

Monitor 7 of 2019 - Committee correspondence

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17 October 2019

Senator the Hon Richard Colbeck
Minister for Aged Care and Senior Australians
Parliament House
Canberra ACT 2600
Via email: Senator.Colbeck@aph.gov.au
CC: Minister.Colebeck.DLO@health.gov.au

Dear Minister,

Quality of Care Amendment (Minimising Use of Restraints) Principles 2019 [F2019L00511]

Thank you for your response of 26 September 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above legislative instrument.

The committee considered your response at its private meeting on 16 October 2019. Whilst noting your advice, the committee retains strong concerns that the above instrument raises significant scrutiny issues that should be brought to the attention of the Senate.

The committee's concerns are detailed in Chapter 1 of its *Delegated Legislation Monitor 7 of 2019*, available on the committee's website at www.aph.gov.au/regords_monitor.

The committee has also resolved not to withdraw the notice of motion to disallow the instrument previously placed by the committee, to emphasise its scrutiny concerns and give the Senate additional time to consider these matters.

Finally, the committee has resolved to seek a meeting with you, or senior officials of your department, to receive a briefing on the relevant issues and ask questions relating to its scrutiny concerns. In this regard, I request that your office please liaise with the committee secretariat to arrange a mutually convenient time to meet in the week beginning 11 November 2019.

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

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email at regords.sen@aph.gov.au.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



17 October 2019

Senator the Hon Jane Hume
Assistant Minister for Superannuation, Financial Services and Financial Technology
Parliament House
Canberra ACT 2600
Via email: Senator.Hume@aph.gov.au
CC: Shelby.brinkley@treasury.gov.au

Dear Assistant Minister,

ASIC Corporations (Changing Scheme Constitutions) Instrument 2019/700 [F2019L01185]

The Senate Standing Committee on Regulations and Ordinances assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Matters more appropriate for parliamentary enactment

Scrutiny principle 23(3)(d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This may include instruments which modify the operation of primary legislation.

The instrument modifies section 601GC of the *Corporations Act 2001* (Cth) (Corporations Act) to expand the circumstances in which the constitution of a registered investment scheme may be modified, or repealed and replaced with a new constitution. In doing so, it continues the relief provided by Class Order [CO 09/552] – Changing scheme constitutions, which commenced in September 2009, for a further 10 years (that is, until they are repealed by the sunset provisions in the *Legislation Act 2003*).

The committee notes that such modifications are authorised by subsection 601QA(1) of the Corporations Act, which provides that ASIC may exempt a person from a provision in Chapter 5C of the Act, or declare that Chapter 5C applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

Nevertheless, the committee generally prefers that the modification of primary legislation by delegated legislation does not continue in force for such time as to operate as a de facto amendment to the primary Act. Accordingly, where a lawmaker intends to include such modifications in delegated legislation, the committee expects a sound explanation to be included in the explanatory materials. In this instance, while the explanatory statement explains the purpose of the modifications to section 601GC of the Corporations Act, it does

not appear to explain why it is necessary to continue to enact them via delegated legislation.

In light of these matters, the committee requests your advice as to why it is considered necessary and appropriate to use delegated legislation to modify the operation of paragraph 601GC(1)(a) of the Corporations Act for a further 10 years by delegated legislation, rather than primary legislation.

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

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **31 October 2019**.

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

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

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



17 October 2019

The Hon Michael McCormack MP
Minister for Infrastructure, Transport and Regional Development
Parliament House
Canberra ACT 2600
Via email: Michael.McCormack.MP@aph.gov.au
CC: cameron.rimington@infrastructure.gov.au

Dear Minister,

**CASA EX101/19 — Helicopter Aerial Application Endorsements Exemption 2019
[F2019L01132]**

The Senate Standing Committee on Regulations and Ordinances assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Significant matters in delegated legislation

Senate standing order 23(3)(d) requires the committee to consider whether an instrument may contain matters more appropriate for parliamentary enactment. This may include instruments that grant or extend exemptions from primary or enabling legislation.

