response – 2020 Measures No. 14) Determination 2020. The Committee has raised concerns that the Determination limits parliamentary oversight and asks whether consultations were undertaken with persons likely to be affected by the Determination.

The Determination provides for temporary enhanced support, balanced with incentives to work, in response to the uncertainty around the evolving nature of the labour market, including:

- extending the COVID-19 Supplement at a rate of $250 a fortnight, from 25 September 2020 until 18 December 2020;
- extending the waivers for the Ordinary Waiting Period, Newly Arrived Resident's Waiting Period and Seasonal Worker Preclusion Period until 18 December 2020;
- reinstating the assets tests and liquid assets test waiting period from 25 September 2020; and
- temporarily increasing the income-free area to $300 a fortnight with a 60 cent taper rate for JobSeeker Payment recipients and Youth Allowance (other) recipients as well as the partner income taper rate for JobSeeker Payment recipients from 25 cents to 27 cents for every dollar over the partner income-free area until 31 December 2020.

The Determination was made pursuant to provisions of the *Social Security Act 1991* relating to the COVID-19 Supplement and item 40A under Schedule 11 of the *Coronavirus Economic Response Package Omnibus Act 2020*. This provision outlines that, as the Minister for Families and Social Services, I may make a determination modifying the social security law in relation to the qualification for or payment rate of a social security payment.

This power allows the Australian Government to respond quickly and flexibly, with appropriate and targeted supports, to changing conditions as the Coronavirus situation unfolds. This was necessary and appropriate, given the uncertain economic outlook that prevailed in the lead up to the 2020-21 Budget, including the lockdown in Victoria, and the potential for further outbreaks which may require a quick response.

Suite MG.60, Parliament House, Canberra ACT 2600 Tel: 02 6277 7560 Email: minister@dss.gov.au

The Government continues to monitor evolving economic conditions arising from COVID-19 to ensure assistance to individuals and families is appropriate and commensurate with the recovering economy and labour market. My department continues to closely monitor social media, incoming correspondence from members of the public including income support recipients, and feedback from Services Australia and other stakeholders as temporary measures are rolled out, to support income support recipients and as Australia transitions to a post-COVID economy.

In relation to some of the specific measures in the Determination, I note that consultation on the reinstatement of the liquid assets test waiting period was not feasible as this waiting period was only reintroduced for new claimants and it was not possible to identify the specific cohort of individuals affected by this change. The reintroduction of the waiting period did not adversely impact existing payment recipients and claimants.

Services Australia undertook a comprehensive communication campaign to work with recipients in the month prior to the reinstatement of the assets test. Affected individuals were contacted by Services Australia by letter, SMS and direct outbound telephone calls and informed of the need to provide or update their assets details.

There was no consultation undertaken on the beneficial measures in the Determination, including the continuation of the COVID-19 Supplement and the introduction of more generous income testing arrangements. I note that by increasing the ordinary income-free area for JobSeeker Payment recipients to $300 a fortnight means those recipients can receive more income before their payment reduces. The increase in the free area has also ensured that a recipient's partner can earn more income before the recipient's rate of JobSeeker Payment starts to reduce under the 27 cent partner income taper rate introduced by the Determination. Therefore, the ordinary income-free area and partner income taper rate changes made by the Determination produces a more beneficial income test for JobSeeker Payment when compared to the social security law as in force on 24 September 2020.

The Government remains committed to supporting all Australians affected by the impacts of COVID-19 and encouraging them to re-engage with the workforce as the economy reopens.

Thank you for raising these matters with me. I trust the information provided will be of assistance to the Committee.

Yours sincerely

Anne Ruston

25 / 11 / 2020

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

PAUL FLETCHER MP

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

MC20-013402

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

Concetta

Dear Chair

Thank you for your letter dated 12 November 2020 concerning the *Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020* ('the class exemption').

My responses to the matters raised by the committee are set out below.

Appropriateness of making the class exemption under delegated legislation

You sought reasons why it is necessary and appropriate to provide class exemptions from the carrier separation rules via delegated, rather than primary legislation.

Under sections 142C and 143 of the *Telecommunications Act 1997* (the Act), providers of superfast broadband services must be either structurally or functionally separated. In other words, they must either operate on a wholesale-only basis, or operate wholesale and retail businesses independently of each other. The provisions establish a default level regulatory playing field. Without this constraint, retail-only providers and NBN Co (which must operate on a wholesale-only basis) would be commercially disadvantaged compared to vertically integrated competitors.

