SENATOR THE HON JANE HUME
ASSISTANT MINISTER FOR SUPERANNUATION, FINANCIAL SERVICES AND FINANCIAL TECHNOLOGY

Ref: MS20-001028

11 JUN 2020

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Fierravanti-Wells

I am writing in response to your letter dated 21 May 2020, on behalf of Senate Standing Committee for the Scrutiny of Delegated Legislation relating to the following legislative instruments issued by the Australian Securities and Investments Commission (ASIC):

- *ASIC Corporations (Amendment) Instrument 2020/290* [F2020L00376];
- *ASIC Corporations (Trading Suspensions Relief) Instrument 2020/289* [F2020L00377]; and
- *ASIC Corporations (COVID-19 – Advice-related Relief) Instrument 2020/355* [F2020L00425].

The Committee has requested further detailed advice as to whether the instruments could be amended to specify a date by which the measures in the instruments will cease to operate. In responding to the Committee's concerns, I have sought advice from ASIC.

Following further consideration of this issue, ASIC has advised that they will amend the legislative instruments in the following manner:

- a new repeal section will be inserted into *ASIC Corporations (Trading Suspensions Relief) Instrument 2020/289* which will have the effect that the instrument will be repealed 6 months after it commenced on 2 April 2020;
- new amendments will be made to *ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547* [F2020C00262] that will reverse the earlier amendments made by *ASIC Corporations (Amendment) Instrument 2020/290* and will take effect 6 months after those earlier amendments commenced on 2 April 2020; and
- a new repeal section will be inserted into *ASIC Corporations (COVID-19 – Advice-related Relief) Instrument 2020/355* which will have the effect that the instrument will be repealed 6 months after it commenced on 15 April 2020.

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 3123 | Facsimile: 61 2 6277 5782

I have been informed that ASIC also intends to note in the explanatory statement that ASIC has the ability to repeal the instrument earlier and outline the factors that ASIC will take into account in making this decision. Any early repeal will be subject to 30 days' notice. I am advised that ASIC will attend to these amendments as soon as possible.

I trust this information will be of assistance to you.

Yours sincerely

Senator the Hon Jane Hume

SENATOR THE HON LINDA REYNOLDS CSC
MINISTER FOR DEFENCE
SENATOR FOR WESTERN AUSTRALIA

MB20-000699

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

3 JUN 2020

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

Dear Senator Sonia

I refer to your correspondence to me on 21 May 2020 concerning the Defence Amendment (2020 Measures No. 1) Regulations 2020 (the Amending Regulations), which amended the Defence Regulation 2016 (the Regulation). The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) has identified scrutiny concerns in relation to the Amending Regulations, and has sought my advice about this matter.

In particular, the committee has requested advice as to whether the Regulation could be amended to provide that the 14 day notice requirement in subsection 24(2) applies to termination decisions made in the circumstances set out in paragraphs 24 (3)(b)(i) and (iii) and if not, why not. If such an amendment is not considered appropriate, the committee has requested my advice as to whether the regulation could be amended to expressly state that subsection 24(3) is not intended to exclude the common law requirements of procedural fairness in order to put the matter beyond doubt for defence officials, defence member s and the courts.

Termination decisions without 14 days written notice

As the committee has outlined in its correspondence, the effect of the Amending Regulations was to restructure section 24 of the Regulation to explicitly exclude decisions to terminate a member who has failed to meet a condition of their appointment or enlistment (paragraph 24(3)(b)(i)), or has been absent without leave for a continuous period of 3 months or more (paragraph 24(3)(b)(iii)), from the requirement in subsection 24(2) to give 14 days' written notice of a termination decision. However, notwithstanding this exclusion, decision-makers must follow a fair and reasonable process when making these decisions, having regard to all the circumstances.

That means that, generally, members would need to be provided with notice in some form and a fair opportunity to be heard, before a decision is made.

The first circumstance of concern to the committee is where a member has failed to meet a condition of appointment or enlistment. A common example of a condition on appointment or enlistment is to complete certain training within a specified period. ADF members are made aware of this condition at the time of appointment or enlistment, and, generally, if an ADF member is at risk of not completing required training, they will be made aware of this (including the possible consequences of failing to complete the required training), and given ample opportunities to satisfy the condition.