The instrument exempts certain persons from requirements in the Civil Aviation Safety Regulations 1998 (CASR) relating to helicopter aerial application ratings, if they meet alternative requirements set out in the instrument. The explanatory statement justifies the exemptions on the basis that the Civil Aviation Safety Authority (CASA) has determined that the alternative requirements in the instrument are 'more effective' than those prescribed by the CASR.¹ However, it does not explain why an exemption instrument has been used to prescribe these alternative requirements, instead of amending the CASR.

The exemptions in the present instrument were initially introduced by CASA EX120/17, which commenced on 10 October 2017. In November 2017, the committee raised concerns that CASA EX120/17 had been used to make 'improvements' to the CASR, rather than directly amending those regulations. The committee sought the minister's advice as to why that approach was taken, and whether the government proposed to amend the CASR to address the matters covered by CASA EX120/17.² In response, the (then) Minister for

1 Explanatory statement, p. 1.

2 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 14 of 2017*, pp. 5-6.

Infrastructure and Transport advised that CASA would amend the CASR to address the matters covered by CASA EX120/17, with amending regulations to be made in 2019.³

Despite the former minister's advice, the present instrument appears to remake CASA EX120/17 in substantially the same terms, thereby extending the operation of the relevant exemptions to 31 August 2022. The committee is therefore concerned that the amendments to the CASR have not been progressed in accordance with the former minister's undertaking, and, consequently, the relevant exemptions have now been in force for such time as to constitute de facto amendments to the CASR.

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

- **whether the government proposes to amend the Civil Aviation Safety Regulations 1998 (CASR) to address the matters covered by the present instrument, in accordance with the former minister's undertaking to the committee; and**
- **if so, when the relevant amendments are likely to be made.**

If the government does not propose to make such amendments, the committee requests your advice as to why it is considered necessary and appropriate to further extend exemptions to the CASR, instead of amending those regulations.

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

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **31 October 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website. If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

3 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 16 of 2017*, pp. 39-41. The former minister's correspondence may be accessed on the committee's website at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor/mon2017/index



17 October 2019

The Hon Paul Fletcher
Minister for Communications, Cyber Safety and the Arts
Parliament House
Canberra ACT 2600
Via email: Paul.Fletcher.MP@aph.gov.au
CC: dlo@communications.gov.au

Dear Minister,

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

The Senate Standing Committee on Regulations and Ordinances assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Incorporation

The *Legislation Act 2003* (Legislation Act) provides that instruments may incorporate, by reference, the provisions of Acts, legislative instruments or other documents as they exist at particular times. It also provides that the explanatory statement to an instrument must:

if any documents are incorporated in the instrument by reference—
contain a description of the incorporated documents and indicate how they may be obtained.¹

With reference to these matters, the committee notes that the instrument incorporates the *List of websites hosting terrorist or violent criminal material (No. 1)* (the list). The explanatory statement explains that the eSafety Commissioner does not intend to publish the list, and that this approach is intended to minimise the risk of drawing further attention and traffic to domains whose operators provide access to material which promotes, incites or instructs in terrorist acts or violent crimes.²

The committee appreciates the importance of protecting Australians from exposure to harmful material, and preventing broad dissemination of the list. Nevertheless, from a scrutiny perspective, the committee reiterates that the Legislation Act expressly requires the explanatory statement to an instrument to indicate where any incorporated document

1 Paragraph 15J(2)(c) of the Legislation Act.

2 Explanatory statement, p. 4.

may be obtained. It appears that this requirement has not been satisfied in relation to the present instrument.

In light of the matters above, the committee requests your advice as to whether the explanatory statement to the instrument could be amended to indicate how the *List of websites hosting terrorist or violent criminal material (No. 1)* may be obtained. If it is not intended to amend the explanatory statement, the committee requests your advice as to how the requirements of paragraph 15J(2)(c) of the *Legislation Act 2003* are to be met.

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

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **31 October 2019**.

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

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

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



17 October 2019

Senator the Hon Bridget McKenzie
Minister for Agriculture
Parliament House
Canberra ACT 2600
Via email: senator.mckenzie@aph.gov.au
CC: DLO-McKenzie@agriculture.gov.au

Dear Minister,

Agriculture and Veterinary Chemicals Legislation Amendment (Timeshift Applications and Other Measures) Regulations 2019 [F2019L00357]

Thank you for your response of 18 September 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 16 October 2019. On the basis of your advice, the committee has concluded its examination of the instrument.

