

Monitor 11 of 2020 - Committee correspondence

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8 October 2020

Senator James Paterson

Chair

Parliamentary Joint Committee on Corporations and Financial Services

Parliament House

CANBERRA ACT 2600

via email: corporations.joint@aph.gov.au

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

Dear Chair

Matters of interest to the Senate—litigation funding

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

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

Noting that the following instrument appears to contain significant policy matters relating to the litigation funding industry, 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
Corporations Amendment (Litigation Funding) Regulations 2020 [F2020L00942]	To amend the Corporations Regulations 2001 to bring litigation funders under the managed investment scheme and Australian Financial Services License regimes to ensure that they are subject to greater regulatory oversight and accountability. The instrument also removes exemptions from anti-hawking provisions and product disclosure requirements for litigation funders.	30/11/2020

Should your committee decide to further examine the above instrument as part of its inquiry into litigation funding and the regulation of the class action industry, I note that the table above identifies the last day (based on the current sitting pattern) for lodging a disallowance notice in the Senate. The committee has also drawn this instrument to the attention of the Senate Economics 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



8 October 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—COVID-19 response instruments

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

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

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

Instrument	Purpose	Last day to lodge disallowance notice
Social Security (Coronavirus Economic Response—2020 Measures No. 12) Determination 2020 [F2020L01010]	To modify section 204A of the <i>Social Security (Administration) Act 1999</i> to provide for additional purposes for which the Secretary of the Department of Social Services can use JobKeeper information provided to the Secretary by the Commissioner of Taxation.	30/11/2020
Social Security (Coronavirus Economic Response—2020 Measures No. 13) Determination 2020 [F2020L00980]	To ensure that a social security recipient who is currently subject to a nil rate period under subsection 23(4A) of the <i>Social Security Act 1991</i> , or who commence a nil rate period before 16 November 2020, will be taken to be receiving a social security payment at a rate of nil until at least 16 November 2020. This will allow the person to retain access to certain benefits, such as concession cards, for a longer period.	30/11/2020

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

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



8 October 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

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

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

Noting that the following instruments appear to contain significant policy matters, 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
ASIC Corporations (Amendment) Instrument 2020/635 [F2020L01020]	To give relief to financial counselling agencies that provide financial counselling to small businesses, from the requirement to hold an Australian financial services licence when providing advice on particular financial products.	30/11/2020
ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98 [F2020L00962]	To set out new standards and requirements for the internal dispute resolution (IDR) procedures of financial firms, specify requirements for written reasons for decisions about complaints, clarify that financial firms must comply with their IDR procedures, and modify the definition of 'small business' in relation to IDR in Chapter 7 of the <i>Corporations Act 2001</i> so it aligns with the definition of 'small business' in the Rules of the Australian Financial Complaints Authority in relation to external dispute resolution.	30/11/2020
Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 7) 2020 [F2020L01021]	To extend the scope of the JobKeeper scheme so that it also benefits employers of more recently engaged employees by providing a new employment reference date of 1 July 2020 for employees to be eligible for the scheme.	30/11/2020
Corporations Amendment (Litigation Funding) Regulations 2020 [F2020L00942]	To amend the Corporations Regulations 2001 to bring litigation funders under the managed investment scheme and Australian Financial Services License regimes to ensure that they are subject to greater regulatory oversight and accountability. The instrument also removes exemptions from anti-hawking provisions and product disclosure requirements for litigation funders.	30/11/2020

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

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



8 October 2020

Senator the Hon Eric Abetz

Chair

Senate Foreign Affairs, Defence and Trade Legislation Committee

Parliament House

CANBERRA ACT 2600

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

cc: Senator the Hon Marise Payne, Minister for Foreign Affairs,
foreign.minister@dfat.gov.au

Dear Chair

Matters of interest to the Senate—Autonomous sanctions and Square Kilometre Array Observatory