If the ADF member fails to complete the required training in time, and termination is contemplated, the procedures adopted in relation to that decision must be reasonable, taking account of previous opportunities the ADF member has had to address the issue. Applying the 14 day written notice requirement in s 24(2) to these sorts of decisions would result in duplication of process, without making any substantive difference to the fairness of the process followed or the decision to terminate the member's service. Other examples of conditions that might apply to appointment or enlistment are obtaining citizenship or obtaining a particular professional qualification. These sorts of condition have a similar intent as a period of probation, but with a more specific focus on a particular quality of the member.

The other circumstance of concern to the committee is where a member has been absent without leave for a continuous period of 3 months or more. Defence policy sets out a range of actions that are to be taken when a member has failed to report for duty, and is absent without leave. This includes attempting to contact the member at their place of residence, contacting their next of kin and emergency contact, checking whether they have been hospitalised, and checking that they are not in custody. After a period of 24 hours, an arrest warrant may be raised, noting that absence without leave is a disciplinary offence. By the time a member has been absent without leave for 3 months, the member would have either been located and encouraged to return to duty (and potentially charged), or efforts to locate the member have not been successful. A mandatory requirement to provide 14 days written notice before proceeding to a termination decision in these circumstances would be redundant.

Accordingly, the Regulation should not be amended to provide that the 14 day written notice requirement in subsection 24(2) applies to termination decisions made in the circumstances set out in paragraphs 24(3)(b)(i) and (iii).

Amending regulation to state effect of common law procedural fairness

The committee is concerned that defence officials, members and the courts may not be aware that the intent of subsection 24(3) is not to exclude the common law requirements of procedural fairness. I have asked the Department to consider inserting a note in regulation 24, with this in mind, next time the Regulation is amended.

Decision-makers and members in Defence are guided by the *Military Personnel Manual*, which provides comprehensive guidance for how termination decisions should be made under section 24. For example, the manual requires that decision-makers obtain legal advice before making a termination decision without providing 14 days written notice. Another internal guide, *Good Decision-Making in Defence: A guide for decision-makers and those who brief them*, includes guidance for decision-makers about how to comply with procedural fairness obligations, including adopting fair and reasonable processes to suit the specific circumstances.

The Department has advised me that the *Military Personnel Manual* will be amended to state clearly that, notwithstanding the operation of subsection 24(3), common law requirements of procedural fairness still apply, and decision-makers must adopt a fair and reasonable process in all the circumstances. This will help ensure that defence officials and members and the courts are aware that common law procedural fairness applies to these decisions.

Thank you for bringing this matter to my attention.

Yours sincerely

[redacted]

Linda Reynolds

THE HON JOSH FRYDENBERG MP
TREASURER

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 Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020* [F2020L00435] (the Regulations).

In that letter, the Committee sought my advice as to Parliamentary oversight, and the retrospective application, of the Regulations.

As outlined in the Explanatory Statement to the Regulations, the significant impact of Coronavirus on the Australian economy has increased the risk of foreign investment in Australia occurring in ways contrary to the national interest. The Regulations address this risk by amending the monetary value thresholds for particular significant actions and notifiable actions to nil, an action expressly contemplated by paragraph 55(1)(a) of the *Foreign Acquisitions and Takeovers Act 1975.*

The Regulations do not specify a date on which the measure will cease, and this reflects the uncertainty around the Coronavirus and its impact on foreign investment into Australia. While the Coronavirus crisis continues, it is in the national interest that the Regulations remain in force.

I note the comparison drawn by the Committee between the Regulations and other instruments, made in response to the Coronavirus crisis, which generally specify set time periods. In this case, it would not be appropriate to amend the instrument to specify a date on which the measures will cease to operate. If the Coronavirus crisis continues beyond any such nominal period, new regulations will be required to be drafted, to ensure the national interest remains protected.

The retrospective application of the Regulations was necessary and appropriate. As indicated above, the Coronavirus crisis increased the risk that foreign investment would occur contrary to the national interest, and the regulations address that risk. Significantly, the Regulations only apply retrospectively for a short period and only from the date of announcement of these changes to the foreign investment framework.

As noted in the Explanatory Statement, the Regulations were urgently prepared, but there was still a delay of 19 days between their announcement and commencement. Applying the Regulations from the time of the announcement on 29 March 2020 ensured that this period of time was covered, reducing the risk of foreign investment occurring contrary the national interest.

If the Regulations applied only prospectively, foreign investors could take advantage of the time between the announcement and the registration of the Regulations to avoid notifying the Treasurer

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

about some actions. This would pose a greater risk to the national interest, a risk that the Regulations are intended to address.

