**THE HON JOSH FRYDENBERG MP**
**TREASURER**

Ref: MS21-000917

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

Dear Senator Fierravanti-Wells

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation regarding the *ASIC Corporations (Amendment) Instrument 2020/1064* and *ASIC Corporations (Amendment) Instrument 2020/1065* (the ASIC Corporations Amendment Instruments).

In that letter, the Committee requested amendment to the explanatory statements of the ASIC Corporations Amendment Instruments to include further information in relation to review of hardship withdrawal decisions made by responsible entities of a registered time-sharing scheme as outlined in my previous letter dated 30 March 2021.

In response to that request, ASIC has undertaken to register replacement explanatory statements as soon as possible.

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

Yours sincerely

THE HON JOSH FRYDENBERG MP

26 / 4 /2021

CC: Minister for Superannuation, Financial Services and the Digital Economy

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**THE HON JOSH FRYDENBERG MP**
**TREASURER**

Ref: MS20-000658

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

Dear Senator Fierravanti-Wells

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) regarding the *ASIC Corporations (Design and Distribution Obligations—Exchange Traded Products) Instrument 2020* (the Instrument).

In that letter, the Committee requested my advice about:

- why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to modify the design and distribution obligations of issuers and distributors of exchange traded products under the *Corporations Act 2001*, including why it is necessary and appropriate to do so prior to the commencement of the modified provisions;
- whether the Instrument can be amended to provide that the measures cease within three years after they commence; and
- whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation.

**Use of delegated legislation**

Exchange traded products (ETPs) are open-end investment products that are traded on a financial market. Issuers of ETPs continuously issue new products that are quoted and an ETP's open-ended structure allows the issuer of an ETP to issue and redeem units on a daily basis resulting in the number of units on issue fluctuating depending on investor demand. Issuers of these products use different market making structures to provide liquidity. This affects how these products are distributed to consumers through financial markets.

The primary legislation provides ASIC with the power to make exemptions and modifications to the new regime in Pt 7.8A of the *Corporations Act 2001*. These powers are intended to support the effective operation of the regime, by allowing ASIC to, for example, tailor the operation of the regime to avoid any unintended consequences that may arise with respect to a particular person or product.

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These powers are necessary because the design and distribution obligations apply broadly to most financial products across all sectors that ASIC regulates. In particular, the products are issued and distributed by financial product firms that have a diverse array of operational structures and employ an extensive variety of distribution methods. As a result, it is difficult for the primary legislation to deal with every business model and distribution structure.

The modifications made by the Instrument support the operation of the primary legislation by addressing unintended consequences resulting from the application of the disclosure rules to ETPs.

Without the modifications made by the Instrument, the design and distribution obligations would apply in an inconsistent and anomalous way to issuers and distributors of ETPs. For example:

- Design and distribution obligations would apply in full for ETP issuers utilising internal market making (IMM) structures, and distributors engaging in retail product distribution conduct in relation to these products, while certain obligations would not apply for issuers of ETPs utilising external market making (EMM) structures. Additionally, distributors engaging in retail product distribution conduct in relation to these products would not be subject to any obligations.

- Issuers of ETPs would face practical difficulties in complying with certain obligations where a product is continually issued and traded on a financial market, including the obligation to cease retail product distribution conduct where a review trigger has occurred. Issuers would also face practical difficulties in complying with review obligations in circumstances where distributors were not required to provide them with information regarding consumer outcomes.

Following the passage of the primary legislation and the making of the regulations, ASIC engaged with industry on its implementation of the design and distribution obligations, and released its draft regulatory guide for consultation on 19 December 2019.

A number of interested stakeholders raised queries about how the obligations would apply to ETP issuers, as well as intermediaries involved in distribution, such as brokers, authorised participants and trading agents appointed by the issuer. As a result of feedback from the Financial Services Council, fund managers, ASX and Chi-X that requested ASIC provide certainty in this area to ensure the regime operated effectively, ASIC carried out further targeted consultation in relation to the application of the regime to ETPs in August 2020.

Therefore, ASIC considered it necessary and appropriate to use its modification powers prior to commencement to provide certainty and consistency in relation to the application of the obligations to issuers and distributors of these products, in circumstances where industry is in the process of planning, systems development and training to implement these reforms. The DDO are systems and processes driven obligations. They require industry to implement robust and effective product governance arrangements ahead of commencement, in order to ensure they are delivering products to consumers that meet their needs.

Without the certainty provided by ASIC's modification ahead of commencement, the ETP sector may not have been in a position to implement effective arrangements and comply with the obligations when they commence. ASIC's broader consultation on guidance and its targeted consultation on this issue indicated considerable demand for this certainty to be provided as soon as possible so that implementation could occur prior to commencement.

Modifying the primary legislation with ASIC's modification powers also meant that ASIC could provide guidance to industry in a timely manner and specifically provide guidance on the application of the obligations to ETPs: see Appendix to Regulatory Guide 274 *Product design and*

*Distribution Obligations*. There was considerable demand for guidance in this area, and more generally demand for guidance to be provided as soon as possible to support implementation of these reforms prior to commencement.

While the primary legislation intended to apply to products that require a PDS and are issued or on-sold to retail clients, ETPs (by virtue of their distribution structure through financial markets) do not fit strictly into the proper operation of the obligations – and this resulted in anomalous and inconsistent outcomes. As noted above, the DDOs cover most products across all sectors of the financial system, making it difficult for primary legislation to deal with every business model and distribution structure. Through the Instrument, ASIC provided clarity regarding the application and addressed inconsistencies to support the practical application of the primary legislation.

**Sunsetting period**

As I have noted in my previous correspondence to the Committee, the Government shares the Committee's objective that the period of operation of legislative instruments should be consistent with maintaining appropriate Parliamentary oversight, while also considering the underlying policy intent of the relevant primary law and the regulatory burden imposed on individuals and entities.

I consider that the 10 year sunsetting period remains appropriate given that issuers and distributors of ETPs will structure their business, systems and processes in accordance with the modified provisions. An earlier sunsetting period of the Instrument will likely create significant uncertainty around compliance and lead to undue burden for industry.

This is consistent with the principles I have previously provided to the Committee about when the default sunsetting period will generally be appropriate.

I look forward to discussing this issue further with the Committee , in a meeting to be arranged between my Office and the Committee.

**Review of the relevant provisions**

As set out in the explanatory statement to the Instrument, ASIC will monitor the operation of the Instrument, including whether the provisions remain necessary and appropriate, and respond as needed.

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

Yours sincerely

THE HON JOSH FRYDENBERG MP

9 / 4 /2021

The Hon Alan Tudge MP

Minister for Education and Youth

Ref: MC21-001810

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

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

Dear Senator Fierravanti-Wells Concetta.

Thank you for your letter of 18 March 2021 in which you raise the scrutiny concerns of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) in relation to the *Commonwealth Grant Scheme Guidelines 2020* (the Instrument). I provide the following advice in response to the Committee.

**Matters more appropriate for parliamentary enactment – national priorities**
Section 10 of the Instrument sets out 'national priorities' in relation to the provision of higher education. It is appropriate for these matters to be specified in delegated legislation, noting that paragraph 30-20(b) of the *Higher Education Support Act 2003* (the Act) expressly allows me to specify national priorities in the Instrument. This is a longstanding power that has been in the Act since it was first enacted in 2003 and has not been amended since that time. As such, national priorities were previously specified in the *Commonwealth Grant Scheme Guidelines 2012* (which were repealed by the Instrument).

Under the Act, non-Table A providers (non-university higher education providers) can only receive Commonwealth Grant Scheme (CGS) funding in relation to the national priorities set out in the Instrument. This is a key mechanism used to ensure that limited Commonwealth funding is appropriately targeted to improving education outcomes in areas of national priority, such as nursing and education.

Further, national priorities may change as Australia's workforce evolves over time. As such, it is vital that there is flexibility to specify new and different national priorities via a legislative instrument. Having this flexibility will also ensure the rapid implementation of Government funding decisions. For example, a number of non-university higher education providers were awarded CGS funding through the 2020–21 Budget for short courses in areas of national priority to support students, and the recently unemployed, to undertake higher education and ultimately position our nation and workforce to recover from the economic downturn caused by the COVID-19 pandemic.

**Compliance with *Legislation Act 2003* – Incorporation**
I confirm that the Australian Bureau of Statistics (ABS) *Australian Standard Classification of Education 2001* (ABS document), as in force or existing from time to time, is incorporated by reference in accordance with subsection 14 of the *Legislation Act 2003*.

The ABS document is freely available to the public on the ABS website at www.abs.gov.au/ausstats/abs@.nsf/0/E7779A9FD5C8D846CA256AAF001FCA5C. The Department of Education, Skills and Employment's website also includes information about the allocation of units to funding clusters (www.dese.gov.au/higher-education-loan-program/resources/2021-allocation-units-study-funding-clusters).

I will amend the Explanatory Statement for the Instrument in due course to reflect the above advice.

I trust this information is of assistance.

Yours sincerely

**Alan Tudge**

12 / 5 / 2021

**THE HON JOSH FRYDENBERG MP**
**TREASURER**

Ref: MS21-000890

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

Dear Senator Fierravanti-Wells

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation regarding the *Competition and Consumer (Consumer Data Right) Amendment Rules (No.3) 2020* (Amending Rules).

In that letter, the Committee sought my advice as to:

- **Significant penalties in delegated legislation –** why it is considered necessary and appropriate to impose civil penalties that are above what the Committee considers reasonable in delegated legislation.
- **Clarity of drafting –** what are the types of "similar documents" that may be prescribed under subrule 2.4(6).
- **Conferral of discretionary powers - availability of independent merits review –**
  - whether there are any factors that the Accreditation Registrar must consider in exercising the discretionary powers under subrule 5.33(1); and
  - whether any safeguards or limitations apply to the exercise of these powers or functions and whether those safeguards are contained in law or policy.
- **Compliance with the *Legislation Act 2003* - incorporation –** Whether ASAE 3150 and the CDR Accreditation Guidelines are incorporated by reference in the instrument, and if so:
  - the manner in which the documents are incorporated (that is, as in force at a particular time or as in force from time to time); and
  - if the documents are incorporated as in force from time to time, whether there is power in the enabling legislation or other primary legislation to incorporate the documents in this manner.

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**Significant penalties in delegated legislation**

The Committee noted that the Amending Rules inserted new rules 5.34 and 9.3 into the *Competition and Consumer (Consumer Data Right) Rules 2020* (the Rules) and that the penalties for failing to comply with the rules introduced by these new sections was a maximum of $50,000 (approximately 225 penalty units) for an individual and $250,000 (approximately 1,125 penalty units) for a body corporate. The letter stated that the Committee's general view was that delegated legislation should not 'contain custodial or pecuniary penalties exceeding a maximum of 50 penalty units for individuals and 250 penalty units for corporations.'

Under Part IVD of the *Competition and Consumer Act 2010* (the Act), the Rules may provide that specified provisions of the Rules are civil penalty provisions (see section 56BL of the Act). As the Consumer Data Right (CDR) is a regime that is intended to evolve and cover new sectors as designated. The Act provides for the making of new rules that accommodate those sectors and relatedly provide for the imposition of penalties.

The penalties imposed in relation to rules 5.34 and 9.3 are the lower maximum penalties available under the CDR regime (the maximum penalties are set out at section 76(1A)(b) of the Act and can be up to $10 million or higher in certain circumstances). This reflects that a breach of these provisions is considered less serious than a breach of, for example, the consumer consent provisions.

In relation to rule 5.34, any direction issued by the Registrar must be necessary and temporary and is intended to facilitate a resolution to any risk posed to the register (see response to Issue 4 below). Nonetheless, a breach of rule 5.34 (the Registrar's direction) could potentially seriously impede the Registrar's ability to maintain and manage the integrity, security and stability of the register as used by all participants in processing consumer data requests. Given this potential impact on the CDR system, a penalty, albeit at the lower end of the scale, is considered appropriate and proportionate should there be a breach of the direction.

In relation to rule 9.3 concerning record keeping, the penalty is commensurate with other record keeping provisions and penalties and so aligns with the general approach under the CDR regime. Penalties at the lower end of the scale attach to certain record keeping provisions as this recognises that record keeping is fundamental to ensuring transparency and compliance.

