

Monitor 7 of 2020 - Committee correspondence

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11 June 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 Richard Colbeck, Minister for Aged Care and
Senior Australians, Minister.Colbeck.DLO@health.gov.au

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

Senator the Hon Anne Ruston, Minister for 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.

Since 4 December 2019, standing order 23(4) has required the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate. These may include instruments which contain significant policy matters or significant elements of a regulatory scheme, instruments which amend primary legislation, and instruments which have a significant impact on personal rights and liberties.

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

Instrument	Purpose	Last day to lodge disallowance notice
Aged Care Legislation Amendment (Subsidies—COVID-19 Support) Instrument 2020 [F2020L00615]	To prescribe a COVID-19 support supplement which is payable to approved providers of residential care and flexible care. The \$205 million funding package is aimed at covering the additional costs of caring for the health and wellbeing of aged care recipients during the COVID-19 pandemic.	25 August 2020
ASIC Corporations (Deferral of Design and Distribution Obligations) Instrument 2020/486 [F2020L00618]	To defer the commencement of new design and distribution obligations by six months so that they will now apply from 5 October 2021 (rather than 5 April 2021). The design and distribution obligations are intended to assist consumers to obtain appropriate financial products by requiring issuers and distributors to have a customer-centric approach to designing, marketing and distributing financial products.	25 August 2020
ASIC Credit (Deferral of Mortgage Broker Obligations) Instrument 2020/487 [F2020L00623]	To defer the commencement of new mortgage broker obligations by six months so that they will now apply from 1 January 2021 (rather than 1 July 2020). The new mortgage broker obligations include a duty to act in the best interests of the consumer in relation to credit assistance, a requirement to prioritise consumers' interests when providing credit assistance, and a ban on conflicted remuneration.	25 August 2020
Coronavirus Economic Response Package (Deferral of Sunsetting—Income Management and Cashless Welfare Arrangements) Determination 2020 [F2020L00572]	To extend the end date for the Cashless Debit Card trial in all existing sites and income management in the Cape York region from 30 June 2020 to 31 December 2020.	25 August 2020
Coronavirus Economic Response Package (Payments and Benefits) Alternative Decline in Turnover Test Rules 2020 [F2020L00461]	To give certain entities or classes of entities an alternative basis on which they may satisfy the decline in turnover test to be eligible for JobKeeper payments.	12 August 2020
Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 2) 2020 [F2020L00546]	To amend the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 to adjust some elements of the scheme, and expand access to the scheme in some areas.	12 August 2020

Instrument	Purpose	Last day to lodge disallowance notice
Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 3) 2020 [F2020L00605]	To amend the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 to provide that the 6 month turnover test period applying to universities is limited to only those universities that are Table A providers within the meaning of <i>Higher Education Support Act 2003</i> . Table B providers will be permitted to assess their eligibility based on a monthly or quarterly test period similar to other entities.	25 August 2020
Corporations (Coronavirus Economic Response) Determination (No. 2) 2020 [F2020L00611]	To modify the operation of certain civil penalty provisions in the <i>Corporations Act 2001</i> to establish a temporary test based on a disclosing entity or its officers' knowledge, recklessness or negligence with respect to whether certain information would have a material effect on the price or value of its enhanced disclosure securities and therefore should be disclosed.	25 August 2020
Social Security (Coronavirus Economic Response—2020 Measures No. 4) Determination 2020 [F2020L00474]	To modify the <i>Social Security Act 1991</i> in relation to the partner income reduction rate for jobseeker payment by reducing it from 60 per cent to 25 per cent of the person's partner income excess.	12 August 2020
Social Security (Coronavirus Economic Response—2020 Measures No. 5) Determination 2020 [F2020L00509]	To modify the <i>Social Security (Administration) Act 1999</i> to facilitate the provision of information (including tax file number information) by the Commissioner of Taxation to the Secretary of the Department of Social Services in matters related to the administration of the JobKeeper payment.	12 August 2020
Social Security (Coronavirus Economic Response—2020 Measures No. 6) Determination 2020 [F2020L00475]	To provide for recipients of widow allowance, partner allowance and special benefit under the <i>Social Security Act 1991</i> to receive the COVID-19 supplement from 27 April 2020.	12 August 2020
Social Security (Coronavirus Economic Response—2020 Measures No. 7) Determination 2020 [F2020L00545]	To vary the <i>Social Security Act 1991</i> to remove the liquid assets test waiting period and seasonal work preclusion period for social security claimants who had already served a part of such period prior to 25 March 2020, and for people who claim during certain specified periods.	12 August 2020

Should your committee decide to further examine any of these instruments, I note that the table above also identifies the last day (based on the current sitting pattern) for lodging a disallowance notice in relation to each instrument in the Senate.

