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

Ref: MS20-000323

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

19 FEB 2020

Dear Senator Fierravanti-Wells,

I am writing in response to your letter of 6 February 2020, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation, requesting further information in relation to the *Financial Sector (Collection of Data) (reporting standard) determination No. 30 of 2019* [F2019L01196].

The Committee has requested more detailed advice as to the reasons for excluding independent merits review of decisions made by APRA under its prudential and reporting standards by reference to the factors which may justify excluding merits review set out in the Administrative Review Council's guideline, '*What decisions should be subject to merits review?*'

Why decisions under the reporting standards should not be subject to merits review

APRA considers decisions made exercising discretions under its reporting standards, including the reporting standard determined under *Financial Sector (Collection of Data) (reporting standard) determination No. 30 of 2019*, should not be subject to merits review as they are financial decisions with a significant public interest element.

APRA's reporting standards collect financial data from regulated entities. This data contains critical indicators of a regulated entity's financial wellbeing, including data on an entity's assets, capital, liquidity, expenses and risk exposures. APRA relies heavily on this financial data to inform its supervisory actions towards its regulated entities. Without timely and complete data, APRA may miss indicators that an entity is taking on imprudent risk, or is in distress. The data therefore informs rapid actions APRA might take to restore or maintain investor confidence in the financial markets. APRA's supervisory decisions may be jeopardised if its receipt of data is unreliable due to entities seeking merits review under the reporting standards.

Further, as indicated in my letter of 22 January 2020, the data collected by APRA's reporting standards is often is used to compile key macroeconomic indicators for Australia. The Reserve Bank of Australia uses the data to compile and publish its monetary and credit aggregates. The Australian Bureau of Statistics uses the data to compile the National Accounts. The data is also used to meet Australia's international reporting obligations.

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 3123 | Facsimile: 61 2 6277 5782

Delays caused by an entity seeking merits review of APRA's decisions under one or more reporting standards could significantly compromise these publications. As the publications are done at an aggregate level, any lack of data from one entity caused by a merits review claim prevents the release of the entire publication.

Further detail on APRA's position

APRA notes that the Committee remains unclear as to why the definition of "reviewable decision" under section 31 of the *Financial Sector (Collection of Data) Act 2001* (FSCODA) should be read to exclude merits review of decisions made under reporting standards.

APRA acknowledges the Committee's advice that it has long considered that the failure of primary legislation to provide for independent merits review does not, of itself, constitute a sufficient reason to exclude such review from legislative instruments. Nonetheless, APRA's position is based on the following considerations.

The instrument in question permits APRA to make a number of discretionary decisions, including changing the reporting periods for an authorised deposit-taking institution (ADI) (paragraph 9), or grant an extension of time for a ADI to provide information to APRA (paragraph 11). Those discretions included in the instrument are authorised by paragraph 13(2)(f) of FSCODA, which states that reporting standards may include matters relating to:

> "(f) the discretion of APRA, in particular cases, to vary reporting standards, including, but not limited to, the discretion to vary any times or periods specified in or under the standards…"

As correctly stated in the Committee's letter of 14 November 2019, Part 3A of FSCODA provides that applications may be made to the Administrative Appeals Tribunal for the review of "reviewable decisions".

Section 31 of FSCODA relevantly provides:

> "reviewable decision means any of the following decisions:
>
> …
>
> (d) a decision under section 13 to determine a reporting standard for a particular financial sector entity;
>
> (e) a decision to vary a reporting standard determined under section 13 for a particular financial sector entity."

Paragraph (d) describes "a decision under section 13 to determine a reporting standard for a particular financial sector entity". Section 13(1) does not explicitly provide a power to determine a reporting standard for a particular financial sector entity. APRA ordinarily makes reporting standards that apply to classes of financial entities (such as all ADIs or all general insurers). However, section 13(3) provides that reporting standards determined under subsection 13(1) may impose:

> "(a) different requirements to be complied with by different financial sector entities or classes of financial sector entities, including (to avoid doubt) requirements to be complied with only by a particular entity or particular entities; …"

Furthermore, subsection 13(4) clearly contemplates that a reporting standard may be determined in relation to a particular financial sector entity, directly referring to such when providing that certain matters may be included in such a standard. Similarly, subsection 13(5) refers explicitly to a reporting standard that would only affect a particular financial sector entity or entities.

There is also provision in section 13C for the Minister to direct APRA, under subsection 13(1B), to determine reporting standards to be complied with by a particular financial sector entity or entities.