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

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

Noting that the following instruments appear to contain significant policy matters relating to autonomous sanctions and the Square Kilometre Array Observatory, 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
Autonomous Sanctions Legislation Amendment (Syria and Proliferation of Weapons of Mass Destruction) Instrument 2020 [F2020L01019]	To continue the designations and/or declarations of 54 persons and entities who the Foreign Minister is satisfied meet the criteria for the continuation of targeted financial sanctions and travel bans under the Autonomous Sanctions Regulations 2011, and in some instances updates the biodata for some designated persons and entities.	30/11/2020
International Organisations (Privileges and Immunities—Square Kilometre Array Observatory) Regulations 2020 [F2020L00950]	To give legal effect to Australia's obligations in providing privileges and immunities to the Square Kilometre Array Observatory and relevant categories of persons, pursuant to the Convention Establishing the Square Kilometre Array Observatory.	30/11/2020

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

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



8 October 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

Dear Chair

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

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

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

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

Instrument	Purpose	Last day to lodge disallowance notice
Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 7) 2020 [F2020L01021]	To extend the scope of the JobKeeper scheme so that it also benefits employers of more recently engaged employees by providing a new employment reference date of 1 July 2020 for employees to be eligible for the scheme.	30/11/2020
Social Security (Coronavirus Economic Response—2020 Measures No. 12) Determination 2020 [F2020L01010]	To modify section 204A of the <i>Social Security (Administration) Act 1999</i> to provide for additional purposes for which the Secretary of the Department of Social Services can use JobKeeper information provided to the Secretary by the Commissioner of Taxation.	30/11/2020
Social Security (Coronavirus Economic Response—2020 Measures No. 13) Determination 2020 [F2020L00980]	To ensure that a social security recipient who is currently subject to a nil rate period under subsection 23(4A) of the Social Security Act 1991, or who commence a nil rate period before 16 November 2020, will be taken to be receiving a social security payment at a rate of nil until at least 16 November 2020. This will allow the person to retain access to certain benefits, such as concession cards, for a longer period.	30/11/2020

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

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

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

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

Yours sincerely

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



8 October 2020

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

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

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

The Hon Michael McCormack MP, Minister for Infrastructure, Transport
and Regional Development, dlo.mccormack@infrastructure.gov.au

The Hon Peter Dutton MP, Minister for Home Affairs,
dlo@homeaffairs.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.

Standing order 23(4) requires the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate.

The instruments listed in the table below, in combination with their enabling Act, authorise the Commonwealth to spend public money on the Local Roads and Community Infrastructure Program and a pandemic leave disaster payments program. The committee considers that the scrutiny of such instruments is an essential aspect of parliamentary scrutiny and control of Commonwealth expenditure. In addition, the committee considers that the Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2020 relates to a significant policy matter. 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 (Home Affairs Measures No. 4) Regulations 2020 [F2020L00994]	Coronavirus economic response—pandemic leave disaster payments	Total amount of spending authorised is not specified.	Funding will be provided for a pandemic leave disaster payments program. Under the program, pandemic payments of \$1500 will be available to eligible individuals who are unable to earn income while under a direction to self-isolate or quarantine as a result of COVID-19.
Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Regional Development and Communications Measures No. 6) Regulations 2020 [F2020L00944]	Local Roads and Community Infrastructure Program	\$500 million over two years from 2020-21	Funding will be provided to local councils and other bodies who are responsible for the provision of local community services and infrastructure to support construction and maintenance of, and improvements to, priority local road and community infrastructure projects across Australia. The program aims to support recovery from the adverse effects of the national crisis resulting from COVID-19.

Should your committee decide to further examine either of the above instruments, I note that (based on the current sitting pattern) the time for lodging a disallowance notice in the Senate expires on 30 November 2020. The committee has also drawn these instruments to the attention of the relevant Senate legislation committees.

In addition, the committee has identified technical scrutiny concerns with the Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2020 and has separately written to the minister to request advice in relation to these matters. A copy of the committee's letter to the minister in relation to these technical scrutiny concerns is attached for the information of your committee.

