Monitor 8 of 2020 - Committee correspondence

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AUSTRALIAN SENATE

Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House, Canberra ACT 2600
02 6277 3066 | sdlc.sen@aph.gov.au
www.aph.gov.au/senate_sdlc

18 June 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 4 June 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee), in relation to the above instrument, and for your willingness to engage constructively with the committee on this matter.

The committee carefully considered your response at its private meeting on 17 June 2020, and, on the basis of your response, has resolved to seek your further advice about the issues outlined below.

Committee's approach to the scrutiny of instruments

The committee takes this opportunity to emphasise that, as a technical scrutiny committee, the committee does not consider the policy merits of the instruments that come before it for consideration. In this regard, the committee understands that the instrument supports the implementation of an important pilot scheme to trial the supply of naloxone to persons who are at risk of an opioid overdose in New South Wales, Western Australia and South Australia. However, under the standing orders of the Senate, the committee is required to assess each instrument against its technical scrutiny principles and, where the committee forms the view that an instrument does not comply with these principles, it may recommend disallowance of the instrument to the Senate.

Compliance with authorising legislation

Interpretation of section 100 of the National Health Act

Your response advises that you remain satisfied that section 25 of the instrument is lawfully supported by subsections 100(1) and 100(3) of the *National Health Act 1953* (National Health Act), on the basis the relevant authorisation falls within the scope of the minister's power under the National Health Act to 'make arrangements for, or in relation to providing that an adequate supply of pharmaceutical benefits will be available to

persons'. You explain that you therefore consider it unnecessary to amend the National Health Act as requested by the committee in its correspondence of 21 May 2020.

The committee has detailed its concerns about this interpretation of subsections 100(1) and 100(3) of the National Health Act in its previous correspondence about this instrument. In summary, it considers 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 the Act. In the committee's view, section 100 does not contain such an express authorisation.

In this respect, section 100 contrasts with other provisions in the National Health Act, such as sections 84AAF, 84AAJ and 84AAB, which expressly provide for the authorisation of certain occupations to exercise prescribed powers and perform prescribed functions in relation to the supply of pharmaceutical benefits. The committee notes that the approach taken in those sections of the National Health Act is consistent with the standard approach taken across the Commonwealth to the delegation to, and authorisation of, third parties to perform the functions and exercise the powers of public officials using primary legislation.

Consistency with other special arrangements

In addition, the committee has also considered the approach taken in other special arrangements made under section 100 of the National Health Act to enabling private third parties to undertake certain actions 'in relation to' the provision of an adequate supply of pharmaceutical benefits to certain persons. In this regard, none of the other special arrangements considered by the committee appear to broadly authorise qualified private third parties to perform all of the functions and exercise all of the powers of a public official under that arrangement.

The special arrangements which require private third parties to perform specified functions or exercise specified powers can be grouped into two categories. Special arrangements in the first category only appear to concern private third parties that are approved and authorised under the National Health Act, such as 'approved hospital authorities' and 'approved pharmacists'. An example of a special arrangement in this category is the National Health (Botulinum Toxin Program) Special Arrangement 2015 (PB 87 of 2015).

Special arrangements in the second category only appear to provide for the approval of private third parties where they meet prescribed conditions, rather than any form of authorisation to exercise a public officer's powers or perform their functions. Once approved, these private third parties can be supplied with pharmaceutical benefits by other third parties approved and authorised under the National Health Act. For example, the National Health (Remote Area Aboriginal Health Services Program) Special Arrangement 2017 (PB 107 of 2017) (Remote Area Aboriginal Health Services instrument) sets out a framework for the approval of Aboriginal health services to be supplied with pharmaceutical benefits by 'approved pharmacists' and 'approved hospital authorities', which are approved under section 90 and 94 of the National Health Act.

Subsection 9(2) of the Remote Area Aboriginal Health Services instrument sets out the conditions of which the Secretary must be satisfied before it approves an Aboriginal health service. The explanatory statement to that instrument helpfully clarifies that the

Secretary's decision to approve Aboriginal health services under the instrument is not subject to independent merits review, as the Secretary has no discretion to refuse an approved applicant if they meet the conditions set out in subsection 9(2) are satisfied.

