

Monitor 10 of 2020 - Committee correspondence

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3 September 2020

The Hon Paul Fletcher MP
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,

Australian Postal Corporation (Performance Standards) Amendment (2020 Measures No. 1) Regulations 2020 [F2020L00579]

Thank you for your response of 30 July 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 2 September 2020. Whilst noting your advice, the committee remains concerned that the above instrument raises significant scrutiny concerns that should be brought to the attention of the Senate.

The committee's concerns are detailed in Chapter 1 of its *Delegated Legislation Monitor 10 of 2019*, available on the committee's website at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Monitor

In summary, from a scrutiny perspective, the committee remains concerned about the adequacy of consultation undertaken in relation to this instrument, particularly in light of the significance of the measures and the broad scope of people and entities likely to be affected by the changes.

In light of this, the committee requests that it be provided with updates as to the progress of future consultation on the instrument, including details of who has been consulted, any issues raised during the consultation, and any outcomes or action taken as a result of the consultation.

As the committee retains scrutiny concerns in relation to this instrument, the committee has resolved to give a notice of motion to disallow the instrument on 6 October 2020 for consideration and debate in the Senate 15 sitting days after that date. The information provided by you in relation to future consultation on the instrument will inform the committee's consideration of whether to withdraw the notice of motion to disallow 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*.

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

Yours sincerely,

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



3 September 2020

The Hon Christian Porter MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Via email: Christian.Porter.MP@aph.gov.au

CC: David.Littleproud.MP@aph.gov.au
Josh.Frydenberg.MP@aph.gov.au
tsrdlos@treasury.gov.au
committeescrutiny@treasury.gov.au
Minister.Littleproud@agriculture.gov.au
DLO.MO@agriculture.gov.au
attorney@ag.gov.au
DLO@ag.gov.au

Dear Attorney-General,

Competition and Consumer (Industry Codes—Dairy) Regulations 2019 [F2019L01610]

Thank you for your response of 31 August 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 meetings on 1 and 2 September 2020. The committee's comments are detailed in Chapter 1 of its *Delegated Legislation Monitor 10 of 2020*, available on the committee's website at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Monitor.

In summary, the committee welcomes your acknowledgment of the broad, systemic issues raised by good faith obligations in Commonwealth legislation and your undertaking to initiate an inquiry into this issue.

The committee also notes your advice that, given the complexity of issue and the need to carefully consider the scope of such an inquiry, you do not anticipate it will be possible to commence the inquiry prior to the expiry of the instrument's the disallowance period on 3 September 2020.

Noting that section 11 of the instrument is just one example of a complex, systemic issue, the committee considers that such an inquiry would be a more effective means of addressing the committee's concerns than pursuing the disallowance of the instrument alone.

Accordingly, the committee has resolved to withdraw its notice of motion to disallow the instrument. Instead, the committee will continue to pursue this matter by monitoring your undertaking and requests that you continue to liaise with the committee in the development of the inquiry terms of reference.

To foster greater consideration of this issue, I note that the committee has also resolved to request that the Australian Competition and Consumer Commission consider this matter as part of its ongoing inquiry into bargaining power in supply chains for perishable products.

Finally, in the interests of transparency, I note that your undertaking to initiate the inquiry will be recorded in the *Delegated Legislation Monitor* until implemented and this correspondence 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 at sdlc.sen@aph.gov.au.

Yours sincerely,

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



3 September 2020

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

Via email: Senator.Ruston@aph.gov.au
CC: dlos@dss.gov.au

Dear Minister,

Coronavirus Economic Response Package (Deferral of Sunsetting—Income Management and Cashless Welfare Arrangements) Determination 2020 [F2020L00572]

Thank you for your responses of 31 August and 1 September 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your responses at its private meetings on 1 and 2 September 2020. The committee's unresolved scrutiny concerns are detailed in Chapter 1 of its *Delegated Legislation Monitor 10 of 2020*, available on the committee's website at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Monitor.

In summary, the committee remains concerned about the inclusion of significant matters in delegated legislation, rather than primary legislation, particularly noting that Parliament has returned to a regular sitting pattern. In this regard, the committee reiterates that the Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019 should be considered by the Senate as soon as practicable.

However, noting that you have provided some compelling reasons as to why the bill has not yet been considered by the Senate, the committee understands that it is not possible for the bill to be scheduled during the current sitting fortnight. Accordingly, the committee has resolved to postpone consideration of the notice of motion to disallow the instrument until 8 October 2020.

The committee requests that you provide an update prior to the October sitting week about progress made towards the scheduling of the bill for debate in the Senate to enable the committee to consider whether the disallowance motion should be further postponed.

