

Monitor 3 of 2020 - Committee correspondence

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27 February 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: The Hon Peter Dutton MP, Minister for Home Affairs,
dlo@homeaffairs.gov.au

Senator the Hon Mathias Cormann, Minister for Finance,
financeminister@finance.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 Commonwealth expenditure on supplementary one-off payments to eligible families who have been adversely affected by the recent bushfires. 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. 1) Regulations 2020 [F2020L00032]	Support to communities affected by bushfires— payments for children	\$10 million in 2019-20 (uncapped)	Funding will be provided for supplementary one-off payments under the Australian Government Disaster Recover Payment to eligible families who have been adversely affected by the recent bushfires. The payments are intended to provide one-off financial assistance to help families meet the costs associated with supporting their child or children to commence or return to school, such as for uniforms, books and stationery.

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 this instrument, I note the time for lodging a disallowance notice expires on 12 May 2020.

Further details about the instrument are published on the Federal Register of Legislation at <https://www.legislation.gov.au/Details/F2020L00032>.

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



27 February 2020

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

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

cc: The Hon Greg Hunt MP, Minister for Health,
Minister.Hunt.DLO@health.gov.au

Senator the Hon Mathias Cormann, Minister for Finance,
financeminister@finance.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 attached table, in combination with its enabling Act, authorises Commonwealth expenditure on the identified grants and 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 engages standing order 23(4), and accordingly has resolved to draw it to the attention of your committee.

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 listed instrument, I note the time for lodging a disallowance notice expires on 12 May 2020.

Further details about the instrument are published on the Federal Register of Legislation at <https://www.legislation.gov.au/Details/F2020L00033>.

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

Legislative instruments specifying Commonwealth expenditure
(registered between 15 January and 5 February 2020 in the
Community Affairs portfolios)

Instrument	Grant/Program	Amount	Description
Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2020 [F2020L00033]	Bushfire Recovery Access Program	\$14.7 million over three years from 2019-20	The program provides for immediate front line distress and trauma counselling for those who were impacted by the recent bushfires.
	Training for front-line personnel	\$2 million over three years from 2019-20	Funding will be provided for training for front-line personnel and volunteers who attended, or were affected by, the recent bushfires to recognise the signs of trauma and support help seeking.
	Bushfire trauma response coordinators	\$3.2 million over three years from 2019-20	Funding will be provided to establish bushfire trauma response coordinators within Primary Health Networks, who will be a single point of contact for individuals, families and communities directly impacted by the bushfires.
	Supporting communities in recovery	\$2.7 million over three years from 2019-20	Funding will be provided for grants of up to \$10,000 to communities for activities at the grass-roots level to strengthen social connectedness and peer support activities, as well as assertive outreach initiatives to prevent suicide and identify post-traumatic stress disorder.
	Cross-jurisdictional mental health framework	\$0.5 million over three years from 2019-20	Funding will be provided to develop a cross-jurisdictional mental health framework that will set out a joint approach to disasters, the response and recovery.



27 February 2020

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

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

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

Senator the Hon Mathias Cormann, Minister for Finance,
financeminister@finance.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 Commonwealth expenditure on the International Space Investment Initiative 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 (International Space Investment Initiative Program) Instrument 2020 [F2020L00089]	International Space Investment Initiative Program	\$15 million (initial funding)	<p>The program will provide Australian organisations and businesses with opportunities to be involved with international space projects and to collaborate with relevant overseas organisations (such as international space agencies). The program will be delivered through streams including:</p> <ul style="list-style-type: none"> • the Open Doors stream, which targets international space agency projects which provide opportunities for the Australian space sector; and • the Expand Capability stream, which provides grants to build the capacity and capability of the Australian space 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 this instrument, I note the time for lodging a disallowance notice expires on 14 May 2020.

Further details about the instrument are published on the Federal Register of Legislation at <https://www.legislation.gov.au/Details/F2020L00089>.