In terms of procedural fairness, the Government is not aware that any stakeholder was disadvantaged by the retrospective application of the Regulations. First, it is significant that the Regulations only applied to the time period following their announcement. The Regulations are simply the enactment of clearly articulated Government policy. Second, in the weeks following the announcement, the Foreign Investment Review Board and Treasury worked closely with stakeholders to address concerns arising from the changes, and remain committed to meeting commercial deadlines wherever possible. These proactive steps undertaken by the Government have ensured minimum disruption to foreign investors.

Generally, the amendments do not apply to an action taken under an agreement which was entered into by the parties before the announcement. This ensures that parties to such agreements are not unduly affected by the changes made by the Regulations.

Thank you for bringing your concerns to my attention.

Yours sincerely,

[redacted]

THE HON JOSH FRYDENBERG MP

3 / 6 /2020

The Hon Greg Hunt MP
Minister for Health
Minister Assisting the Prime Minister for the Public Service and Cabinet

Ref No: MC20-020946

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Senator for New South Wales
sdlc.sen@aph.gov.au

4 JUN 2020

Dear Senator

I refer to your letter of 21 May 2020 from the Senate Standing Committee for the Scrutiny of Delegated Legislation (Committee), concerning the *National Health (Take Home Naloxone Pilot) Special Arrangement 2019* (Instrument).

The purpose of this letter is to respond to your further concerns about s 25 of the Instrument and propose a way forward.

Legal authority for s 25 of the Instrument

I have considered your concerns regarding the legal authority for s 25 of the Instrument. However, I remain of the view that ss 100(1) and 100(3) of the *National Health Act 1953* (NHA) provide legal authority for s 25 of the Instrument. As I have previously explained, the fact that s 25 permits the Secretary to authorise other parties to perform their functions and exercise their powers does not, in my view, take the arrangement beyond being an arrangement 'for' or 'in relation to' providing that an 'adequate supply of pharmaceutical benefits will be available to persons'. In my view, I consider it unnecessary to amend the NHA on the basis that I am satisfied that the current arrangement is legally sound.

The role of the third party administrator in practice

To address your concerns about the role of third party administrators under s 25 of the Instrument, it may be useful to explain what powers and functions third party administrators exercise in practice.

In particular, I wish to emphasise that the powers and functions which the Secretary may exercise under the instrument – or authorise a third party administrator to exercise in accordance with s 25 – are relatively confined, and are of a routine administrative nature. The main powers and functions are to:

- determine the amount payable for a claim made under Part 2 of the Instrument, and make the payment (s 22), and
- request and collect further information in relation to certain claims (s 23).

In practice, the role of a third party administrator which is authorised to exercise these powers and functions is to receive and manage claims, process payments, collect data, and report information to my Department.

For example, in accordance with s 25 of the Instrument, my Department has entered into a Contract for Services to engage Australian Healthcare Associates (AHA) to perform these administrative functions. Under the Contract for Service, AHA provides a software solution to:

- enable approved suppliers (as defined in the Instrument) to make claims for payment of naloxone provided to designate persons
- collect data used to evaluate the pilot program, and
- provide regular reporting on the pilot to my Department.

The reason why it is necessary to engage a third party administrator is because my Department does not have the current resource capacity or IT systems or infrastructure to perform these administrative processes.

As well as being practically necessary, I consider it is reasonable as a matter of policy for a third party administrator to perform this kind of limited, routine administrative role in the context of the pilot program. The powers and functions which a third party administrator is authorised to exercise are clearly set out in the Instrument, and do not involve any discretionary decision-making. In my view, this does not represent an inappropriate conferral of powers and functions on a third party.

Amending s 25 of the Instrument

Although I consider that the current arrangement is legally sound and reasonable as a matter of policy, my Department would be open to the possibility of amending s 25 of the Instrument to address the Committee's concerns about the role of third party administrators. For example, it may be possible to amend s 25 to clarify the role of third party administrators, or to provide additional oversight by my Department of the third party administrators' activities. I would welcome any specific suggestions from the Committee in this regard.

Thank you for raising this matter.