I note that if there are any further developments in relation to this matter the committee will report to the Senate in a future Delegated Legislation Monitor.

In the interests of transparency, I also 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 sdlc.sen@aph.gov.au.

Yours sincerely,

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



3 September 2020

Senator Anthony Chisholm
Chair
Senate Select Committee on Administration of Sports Grants
Parliament House
CANBERRA ACT 2600

via email: sportsgrants.sen@aph.gov.au

cc: Senator the Hon Mathias Cormann, Minister for Finance,
financeminister@finance.gov.au

Dear Chair

Matters of interest to the Senate—Commonwealth grants

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 scrutiny principles outlined in Senate standing order 23.

Since 4 December 2019, standing order 23(4) has required 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 instrument appears to contain significant policy matters relating to the making of Commonwealth grants, the committee has determined that the instrument engages standing order 23(4) and accordingly has resolved to draw it to the attention of your committee:

Instrument	Purpose	Last day to lodge disallowance notice
Public Governance, Performance and Accountability Amendment (Grant Rules for Corporate Commonwealth Entities) Rules 2020 [F2020L00923]	To amend the Public Governance, Performance and Accountability Rule 2014 to prescribe mandatory advising, decision-making and reporting requirements that apply when a minister is involved in the making of a corporate Commonwealth entity grant. The instrument implements recommendation no. 4 of the 2019-20 Auditor-General Report No. 23: <i>Award of Funding under the Community Sport Infrastructure Program</i> .	30 November 2020

Should your committee decide to further examine the above instrument, I note that the table above also identifies the last day (based on the current sitting pattern) for lodging a disallowance notice in the Senate. The committee has also drawn this instrument to the attention of the Senate Finance and Public Administration Legislation Committee.

Further details about the instrument 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.

Yours sincerely

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



3 September 2020

Senator Wendy Askew
Chair
Senate Community Affairs Legislation Committee
Parliament House
CANBERRA ACT 2600

via email: community.affairs.sen@aph.gov.au

cc: Senator the Hon Anne Ruston, Minister for Families and Social Services,
dlos@dss.gov.au

Dear Chair

Matters of interest to the Senate—paid parental leave and income support payments

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 scrutiny principles outlined in Senate standing order 23.

Since 4 December 2019, standing order 23(4) has required 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 paid parental leave and eligibility for income support payments, 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
Paid Parental Leave Amendment (Flexibility Measures) Rules 2020 [F2020L00837]	To amend the Paid Parental Leave Rules 2010 to set out the eligibility criteria for parental leave pay for days in a person's initial continuous 12 week paid parental leave period and for a person's flexible paid parental leave days.	30 November 2020

Instrument	Purpose	Last day to lodge disallowance notice
Social Security (Coronavirus Economic Response—2020 Measures No. 11) Determination 2020 [F2020L00765]	To modify provisions of the <i>Social Security Act 1991</i> and the <i>Social Security (Administration) Act 1999</i> to extend qualification for income support payments and concessions, where a recipient would otherwise cease to qualify due to a change in their or their partner's employment income.	30 November 2020

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 either of these instruments, I note that the table above also identifies the last day (based on the current sitting pattern) for lodging a disallowance notice in the Senate.

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.

Yours sincerely

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



3 September 2020

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

via email: covid.sen@aph.gov.au

cc: The Hon Josh Frydenberg MP, Treasurer,
tsrdlos@treasury.gov.au

Senator the Hon Anne Ruston, Minister for Families
and Social Services, dlos@dss.gov.au

The Hon Dan Tehan MP, Minister for Education,
dlo.education@education.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 scrutiny principles outlined in Senate standing order 23.

Since 4 December 2019, standing order 23(4) has required 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 these instruments to the attention of your committee:

Instrument	Purpose	Last day to lodge disallowance notice
Child Care Subsidy Amendment (Coronavirus Response Measures No. 4) Minister's Rules 2020 [F2020L00802]	To amend the Child Care Subsidy Minister's Rules 2017 to introduce a number of new measures to support approved child care providers and individuals with children in care during the COVID-19 pandemic.	30 November 2020
Child Care Subsidy Amendment (Coronavirus Response Measures No. 5) Minister's Rules 2020 [F2020L00930]	To amend the Child Care Subsidy Minister's Rules 2017 to support approved child care providers and individuals with children in care by adding a rule that permits approved providers to waive their fees for child care services in areas subject to Stage 3 or higher "stay at home" restrictions in response to the COVID-19 pandemic.	30 November 2020
Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 5) 2020 [F2020L00884]	To amend the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 so that approved child care providers are not entitled to JobKeeper payments for certain employees or for a business participant following the government's decision to extend separate support to the child care sector.	30 November 2020
Social Security (Coronavirus Economic Response—2020 Measures No. 11) Determination 2020 [F2020L00765]	To modify provisions of the <i>Social Security Act 1991</i> and the <i>Social Security (Administration) Act 1999</i> to extend qualification for income support payments and concessions, where a recipient would otherwise cease to qualify due to a change in their or their partner's employment income.	30 November 2020

Should your committee decide to further examine any of these instruments, I note that the table above also 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.