In the committee's view, the instrument does not appear to be consistent with the approach taken in the two categories of special arrangements outlined above, which also require certain actions to be performed by private third parties.

In light of committee's persistent scrutiny concern about the source of legal authority for section 25 of the instrument, the committee requests your advice as to:

- **why it was considered necessary to authorise suitably qualified and experienced persons to perform all of the functions and exercise all of the powers of the Secretary, when this approach does not appear to have been used in other special arrangements made under section 100 of the National Health Act which also require certain actions to be performed by private third parties; and**
- **whether the department obtained external legal advice on the source of legal authority for section 25 of the instrument, and, if so, whether the committee may be provided with that advice.**

Role of the third party administrator in practice

Your response helpfully outlines the powers and functions that third party administrators exercise and perform pursuant to section 25 of the instrument. In particular, you emphasise that that the powers and functions of the third party are administrative in nature and do not involve any discretionary decision making. You also indicate your openness to instructing the department to amend section 25 to address the committee's concerns about the role of third party administrators.

At this stage, the committee remains most concerned about the legality of section 25 of the instrument. However, as a technical scrutiny matter, the committee is also concerned to ensure that, where a private third party is lawfully authorised to exercise certain powers and perform certain functions of a public official, the decision to authorise that third party, and the actions of that authorised party, are subject to appropriate public accountability safeguards. These include the availability of independent review of the decision to authorise the third-party and any decisions made by the third party, and the application of privacy and freedom information laws as though the third party were a public official.

In this regard, the committee notes that it is unclear whether the Secretary's initial decision to authorise a third party to perform their functions or exercise their powers is subject to any form of independent review. In contrast, decisions to authorise other private individuals under the National Health Act, such as midwives, nurse practitioners and optometrists, appear to be subject independent merits review (see, for example subsections 105AB(2) and (3)). It is also unclear to the committee whether the third party administrator is subject to the same privacy and freedom of information laws as the Secretary when they perform the Secretary's functions and exercise the Secretary's powers.

Accordingly, whilst the committee remains most concerned about the source of legal authority for section 25, the committee would also welcome your advice as to:

- **the availability of independent merits review of the Secretary's decision to authorise third parties to exercise the Secretary's powers and perform the Secretary's functions; and**
- **the application of the *Privacy Act 1988* and *Freedom of Information Act 1982* to third parties purportedly authorised by the Secretary under section 25 of the instrument.**

To facilitate the committee's consideration of the matters above, and noting that the notice of motion to disallow the instrument is due to be considered by the Senate on 12 August 2020, the committee would appreciate your response by **2 July 2020**.

Finally, please note that, in the interests of transparency, the committee has published a summary of its scrutiny concerns in Chapter 1 of *Delegated Legislation Monitor 8 of 2020,* and this correspondence and your response will be published on the committee's website, and may be referred to in future Monitors.

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

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18 June 2020

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

Via email: Minister@education.gov.au

CC: dlo@education.gov.au

Dear Minister,

Child Care Subsidy Amendment (Coronavirus Response Measures No. 2) Minister's Rules 2020 [F2020L00406]

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 the committee seeks your advice in relation to this matter.

Clarity of drafting

Parliamentary oversight

Senate standing order 23(3)(e) requires the committee to examine each legislative instrument as to whether its drafting is defective or unclear. In addition, Senate standing order 23(3)(k) requires the committee to examine each instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes whether an instrument may exclude or limit parliamentary oversight.

The instrument amends the Child Care Subsidy Minister's Rules 2017 (principal rules) to provide for the making of business continuity payments (BCPs) to the providers of childcare services. New paragraph 60E(3)(a) of the principal rules provides that the amount of a BCP will be nil if the secretary is satisfied that the provider has failed to comply with any requirements on the making of BCPs set out in the *Early Childhood Education and Care Relief Package Payment Conditions* document (the document), as published by the Department of Education, Skills and Employment (the department) from time to time. In addition, new section 60F provides that supplementary amounts of BCPs are worked out in accordance with the document.

