

Monitor 9 of 2020 - Committee correspondence

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27 August 2020

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

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

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

Dear Attorney-General,

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

Thank you for your joint response of 18 August 2020 with the Treasurer and Minister for Agriculture, Drought and Emergency Management to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered the response at its private meeting on 26 August 2020. The committee's unresolved scrutiny concerns in relation to this instrument are detailed in Chapter 1 of its *Delegated Legislation Monitor 9 of 2020*, available on the committee's website at:

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

In summary, in the absence of an undertaking to amend the instrument, the committee remains concerned that the civil penalty provisions in section 11 of the instrument lack the clarity necessary to enable persons and entities to understand their obligations and the consequences of non-compliance. In particular, the committee considers that it is important for farmers on the ground to be able to understand their rights and obligations by reading the text on the face of the instrument, without the need to also understand nebulous common law concepts of good faith. Whilst the response identifies a number of policy justifications for this approach, the Senate requires this committee to identify, and where necessary report on such technical scrutiny concerns in performing its technical legislative scrutiny role under standing order 23.

More broadly, the committee considers that the examples provided in the response of good faith obligations in other Commonwealth laws raise systemic concerns about the pursuit of regulatory flexibility via the imposition of broadly drafted good faith provisions at the expense of legal clarity and certainty. Such concerns extend beyond the scope of this committee to the extent that they relate to primary legislation and matters of policy, rather than technical legislative scrutiny.

Accordingly, noting that the instrument raises complex, systemic issues relevant to both delegated and primary legislation, the committee requests that you refer the codification of good faith obligations in Commonwealth legislation to the Australian Law Reform Commission for inquiry, with particular reference to:

- **the importance of balancing legal clarity and certainty with regulatory flexibility; and**
- **how potential divergence between common law concepts of good faith and concepts used in statute could be resolved without compromising legal clarity and certainty.**

Your response will assist the committee in determining whether to withdraw the notice of motion to disallow the instrument, placed by the Chair on 14 May 2020, which must be considered by the Senate by 3 September 2020.

Noting this, the committee would appreciate your response by close of business **31 August 2020**.

Finally, in the interests of transparency, I note that this correspondence and your response will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns about this matter, 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**



26 August 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 29 June 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee), in relation to the above instrument, and for your willingness to engage constructively with the committee on this matter.

The committee considered your response at its private meeting on 26 August 2020. Whilst noting your advice, the committee remains concerned that the instrument raises significant scrutiny concerns that should be brought to the attention of the Senate and has resolved to seek your further urgent advice.

Modification of primary legislation

Parliamentary oversight – deferral of sunsetting

The committee welcomes your advice that the Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019 will be scheduled for consideration as early as is practical. However, the committee notes that the bill has not yet been scheduled for debate.

The committee acknowledges the unique circumstances of the COVID 19 pandemic and your advice that the extension of the sunset dates for the income management and cashless debit card trial measures by delegated legislation was necessary to provide certainty to stakeholders and participants at the time the instrument was made. However, noting the Senate's return to a more regular sitting schedule since that time, the committee considers that there is no longer a clear justification for this significant matter to be included in delegated legislation. Certainty can now be provided through the consideration and passage (or otherwise) of the primary legislation.

Extensions of the income management and cashless debit card trial measures have previously been made through primary, rather than delegated, legislation. Noting the significance of these measures, the committee strongly considers that such an approach is necessary and appropriate.

The committee therefore strongly considers that it is necessary and appropriate for the Parliament to be provided with an opportunity to consider and scrutinise the extension of the end dates for these measures at the earliest available opportunity, rather than leaving this significant matter to be determined in delegated legislation for an extended period of time.

Accordingly, the committee requests your urgent advice as to whether the Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019 can be scheduled for debate in the Senate during the current sitting fortnight (that is, by 3 September 2020).

Please note that, if the bill is not listed for debate in the next sitting week, the committee has resolved to give a notice of motion to disallow the instrument on 31 August 2020 for consideration and debate in the Senate on 3 September 2020.

Full details of the committee's scrutiny concerns will be detailed in Chapter 1 of its *Delegated Legislation Monitor 9 of 2020*, which will be made available on the committee's website after tabling on 27 August 2020 at:

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

The committee intends to consider and report on this urgent matter in its next Delegated Legislation Monitor, which is due to be presented to the Senate on 2 September 2020. The committee would therefore appreciate your response by **31 August 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 August 2020

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Dear Treasurer,

**Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020
[F2020L00435]**

Thank you for your response of 26 June 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 August 2020. Whilst noting your advice, the committee remains concerned that the above instrument raises significant scrutiny concerns that should be brought to the attention of the Senate.

The committee's scrutiny concerns are detailed in Chapter 1 of its *Delegated Legislation Monitor 9 of 2020*, available on the committee's website at:

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

As set out in the Delegated Legislation Monitor, the committee has recommended that the Senate disallow the instrument and has therefore resolved to give a notice of motion to disallow the instrument on 1 September 2020 for consideration and debate in the Senate 15 sitting days after that date. If there are any further developments in relation to this matter the committee may reconsider its recommendation and will report to the Senate in a future Delegated Legislation Monitor.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the Delegated Legislation Monitor.

