

# Monitor 1 of 2020 - Committee correspondence

## Contents

### Appendix A - Ongoing matters

|  |   |
|--|---|
| Financial Sector (Collection of Data) (reporting standard) determination No. 30 of 2019..... | 1 |
| Jervis Bay Territory Rural Fires Amendment (Miscellaneous Measures) Rules 2019 .....         | 3 |
| Taxation Administration (Private Ancillary Fund) Guidelines 2019 .....                       | 6 |
| Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Regulations 2019..... | 8 |

### Appendix B - Concluded matters

|   |    |
|---|----|
| ASIC Corporations (Whistleblower Policies) Instrument 2019/1146.....  | 10 |
| Jervis Bay Territory Rural Fires Amendment (Miscellaneous Measures) Ordinance 2019 .....                            | 3  |
| Telecommunications (Protecting Australians from Terrorist or Violent Criminal Material) Direction (No. 1) 2019..... | 11 |





6 February 2020

Senator the Hon Jane Hume  
Assistant Minister for Superannuation, Financial Services and Financial Technology  
Parliament House  
Canberra ACT 2600

Via email: [Senator.Hume@aph.gov.au](mailto:Senator.Hume@aph.gov.au)  
CC: [Shelby.Brinkly@treasury.gov.au](mailto:Shelby.Brinkly@treasury.gov.au)

Dear Assistant Minister,

**Financial Sector (Collection of Data) (reporting standard) determination No. 30 of 2019 [F2019L01196]**

Thank you for your response of 22 January 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument. The committee considered your response at its private meeting on 5 February 2020.

The committee remains concerned about the scrutiny issues outlined below, and has resolved to seek further information in relation to this matter.

***Merits review***

*Legal considerations*

Your letter advises that APRA considers that section 31 of the *Financial Sector (Collection of Data) Act 2001*, 'when considered in context', only provides for merits review of APRA's decision to formally change a standard that has been determined for a particular entity, and does not provide for the merits review of discretionary decisions made by APRA under a standard. In the absence of further information to support this interpretation, it remains unclear to the committee why section 31 of the Act should be read down in this manner. Moreover, the committee 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, such as APRA's reporting standards.

*Policy consideration*

Your letter also advises that, from a policy perspective, APRA considers that it is neither necessary nor appropriate to provide for the independent merits review of discretionary decisions made under its prudential and reporting standards, for the following reasons:

- extensive public consultation is conducted in drafting the standards;
- the discretionary decisions are minor or operational in nature;

- it is unlikely that an entity could be 'worse off' by the exercise of the discretion; and
- delays caused by an entity seeking merits review could compromise the Reserve Bank of Australia's compilation and publication of the monetary and credit aggregates, and the Australian Bureau of Statistics' compilation of the National Accounts.

Whilst noting this advice, it remains unclear to the committee how these justifications accord with the grounds for excluding merits review set out in the Administrative Review Council's guideline, *What decisions should be subject to merits review?*. For example, it is unclear why public consultation in the preparation of an instrument is a reason to exclude merits review of discretionary decisions made under the instrument, where such decisions have the capacity to affect obligations or interests. It is similarly unclear why the operational nature of the decisions alone should preclude the availability of review, without further information.

**Accordingly, the committee requests your 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?*.**

Noting that notice has been given to disallow the instrument, the committee would appreciate your response by **Wednesday 19 February 2020**, to facilitate the timely resolution of this matter before the revised disallowance period expires.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,

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



6 February 2020

The Hon Nola Marino MP  
Assistant Minister for Regional Development and Territories  
Parliament House  
Canberra ACT 2600

Via email: [Nola.Marino.MP@aph.gov.au](mailto:Nola.Marino.MP@aph.gov.au)  
CC: [Minister.marino@infrastructure.gov.au](mailto:Minister.marino@infrastructure.gov.au)

Dear Assistant Minister,

**Jervis Bay Territory Rural Fires Amendment (Miscellaneous Measures) Ordinance 2019 [F2019L01546]**

**Jervis Bay Territory Rural Fires Amendment (Miscellaneous Measures) Rules 2019 [F2019L01494]**

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified two significant scrutiny concerns in relation to the above instruments, outlined below, and seeks your advice in relation to one of these matters.

***Significant penalties in delegated legislation***

Item 26 of Schedule 1 to the Jervis Bay Territory Rural Fires Amendment (Miscellaneous Measures) Ordinance 2019 (amendment ordinance) inserts an offence punishable by 7 years' imprisonment or 420 penalty units into the Jervis Bay Territory Rural Fires Ordinance 2014 (principal ordinance).