Yours sincerely

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



3 September 2020

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

via email: economics.sen@aph.gov.au

cc: The Hon Josh Frydenberg MP, Treasurer,
tsrdlos@treasury.gov.au

Dear Chair

Matters of interest to the Senate—JobKeeper payment

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 scrutiny principles outlined in Senate standing order 23.

Since 4 December 2019, standing order 23(4) has required 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 instrument appears to contain significant policy matters relating to eligibility for JobKeeper payment, the committee has determined that the instrument engages standing order 23(4) and accordingly has resolved to draw it to the attention of your committee:

Instrument	Purpose	Last day to lodge disallowance notice
Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 5) 2020 [F2020L00884]	To amend the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 so that approved child care providers are not entitled to JobKeeper payments for certain employees or for a business participant following the government's decision to extend separate support to the child care sector.	30 November 2020

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 the above instrument, I note that the table above also identifies the last day (based on the current sitting pattern) for lodging a disallowance notice in the Senate.

Further details about the instrument 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.

Yours sincerely

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



3 September 2020

Senator the Hon James McGrath
Chair
Senate Education and Employment Legislation Committee
Parliament House
CANBERRA ACT 2600

via email: eec.sen@aph.gov.au

cc: The Hon Dan Tehan, Minister for Education,
dlo@education.gov.au

Dear Chair,

Matters of interest to the Senate—Child care subsidy rules

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 scrutiny principles outlined in Senate standing order 23.

Since 4 December 2019, standing order 23(4) has required 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 provision of child care subsidies, 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
Child Care Subsidy Amendment (Coronavirus Response Measures No. 4) Minister's Rules 2020 [F2020L00802]	To amend the Child Care Subsidy Minister's Rules 2017 to introduce a number of new measures to support approved child care providers and individuals with children in care during the COVID-19 pandemic.	30 November 2020

Instrument	Purpose	Last day to lodge disallowance notice
Child Care Subsidy Amendment (Coronavirus Response Measures No. 5) Minister's Rules 2020 [F2020L00930]	To amend the Child Care Subsidy Minister's Rules 2017 to support approved child care providers and individuals with children in care by adding a rule that permits approved providers to waive their fees for child care services in areas subject to Stage 3 or higher "stay at home" restrictions in response to the COVID-19 pandemic.	30 November 2020

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 either of these instruments, I note that the table above also identifies the last day (based on the current sitting pattern) for lodging a disallowance notice in the Senate.

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.

Yours sincerely

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



3 September 2020

Senator James Paterson
Chair
Senate Finance and Public Administration Legislation Committee
Parliament House
CANBERRA ACT 2600

via email: fpa.sen@aph.gov.au

cc: Senator the Hon Mathias Cormann, Minister for Finance,
financeminister@finance.gov.au

Dear Chair

Matters of interest to the Senate—Commonwealth grants

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 scrutiny principles outlined in Senate standing order 23.

Since 4 December 2019, standing order 23(4) has required 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 instrument appears to contain significant policy matters relating to the making of Commonwealth grants, the committee has determined that the instrument engages standing order 23(4) and accordingly has resolved to draw it to the attention of your committee:

Instrument	Purpose	Last day to lodge disallowance notice
Public Governance, Performance and Accountability Amendment (Grant Rules for Corporate Commonwealth Entities) Rules 2020 [F2020L00923]	To amend the Public Governance, Performance and Accountability Rule 2014 to prescribe mandatory advising, decision-making and reporting requirements that apply when a minister is involved in the making of a corporate Commonwealth entity grant. The instrument implements recommendation no. 4 of the 2019-20 Auditor-General Report No. 23: <i>Award of Funding under the Community Sport Infrastructure Program</i> .	30 November 2020

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 the above instrument, I note that the table above also identifies the last day (based on the current sitting pattern) for lodging a disallowance notice in the Senate.

Further details about the instrument 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.

