

Monitor 6 of 2020 - Committee correspondence

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21 May 2020

Senator Katy Gallagher
Chair
Senate Select Committee on COVID-19
Parliament House
CANBERRA ACT 2600

via email: covid.sen@aph.gov.au

cc: Senator the Hon Anne Ruston, Minister for Families and Social Services,
dlos@dss.gov.au

The Hon Josh Frydenberg MP, Treasurer
tsrdlos@treasury.gov.au

The Hon Christian Porter MP, Minister for Industrial Relations
dlo@ag.gov.au

Dear Chair

Matters of interest to the Senate—COVID-19 response instruments

I write on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation which assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23.

Since 4 December 2019, standing order 23(4) has required the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate. These may include instruments which contain significant policy matters or significant elements of a regulatory scheme, instruments which amend primary legislation, and instruments which have a significant impact on personal rights and liberties.

Noting that the following instruments appear to contain significant policy matters relating to the Australian Government's response to the COVID-19 pandemic, the committee has determined that the instruments engage standing order 23(4) and accordingly has resolved to draw these instruments to the attention of your committee:

- Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 [F2020L00419];

- Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020 [F2020L00432];
- Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020 [F2020L00435];
- Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Rules 2020 [F2020L00413];
- National Consumer Credit Protection Amendment (Coronavirus Economic Response Package) Regulations 2020 [F2020L00386];
- Social Security (Coronavirus Economic Response—2020 Measures No. 3) Determination 2020 [F2020L00338];
- Social Security (Coronavirus Economic Response—2020 Measures No. 8) Determination 2020 [F2020L00428]; and
- Social Security (Coronavirus Economic Response—2020 Measures No. 9) Determination 2020 [F2020L00440].

Should your committee decide to further examine any of these instruments, I note that (based on the current sitting pattern) the time for lodging a disallowance notice in relation to the National Consumer Credit Protection Amendment (Coronavirus Economic Response Package) Regulations 2020 [F2020L00386] and the Social Security (Coronavirus Economic Response—2020 Measures No. 3) Determination 2020 [F2020L00338] expires on 14 September 2020. The disallowance period for the remaining six instruments currently expires on 15 September 2020.

Further details about the instruments are set out in the committee's *Delegated Legislation Monitor 6 of 2020* at page 3. The text of the instruments, and the accompanying explanatory material for each instrument, is published on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

Please note that in the interests of transparency this correspondence will be published on the Scrutiny of Delegated Legislation Committee's website.

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

Yours sincerely

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



21 May 2020

Senator Wendy Askew
Chair
Senate Community Affairs Legislation Committee
Parliament House
CANBERRA ACT 2600

via email: community.affairs.sen@aph.gov.au

Dear Chair

Matters of interest to the Senate

I write on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation which assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23.

Since 4 December 2019, standing order 23(4) has required the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate. These may include instruments which contain significant policy matters or significant elements of a regulatory scheme, instruments which amend primary legislation, and instruments which have a significant impact on personal rights and liberties.

Noting that the following instruments appear to contain significant policy matters relating to the Australian Government's response to the COVID-19 pandemic, the committee has determined that the instruments engage standing order 23(4) and accordingly has resolved to draw these instruments to the attention of your committee:

- Social Security (Coronavirus Economic Response—2020 Measures No. 3) Determination 2020 [F2020L00338];
- Social Security (Coronavirus Economic Response—2020 Measures No. 8) Determination 2020 [F2020L00428]; and
- Social Security (Coronavirus Economic Response—2020 Measures No. 9) Determination 2020 [F2020L00440].

I note that under standing order 25(2)(a) your committee is empowered to conduct own-motion inquiries into legislative instruments which relate to the portfolios allocated to your committee, although there is no requirement to do so. Should your committee decide to further examine any of these instruments, I note that (based on the current sitting pattern) the time for lodging a disallowance notice in relation to the Social Security (Coronavirus Economic Response—2020 Measures No. 3) Determination 2020 [F2020L00338] expires on 14 September 2020. The disallowance period for the remaining two instruments currently expires on 15 September 2020.

Further details about the instruments are set out in the committee's *Delegated Legislation Monitor 6 of 2020* at page 3. The text of the instruments, and the accompanying explanatory material for each instrument, is published on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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

Yours sincerely

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



21 May 2020

Senator Slade Brockman
Chair
Senate Economics Legislation Committee
Parliament House
CANBERRA ACT 2600

via email: economics.sen@aph.gov.au

Dear Chair

Matters of interest to the Senate—COVID-19 response instruments

I write on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation which assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23.

Since 4 December 2019, standing order 23(4) has required the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate. These may include instruments which contain significant policy matters or significant elements of a regulatory scheme, instruments which amend primary legislation, and instruments which have a significant impact on personal rights and liberties.

Noting that the following appear to contain significant policy matters relating to the Australian Government's response to the COVID-19 pandemic, the committee has determined that the instruments engage standing order 23(4) and accordingly has resolved to draw these instruments to the attention of your committee:

- Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 [F2020L00419];
- Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020 [F2020L00435];
- Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Rules 2020 [F2020L00413]; and
- National Consumer Credit Protection Amendment (Coronavirus Economic Response Package) Regulations 2020 [F2020L00386].

I note that under standing order 25(2)(a) your committee is empowered to conduct own-motion inquiries into legislative instruments which relate to the portfolios allocated to your committee, although there is no requirement to do so. Should your committee decide to further examine any of these instruments, I note that (based on the current sitting pattern) the time for lodging a disallowance notice in relation to the National Consumer Credit Protection Amendment (Coronavirus Economic Response Package) Regulations 2020 [F2020L00386] expires on 14 September 2020. The disallowance period for the remaining three instruments currently expires on 15 September 2020.

Further details about the instruments are set out in the committee's *Delegated Legislation Monitor 6 of 2020* at page 3. The text of the instruments, and the accompanying explanatory material for each instrument, is published on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

Please note that in the interests of transparency this correspondence will be published on the Scrutiny of Delegated Legislation Committee's website.

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

Yours sincerely

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



21 May 2020

Senator the Hon James McGrath
Chair
Senate Education and Employment Legislation Committee
Parliament House
CANBERRA ACT 2600

via email: eec.sen@aph.gov.au

Dear Chair

**Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020
[F2020L00432]**

I write on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation which assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23.