Under section 143A of the Act, the Australian Competition and Consumer Commission (ACCC) can make class exemptions from the carrier separation rules. This power was introduced by the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020*, and the relevant provisions came into effect on 25 August 2020. The ACCC relied on this power to make the class exemption.

The provisions allow the ACCC, as the independent expert competition regulator, to grant class exemptions for smaller providers if it is in the long-term interests of end-users of telecommunications services (as required by paragraph 143A(8)(a) of the Act). The availability of a class exemption is limited by paragraphs 143A(1)(b)-(e) and 143A(2)(b)-(e) of the Act. Class exemptions can only apply to persons with no more than 2,000 fixed-line residential customers (or up to 12,000 if specified by regulation). A person must elect to be bound under a written notice given to the ACCC.

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The Committee has suggested that section seven of the class exemption captures any person that meets the criteria in paragraphs 143A(1)(b)-(e) and 143A(2)(b)-(e) of the Act, and that it is therefore unclear why the exemptions should be made by delegated legislation. However, the provisions do provide useful flexibility in allowing the ACCC to tailor class exemptions to respond to market factors and individual circumstances. That flexibility would be lost if the class exemption parameters were contained only in primary legislation.

For instance, the ACCC can specify that the class exemption applies to persons with less than the 2,000 customer upper limit. The ACCC can add conditions and limitations to any class exemption. Indeed, section eight of the class exemption creates several conditions and limitations that go beyond those provided for by the Act. Beneficiaries of the class exemption must supply a service provided for by existing ACCC final access determinations relating to the supply of superfast broadband services on a non-discriminatory basis.

Further, section 33(3) of the *Acts Interpretation Act 1901* provides the makers of legislative instruments with power to repeal, rescind, revoke, amend, or vary such instruments. Subsequently, the ACCC will be able to monitor the implementation of the class exemption and make changes in response to changing circumstances. This is important given telecommunications is a dynamic market where technologies can rapidly change. If the class exemption was enshrined in primary legislation, the scope of the exemption could not shift in response to changing circumstances, and could create adverse market outcomes.

When the Parliament provided the ACCC with the power to establish a class exemption, it specified that class exemptions would be legislative instruments and thus remain subject to parliamentary disallowance. This ensures that the instrument and any subsequent modifications will be subject to scrutiny by the legislature.

The proposed ten-year duration of the ACCC Class Exemption

The Committee also raised concerns that the class exemption is intended to remain in force for at least 10 years (until the instrument sunsets in accordance with the *Legislation Act 2003*). The Committee has expressed the view that to ensure a minimum degree of parliamentary oversight, provisions which modify or exempt persons or entities from the operation of primary legislation should cease to operate no more than three years after they commence.

The ACCC has advised that it opposes amending the exemption instrument to specify that it ceases to operate three years after its commencement, for the following reasons.

First, the class exemption is only available to a narrow class of very small network operators to facilitate their entry into the market. This provides a limited exception to the costs of implementing and maintaining the structural or functional separation requirements (costs are disproportionately large for smaller network operators) that would otherwise apply. This will support the growth of their businesses which will promote investment, competition and consumer benefits in the telecommunications market over the longer term. This view was established through the required application of the long-term interests of end users test, for which the promotion of competition and efficient investment are key criteria.

Further, section four of the Act indicates that Parliament intends telecommunications to be regulated in a manner that 'does not impose undue financial and administrative burdens on participants in the Australian telecommunications industry'. Due to the lengthy payback periods for recovering high construction costs of fibre networks, the ACCC is of the view that a three-year operation period is unlikely to provide sufficient certainty to prospective network operators. Consequently, if the duration of the class exemption was reduced to three years then this would potentially deter market entry and detract from the competitive outcomes (and associated consumer benefits) that would otherwise accrue in the sector.

In addition to being available to only a narrow class of very small network operators, the availability of the exemption falls away as exempted entities grow beyond the upper threshold of 2,000 residential services. Of the six small operators supplying less than the threshold number of lines that provided submissions to the ACCC's June 2020 consultation on the class exemption, the majority indicated they expected to exceed the specified threshold within a period of five years. In this context, the duration of the class exemption is less important than the class threshold because it is not envisaged that network operators would typically derive a benefit from the relief granted by the class exemption for the full ten years.