The explanatory statement to the instrument acknowledges the general principle that delegated legislation should not create offences that impose penalties greater than 50 penalty units. However, it states that the addition of such offences to the principal ordinance is 'appropriate', in light of the legislative framework established by the *Jervis Bay Territory Act 1915*.

The committee acknowledges that section 4F of the *Jervis Bay Territory Act 1915* confers broad powers on the Governor-General to make ordinances 'for the peace, order and good government of the Territory'. However, the committee also notes that section 4G clearly provides for the tabling and disallowance of such ordinances. This ensures that the ordinances fall within the scope of this committee's scrutiny of delegated legislation. In this regard, the committee has long considered that custodial penalties and penalties

exceeding 50 penalty units are matters more appropriate for parliamentary enactment, regardless of whether such penalties are authorised by the enabling legislation.

The committee will continue to closely monitor this issue in 2020, with a view to seeking your more detailed advice about the government's approach to the inclusion of significant matters in territory ordinances at a later date.

### ***Merits review***

The Jervis Bay Territory Rural Fires Amendment (Miscellaneous Measures) Rules 2019 (the amendment rules) insert new paragraphs into subsections 7(2) and 10(1) of the Jervis Bay Territory Rural Fires Rule 2014 (principal rule). The new paragraphs provide that a person may be removed from a brigade register, or be found to have committed a breach of discipline, for failing to comply with conditions imposed by the minister.

The committee understands that decisions made under the amended subsections 7(2) and 10(1) of the principal instrument are not subject to independent merits review, because the principal rule is intended to align as closely as possible with the equivalent New South Wales legislation, which only provides for internal review.

The committee acknowledges the underlying policy rationale of promoting consistency with the equivalent New South Wales legislation. However, as matter of technical legislative scrutiny, the committee notes the Senate's strong and longstanding commitment to ensuring that delegated legislation provides for the independent review of administrative decisions with the capacity to affect rights, liberties, obligations or interests of individuals.

Given the importance of independent review as a safeguard against undue trespass on an individual's personal rights, liberties, obligations and interests, the committee does not consider that the desire to promote consistency with state law is, of itself, a sufficient reason to preclude access to independent merits review under Commonwealth law.

**Accordingly, the committee requests your advice as to the justification, beyond consistency with state legislation, for excluding independent review of decisions made under amended subsections 7(2) and 10(1) of the principal rule by reference to the Administrative Review Council's guide, *What decisions should be subject to merits review?*.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **Thursday, 20 February 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,

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



6 February 2020

Senator the Hon Zed Seselja  
Assistant Minister for Finance, Charities and Electoral Matters  
Parliament House  
Canberra ACT 2600

Via email: [Senator.Seselja@aph.gov.au](mailto:Senator.Seselja@aph.gov.au)  
CC: [Dlo-amf@finance.gov.au](mailto:Dlo-amf@finance.gov.au); [CommitteeScrutiny@treasury.gov.au](mailto:CommitteeScrutiny@treasury.gov.au)

Dear Assistant Minister,

**Taxation Administration (Private Ancillary Fund) Guidelines 2019  
[F2019L01227]**

Thank you for your letter of 3 December 2019 in response to the committee's scrutiny concerns regarding the above instrument. The committee considered your response at its private meeting on 5 February 2020.

***Consultation***

The committee welcomes your undertaking to revise the explanatory statement to include a detailed description of the consultation undertaken, in accordance with the committee's request. This undertaking has been recorded in *Delegated Legislation Monitor 1 of 2020*.

***Merits review***

The committee notes your advice that the enabling Act does not currently provide for the independent merits review of decisions made under the instrument, and the provision of such review would require amendments to the *Taxation Administration Act 1953* (enabling Act). In this regard, the committee acknowledges that the enabling Act does not expressly provide for the independent merits review of decisions made under instruments other than regulations. However, in the absence of any express statutory prohibition on the provision of independent merits review, it remains unclear why the instrument itself cannot be amended to make such review available. Moreover, the committee has long considered that the failure of an enabling Act to provide for independent merits review is not, of itself, a sufficient justification for failing to provide for independent merits review of discretionary decisions.



The committee also notes your advice that internal review and judicial review remain available for decisions made under the instrument, and Treasury has not received any representations seeking the extension of merits review to decisions made under the instrument. In this regard, the committee reiterates that it does not consider internal review or judicial review to be appropriate substitutes for independent merits review.