Since 4 December 2019, standing order 23(4) has required the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate. These may include instruments which contain significant policy matters or significant elements of a regulatory scheme, instruments which amend primary legislation, and instruments which have a significant impact on personal rights and liberties.

Noting that the above instrument appears to contain a significant policy matter relating to the Australian Government's response to the COVID-19 pandemic, the committee has determined that the instrument engages standing order 23(4) and accordingly has resolved to draw this instrument to the attention of your committee.

I note that under standing order 25(2)(a) your committee is empowered to conduct own-motion inquiries into legislative instruments made in the portfolios allocated to your committee, although there is no requirement to do so. Should your committee decide to further examine this instrument, I note the time for lodging a disallowance notice expires on 15 September 2020.

To assist in your committee's consideration of this matter, please find attached a copy of the instrument and its explanatory statement. These documents are also published on the Federal Register of Legislation at

<https://www.legislation.gov.au/Details/F2020L00432>. In addition, further details about the instrument are set out in the committee's *Delegated Legislation Monitor 6 of 2020* at page 3.

Please note that in the interests of transparency this correspondence will be published on the Scrutiny of Delegated Legislation Committee's website.

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

Yours sincerely

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



21 May 2020

Senator Susan McDonald

Chair

Senate Rural and Regional Affairs and Transport Legislation Committee

Parliament House

CANBERRA ACT 2600

via email: rrat.sen@aph.gov.au

cc: Senator the Hon Mathias Cormann, Minister for Finance,
financeminister@finance.gov.au

The Hon David Littleproud MP, Minister for Agriculture, Drought and
Emergency Management, minister.littleproud@agriculture.gov.au

Department of Finance, FFSPRegs@finance.gov.au

Dear Chair,

Legislative instruments specifying Commonwealth expenditure

I write on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation which assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23.

Since 4 December 2019, standing order 23(4) has required the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate.

The instrument listed in the table below, in combination with its enabling Act, authorises Commonwealth expenditure on initiatives to reduce regulatory burden and streamline audit arrangements for the dairy industry. The committee considers that the scrutiny of such instruments is an essential aspect of parliamentary scrutiny and control of Commonwealth expenditure. Noting this, the committee has determined that the instrument listed below engages standing order 23(4), and accordingly has resolved to draw it to the attention of your committee:

Instrument	Grant/Program	Amount	Description
Financial Framework (Supplementary Powers) Amendment (Agriculture, Water and the Environment Measures No. 2) Regulations 2020 [F2020L00390]	Initiatives to reduce regulatory and auditing burdens in the dairy export supply chain, and to support Dairy RegTech 2022	\$14.8 million over six years from 2019-20	Funding will be provided to support: <ul style="list-style-type: none"> • projects to minimise the burdens for businesses in the dairy export supply chain of compliance with regulatory and auditing requirements; • projects to assist dairy businesses with export readiness; • projects to improve the use of data in regulation of the dairy export supply chain; and • the Dairy RegTech 2022 initiative of Dairy Food Safety Victoria.

I note that under standing order 25(2)(a) your committee is empowered to conduct own-motion inquiries into legislative instruments which relate to the portfolios allocated to your committee, although there is no requirement to do so. Should your committee decide to further examine this instrument, I note that (based on the current sitting pattern) the time for lodging a disallowance notice expires on 14 September 2020.

Further details about the instruments are published on the Federal Register of Legislation at <https://www.legislation.gov.au/Details/F2020L00390>.

Please note that in the interests of transparency this correspondence will be published on the Scrutiny of Delegated Legislation Committee's website.

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

Yours sincerely,

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



21 May 2020

Senator the Hon David Fawcett
Chair
Senate Environment and Communications Legislation Committee
Parliament House
CANBERRA ACT 2600

via email: ec.sen@aph.gov.au

cc: Senator the Hon Mathias Cormann, Minister for Finance,
financeminister@finance.gov.au

The Hon Paul Fletcher MP, Minister for Communications, Cyber
Safety and the Arts, dlo@communications.gov.au

Department of Finance, FFSPRegs@finance.gov.au

Dear Chair,

Legislative instruments specifying Commonwealth expenditure

I write on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation which assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23.

Since 4 December 2019, standing order 23(4) has required the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate.

The instrument listed in the table below, in combination with its enabling Act, authorises the Commonwealth to spend public money on the identified grants or programs. The committee considers that the scrutiny of such instruments is an essential aspect of parliamentary scrutiny and control of Commonwealth expenditure. Noting this, the committee has determined that the instrument listed below engages standing order 23(4), and accordingly has resolved to draw it to the attention of your committee:

Instrument	Grant/Program	Amount	Description
Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Regional Development and Communications Measures No. 3) Regulations 2020 [F2020L00384]	Imparja Television	\$0.8 million in 2019-20.	Funding will be provided to Imparja Television Pty Ltd to support its continued provision of commercial television services in regional and remote Australia.
	Australian Music Industry Package	\$30.9 million over five years from 2019-20.	Funding will be provided to: <ul style="list-style-type: none"> • establish and deliver a national mentoring program for women in the music industry; • assist businesses and music industry organisations to support performances of Australian music; • establish and deliver a national development program for Indigenous musicians and bands; and • promote Australian music overseas through funding the activities of Sounds Australia.

I note that under standing order 25(2)(a) your committee is empowered to conduct own-motion inquiries into legislative instruments which relate to the portfolios allocated to your committee, although there is no requirement to do so. Should your committee decide to further examine this instrument, I note that (based on the current sitting pattern) the time for lodging a disallowance notice expires on 14 September 2020.

Further details about the instruments are published on the Federal Register of Legislation at <https://www.legislation.gov.au/Details/F2020L00384>.

Please note that in the interests of transparency this correspondence will be published on the Scrutiny of Delegated Legislation Committee's website.

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

Yours sincerely,

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



21 May 2020

Senator the Hon James McGrath
Chair
Senate Education and Employment Legislation Committee
Parliament House
CANBERRA ACT 2600

via email: eec.sen@aph.gov.au

cc: Senator the Hon Mathias Cormann, Minister for Finance,
financeminister@finance.gov.au

The Hon Dan Tehan MP, Minister for Education
minister@education.gov.au

Department of Finance, FFSPRegs@finance.gov.au

Dear Chair,

Legislative instruments specifying Commonwealth expenditure

I write on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation which assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23.

Since 4 December 2019, standing order 23(4) has required the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate.