Given the above, APRA considers that paragraph (d) of the definition of reviewable decision is clearly referring to a decision to determine a reporting standard for a particular entity. Paragraph (e) must then be referring to a decision to vary such a reporting standard, as opposed to making a decision using a discretion that has been created within a reporting standard in accordance with paragraph 13(2)(f). It is true that there is not a specific power to vary a reporting standard in FSCODA, however the Note to subsection 13(1) points out that:

"When APRA has determined a reporting standard, it has power at any time to revoke or vary the standard (see subsection 33(3) of the *Acts Interpretation Act 1901*)."

I trust this information will be of assistance to you.

Yours sincerely

[redacted]

Senator the Hon Jane Hume

The Hon Nola Marino MP

Assistant Minister for Regional Development and Territories
Federal Member for Forrest

Ref: MC20-000661

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 of 6 February 2020 regarding the *Jervis Bay Territory Rural Fires Amendment (Miscellaneous Measures) Rules 2019* (the Amendment Rules).

I understand that on 10 January 2020 the Department of Infrastructure, Transport, Regional Development and Communications responded to an email from the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) secretariat raising potential scrutiny concerns in relation to the Amendment Rule. As requested by the Committee, I am happy to provide further information below to address the Committee's concerns in relation to merits review.

Updating legislation to support the provision of fire and emergency services in the Jervis Bay Territory is important for ongoing effective cooperation in the management of cross-border bushfires.

With regard to the Amendment Rules, I note the Committee's acknowledgement of the underlying policy rationale of promoting consistency with the equivalent NSW legislation. Indeed, the requirement for alignment is at the centre of the arrangements with the NSW Government to provide NSW Rural Fires Service personnel for fire and emergency services operations in the Jervis Bay Territory.

The unique operational circumstances relating to cross-jurisdictional fire and emergency services activities means that personnel must have clarity as to their role and their rights and responsibilities regardless of whether they are operating in the Jervis Bay Territory or in NSW. For this reason the intention has been to maintain, as far as possible, a regime as it is established under NSW legislation, with as few departures as possible under the Jervis Bay Territories legislation.

The *Jervis Bay Territory Rural Fires Rule 2014* (the Rural Fires Rule) contains a robust investigation and appeals process in relation to disciplinary action. By way of example, a member of a rural fire brigade may be subject to disciplinary action if they are negligent or careless in the discharge of their duties, or fail to comply with service standards. In the first instance, the member will appear before a senior officer of the NSW Rural Fires Service or a disciplinary panel, and the alleged breach will be investigated. If a member is found guilty of a breach of discipline, they may then appeal to the Minister against the findings or any disciplinary action to be taken.

Consistent with the Senate's commitment to ensuring delegated legislation provides for the independent review of administrative decisions with the capacity to affect rights, liberties, obligations or interests of individuals, this appeals process provides for independent review of the decision by a person other than the primary decision-maker.

With regard to the Administrative Review Council's guide, What Decisions Should Be Subject To Merits Review?, the existing appeals process is consistent with the objectives for merits review set out by the Council as it ensures fair treatment of all persons affected by a decision.

Further, the approach is consistent with two of the factors the Council identifies that may justify excluding merits review. First, the Council states that 'decisions that are the product of processes that would be time-consuming and costly to repeat on review' may be excluded. Under the Rural Fires Rule, before disciplinary action is taken the alleged breach of discipline must be investigated. Further investigation may also be undertaken as part of an appeals process. Such investigations are both time-consuming and costly to repeat.

Secondly, the Council identifies decisions which have 'such limited impact that the costs of review cannot be justified' as suitable for exclusion from merits review. The range of disciplinary actions available under the Rural Fires Rule include reprimand, suspension for a specified period and demotion. The most severe is removal of the member's name from the brigade register. The effect of the majority of these actions is generally temporary and allows for the member to either continue their participation in the brigade or to return to their normal activities after a period of time. The costs of undertaking merits review, given the short-term impact of the decisions, therefore cannot be justified.

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

Yours sincerely

[redacted]

Nola Marino

18 FEB 2020

SENATOR THE HON ZED SESELJA
Assistant Minister for Finance, Charities and Electoral Matters

REF: MS20-000313

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

Dear Senator Fierravanti-Wells

Taxation Administration (Private Ancillary Fund) Guidelines 2019

I am writing in response to your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee), dated 6 February 2020, concerning the *Taxation Administration (Private Ancillary Fund) Guidelines 2019* (the Guidelines).

The purpose of the Guidelines is to remake the *Private Ancillary Fund Guidelines 2009*, which ceased on 21 September 2019 as part of the sunsetting regime.