**Clarity of drafting**

The Committee noted that the Amending Rules inserted a new subrule 2.4(6) into the Rules, setting out a definition of 'disclosure document' for the purpose of disclosing product data in response to a product data request. The definition of disclosure document included 'a similar document that is required by law to be disclosed to a customer prior to entering a contract with that customer'. The Committee considered that it was unclear what might be included in this definition.

The purpose of rule 2.4 is to ensure that the product data to be made accessible under Part 2 of the Rules is as comprehensive as possible, and consistent across all products, so that persons accessing the data can easily compare and otherwise use the data. This includes ensuring that the product data provided in accordance with the standards is commensurate to the publicly available data in relation to that product.

Rule 2.4 applies in respect of banking products that are listed in clause 1.4 of Schedule 3 to the Rules. This list covers a range of products of varying types, some of which are products for which a Product Disclosure Statement (PDS, a term defined in the *Corporations Act 2001*) is required to be disclosed to a consumer and others for which a key fact sheet within the meaning of the *National*

*Consumer Credit Protection Act 2009* must be disclosed to consumers. The reference to PDS and to the key fact sheet clarify for participants what information is to be made accessible via their product data request service. However, there will be some products of a type for which neither a PDS nor a key fact sheet is required by law to be provided to a consumer and for which 'a similar document that is required by law' applies. The phrase is to be interpreted narrowly, in that the information contained in such a document will be of a similar kind to that contained in a PDS or key fact sheet for a product, and will be in a document 'required by law' to be provided to consumers. So the information is in all cases the kind of information that ordinarily must be made available (that is other than via the CDR) to consumers.

There is also a fundamental constraint on the kind of product data that is required to be disclosed (as distinct from voluntary product data that a data holder chooses to disclose). The definition of 'required product data' is limited to the scope as defined in the Act (section 56BF(1)) so the Rules cannot require the disclosure of data unless it is about the eligibility criteria, terms and conditions, price, or already publicly available information about availability or performance of a product.

Rule 2.4(3)(a)(ii) also provides that any disclosure of required product data must be "in accordance with the data standards" (and the same applies to the disclosure of voluntary product data). The data standards set parameters and provide guidance as to how such data is to be provided.

**Conferral of discretionary powers – availability of independent merits review**

The Committee noted that the Amending Rules inserted a new Rule 5.33 into the CDR Rules. The rule provides that the Accreditation Registrar (currently the ACCC), may take steps to prevent the Register of Accredited Persons and associated database from being used to make consumer data requests to a data holder for a period of up to ten days, if the Accrediation Registrar believes it is necessary to do so. This is in place in order to ensure the security, integrity and stability of the register or associated database. The Committee was concerned that the instrument did not provide clear limits on the exercise of this discretionary power.

The register is used by all participants in the processing of consumer data requests. The register has evidentiary value in any proceedings (see section 56CF of the Act). The register is a cache of information that is constantly updated with information used by participants to transfer consumer data securely. This rule recognises that the nature of the register, as an electronic means of recording data that is accessed by participants via technical means, may require the Registrar to take immediate action should there be any risk to the register.

The Registrar may only issue a written notice to refrain from processing consumer data requests if the Registrar reasonably believes it is necessary to do so in order to ensure the security, integrity and stability of the register or associated database. Any belief of the Registrar therefore must be based on the Registrar's understanding of the impact on the register and any effect on the processing of consumer data requests. The Registrar's actions are is confined to this purpose, consistent with the scope of the Registrar's responsibility under the Act and the Rules for maintaining the register including functions relating to the context, administration and operation of the register (see section 56CE of the Act and the Rules). The direction must also be "necessary" to address the particular matter that is impacting the register.

The period of any such direction is limited to a maximum of 10 days, and could be for a lesser period of time depending on what is necessary to resolve the matter. This limited time period minimises the impact on participants while allowing affected participants, for example, to make any technical corrections which may be posing a risk to the operation of the register. The Registrar must provide participants with a reasonable opportunity to be heard in relation to any such direction. For context, participants have access to the Registrar and ordinarily engage with the register via their portal account and have certain responsibilities in relation to that account.

The provision balances the Registrar's responsibilities, and the technical nature of the register, with the responsibilities of participants who are to use the register to process consumer data requests.

**Compliance with *Legislation Act 2003* - Incorporation**

The Committee noted the requirement in paragraph 15J(2)(c) of the *Legislation Act 2003* that the Explanatory Statement to an instrument that incorporates a document contains a description of that document, including the manner in which it is incorporated and how it may be obtained. It also noted that under Senate Standing Order 23(3)(f), the Committee expects any incorporated document to be freely accessed and used. The Committee stated that it was unclear whether ASAE 3150 and the CDR Accreditation Guidelines were incorporated and if so, whether it was incorporated as in force from time to time, or at a particular time.

ASAE 3150 and the CDR Accreditation Guidelines are incorporated by reference in Part 2 of Schedule 1 to the Rules (Default conditions on accreditations). Section 56BG of the Act provides that the rules may make provision by applying, adopting, or incorporating any matter contained in any other instrument or writing as in force or existing at a particular time or as in force or existing from time to time. ASAE 3150 and the CDR Accreditation Guidelines are incorporated as existing from time to time. The definition of "ASAE" in Part 2 of Schedule 1, defines a standard as that "issued by the Auditing and Assurance Standards of the Australian Government" which will be the standard in place as it exists from time to time. Similarly, the Guidelines are those as issued by the ACCC. The Guidelines state that they may be updated from time to time. The details for accessing the most up to date versions are included in the Note for the definition of 'assurance report'.

Thank you for bringing the Committee's concerns to my attention.

Yours sincerelv

THE HON JOSH FRYDENBERG MP

28 April 2021

**THE HON JOSH FRYDENBERG MP**
**TREASURER**

Ref: MS21-000895

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

Dear Senator Fierravanti-Wells

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation regarding the *Competition and Consumer Amendment (AER Functions) Regulations 2020* (amending Regulations).

In that letter, the Committee sought my advice as to:

- The specific rights and obligations that are affected by the designation of the Australian Energy Regulator (AER) to operate as a data holder of CDR data in accordance with the CDR provisions; and
- Whether any safeguards or limitations apply to the exercise of these powers or functions, and whether these safeguards are contained in law or policy.

*Rights and obligations of the AER as a data holder*

Under the *Competition and Consumer Act 2010* (Act), the provisions of Part IVD of the Act and the consumer data rules and regulations (CDR provisions) apply to Commonwealth entities that hold information covered by a designation made under the Act (ss. 56AJ and 56AR). The *Consumer Data Right (Energy Sector) Designation 2020* (Energy Designation) designated the AER as a data holder for information it collects about retail products offered by energy retailers. This means that the rights, functions and obligations applicable to data holders under the CDR provisions apply to the AER by virtue of it being specified in the Energy Designation.

The detailed functions of the AER under the CDR regime will be set out in the consumer data rules, however, there was a delay between the AER being designated as a data holder and the start of the consumer data rules applying to it. There was a concern that this delay might mean that the AER would not be able to undertake any actions relevant to its role as a data holder until after the rules had started to apply.

The amendment ensures there is no doubt about the AER's ability to undertake all functions necessitated by its role as a data holder under the CDR regime. This includes any preparatory work (for example, developing Application Program Interfaces (APIs) to enable access to the CDR data it

holds) it would need to undertake in the lead up to the start of the detailed obligations under the consumer data rules applying to it.

The effect of the amending Regulations is not to extend the AER's functions as a data holder under the CDR regime, as those functions were applied broadly to the AER when it was designated as a data holder.

*Safeguards and limitations on AER's functions*

The CDR provisions apply in full to the AER, subject to any modification in the regulations. As a result, all of the safeguards and limitations that apply to data holders under the CDR provisions apply to the AER.

Thank you for bringing the Committee's concerns to my attention.

Yours sincerely

THE HON JOSH FRYDENBERG MP

28 / 9 /2021

**THE HON JOSH FRYDENBERG MP**
**TREASURER**

Ref: MS21-000882

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

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

Dear Senator Fierravanti-Wells

Thank you for your correspondence, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation, requesting advice in relation to the *Corporations (Stay on Enforcing Certain Rights) Amendment (Corporate Insolvency Reforms) Declaration 2020.*

In that letter, the Committee requested my advice about:

- Why it is necessary and appropriate to use delegated legislation, rather than primary legislation, to provide for exemptions to the operation of the *Corporations Act 2001*;
- Whether the Corporations (Stay on Enforcing Certain Rights) Amendment (Corporate Insolvency Reforms) Declaration 2020 [F2020L01682] can be amended to provide that the measures cease within three years after commencement;
- Whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation; and
- Whether any consultation was undertaken in relation to the specific measures in the Corporations (Stay on Enforcing Certain Rights) Amendment (Corporate Insolvency Reforms) Declaration 2020 [F2020L01682] or, if not, why no consultation was undertaken.

**Use of delegated legislation**

The *Corporations Amendment (Corporate Insolvency Reforms) Act 2020* established the debt restructuring process to assist small businesses to remain in business and avoid being wound up. To ensure continuity for businesses and their creditors, the process adopted key provisions from other, existing forms of external administration processes where appropriate. This included the establishment of a blanket stay on the enforcement of rights that arise under contracts, agreements or arrangements, under section 454N of the *Corporations Act 2001*. The objective of the stay provisions is to protect a party from ipso facto clauses that allow a party to a contract to terminate

or modify the contract if the other party enters restructuring, thereby improving the opportunity for the party under restructuring to restructure their debts and go on trading.

I am also empowered under section 454N(6) of the *Corporations Act 2001* to exclude rights from the application of the stay on enforcement, which would otherwise apply to all rights under a contract. Some industry stakeholders have told the Government that in certain sectors, stay provisions hinder the making of financing arrangements and standstill or forbearance arrangement with a party after that party enters restructuring. For this reason, the *Corporations (Stay on Enforcing Certain Rights) Amendment (Corporate Insolvency Reforms) Declaration 2020* (Amendment Declaration) excludes financing arrangements and standstill or forbearance arrangement from the stay on enforcement. These types of arrangements typically involve parties that are sophisticated enough to price the risk of entering into a contract or arrangement with a party that is subject to restructuring.

It is necessary and appropriate to use delegated legislation, rather than primary legislation, to provide for exemptions from the stay on enforcement to ensure that any unintended consequences of the blanket stay could be remedied quickly to minimise disruption of commercial undertakings. For example, where a medical company has a contract for the delivery of equipment from a supplier, and that supplier enters restructuring, the company would be unable to enforce ipso facto clauses under the contract. This could lead to the medical company being unable to fulfil certain obligations, such as the provision of services to government under tender. It is appropriate that I have the power to provide for a quick resolution should concerns of this nature appear.

**Sunsetting Period**

All Commonwealth legislative instruments are subject to a default 10-year sunsetting period but may provide for a shorter sunsetting period. The appropriate length of the sunsetting period for individual legislative instruments varies depending on the nature of the instrument and the circumstances it addresses.

As I have noted in my previous correspondence with the Committee, the Government shares the Committee's view that the period of operation of legislative instruments should be consistent with maintaining appropriate Parliamentary oversight, while also taking into account the underlying policy intent of the relevant primary law and the regulatory burden imposed on individuals and entities. With these considerations in mind, I consider that a 10-year sunsetting period is appropriate for instruments in the following circumstances:

a) The instrument is made under a specifically delegated power which is set out in the primary legislation and is intended to complement the requirements or objectives in the primary legislation, for example by specifying administrative or technical detail consistent with the principles of the primary legislation.

b) There would be appreciable business uncertainty about the treatment of, or framework for, business activities giving rise to significant commercial risks and/or costs if the sunsetting period was shorter. For example, uncertainty which impacts investment in compliance systems, or the effective operation of a market, are examples where this principle may apply.

c) The legislative instrument deals with confined or unique circumstances affecting a particular class of entities or products which do not fit within the strict operation of the primary law but would result in anomalous or inconsistent outcomes that would be inconsistent with the intent of the primary legislation as set by Parliament.

d) The legislative instrument makes minor and technical changes which support the practical operation of the legislative regime.

The Committee has asked whether the Amendment Declaration could sunset after three years. As I have set out in previous correspondence, a three-year sunsetting period may be appropriate, for example where an instrument is required to address short-term transitory circumstances. This is not the case with the Amendment Declaration, which is part of a permanent reform and has been comprehensively designed to remain fit-for-purpose for at least 10 years. The Amendment Declaration is part of the 2020 reforms to Australia's corporate insolvency framework, which were carefully considered prior to implementation.