The instrument listed in the table below, in combination with its enabling Acts, authorises Commonwealth expenditure on the Destination Australia Cheung Kong Exchange Pilot. The committee considers that the scrutiny of such instruments is an essential aspect of parliamentary scrutiny and control of Commonwealth expenditure. Noting this, the committee has determined that the instrument listed below engages standing order 23(4), and accordingly has resolved to draw it to the attention of your committee:

Instrument	Grant/Program	Amount	Description
Financial Framework (Supplementary Powers) Amendment (Education, Skills and Employment Measures No. 2) Regulations 2020 [F2020L00391]	Destination Australia Cheung Kong Exchange Pilot	\$0.25 million in 2019-20	Funding will be provided to Australian universities to subsidise the cost of providing scholarships for cultural and educational exchange with universities in 16 specified Asian countries.

I note that under standing order 25(2)(a) your committee is empowered to conduct own-motion inquiries into legislative instruments which relate to the portfolios allocated to your committee, although there is no requirement to do so. Should your committee decide to further examine this instrument, I note that (based on the current sitting pattern) the time for lodging a disallowance notice expires on 14 September 2020.

Further details about the instrument are published on the Federal Register of Legislation at <https://www.legislation.gov.au/Details/F2020L00391>.

Please note that in the interests of transparency this correspondence will be published on the Scrutiny of Delegated Legislation Committee's website.

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

Yours sincerely,

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



21 May 2020

Senator Wendy Askew
Chair
Senate Community Affairs Legislation Committee
Parliament House
CANBERRA ACT 2600

via email: community.affairs.sen@aph.gov.au

cc: Senator the Hon Mathias Cormann, Minister for Finance,
financeminister@finance.gov.au

The Hon Stuart Robert MP, Minister for the National Disability
Insurance Scheme, dlorobert@dss.gov.au

The Hon Greg Hunt MP, Minister for Health,
Minister.Hunt.DLO@health.gov.au

Department of Finance, FFSPRegs@finance.gov.au

Dear Chair,

Legislative instruments specifying Commonwealth expenditure

I write on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation which assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23.

Since 4 December 2019, standing order 23(4) has required the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate.

The instruments listed in the table below, in combination with their enabling Acts, authorise the Commonwealth to spend public money on the identified grants or programs. The committee considers that the scrutiny of such instruments is an essential aspect of parliamentary scrutiny and control of Commonwealth expenditure. Noting this, the committee has determined that the instruments listed below engage standing order 23(4), and accordingly has resolved to draw them to the attention of your committee:

Instrument	Grant/Program	Amount	Description
Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 1) Regulations 2020 [F2020L00385]	Continuity of Support Fund for Clients of Programs Transitioning to the National Disability Insurance Scheme (NDIS) National Auslan Interpreter Booking and Payment Services	\$9.7 million in 2020-21, with reduced funding in subsequent years \$1 million per year from 2020-21	Funding will be provided for continued disability support, and early intervention services, for people with disability who are clients of programs transitioning to the NDIS, but who are ineligible for the NDIS. Funding will be provided for the provision of Auslan translation services at private medical consultations for deaf people over the age of 65 who are ineligible for the NDIS.
Financial Framework (Supplementary Powers) Amendment (Health Measures No. 2) Regulations 2020 [F2020L00392]	Youth Action Support Project Grants Scheme	\$3.2 million over two years from 2019-20	Funding will be provided to: <ul style="list-style-type: none"> • establish national networks to ensure the voice of young people, particularly those marginalised, is heard in the policy making process; and • one-off or small scale innovative projects for mechanisms to assist youth experiencing disadvantage.

I note that under standing order 25(2)(a) your committee is empowered to conduct own-motion inquiries into legislative instruments which relate to the portfolios allocated to your committee, although there is no requirement to do so. Should your committee decide to further examine these instruments, I note that (based on the current sitting pattern) the time for lodging a disallowance notice for both instruments expires on 14 September 2020.

Further details about the instruments are published on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

Please note that in the interests of transparency this correspondence will be published on the Scrutiny of Delegated Legislation Committee's website.

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

Yours sincerely,

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



21 May 2020

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

Via email: Senator.Hume@aph.gov.au

CC: tsrdlos@aph.gov.au; committeescrutiny@treasury.gov.au;
Shelby.Brinkley@treasury.gov.au

Dear Assistant Minister,

ASIC Corporations (Amendment) Instrument 2020/290 [F2020L00376]

ASIC Corporations (Trading Suspensions Relief) Instrument 2020/289 [F2020L00377]

**ASIC Corporations (COVID-19—Advice-related Relief) Instrument 2020/355
[F2020L00425]**

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instruments, and seeks your advice about this matter.

Exemptions and modifications to primary legislation

Parliamentary oversight

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 enacted via primary rather than delegated legislation). This includes where an instrument modifies or exempts persons or entities from the operation of primary legislation. In addition, Senate standing order 23(3)(k) requires the committee to scrutinise each legislative instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes whether an instrument limits parliamentary oversight.

The instruments provide relief from certain disclosure and licensing requirements in the *Corporations Act 2001* (Corporations Act). To do so, they modify the operation of, or create or extend exemptions to, specified provisions of that Act.

The explanatory statements to the instruments indicate that the measures are intended to be temporary. They also explain that ASIC will continue to monitor the appropriateness of the instruments having regard to the state of capital markets, and will provide 30 days' notice to stakeholders before repealing the measures. The committee understands that the matters ASIC will take into account when making such a decision include the extent of capital raising activities conducted in reliance on the instruments; levels of market volatility; whether adverse economic impacts associated with COVID-19 have eased; and whether governments have lifted restrictions implemented in response to the pandemic.

However, the committee is concerned that the instruments do not specify when the measures will cease. In this regard, the committee draws your attention to its letter of 2 April 2020 in which the committee outlined its expectations in relation to legislative instruments implementing COVID-19 responses measures. In that letter the committee outlined its expectation that such instruments will be time limited where they modify the operation of primary legislation.

In this instance, the committee understands that it is not considered appropriate to specify a cessation date due to uncertainties around the nature, severity and duration of the economic impacts associated with the COVID-19 pandemic. While the committee appreciates this point, the committee considers that the instruments should still specify a date by which the exemptions and modifications will cease in line with the committee's previous advice. This is to ensure an appropriate level of regular parliamentary oversight.