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



27 February 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; CommitteeScrutiny@treasury.gov.au

Dear Assistant Minister,

ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38 [F2020L00034]

ASIC Credit (Litigation Funding—Exclusion) Instrument 2020/37 [F2020L00035]

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 seeks your advice about this matter.

Exemptions to 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 enacted via primary rather than delegated legislation). This may include instruments which provide continuing exemptions to primary legislation.

Part 3 of the ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38 (conditional costs schemes instrument) provides exemptions to litigation funding or proof of debt schemes, which are funded by a conditional cost agreement, from certain requirements set out in Chapters 5C and 7 of the *Corporations Act 2001* until 31 January 2023.

Part 2 of the ASIC Credit (Litigation Funding—Exclusion) Instrument 2020/37 (litigation funding instrument) provides that litigation funding arrangements and proof of debt funding arrangements are exempt from the application of the National Credit Code, set out in Schedule 1 to the *National Consumer Credit Protection Act 2009*.

Together, these instruments extend the exemption initially provided by ASIC Class Order [CO 13/898] (original exemption instrument), which commenced on 11 July 2013. The explanatory statement to that instrument notes that the exemption was an interim measure to provide the government with additional time to consider legislative changes in

response to the Full Federal Court decision in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11.

The committee generally prefers that exemptions from primary legislation by delegated legislation do not continue in force for such time as to operate as a de facto amendment to the principal Act. In this instance, the explanatory statements to the instruments state that it is necessary to extend the exemption via delegated legislation as further time is required for the government to consider future legislative changes. However, in the absence of additional information, it is unclear to the committee why the necessary legislative changes have not been implemented in the seven years since the original exemption instrument commenced.

The committee would therefore appreciate your advice as to when the government intends to pursue the changes to primary legislation necessary to replace the exemptions provided for by these instruments.

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 **12 March 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



27 February 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; CommitteeScrutiny@treasury.gov.au

Dear Assistant Minister,

ASIC Corporations (Hawking-Life Risk Insurance and Consumer Credit Insurance) Instrument 2019/839 [F2019L01570]

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 about this matter.

Matters more appropriate for parliamentary enactment

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).

Subsection 992A(3) of the *Corporations Act 2001* (Corporations Act) makes it an offence punishable by six months' imprisonment for a person to offer to issue or sell a financial product via an unsolicited telephone call, unless that person satisfies the conditions in paragraphs (a) to (e). This instrument modifies subsection 992A(3) as it applies to life risk insurance products and consumer credit insurance products by substituting the conditions in paragraphs (a) to (e) with the requirement that the person offering to issue or sell the relevant product has already provided the other person with personal advice about that product.

The committee notes that the instrument appears to have been made in response to the recommendations of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission) relating to the hawking of insurance and superannuation products. However, it remains unclear why it was considered necessary and appropriate to address this matter in delegated legislation,

rather than primary legislation, particularly noting that the relevant provision is a criminal offence punishable by six months' imprisonment.

Accordingly, the committee requests your advice as to:

- **why it was considered necessary and appropriate to modify the hawking provision set out in the Corporations Act via delegated legislation, rather than primary legislation, noting that the provision modified is a criminal offence punishable by six months' imprisonment; and**
- **whether there is any intention to amend the Corporations Act to incorporate the modifications set out in the instrument and, if so, when this is likely to occur.**

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 **12 March 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



27 February 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; rezana.berman@health.gov.au

Dear Minister,

National Health (Supplies of out-patient medication) Determination 2019 (No. 2) (PB 110 of 2019) [F2019L01703]

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 seeks your advice about this matter.

Incorporation

Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act and otherwise complies with all legislative requirements. These include the requirements prescribed by the *Legislation Act 2003* (Legislation Act).

Sections 8 and 10 of the instrument appear to incorporate the National Health Reform Agreement (the Agreement), as they rely on the Agreement to determine the scope and application of the law. For example, paragraph 8(2)(b) of the instrument provides that section 8 does not apply to supplies of out-patient medication made by a public hospital that is participating in Pharmaceutical Reform Arrangements 'within the meaning of the National Health Reform Agreement'. Similarly, subsection 10(1) limits the scope of section 10 to the supply of out-patient medication made by a public hospital participating in Pharmaceutical Reform Arrangements 'within the meaning of the National Health Reform Agreement'.