Further, the process of remaking an instrument imposes costs on industry, including through involvement in consultation processes and commercial uncertainty about whether an instrument will be extended or what its future form will be. My preference is to allow time for the new insolvency processes to settle, and for industry to familiarise themselves with the new provisions before the provisions are remade.

Applying the above principles, I consider that a 10-year sunsetting period is appropriate for the Amendment Declaration.

**Review of the relevant provisions**

There is no intention to review the provisions because the justification for making them will not fade with the passing of time. The provisions in the Amendment Declaration continue to be appropriate to be included in delegated legislation. However, given this is a new reform, my Department will be seeking regular feedback on the new insolvency processes in regular meetings with key stakeholders for the foreseeable future.

**Consultation**

In October 2020 my Department consulted on the Corporations Amendment (Corporate Insolvency Reforms) Bill 2020. Included in this Bill and at paragraph 1.98 of the Explanatory Memorandum were the provisions providing the Minister with the power to declare certain rights as enforceable on a company under restructuring.

Consultation was not undertaken on the specific measures in the Amendment Declaration because it simply brings the restructuring process into alignment with the other insolvency processes in relation to stays on enforceable rights. The Amendment Declaration provides clarity to a part of the reforms consulted on under the Corporations Amendment (Corporate Insolvency Reforms) Bill 2020.

Thank you for bringing the Committee's concerns to my attention.

Yours sincerely

THE HON JOSH FRYDENBERG MP

26 / 4 /2021

**THE HON JOSH FRYDENBERG MP**
**TREASURER**

Ref: MS21-000656

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

Dear Senator Fierravanti-Wells

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) regarding the *Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020*.

In that letter, the Committee requested my advice about:

- why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to modify the operation of the *Corporations Act 2001*;
- how long the relevant provisions are intended to remain in force, and if they are intended to remain in force for longer than three years, whether the instrument can be amended to provide that they cease within three years of commencement;
- whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate; and
- the clarity of the drafting of an offence provision.

Given the number of matters to be covered, I have set my response in the Annexure to this letter.

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

Yours sincerely

THE HON JOSH FRYDENBERG MP

9 / 4 /2021

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**Annexure**

**Use of delegated legislation**

The *Corporations Amendment (Corporate Insolvency Reforms) Act 2020* established subsection 500AC(4) to enable regulations made for the purposes of subsection 500AC(2) to modify the effect of the *Corporations Act 2001.*

This power is not a 'blank cheque' to modify the *Corporations Act 2001* in ways that are extraneous to the scope and purpose of that Act, that undermine the purpose and scheme of that Act by effectively suspending its operation, or that are so far-reaching as to be an excess of power.

In subsection 500AC(2), the Parliament has limited the scope of the modification power to circumstances concerning the transition of a company from simplified liquidation to another Chapter 5 insolvency process. In subsection 500AC(3), the Parliament outlined the types of issues that would need to be dealt with in regulations made under subsection 500AC(2) when a company transitions from simplified liquidation to another insolvency process.

The ability to modify the Act within these clear limits is necessary and appropriate to ensure that distressed companies can transition from simplified liquidation at any point in that process to a corresponding point in another insolvency process. Currently, the only regulation made under subsection 500AC(2) – regulation 5.5.08 – modifies the timing of the submission of a report to ensure the period within which the report has to be provided is suitable for a company that is transitioning from simplified liquidation into the full liquidation process. Regulation 5.5.08 preserves an important integrity feature of the liquidation process.

**Sunsetting period**

The Committee has asked whether regulations 5.5.04 and 5.5.08(4) of the Regulations could sunset after three years.

As I have set out in previous correspondence, a three year sunsetting period may be appropriate where, for example an instrument is required to address short-term transitory circumstances. This is not the case with these provisions, which are part of a permanent reform and have been comprehensively designed to remain fit-for-purpose for at least 10 years.

Regulation 5.5.04, made for the purposes of paragraph 500AE(3)(b) of the *Corporations Act 2001*, implements a key policy feature by narrowing the range of transactions that a registered liquidator needs to look into for the simplified liquidation process. This benefits the small business undertaking the simplified liquidation as it reduces the costs of the process associated with investigating these transactions.

Given the links between regulation 5.5.04 and the objectives of the reform – to provide a faster and lower-cost liquidation, increasing returns for both creditors and small businesses – the intention is that this regulation remains in place for at least 10 years. This aspect of the reform was recommended by the Productivity Commission in its 2015 report into Business Set-up, Transfer and Closure, which was based on extensive stakeholder consultation.

Further, the process of remaking an instrument imposes costs on industry, including through involvement in consultation processes and commercial uncertainty about whether an instrument will be extended or what its future form will be. My preference is to allow time for the new insolvency processes to settle, and for industry to familiarise themselves with the new provisions before the provisions are remade.

Therefore, I consider that a 10 year sunsetting period is appropriate for both regulations 5.5.04 and 5.5.08(4) of the Regulations. This is consistent with the principles I have previously provided to the Committee about when the default sunsetting period will generally be appropriate.

I look forward to discussing this issue further with the Committee, in a meeting to be arranged between my office and the Committee.

**Review of the relevant provisions**

There is no intention to review the provisions as the justification for making them will not fade with the passing of time. The modification in regulation 5.5.08(3) of the *Corporations Regulations 2001* continues to be appropriate to be included in delegated legislation. However, given this is a new reform, my Department will continue to seek feedback from stakeholders on the new insolvency processes implementation of the reforms.

**Clarity of drafting of an offence provision**

Regulations 5.3B.25 of the *Corporations Regulations 2001* deals with when a restructuring plan is accepted. Subregulation (3) makes it an offence for a person to give, or agree or offer to give, to an affected creditor any valuable consideration with the intention of securing the affected creditor's acceptance or non-acceptance of the restructuring plan.

The inclusion of the fault element of intention in paragraph 5.3B.25(3)(b) is key to the offence provision. A small business in a restructuring process will continue to trade, and therefore will continue to make payments to creditors in the ordinary course of business. Separately, those creditors will be voting on the restructuring plan. Without the fault element of intention, these small businesses undertaking normal business practices may be caught under the offence provisions.

Subregulation (4) provides that the offence in subregulation (3) is an offence of strict liability. The Committee is correct to note that because the fault element of intention is included in subregulation (3), the offence is not technically an offence of strict liability. The inclusion of subregulation (4) was an oversight which I will seek to rectify.

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29 April 2021

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

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

CC: Senator the Hon Michaelia Cash, Attorney-General for Australia and Minister for Industrial Relations: attorney@ag.gov.au; DLO@ag.gov.au

Dear Senator

**RE: Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01361]**

**Federal Circuit Court Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01362]**

I refer to your letter of 15 April 2021 in relation to recent amendments to the *Family Law Rules 2004* and the *Federal Circuit Court Rules 2001* to introduce the Notice of Child Abuse, Family Violence or Risk, which responded to my letter of 15 March 2021.

I understand that the Committee's view is that the effect of section 42 and paragraph 15J(2)(f) of the *Legislation Act 2003* (Cth) in relation to disallowance and explanatory statements respectively is to require a statement of compatibility with human rights to be included in each explanatory statement to rules of court.

The Courts can only reiterate that the approach adopted by the Courts is based on advice from the Office of Parliamentary Counsel that section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) does not require a statement of compatibility to be prepared in respect of rules of court made under the *Family Law Act 1975* (Cth) or the *Federal Circuit Court of Australia Act 1999* (Cth). The advice received was that the enabling provisions for rules of court, section 123 of the *Family Law Act 1975* (Cth) and section 81 of the *Federal Circuit Court of Australia Act 1999* (Cth), only provide that the *Legislation Act 2003* (Cth) (other than particular specified provisions of that Act) applies in relation to rules of court as if a reference to a legislative instrument were a reference to rules of court, but do not have the effect of translating a reference to a legislative instrument in legislation other than the *Legislation Act 2003* (Cth) into a reference to rules of court.

As detailed in my letter of 12 February 2021 and again in my letter of 15 March 2021, the Courts are concerned about the impact of this process on the implementation of an important

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rule amendment. The rule amendments currently under scrutiny facilitate the filing of a new court form that more fully identifies risks to children and other vulnerable parties in parenting proceedings, such as family violence, child abuse, substance abuse, mental health concerns and threats of harm or abduction. This is critical information in family law proceedings.

The Courts are not seeking to avoid the preparation of a statement of compatibility with human rights per se, rather the Courts are concerned more generally about the application of the disallowance process to rules of court. In the Courts' view, this is at odds with rules of court being an instrument made by a majority of Judges to regulate the practice and procedure of the relevant Court and incidental to the exercise of judicial power, each being a Chapter III court and collectively a separate arm of Government.

As previously stated, rules of court are critical for the proper administration of justice and the effective operation of each court. It is fundamental that they are able to be amended, modernised and improved as considered necessary and appropriate by the Judges, in a timeframe appropriate to the urgency or importance of the amendment.

Notwithstanding this, as an interim measure to resolve the technical scrutiny matter relevant to these rule amendments, in this instance the explanatory statements have been amended to each include a statement of compatibility with human rights (amended explanatory statements **enclosed**).

Noting that the Committee has referred the broader issue of the technical operation of the various provisions to the Attorney-General, a copy of this correspondence will also be forwarded to the Attorney-General. Further, the Courts may provide more fulsome submissions on the broader topic of the operation of the relevant provisions to the Attorney-General and the Committee in due course.

In the meantime, I look forward to receiving confirmation from the Committee that this matter has been resolved as soon as possible.

Should you have any further queries in relation to these rule amendments, please contact my Chambers via email to Ms Jordan Di Carlo, Executive Legal and Policy Adviser: jordan.dicarlo@familycourt.gov.au

Yours sincerely

The Honourable Justice Alstergren
Chief Justice
Family Court of Australia
Chief Judge
Federal Circuit Court of Australia

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Enclosures:

*Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 – Replacement Explanatory Statement*

*Federal Circuit Court Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 – Replacement Explanatory Statement*

*FAMILY LAW AMENDMENT (NOTICE OF CHILD ABUSE, FAMILY VIOLENCE OR RISK) RULES 2020*

**REPLACEMENT EXPLANATORY STATEMENT**

FAMILY LAW AMENDMENT (NOTICE OF CHILD ABUSE, FAMILY VIOLENCE OR RISK) RULES 2020

**EXPLANATORY STATEMENT**

**Issued by the authority of the Judges of the Family Court of Australia**

Section 123 of the *Family Law Act 1975* (Cth) ('the Act') provides that the Judges of the Family Court of Australia ('the Family Court'), or a majority of them, may make Rules of Court providing for the practice and procedure to be followed in the Family Court and some other courts exercising jurisdiction under the Act. The Judges of the Family Court made the *Family Law Rules 2004* ('the Rules') which commenced on 29 March 2004. These amending Rules, the *Family Law Amendment (Notice of Child Abuse, Family Violence of Risk) Rules 2020* ('the amendments'), have now been made by the Judges to amend the Rules.

Subsection 123(2) of the Act provides that the *Legislation Act 2003* (Cth) (other than sections 8, 9, 10, 16 and Part 4 of Chapter 3) applies to rules of court. In this application, references to a legislative instrument in the Act are to be read as references to Rules and references to a rule-maker as references to the Chief Justice acting on behalf of the judges.

The Court has proceeded on the basis that a statement of compatibility with human rights is not required to be included in an explanatory statement to rules of court, as whilst the Act applies the *Legislation Act 2003* (Cth) to rules of court, it does not expressly translate a reference to a legislative instrument in legislation other than the *Legislation Act 2003* (Cth) into a reference to rules of court, such as in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

The Court notes that different views are held as to whether a statement of compatibility with human rights is formally required to be included in an explanatory statement to rules of court. However as an interim measure, and for the purposes of expediency so as to ensure the prompt finalisation of important rule amendments that facilitate the provision of information about risks including child abuse and family violence to the Court, on this occasion, a statement of compatibility with human rights is included below.