For example, the instruments could specify that the measures cease to operate six months after they commence, with the option to extend this date using a subsequent disallowable legislative instrument if necessary. If it is deemed appropriate to cease the measures at an earlier date, the measures could still be repealed following the provision of 30 days' notice to stakeholders. Noting this, the committee does not consider that specifying an end date for the measures would inhibit ASIC from responding flexibly to the economic impacts associated with the COVID-19 pandemic.

In light of the comments above, the committee requests your advice as to whether the instruments could be amended to specify a date by which the measures in the instruments will cease to operate.

The committee's expectation is to receive a response in time for it to consider and report on the instruments while they are 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 **4 June 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.

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



21 May 2020

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

Via email: Senator.Hume@aph.gov.au

CC: tsrdlos@aph.gov.au; committeescrutiny@treasury.gov.au;
Shelby.Brinkley@treasury.gov.au

Dear Assistant Minister,

**ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licensees)
Instrument 2020/198 [F2020L00237]**

**ASIC Corporations (Foreign Financial Services Providers—Funds Management
Financial Services) Instrument 2020/199 [F2020L00238]**

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instruments, and seeks your advice about this matter.

Exemptions and modifications to primary legislation

Parliamentary oversight

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 enacted via primary rather than delegated legislation). This includes where an instrument modifies or exempts persons or entities from the operation of primary legislation. In addition, Senate standing order 23(3)(k) requires the committee to scrutinise each legislative instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes whether an instrument limits parliamentary oversight.

The instruments seek to give effect to a modified Australian Financial Services licensing regime for foreign financial services providers (FFSPs) by modifying the operation of specified provisions of the *Corporations Act 2001* (Corporations Act) for FFSPs. For

example, the instruments exempt FFSPs from the obligation to hold an Australian financial services license, subject to specified conditions.

The instruments were made under subsections 926A(2), 992B(1) and 1020F(1) of the Corporations Act. Those subsections allow ASIC to exempt persons, entities and classes of persons and entities from provisions of the Corporations Act, or to declare that certain provisions of that Act apply as if modified or varied.

Provisions that modify or exempt persons or entities from the operation of primary legislation may limit parliamentary oversight, and may subvert the appropriate relationship between Parliament and the executive. The committee considers that such measures should ordinarily be included in primary legislation, unless a sound justification for the use of delegated legislation is provided.

In this instance, the committee understands that the measures are considered suitable for delegated legislation because the measures are made under powers given by Parliament, and it may be necessary for ASIC to revise the measures at short notice to keep pace with developments in global wholesale markets. Further, the committee understands that it is considered that if the measures were to be included in primary legislation, this would result in additional cost and complexity for users of the Corporations Act.

However, the committee also understands that it is intended for the measures to remain in force for at least 10 years (until the instruments sunset under the *Legislation Act 2003*). Further, while the committee understands that ASIC intends to conduct a review of the instruments before that time, it is not clear when this review will take place. In this regard, the committee emphasises its longstanding view that 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. This is to ensure a minimum degree of regular parliamentary oversight.

The committee therefore considers that the instruments should be amended to specify that they cease to operate three years after they commence. If it becomes necessary to extend the operation of the instruments, this should be done via subsequent legislative instruments that are subject to disallowance and parliamentary scrutiny.

The committee therefore requests your advice whether the instruments could be amended to specify that they cease to operate three years after they commence.

The committee's expectation is to receive a response in time for it to consider and report on the instruments while they are 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 **4 June 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.

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



21 May 2020

The Hon Peter Dutton MP
Minister for Home Affairs
Parliament House
CANBERRA ACT 2600

Via email: Peter.Dutton.MP@aph.gov.au

CC: dlo@homeaffairs.gov.au

Dear Minister,

Australian Crime Commission Establishment Regulations 2020 [F2020L00162]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the 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 about this matter.

Availability of independent review

Senate standing order 23(3)(i) requires the committee to consider whether an instrument unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests.

Section 6 of the instrument permits the CEO of the Australian Criminal Intelligence Commission (ACIC) to vary or revoke a non-publication direction given by a hearing officer under the (former) *National Crime Authority Act 1984*. Subsection 6(3) provides that the CEO must not vary or revoke a direction if to do so might prejudice the safety or reputation of a person, or the fair trial of a person who has been or may be charged with an offence.

The committee understands that it may be argued that decisions to vary or revoke a non-publication direction should not be subject to merits review, as they are decisions of a law enforcement nature. This accords with the Administrative Review Council guidance document, *What decisions should be subject to merit review?* (ARC Guide). In this respect, the committee understands that the relevant decisions would ordinarily be made in the course of carrying out an investigation, or to enable or assist a law enforcement or investigative body to carry out an investigation.

However, the ARC Guide also indicates that decisions relating directly to the security of a person should be subject to independent merits review. It appears to the committee that the relevant directions relate directly to the security of a person—noting in particular that the CEO must not vary or revoke a non-publication direction if this might prejudice

personal safety. This is despite the fact that the decisions also relate to law enforcement matters.

The committee notes that judicial review is available in relation to decisions to vary or revoke a non-publication order, and that the validity of a decision may be challenged if it breaches subsection 6(3) of the instrument. However, while noting that judicial review is an important safeguard, the committee does not consider judicial review to be an adequate substitute for independent merits review.

In this regard, it appears that subsection 6(3) would require the CEO to determine whether the variation or revocation of a direction might prejudice a person's safety, reputation, or right to a fair trial. If the CEO is satisfied—based on the available evidence—that a person's safety, reputation or right to fair trial would not be affected, it may be difficult for a court to challenge the validity of the CEO's decision on administrative law grounds. By contrast, merits review would permit an independent tribunal (or other person or body, if appropriate), to determine whether the CEO has made the *preferable* decision based on the available evidence.

The committee also appreciates the importance of ensuring that any review process does not unnecessarily expose sensitive law enforcement information. However, the committee notes that the Administrative Appeals Tribunal (AAT) may order that a hearing be held in private, and may issue orders for the non-publication or non-disclosure of information. Moreover, it may not be strictly necessary for independent review to be conducted by the AAT. For example, it may be possible for the ACIC to engage an independent reviewer to conduct the review process.

Finally, the committee notes that other Commonwealth laws allow persons and entities to vary or revoke directions relating to the confidentiality of information, without providing for independent merits review. However, the committee does not consider consistency with other legislation to be a sufficient justification for excluding independent merits review.