**Accordingly, the committee requests your further advice as to:**

- **why the provision of independent merits review of decisions made under the instrument would require amendments to the enabling Act, rather than the instrument itself; and**
- **the characteristics of the decisions, if any, that would justify their exclusion from independent merits review, by reference to the Administrative Review Council's guide, *What decisions should be subject to merits review?*.**

Noting that notice has been given to disallow the instrument, the committee would appreciate your response by **Thursday, 20 February 2020**, to facilitate the timely resolution of this matter before the revised disallowance period expires.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,

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



6 February 2020

Mr Josh Frydenberg MP  
Treasurer  
Parliament House  
Canberra ACT 2600

Via email: [Josh.Frydenberg.MP@aph.gov.au](mailto:Josh.Frydenberg.MP@aph.gov.au)  
CC: [tsrdlos@aph.gov.au](mailto:tsrdlos@aph.gov.au), [committeescrutiny@treasury.gov.au](mailto:committeescrutiny@treasury.gov.au)

Dear Treasurer,

**Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Regulations 2019 [F2019L01526]**

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to this matter.

***Matters more appropriate for parliamentary enactment***

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be included in primary, rather than delegated, legislation).

The instrument is made pursuant to subsection 963N(1) of the *Corporations Act 2001*. It amends the Corporations Regulations 2001 to establish a scheme to rebate certain benefits to affected retail clients which would otherwise have been paid as conflicted remuneration under the now repealed grandfathered conflicted remuneration scheme.

The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) commented on section 963N of the *Corporations Act 2001* when the Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Bill 2019 was before Parliament. The Scrutiny of Bills committee noted that the provision would provide for the inclusion of key elements of the regulatory scheme in delegated legislation, and reiterated its longstanding scrutiny position that such significant matters should instead be included in primary legislation.

The committee's views about this matter accord with those of the Scrutiny of Bills committee. The committee is concerned that the instrument deals with significant matters arising from the repeal of the grandfathered conflicted remuneration scheme. In this regard, the explanatory statement does not indicate why it is considered necessary and appropriate to leave these matters to delegated legislation, rather than primary legislation.

**In light of these matters, the committee requests your advice as to why it is considered necessary and appropriate to establish key elements of the conflicted remuneration rebate scheme via delegated legislation, rather than primary legislation.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **Thursday, 20 February 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,

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



6 February 2020

Senator the Hon Jane Hume  
Assistant Minister for Superannuation, Financial Services and Financial Technology  
Parliament House  
Canberra ACT 2600

Via email: [Senator.Hume@aph.gov.au](mailto:Senator.Hume@aph.gov.au)  
CC: [Shelby.Brinkly@treasury.gov.au](mailto:Shelby.Brinkly@treasury.gov.au)

Dear Assistant Minister,

**ASIC Corporations (Whistleblower Policies) Instrument 2019/1146 [F2019L01457]**

Thank you for your response of 19 December 2019 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 5 February 2020. On the basis of your advice, the committee has concluded its examination of the instrument.

While the committee has concluded its examination of the instrument, the committee reiterates that exemptions from primary legislation by delegated legislation should not generally continue in force for such time as to operate as a de facto amendment to the principal Act. Accordingly, the committee requests that this matter be considered in the future review of the operation of the corporate sector whistleblower protection regime under the *Corporations Act 2001*.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the Delegated Legislation Monitor.

Thank you for your assistance with this matter.

Yours sincerely,

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



6 February 2020

Ms Julie Inman Grant  
eSafety Commissioner  
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[dlo@communications.gov.au](mailto:dlo@communications.gov.au); [Elizabeth.Clark@communications.gov.au](mailto:Elizabeth.Clark@communications.gov.au)

Dear Ms Inman Grant,

**Telecommunications (Protecting Australians from Terrorist or Violent Criminal Material) Direction (No. 1) 2019 [F2019L01159]**

Thank you for your response of 17 December 2019 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 5 February 2020. On the basis of your advice, the committee has concluded its examination of the instrument.

The committee welcomes your undertaking to amend the explanatory statement to the instrument to indicate that a copy of the *List of websites hosting terrorist or violent criminal material (No. 1)* will be made available free of charge on request to the eSafety Commissioner.

In the interests of transparency, I note that your undertaking will be recorded in the *Delegated Legislation Monitor*, and this correspondence will be published on the committee's website

Thank you for your assistance with this matter.

Yours sincerely,

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