The committee also takes this opportunity to reiterate that where an instrument imposes or changes a fee, levy, charge, scale or rate of costs or payment, the explanatory statement should make clear the specific basis on which the relevant imposition or change has been calculated. This information should be included even where relevant provisions replicate those in a previous instrument, or preserve existing fees or charges.

The committee also reiterates its expectation that where an instrument incorporates a document by reference, the explanatory statement will indicate where that document may be accessed free of charge. This may be, for example, by noting availability through specified public libraries or by making the document available for viewing on request at departmental offices. This is to ensure that all persons interested in or affected by the law can readily access its terms.

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

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



17 October 2019

The Hon Jason Wood MP
Assistant Minister for Customs, Community Safety and Multicultural Affairs
Parliament House
Canberra ACT 2600
Via email: Jason.Wood.MP@aph.gov.au
CC: amo.dlo@homeaffairs.gov.au

Dear Minister,

**Customs (Prohibited Imports) Amendment (Collecting Tobacco Duties) Regulations 2019
[F2019L00352]**

Thank you for your response of 18 September 2019 to the Senate Standing Committee on Regulations and Ordinances in relation to the above instrument.

The committee considered your response at its private meeting on 16 October 2019. On the basis of your advice, the committee has concluded its examination of the instrument.

However, the committee takes this opportunity to reiterate that delegations of power in instruments should generally be restricted to members of the Senior Executive Service (SES) or, at a minimum, that delegates be required to possess expertise appropriate to the delegated powers. The committee notes that it does not expect particular details of a delegate's qualifications, attributes or expertise to be specified in the instrument. Rather, the committee considers that the instrument should include some requirement that the person delegating powers or functions be satisfied that delegates possess expertise appropriate to the relevant delegation.

The committee also considers that, as a matter of best practice, it would be appropriate for the information provided in your response to be included in the explanatory statement, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

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

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



17 October 2019

The Hon Greg Hunt MP
Minister for Health
Parliament House
Canberra ACT 2600
Via email: Greg.Hunt.MP@aph.gov.au
CC: Minister.Hunt.DLO@health.gov.au

Dear Minister,

Health Insurance (Diagnostic Imaging Services Table) Regulations 2019 [F2019L00563]

Thank you for your response of 19 August 2019 to the Senate Standing Committee on Regulations and Ordinances, advising the committee of your undertaking to amend the above instrument to provide for independent merits review in relation to decisions relating to capital sensitivity exemptions.

The committee welcomed this undertaking, and resolved to place a notice of motion to disallow the instrument while the undertaking remained outstanding. The notice was placed on 16 September 2019. The committee notes that the instrument has since been amended, in accordance with your undertaking.¹ The committee has therefore resolved to withdraw the notice of motion to disallow the instrument.

Please note that, in the interest of transparency, all correspondence relating to this matter will be published on the committee's website.

If you have any questions or concerns, or wish provide further information in relation to this matter, please contact the committee secretariat on (02) 6277 3066 or by email to regords.sen@aph.gov.au.

1 The relevant amendments were made by the Health Insurance Legislation Amendment (2019 Measures No. 1) Regulations 2019 [F2019L01256].

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



17 October 2019

The Hon David Coleman MP
Minister for Immigration, Multicultural Affairs and Citizenship
Parliament House
Canberra ACT 2600
Via email: David.Coleman.MP@aph.gov.au
CC: dlo.immi@homeaffairs.gov.au

Dear Minister,

Migration Amendment (New Skilled Regional Visas) Regulations 2019 [F2019L00578]

Thank you for your response of 24 September 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 16 October 2019. On the basis of your advice, and the registration of the replacement explanatory statement, the committee has concluded its examination of the instrument. Please note that, in the interest of transparency, all correspondence relating to this matter will be published on the committee's website.

If you have any questions or concerns, or wish provide further information in relation to this matter, please contact the committee secretariat on (02) 6277 3066 or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances