



AUSTRALIAN  
SENATE

**Senate Standing Committee for the  
Scrutiny of Delegated Legislation**

Parliament House, Canberra ACT 2600  
02 6277 3066 | [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au)  
[www.aph.gov.au/senate\\_sdlc](http://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](mailto:Josh.Frydenberg.MP@aph.gov.au)

CC: [tsrdlos@treasury.gov.au](mailto:tsrdlos@treasury.gov.au); [Committeescrutiny@treasury.gov.au](mailto:Committeescrutiny@treasury.gov.au);

Dear Treasurer,

**Corporations (Coronavirus Economic Response) Determination (No. 4) 2020  
[F2020L01206]**

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

***Matters more appropriate for parliamentary enactment***

Senate standing order 23(3)(j) requires the committee to examine each legislative instrument as to whether it contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted by primary rather than delegated legislation).

The instrument temporarily modifies the operation of the civil penalty provisions in subsections 674(2), 674(2A), 675(2) and 675(2A) of the *Corporations Act 2001* (Corporations Act). The unmodified provisions establish an objective test for the disclosure of information where the information would have a material effect on the price or value of the entity's enhanced disclosure (ED) securities.

The modifications in the instrument replace this objective test with a temporary test based on the knowledge, recklessness or negligence of a disclosing entity or its officers with respect to whether certain information would have a material effect on the price or value of its ED securities and therefore should be disclosed under sections 674 or 675. Breach of the continuous disclosure obligations attracts both civil and criminal penalties. However, the modifications made by the instrument only affect the operation of the civil penalty provisions. The modifications made by the instrument will remain in force for six months.

The instrument was made under section 1362A of the Corporations Act, which was inserted by item 1 of Schedule 8 to the *Coronavirus Economic Response Package Omnibus Act 2020*. Section 1362A provides that the Treasurer may, by disallowable legislative instrument, temporarily modify specified provisions of the Corporations Act. The Treasurer must first be satisfied that it would not be reasonable to expect persons to comply with the relevant provisions because of the impact of COVID-19.

Section 1362A of the Corporations Act appears to be a Henry VIII clause, as it enables delegated legislation to modify the operation of legislation which has been passed by the Parliament. The committee notes that the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) commented on section 1362A when the Coronavirus Economic Response Package Omnibus Bill 2020 was before the Parliament. The Scrutiny of Bills committee emphasised that there are significant scrutiny concerns with Henry VIII clauses, as such clauses impact on levels of parliamentary scrutiny and may subvert the appropriate relationship between Parliament and the Executive.

This committee shares the views of the Scrutiny of Bills committee regarding Henry VIII clauses, and takes this opportunity to reiterate that committee's concerns about the modification of primary legislation by delegated legislation.

The committee also considers that the instrument raise significant policy matters relating to the Commonwealth Government's response to the COVID-19 pandemic, and therefore engages standing order 23(4). Accordingly, the committee has resolved to draw the instrument to the attention of the Senate and relevant Senate committees.

Finally, 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**



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3 December 2020

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

via email: [covid.sen@aph.gov.au](mailto:covid.sen@aph.gov.au)

cc: The Hon Josh Frydenberg MP, Treasurer, [tsrdlos@treasury.gov.au](mailto:tsrdlos@treasury.gov.au)  
Senator the Hon Richard Colbeck, Minister for Aged Care and Senior  
Australians, [Minister.Colbeck.DLO@health.gov.au](mailto:Minister.Colbeck.DLO@health.gov.au)

  
Dear Chair,

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

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

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

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

Instrument	Purpose	Last day to lodge disallowance notice
<b>Aged Care Legislation Amendment (Subsidies—COVID-19 Support Supplement and Workforce Continuity Funding Measures No. 2) Instrument 2020 [F2020L01183]</b>	To prescribe a second COVID-19 support supplement payment, which is payable for each day in June 2020 that a care recipient was being provided residential care by their approved provider, and continue, from 1 September 2020, the temporary increases to the viability supplement and to the homeless supplement which had ended on 31 August 2020.	1 <sup>st</sup> day of sitting of 2021
<b>Coronavirus Economic Response Package (Payments and Benefits) Alternative Decline in Turnover Test Rules (No. 2) 2020 [F2020L01200]</b>	To give certain entities or classes of entities an alternative basis on which they may satisfy the actual decline in turnover test or the decline in turnover test to be eligible for JobKeeper payments. This will ensure that entities in certain classes will still be eligible to receive assistance through JobKeeper payments where their particular circumstances are not specifically accounted for in the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020.	1 <sup>st</sup> day of sitting of 2021
<b>Corporations (Coronavirus Economic Response) Determination (No. 3) 2020 [F2020L01194]</b>	To modify the <i>Corporations Act 2001</i> to enable meetings to be run electronically and to enable electronic signatures to be used, to relieve companies from problems they face due to COVID-19.	1 <sup>st</sup> day of sitting of 2021
<b>Corporations (Coronavirus Economic Response) Determination (No. 4) 2020 [F2020L01206]</b>	To modify the operation of certain civil penalty provisions in the <i>Corporations Act 2001</i> to establish a temporary test based on a disclosing entity or its officers' knowledge, recklessness or negligence with respect to whether certain information would have a material effect on the price or value of its enhanced disclosure securities and therefore should be disclosed.	1 <sup>st</sup> day of sitting of 2021

Should your committee decide to further examine any of the above instruments, I note that the table above identifies the last day (based on the current sitting pattern) for lodging a disallowance notice in the Senate. The committee has also drawn these instruments to the attention of the relevant Senate legislation committees.

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

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

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

Yours sincerely,

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



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3 December 2020

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

via email: [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

cc: The Hon Josh Frydenberg MP, Treasurer, [tsrdlos@treasury.gov.au](mailto:tsrdlos@treasury.gov.au)  
The Hon Keith Pitt MP, Minister for Resources, Water and Northern  
Australia, [Keith.Pitt.MP@aph.gov.au](mailto:Keith.Pitt.MP@aph.gov.au)

  
Dear Chair,

**Matters of interest to the Senate**

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

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Noting that the following instruments appear to contain significant policy matters, the committee has determined that the instruments engage standing order 23(4) and accordingly has resolved to draw them to the attention of your committee:

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<b>Coronavirus Economic Response Package (Payments and Benefits) Alternative Decline in Turnover Test Rules (No. 2) 2020 [F2020L01200]</b>	To give certain entities or classes of entities an alternative basis on which they may satisfy the actual decline in turnover test or the decline in turnover test to be eligible for JobKeeper payments. This will ensure that entities in certain classes will still be eligible to receive assistance through JobKeeper payments where their particular circumstances are not specifically accounted for in the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020.	1 <sup>st</sup> day of sitting of 2021
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<b>Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers) (Mortgage Brokers) Regulations 2020 [F2020L01189]</b>	To address conflicted remuneration for mortgage brokers, as per Recommendation 1.3 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, including by setting out what is conflicted remuneration and circumstances in which conflicted remuneration must not be accepted or given.	1 <sup>st</sup> day of sitting of 2021

I note that under standing order 25(2)(a) your committee is empowered to conduct own-motion inquiries into legislative instruments which relate to the portfolios allocated to your committee, although there is no requirement to do so. Should your committee decide to further examine any of the above instruments, I note that the table above identifies the last day (based on the current sitting pattern) for lodging a disallowance notice in the Senate.

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

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

Yours sincerely,

**Senator the Hon Concetta Fierravanti-Wells**  
**Chair**  
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