The text of the instruments, and the accompanying explanatory material for each instrument, is 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



11 June 2020

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

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

Since 4 December 2019, standing order 23(4) has required the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate. These may include instruments which contain significant policy matters or significant elements of a regulatory scheme, instruments which amend primary legislation, and instruments which have a significant impact on personal rights and liberties.

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

Instrument	Purpose	Last day to lodge disallowance notice
Aged Care Legislation Amendment (Subsidies—COVID-19 Support) Instrument 2020 [F2020L00615]	To prescribe a COVID-19 support supplement which is payable to approved providers of residential care and flexible care. The \$205 million funding package is aimed at covering the additional costs of caring for the health and wellbeing of aged care recipients during the COVID-19 pandemic.	25 August 2020

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Coronavirus Economic Response Package (Deferral of Sunsetting—Income Management and Cashless Welfare Arrangements) Determination 2020 [F2020L00572]	To extend the end date for the Cashless Debit Card trial in all existing sites and income management in the Cape York region from 30 June 2020 to 31 December 2020.	25 August 2020
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Social Security (Coronavirus Economic Response—2020 Measures No. 6) Determination 2020 [F2020L00475]	To provide for recipients of widow allowance, partner allowance and special benefit under the <i>Social Security Act 1991</i> to receive the COVID-19 supplement from 27 April 2020.	12 August 2020
Social Security (Coronavirus Economic Response—2020 Measures No. 7) Determination 2020 [F2020L00545]	To vary the <i>Social Security Act 1991</i> to remove the liquid assets test waiting period and seasonal work preclusion period for social security claimants who had already served a part of such period prior to 25 March 2020, and for people who claim during certain specified periods.	12 August 2020

Should your committee decide to further examine any of these instruments, I note that the table above also identifies the last day (based on the current sitting pattern) for lodging a disallowance notice in relation to each instrument in the Senate.

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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



11 June 2020

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

via email: economics.sen@aph.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.

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

Instrument	Purpose	Last day to lodge disallowance notice
ASIC Corporations (Deferral of Design and Distribution Obligations) Instrument 2020/486 [F2020L00618]	To defer the commencement of new design and distribution obligations by six months so that they will now apply from 5 October 2021 (rather than 5 April 2021). The design and distribution obligations are intended to assist consumers to obtain appropriate financial products by requiring issuers and distributors to have a customer-centric approach to designing, marketing and distributing financial products.	25 August 2020

Instrument	Purpose	Last day to lodge disallowance notice
ASIC Credit (Deferral of Mortgage Broker Obligations) Instrument 2020/487 [F2020L00623]	To defer the commencement of new mortgage broker obligations by six months so that they will now apply from 1 January 2021 (rather than 1 July 2020). The new mortgage broker obligations include a duty to act in the best interests of the consumer in relation to credit assistance, a requirement to prioritise consumers' interests when providing credit assistance, and a ban on conflicted remuneration.	25 August 2020
Coronavirus Economic Response Package (Payments and Benefits) Alternative Decline in Turnover Test Rules 2020 [F2020L00461]	To give certain entities or classes of entities an alternative basis on which they may satisfy the decline in turnover test to be eligible for JobKeeper payments.	12 August 2020
Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 2) 2020 [F2020L00546]	To amend the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 to adjust some elements of the scheme, and expand access to the scheme in some areas.	12 August 2020
Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 3) 2020 [F2020L00605]	To amend the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 to provide that the 6 month turnover test period applying to universities is limited to only those universities that are Table A providers within the meaning of <i>Higher Education Support Act 2003</i> . Table B providers will be permitted to assess their eligibility based on a monthly or quarterly test period similar to other entities.	25 August 2020
Corporations (Coronavirus Economic Response) Determination (No. 2) 2020 [F2020L00611]	To modify the operation of certain civil penalty provisions in the <i>Corporations Act 2001</i> to establish a temporary test based on a disclosing entity or its officers' knowledge, recklessness or negligence with respect to whether certain information would have a material effect on the price or value of its enhanced disclosure securities and therefore should be disclosed.	25 August 2020

Should your committee decide to further examine any of these instruments, I note that the table above also identifies the last day (based on the current sitting pattern) for lodging a disallowance notice in relation to each instrument in the Senate.