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



8 October 2020

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

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

cc: The Hon Keith Pitt MP, Minister for Resources, Water and
Northern Australia
minister.pitt@industry.gov.au

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

Dear Chair,

**Legislative instruments specifying Commonwealth expenditure—Advancing
Research and Development for Critical Minerals Program**

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

Standing order 23(4) requires the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate.

The instrument listed in the table below, in combination with its enabling Act, authorises the Commonwealth to spend public money on the Advancing Research and Development for Critical Minerals 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
Industry Research and Development (Advancing Research and Development for Critical Minerals Program) Instrument 2020 [F2020L00949]	Advancing Research and Development for Critical Minerals Program	\$4.5 million	Funding will be provided to Geoscience Australia, the Commonwealth Scientific and Industrial Research Organisation and the Australian Nuclear Science and Technology Organisation to undertake eligible scientific research and development projects to help grow Australia's critical minerals sector.

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 in the Senate 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



8 October 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,
dlo@homeaffairs.gov.au

Department of Finance, FFSPRegs@finance.gov.au

Dear Chair,

Legislative instruments specifying Commonwealth expenditure—Pandemic leave disaster payments program

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

Standing order 23(4) requires the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate.

The instrument listed in the table below, in combination with its enabling Act, authorises the Commonwealth to spend public money on the pandemic leave disaster payments program. The committee considers that the scrutiny of such instruments is an essential aspect of parliamentary scrutiny and control of Commonwealth expenditure. In addition, the committee considers that the instrument relates to a significant policy matter. 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. 4) Regulations 2020 [F2020L00994]	Coronavirus economic response—pandemic leave disaster payments	Total amount of spending authorised is not specified.	Funding will be provided for a pandemic leave disaster payments program. Under the program, pandemic payments of \$1500 will be available to eligible individuals who are unable to earn income while under a direction to self-isolate or quarantine as a result of COVID-19.

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 in the Senate expires on 30 November 2020.

The Scrutiny of Delegated Legislation Committee has also identified technical scrutiny concerns in relation to this instrument and has separately written to the minister to request advice in relation to these matters. A copy of the committee's letter to the minister in relation to these technical scrutiny concerns is attached for the information of your 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



8 October 2020

Senator Susan McDonald

Chair

Senate Rural and Regional Affairs and Transport Legislation Committee

Parliament House

CANBERRA ACT 2600

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

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

The Hon Michael McCormack MP, Minister for Infrastructure, Transport
and Regional Development, dlo.mccormack@infrastructure.gov.au

Department of Finance, FFSPRegs@finance.gov.au

Dear Chair,

**Legislative instruments specifying Commonwealth expenditure—Local Roads and
Community Infrastructure Program**

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

Standing order 23(4) requires the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate.

The instrument listed in the table below, in combination with its enabling Act, authorises the Commonwealth to spend public money on the Local Roads and Community Infrastructure Program. The explanatory statement to the instrument explains that grant funding of \$500 million will be available under the program over two years from 2020-21. 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 (Infrastructure, Transport, Regional Development and Communications Measures No. 6) Regulations 2020 [F2020L00944]	Local Roads and Community Infrastructure Program	\$500 million over two years from 2020-21	Funding will be provided to local councils and other bodies who are responsible for the provision of local community services and infrastructure to support construction and maintenance of, and improvements to, priority local road and community infrastructure projects across Australia. The program aims to support recovery from the adverse effects of the national crisis resulting from COVID-19.

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 in the Senate 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



8 October 2020

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

Via email: Senator.Hume@aph.gov.au
CC: shelby.brinkley@treasury.gov.au

Dear Assistant Minister,

ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98 [F2020L00962]

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

Modification of primary legislation

Parliamentary oversight

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 whether an instrument modifies or exempts persons or entities from the operation of primary legislation. In addition, Senate standing order 23(3)(k) requires the committee to examine each instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes whether any instrument may exclude or limit parliamentary oversight.

