

Monitor 10 of 2019 - Committee correspondence

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5 December 2019

Senator the Hon Jane Hume
Assistant Minister for Superannuation, Financial Services and Financial Technology
Parliament House
Canberra ACT 2600

Dear Assistant Minister,

ASIC Corporations (Whistleblower Policies) Instrument 2019/1146 [F2019L01457]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) 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 the committee seeks your advice in relation to this matter.

Exemption from primary legislation

Scrutiny principle 23(3)(j) 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 provide exemptions or modifications to primary legislation.

The instrument provides an exemption for public companies limited by guarantee that are not-for-profits or charities and have an annual consolidated revenue of less than \$1 million, from the requirement to have a whistleblower policy under subsection 1317AI(1) of the *Corporations Act 2001* (Corporations Act).

The committee notes that the exemption appears to be authorised under section 1317AJ of the Corporations Act, which provides that the Australian Securities and Investments Commission may make an order, by legislative instrument, relieving companies from all or specified requirements of section 1317AI. The committee further notes that subsection 1317AJ(2) of the Corporations Act allows these orders to continue indefinitely.

Nevertheless, the committee generally prefers that exemptions from primary legislation by delegated legislation do not continue in force for such time as to operate as a de facto

amendment to the principal Act. In this instance, the committee is particularly concerned that the instrument is intended to continue indefinitely.

Where a lawmaker intends to make exemptions to primary legislation by delegated legislation, rather than amending primary legislation, the committee expects a sound explanation to be included in the explanatory materials. In this regard, the explanatory statement to the instrument explains that the exemption is necessary as:

the requirement to have a whistleblower policy would impose a disproportionate burden on public companies that are small not-for-profits or charities, many of which have limited staff and financial resources.

However, the explanatory statement does not appear to explain why it is necessary to include the exemption in delegated legislation, instead of amending the Corporations Act, noting the additional parliamentary scrutiny inherent in such processes. Similarly, it does not appear to explain why it is necessary for the exemption to continue indefinitely.

In light of the matters above, the committee requests your advice as to why it is considered necessary and appropriate to use delegated legislation to make exemptions from the requirements of subsection 1317A(1) for an indefinite period of time, instead of amending the Corporations Act.

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 **19 December 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 for the Scrutiny of Delegated Legislation



5 December 2019

Ms Julie Inman Grant
eSafety Commissioner
PO Box Q500
Queen Victoria Building
SYDNEY NSW 1230

Dear Ms Inman Grant,

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

Thank you for providing a private briefing to the committee on 27 November 2019 regarding the above instrument.

In contrast to other Senate standing committees, this committee is solely concerned with the technical scrutiny of delegated legislation in accordance with the principles prescribed by Senate standing order 23. It does not consider substantive matters of policy. Accordingly, while the committee fully appreciates the policy rationale for the instrument, the committee is only concerned to ensure that it complies with the technical scrutiny principles prescribed by Senate standing order 23. These principles include compliance with the law.

In this regard, the committee remains concerned that the explanatory statement to the instrument does not comply with the *Legislation Act 2003* (Legislation Act). Paragraph 15J(2)(c) of the Legislation Act provides that, where an instrument incorporates a document by reference, as this instrument does, the explanatory statement must 'contain a description of the incorporated documents and indicate how they may be obtained'.

The committee is satisfied that the instrument contains a sufficient description of the document incorporated by the instrument. However, it remains concerned that, as drafted, the explanatory statement does not indicate how the *List of websites hosting terrorist or violent criminal material (No. 1)* may be obtained, as required by paragraph 15J(2)(c) of the Legislation Act.

Accordingly, the committee requests your advice as to:

- **whether the explanatory statement could be amended to indicate how the *List of websites hosting terrorist or violent criminal material (No. 1)* may be obtained, as required by the Legislation Act, and;**
- **if not, how the explanatory statement complies with paragraph 15J(2)(c) of the Legislation Act.**

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. Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **Wednesday, 18 December 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 for the Scrutiny of Delegated Legislation



5 December 2019

Senator the Hon Jane Hume
Assistant Minister for Superannuation, Financial Services and Financial Technology
Parliament House
CANBERRA ACT 2600

Dear Assistant Minister,

**ASIC Corporations (Unclaimed Superannuation-Former Temporary Residents) Instrument
2019/873[F2019L01213]**

Thank you for your response of 26 November 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 4 December 2019. On the basis of your advice, 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



5 December 2019

Senator the Hon Mathias Cormann
Minsiter for Finance
Parliament House
CANBERRA ACT 2600

Dear Minister,

Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Cities and Regional Development Measures No. 1) Regulations 2019 [F2019L01344]

On 14 November 2019, I wrote to you on behalf of the Senate Standing Committee on Regulations and Ordinances to indicate the committee's intention to consider the above instrument further and, if necessary, to seek external advice regarding potential scrutiny concerns.

Following further consideration of the relevant issues, the committee resolved to conclude its examination the instrument at its private meeting on 4 December 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*.

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



5 December 2019

Senator the Hon Anne Ruston
Minister for Families and Social Services
Parliament House
CANBERRA ACT 2600

Dear Minister,

**Social Security (Reasonable Excuse - Student Payments) Determination 2019
[F2019L01287]**

Thank you for your response of 27 November 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 4 December 2019. On the basis of your advice, 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



5 December 2019

The Hon Greg Hunt MP
Minister for Health
Parliament House
Canberra ACT 2600

Dear Minister,

National Health (Highly specialised drugs program) Special Arrangement Amendment Instrument 2018 (No. 10) [F2018L01646]

National Health (Highly specialised drugs program) Special Arrangement Amendment Instrument 2019 (No. 1) (PB 3 of 2019) [F2019L00081]

Thank you for your letter of 2 December 2019 confirming that your undertaking to amend the explanatory statements to these instruments in response to the committee's scrutiny concerns has now been implemented.

I confirm that these instruments will now be added to the list of implemented undertakings in the committee's *Delegated Legislation Monitor 10 of 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*.

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