In light of the comments above, the committee requests your detailed advice as to the characteristics of a decision made under section 6 of the instrument, to vary or revoke a non-publication direction, which would justify excluding merits review. The committee's consideration of this matter would be assisted if your response would expressly identify established grounds for excluding merits review set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit 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 **4 June 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.

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



21 May 2020

The Hon David Littleproud MP
Minister for Agriculture, Drought and Emergency Management
Parliament House
CANBERRA ACT 2600

Via email: David.Littleproud.MP@aph.gov.au
CC: Minister.Littleproud@agriculture.gov.au
DLO.MO@agriculture.gov.au

Dear Minister,

Competition and Consumer (Industry Codes—Dairy) Regulations 2019 [F2019L01610]

Thank you for your response of 17 April 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) in relation to the above instrument.

The committee considered your response at its private meeting on 20 May 2020. The committee remains concerned that the instrument imposes significant civil penalties for non-compliance with a term undefined by the written law.

Accordingly, the committee resolved to seek a meeting with senior officials of your department, to provide committee members with an opportunity to be briefed on the relevant issues and ask questions relating to its scrutiny concerns. In this regard, I request that the relevant officials please liaise with the committee secretariat to arrange a mutually convenient time to meet in the sitting fortnight commencing 10 June 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.

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



21 May 2020

Senator the Hon Linda Reynolds CSC
Minister for Defence
Parliament House
CANBERRA ACT 2600

Via email: Senator.Reynolds@aph.gov.au
CC: parliamentary.business@defence.gov.au

Dear Minister,

Defence Amendment (2020 Measures No. 1) Regulations 2020 [F2020L00120]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the 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 about this matter.

Procedural fairness

Senate standing order 23(3)(h) requires the committee to scrutinise each instrument as to whether it trespasses unduly on personal rights and liberties.

The instrument amends section 24 of the Defence Regulation 2016 (the regulation), which relates to early termination of service. The effect of the restructure of section 24 is to explicitly exclude decisions to terminate a member who has failed to meet a condition of the member's appointment or enlistment (paragraph 24(3)(b)(i)), or has been absent without leave for a continuous period of 3 months or more (paragraph 24(3)(b)(iii)), from the requirement in subsection 24(2) to give 14 days' notice of the termination decision.

The committee notes that the previous iteration of section 24 was silent in relation to the giving of notice in these circumstances. In the absence of an express legislative exclusion of procedural fairness, courts will require that notice, and an opportunity to be heard, be afforded to individuals whose interests may be affected by a decision. The committee considers that having notice of decisions is an important feature of the common law right to procedural fairness.

It is not clear to the committee why the 14 day notice requirement cannot be applied to termination decisions made in the circumstances set out in paragraphs 24(3)(b)(i) and (iii). In this regard, the committee does not consider the fact that the 14 day notice requirement did not apply to such terminations in the previous iteration of section 24 to

be a sufficient justification for not including the notice requirement for terminations made in these circumstances in the latest iteration of section 24.

The committee understands that the restructure of section 24 is not intended to exclude the general common law requirements of procedural fairness, including the requirement that a member be given notice and an opportunity to respond if that is appropriate in the particular circumstances of the case. However, the committee considers that section 24, as amended by the instrument, does not make this intention clear on its face. In any event, the committee does not consider the fact that the common law requirements of procedural fairness will apply to be, on its own, a sufficient justification for the exclusion of the statutory 14 day notice requirement.

The committee therefore requests your advice as to whether the regulation could be amended to provide that the 14 day notice requirement in subsection 24(2) applies to termination decisions made in the circumstances set out in paragraphs 24(3)(b)(i) and (iii) and if not, why not.

If such an amendment is not considered appropriate, the committee also requests your advice as to whether the regulation could at least be amended to expressly state that subsection 24(3) is not intended to exclude the common law requirements of procedural fairness in order to put the matter beyond doubt for defence officials, defence members and the courts.

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 **4 June 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.

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



21 May 2020

The Hon David Littleproud MP
Minister for Agriculture, Drought and Emergency Management
Parliament House
CANBERRA ACT 2600

Via email: David.Littleproud.MP@aph.gov.au
CC: Minister.Littleproud@agriculture.gov.au
DLO.MO@agriculture.gov.au

Dear Minister,

Export Control (Sheepmeat and Goatmeat Export to the European Union Tariff Rate Quotas) Order 2019 [F2019L01564]

Thank you for your response of 14 May 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 20 May 2020. On the basis of your advice, the committee has concluded its examination of the instrument. Consequently, the committee has also resolved to withdraw the notice of motion to disallow the instrument, which was placed on 13 May 2020.

The committee welcomes your undertaking to amend the instrument to explicitly rule out the use of computer programs for discretionary decisions. The committee will monitor this undertaking to ensure that it is implemented.

In the interests of transparency, I note that your undertaking will be recorded in the Delegated Legislation Monitor, and that 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



21 May 2020

The Hon Christian Porter MP
Minister for Industrial Relations
Parliament House
CANBERRA ACT 2600

Via email: Christian.Porter.MP@aph.gov.au
CC: attorney@ag.gov.au; dlo@ag.gov.au

Dear Minister,

Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020 [F2020L00432]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instruments, and seeks your advice about this matter.

Matters more appropriate for parliamentary enactment

Adequacy of explanatory materials

Senate standing order 23(3)(j) requires the committee to scrutinise each instrument as to whether it contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). In addition, Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument.

The instrument was made under subsection 211(6) of the *Fair Work Act 2009* (the Act). It has the effect of modifying one of the conditions of which the Fair Work Commission must be satisfied before approving a variation to an enterprise agreement. Specifically, it shortens the minimum period ('access period') in which employees must be able to access the proposed variation before voting from seven calendar days to one calendar day.

The reduction of the access period of which the Fair Work Commission must be satisfied before approving a variation to an enterprise agreement appears to constitute a significant change to the regulatory scheme for the variation of enterprise agreements provided for in the Act. As a technical scrutiny committee, the committee does not express a view as to the policy merits of this measure. However, the committee's longstanding technical scrutiny view is that any significant modification to a regulatory scheme should be enacted via primary legislation, unless the explanatory materials provide a sound justification for the use of delegated legislation instead. In this instance, the explanatory statement does not appear to explain why delegated legislation has been used to modify the access period, rather than primary legislation.

The committee would therefore appreciate your detailed advice as to:

- why it was considered necessary and appropriate to include these measures in delegated legislation, rather than primary legislation; and
- noting that the Parliament is now sitting more regularly than was envisaged at the time the instrument was made, the appropriateness of amending the *Fair Work Act 2009* to include the measures in primary legislation, rather than delegated legislation.

Adequacy of consultation

Senate standing order 23(3)(d) requires the committee to consider whether those likely to be affected by an instrument were adequately consulted in relation to it. This principle is informed by subsection 17(2) of the *Legislation Act 2003*, which provides that, in assessing whether appropriate consultation has taken place in making the instrument, the rule-maker may have regard to the extent to which persons likely to be affected by the instrument had an adequate opportunity to comment on its proposed content.

In this instance, the explanatory statement to the instrument notes that the government consulted with the referring states and territories under the *Intergovernmental Agreement for a National Workplace System for the Private Sector*. However, it does not appear to indicate whether the government also consulted with persons and entities likely to be affected by the instrument, such as employers and employees and their representatives.

The committee would therefore appreciate your detailed advice as to:

- whether persons and entities likely to be affected by the measures in the instrument, such as employers and employees and their representatives, were consulted before the instrument was made; or
- if not, why such persons and entities were not consulted.

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 **4 June 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.

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



21 May 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

CC: Shelby.Brinkley@treasury.gov.au

Dear Assistant Minister,

Financial Sector (Collection of Data) (reporting standard) determination No. 3 of 2020 [F2020L00328]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instruments, and seeks your advice about this matter.

Incorporation of external materials

Senate standing order 23(3)(f) requires the committee to scrutinise each legislative instrument as to whether it, and any document it incorporates, may be freely accessed and used.

The instrument requires an authorised deposit-taking institution (ADI) to report counterparty countries using the English name of the relevant country, assigned in accordance with international standard ISO 3166. It also requires ADIs to report the Legal Entity Identifier (LEI) for a counterparty (if available), issued in accordance with ISO 17442. The instrument provides links to online databases where country codes, country names and LEIs may be obtained.

The explanatory statement states that although the instrument refers to ISO 3166 and ISO 17442, these standards are not intended to be incorporated, as the standards are not relevant to understanding the terms of the instrument. The explanatory statement also states that the online databases, LEI codes and country names are not intended to be incorporated.

However, it appears to the committee that, in practice, an ADI may be obliged to refer to ISO 3166 and ISO 17442 to comply with the instrument. In particular, the committee notes that the definition of 'counterparty country' requires ADIs to report the English name of a counterparty country, 'assigned...to a country code defined under the International Organisation for Standardisation's International Standard ISO 3166'. ADIs may be obliged to examine ISO 3166 to ensure that the ADI complies with their reporting requirements. ADIs may similarly be obliged to examine ISO 17422 to ensure compliance with reporting requirements relating to LEIs. This is notwithstanding the statement in the explanatory statement that it would not be possible to 'determine' an LEI by referring to ISO 17422. In light of these matters, it is not clear to the committee that ISO 3166 and ISO 17422 are not incorporated.

Further, even if ISO 3166 and 17442 are not incorporated by reference, it appears that the online databases (that is, the online browsing platform and the LEI database) may be incorporated—as it appears that an ADI would be required to access these databases in order to comply with the instrument. The committee was previously advised that 'up-to-date information about...[country] names and codes is only available via the Online Browsing Platform or by purchasing the Country Codes Collection'. The committee was also advised that 'LEIs are only searchable via an online database' (see *Delegated Legislation Monitor 13 of 2018*, p. 99). The committee also notes that the explanatory statement to the present instrument does not indicate any other means by which LEIs, country names and country codes may be located.

Where an instrument incorporates a document by reference, the instrument or its explanatory statement should indicate the manner in which the document is incorporated (as in force from time to time or as in force at a particular time), and should indicate where the document may be accessed free of charge. In this respect, the committee notes that the explanatory statement provides web references for where the databases may be freely accessed. However, the instrument and its explanatory statement are silent as to where ISO 3166 and ISO 17442 may be accessed free of charge, and as to the manner in which the standards and the associated databased are incorporated.

Finally, the committee notes that the enabling legislation for the instrument allows for the incorporation of certain documents as in force from time to time. However, it appears that the exercise of that power is restricted to matters related to reporting under the *Major Bank Levy Act 2017*. It is therefore unclear that the power to incorporate documents as in force from time to time would extend to the incorporation of ISO 3166, ISO 17442, or the associated online databases.

The committee therefore requests your advice as to whether international standards ISO 3166, ISO 17442, and the associated online databases, are incorporated by the instrument; and if not, why not.

If the advice is that either the standards or the associated online databases are incorporated, the committee also requests your advice as to:

- **where the standards may be accessed or viewed free of charge;**
- **the manner in which the standards and/or the online databases are incorporated; and**

- **if it is intended to incorporate either the standards or the online databases as in force from time to time, the power in the enabling legislation or other Commonwealth law that is relied on to incorporate the documents in this manner.**

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 **4 June 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.

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



21 May 2020

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: Josh.Frydenberg.MP@aph.gov.au

CC: tsrdlos@treasury.gov.au; committeescrutiny@treasury.gov.au;
chris.reside@treasury.gov.au

Dear Treasurer,

Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020 [F2020L00435]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instruments, and seeks your advice about this matter.

Parliamentary oversight

Senate standing order 23(3)(k) requires the committee to scrutinise each legislative instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes where an instrument enacts significant policy measures, or appears to limit parliamentary oversight.

The instrument amends the Foreign Acquisitions and Takeovers Regulation 2015 (Principal Regulation), to set the monetary thresholds for particular significant actions and notifiable actions to nil. In effect, this would mean that the majority of actions relating to the holding or acquisition of interests in Australian business or land would require notification to the Treasurer under the *Foreign Acquisitions and Takeovers Act 1975* (Foreign Acquisitions Act). The Treasurer may impose conditions on these actions, and may refuse to allow an action to proceed if it is deemed contrary to the national interest.

The explanatory statement explains that this measure is necessary to safeguard the national interest during the COVID-19 pandemic, which is placing intense pressure on the Australian economy and Australian businesses. It also states that the measure is 'intended to be in place for the duration of the Coronavirus crisis'.

The committee considers that setting the monetary threshold at nil, for a large number of actions relating to the holding or acquisition of interests in Australian business and land, is a significant measure. The committee would therefore expect this measure to be subject to an appropriate level of parliamentary oversight.