The text of the instruments, and the accompanying explanatory material for each instrument, is published on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

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Yours sincerely

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



11 June 2020

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

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

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

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

Department of Finance, FFSPRegs@finance.gov.au

Dear Chair,

Legislative instruments specifying Commonwealth expenditure

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

Since 4 December 2019, standing order 23(4) has required the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate.

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

Instrument	Grant/Program	Amount	Description
Industry Research and Development (Access to Bushfire Construction Standards Program) Instrument 2020 [F2020L00476]	Access to Bushfire Construction Standards Program	Up to \$132,000 in 2019-20	Funding will be provided to Standards Australia to ensure that Australian Standard AS 3959:2018, <i>Construction of buildings in bushfire-prone areas</i> , is made available to the public online and free of charge.
Industry Research and Development (Maker Projects—Community STEM Engagement Grants Program) Instrument 2020 [F2020L00554]	Community STEM Engagement Grants Program	Up to \$1 million per year from 2019-20	Funding will be provided to make grants to organisations to deliver initiatives to improve the skills of people under 18 years of age in the areas of science, technology, engineering and mathematics, including through hands-on learning.
Industry Research and Development (Strengthening Business—Business Advice for Recovery and Resilience Program) Instrument 2020 [F2020L00573]	Business Advice for Recovery and Resilience Program	\$12.8 million	Funding will be provided for the engagement of 21 new business advisers to work with community recovery hubs and mobile services, to provide business advice to businesses affected by the bushfire emergency.

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.

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



11 June 2020

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

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

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

Senator the Hon Michaelia Cash, Minister for Employment,
Skills, Small and Family Business, minister.cash@jobs.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 instruments listed in the table below, in combination with its enabling Act, authorises Commonwealth expenditure on the National Communications Campaign to Support Small Business 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 (National Communications Campaign to Support Small Business Program) Instrument 2020 [F2020L00607]	National Communications Campaign to Support Small Business Program	\$5 million in 2019-20 and 2020-21	Funding will be provided to an appropriate industry association to develop and implement a national communication campaign to support small businesses through the impacts of the COVID-19 crisis by encouraging Australians to buy and spend locally.

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.

Further details about the instrument are published on the Federal Register of Legislation at <https://www.legislation.gov.au/Details/F2020L00607>.

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



11 June 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

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 Hinkler Regional Deal Agricultural Technology Facility 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 (Hinkler Regional Deal Agricultural Technology Facility Program) Instrument 2020 [F2020L00472]	Hinkler Regional Deal Agricultural Technology Facility Program	Up to \$5 million in 2019-20	Funding will be provided to Central Queensland University to establish an agricultural technology facility in the Bundaberg local government area, and for such a facility to undertake activities including conducting academic research, gathering data, supporting commercial innovation, and applying technological and other methods to improve agricultural productivity for farms in the area.

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 that (based on the current sitting pattern) the time for lodging a disallowance notice expires on 12 August 2020.

Further details about the instruments are published on the Federal Register of Legislation at <https://www.legislation.gov.au/Details/F2020L00472>.

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



11 June 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: tsrdlos@aph.gov.au; committeescrutiny@treasury.gov.au;
Shelby.Brinkley@treasury.gov.au

Dear Assistant Minister,

ASIC Corporations (Deferral of Design and Distribution Obligations) Instrument 2020/486 [F2020L00618]

ASIC Credit (Deferral of Mortgage Broker Obligations) Instrument 2020/487 [F2020L00623]

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

Matters more appropriate for parliamentary enactment

Parliamentary oversight

Senate standing order 23(3)(j) requires the committee to examine each legislative instrument as to whether it contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted by primary rather than delegated 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.

The instruments were made under subsection 994L(2) of the *Corporations Act 2001* (Corporations Act) and subsection 163(3) of the *National Consumer Credit Protection Act 2009* (NCCP Act). Those provisions, respectively, allow ASIC to exempt persons and entities from the operation of specified provisions of the Corporations Act and the NCCP Act.

The ASIC Corporations (Deferral of Design and Distribution Obligations) Instrument 2020/486 exempts regulated persons from all provisions of Part 7.8A of the Corporations Act for the period from 5 April 2021 to 4 October 2021. Part 7.8A of the Corporations Act establishes the design and distribution obligations (DDO) regime which is intended to assist consumers to obtain appropriate financial products by requiring issuers and distributors to have a customer-centric approach to designing, marketing and distributing financial products.