Section 5 of the instrument states that 'National Health Reform Agreement has the meaning given in the *Federal Financial Relations Act 2009*'. That Act defines the Agreement as the National Health Reform Agreement as agreed to by the Council of Australian Governments on 2 August 2011, as amended from time to time.

Subsection 14(2) of the Legislation Act provides that legislative instruments may not incorporate documents other than provisions of an Act, a Commonwealth disallowable legislative instrument or rules of court as in force from time to time, unless a specific provision

in the instrument's authorising Act (or another Act of Parliament) provides that the document can be incorporated in this manner.

The committee is unaware of any specific provision in the *National Health Act 1953*, under which the instrument is made, which provides that documents can be incorporated as in force from time to time. Following initial engagement with the department about this matter, a supplementary explanatory statement was registered to clarify that the section 5 of the instrument does not incorporate the Agreement by reference, nor does the instrument incorporate any other document by reference.

Despite the information contained in the supplementary explanatory statement, the committee remains concerned that, by defining the scope of certain provisions by reference to the definition of 'Pharmaceutical Reform Arrangements' in the Agreement, paragraph 8(2)(b) and subsection 10(1) of the instrument incorporate the Agreement as in force from time to time without the legal authority to do so.

In light of these concerns, the committee requests your advice as to whether the instrument could be amended to include the definition of 'pharmaceutical reform arrangements' on the face of the instrument, rather than relying on the definition in the National Health Reform Agreement.

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 **12 March 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



27 February 2020

Senator the Hon Zed Seselja
Assistant Minister for Finance, Charities and Electoral Matters
Parliament House
CANBERRA ACT 2600

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

CC: DLO-amf@finance.gov.au; CommitteeScrutiny@treasury.gov.au

Dear Assistant Minister,

Taxation Administration (Private Ancillary Fund) Guidelines 2019 [F2019L01227]

Thank you for your response of 19 February 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) in relation to the above instrument.

The committee considered your response at its private meeting on 26 February 2020. The committee is concerned that the response did not address the specific questions which the committee asked in its correspondence of 6 February 2020.

Accordingly, the committee has resolved not to withdraw the notice of motion to disallow the instrument previously placed by the committee. The committee has also resolved to seek a meeting with senior officials of your department, to provide committee members with an opportunity to be briefed on the relevant issues and ask questions relating to its scrutiny concerns. In this regard, I request that the relevant officials please liaise with the committee secretariat to arrange a mutually convenient time to meet in the week beginning **Monday 2 March 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



27 February 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,

**Financial Sector (Collection of Data) (reporting standard) determination No. 30 of 2019
[F2019L01196]**

Thank you for your response of 19 February 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 26 February 2020. On the basis of your advice, the committee has concluded its examination of the instrument.

In the future, the committee expects that where similar instruments do not provide for the independent merits review of discretionary decisions, the explanatory statements to such instruments should provide a comprehensive justification for the exclusion of such review.

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



27 February 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.Terrill@infrastructure.gov.au

Dear Assistant Minister,

**Jervis Bay Territory Rural Fires Amendment (Miscellaneous Measures) Rules 2019
[F2019L01494]**

Thank you for your response of 18 February 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 26 February 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



AUSTRALIAN
SENATE

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

Parliament House, Canberra ACT 2600
02 6277 3066 | sdlc.sen@aph.gov.au
www.aph.gov.au/senate_sdlc

27 February 2020

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: Josh.Frydenberg.MP@aph.gov.au

CC: tsrdlos@aph.gov.au; committeescrutiny@treasury.gov.au;
chris.reside@treasury.gov.au

Dear Treasurer,

**Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration)
Regulations 2019 [F2019L01526]**

Thank you for your response of 20 February 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 26 February 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