## Statement of Compatibility with Human Rights

**Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01361]**

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

### Human rights implications

This legislative instrument engages applicable human rights or freedoms, including the following:

- ***The best interests of the child:*** Article 3(1) of the *Convention on the Rights of the Child* (CRC) provides that in all actions concerning children, including by courts, the best interests of the child shall be a primary consideration. Article 7(2) of the *Convention on the Rights of Persons with Disabilities* (CRPD) provides for this right in relation to children with disabilities. Article 3(2) of the CRC requires all legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

- ***The protection of children from exploitation, violence and abuse:*** Article 20(2) of the *International Covenant on Civil and Political Rights* (ICCPR) provides for the right to protection from exploitation, violence and abuse. Article 19(1) of the CRC provides for the right to protection of children from exploitation, violence and abuse and article 34 of the CRC provides for the right of protection of children against sexual exploitation. Article 24(1) of the ICCPR also provides for the protection of all children, without discrimination, by virtue of their status as minors. Article 16(1) of the CRPD provides the protection in relation to persons with disabilities. As stated in article 19(1) of the CRC, this right provides that States are required to 'take all appropriate legislative, administrative, social and educational measures to protect the child or people from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person'.

The provisions in the *Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020* broadly replicate existing provisions in the Rules. The Notice in the new form is filed at the commencement of family law parenting proceedings where parties must report any allegations of child abuse, family violence or other risks to children. Where allegations of child abuse, risk of child abuse, or family violence amounting to child abuse, are made in the Notice, the Courts must refer it to the relevant child welfare authority pursuant to subsection 67Z(2) or 67ZBA(2) of the *Family Law Act 1975* (Cth). The new form includes additional questions about a broader variety of risk factors, which will enable the Courts to better understand and respond to those risks.

The new form for the first time requires the provision of risk-related information at the earliest possible stage across both Courts to assist the Courts to respond to child abuse, family violence and other risk factors relevant to parenting proceedings, protect children from violence and abuse and to inform judicial decision-making in the best interests of the child.

It thereby further supports and enhances the treatment of the rights listed above.

**Conclusion**

This legislative instrument is therefore compatible with human rights as it does not raise any human rights issues.

## 1. General Outline

### Schedule 1 – Amendments

#### Part 1 – Main amendments

The amendments provide that the prescribed form for a notice mentioned in subsection 67Z(2) or 67ZBA(2) of the Act is a new form called the Notice of Child Abuse, Family Violence or Risk ('the Notice'). This form replaces the Notice of Child Abuse, Family Violence or Risk of Family Violence (Current Case) and the Notice of Child Abuse, Family Violence or Risk of Family Violence (Application for Consent Orders).

The amendments provide that the Notice must be filed with an Initiating Application (Family Law), Response to an Initiating Application or Application for Consent Orders in which a parenting order is sought under Part VII of the Act. This is a change to the procedure that was in place immediately before the commencement of these rules amendments, where the form being replaced only had to be filed where an allegation of child abuse, risk of child abuse, family violence, or risk of family violence was made.

The amendments also provide for the filing of another Notice when a person becomes aware of new facts or circumstances that would require them to file a Notice for the purposes of subsection 67Z(2) or 67ZBA(2) of the Act.

The amendments include transitional provisions in Part 27.4 which clarify when the new Notice comes into effect. In summary, where a Notice is required to be filed, the new Notice must be used from the commencement day of the Rules in relation to any proceeding filed on or after the commencement day, or in any proceeding that was instituted but not concluded before the commencement day.

The amendments, in conjunction with concurrent amendments to the *Federal Circuit Court Rules 2001*, have the effect of harmonising the Notice and relevant Rules of Court in relation to the Notice used in the Family Court of Australia and the Federal Circuit Court of Australia.

#### Part 2 – Prescribed form

The amendment provides that the Notice is the prescribed form in Schedule 2 of the Rules, and removes the Notice of Child Abuse, Family Violence or Risk of Family Violence (Current Case) and the Notice of Child Abuse, Family Violence or Risk of Family Violence (Application for Consent Orders).

## 2. Consultation

The *Legislation Act 2003* (Cth) provides for certain consultation obligations when Rules are made.

The Court consulted on the Notice with the Family Law Section of the Law Council of Australia, State and Territory Law Societies and Bar Associations, Legal Aid organisations and child welfare agencies, amongst other stakeholders. Consultation occurred in relation to the requirement to file the Notice with every Initiating Application or Response seeking parenting orders, and in relation to the form and content of the Notice.

No further consultation was required. Consultation was not required in relation to the transitional provisions which are technical drafting amendments.

## 3. Summary of major changes

The major changes introduced by the amendments to the Rules are set out below in relation to Part 1 and Part 2 of Schedule 1.

### Part 1 – Main amendments

1) To amend subrule 2.04D(1) to provide that the prescribed form for a notice mentioned in subsection 67Z(2) or 67ZBA(2) of the Act is the Notice of Child Abuse, Family Violence or Risk ('the Notice').
2) To amend table 2.2 to provide that the Notice must be filed with an Initiating Application (Family Law), Response to an Initiating Application or Application for Consent Orders seeking orders under Part VII of the Act.
3) To insert a definition of 'interested person' in rule 2.04 that adopts the definition in section 67Z or section 67ZBA where either of those sections applies.
4) To insert rule 2.04B to provide for another Notice to be filed where a person has filed a Notice, and becomes aware of new facts or circumstances that would require the person to file another Notice for the purposes of subsection 67Z(2) or 67ZBA(2) of the Act.
5) To amend rule 2.04D to provide that if a person files a Notice that includes one or more allegations of child abuse, family violence or risk of harm to a child, the person must file an affidavit stating the evidence on which each allegation set out in the Notice is based. This does not apply to a Notice filed with an Application for Consent Orders.
6) To insert a definition of the Notice in the Dictionary which refers to the form of the Notice in Schedule 2, with any variations that are necessary or as the Chief Justice directs.
7) To insert Part 27.4 in relation to transitional provisions.

### Part 2 – Prescribed form

1) To provide the 'Notice of Child Abuse, Family Violence or Risk' as the prescribed form in Schedule 2 for the purposes of section 67Z(2) and section 67ZBA(2) of the Act.

## 4. Details of Amendments

### Rule 1 Name of Rules

The name of the rules is the *Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020*.

**Rule 2 Commencement**

The whole of the Rules commence the day after the Rules are registered.

**Rule 3 Authority**

The Rules are made under the *Family Law Act 1975* (Cth).

**Rule 4 Schedules**

Schedule 1 amends the *Family Law Rules 2004*.

## Schedule 1 – Amendments

### Part 1 – Main amendments

**[1] Subrule 2.02(1) (table 2.2, item 2A, column headed "Documents to be filed with application", paragraph (a))**

The amendment inserts the words 'unless paragraph (b) applies' at the beginning of paragraph (a), to make clear that only paragraphs (a) and (b) are alternatives, and that paragraphs (c) and (d) apply in either scenario.

**[2] Subrule 2.02(1) (table 2.2, item 2A, column headed "Documents to be filed with application", paragraph (a))**

The amendment omits the word 'or' at the end of paragraph (a), as it is obsolete given that the words 'unless paragraph (b) applies' have been inserted at the beginning of paragraph (a).

**[3] Subrule 2.02(1) (table 2.2, item 2A, column headed "Documents to be filed with application", after paragraph (c))**

The amendment inserts a new paragraph (d) in item 2A which requires a Notice of Child Abuse, Family Violence or Risk to be filed with an Initiating Application (Family Law) in which a parenting order is sought under Part VII of the Act.

**[4] Subrule 2.02(1) (table 2.2, after item 2B)**

The amendment inserts a new item 2C in table 2.2 which requires a Notice of Child Abuse, Family Violence or Risk to be filed with a Response to Initiating Application (Family Law) in which a parenting order is sought under Part VII of the Act.

**[5] Subrule 2.02(1) (table 2.2, at the end of the cell at item 9, column headed "Documents to be filed with application")**

The amendment inserts a new paragraph (c) in item 9 which requires a Notice of Child Abuse, Family Violence or Risk to be filed with an Application for Consent Orders where an order is sought under Part VII of the Act.

**[6] Rule 2.04 Definition**

The amendment inserts a definition of 'interested person'. Where section 67Z of the Act applies to the proceeding, the definition of 'interested person' given by subsection (4) of that section applies. Where section 67ZBA of the Act applies to the proceeding, the definition of 'interested person' given by subsection (4) of that section applies.

**[7] After rule 2.04A**

The amendment inserts a new rule 2.04B, which provides that if a person who is party to a proceeding, or an interested person in a proceeding, has filed a Notice in the proceeding and after that time the person becomes aware of new facts or circumstances that would require the person to file a Notice, they must file another Notice setting out those new facts or circumstances. They must also file an affidavit stating the evidence relied on to support each allegation set out in the Notice. This rule mirrors the equivalent rule in the *Federal Circuit Court Rules 2001* (rule 22A.04).

The amendment adds two notes to subrule 2.04B which remind the person filing the Notice that a true copy of the Notice must be served on the person to whom the allegations relate, and reiterate the obligation on the Registry Manager to notify a prescribed child welfare authority if the Notice alleges that a child has been abused or is at risk of being abused.

**[8] Subrules 2.04D(1) and (2)**

The amendment repeals subrule 2.04D(1) prescribing the form of the notice mentioned in subsection 67Z(2) or 67ZBA(2) of the Act to be the Notice of Child Abuse, Family Violence or Risk of Family Violence (Current Case) or the Notice of Child Abuse, Family Violence or Risk of Family Violence (Application for Consent Orders) and substitutes provisions providing the form of the notice to be the Notice of Child Abuse, Family Violence or Risk. This form has been harmonised with the form used in the Federal Circuit Court of Australia, and is the same as the form inserted in Schedule 2 of the *Federal Circuit Court Rules 2001* by the *Federal Circuit Court (Notice of Child Abuse, Family Violence or Risk) Rules 2020*.

The amendment to subrule 2.04D(1) adds a note which provides that the Notice of Child Abuse, Family Violence or Risk is set out in Schedule 2.

The amendment also repeals subrule 2.04D(2) and substitutes a new subrule 2.04D(2) which sets out more expansively the requirement to file an affidavit that sets out the evidence on which any allegations of child abuse, family violence or risk of harm to a child in the Notice are based.

The amendment adds two notes to subrule 2.04D(2) which remind the person filing the Notice that a true copy of the Notice must be served on the person to whom the allegations

relate, and reiterate the obligation on the Registry Manager to notify a prescribed child welfare authority if the Notice alleges that a child has been abused or is at risk of being abused.

The amendment adds a new subrule 2.04D(3) which provides that subrule 2.04D(2) does not apply to a notice filed with an Application for Consent Orders.

**[9] Subrules 10.15A(2), (3) and (4) (note)**

The amendment repeals the notes to each of subrules 10.14A(2), (3) and (4). The notes are not required as a Notice will be filed with the Initiating Application (Family Law), Response to an Initiating Application or Application for Consent Orders, not only when an allegation of abuse, risk of abuse, family violence or risk of family violence is made.

**[10] Paragraph 19.41(2)(b)**

The amendment is a technical amendment, substituting 'the form' for 'a form' in paragraph 19.41(2), to change the indefinite article 'a' to the definite article 'the', because there is now only one form in Schedule 2 to the Rules.

**[11] Paragraph 24.01(1)(g)**

The amendment substitutes 'Notice of Child Abuse, Family Violence or Risk' for 'a form in Schedule 2' as there is only one form in Schedule 2 to the Rules.

**[12] Subrule 24.04(2)**

The amendment repeals subrule 24.04(2) providing that the Notice of Child Abuse, Family Violence or Risk of Family Violence (Current Case) or the Notice of Child Abuse, Family Violence or Risk of Family Violence (Application for Consent Orders) is the form of that name in Schedule 2. It substitutes the name of the form to the 'Notice of Child Abuse, Family Violence or Risk', and provides that a reference to the Notice is a reference to the form of that name in Schedule 2, with any variations that are necessary or as the Chief Justice directs. This subrule is intended to facilitate any minor or technical changes that may need to be made to the hard copy form, such as changes required to facilitate an interactive version of the form, at the direction of the Chief Justice after consultation with the Judges of the Court.

**[13] Subrule 24.04(3)**

The amendment is a technical amendment, substituting 'the form' for 'a form' in subrule 24.04(3), to change the indefinite article 'a' to the definite article 'the', because there is now only one form in Schedule 2 to the Rules.

**[14] In the appropriate position in Chapter 27**

The amendment inserts Part 27.4 for transitional provisions relating to the *Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020.*

**Rule 27.09** inserts definitions of 'amending Rules', 'commencement day', and 'old format notice of risk'.

**Rule 27.10** inserts a transitional provision that clarifies that the amended rule 2.02 applies to an application or response filed on or after the commencement day, even if it is a response to an application filed before the commencement day.