The ASIC Credit (Deferral of Mortgage Broker Obligations) Instrument 2020/487 exempts a broad range of persons and entities from Divisions 2 and 4 of Part 3-5A of the *National Consumer Credit Protection Act 2009* (NCCP Act) for the period from 1 July 2020 to 1 January 2021. Part 3-5A of the NCCP Act sets out a series of new mortgage broker obligations, including a duty to act in the best interests of the consumer in relation to credit assistance, a requirement to prioritise consumers' interests when providing credit assistance, and a ban on conflicted remuneration.

By creating these exemptions from the DDO and mortgage broker obligations regimes, the instruments effectively defer the commencement of those regimes for six months. The committee's longstanding scrutiny view is that such significant changes to the operation of a regulatory regime are more appropriately enacted via primary legislation, unless the explanatory statement provides a sound justification for using delegated legislation. This is to ensure appropriate levels of parliamentary oversight.

In this instance, the explanatory statement explains that the subject matter and policy implemented by the instruments is more appropriate for a legislative instrument than primary legislation. In this respect, it explains that the instruments use powers given to ASIC by the Parliament, which allow ASIC to exempt persons from specified provisions in the NCCP Act and Corporations Act. The explanatory statement also states that a timely response is important to provide certainty to industry about the deferral of the DDO and broker obligation regimes before the scheduled commencement of those reforms.

The committee appreciates that COVID-19 is creating unprecedented challenges; however, the committee is concerned that using delegated legislation to effectively defer the commencement of the DDO and mortgage broker obligations regimes limits parliamentary oversight. In this respect, the committee notes that the recently enacted primary legislation establishing the new regimes specified the date that the Parliament intended the regimes to commence. The committee therefore considers that the deferral of the regimes should also be enacted via primary legislation.

Further, from a scrutiny perspective, the committee does not consider administrative certainty to be sufficient justification for using delegated legislation to defer the operation of the DDO and mortgage broker obligations regimes. Moreover, the committee notes that a greater level of certainty could be provided by the deferral of the regimes through the enactment of primary legislation. The committee therefore considers that it would be more appropriate to defer the operation of the regimes by amending commencement dates in the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* and the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020*. In this regard, the committee notes that other policy measures in response to COVID-19 have been

appropriately enacted via primary legislation, and that the relevant bills have passed the Parliament within a relatively short amount of time.

With regard to the matters outlined above, the committee requests your detailed advice as to:

- **why it was considered necessary and appropriate to use delegated legislation, rather than primary legislation, to defer the commencement of the new design and distribution obligations regime and mortgage broker obligations regime; and**
- **the appropriateness of amending the commencement dates of relevant provisions of the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* and the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020*, to give effect to the measures set out in the instruments in primary legislation.**

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 **25 June 2020**.

The committee also considers that the instruments raise 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 the instruments to the attention of the Senate and relevant Senate committees.

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



11 June 2020

The Hon Paul Fletcher MP
Minister for Communications, Cyber Safety and the Arts
Parliament House
CANBERRA ACT 2600

Via email: Paul.Fletcher.MP@aph.gov.au

CC: dlo@communications.gov.au

Dear Minister,

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

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.

Adequacy of consultation

Senate standing order 23(3)(d) requires the committee to consider whether those likely to be affected by an instrument were adequately consulted in relation to it. This principle is informed by subsection 17(2) of the *Legislation Act 2003*, which provides that, in assessing whether appropriate consultation has taken place in making the instrument, the rule-maker may have regard to the extent to which persons likely to be affected by the instrument had an adequate opportunity to comment on its proposed content.

The instrument amends the Australian Postal Corporation (Performance Standards) Regulations 2019 to implement a number of temporary changes to performance standards for the delivery of letters, and to temporarily exempt Australia Post from its retail outlet obligations. These changes aim to respond to the challenges faced by Australia Post during the COVID-19 pandemic.

The explanatory statement to the instrument notes that Australia Post was consulted in the development of the instrument. However, the committee is concerned that the explanatory statement does not indicate whether consultation was also undertaken with other persons and entities likely to be affected by the measures, including employees of

Australia Post and their representatives, and persons and entities that regularly utilise postal services.

The committee would therefore appreciate your detailed advice as to:

- **whether persons and entities likely to be affected by the measures in the instrument, including employees of Australia Post and their representatives, and persons and entities that regularly utilise postal services, were consulted before the instrument was made; or**
- **if not, why such persons and entities were not consulted.**

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 **25 June 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



11 June 2020

Senator the Hon Anne Ruston
Minister for Social Services
Parliament House
Canberra 2600 ACT

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]

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.