Finally, as part of its regulatory responsibilities, the ACCC monitors the operation and market effects of the delegated legislation it makes, including to ensure it remains fit for purpose. As indicated above, if the ACCC forms the view that the class exemption is no longer operating as intended, it could exercise its powers under subsection 33(3) of the *Acts Interpretation Act 1901* to amend the exemption (including by amending the scope of the exempted class or by the insertion of a cessation provision) or otherwise by revoking the class exemption.

Consequently, the ACCC has expressed the view that while it understands and appreciates the Committee's long-held views on these matters, it considers that the instrument should remain in its current form. I agree with that assessment.

Thank you again for bringing your concerns to my attention. I hope the information in this letter is of some help.

Yours sincerely

Paul Fletcher

21 / 11 / 2020

The Hon Darren Chester MP

Minister for Veterans' Affairs
Minister for Defence Personnel

MC20-004470

26 NOV 2020

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

Dear Senator

I am writing in response to your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee), dated 12 November 2020, which requested advice relating to the *Veterans' Affairs (Treatment Principles — Rehabilitation in the Home and Other Amendments) Determination 2020* [F2020L01028] (the instrument).

The committee has referred to decisions made by a delegate of the Repatriation Commission or the Military Rehabilitation and Compensation Commission (the commissions) to accept financial responsibility for a Rehabilitation in the Home program and has determined that while such decisions will involve at least some discretion, they will not be subject to independent merits review.

The committee requests my advice as to the characteristics of the decisions made by the commissions to accept financial responsibility for a Rehabilitation in the Home program which justify the exclusion of independent merits review, particularly by reference to the grounds set out in the Administrative Review Council's (ARC) guidance document, *What decisions should be subject to merit review?*

As noted in the email to the committee of 15 October 2020, all decisions made pursuant to the Treatment Principles under the *Veterans' Entitlements Act 1986* (VEA) and *Military Rehabilitation and Compensation Act 2004* (MRCA) are not subject to independent merits review. Under the VEA, such decisions have never been so reviewable and under the MRCA, those decisions have been specifically excluded from the definition of 'original determination' and 'reviewable determination' under section 345.

As outlined in the Explanatory Memorandum (EM) for the MRCA, this is because treatment is provided by health care providers through the use of Repatriation Health Cards (the White and Gold Cards). The veteran will not incur any costs and the treatment to be provided will be specified.

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It should be noted that since the commencement of the MRCA, the formal and informal contractual arrangements with health care providers referred to in the EM were replaced in 2007 for the purposes of the Treatment Principles by a statutory registration scheme. Under the scheme, the Department of Veterans' Affairs (DVA) recognises a health provider's current registration with Medicare as the basis for providing treatment under an arrangement with DVA. Formal contractual arrangements still apply for the purposes of treatment provided by public and private hospitals and for treatment of the type provided under Rehabilitation in the Home programs.

Nevertheless, the general principle remains the same – treatment is provided through the use of White and Gold cards having regard to health provider's recommendations in accordance with the Treatment Principles. Approval of such treatment does not usually involve a 'determination' in the traditional sense – once a veteran has a White or Gold card, the veteran is eligible for treatment covered by the Treatment Principles.

The instrument essentially adopts the same approach, expanding the Treatment Principles to include the provision of a Rehabilitation in the Home program in the circumstances where the provider of the program has assessed the veteran as being both a suitable candidate and having a clinical need for the treatment.

The delegate proceeds on the assumption that the Rehabilitation in the Home provider is qualified to make an accurate assessment of the veteran's rehabilitation needs and will follow the recommendations of that provider. Of course, the delegate will need to ensure that the person meets other non-medical criteria (for example, that the claimant is a veteran) but the substance of the claim is governed by the program provider's assessment of the veteran's needs.

Therefore, whilst not strictly a mandatory decision as per paragraph 3.8 of the ARC guidance document, the decision maker is reliant on the assessment by the provider of whether the veteran meets the relevant criteria referred to in the Treatment Principles, which leaves little room for discretion or for independent merits review to operate. Further, if new evidence becomes available that is relevant to the assessment of the veteran's medical needs, the veteran can seek a reassessment of their medical needs. In other words, an initial decision is not necessarily final such as to justify the need for a formal independent review.

I trust this information will be of assistance to you.

Yours sincerely

DARREN CHESTER