**Rule 27.11** inserts a transitional provision that clarifies that rule 2.04B (in relation to filing an amended Notice) applies to a proceeding instituted on or after the commencement day, and to a proceeding that was instituted but not concluded before the commencement day, and that a reference to the new Notice in paragraph 2.04B(a) should be read as a reference to the old format notice of risk if a person had filed a notice before the commencement day.

**Rule 27.12** inserts a transitional provision that clarifies that the amended subrule 2.04D(1) (the prescribed form) applies in relation to an allegation that is made on or after the commencement day, even if the proceeding in which the allegation is made was instituted before the commencement day.

**[15] Paragraph 6.42(2)(b) of Schedule 6**

The amendment is a technical amendment, substituting 'the form' for 'a form' in paragraph 6.42(2)(b) of Schedule 6, because there is now only one form in Schedule 2 to the Rules.

**[16] Dictionary**

The amendment inserts a definition of 'Notice of Child Abuse, Family Violence or Risk' into the Dictionary, which is defined as the form set out in Schedule 2, with any variations that are necessary or as the Chief Justice directs. This definition is intended to facilitate any minor or technical changes that may need to be made to the hard copy form, such as changes required to facilitate an interactive version of the form, at the direction of the Chief Justice after consultation with the Judges of the Court.

**Part 2 – Prescribed form**

**[17] Schedule 2**

The amendment repeals the schedule and substitutes 'Schedule 2—Notice of Child Abuse, Family Violence or Risk' and the Notice of Child Abuse, Family Violence or Risk.

The amendment adds a note to see Division 2.3.1 and subrule 24.04(2) of the Rules.

*FEDERAL CIRCUIT COURT AMENDMENT (NOTICE OF CHILD ABUSE, FAMILY VIOLENCE OR RISK) RULES 2020*

**REPLACEMENT EXPLANATORY STATEMENT**

FEDERAL CIRCUIT COURT AMENDMENT (NOTICE OF CHILD ABUSE, FAMILY VIOLENCE OR RISK) RULES 2020

**EXPLANATORY STATEMENT**

**Issued by the authority of the Judges of the Federal Circuit Court of Australia**

Section 81 of the *Federal Circuit Court of Australia Act 1999* (Cth) ('the Act') provides that the Judges of the Federal Circuit Court of Australia ('the Federal Circuit Court'), or a majority of them, may make Rules of Court making provision for or in relation to the practice and procedure to be followed in the Federal Circuit Court. The Judges of the Federal Magistrates Court (as the Federal Circuit Court was then called) made the *Federal Magistrates Court Rules 2001* which commenced on 18 April 2002. On 12 April 2013 the *Federal Magistrates Court Rules 2001* were amended to the *Federal Circuit Court Rules 2001* ('the Rules'). These amending Rules, the *Federal Circuit Court Amendment (Notice of Child Abuse, Family Violence of Risk) Rules 2020* ('the amendments'), have now been made by the Judges to amend the Rules.

Subsection 81(3) of the Act provides that the *Legislation Act 2003* (Cth) (other than sections 8, 9, 10, 16 and Part 4 of Chapter 3) applies to rules of court. In this application, references to a legislative instrument in the Act are to be read as references to Rules and references to a rule-maker as references to the Chief Judge acting on behalf of the judges.

The Court has proceeded on the basis that a statement of compatibility with human rights is not required to be included in an explanatory statement to rules of court, as whilst the Act applies the *Legislation Act 2003* (Cth) to rules of court, it does not expressly translate a reference to a legislative instrument in legislation other than the *Legislation Act 2003* (Cth) into a reference to rules of court, such as in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

The Court notes that different views are held as to whether a statement of compatibility with human rights is formally required to be included in an explanatory statement to rules of court. However as an interim measure, and for the purposes of expediency so as to ensure the prompt finalisation of important rule amendments that facilitate the provision of information about risks including child abuse and family violence to the Court, on this occasion, a statement of compatibility with human rights is included below.

## Statement of Compatibility with Human Rights

**Federal Circuit Court Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01362]**

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

### Human rights implications

This legislative instrument engages applicable human rights or freedoms, including the following:

- ***The best interests of the child:*** Article 3(1) of the *Convention on the Rights of the Child* (CRC) provides that in all actions concerning children, including by courts, the best interests of the child shall be a primary consideration. Article 7(2) of the *Convention on the Rights of Persons with Disabilities* (CRPD) provides for this right in relation to children with disabilities. Article 3(2) of the CRC requires all legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

- ***The protection of children from exploitation, violence and abuse:*** Article 20(2) of the *International Covenant on Civil and Political Rights* (ICCPR) provides for the right to protection from exploitation, violence and abuse. Article 19(1) of the CRC provides for the right to protection of children from exploitation, violence and abuse and article 34 of the CRC provides for the right of protection of children against sexual exploitation. Article 24(1) of the ICCPR also provides for the protection of all children, without discrimination, by virtue of their status as minors. Article 16(1) of the CRPD provides the protection in relation to persons with disabilities. As stated in article 19(1) of the CRC, this right provides that States are required to 'take all appropriate legislative, administrative, social and educational measures to protect the child or people from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person'.

The provisions in the *Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020* and the *Federal Circuit Court Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020* broadly replicate existing provisions in the respective Rules. The Notice in the new form is filed at the commencement of family law parenting proceedings where parties must report any allegations of child abuse, family violence or other risks to children. Where allegations of child abuse, risk of child abuse, or family violence amounting to child abuse, are made in the Notice, the Courts must refer it to the relevant child welfare authority pursuant to subsection 67Z(2) or 67ZBA(2) of the *Family Law Act 1975* (Cth). The new form includes additional questions about a broader variety of risk factors, which will enable the Courts to better understand and respond to those risks.

The new form for the first time requires the provision of risk-related information at the earliest possible stage across both Courts to assist the Courts to respond to child abuse, family violence and other risk factors relevant to parenting proceedings, protect children from violence and abuse and to inform judicial decision-making in the best interests of the child.

It thereby further supports and enhances the treatment of the rights listed above.

**Conclusion**

This legislative instrument is therefore compatible with human rights as it does not raise any human rights issues.

## 1. General Outline

### Schedule 1 – Amendments

### Part 1 – Main amendments

The amendments provide that the prescribed form for a notice mentioned in subsection 67Z(2) or 67ZBA(2) of the Act is a new form called the 'Notice of Child Abuse, Family Violence or Risk' ('the Notice'). This form replaces the 'notice of risk' in the Rules.

The amendments include transitional provisions in Part 47 which clarify when the new Notice comes into effect. In summary, where a Notice is required to be filed, the new Notice must be used from the commencement day of the Rules in relation to any proceeding filed on or after the commencement day, or in any proceeding that was instituted but not concluded before the commencement day.

The amendments, in conjunction with concurrent amendments to the *Family Law Rules 2004*, have the effect of harmonising the Notice and relevant Rules of Court in relation to the Notice used in the Family Court of Australia and the Federal Circuit Court of Australia.

### Part 2 – Prescribed form

The amendment provides that the Notice is the prescribed form in Schedule 2 of the Rules, and removes the 'notice of risk'.

## 2. Consultation

The *Legislation Act 2003* (Cth) provides for certain consultation obligations when Rules are made.

The Court consulted on the Notice with the Family Law Section of the Law Council of Australia, State and Territory Law Societies and Bar Associations, Legal Aid organisations and child welfare agencies, amongst other stakeholders. Consultation occurred in relation to the form and content of the Notice.

No further consultation was required. Consultation was not required in relation to the transitional provisions which are technical drafting amendments.

## 3. Summary of major changes

The major changes introduced by the amendments to the Rules are set out below in relation to Part 1 and Part 2 of Schedule 1.

### Part 1 – Main amendments

1) To amend subrule 2.04(1B) to remove reference to the notice of risk and to provide that a reference in the Rules to the Notice is a reference to the form in Schedule 2, with any variations that are necessary or as the Chief Judge directs.

2) To remove all references to the 'notice of risk' and replace them with 'Notice of Child Abuse, Family Violence or Risk'.
3) To amend subrule 22A.02(2) to provide that if a person files a Notice that includes one or more allegations of child abuse, family violence or risk of harm to a child, the affidavit the person files with their application or response, in accordance with rule 4.05, must state the evidence on which each allegation set out in the Notice is based.
4) To insert a definition of the Notice in the Dictionary which refers to the form of the Notice in Schedule 2, with any variations that are necessary or as the Chief Judge directs.
5) To insert Part 27.4 in relation to transitional provisions.

**Part 2 – Prescribed form**

1) To provide the 'Notice of Child Abuse, Family Violence or Risk' as the prescribed form in Schedule 2 for the purposes of section 67Z(2) and section 67ZBA(2) of the Act.

## 4. Details of Amendments

**Rule 1 Name of Rules**

The name of the Rules is the *Federal Circuit Court Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020*.

**Rule 2 Commencement**

The whole of the Rules commence the day after the Rules are registered.

**Rule 3 Authority**

The Rules are made under the *Federal Circuit Court of Australia Act 1999* (Cth).

**Rule 4 Schedules**

Schedule 1 amends the *Federal Circuit Court Rules 2001*.

## Schedule 1 – Amendments

**Part 1 – Main amendments**

**[1] Subrule 2.04(1B)**

The amendment repeals subrule 2.04(1B), and substitutes a new subrule that provides that a reference in these Rules to the Notice is a reference to the form in Schedule 2, with any variations that are necessary or as the Chief Judge directs. This subrule is intended to facilitate any minor or technical changes that may need to be made to the hard copy form,

such as changes required to facilitate an interactive version of the form, at the direction of the Chief Judge after consultation with the Judges of the Court.

**[2] Subrule 4.01(4) (note)**

The amendment omits the words 'notice of risk' and substitutes 'Notice of Child Abuse, Family Violence or Risk' when referring to the Notice.

**[3] Subrule 4.03(3) (note)**

The amendment omits the words 'notice of risk' and substitutes 'Notice of Child Abuse, Family Violence or Risk' when referring to the Notice.

**[4] Part 22A (heading)**

The amendment omits the word 'risk' and substitutes 'Child Abuse, Family Violence or Risk' when referring to the Notice.

**[5] Division 1 of Part 22A (heading)**

The amendment omits the word 'risk' and substitutes 'Child Abuse, Family Violence or Risk' when referring to the Notice.

**[6] Rule 22A.02 (heading)**

The amendment omits the word 'risk' and substitutes 'Child Abuse, Family Violence or Risk' when referring to the Notice.

**[7] Subrule 22A.02(1)**

The amendment omits the words 'notice of risk' and substitutes 'Notice of Child Abuse, Family Violence or Risk' when referring to the Notice.

**[8] Subrule 22A.02(1) (note 1)**

The amendment repeals note 1, and substitutes a new note 1 that provides that the Notice must be in accordance with the form in Schedule 2, with any variations that are necessary or as the Chief Judge directs, with a reference to see subrule 2.04(1B).

**[9] Subrule 22A.02(2)**

The amendment repeals subrule 22A.02(2) and substitutes a new subrule 22A.02(2) which sets out more expansively the requirement that the affidavit filed with the application or response, in accordance with rule 4.05, must state the evidence on which any allegations of child abuse, family violence or risk of harm to a child in the Notice are based.

**[10] Subrule 22A.02(2) (notes 1 and 2)**

The amendment omits the words 'notice of risk' and substitutes 'Notice of Child Abuse, Family Violence or Risk' when referring to the Notice in notes 1 and 2.

**[11] Rule 22A.03 (heading)**

The amendment omits the word 'risk' and substitutes 'Child Abuse, Family Violence or Risk' when referring to the Notice.

**[12] Paragraph 22A.03(a)**

The amendment omits the words 'notice of risk' and substitutes 'Notice of Child Abuse, Family Violence or Risk' when referring to the Notice.

**[13] Paragraph 22A.03(b)**

The amendment omits the words 'of risk' when referring to the Notice.

**[14] Rule 22A.03**

The amendment omits the third occurrence of the words 'of risk' when referring to the Notice.

**[15] Rule 22A.04 (heading)**

The amendment omits the words 'notice of risk' and substitutes 'Notice of Child Abuse, Family Violence or Risk' when referring to the Notice.

**[16] Paragraphs 22A.04(a) and (b)**

The amendment omits the words 'notice of risk' and substitutes 'Notice of Child Abuse, Family Violence or Risk' when referring to the Notice in paragraphs (a) and (b).