Yours sincerely

[redacted]

Greg Hunt

Senator the Hon Anne Ruston

Minister for Families and Social Services
Senator for South Australia
Manager of Government Business in the Senate

Ref: MB20-000542

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 of 21 May 2020 on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) concerning the National Rental Affordability Scheme Regulations 2020 (the Regulations). The Committee has asked for advice on the following two matters:

- Availability of independent merit review:
  - why decisions under sections 20, 21 and 23 of the Regulations relating to the transfer and revocation of allocations, and decisions under subsections 39(1) and 42(4) of the Regulations relating to the extension of time for compliance with statutory requirements, are not subject to independent merits review, by reference to the established grounds for excluding merits review set out in the Administrative Review Council's guidance document, 'What decisions should be subject to merit review'
- Privacy:
  - what safeguards are in place to ensure personal information is not disclosed in a notice published under section 31 of the Regulations
  - the appropriateness of amending the Regulations to specify personal information relating to a natural person must not be included in a published notice of serious or disqualifying breach or, at a minimum, the only information relating to a natural person that may be published is the name of the participant and the basis of the breach determination.

Availability of independent merit review

Sections 20, 21 and 23 of the Regulations enable the Secretary of the Department of Social Services (the Secretary) to make decisions in relation to an approved participant in response to an application by the approved participant once certain requirements are met.

The Secretary's decisions under sections 20 and 21 are made following extensive consultation to ensure affected stakeholders, including gaining and original approved participants, investors, tenants and state and territory governments, are agreeable to the proposed action. Under these sections, when an approved participant requests the transfer of allocations they hold under the National Rental Affordability Scheme (NRAS, the Scheme), it must also provide supporting evidence to establish they have undertaken the extensive administrative and consultation processes required under the Regulations. The Secretary will undertake the action requested by the approved participant if these requirements have been met and affected stakeholders are agreeable to the requested action. Advice relating to the operation of the specific provisions are detailed below.

Section 20 of the Regulations gives the Secretary the power to transfer an allocation between rental dwellings at the request of the original approved participant, which aims to ensure an allocation can remain in the Scheme where the original dwelling cannot be tenanted. In making a decision to transfer an allocation under section 20, the Secretary must have regard to the views of the state or territory in which the new dwelling is located, whether affected investors have agreed to the transfer, and whether the approved participant has complied with their obligations to investors.

Section 21 of the Regulations gives the Secretary the power to transfer allocations between approved participants at the request of the original approved participant, which aims to ensure an allocation can remain in the Scheme where the original approved participant is no longer willing or able to manage the allocation. In the case of section 21 transfers, the gaining approved participant must agree to the transfer (signed agreement is required in the application form) and the Department of Social Services (the department) will carry out assurance checks on the gaining approved participant to confirm its capacity and suitability to manage the transferring allocations. This includes checks to ensure the approved participant is not subject to a disqualifying breach or any other significant compliance action.

Decisions under sections 20 and 21 of the Regulations require extensive administrative and consultation processes to be undertaken to determine the applicant has met the regulatory requirements and all affected parties agree to the proposed action. According to paragraph 4.53 of the ARC paper, these decisions justify exclusion from merit review because they "are the product of processes that would be time consuming and costly to repeat on review".

Other than in exceptional circumstances, an application under section 20 or 21 of the Regulations where the statutory requirements for a transfer are met will be approved by the Secretary, because a transfer would be consistent with the objective to maximise the number of dwellings available for rent under the Scheme.

Additionally, both sections 20 and 21 permit the Secretary to impose additional special conditions on the allocation, provided the approved participant (in the case of a transfer under section 20) or the gaining approved participant (in the case of a transfer under section 21) agrees to the special conditions before the transfer takes effect. The need for, and the content of, such special conditions, would arise from consultations with stakeholders who would not be a party to the merits review process and, in the case of a transfer under section 21, would require negotiation with a commercial entity who is not party to the merits review process.

Section 23 gives the Secretary power to revoke an allocation for a dwelling at the request of an approved participant for the dwelling. Typically, approved participants make such requests where they are no longer able to manage an allocation. For example this may arise where a dwelling has been sold and the new owner does not wish to participate in the Scheme, or the dwelling has been severely damaged as a result of a natural disaster.

These discretionary decisions are more accurately characterised as automatic decisions as in practice they operate as an endorsement by the Secretary that all regulatory requirements have been met and affected parties agree to the proposed action. According to paragraph 3.8 of the ARC paper, these decisions are unsuitable for merit review because "there is a statutory obligation [for the Secretary] to act in a certain way upon the occurrence of a specified set of circumstances".

NRAS allocations are a valuable right which permits approved participants to receive incentives under the Scheme if particular conditions are met. The sanction for not complying with the conditions of allocation is no incentives are payable in respect of the allocation, so if the approved participant is not willing or able to comply with the conditions of allocation, the approved participant may decide to give up the allocation by making a request to the Secretary under section 23 of the Regulations. Alternatively, the approved participant could simply not meet the conditions of allocation and receive no incentive each year.