Section 7 of the instrument modifies the operation of specified provisions of the *Corporations Act 2001* (Corporations Act) and the *National Consumer Credit Protection Act 2009* (Credit Act) to provide that financial firms must comply with their internal dispute resolution procedures. Section 8 of the instrument modifies the definition of 'small business' in relation to internal dispute resolution in Chapter 7 of the Corporations Act so that it aligns with the definition of 'small business' in the rules of the Australian Financial Complaints Authority in relation to external dispute resolution.

Part 3 of the instrument is made under subsections 926A(2) and 1020F(1) of the Corporations Act and subsection 109(3) of the Credit Act. Those subsections allow ASIC to exempt persons, entities and classes of persons and entities from provisions of the Corporations Act or Credit Act, or to declare that certain provisions of the Acts apply as if modified or varied.

Provisions that modify or exempt persons or entities from the operation of primary legislation may limit parliamentary oversight, and may subvert the appropriate relationship between Parliament and the executive. The committee considers that such measures should be included in primary, rather than delegated, legislation. When an instrument nevertheless modifies the operation of primary legislation, the committee considers that a sound justification for the use of delegated legislation should be provided, and the instrument should be time-limited.

In this instance, the explanatory statement to the instrument states that it is appropriate to set out these matters in delegated legislation as it provides for greater flexibility to respond to market developments, and will ensure that primary legislation can respond to poor industry compliance practices in a way that is consistent with the legislative policy of promoting consumer protection.

While the committee acknowledges this explanation, it is concerned that these measures appear to be intended to remain in force for at least 10 years (until the instrument sunsets under the *Legislation Act 2003*). The committee's longstanding view is that provisions which modify or exempt persons or entities from the operation of primary legislation should cease to operate no more than three years after they commence. This is to ensure a minimum degree of regular parliamentary oversight.

In light of this, from a scrutiny perspective the committee considers that Part 3 of the instrument should be amended to specify that it ceases to operate three years after it commences. If it becomes necessary to extend the operation of these provisions, the committee considers that this should be done by amending the primary legislation or via a subsequent legislative instrument that is subject to disallowance and parliamentary scrutiny.

The committee therefore requests your advice as to whether the instrument could be amended to specify that Part 3 ceases to operate three years after it commences.

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 **22 October 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



8 October 2020

Senator the Hon Richard Colbeck
Minister for Aged Care and Senior Australians
Parliament House
CANBERRA ACT 2600

Via email: Senator.Colbeck@aph.gov.au
CC: Minister.Colbeck.DLO@health.gov.au;
parliamentary.committees@health.gov.au

Dear Minister,

Contingence Aids Payment Scheme 2020 [F2020L00758]

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

Availability of independent merits review

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

Where an instrument empowers a decision-maker to make discretionary decisions with the capacity to affect rights, liberties, obligations or interests, the committee ordinarily expects that those decisions should be subject to independent merits review.

Decisions made by the secretary under sections 21 and 22 of the instrument to approve a responsible person in relation to an individual, and to direct the Chief Executive Medicare to decline to make a contingency aids payment scheme payment to an organisation, appear to be discretionary decisions affecting the rights and interests of individuals and would therefore be suitable for independent merits review. However, neither the instrument nor the explanatory statement indicates whether these decisions are reviewable.

While sections 14 and 15 of the *National Health Act 1953* (the Act) provide for merits review by the Administrative Appeals Tribunal (AAT) of decisions made by the Chief Executive Medicare that an applicant or participant is not eligible to participate in the scheme, the Act is silent in relation to other decisions, including in relation to the decisions

that may be made by the secretary under sections 21 and 22 of the instrument. The committee does not consider the fact that the Act specifically provides for merits review of some decisions excludes the provision of merits review for other decisions. The committee therefore considers that it is open under the Act for the instrument to provide for access to independent merits review by the AAT of decisions made under sections 21 and 22 of the instrument.