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

Yours sincerely,

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



27 August 2020

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

Dear Minister,

**National Health (Take Home Naloxone Pilot) Special Arrangement 2019 (PB 97 of 2019)
[F2019L01542]**

Thank you for your response of 31 July 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 26 August 2020. On the basis of your response, the committee has concluded its examination of the instrument, and has resolved to withdraw the notice of motion to disallow the instrument following the registration of the amending instrument on the Federal Register of Legislation. The committee's consideration of the instrument is detailed in Chapter 1 of its *Delegated Legislation Monitor 9 of 2020*, available on the committee's website at:

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

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

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

Yours sincerely,

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



27 August 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,

**Radiocommunications (Receiver Licence Tax) Amendment Determination 2020 (No. 2)
[F2020L00653]**

**Radiocommunications (Transmitter Licence Tax) Amendment Determination 2020 (No. 2)
[F2020L00652]**

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

Levy of taxation in delegated legislation

Matters of interest to the Senate

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary legislation rather than delegated legislation). In addition, Senate standing order 23(4) requires the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest.

The above instruments lower a number of receiver licence and transmitter licence taxes by 0.8%. 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 the rate of a tax.

As this issue is systemic in nature, the committee has resolved to draw these instruments to the attention of the Senate in its *Delegated Legislation Monitor 9 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



27 August 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 Anne Ruston, Minister for Families and Social Services,
dlos@dss.gov.au

Dear Chair

Social Security (Coronavirus Economic Response—Coronavirus Economic Response Measures No. 10) Determination 2020 [F2020L00690]

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 instrument appears to contain significant policy matters relating to the Australian Government's response to the COVID-19 pandemic, the committee has determined that the instrument engages standing order 23(4) and accordingly has resolved to draw the instrument to the attention of your committee:

| Instrument | Purpose | Last day to lodge disallowance notice |
|---|--|---------------------------------------|
| Social Security (Coronavirus Economic Response—Coronavirus Economic Response Measures No. 10) Determination 2020 [F2020L00690] | To temporarily modify the <i>Social Security Act 1991</i> to implement measures related to carer payment and carer allowance, former recipients of wife pension, mobility allowance, and pension portability, to prevent detriment to social security recipients resulting from the impacts of COVID-19. | 9 November 2020 |

I note that under standing order 25(2)(a) your committee is empowered to conduct own-motion inquiries into legislative instruments which relate to the portfolios allocated to your committee, although there is no requirement to do so. Should your committee decide to further examine the above instrument, I note that the table above also identifies the last day (based on the current sitting pattern) for lodging a disallowance notice in the Senate.

Further details about the instrument are published on the Federal Register of Legislation at <https://www.legislation.gov.au/Details/F2020L00690>.

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 August 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

Social Security (Coronavirus Economic Response—Coronavirus Economic Response Measures No. 10) Determination 2020 [F2020L00690]

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 instrument appears to contain significant policy matters relating to the Australian Government's response to the COVID-19 pandemic, the committee has determined that the instrument engages standing order 23(4) and accordingly has resolved to draw the instrument to the attention of your committee:

| Instrument | Purpose | Last day to lodge disallowance notice |
|---|--|---------------------------------------|
| Social Security (Coronavirus Economic Response—Coronavirus Economic Response Measures No. 10) Determination 2020 [F2020L00690] | To temporarily modify the <i>Social Security Act 1991</i> to implement measures related to carer payment and carer allowance, former recipients of wife pension, mobility allowance, and pension portability, to prevent detriment to social security recipients resulting from the impacts of COVID-19. | 9 November 2020 |

I note that under standing order 25(2)(a) your committee is empowered to conduct own-motion inquiries into legislative instruments which relate to the portfolios allocated to your committee, although there is no requirement to do so. Should your committee decide to further examine the above instrument, I note that the table above also identifies the last day (based on the current sitting pattern) for lodging a disallowance notice in the Senate.

Further details about the instrument are published on the Federal Register of Legislation at <https://www.legislation.gov.au/Details/F2020L00690>.

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 August 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 David Littleproud MP, Minister for Agriculture, Drought and
Emergency Management, DLO-MO@agriculture.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 instruments listed in the table below, in combination with their enabling Act, authorise the Commonwealth to spend public money on the identified grants or programs. The committee considers that the scrutiny of such instruments is an essential aspect of parliamentary scrutiny and control of Commonwealth expenditure. Noting this, the committee has determined that the instruments listed

below engage standing order 23(4), and accordingly has resolved to draw them to the attention of your committee:

| Instrument | Grant/Program | Amount | Description |
|--|---|---|---|
| Financial Framework (Supplementary Powers) Amendment (Agriculture, Water and the Environment Measures No. 3) Regulations 2020 [F2020L00657] | Australia-China Agricultural Regulatory Cooperation | \$4.7 million over four years from 2019-20 | Funding will be provided to support: <ul style="list-style-type: none">• collaborative agricultural research programs;• collaboration and engagement on biosecurity and food safety;• bilateral meetings and scientific exchange;• the hosting of international standards meetings; and• cooperation to address non-tariff measures affecting trade in agricultural products. |
| Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Regional Development and Communications Measures No. 4) Regulations 2020 [F2020L00658] | Grant to QAL Finance Pty Ltd | Up to \$8.4 million over two years from 2020-21 | Funding will be provided to QAL Finance Pty Ltd to contribute to the costs of re-establishing border services as part of the redevelopment of the terminal at Gold Coast Airport. |

