



AUSTRALIAN
SENATE

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

3 December 2020

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

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

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


Dear Treasurer,

Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers) (Mortgage Brokers) Regulations 2020 [F2020L01189]

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

Significant matters in delegated legislation

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

Section 158N of the *National Consumer Credit Protection Act 2009* (National Credit Act) sets out the definition of conflicted remuneration. Section 158NA further provides that the National Consumer Credit Protection Regulations 2010 (principal instrument) may further define conflict remuneration.

This instrument amends the principal instrument to specify the circumstances under which a benefit is and is not conflicted remuneration and prescribe the circumstances under which conflicted remuneration must not be accepted or must not be given.

The committee generally considers that significant matters, such as specifying key elements of the definition of conflicted remuneration, are more appropriately enacted via primary legislation. Where significant matters are nevertheless left to delegated legislation, the committee would expect a sound justification for the use of delegated legislation to be provided.

In this instance, the explanatory statement to the instrument notes that the instrument, together with Schedule 3 to the *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2019 Measures)) Act 2020*, has been made to implement the government's response to Recommendation 1.3 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry to address conflicted remuneration for mortgage brokers. However, the explanatory statement does not provide any information as to why it was considered necessary and appropriate to include significant elements of the definition of conflicted remuneration in delegated legislation.

The committee therefore requests your advice as to why it was considered necessary and appropriate to prescribe key elements of the definition of conflicted remuneration in delegated, 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 **17 December 2020**.

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

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

Thank you for your assistance with this matter.

Yours sincerely,

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



THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS20-002736

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

Thank you for your letter dated 3 December 2020, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee), requesting advice in relation to the *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers) (Mortgage Brokers) Regulations 2020* [F2020L01189].

The Committee requested advice as to why it was considered necessary and appropriate to prescribe key elements of the definition of conflicted remuneration in delegated, rather than primary, legislation.

The use of delegated legislation is justified in recognition of the need to account for the variety of and complexity of benefits that may be given to mortgage brokers and mortgage aggregators in relation to credit assistance, and the variety of situations in which such payments may be given.

In these circumstances, the use of delegated legislation allows for the regime to respond to changes in industry practice and to ensure that the new regime operates for the benefit of consumers.

I also note that, in dealing with the circumstances in which a benefit will or will not be conflicted remuneration, as well as the circumstances in which conflicted remuneration is banned, the regulations only have applicability in relation to a limited class of persons. Specifically, they will only have effect in relation to the giving of benefits to, or the acceptance of benefits by, mortgage brokers and mortgage intermediaries and their representatives.

Given the limited class of persons in relation to which the ban on conflicted remuneration applies, it is appropriate that the detail of these matters is dealt with in regulations, rather than in the primary law.

If these matters were to be inserted into the *National Consumer Credit Protection Act 2009*, they would insert, into an already complex statutory framework, a set of technical and specific

provisions that would apply only to a relatively small group of persons. This would result in additional cost and unnecessary complexity for other users of that act.

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

Yours sincerely,

THE HON JOSH FRYDENBERG MP

17 / 12 / 2020



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Scrutiny of Delegated Legislation**

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22 January 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au
CC: committeescrutiny@treasury.gov.au

Dear Treasurer,

Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers) (Mortgage Brokers) Regulations 2020 [F2020L01189]

Thank you for your response of 17 December 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 22 January 2021. On the basis of the advice that delegated legislation is necessary in this instance to allow the measures in the instrument to account for the variety and complexity of benefits, the committee has concluded its examination of the instrument.

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

Thank you for your assistance with this matter.

Yours sincerely,

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