The committee acknowledges that paragraph 55(1)(a) of the Foreign Acquisitions Act expressly contemplates the making of regulations that set monetary thresholds to nil. However, the committee is concerned that—although the explanatory statement indicates that the measure is intended to be temporary—the instrument does not specify a date by which the measure will cease. The committee notes that other instruments which implement temporary measures in response to COVID-19 generally specify a period for which the measures will apply.

The committee appreciates that the COVID-19 pandemic is creating unprecedented challenges for the Australian economy, which may necessitate changes to the foreign acquisitions regime. Nevertheless, the committee considers that the instruments implementing significant COVID-19 responses measures should still specify a date by which they will cease. This is to ensure an appropriate level of regular parliamentary oversight.

For example, the instrument could specify that the measures cease to operate six months after they commence, with the option to extend this date using a subsequent disallowable legislative instrument if necessary. If it is deemed appropriate to cease the measures at an earlier date, the measures could still be repealed at an earlier time. Noting this, the committee does not consider that specifying an end date for the measures would inhibit the government from responding flexibly to the economic impacts associated with the COVID-19 pandemic.

In light of the comments above, the committee requests your advice as to:

- **the length of time for which it is intended the measures enacted by the instrument will remain in force; and**
- **whether the instrument could be amended to specify a date by which the measures will cease to operate.**

Retrospective application

Senate standing order 23(3)(h) requires the committee to scrutinise each instrument as to whether it trespasses unduly on personal rights and liberties. This may include where an instrument applies retrospectively or has retrospective effect.

The instrument commenced on 18 April 2020. Item 5 of the instrument inserts a new section 74 into the Principal Regulation. Subsection 74(1) provides that the amendments made by the present instrument apply to actions taken on or after the announcement time, unless the action is covered by an agreement entered into before that time. Subsection 74(5) provides that 'announcement time' means 10.30 pm, by legal time in the Australian Capital Territory, on 29 March 2020. The amendments made by the present instrument therefore apply retrospectively.

The committee acknowledges that the retrospective application of the present instrument will only affect actions taken up to 19 days before the instrument commenced, and will not apply to actions covered by agreements made before that date.

Nevertheless, the committee is concerned that the explanatory statement only indicates that the instrument will apply retrospectively. It does not explain why retrospectivity is considered necessary and appropriate; whether any person has been, or may be, disadvantaged by the retrospectivity; and, if so, what steps have been or will be taken to avoid such disadvantage, and to ensure procedural fairness for affected persons. Where an instrument or a provision of an instrument applies retrospectively, the committee would expect this information to be included in the explanatory statement.

In light of the comments above, the committee requests your advice as to:

- **why it is considered necessary and appropriate that amendments made by the instrument apply retrospectively;**
- **whether any person was, or could be, disadvantaged by the retrospective application of the instrument; and**
- **if so, what steps have been or will be taken to avoid such disadvantage, and to ensure procedural fairness for affected persons.**

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 **4 June 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.

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



21 May 2020

The Hon Dan Tehan MP
Minister for Education
Parliament House
CANBERRA ACT 2600

Via email: Dan.Tehan.MP@aph.gov.au

CC: Rob.Mason@dese.gov.au; Amanda.Gilkes@dese.gov.au

Dear Minister,

Higher Education Provider Amendment (Tuition Protection and Other Measures) Guidelines 2019 [F2019L01699]

Thank you for your response of 24 April 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee), in relation to the above instrument. The committee considered your response at its private meeting on 20 May 2020, and resolved to seek your further advice about the matter outlined below.

Availability of independent review

As you are aware, the instrument inserts new sections 2.10.25 to 2.10.35 into the Higher Education Provider Guidelines 2020 (principal guidelines). These sections set out the circumstances in which a leviable provider may request a review of a levy determination by the Director, the options available to the Director in reviewing the decision, and the notice requirements attaching to the review decision. The instrument provides for internal review of these decisions; however, it does not appear to provide for independent merits review of the same decisions.

Following informal engagement with your department, the committee sought your formal advice as to what characteristics of the determination of levy components 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 merits review?* (ARC guidance document).

In your response to the committee, you advise that the automatic or mandatory nature of the decisions relating to the determination of levy components makes them inappropriate for independent merits review. In support of your advice, you explain that 'there is no discretion exercisable around the factors relevant to the levy determination', as the determination 'is based on categories of statistical and other data which must be considered when making a determination'.

The committee shares your view, and the view of the ARC, that automatic or mandatory decisions are not suitable for independent merits review. However, the committee remains concerned that, unlike strictly automatic or mandatory decisions, the relevant decisions in this instance require the decision-maker to exercise some discretion, albeit minor. This appears to be reflected in your advice that:

As the facts are based on measurable data (such as student numbers, completion rates and compliance history) the decision-maker's discretion, to the extent it may be exercised, is strictly confined to an objective assessment of the data.

In the committee's view, the fact that a decision is based on quantitative data, is not, of itself, a reason to exclude such a decision from independent merits review. In this regard, the committee understands that such decisions are often subject to independent merits review by the Administrative Appeals Tribunal in relation taxation. Moreover, the committee considers that the availability of internal review under the principal guidelines, as amended by the instrument, indicates that there is some scope for disagreement about the relevant data.

Accordingly, in the absence of any other reason to exclude independent merits review for decisions made under the principal guidelines, as inserted by the instrument, the committee remains of the view that independent merits review should be made available.

The committee therefore requests your advice as to whether the instrument could be amended to provide for independent merits review of decisions made under new sections 2.10.25 to 2.10.35 of the Higher Education Provider Guidelines 2020.

I note that on 14 May 2020, the committee gave notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider the instrument. Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **4 June 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.

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



21 May 2020

The Hon Greg Hunt MP
Minister for Health
Parliament House
CANBERRA ACT 2600

Via email: Greg.Hunt.MP@aph.gov.au

CC: Minister.Hunt.DLO@health.gov.au

Dear Minister,

**National Health (Take Home Naloxone Pilot) Special Arrangement 2019 (PB 97 of 2019)
[F2019L01542]**

Thank you for your response of 24 April 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee), in relation to the above instrument. The committee considered your response at its private meeting on 20 May 2020.

Your response has further assisted the committee in its consideration of the instrument. Nevertheless, the committee retains significant scrutiny concerns about the source of legal authority for section 25 of the instrument, and has resolved to request amendments to the *National Health Act 1953* (the Act) to address these concerns, for the reasons outlined below.