Yours sincerely

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



3 September 2020

Senator Wendy Askew
Chair
Senate Community Affairs Legislation Committee
Parliament House
CANBERRA ACT 2600

via email: community.affairs.sen@aph.gov.au

cc: Senator the Hon Mathias Cormann, Minister for Finance,
financeminister@finance.gov.au

Senator the Hon Anne Ruston, Minister for Families and Social Services,
dlos@dss.gov.au

Department of Finance, FFSPRegs@finance.gov.au

Dear Chair,

Legislative instruments specifying Commonwealth expenditure

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.

Since 4 December 2019, standing order 23(4) has required 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.

The instrument listed in the table below, in combination with its enabling Act, authorises the Commonwealth to spend public money on the identified grants or programs. The committee considers that the scrutiny of such instruments is an essential aspect of parliamentary scrutiny and control of Commonwealth expenditure. Noting this, the committee has determined that the instrument listed below engages standing order 23(4), and accordingly has resolved to draw it to the attention of your committee:

Instrument	Grant/Program	Amount	Description
Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 2) Regulations 2020 [F2020L00792]	Grants to University of Technology Sydney for Anti-Slavery Australia—Complex Violence Intervention (Forced Marriage) Project	\$400,000 in 2020-21	Funding will be provided to Anti-Slavery Australia to support the development of an online forum, community engagement strategy, national champions program and training for community workers.
	National Centre for the Prevention of Child Sexual Abuse	\$22.5 million over five years from 2020-21	Funding will be provided for the establishment and ongoing costs of the National Centre for the Prevention of Child Sexual Abuse to raise community awareness, increase knowledge and competence of practitioners and develop better services and interventions.

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 the above instrument, I note that (based on the current sitting pattern) the time for lodging a disallowance notice expires on 30 November 2020.

Further details about the instrument 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.

Yours sincerely,

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



3 September 2020

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

via email: economics.sen@aph.gov.au

cc: Senator the Hon Mathias Cormann, Minister for Finance,
financeminister@finance.gov.au

The Hon Karen Andrews MP, Minister for Industry, Science and
Technology, industrydlo@industry.gov.au

Department of Finance, FFSPRegs@finance.gov.au

Dear Chair,

Legislative instruments specifying Commonwealth expenditure

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.

Since 4 December 2019, standing order 23(4) has required 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.

The instrument listed in the table below, in combination with its enabling Act, authorises the Commonwealth to spend public money on the National Radioactive Waste Management Facility New Community Benefit Program. The committee considers that the scrutiny of such instruments is an essential aspect of parliamentary scrutiny and control of Commonwealth expenditure. Noting this, the committee has determined that the instrument listed below engages standing order 23(4), and accordingly has resolved to draw it to the attention of your committee:

Instrument	Grant/Program	Amount	Description
Financial Framework (Supplementary Powers) Amendment (Industry, Science, Energy and Resources Measures No. 1) Regulations 2020 [F2020L00817]	National Radioactive Waste Management Facility New Community Benefit Program	\$4 million over two years from 2020-21	Funding will be provided to support the participation of the communities of Lyndhurst, Napandee and Wallerberdina in the selection process for the potential establishment and operation of the National Radioactive Waste Management Facility.

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 the above instrument, I note that (based on the current sitting pattern) the time for lodging a disallowance notice expires on 30 November 2020.

Further details about the instrument 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.

Yours sincerely,

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



3 September 2020

Senator the Hon David Fawcett
Chair
Senate Environment and Communications Legislation Committee
Parliament House
CANBERRA ACT 2600

via email: ec.sen@aph.gov.au

cc: Senator the Hon Mathias Cormann, Minister for Finance,
financeminister@finance.gov.au

The Hon Paul Fletcher MP, Minister for Communications, Cyber
Safety and the Arts, dlo@communications.gov.au

The Hon Angus Taylor MP, Minister for Energy and Emissions Reduction,
DLOTaylor@environment.gov.au

Department of Finance, FFSPRegs@finance.gov.au

Department of Industry, Science, Energy and Resources,
legislation@industry.gov.au

Dear Chair,

Legislative instruments specifying Commonwealth expenditure

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.

Since 4 December 2019, standing order 23(4) has required 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.