**[17] Paragraph 22A.04(b)**

The amendment omits the words 'those facts' and substitutes 'those new facts', to make clear that the requirement to file an amended Notice is due to new facts or circumstances of which the person has become aware.

**[18] Paragraph 22A.04(c)**

The amendment omits the word 'new' before the Notice and substitutes 'Notice of Child Abuse, Family Violence or Risk setting out those new', to make clear that it is the same form of notice that must be filed, but in relation to new facts or circumstances.

**[19] Rule 22A.04 (notes 1 and 2)**

The amendment omits the words 'notice of risk' and substitutes 'Notice of Child Abuse, Family Violence or Risk' when referring to the Notice in notes 1 and 2.

**[20] Paragraph 22A.05(2)(a)**

The amendment omits the words 'notice of risk' and substitutes 'Notice of Child Abuse, Family Violence or Risk' when referring to the Notice.

**[21] Subrule 22A.05(3)**

The amendment omits the words 'notice of risk' and substitutes 'Notice of Child Abuse, Family Violence or Risk' when referring to the Notice.

**[22] Rule 22A.06 (heading)**

The amendment omits the words 'notice of risk' and substitutes 'Notice of Child Abuse, Family Violence or Risk' when referring to the Notice.

**[23] Rule 22A.06**

The amendment omits the words 'notice of risk' and substitutes 'Notice of Child Abuse, Family Violence or Risk' when referring to the Notice.

**[24] Rule 22A.07 (heading)**

The amendment omits the word 'risk' and substitutes 'Child Abuse, Family Violence or Risk' when referring to the Notice.

**[25] Rule 22A.07**

The amendment omits the words 'notice of risk' wherever occurring and substitutes 'Notice of Child Abuse, Family Violence or Risk' when referring to the Notice.

**[26] In the appropriate position in Chapter 9**

The amendment inserts Part 47 for transitional provisions relating to the *Federal Circuit Court Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020*.

**Rule 47.01** inserts definitions of 'amending Rules', 'commencement day', and 'old format notice of risk'.

**Rule 47.02** inserts a transitional provision that clarifies that the amended rule 22A.02 applies to an application or response filed on or after the commencement day, even if it is a response to an application filed before the commencement day.

**Rule 47.03** inserts a transitional provision that clarifies that the amended rule 22A.03 applies to a proceeding instituted on or after the commencement day, and a proceeding that was instituted but not concluded before the commencement day.

**Rule 47.04** inserts a transitional provision that clarifies that the amended rule 22A.04 (in relation to filing an amended Notice) applies to a proceeding instituted on or after the commencement day, and to a proceeding that was instituted but not concluded before the commencement day, and that a reference to the new Notice in paragraph 22A.04(a) should be read as a reference to the old format notice of risk if a person had filed a notice before the commencement day.

**Rule 47.05** inserts a transitional provision that clarifies that the amended rule 22A.05 applies in relation to a proceeding that is transferred to the Federal Circuit Court on or after the commencement day.

**Rule 47.06** inserts a transitional provision that clarifies that the amended subrule 22A.07(1) applies in relation to an allegation that is made on or after the commencement day, even if the proceeding in which the allegation is made was instituted before the commencement day, and that the amended subrule 22A.07(2) applies to a proceeding instituted on or after the commencement day, and a proceeding that was instituted but not concluded before the commencement day.

**[27] Dictionary**

The amendment inserts a definition of 'Notice of Child Abuse, Family Violence or Risk' into the Dictionary, which is defined as the form set out in Schedule 2, with any variations that are necessary or as the Chief Judge directs. This definition is intended to facilitate any minor or technical changes that may need to be made to the hard copy form, such as changes required to facilitate an interactive version of the form, at the direction of the Chief Judge after consultation with the Judges of the Court.

**Part 2 – Prescribed form**

**[28] Schedule 2**

The amendment repeals the schedule and substitutes 'Schedule 2—Notice of Child Abuse, Family Violence or Risk' and the Notice of Child Abuse, Family Violence or Risk.

The amendment adds a note to see subrule 2.04(1B) and Division 1 of Part 22A of the Rules.

**THE HON JOSH FRYDENBERG MP**
**TREASURER**

Ref: MS21-000880

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

Dear Senator Fierravanti-Wells

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) regarding the *Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020* (the Amending Regulations) which amended the *Foreign Acquisitions and Takeovers Regulation 2015*.

In that letter, the Committee requested amendment to the explanatory statement of the Amending Regulations to include further information on the incorporation of the Australian System of National Accounts as outlined in my previous letter of 30 March 2021.

In response to that request, I undertake to amend the explanatory statement to include the information as soon as possible.

Thank you for bringing the Committee's concerns to my attention.

Yours sincerely

THE HON JOSH FRYDENBERG MP

27 April 2021

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

**Senator the Hon Amanda Stoker**
Assistant Minister to the Attorney-General

MC21-009629

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny
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Dear Chair Connie,

Thank you for your Letter of 18 March 2021 to the former Attorney-General and Minister for Industrial Relations, the Hon Christian Porter MP, regarding the *Law Enforcement Integrity Commissioner Amendment (Law Enforcement Agencies) Regulations 2020* (Regulations).

As you are aware, the Regulations expand the jurisdiction of the Australian Commission for Law Enforcement Integrity (ACLEI) to cover the Australian Competition and Consumer Commission (ACCC), the Australian Prudential Regulation Authority (APRA), the Australian Securities and Investments Commission (ASIC) and the Australian Taxation Office (ATO).

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) has requested further advice in relation to whether consideration was given to including ACLEI's expansion in primary legislation and information about the practical effect and scope of expanding ACLEI's jurisdiction. Please see my advice below.

***Consideration of primary legislation***

I confirm that the government did give consideration to expanding ACLEI's jurisdiction via primary legislation rather than delegated legislation. On balance, the government determined that in this circumstance it would more appropriate to expand ACLEI's jurisdiction via regulation.

The primary reasons for this decision are set out in the former Attorney-General's letter to you of 26 February 2021.

The Government is progressing the establishment of the Commonwealth Integrity Commission (CIC) through primary legislation. The Government determined that the first stage of implementing the CIC would be to expand ACLEI's current jurisdiction to the remaining agencies that would form the Law Enforcement Integrity Division of the CIC. The second stage is to finalise the CIC legislation to bring the remainder of the public sector, along with higher education providers and some research bodies, into the jurisdiction of the CIC. At this time, ACLEI will be subsumed by the CIC.

The new agencies – ACCC, APRA, ASIC and ATO – have access to significant coercive powers and highly sensitive information. This access carries particular corruption risks and can make it more difficult to detect corruption within the highest risk parts of these agencies, similar to other law enforcement agencies within ACLEI's jurisdiction.

While the Government intends to introduce the CIC Bill into Parliament in 2021, it is complex legislation, which may take some time to pass parliamentary processes. Providing coverage of these agencies by regulation, which is expressly provided for in ACLEI's existing primary legislation, allows corrupt activity to be investigated without delay. Even if primary legislation to amend the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act) was progressed, any delays with the passage of that legislation could cause it to be in the Parliament at the same time as the CIC Bill, leading to duplication and confusion for the affected agencies.

The Government is consulting extensively with key stakeholders on the CIC legislation – to date it has received 334 written submissions and hosted 45 meetings with key stakeholders. Concerns have not been raised about ACLEI's jurisdiction being expanded by regulation in advance of the CIC legislation being finalised in submissions or at meetings. In fact, they have welcomed these early steps to implementing a comprehensive anti-corruption body at the federal level.

***Practical effect and scope of ACLEI's expansion***

Prior to the commencement of the Regulations, ACLEI's jurisdiction included the Australian Criminal Intelligence Commission (ACIC), the Austral Federal Police (AFP), the Australian Transaction Reports and Analysis Centre (AUSTRAC), the Department of Home Affairs, and prescribed aspects of the Department of Agriculture, Water and the Environment (DAWE).

As at 30 June 2020, ACIC, AFP, AUSTRAC and the Department of Home Affairs reported a total of approximately 22,184 staff in their annual reports. In addition, ACLEI's jurisdiction over DAWE only extends to the Secretary of DAWE and the class of persons prescribed by regulation – a total of approximately 1,818. Accordingly, the total number of staff in ACLEI's jurisdiction prior to the commencement of the regulations was approximately 24,002.

As at 30 June 2020, the four new agencies within ACLEI's jurisdiction reported a total of approximately 25,197 staff in their annual reports. However, this does not equate to the number of new staff that would in fact fall within ACLEI's jurisdiction.

Pursuant to subsection 6(2) of the LEIC Act , the question of whether a staff member within the four new agencies falls within ACLEI's jurisdiction depends on whether the staff member has engaged in corrupt conduct that 'relates to the performance of a law enforcement function'. This restriction significantly reduces the number of people within the agencies that the powers apply to. It is imposed by the LEIC Act to ensure ACLEI's jurisdiction over agencies added by regulation is limited to activities that pose higher corruption risks.

The determination of whether a matter 'relates to the performance of a law enforcement function' will depend on a range of facts and circumstances. As such, the number of staff in the new agencies that would be subject to ACLEI's powers under the instrument would be less than the 25,197 quoted above. Given it will be determined on a case by case basis whether a staff member has engaged in corrupt conduct in relation to the performance of a law enforcement function, it is not possible to provide an exact figure to the Committee.

Thank you again for bringing the Committee's concerns to the government's attention. I trust this information is of assistance to you.

Yours sincerely

**Senator the Hon Amanda Stoker**
Assistant Minister to the Attorney-General

**The Hon Nola Marino MP**

**Assistant Minister for Regional Development and Territories**
**Federal Member for Forrest**

Ref: MS21-000632

28 APR 2021

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

Dear Senator Bonnie

Thank you for your letter of 14 April 2021 on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee), regarding the Norfolk Island Employment Rules 2020.

In response to the Committee's request, I have approved the inclusion of further information in the explanatory statement about the application of the *Privacy Act 1988* and the Australian Privacy Principles.

The amended explanatory statement will appear on the Federal Register of Legislation after the replacement has been uploaded.

Thank you for bringing the Committee's concerns to my attention and I trust this is of assistance.

Yours sincerely

Nola Marino

The Hon Nola Marino MP
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**THE HON JOSH FRYDENBERG MP**
**TREASURER**

Ref: MS21-000920

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

Dear Senator Fierravanti-Wells

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation regarding the Takeovers Panel Procedural Rules 2020.

In that letter, the Committee requested my advice about:

- the adequacy of explanatory materials;
- the clarity of drafting;
- personal rights and liberties issues;
- insufficiently defined powers;
- privacy issues; and
- freedom of expression issues.

Given the number of matters, I have provided my response in the Annexure to this letter.

Thank you for bringing the Committee's concerns to my attention.

Yours sincerely

THE HON JOSH FRYDENBERG MP
28 / 4 /2021

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Annexure 1

## Introduction

Section 195 of the *Australian Securities and Investments Commission Act 2001* (the **ASIC Act)** provides that the Takeovers Panel may determine the procedural rules to be followed in Panel proceedings subject to the requirements of:

- Part 10 Division 3 of the ASIC Act
- the *Australian Securities and Investments Commission Regulations 2001* (the **ASIC Regulations**) and
- the rules of procedural fairness, to the extent that they are not inconsistent with the ASIC Act or the ASIC Regulations.

The *Takeovers Panel Procedural Rules 2020* (the **new Rules** or **instrument)** set out the procedures the Panel adopts in the exercise of its functions and powers in accordance with the ASIC Act, the ASIC Regulations and procedural fairness.

On 2 October 2020, the Panel released the exposure draft of the new Rules for public comment. The Panel received 3 submissions in response. All respondents generally shared the Panel's view that the Panel's previous Rules[1] (which were in operation at the time of consultation) were operating effectively and efficiently and were broadly supportive of the form of the new Rules and accompanying Procedural Guidelines. One respondent commented that the new Rules and Procedural Guidelines *"will further assist parties and ASIC in understanding how Panel proceedings are conducted and the relevant expectations for those involved"*. In light of the submissions that the previous Rules were operating effectively and efficiently, the Panel considered that it was appropriate for the previous Rules to be remade without any significant changes in the form of the new Rules.