The instrument notes that the document is available on the department's website, and the explanatory statement identifies the relevant provision in the enabling legislation which enables the document to be incorporated as in force from time to time. However, the explanatory statement does not appear to explain why it was considered necessary to include conditions for the payment of BCPs in the document, rather than including the conditions on the face of the instrument.

The committee understands that the department has chosen to set out the conditions for the payment of BCPs in an external document to ensure that the department can respond flexibly to the needs of the childcare sector during the COVID-19 pandemic. The committee also understands that all changes to the conditions are published on the department's website, and are communicated to the sector by email. Finally, the committee notes that the principal rules, and other instruments associated with the childcare and family assistance sectors, make provision for matters by reference to incorporated documents.

However, the committee does not consider administrative flexibility, or consistency with other legislation, to be sufficient justification for including conditions for the payment of BCPs in an external document. From a scrutiny perspective, the committee is concerned that including the relevant conditions in the document will permit the conditions to be changed without any form of parliamentary oversight.

In this regard, it is unclear to the committee why it would not be possible to specify the conditions for the payment of BCPs on the face of the instrument, and to make changes to the conditions as necessary to respond to the changing needs of the child care sector. In this respect, the committee notes that amendments to delegated legislation (and particularly ministerial rules) are often made and registered quickly. Moreover, the department could still provide guidance on the payment of BCPs through documents published on its website, if this is necessary to ensure clarity and certainty for stakeholders.

With regard to the matters outlined above, the committee requests your detailed advice as to:

- **why it was considered necessary and appropriate to set out conditions for receiving business continuity payments in the *Early Childhood Education and Care Relief Package Payment Conditions* document (the document), rather than including those conditions on the face of the instrument;**
- **whether the instrument could be amended to specify the relevant conditions, instead of referring to the document.**

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 **2 July 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

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18 June 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]

Thank you for your response of 4 June 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 17 June 2020.

Your response has further assisted the committee in its consideration of the instrument. Nevertheless, the committee retains some scrutiny concerns about the matter outlined below, and has resolved to seek your further advice.

Procedural fairness

The committee sought your advice as to whether the instrument 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. The committee also requested your advice as to whether—as an alternative—the instrument could be amended to expressly state that subsection 24(3) is not intended to exclude the common law requirements of procedural fairness, to put the matter beyond doubt for defence officials, defence members and the courts.

In response, you advised that the regulations should not be amended to provide that the 14-day notice period in subsection 24(2) applies to termination decisions made in the circumstances set out in paragraphs 24(3)(b)(i) and (iii). However, you also advised that you have asked the Department of Defence (the department) to consider inserting a note into section 24 of the Defence Regulations 2016 (primary regulations) next time they are amended. You indicated that this note would clarify that the intent of the provision is not to exclude the common law requirements of procedural fairness.

You further advised that decision-makers are guided by the *Military Personnel Manual* (Manual) and the guidance document, *Good Decision-Making in Defence: A guide for decision makers and those who brief them*. You advised that these materials include guidance on how to comply with procedural fairness obligations. In particular, you noted

that the Manual includes a requirement for decision-makers to obtain legal advice before making a termination decision without providing 14 days' written notice.

Finally, you noted that the department has advised that the Manual will be amended to state clearly that, notwithstanding the operation of subsection 24(3), common law requirements of procedural fairness still apply, and decision-makers must adopt a fair and reasonable process in all circumstances.

The committee welcomes the advice that you have asked the department to consider amending the primary regulations to insert a note, clarifying that procedural fairness obligations apply to termination decisions under section 24. The committee also welcomes the foreshadowed amendments to the Manual in this regard.

However, in order to provide maximum clarity for defence officials, defence members and the courts, the committee considers that it would be appropriate to amend the primary regulations to include the relevant note as soon as practicable, rather than waiting until those regulations are next amended. In this regard, the committee notes that the regulations have been amended only three times (including by the present instrument) since they were enacted in 2016.

Noting this, the committee requests your clear advice as to whether and, if so, when, the Defence Regulations 2016 will be amended to insert a note clarifying that the common law requirements of procedural fairness apply to termination decisions made under section 24.

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. Noting that today is the 15th sitting day after the instrument was tabled in the Senate, the committee has resolved to 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 2 **July 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

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18 June 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]

Thank you for your response of 4 June 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 17 June 2020.