The instruments listed in the table below, in combination with their enabling Acts, authorise the Commonwealth to spend public money on the identified grants or programs. The committee considers that the scrutiny of such instruments is an essential aspect of parliamentary scrutiny and control of Commonwealth expenditure. Noting this, the committee has determined that the instruments listed below engage standing order 23(4), and accordingly has resolved to draw them to the attention of your committee:

Instrument	Grant/Program	Amount	Description
Financial Framework (Supplementary Powers) Amendment (Agriculture, Water and the Environment Measures No. 4) Regulations 2020 [F2020L00816]	National Environmental Science Program	\$149 million over seven years from 2020-21	Funding will be provided for Phase 2 of the National Environmental Science Program to support applied environmental science through four multi-disciplinary research hubs.
Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Regional Development and Communications Measures No. 5) Regulations 2020 [F2020L00818]	Telecommunications Emergency Resilience Package	\$37.1 million over two years from 2020-21	Funding will be provided for initiatives to improve telecommunications capacity and resilience during bushfires and other natural disasters.
Industry Research and Development (Bankable Feasibility Study on High-Efficiency Low-Emissions Coal Plant in Collinsville Program) Instrument 2020 [F2020L00772]	Bankable Feasibility Study on High-Efficiency Low-Emissions Coal Plant in Collinsville Program	Up to \$4 million	Funding will be provided to Shine Energy Pty Ltd to support a feasibility study into the viability of a new high- efficiency, low- emissions coal- fired power plant in Collinsville, Queensland.
Industry Research and Development (Environmental Education Centres Program) Instrument 2020 [F2020L00771]	Environmental Education Centres Program	\$50 million	Funding will be provided to: <ul style="list-style-type: none"> • Murdoch University to establish the Harry Butler Environmental Education Centre to develop and promote understanding of the positive relationship between economic development and environmental sustainability; and • the University of Melbourne to establish the National Centre for Coasts, Environment and Climate to foster research and education focused on the coastal environment, climate change, science, history and culture, the arts and community engagement.

Instrument	Grant/Program	Amount	Description
Industry Research and Development (Pre-feasibility Study on a Proposed Pumped Hydro-electric Power Plant in Central Queensland Program) Instrument 2020 [F2020L00774]	Pre-feasibility Study on a Proposed Pumped Hydro-electric Power Plant in Central Queensland Program	\$2 million	Funding will be provided to Blue Hydro Project Pty Ltd to undertake a pre-feasibility study into the viability of a new pumped hydro-electric power plant in central Queensland.

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 (based on the current sitting pattern) the time for lodging a disallowance notice expires on 30 November 2020.

Further details about the instrument 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.

Yours sincerely,

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



3 September 2020

Senator Amanda Stoker

Chair

Senate Legal and Constitutional Affairs Legislation Committee

Parliament House

CANBERRA ACT 2600

via email: legcon.sen@aph.gov.au

cc: Senator the Hon Mathias Cormann, Minister for Finance,
financeminister@finance.gov.au

The Hon Peter Dutton MP, Minister for Home Affairs,
Peter.Dutton.MP@aph.gov.au

Department of Finance, FFSPRegs@finance.gov.au

Dear Chair,

Legislative instruments specifying Commonwealth expenditure

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.

Since 4 December 2019, standing order 23(4) has required 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.

The instrument listed in the table below, in combination with its enabling Act, authorises the Commonwealth to spend public money on the identified grants or programs. The committee considers that the scrutiny of such instruments is an essential aspect of parliamentary scrutiny and control of Commonwealth expenditure. Noting this, the committee has determined that the instrument listed below engages standing order 23(4), and accordingly has resolved to draw it to the attention of your committee:

Instrument	Grant/Program	Amount	Description
Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 3) Regulations 2020 [F2020L00781]	Multicultural Community Amenities Grants in the Northern Territory	Up to \$2 million in 2020-21	Funding will be provided to multicultural community organisations to undertake activities in the Northern Territory to support social and economic participation.
	Disaster Risk Reduction Package	\$26.1 million over five years from 2019-20	Funding will be provided for national initiatives that reduce the risk, and limit the impact, of disasters associated with natural hazards on Australian communities and economies.

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 the above instrument, I note that (based on the current sitting pattern) the time for lodging a disallowance notice expires on 30 November 2020.

Further details about the instrument 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.

Yours sincerely,

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



3 September 2020

The Hon Nola Marino MP
Assistant Minister for Regional Development and Territories
Parliament House
CANBERRA ACT 2600

Via email: Nola.Marino.MP@aph.gov.au

CC: Minister.marino@infrastructure.gov.au; Rob.terrell@infrastructure.gov.au

Dear Assistant Minister,

**Norfolk Island Continued Laws Amendment (Employment) Ordinance 2020
[F2020L00870]**

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 the committee seeks your advice in relation to this matter.

Delegation of administrative powers and functions

Senate standing order 23(3)(c) requires the committee to consider whether an instrument makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers.