If an approved participant applies to the Secretary to revoke an allocation and the application is in the approved form, the Secretary would, as a matter of course either revoke the allocation or transfer the allocation to another approved participant under subsection 23(4) of the Regulations. The effect for the original approved participant is the same whether the Secretary decides to revoke or transfer the allocation under section 23.

Accordingly, from the perspective of the approved participant, section 23 operates as an automatic or mandatory decision triggered by a set of circumstances, namely the request by the approved participant to revoke the allocation, made in the approved form. Once such a request is made, the Secretary will either revoke or transfer the allocation and the decision whether to revoke or transfer does not affect the interests of the approved participant requesting the revocation.

Subsections 39(1) and 42(4) of the Regulations give the Secretary discretion to extend the time available for an approved participant to give the Secretary the required documentation to show a dwelling is compliant under the Scheme and therefore entitled to the full incentive. The Scheme provides an annual incentive payment in relation to a rental dwelling for 10 years if certain conditions are satisfied.

These discretionary decisions justify exclusion from merit review according to paragraphs 4.3-4.5 of the ARC paper, because they are preliminary decisions that lead to the making of substantive decisions relating to the eligibility to an incentive which are subject to merit review.

In order to grant an extension of time under subsection 39(1), the Secretary must be satisfied the approved participant has a reasonable excuse for not being able to provide the valuation on time, or be satisfied it is reasonable to grant an extension because of a transfer. Similarly, subsections 42(3) and 42(4) of the Regulations give the Secretary discretion to approve a later date for an approved participant to give a statement of compliance in specified circumstances on the Secretary's own initiative or on application by the approved participant. Such decisions will always flow to those substantive decisions about the reduction of incentives found under sections 13 (incentive is not available for any period where documents or information remain outstanding), 51 (reductions of incentive) and 56 (variation of incentive amounts) of the Regulations.

Decisions under subsection 39(1) and 42(4) regarding extensions of time are preliminary decisions and to offer merit review on these decisions would be impracticable as they directly relate to those substantive decisions under sections 13, 51 or 56 which are subject to merit review.

If the Secretary does not grant an extension under subsections 39(1) or 42(4), the approved participant has the option of seeking a determination under subsection 13(9) of the Regulations. This provision enables the Secretary to waive the no incentive rule for outstanding documents in subsection 13(2) of the Regulations if the approved participant has a reasonable excuse for not complying with the requirement to provide the documents on time. A refusal to make a determination under subsection 13(9) is reviewable by the Administrative Appeals Tribunal. Similarly, if the Secretary makes a decision to reduce an incentive under sections 51 or 56 of the Regulations, these decisions are subject to merit review.

In the interests of ensuring the timely administration of the Scheme, it is the related substantive decisions that may be made under sections 13, 51 or 56 that are subject to merit review. Decisions under subsections 39(1) or 42(4) may be effectively overridden by a decision to provide incentives (as a result of a decision under subsection 13(9) or as a result of merit review under sections 51 or 56) despite timeframes not being met.

Privacy

Section 31 does not authorise the disclosure of any personal information other than the name of the approved participant and the fact of the breach. It is established departmental practice to only publish the name of the approved participant that is the subject of the serious or disqualifying breach and the basis of the breach in the Regulations. Publication of breach notices under section 31 of the Regulations is an essential component of the Scheme's compliance framework, as is the case in many other regulatory regimes.

Noting at the time of writing, there is only one approved participant who is an individual (the other 121 approved participants are companies), any notice under section 31 in relation to this individual would publish a very limited amount of personal information (only the individual's name and the fact of the breach).

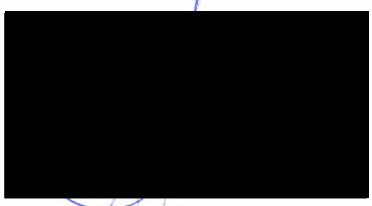
The disclosure of the details of serious and disqualifying breaches under section 31 is an important aspect of the compliance framework, and is vital for investors who may have a right to request a transfer as a result of the publicised breach.

Also I note the names of all approved participants are already publically available, which has been the case since the Scheme commenced.

Accordingly, I do not consider it necessary to make any amendments to section 31 of the Regulations.

I trust this information addresses the Committee's concerns.

Yours sincerely



Anne Ruston

29/5 / 2020