Matters more appropriate for parliamentary enactment

Parliamentary oversight

Senate standing order 23(3)(j) requires the committee to examine each legislative instrument as to whether it contains matters more appropriate for parliamentary enactment (matters that should be included in primary rather than delegated legislation). In addition, 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 where an instrument may limit parliamentary oversight.

Section 123UF and Part 3D of the *Social Security (Administration) Act 1999* (Administration Act) respectively establish the Cape York Welfare Reform Income Management measure (Cape York measure) and the Cashless Debit Card (CDC) trials. Persons subject to these income management arrangements may have social security benefits 'quarantined', with quarantined funds restricted to the purchase of particular items. Under the Administration Act, the arrangements were due to sunset on 30 June 2020. However the instrument provides that the arrangements now continue to operate until 31 December 2020.

The measures in the instrument constitute a significant extension of the existing income management arrangements. The committee's longstanding scrutiny view is that such significant measures should be enacted via primary legislation to ensure appropriate levels of parliamentary oversight, unless the explanatory statement provides a sound justification for using delegated legislation.

The explanatory statement to the instrument notes that the Social Security (Administration) Amendment (Income Management to Cashless Debit Card) Bill 2019 (2019 Bill)—which is currently before the Parliament—proposes to extend the operation of existing CDC trial sites for a further year, and to transition persons subject to the Cape York measure to the CDC. However, due to the revision of parliamentary sittings in response to COVID-19, the 2019 Bill will not pass the Parliament before the expiry of the existing income management arrangements. The explanatory statement suggests that the instrument is intended to avoid circumstances where a participant ceases to be subject to income management while awaiting the passage of primary legislation.

The committee appreciates that COVID-19 is creating unprecedented challenges; however, the committee is concerned that using delegated legislation to extend the operation of the CDC trial and the Cape York measure limits parliamentary consideration of these income management arrangements, including whether the arrangements are functioning effectively. From a scrutiny perspective, the committee does not consider administrative certainty to be sufficient justification for extending the operation of the income management regime by delegated legislation. In this respect, the committee notes that the previous extension of the CDC trials and the Cape York measure was enacted by primary legislation, and that other economic and social policy measures in response to COVID-19 have been appropriately enacted through primary legislation.

In addition, the Parliament has recently agreed to a revised sitting calendar, which provides for a greater number of sitting days than was envisaged at the time the instrument was made on 17 April 2020. In light of this, it is not clear that the Parliament would lack the time to debate and, if appropriate, pass primary legislation which extends or modifies the operation of income management arrangements before 30 June 2020, or at least by the end of August 2020. Consequently, it is not clear why it is necessary for the instrument to extend the operation of the CDC trials and the Cape York measure to 31 December 2020.

Finally, the committee notes that the Senate Standing Committee for the Scrutiny of Bills, in its consideration of the provision under which this instrument was made, noted that sunset clauses in primary legislation are important safeguards which facilitate increased parliamentary oversight of extraordinary measures. That committee emphasised that such clauses should not be extended without a thorough review and the presentation of compelling evidence to the Parliament.

With regard to the matters outlined above, the committee requests your detailed advice as to:

- **why it was considered necessary and appropriate to extend the operation of the Cashless Debit Card trials and the Cape York Welfare Reform Income Management measure by delegated legislation, rather than primary legislation;**

- **why it was considered necessary and appropriate to extend the operation of those income management arrangements for the full six months permitted under the *Coronavirus Economic Response Package Omnibus Act 2020*, as opposed to a shorter period; and**
- **the appropriateness of bringing forward consideration of the Social Security (Administration) Amendment (Income Management to Cashless Debit Card) Bill 2019 to provide the Parliament with the opportunity to consider and scrutinise the extension of the income management arrangements at the earliest available opportunity.**

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 **25 June 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



11 June 2020

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

Via email: Minister@education.gov.au

CC: dlo@education.gov.au

Dear Minister,

Tertiary Education Quality and Standards Agency Determination of Fees No. 1 of 2020 [F2020L00549]

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

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 and interests.

Schedule A of the instrument determines the fees payable for certain assessment activities conducted by, and applications made to, the Tertiary Education Quality and Standards Agency (TEQSA). Schedule B permits TEQSA to waive or refund all or part of a fee set out in Schedule A where specified circumstances exist.