Item 1 of the instrument has the effect of inserting new sections 47D to 47H into the *Employment Act 1988* (NI) (Employment Act) to set out provisions for the appointment of an Employment Liaison Officer (ELO) and establish the ELO's powers and functions with regard to the management of the Norfolk Island Workers' Compensation Scheme (scheme). These powers include the ability to make a number of discretionary decisions. New subsection 47H(1) further provides that, if the ELO is satisfied an individual has appropriate qualifications and expertise, the ELO may further subdelegate their powers and functions to a range of individuals, including 'any other person'.

Where an instrument provides for the delegation of discretionary powers to a person or broad classes of persons, the committee generally expects those persons to possess the appropriate qualifications or experience necessary to exercise those powers. In this instance, the explanatory statement to the instrument notes that the delegation of the ELO's powers is intended to allow the scheme 'to be administered by a workers' compensation provider and for relevant functions and powers (for example, assessing claims for compensation) to be delegated to suitably qualified staff of the provider'. However, neither the instrument nor explanatory statement provides further information as to the types of qualifications or expertise that a delegate must possess.

Accordingly, the committee requests your advice as to what qualifications or expertise persons authorised to perform the functions and exercise the powers of the ELO under subsection 47H(1) are required to possess.

Availability of accountability safeguards

Privacy safeguards

Senate standing order 23(3)(k) requires the committee to consider whether an instrument complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate. The committee interprets this to include whether certain accountability safeguards are available.

As noted above, it appears that the workers' compensation provider may exercise certain discretionary powers of the ELO under the instrument. This may include the discretion to determine what information may be relevant to the management and control of the scheme or to assess a compensation claim, and the power to gather that information from employers and employees under new subsections 39(10) and 47(2).

As a technical scrutiny matter, the committee is concerned to ensure that, where a private third party is lawfully authorised to exercise certain powers and perform certain functions of a public official, the actions of that third party, are subject to appropriate public accountability safeguards. These include the application of privacy and freedom of information laws as though the third party were a public official.

The committee therefore requests your advice as to the application of the *Privacy Act 1988* and *Freedom of Information Act 1982* to persons authorised to perform functions and exercise powers of the ELO under subsection 47H(1).

Availability of independent merits review

Senate standing order 23(3)(i) requires the committee to consider whether an instrument unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests.

As noted above, the ELO (and persons authorised to perform the functions and exercise the powers of the ELO under subsection 47H(1)) may make a number of discretionary decisions in determining membership fees, assessing claims for compensation, making payments on behalf of the Commonwealth and requesting specified information related to these functions.

Item 1 of the instrument has the effect of inserting new Division 1 of Part 5 into the Employment Act to provide for an internal review process of such decisions. In addition, the explanatory statement appears to indicate that if a person is not satisfied with the outcome of the internal review process, 'it is open to them to apply to the Tribunal for an inquiry' under new section 82. However, in the absence of further information, it is unclear whether decisions made under the instrument are also subject to independent merits review by the Tribunal, rather than just inquiry by the Tribunal.

The committee therefore requests your advice as to:

- **whether decisions made under the instrument by the ELO, or persons authorised to perform functions and exercise powers of the ELO under subsection 47H(1), are subject to independent merits review by the Tribunal; and**
- **if not, the characteristics of decisions that would justify excluding independent merits review, by reference to established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?***

Immunity from liability

Senate standing order 23(3)(h) requires the committee to consider whether an instrument trespasses unduly on personal rights and liberties.

New section 107 confers immunity from liability on a range of persons and entities. The immunity applies to acts done, or omitted to be done, in good faith in the exercise of a function or power under the *Norfolk Island Act 1979*. The persons and entities to whom the immunity applies are listed in subsection 107(2) and include the Commonwealth and persons to whom the ELO may delegate a power or function under subsection 47H(1).

This conferral of immunity from liability on the persons and entities listed in subsection 107(2) removes any common law right to bring an action to enforce legal rights, unless a lack of good faith can be demonstrated. The committee notes that, in the context of judicial review, bad faith is said to imply a lack of an honest or genuine attempt to undertake a task, and will involve a personal attack on the honesty of the decision-maker. Consequently, the courts have therefore taken the position that bad faith can only be shown in very limited circumstances.

Additionally, while it is clear from the terms of the instrument why it may be necessary to confer immunity from civil liability on certain persons and entities, it is not clear why it is also considered necessary to extend this immunity to the Commonwealth or persons to whom the ELO may delegate a power or function under subsection 47H(1).

The committee therefore requests your advice as to why it is considered necessary and appropriate to extend immunity from civil liability to the Commonwealth and persons to whom the ELO may delegate a power or function under subsection 47H(1).

Significant penalties 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). This includes instruments which impose custodial penalties.