The purpose of the sunsetting regime is to ensure that all legislation on the Parliament's statute book remains relevant and fit-for-purpose over time. This requires thorough analysis of each sunsetting instrument. Consultation with stakeholders is a vital element of this process. Where the existing instrument is considered to be working effectively, the sunsetting instrument is remade without the need for substantive policy changes. Alternatively, if the legislation is no longer considered relevant or fit-for-purpose, the sunsetting instrument is removed from the statute book.

The *Taxation Administration Act 1953* outlines the policy and legislative framework for the broader tax system. This longstanding framework provides that certain decisions made by the Commissioner under a taxation law (an Act) or regulations made under such an Act may be subject to merits review, but does not extend this to decisions made under other legislative instruments. This longstanding policy applies to all Acts, regulations and other legislative instruments within the broader tax framework. It applied to the sunsetting instrument, and continues to apply to the remade instrument.

The standard sunsetting process was followed in remaking the Guidelines. Overall, consultation with key stakeholders confirmed that the sunsetting instrument was largely operating effectively and efficiently, and that the 2019 Guidelines would effectively remake the 2009 Guidelines as intended. No stakeholders raised any concerns in relation to merits review. Accordingly, the existing policy will continue to apply to the remade instrument.

The Guidelines is a vital legislative instrument which sets minimum standards for the governance and conduct of private ancillary funds and their trustees. Private ancillary funds are designed to encourage private philanthropy by providing private groups, such as businesses and families, with greater flexibility to start their own trust funds for philanthropic purposes.

I note that the Guidelines instrument is subject to a disallowance motion. I trust that the Committee can resolve this matter before the disallowance period expires, so that the Guidelines can continue to provide the necessary legislative protection to ensure that private ancillary funds remain properly accountable and act in the manner expected of an entity holding philanthropic funds for a broad public benefit.

I trust this information will be of assistance to you.

Yours sincerely

[redacted]

Senator the Hon Zed Seselja
Assistant Minister for Finance, Charities and Electoral Matters

19 / 2 /2020

THE HON JOSH FRYDENBERG MP
TREASURER
DEPUTY LEADER OF THE LIBERAL PARTY

Ref: MS20-000314

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

I am writing in response to your letter of 6 February 2020 requesting information in relation to the *Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Regulations 2019* (the Regulations).

The Committee sought advice as to:

- whether the Regulations contain matter more appropriate for parliamentary enactment; and
- why it is considered necessary and appropriate to establish key elements of the conflicted remuneration rebate scheme via delegated legislation, rather than primary legislation.

As you note, the Regulations provide the rules around how grandfathered benefits are to be passed through to retail clients.

I consider it appropriate that the these rules are contained in delegated legislation, within the bounds of the framework set out in the primary legislation, in order to account for the variety of financial products and arrangements in relation to which rebates may need to be paid, and the variety of potential recipients of those rebates. Specifying these requirements in the Regulations provides the ability to make more detailed rules on how benefits must be passed through and reported on as the regulations provide for flexibility to respond to changing industry circumstances in a more timely manner. This will help to achieve the intended policy of the primary legislation and enabling provisions: specifically, to ensure that the benefits of ending grandfathered conflicted remuneration go to customers.

While the rebating scheme must be sufficiently adaptable to cover the wide variety of situations in which conflicted remuneration may be provided, it will only be applicable to a limited class of persons. The rebating scheme in the Regulations only applies to those covered persons, within the meaning of section 963N of the *Corporations Act 2001*[1] (the Act) where the person would be legally obliged (disregarding the ban on conflicted remuneration in Subdivision C of Division 4 of Part 7.7A of the Act) to give conflicted remuneration to another person, on or after 1 January 2021.

[1] As will be inserted by item 9 of Schedule 1 to the *Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Act 2019*.

That is, the obligations to make payments in accordance with the regulations would only apply to those covered persons who still had obligations to pay conflicted remuneration as at 1 January 2021 under an arrangement that had been in place prior to the application date of Division 4 of Part 7.7A of the Corporations Act (generally 1 July 2013).

Given the limited class of persons who would be required to pay rebates in accordance with the regulations, it is appropriate that these matters are dealt with in the Regulations, rather than in the primary law. If matters in relation to rebating were to be inserted into the Act, they would insert, into an already complex statutory framework, a set of specific provisions that would apply only to a relatively small group of persons. This would result in additional cost and unnecessary complexity for other users of the Act.

Thank you for bringing your concerns to my attention.

Yours sincerely

THE HON JOSH FRYDENBERG MP

20 / 02 / 2020