Accordingly, the committee requests your advice as to:

- **what characteristics of the decisions made by the secretary under sections 21 and 22 of the instrument justify the exclusion of independent merits review, by reference to the established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*; or**
- **if the decisions are considered suitable for independent merits review, whether the instrument can be amended to provide for independent merits review by the Administrative Appeals Tribunal of decisions made under sections 21 and 22.**

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 **22 October 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



8 October 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 response of 6 October 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 7 October 2020. The committee noted your advice that the government intends to introduce a new bill into the House of Representatives this week which would, if passed, support the operation of the Cashless Debit Card as an ongoing measure and make amendments currently provided for in the Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019.

On the basis of your advice, the committee resolved to postpone the notice of motion to disallow the instrument to 12 November 2020, with a view to withdrawing the notice of motion after the new bill is agreed to by the Senate. If the new bill is not passed by the Senate the committee will consider whether to proceed with the disallowance notice at that time. I note that, based on the current sitting pattern, the notice of motion to disallow the instrument must be resolved by 7 December 2020 or the instrument will be deemed to have been disallowed.

In the interests of transparency, I note that your response 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



8 October 2020

The Hon Christian Porter MP
Minister for Industrial Relations
Parliament House
CANBERRA ACT 2600

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

CC: attorney@ag.gov.au; dlo@ag.gov.au; parliamentary@ag.gov.au

Dear Minister,

Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020 [F2020L00702]

Thank you for your response of 22 September 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 7 October 2020. On the basis of your advice, the committee has resolved to seek your further advice about the issues outlined below.

Compliance with the Legislation Act 2003 – consultation

Your response indicates that you consulted with trade union movement prior to making the Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020 (principal instrument). You further advised that, taking into account the views publicly and privately expressed to you by representatives of the union movement and the business community, the government considered it appropriate to bring forward the repeal date of the principal instrument.

On this basis, you have advised that you are satisfied that appropriate consultation was undertaken in relation to the Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020 (repeal instrument).

While noting this advice, the committee remains concerned that the repeal instrument does not, at present, comply with the technical requirements of paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003* (Legislation Act). These provisions require that the explanatory statement to an instrument *must* describe the nature of any consultation that was undertaken in relation to the instrument, or if no consultation was undertaken, explain why no such consultation was undertaken.

The committee therefore requests that the explanatory statement to the repeal instrument be amended to include the information that you have provided to the committee to ensure that it complies with the technical requirements of paragraphs 15J(2)(d) and (e) 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. 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 **22 October 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



8 October 2020

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

Via email: Senator.Cormann@aph.gov.au

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

Dear Minister,

Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2020 [F2020L00994]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to these matters. The committee has also resolved to draw this instrument to the attention of the Senate under standing order 23(4) in its *Delegated Legislation Monitor 11 of 2020*.

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 instrument amends the Financial Framework (Supplementary Powers) Regulations 1997 (FF(SP) regulations) to provide legislative authority for the government to make pandemic leave disaster payment grants (pandemic payments) to eligible individuals who are unable to earn income while under a direction to self-isolate or quarantine resulting from COVID-19.

The instrument appears to contain significant elements of the government's policy response to COVID-19. In this regard, the committee generally considers that such significant policy matters should be set out in primary, rather than delegated, legislation.

The explanatory statement states that it is appropriate to include the program in the FF(SP) regulations as 'government spending on the program will be time limited and not recurrent' and the program 'has a limited purpose and expenditure criteria'. However, the

committee does not consider that this, of itself, is a sufficient justification for including such a significant COVID-19 policy response in delegated legislation.

In light of these matters, the committee requests your advice as to why it is considered necessary and appropriate to include a significant element of the government's policy response to COVID-19 in delegated legislation.

Parliamentary oversight

Senate standing order 23(3)(k) requires the committee to examine each instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes whether any instrument may exclude or limit parliamentary oversight.

In general, the committee will be concerned where significant details concerning the operation and application of measures prescribed by an instrument are set out in non-legislative policy guidance. The committee notes that this issue often arises in instruments which amend the FF(SP) regulations.

In this instance, the instrument provides for the broad purpose of the grant program; however, it does not appear to provide any detail as to how the program will operate. Further, while the explanatory statement contains some high-level guidance as to how the grant program may operate, it states that further information about the grants program, including the eligibility criteria for pandemic payments, will be set out in the grant opportunity guidelines.