New subsection 39(2) makes it a strict liability offence if an employer does not have a policy of insurance or indemnity with an insurer for the full amount of the employer's liability if they are not a member of the scheme and are not prescribed by the rules. The offence is punishable by 50 penalty units or 2 years imprisonment for individuals or 250 penalty units for body corporates.

The explanatory statement states that the enabling Act 'authorises the broadest range of ordinances to be made for the good government of Norfolk Island, which includes the power to prescribe offences that impose penalties exceeding a fine of 50 penalty units and/or punishable by imprisonment'. The explanatory statement further notes that subsection 39(2) replaces an existing offence in the Employment Act to bring it into line with modern drafting standards and that similar offence provisions are included in other state and territory workers' compensation legislation.

Whilst noting the special legislative framework in which Norfolk Island legislation operates, the committee does not generally consider consistency with an existing regime alone to justify the inclusion of significant matters, such as custodial penalties, in delegated legislation. Further, the committee notes that, where legislation prescribes a custodial penalty, paragraph 3.3 of the *Guide to Framing Commonwealth Offences* (guide) requires that the Attorney-General be consulted. In the absence of further information in the explanatory statement, it is also unclear whether such consultation was undertaken.

Accordingly, the committee requests your advice as to:

- why it is considered necessary and appropriate to prescribe custodial penalties in new subsection 39(2); and
- whether the Attorney-General was consulted in relation to the inclusion of custodial penalties, in accordance with paragraph 3.3 of the *Guide to Framing Commonwealth Offences*.

Evidentiary certificates

Senate standing order 23(3)(h) requires the committee to consider whether an instrument trespasses unduly on personal rights and liberties, including the right to the presumption of innocence.

New subsection 39(4) provides that, in proceedings against a person for an offence under subsection 39(2), the ELO may issue a certificate saying an employer did not have an insurance policy in place or was not a member of the scheme. Such certificates are prima facie evidence of the matters stated in the certificates.

Where an evidentiary certificate is issued, this allows evidence to be admitted into court which would need to be rebutted by the other party to the proceedings. This may effectively reverse the evidential burden of proof and may, if used in criminal proceedings, interfere with the common-law right to be presumed innocent until proven guilty. The committee would therefore expect a sound justification for the use of evidentiary certificates to be included in the explanatory materials.

In this instance, the explanatory statement to the instrument notes that subsection 39(4) is consistent with paragraph 5.3 of the guide, which indicates that it is acceptable to use evidentiary certificates to settle formal or technical matters of fact that would be difficult to prove by adducing admissible evidence. Whilst it appears that the matters included in a certificate issued under subsection 39(4) may relate to technical matters, the committee notes that paragraph 5.3 of the guide also provides that '[I]n legislation that provides for the use of an evidentiary certificate should provide that it be issued by a responsible officer who is independent of the prosecution, not by a prosecutor'.

Noting that an SES officer within the department may be appointed as the ELO, it is unclear whether they (or any persons to whom they delegate the power to issue an evidentiary certificate under subsection 47H(1)) are sufficiently independent of the prosecution so as to comply with the requirements of paragraph 5.3 of the guide.

The committee therefore requests your advice as to whether the ELO, and any persons to whom they may delegate their power to issue evidentiary certificates under subsection 47H(1), are sufficiently independent of the prosecution so as to comply with the requirements of paragraph 5.3 of the *Guide to Framing Commonwealth Offences*.

Significant matters in delegated legislation

Finally, I take this opportunity to reiterate the committee's ongoing concerns about the inclusion of significant matters in territory ordinances, which have the effect of amending primary legislation. As the committee has previously indicated, it will continue to monitor this issue with a view to seeking your more detailed advice about the government's approach to territory ordinances at a later date.

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 September 2020**.

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



3 September 2020

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

Via email: financeminister@finance.gov.au

CC: DLO-Finance@finance.gov.au; plc@finance.gov.au

Dear Minister,

Public Governance, Performance and Accountability Amendment (2020 Measures No. 3) Rules 2020 [F2020L00782]

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 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).

The Public Governance, Performance and Accountability Rule 2014 (the PGPA Rule) allows prescribed officials to exercise powers, perform functions and discharge duties under the *Public Governance, Performance and Accountability Act 2013* (the PGPA Act). The Public Governance, Performance and Accountability Amendment (2020 Measures No. 3) Rules 2020 [F2020L00782] (the instrument) amends the PGPA Rule to allow prescribed officials to also exercise powers, perform functions and discharge duties under the *Financial Framework (Supplementary Powers) Act 1997* (the FFSP Act).