The Panel also recently conducted a survey of stakeholders in 2020. 91% of stakeholders surveyed were either very satisfied or somewhat satisfied with the Panel, with stakeholders also highly satisfied with the Panel's effectiveness with proceedings, the Panel's processes and the Panel's operational delivery.[2]

## Adequacy of explanatory materials

**The Committee has requested the Treasurer's advice as to whether the explanatory statement to the instrument could be amended to include further information as to the purpose and operation of each section of the instrument, including the specific information identified in relevant sections of this correspondence.**

The Panel undertakes to amend the explanatory statement as soon as possible to include further information as to the purpose and operation of each section of the instrument, including to address the Committee's comments. The Panel does not consider it necessary to amend the instrument given that the ASIC Act, the ASIC Regulations and procedural fairness all prevail over the instrument. Section 7 of the instrument also allows a sitting Panel to vary the procedures where appropriate in the light of the requirements and objectives of the ASIC Act and the ASIC Regulations and the requirements of procedural fairness in particular circumstances.

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[1] *Procedural Rules to be followed in Panel Proceedings (made on 12 April 2010) (F2010L00948)*

[2] The results of the Panel's 2020 stakeholder survey conducted by Ipsos are available on the Panel's website (https://www.takeovers.gov.au/)

**Clarity of drafting**

**Scope of administrative powers**

**The Committee has requested the Treasurer's advice as to:**

- **what may constitute cooperating with other parties in good faith, the consequences for failing to do so, and who is empowered to determine whether parties have acted in good faith under subsection 7(4);**

- **whether subsection 7(4) of the instrument can be redrafted to provide greater clarity as to its operation, purpose and meaning (or, at a minimum, further clarifying detail can be set out in the explanatory statement);**

- **what may constitute reasonable endeavours, the consequences for failing to do so, and who is empowered to determine whether parties have made reasonable endeavours under subsection 10(3); and**

- **whether subsection 10(3) of the instrument can be redrafted to provide greater clarity as to its operation, purpose and meaning (or, at a minimum, further clarifying detail can be set out in the explanatory statement).**

Where parties need to cooperate to comply with a direction, subsection 7(4) is intended to require that they act as if they had agreed to negotiate in good faith to achieve that purpose. Most parties before the Panel should be aware of the case law interpreting such requirements, making codification in the rules unnecessary. Generally speaking, the case law considers good faith to involve elements of fairness, honesty, reasonableness, not undermining the contractual objective, not acting arbitrarily or capriciously and having regard to the interests of the other parties (without having to subordinate one's own interests to the interests of the other parties).[3]

The sitting Panel would determine whether a party has acted in accordance with subsection 7(4). There is no specific sanction for failing to comply with a Panel direction, but a breach may be taken into account by the sitting Panel in determining how it conducts proceedings and may have procedural consequences.

The Panel undertakes to amend the explanatory statement as soon as possible to provide further clarifying detail in relation to subsection 7(4).

If an applicant fails to provide the application to a person identified as an interested person as required by subsection 10(3), the Panel may be unable to make the declaration or orders requested due to the requirements of procedural fairness and/or sections 657A(4)(a) or 657D(1)(a) of the *Corporations Act 2001* (**Corporations Act**). It follows that it is likely to be in the interests of the applicant to use reasonable endeavours to provide the application to identified interested persons (for example, by searching publicly available information for contact details and attempting to provide the application to the interested person based on known contact details). It is possible that the reasonableness of the applicant's endeavours may be relevant to whether the Panel should allow late service, notwithstanding the Panel's obligation to ensure that the proceedings are "as timely" as proper consideration and the law permit (subsections 6(1) and 6(2) and regulations 13 and 16(2) of the ASIC Regulations). If so, that would be a matter for the sitting Panel to determine, subject to the supervisory jurisdiction of the courts.

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[3] See eg *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] FCA 903, *Commonwealth Bank of Australia v Barker* [2014] HCA 32, *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50

The Panel undertakes to amend the explanatory statement as soon as possible to provide further clarifying detail in relation to subsection 10(3).

**Personal rights and liberties—procedural fairness (section 11)**

**The Committee has requested the Treasurer's advice as to:**

- **whether the Panel is required to consider whether withholding information will abrogate the rights of any party to procedural fairness in making a decision to withhold such information;**
- **whether a party from whom information is withheld will have an opportunity to present their case against the decision of the Panel to withhold information; and**
- **whether subsection 11(1) of the instrument and the relevant sections of the explanatory statement can be redrafted to provide greater clarity as to the section's operation, purpose and meaning.**

The instrument cannot limit or affect the application of the rules of procedural fairness to the Panel. The Panel's power to make procedural rules in subsection 195(1) of the ASIC Act is expressly subject to a requirement that the rules of procedural fairness apply to the extent that they are not inconsistent with the ASIC Act and the ASIC Regulations.

Except in exceptional cases, all material considered by the Panel must first be copied to ASIC and all parties (as required by subsection 10(6)). In some cases, however, there may be a difficult tension between disclosure and confidentiality or the public interest (see eg *VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88). Subsection 11(1) provides a procedure to accommodate these cases. Where a request is made under subsection 11(1) the tension between disclosure and confidentiality may be resolved in various ways, including waiver by parties of their right to receive the information or disclosure only of the substance of the information to all parties and the Panel.

Procedural fairness may require that a party from whom information is withheld must be heard on a decision by the Panel to allow that. If so, the Panel will give them that opportunity.

The instrument is intended to ensure that the Panel can conduct its proceedings in accordance with procedural fairness, rather than to describe what that involves. The content of procedural fairness depends on what practical fairness requires in all the circumstances, which is difficult to describe in a useful way in the context of the instrument.

The Panel undertakes to amend the explanatory statement as soon as possible to provide further clarifying detail in relation to subsection 11(1).

**Personal rights and liberties—legal professional privilege**

**The Committee has requested the Treasurer's advice as to:**

- **why it is considered necessary and appropriate for subsection 11(2) of the instrument to limit legal professional privilege;**
- **what factors will be considered by the Panel in deciding whether to grant an application for legal professional privilege; and**
- **whether subsection 11(2) of the instrument and the relevant sections of the explanatory statement can be redrafted to provide greater clarity as to the section's operation, purpose and meaning.**

Subsection 11(2) is not intended to limit legal professional privilege but rather to provide a procedure whereby it can be claimed consistently with the requirements of procedural fairness. The procedure in subsection 11(2) is consistent with the process for claiming legal professional privilege as set out in the case law (see eg *AWB v Cole (No 5)* (2006) 155 FCR 30 at [44], *Kennedy v Wallace* (2004) 142 FCR 185 at [12]-[21], *NCA v S* (1991) 29 FCR 203 at 211).

Subsection 11(2) provides an exception to subsection 10(6) that allows privileged material to be withheld, but requires that other parties are made aware that privileged material is being withheld. This ensures that other parties have the opportunity to test whether privilege has been properly claimed (for example, by requesting the Panel to refer a question of law to the Court under section 659A of the Corporations Act). The Panel does not exercise judicial power and could not decide conclusively whether privilege has been properly claimed. If it were necessary for the Panel to reach a view (albeit inconclusive) on that question, it would need to consider and apply the relevant law.

The Panel undertakes to amend the explanatory statement as soon as possible to provide further clarifying detail in relation to subsection 11(2).

**Scope of administrative power—insufficiently defined power (section 15)**

**The Committee has requested the Treasurer's advice as to:**

- **why it is considered necessary and appropriate for section 15 of the instrument to require the Panel to consent to a request from the applicant to withdraw their application;**
- **what factors may be considered by the Panel in determining whether to consent to an application made under section 15; and**
- **whether section 15 of the instrument and the relevant sections of the explanatory statement can be redrafted to provide greater clarity as to the section's operation, purpose and meaning.**

Section 15 provides a process that ensures that ASIC, all parties and the market are informed in a coordinated and timely manner consistent with section 602 of the Corporations Act when an application is to be withdrawn.

If the dispute is resolved the Panel will generally give consent to withdraw. However, consent may be delayed or refused in rare cases, for example, where ASIC or another party wishes to seek an

interim order and/or make their own application to ensure that unacceptable circumstances uncovered in the proceedings can be properly considered.

The Panel undertakes to amend the explanatory statement as soon as possible to provide further clarifying detail in relation to section 15.

**Scope of administrative power—insufficiently defined power (section 16)**

**The Committee has requested the Treasurer's advice as to:**

- **what factors may be considered by the Panel in determining whether to consent to an application made under section 16 by a person to become party to proceedings; and**
- **whether section 16 of the instrument and the relevant sections of the explanatory statement can be redrafted to provide greater clarity as to the section's operation, purpose and meaning.**

If a person seeking to become a party is an interested person then the person will generally be accepted as a party to proceedings. This is because an interested person is a person that is entitled to be heard by the Panel before it makes a decision or a person to whom a proposed declaration relates or a proposed order would be directed. As noted above in relation to section 10(3), the person's participation in proceedings is preferable due to the requirements of procedural fairness and/or sections 657A(4)(a) or 657D(1)(a) of the Corporations Act.

A person not identified in an application as an interested person who wishes to become a party to the proceedings should explain why they may be a potentially interested person or why they may be able to assist the Panel (subsection 16(2)). The factors the Panel will consider in deciding to accept as a party a person who is not an interested person will depend on the circumstances but may include whether the person has relevant information or can provide probative material that is different from other parties or whether the person would have standing to make an application in relation to the matter. The Panel may also have regard to the time at which the request to become a party has been made (the Panel is more likely to consider accepting the person as a party if the request is made in the early stages of the proceedings). The Panel would also consider submissions from the parties to the proceedings in relation to the request including any concerns raised about the participation of the person making the request.

The Panel undertakes to amend the explanatory statement as soon as possible to provide further clarifying detail in relation to section 16.

**Privacy (section 18)**

**The Committee has requested the Treasurer's advice as to:**

- **the nature, scope and extent of personal information that may be collected, used or disclosed by ASIC under the instrument;**
- **who, or which entities, can this information be disclosed to; and**
- **whether any statutory safeguards apply to protect this personal information, including whether the Privacy Act 1988 applies.**

The Panel is required to seek submissions from ASIC when considering applications (see for example sections 657A(4)(c) and 657D(1)(c) of the Corporations Act and regulation 22(1)(a)(i) of

the ASIC Regulations). Personal information may be collected by ASIC when they receive submissions from parties.

ASIC is subject to detailed confidentiality provisions in section 127 of the ASIC Act, which includes information received in Panel proceedings. ASIC is exempted from section 18 to avoid inconsistency with its obligations under section 127 of the ASIC Act. These provisions in section 127 of the ASIC Act are also applied to the Panel under section 186 of the ASIC Act. One of the purposes of section 18 is to ensure that the Panel complies with section 186 of the ASIC Act.

ASIC and the Panel, as Australian Government Agencies, are also required to comply with the *Privacy Act 1988* **(Privacy Act)**. Personal information obtained by ASIC in Panel proceedings is protected through the operation of section 127 of the ASIC Act and the Privacy Act.

The Panel undertakes to amend the explanatory statement as soon as possible to provide further clarifying detail in relation to section 18.

**Freedom of expression**

**Clarity of drafting (section 19)**

**The Committee has requested the Treasurer's advice as to:**

- **why it is considered necessary and appropriate for section 19 to provide that parties to proceedings, with the exception of ASIC, must not directly or indirectly cause, participate in or assist the canvassing in any media of any issue that is before, or is likely to be before the panel in proceeding, within certain circumstances;**
- **what may constitute 'indirectly' causing, participating or assisting the canvassing of such issues in the media; and**
- **what the penalties or consequences may be for failing to meet the requirements in section 19.**

Consistent with the Panel's duty to act "in as timely a manner" as the legislation and a proper consideration of matters permits (subsections 6(1) and 6(2) and regulations 13 and 16(2) of the ASIC Regulations), Panel proceedings are generally conducted in private. This has enabled the Panel, among other things, to resolve disputes quickly and efficiently, as parties can more readily prepare submissions within short deadlines because there is less need for attention to how they may be used and portrayed in the media. The Panel's surveys (including in its most recent survey results from 2020) have indicated strong support for this approach by stakeholders.

Indirect media canvassing occurs where a party arranges for a supportive party or adviser to canvass and seek media coverage of arguments or claims. In the context of large takeovers, given what is at stake, the aim of this media canvassing may be to advance the desired outcome for the takeovers, regardless of what that means for the proceedings before the Panel. Accordingly, without section 19, there would be an incentive for market participants to make applications and delay proceedings for publicity purposes, which would be contrary to the purpose of the Panel to resolve disputes *"as quickly and efficiently as possible by a specialist body largely comprised of takeover experts, so that the outcome of the bid can be resolved by the target shareholders on the basis of its commercial merits"* (see Corporate Law Economic Reform Program Bill 1998, Explanatory Memorandum at [7.3]).