The committee is concerned that the inclusion of such eligibility criteria for pandemic payments in non-legislative policy guidance rather than the instrument will enable the criteria to be changed without any form of parliamentary oversight. For example, the committee notes that while the explanatory statement states that grants will be provided to eligible individuals in Victoria, the grants program has already been extended to New South Wales, Tasmania and Western Australia, without an opportunity for parliamentary oversight of these extensions.

The committee acknowledges that the amount of expenditure under the program will be demand-driven. Nevertheless the committee's scrutiny concerns about inadequate parliamentary oversight are heightened by the failure to specify a cap on the amount of money that may be expended under the grants program (which could later be increased, if necessary), or to at least provide details in the explanatory statement as to how much is forecast to be expended under the program.

In light of these matters, the committee requests your advice as to:

- **why it is considered necessary and appropriate to set out significant elements of the grants program, including the eligibility criteria for pandemic payments, the amount of grants provided and the duration of the grants program, in grant opportunity guidelines, rather than in a legislative instrument;**
- **why a cap on the amount that may be expended under the grants program has not been specified; and**
- **whether the explanatory statement to the instrument could be amended to specify how much is forecast to be expended under the grants program.**

Availability of independent merits review

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

Where an instrument empowers a decision-maker to make discretionary decisions with the capacity to affect rights, liberties, obligations or interests, the committee ordinarily expects that those decisions should be subject to independent merits review.

It appears that a range of discretionary decisions relating to the pandemic payments may be made in the administration of the program. The explanatory statement to the instrument notes that independent merits review is not suitable for such decisions as they are 'automatic or mandatory in nature'. The explanatory statement further explains that the decision to make a payment will be very limited and procedural.

While noting this explanation, it appears that decisions relating to determining the amount to be awarded and whether a person meets the eligibility criteria for a grant may contain an element of discretion. The capacity of the decision-maker to exercise some discretion, albeit minor, suggests that the decisions made under the instrument cannot accurately be described as 'automatic or mandatory'.

Accordingly, the committee requests your more detailed advice as to the rationale for not providing for merits review of discretionary decisions made under the instrument, including what other characteristics of the decisions relating to pandemic payments justify the exclusion of independent merits review, by reference to the established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.

Consultation with persons affected

Senate standing order 23(3)(d) requires the committee to scrutinise each instrument as to whether persons likely to be affected by the instrument were adequately consulted in relation to it.

The explanatory statement to the instrument notes that consultation was undertaken between the Prime Minister and the Premier of Victoria in relation to the program. However, the explanatory statement does not indicate whether consultation was also undertaken with persons likely to be affected by the instrument, such as employers, employees and relevant peak organisations, or if not, why not.

The committee therefore request your advice as to whether persons likely to be affected by the instrument, such as employers, employees and relevant peak organisations, were consulted in relation to the instrument, and if not, why not.

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 **22 October 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



8 October 2020

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

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

CC: minister.marino@infrastructure.gov.au; rob.terry@infrastructure.gov.au

Dear Assistant Minister,

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

Thank you for your response of 11 September 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 7 October 2020. On the basis of your advice, the committee has concluded its examination of the instrument in relation to its concerns about the availability of accountability safeguards, independent merits review, significant penalties in delegated legislation, and evidentiary certificates. However, the committee has resolved to seek your further advice about the issues outlined below.

Delegation of administrative powers and functions

Your response indicates that, prior to authorising persons to perform relevant powers and functions in administering the Norfolk Island Workers' Compensation Scheme (scheme), the Employment Liaison Officer (ELO) must be satisfied that the persons have:

- knowledge and understanding of the scheme;
- experience managing claims for compensation under other Australian workers' compensation schemes;
- the ability to work effectively with claimants, employers and medical practitioners; and
- time management and communication skills and the ability to work autonomously and as part of a team.