A decision by TEQSA to waive or refund all or part of a fee appears to involve at least an element of discretion, and has the potential to affect the rights and interests of higher education providers. Consequently, such decisions appear to be suitable for independent merits review. However, the committee understands that the decisions are not reviewable.

In relation to decisions under section 1 of Schedule B, the committee understands that any discretion afforded to TEQSA to refuse to waive all or part of a fee is rarely used. The committee also understands that TEQSA has waived the relevant fee in most if not all instances where the discretion has been enlivened.

The committee understands that section 2 of Schedule B is a new provision which is designed to give effect to the Australian Government's higher education relief measure, which provides for TEQSA to waive or refund fees for all applications by registered providers that fall due between 1 January 2020 and 30 June 2021. The committee also understands that TEQSA has publicly stated that all fees payable by registered providers will be waived, and that the discretion to allow refunds to be refused will only be enlivened in the narrow range of circumstances where providing refunds would be inconsistent with the policy authority for the instrument (for example, where an applicant seeks to take advantage of the fee relief measure by bringing forward applications long before they are due).

The committee appreciates that, in practice, there may be limited circumstances in which it would be necessary to provide for independent merits review in relation to a decision by the TEQSA to waive or refund a fee. However, from a scrutiny perspective, the committee remains concerned that there may still be circumstances in which a person or entity may wish to have an adverse decision reviewed. The committee considers that it would be appropriate to provide for merits review in these circumstances.

Further, where an instrument excludes or fails to provide for independent merits review, the committee expects the explanatory statement to identify established grounds for excluding review, by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merit review?* The committee notes that no such grounds are identified in the explanatory statement to the instrument.

With regard to the matters outlined above, the committee requests your detailed advice as to:

- **the appropriateness of amending the instrument to provide that decisions by the Tertiary Education Quality and Standards Agency (TEQSA) to waive or refund fees are subject to independent merits review; and**
- **if it is considered that the decisions are not appropriate for independent merits review, the characteristics of the decisions that would justify their exclusion from merits review, by reference to established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?***

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 **25 June 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



11 June 2020

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

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

CC: tsrdlos@treasury.gov.au; Committeescrutiny@treasury.gov.au;
chris.reside@treasury.gov.au

Dear Treasurer,

**Corporations (Coronavirus Economic Response) Determination (No. 2) 2020
[F2020L00611]**

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 has resolved to draw your attention to the following matter.

Matters more appropriate for parliamentary enactment

Senate standing order 23(3)(j) requires the committee to examine each legislative instrument as to whether it contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted by primary rather than delegated legislation).

The instrument modifies the operation of the continuous disclosure provisions in sections 674, 675 and 677 of the *Corporations Act 2001* (Corporations Act). These provisions provide that information must be disclosed to financial markets or to ASIC if a reasonable person would expect the information to have a material effect on the price or value of securities. The modifications in the instrument replace this reasonable person test with a test based on the whether the relevant entity or its officers had knowledge of, or were reckless or negligent as to, whether the information would have a material effect on the price or value of securities. Breach of the continuous disclosure obligations attracts both civil and criminal penalties. However, the modifications made by the instrument only affect the operation of the civil penalty provisions. The modifications made by the instrument will remain in force for six months.

The instrument was made under section 1362A of the Corporations Act, which was inserted by item 1 of Schedule 8 to the *Coronavirus Economic Response Package Omnibus Act 2020*. Section 1362A provides that the Treasurer may, by disallowable legislative instrument, temporarily modify specified provisions of the Corporations Act. The Treasurer must first be satisfied that it would not be reasonable to expect persons to comply with the relevant provisions because of the impact of COVID-19.

Section 1362A of the Corporations Act appears to be a Henry VIII clause, as it enables delegated legislation to modify the operation of legislation which has been passed by the Parliament. The committee notes that the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) commented on section 1362A when the Coronavirus Economic Response Package Omnibus Bill 2020 was before the Parliament. In doing so, the Scrutiny of Bills committee emphasised that there are significant scrutiny concerns with Henry VIII clauses, as such clauses impact on levels of parliamentary scrutiny and may subvert the appropriate relationship between Parliament and the Executive.

This committee shares the views of the Scrutiny of Bills committee regarding Henry VIII clauses, and takes this opportunity to draw your attention to its concerns regarding the modification of primary legislation by delegated legislation.

The committee also considers that the instruments raise 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 the instruments to the attention of the Senate and relevant Senate committees.

Finally, 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