Compliance with authorising legislation

The committee has twice sought your formal advice about the source of legal authority for section 25 of the instrument, following preliminary, informal engagement with your department.

In your initial response of 2 March 2020, you advised that section 25 of the instrument is expressly supported by subsection 100(1) of the Act, when read in conjunction with subsection 100(3), as this subsection provides broad authority for the Minister to make special arrangements 'for' or 'in relation to' providing that an adequate supply of pharmaceutical benefits will be available to certain persons.

Whilst noting your interpretation, the committee remained concerned that the use of section 100 of the Act to support the authorisation of private third parties to perform all of the powers and functions of a departmental secretary to administer a special arrangement constitutes an unusual and potentially unintended use of that power. The committee therefore sought your advice as to the evidence available, beyond the terms of section 100

of the Act, to indicate that Parliament intended that section to provide legislative authority for such authorisations.

In your most recent response, you advised that the explanatory material relating to section 100 of the Act demonstrates that Parliament clearly intended that section 100 would provide for funding of medicines outside the normal operation of the Pharmaceutical Benefits Scheme (PBS), including arrangements such as those provided for by the instrument. Your response also cited *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18 (*ADCO Constructions*) in support of the proposition that Henry VIII clauses such as subsection 100(1) of the Act need not be construed strictly.

The committee shares your view, informed by the explanatory material to the Act, that section 100 of the Act provides clear authority for the minister to fund medicines outside the normal operation of the PBS by way of a special arrangement. However, the committee remains concerned that this does not extend to authorising private third parties to perform the powers and functions of the secretary to administer special arrangements.

While subsection 100(3) of the Act provides that Part VII of the Act and associated regulations or instruments have effect subject to a special arrangement made under subsection (1), the committee does not consider that *ADCO Constructions* can support the view that section 100 provides legislative authority for the authorisation private third parties to perform the powers and functions of the secretary to administer special arrangements. In this regard the committee notes that Gageler J's proposition regarding the construction of Henry VIII clauses does not appear to have been endorsed by the majority of the Court.

In summary, whilst noting your advice, the committee remains of the view that the authorisation of private third parties to perform the powers and functions of a departmental secretary is a significant matter that must be expressly authorised on the face of an Act. Accordingly, in this instance the committee considers that section 25 of the instrument cannot be impliedly authorised by subsections 100(1) and (3) of the Act, which enable the minister to make special arrangements 'for' or 'in relation to' providing that an adequate supply of pharmaceutical benefits will be available to certain persons.

In light of the committee's views, the committee requests that the *National Health Act 1953* be amended to expressly provide for the authorisation of private third parties to perform all of the powers and functions of the secretary in administering special arrangements.

I note that on 12 May 2020, the committee gave notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider the instrument. Your response to the committee's request will assist the committee in forming a view as to whether it would be appropriate to pursue the disallowance of the instrument.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **4 June 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.

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



21 May 2020

Senator the Hon Anne Ruston
Minister for Social Services
Parliament House
CANBERRA ACT 2600

Via email: Senator.Ruston@aph.gov.au

CC: dlos@dss.gov.au

Dear Minister,

National Rental Affordability Scheme Regulations 2020 [F2020L00282]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instruments, and seeks your advice about this matter.

Availability of independent review

Senate standing order 23(3)(i) requires the committee to consider whether an instrument unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests.

The instrument permits the Secretary of the Department of Social Services (the Secretary) to make a number of discretionary decisions relating to the administration of the National Rental Affordability Scheme (NRAS). Several of these decisions are subject to review by the Administrative Appeals Tribunal (AAT), in accordance with section 71 of the instrument. It appears that the remainder of the decisions under the instrument would not be subject to independent merits review.

A number of the decisions that are not reviewable appear to be preliminary or procedural. In this regard, the decisions appear to lead to or follow from more substantive decisions, which are subject to AAT review. The committee notes that the Administrative Review Council guidance document, *What decisions should be subject to merit review?* (ARC Guide), indicates that such decisions are unsuitable for merits review.

However, in relation to decisions under sections 20, 21 and 23 of the instrument, it does not appear that such decisions are preliminary or procedural in nature, nor are they automatic or mandatory. Rather, those decisions appear to be substantive decisions involving the consideration of particular factors (see subsection 20(3)), or being satisfied of

particular things (see subsections 21(3) and 23(5)). It is therefore unclear why these decisions, which may affect the interests of participants, are not subject to independent merits review.

In addition, certain decisions that are not subject to independent merits review appear to relate to extensions of time for compliance with requirements set out in the instrument. These include decisions made under subsections 39(1) and 42(4). The committee notes that the ARC Guide indicates that decisions relating to the extension of time should be subject to independent merits review, as such decisions may have a substantive effect.

The committee therefore requests your advice as to why the following decisions are not subject to independent merits review, by reference to the established grounds for excluding merits review set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*

- **decisions under sections 20, 21 and 23 of the instrument, relating to the transfer and revocation of allocations; and**
- **decisions under subsections 39 and 42 of the instrument, relating to the extension of time for compliance with statutory requirements.**

Privacy

Senate standing order 23(3)(h) requires the committee to consider whether an instrument trespasses unduly on personal rights and liberties, including the right to privacy.

Section 31 of the instrument provides that, if the Secretary makes a determination that an approved participant has committed a serious breach or a disqualifying breach, the secretary may publish notice of the determination on the department's website. It is unclear from the instrument and the explanatory statement whether this notice would contain personal or sensitive information.

The committee understands that it is intended that the only information that would be disclosed in a notice of serious or disqualifying breach would be the name of the approved participant and the basis of the breach determination. This would only constitute personal information if it related to a natural person, as opposed to a business entity. In this regard, the committee understands that currently of the 122 participants in the NRAS, only one is a natural person.

However, the committee is concerned that there does not appear to be anything on the face of the instrument that would restrict the type of personal information included in a notice of serious or disqualifying breach. In addition, while the committee appreciates that there is currently only one NRAS participant who is a natural person, there is no guarantee that more individuals will not participate in the scheme in the future.

The committee therefore requests your advice as to:

- **any safeguards in place to ensure that personal information is not disclosed in a notice published under section 31 of the instrument; and**
- **the appropriateness of amending the instrument to specify that personal information relating to a natural person must not be included in a published notice of serious or disqualifying breach or, at a minimum, that the only**

information relating to a natural person that may be published is the name of the participant and the basis of the breach determination.

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 **4 June 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.

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