At that meeting the committee resolved to conclude its examination of the scrutiny issue relating to retrospective application. However, the committee retains scrutiny concerns about the second matter, and has resolved to seek your further advice.

Retrospective application

The committee sought your advice as to why it is considered necessary and appropriate that the measures in the instrument apply retrospectively; whether any person was or could be disadvantaged by this approach; and if so, what steps have been taken to avoid such disadvantage and to ensure procedural fairness for affected persons.

You advised that the measures would only apply retrospectively from the date of their announcement (29 March 2020), and noted that there was only a short period of time between the announcement of the measures and their commencement. You advised that applying the measures retrospectively was to ensure that foreign investors could not take advantage of the time between the announcement and commencement of the measures, to engage in activity that is contrary to the national interest. In addition, you indicated that stakeholders would have been aware of the measures before they were enacted, and advised that the government is not aware that any stakeholder was disadvantaged by the retrospective application of the measures.

In light of your advice regarding the retrospective application of the measures, the committee has resolved to take no further action in relation to this matter. The committee also considers that the information provided in your response should be included in the explanatory statement, noting the importance of that document as a point of access to understanding the law and, if necessary, as extrinsic material to assist with interpretation.

Parliamentary oversight

The committee sought 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.

In response, you advised that not specifying a date on which the measures will cease reflects the uncertainty around the COVID-19 pandemic and its impact on foreign investment, and that it is in the national interest for the instrument to continue in force while the pandemic continues.

You also advised that it would not be appropriate to amend the instrument to specify a date on which the measures will cease to operate. In this respect, you observed that if the COVID-19 pandemic continues beyond any such nominal period, new regulations will be required to be drafted to ensure the national interest remains protected.

While noting your advice, the committee remains concerned that the instrument makes a significant change to the foreign acquisitions and takeovers regime without specifying a time by which the measures will cease to operate. While the committee appreciates that challenges associated with COVID-19 may make it necessary to implement significant measures by delegated legislation, the committee emphasises that any such legislation should specify a date by which the measures will cease. This is to ensure an appropriate level of regular parliamentary oversight, and to guard against the risk that temporary measures enacted in response to COVID-19 become a permanent part of Australian law without being subject to parliamentary scrutiny and debate.

Further, the committee does not consider uncertainty around the length of the COVID-19 pandemic to be sufficient reason for not specifying a date by which the measures in the instrument will cease to operate. In this respect, the committee reiterates that other instruments implementing temporary measures in response to COVID-19 generally specify a period for which the measures will apply.

The committee therefore considers that it would be appropriate to amend the instrument to specify a date on which the measures cease. The committee notes that this does not mean that the measures must, in fact, cease on that date. As noted in the committee's previous correspondence, the instrument could, for example, specify that the measures cease to operate six months after they commence, with the date being extended (or brought forward) by a subsequent disallowance instrument, if required.

The committee acknowledges that extending the date would require amendment regulations to be drafted. However, the committee does not consider that this would be an onerous process. Similarly, while the committee acknowledges that amending regulations may require approval by the Federal Executive Council, the committee

considers this to be an important accountability mechanism within executive government, and not an undue administrative burden.

In light of the matters above, the committee considers that it would be appropriate to amend the instrument to specify a date by which the measures cease to operate, and seeks your advice in relation to this matter.

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 **2 July 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

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18 June 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: 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]

Thank you for your response of 11 June 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instruments.

The committee considered your response at its private meeting on 17 June 2020. On the basis of your advice, the committee has concluded its examination of the instrument.

The committee welcomes your undertaking to amend the instruments to specify an end date, and notes that this undertaking was implemented on 12 June 2020.

In the interests of transparency, I note that your undertaking will be recorded as implemented 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

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18 June 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]

Thank you for your response of 2 June 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 17 April 2020. On the basis of your advice, the committee has concluded its examination of the instrument.

While the committee has concluded its examination of this instrument, the committee considers that it would be appropriate for the information provided in your response to be included in the explanatory statement to the instrument, noting the importance of that document as a point of access to understanding the law and, if necessary, as extrinsic material to assist with interpretation.

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