Subsection 9(1) of the PGPA rule provides that consultants, independent contractors and their employees are prescribed as officials of non-corporate Commonwealth entities. The instrument therefore appears to enable consultants and independent contractors and their employees, to make, vary and administer arrangements or grants of financial assistance as per sections 32B and 32C of the FFSP Act. The explanatory statement notes

that the instrument is intended to facilitate greater administrative flexibility for accountable authorities managing arrangements under the FFSP Act.

Allowing consultants, independent contractors and their employees to exercise powers, perform functions or discharge duties in relation to Commonwealth expenditure is a significant matter. Provisions which authorise non-APS/non-Commonwealth employees (who may not be bound by relevant codes of conduct) to exercise significant powers should ordinarily be set out in primary legislation. The significance of the powers provided for in this instrument is amplified as they appear to facilitate the allocation of Commonwealth money by non-APS/non-Commonwealth employees.

The committee requests your detailed advice as to why it was considered necessary and appropriate to use delegated legislation, rather than primary legislation, to allow consultants and independent contractors of non-corporate Commonwealth entities (and their employees) to exercise powers, perform functions and discharge duties under the *Financial Framework (Supplementary Powers) Act 1997*.

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 September 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



3 September 2020

The Hon Michael Sukkar MP
Minister for Housing and Assistant Treasurer
Parliament House
CANBERRA ACT 2600

Via email: minister.sukkar@treasury.gov.au

CC: atdlo@treasury.gov.au

Dear Minister,

Treasury Laws Amendment (Acquisition as Consumer—Financial Thresholds) Regulations 2020 [F2020L00907]

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.

Modification of primary 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).

The instrument amends the Competition and Consumer Regulations 2010 to increase the monetary threshold in the definition of 'consumer' for the purposes of the Australian Consumer Law. The instrument also amends mirror provisions in the Australian Securities and Investments Commission Regulations 2001 (ASIC regulations) for consistency.

The monetary threshold for the purposes of defining a consumer was previously \$40,000 and the instrument increases this threshold to \$100,000. The explanatory statement to the instrument notes that this is the first time the threshold has been changed since 1986. The committee is concerned that while paragraph 3(1)(ii) of the Australian Consumer Law permits an amount greater than \$40,000 to be specified in regulations this is a significant change that should be enacted via primary legislation.

This significant increase to the monetary threshold is likely to have a substantial effect even if the increase is only designed to restore the real value of the monetary threshold. Furthermore, as the threshold has not been amended since 1986, from a scrutiny perspective, the committee considers that it would be appropriate for the changes to be

subject to the full range of parliamentary scrutiny associated with amending primary legislation. The instrument is exempt from sunseting and will therefore be in place for an unspecified amount of time which makes the measures more appropriate for the full range of parliamentary scrutiny given their potential longevity.

The committee therefore requests your detailed advice as to why it was considered necessary and appropriate to use delegated legislation, rather than primary legislation, to significantly increase the monetary threshold in the definition of 'consumer' for the purposes of the Australian Consumer Law.

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 September 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



3 September 2020

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,

Narcotic Drugs (Licence Charges) Amendment (2020 Measures No. 1) Regulations 2020 [F2020L00901]

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 instruments.

Levy of taxation in delegated legislation

Matters of interest to the Senate

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 enacted via primary legislation rather than delegated legislation). In addition, Senate 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.

The instrument provides for the imposition of charges for certain medicinal cannabis licences and cannabis research licences. The explanatory statement notes that the charges imposed by the instrument are for the purposes of administrative cost recovery as incurred in the course of regulating the medicinal cannabis regulatory scheme.

Whilst noting this information, the committee is concerned that the instrument may impose charges which would be more properly regarded as taxation. In particular, the committee notes that the instrument is made under the *Narcotic Drugs (Licence Charges) Act 2016* (the Act). Section 6 of the Act provides for the levying of taxation in relation to

narcotic drugs licences. Subsection 8(1) further provides that the amount of the relevant charge may be prescribed by regulations made under the Act; however, it does not set any cap on the amount that may be charged.

The committee considers that one of the most fundamental functions of the Parliament is to levy taxation. In this regard, the committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. In this instance, there is no cap on the amount that can be charged for licences issued for the purpose of the Act, which compounds the committee's scrutiny concerns in relation to this charge due to the limited parliamentary oversight afforded to it.

As the levying of taxation in delegated legislation is a systemic matter, the committee has resolved draw this instrument to the attention of the Senate in its *Delegated Legislation Monitor 10 of 2020*.

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 to sdlc.sen@aph.gov.au.

Yours sincerely,

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