Section 19's application is only temporary. In effect, after Panel proceedings have concluded, parties are free to discuss any issues arising from the matter with the media.

There are no specific penalties for breaching section 19 beyond the procedural consequences that may result from breach of the rules. However, the Panel has sometimes criticised parties in its reasons for breach of the media canvassing rules.

ASIC is exempted from the media canvassing rules to avoid inconsistency with ASIC's statutory obligations, noting that section 657H of the Corporations Act allows ASIC to publish a *"report, statement or notice"* in relation to any application it has made to the Panel. It is not expected that ASIC would engage in conduct contrary to the media canvassing rules unless ASIC considered that was required in the proper performance of its statutory duties (for example, in taking action in relation to matters connected with those before the Panel).

The Panel undertakes to amend the explanatory statement as soon as possible to provide further clarifying detail in relation to section 19.

**Personal rights and liberties—procedural fairness (section 20)**

**The Committee has requested the Treasurer's advice as to:**

- **whether the Panel is required to consider the rights of any party to procedural fairness in making a decision under section 20;**

- **why it is considered necessary and appropriate for subsection 20(3) to provide that any person not party to the proceedings may make preliminary submissions with Panel approval, noting that the parties have no opportunity to rebut these submissions as per subsection 20(1); and**

- **whether section 20 of the instrument and the relevant sections of the explanatory statement can be redrafted to provide greater clarity as to the section's operation, purpose and meaning.**

Section 20 does not limit or reduce the Panel's obligation to observe procedural fairness. The Panel's power to make procedural rules in subsection 195(1) of the ASIC Act is expressly subject to a requirement that the rules of procedural fairness apply to the extent that they are not inconsistent with the ASIC Act and ASIC Regulations. It is doubtful whether the Panel has power to attempt to codify the requirements of procedural fairness in the instrument and unlikely that it would be helpful to do so.

Section 20 describes the process that the Panel usually follows. Sitting Panels can and do vary that process under subsections 7(1) or (3) where appropriate, including to accept "out of process" rebuttals to preliminary submissions where practical fairness requires that in the circumstances. In doing so, the Panel will also have regard to its duty under regulations 13 and 16(2) of the ASIC Regulations – which prevails to the extent it is inconsistent with procedural fairness (subsection 195(4) of the ASIC Act) – to act "in as timely a manner" as the law and a proper consideration permit.

It is considered necessary to provide that the Panel may accept preliminary submissions from a person that is not a party because:

- such persons may not have had time to decide whether to seek to become a party and
- the Panel is not confined to an adversarial/judicial model and the ASIC Regulations contemplate that it may invite and receive submissions from non-parties (regulations 23-25 of the ASIC Regulations).

Factors the Panel considers in deciding whether to accept preliminary submissions from a person who is not a party include whether the submissions are relevant (or provide relevant probative material) and whether the person would be entitled to become a party.

The Panel undertakes to amend the explanatory statement as soon as possible to provide further clarifying detail in relation to section 20.

# THE HON MICHAEL SUKKAR MP

**Assistant Treasurer**
**Minister for Housing**
**Minister for Homelessness, Social and Community Housing**


Ref: MS21-000966

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

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

Dear Senator Fierravanti-Wells Concetta

Thank you for your correspondence, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation, requesting advice in relation to the *Tax Agent Services (Specified BAS Services No. 2) Instrument 2020* [F2020L01406] (Instrument).

The Committee has asked for further advice as to how subsection 90-10(1A) of the *Tax Agent Services Act 2009* (Act) authorises delegated legislation to extend business activity statement (BAS) services to those relating to the superannuation guarantee charge.

**Advice**

The power to make the Instrument is within the scope of the Act. This includes specifying in the Instrument that services under the *Superannuation Guarantee Charge Act 1992* are 'BAS services' for the purposes of subsection 90-10(1A) of the Act. The following analysis outlines the reasons for this conclusion.

**Analysis**

The Act authorises delegated legislation to extend 'BAS service' to other categories of tax agent services in addition to those specified in subsection 90-10(1) of the Act, and the Act does not require that the specified service be related to those already covered by subsection 90-10(1).

Section 90-10 of the Act provides that a 'BAS service' must:

1. fall within the definition in subsection 90-10(1); or
2. be specified by legislative instrument made under subsection 90-10(1A); and
3. not be excluded by subsection 90-10(2).

The services related to a superannuation guarantee charge identified by the Committee meet the criteria in subsection 90-10(1A) of the Act on the basis that subsection 5(b) of the Instrument specifies that "a service under the *Superannuation Guarantee Charge Act 1992"* is a 'BAS service'.

These services meet the criteria in subsection 2, as it is not excluded by the regulations, and there is nothing in the wording of subsection 90-10(2) which requires a service under subsection 90-10(2) to relate to or meet any of the criteria in subsection 90-10(1).

As a matter of construction, the content of section 90-10(1) does not itself limit the services that can be prescribed under subsection 90-10(1A). Further, there is no clear basis on which to conclude that a subject matter constraint is intended to apply to the kind of services that can fall within the definition which is implied from the content of subsection 90-10(1) of the Act, the title of the services (being 'BAS services') and/or the Act more broadly.

It is relevant to note that BAS services are clearly intended to be a subset of tax agent services. As a practical matter it is not clear what services could be both tax agent services and also relate to BAS provisions/statements without already being covered by subsection 90-10(1), so it is not clear that subsection 90-10(1A) would have a discernible function if it were limited in the manner suggested by the Committee.

Finally, it is consistent with the expressed Parliamentary intention that subsection 90-10(1A) be used to expand the range of services that are BAS services to allow the Tax Practitioners Board to ensure that the regulatory framework continues to reflect industry practice (see paragraphs 1.56, 1.59, 1.31 and 1.32 of the Explanatory Memorandum to the Tax Laws Amendment (2013 Measures No 3) Bill 2013).

For these reasons, I have been advised by the Tax Practitioners Board that it does not consider that subsection 90-10(1) of the Act limits delegated legislation made under subsection 90-10(1A) of the Act to specifying services that relate to BAS.

Thank you for bringing the Committee's concerns to my attention.

Yours sincerely

The Hon Michael Sukkar MP

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7230

**THE HON JOSH FRYDENBERG MP**
**TREASURER**

Ref: MS21-000409

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

Dear Senator

Thank you for your letter on behalf of the Committee in relation to the *Taxation Administration (Remedial Power – Seasonal Labour Mobility Program) Determination 2020* (the Determination). In that letter you requested my advice as to whether there is an intention to move amendments to the *Income Tax Assessment Act 1997* to provide for the changes to tax policy, currently in the Determination, to the face of primary law, and if not, why not.

In preparing this response, my Department consulted with the Australian Taxation Office (ATO), who made the Determination.

The Determination has been made in response to temporary changes to visa arrangements announced by the Government on 4 April 2020 due to the COVID-19 pandemic, which included allowing employees under the Seasonal Labour Mobility Program (the Program) to extend their stay in Australia using a different temporary visa and still continue to be eligible to participate in the Program. Without the Determination critical seasonal workers for the agricultural sector are subject to a higher non-resident tax rate and a requirement to lodge an income tax return. The outcome of the negative tax effects may be to jeopardise Australian farmers' ability to obtain the seasonal worker labour force it needs.

With regard to amendments to the primary law to incorporate the amendments from the Determination, I will ask my Department to consider whether the amendments to the primary law are necessary and appropriate. In the meantime, the use of the Commissioner's Remedial Power allows for a timely and effective solution to be put in place to ensure affected individuals are not subjected to taxation at the higher non-resident tax rates and required to lodge an income tax return.

The appropriate exercising of the Commissioner's Remedial Power (CRP) allows the taxation law to be remedied to apply as intended in more situations, enhancing certainty and reducing compliance burdens for taxpayers. The inability to address unintended outcomes in a timely manner places the onus on affected taxpayers to either comply with the provision and the unintended outcome it gives effect to, thereby incurring additional tax and compliance costs; or comply with the provision as intended but bear the risk of being penalised.

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I understand that the Commissioner remains cognisant that the power he has been given is to be used judiciously and not to circumvent nor limit the need for parliamentary oversight. The Commissioner balances the exercise of the power with the need to help clarify obligations for taxpayers more quickly, providing certainty and confining the need for complicated anticipatory administrative approaches. The ATO have advised that they remain sensitive to the balances that need to be struck. The inability to address these issues in a timely manner could reduce people's confidence in the tax system and willingness to voluntarily comply with tax obligations. This could draw resources away from resolving unintended outcomes and towards managing downstream effects from these outcomes.

The ATO have advised that they have implemented thorough governance processes to ensure consistent decision making before exercising the power. The ATO undertakes rigorous consultation with the CRP Advisory Panel (comprised of private sector specialists, Treasury and senior ATO representatives), the Board of Taxation, and externally with the community.

I trust this information has been of assistance.

Yours sincerely

THE HON JOSH FRYDENBERG MP

22 April 2021

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

# PAUL FLETCHER MP

Federal Member for Bradfield
Minister for Communications,
Urban Infrastructure,
Cities & the Arts

*MC21-003299*

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

Thank you for your letter of 14 April 2021 concerning the *Telecommunications (Fibre-ready Facilities - Exempt Real Estate Development Projects) Instrument 2021* (the Instrument) made under Part 20A of the *Telecommunications Act 1997* (the Act).

I note the Committee's concerns that the exemption in the Instrument may be more appropriately incorporated in the primary legislation and the long period of operation of the Instrument. The Committee has sought my advice on why it is considered necessary to use delegated legislation, whether the Instrument can be amended to sunset within three years after commencement, and whether there is any intention to conduct a review of the relevant provisions.

In response to the Committee's first question, the Explanatory Memorandum to the originating Bill, the Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011, noted that the statute provided a default framework for the whole of Australia that carried potentially significant obligations but applied to a marketplace that is inherently complex and undergoing significant change. As such, the statute included flexibility in the form of exemption powers (page 32). These exemption powers are intended to enable the default framework to be tailored to accommodate different circumstances in particular areas of Australia, circumstances which can change over time. This flexibility continues to be vital.

For example, the fixed-line facilities generally required under Part 20 of the Act are not usually required in NBN Co's fixed wireless and satellite footprints, but this may alter, for example, due to the changes in the way telecommunications carriers operate or changes in demographic trends in areas adjacent to NBN Co's fixed line footprint.

Moreover, apart from the need for flexibility, such exemptions are generally complex, as the Committee will be able to gauge from the Instrument itself. This level of detail was anticipated when the Bill was developed and it was not clear such detail would be appropriate for primary legislation, particularly given the need for flexibility.

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The original version of the Instrument made in 2016 reflected this complexity and the need for detail. When I remade the Instrument, I was conscious that there may be a need for further changes to the exemption given changes in the marketplace, including concurrent moves to bring unincorporated developers into Part 20A. There is therefore an ongoing need for the flexibility conferred by the use of a legislative instrument. I envisage, for example, that the exemption may need to be modified given emerging issues, thus my intention to initiate a review in the near term, as discussed below.

In response to the Committee's second question, I remade the Instrument for the period I have because of the certainty it provides for developers and stakeholders, and the importance of them having ongoing confidence that such an exemption will be available on a long term basis, noting the default requirements under the Act. I note that the exemption has been regularly used. While the exemption could be remade for three years, I envisage an exemption under subordinate legislation will need to be an ongoing feature of the regime given the design of the regime and the factors affecting the provision of telecommunications in new developments across Australia.

In response to the Committee's third question, as noted above, I envisage the Instrument will need to be reviewed in the near term given past experience and the telecommunications market. The Explanatory Statement to the Instrument indicates on page 2 that the intention is to further review the Instrument and a related instrument. I would expect this review to commence during the next twelve months. While the intention of the review would be to explore the need to update the exemptions in place in light of experience and current circumstances, the review could also consider whether the matters dealt with by the Instrument could be incorporated into Part 20A of the Act, noting the statutory design considerations above.

I trust the information in this letter is of assistance to the Committee. Should the Committee require further information, the contact officer in the Department of Infrastructure, Transport, Regional Development and Communications is Philip Mason (phone: (02) 6271 1579; email: philip.mason@infrastructure.gov.au).

Yours sincerely

Paul Fletcher

1/5/2021