The committee considers that the information about these requirements should be set out on the face of the instrument, or at least in the explanatory statement to the instrument,

noting the importance of explanatory statements as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

The committee therefore requests your advice as to whether the instrument, or at least the explanatory statement to the instrument, could be amended to provide greater specificity as to the qualifications and expertise that the ELO must be satisfied a person possesses before the ELO delegates a power or function under section 47H to that person.

Immunity from civil liability

Your response explains that you consider it necessary and appropriate to extend immunity from civil liability to persons to whom the ELO may delegate a power or function under section 47H because such immunity ensures that persons making decisions about claims for workers' compensation are able to perform their jobs effectively. In this regard, you state that not offering immunity to persons administering the scheme would likely undermine its effective functioning and ultimately disadvantage the community. You also note that decisions made by the ELO and their delegates are subject to some scrutiny, as they are subject to internal review and independent merits review.

Your response does not, however, appear to address the necessity of extending immunity from civil liability to the Commonwealth as an entity for the purposes of the scheme, as distinct from particular persons administering the scheme. In the absence of such information, it remains unclear to the committee why it is necessary to make the Commonwealth immune from civil liability, in addition to persons to whom the ELO may delegate a power or function under section 47H.

The committee therefore requests your more detailed advice as to why it is considered necessary and appropriate to extend immunity from civil liability to the Commonwealth as an entity.

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 **22 October 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



8 October 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]**

Thank you for your detailed response dated 23 September 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 7 October 2020. On the basis of your advice, the committee has resolved to seek your further advice about the issues outlined below.

Matters more appropriate for parliamentary enactment

Amongst other matters, your response advises that the use of delegated legislation, rather than primary legislation, enables the more selective targeting of certain contractors for prescription as officials. Your response further explains that defining contractors as officials on the face of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) would likely result in all Commonwealth contractors being captured by the definition of official, including those contractors whose role does not require the exercise of statutory powers or decision making in relation to Commonwealth resources.

Whilst the committee acknowledges that delegated legislation can facilitate greater flexibility and specificity in the administration of a scheme, it does not generally consider these qualities, of their own, to constitute a sufficient justification for including significant elements of a regulatory scheme in delegated legislation. In this instance, the committee notes that the list of persons who are official of Commonwealth entities in section 9 of the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule) has only been altered on three occasions in the last six years. Moreover, the committee notes that, as drafted and amended, section 9 of the PGPA Rule captures broad classes of persons who share certain attributes. Accordingly, it remains unclear to the committee why this approach could only be achieved via the use of delegated legislation.

In addition, it is unclear to the committee why the insertion of provisions equivalent to section 9 of the PGPA Rule into the PGPA Act would likely have the effect of capturing all Commonwealth contractors within its scope, regardless of what their role entails.

The committee therefore requests your further advice as to why the prescription of certain consultants and independent contractors as officials cannot be set out on the face of primary legislation, noting that officials can exercise significant delegated statutory powers on behalf of the Commonwealth, including the allocation of public money.

Availability of accountability safeguards

Your response also states that contractors will be subject to a range of accountability measures and safeguards set out in section 16 and sections 25 to 29 of the PGPA Act. In this regard, the committee notes that sections 25 to 29 of the PGPA Act provide for standard public administration duties and conflict of interest requirements, while section 16 imposes a duty on the accountable authority of a Commonwealth entity to establish and maintain appropriate systems of risk oversight and management and internal control.

The committee welcomes your advice about the availability of these safeguards. However, noting the broad and significant powers that may be performed by Commonwealth officials, it is unclear to the committee whether persons prescribed as officials of non-corporate Commonwealth entities are subject to other, independent public accountability safeguards, including the obligations of the *Freedom of Information Act 1982* and *Privacy Act 1988*, independent merits review, and oversight by the Commonwealth Ombudsman and Auditor-General.

The committee therefore requests your advice as to:

- **whether persons who are prescribed as officials of non-corporate Commonwealth entities are subject to independent accountability mechanisms, including obligations under the *Freedom of Information Act 1982* and *Privacy Act 1988* and oversight by the Commonwealth Ombudsman and Auditor-General; and**
- **whether decisions made by these officials are subject to independent merits review.**

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 **22 October 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



8 October 2020

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

Via email: Minister.Hunt.DLO@health.gov.au

CC: rezana.berman@health.gov.au

Dear Minister,

Therapeutic Goods Legislation Amendment (2020 Measures No. 1) Regulations 2020 [F2020L00946]

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

Element of offence specified 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).

Subsections 41MP(1) and 41MPA(1) of the *Therapeutic Goods Act 1989* (Act) provide that certain persons must notify the secretary of certain information relating to adverse events within the timeframe specified in the Therapeutic Goods (Medical Devices) Regulations 2002 (principal regulations). Failure to comply with this requirement attracts a criminal penalty of 12 months imprisonment or 1,000 penalty units, or both, or a civil penalty of 3,000 penalty units for an individual or 30,000 penalty units for a body corporate.

Item 2 of Schedule 3 to the instrument amends the principal regulations to specify that the timeframe for providing such information to the secretary is 60 days after the person becomes aware of the information in any case other than those listed in paragraphs 5.7(1)(a) to (c) of the principal regulations.

The committee generally considers that all elements of a criminal offence, particularly those subject to custodial penalties, should be set out in primary, rather than delegated,

legislation. This is due to the additional level of parliamentary scrutiny attached to the legislative process for primary legislation.

While noting that the Act permits regulations to prescribe the timeframe for notifying the secretary of certain information, the committee is concerned about the use of delegated legislation to specify important details relating to an element of the offence.

The committee therefore requests your advice as to why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to specify important details relating to an element of the offence and civil penalty provision in subsections 41MP(1) and 41MPA(1) of the Act. In particular, the committee requests your advice as to why it would not be possible to instead specify these details on the face of the 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 **22 October 2020**.

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



8 October 2020

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

Via email: Senator.Hume@aph.gov.au
CC: shelby.brinkley@treasury.gov.au

Dear Assistant Minister,

**ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licensees)
Instrument 2020/198 [F2020L00237]**

**ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial
Services) Instrument 2020/199 [F2020L00238]**

Thank you for your response of 7 September 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instruments.

The committee considered your response at its private meeting on 7 October 2020. On the basis of your advice, the committee has concluded its examination of the instruments.

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**



8 October 2020

The Hon Dan Tehan MP
Minister for Education
Parliament House
CANBERRA ACT 2600

Via email: minister@education.gov.au

CC: Steve.Irons.MP@aph.gov.au; dlo@education.gov.au

Dear Minister,

Higher Education Support (HELP Tuition Protection Levy) (Risk Rated Premium and Special Tuition Protection Components) Determination 2020 [F2020L00960]

VET Student Loans (VSL Tuition Protection Levy) (Risk Rated Premium and Special Tuition Protection Components) Determination 2020 [F2020L00961]

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 instruments determine various matters relevant to the calculation of the risk rated premium component and special tuition protection component of the HELP and VSL tuition protection levies for the 2020 calendar year. The committee notes that these levies are imposed as taxes under the *Higher Education Support (HELP Tuition Protection Levy) Act 2020* and the *VET Student Loans (VSL Tuition Protection Levy) Act 2020* (the enabling Acts).

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 only limited guidance on the face of the enabling Acts as to the amounts of levy that may be imposed, which compounds the committee's scrutiny concerns in relation to determining core elements of these levies in delegated legislation.

As the levying of taxation in delegated legislation is a systemic matter, the committee has resolved draw these instruments to the attention of the Senate in its *Delegated Legislation Monitor 11 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*.

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



AUSTRALIAN
SENATE

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

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8 October 2020

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

Via email: Michael.sukkar.MP@aph.gov.au

CC: atdlo@treasury.gov.au; CommitteeScrutiny@treasury.gov.au

Dear Minister,

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

Thank you for your response of 28 September 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 7 October 2020. 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