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 instruments, I note that (based on the current sitting pattern) the time for lodging a disallowance notice for both instruments expires on 6 October 2020.

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



27 August 2020

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

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

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

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

Department of Finance, FFSPRegs@finance.gov.au

Dear Chair,

Legislative instruments specifying Commonwealth expenditure

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

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

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

| Instrument | Grant/Program | Amount | Description |
|--|--|--|--|
| Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Regional Development and Communications Measures No. 4) Regulations 2020 [F2020L00658] | Public Interest News Gathering Program | Up to \$50 million over two years from 2019-20 | Funding will be provided to or for media organisations (including print, digital, radio or television) to support and encourage original, high quality public interest journalism. |

I note that under standing order 25(2)(a) your committee is empowered to conduct own-motion inquiries into legislative instruments which relate to the portfolios allocated to your committee, although there is no requirement to do so. Should your committee decide to further examine the above instrument, I note that (based on the current sitting pattern) the time for lodging a disallowance notice expires on 6 October 2020.

Further details about the instrument are published on the Federal Register of Legislation at <https://www.legislation.gov.au/Details/F2020L00658>.

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 August 2020

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

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

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

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

Department of Finance, FFSPRegs@finance.gov.au

Dear Chair,

Legislative instruments specifying Commonwealth expenditure

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

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

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

| Instrument | Grant/Program | Amount | Description |
|--|---|--|---|
| Financial Framework (Supplementary Powers) Amendment (Health Measures No. 3) Regulations 2020 [F2020L00659] | Perinatal Mental Health and Wellbeing Program | \$43.9 million over seven years from 2018-19 | Funding will be provided to organisations to develop and provide perinatal mental health support, promotion and training and wellbeing peer support. |
| | Perinatal Mental Health Check | Up to \$16 million over three years from 2020-21 | Funding will be provided to establish a national perinatal mental health check, including the delivery of digital perinatal screening infrastructure, training and support for perinatal mental health screening in public hospitals. |
| | Donor Human Milk Bank Service | \$2 million in 2019-20 | Funding will be provided to support the ongoing operation and expansion of a coordinated network of donor human milk banks. |
| | Adult Mental Health Centres | \$93.5 million over four years from 2020-21 | Funding will be provided for the establishment and operation of Adult Mental Health Centres to assist adults seeking help in times of crisis. |

I note that under standing order 25(2)(a) your committee is empowered to conduct own-motion inquiries into legislative instruments which relate to the portfolios allocated to your committee, although there is no requirement to do so. Should your committee decide to further examine the above instrument, I note that (based on the current sitting pattern) the time for lodging a disallowance notice expires on 6 October 2020.

Further details about the instrument are published on the Federal Register of Legislation at <https://www.legislation.gov.au/Details/F2020L00659>.

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 August 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

The Hon Dan Tehan MP, Minister for Education, dlo@education.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 their enabling Acts, authorise the Commonwealth to spend public money on the identified grants or programs. The committee considers that the scrutiny of such instruments is an essential aspect of parliamentary scrutiny and control of Commonwealth expenditure. Noting this, the committee has determined that the instruments listed below engage standing order 23(4), and accordingly has resolved to draw them to the attention of your committee:

| Instrument | Grant/Program | Amount | Description |
|--|---|---|---|
| Financial Framework (Supplementary Powers) Amendment (Education, Skills and Employment Measures No. 3) Regulations 2020 [F2020L00660] | Grant to Anti-Defamation Commission Incorporated—Click Against Hate Program | \$3 million over four years from 2019-20 | Funding will be provided to Anti-Defamation Commission Incorporated to deliver the Click Against Hate program to participating primary and secondary schools, to equip young people with strategies and skills to combat hate experienced online. |
| | Grant to DemODAIRY Foundation Limited—Powell Legacy Fund | \$100,000 in 2019-20 | Funding will be provided for a grant to support the Powell Legacy Fund initiative to provide scholarships to eligible school students. |
| | Phonics Targeted Assistance Program for Disadvantaged Schools | \$2.8 million over two years from 2020-21 | Funding will be provided to assist children to develop phonics and literacy skills through the provision of tailored professional learning resources and placement of curriculum officers or phonics coaches in disadvantaged schools. |
| Industry Research and Development (Empowering Business To Go Digital Program) Instrument 2020 [F2020L00731] | Empowering Businesses To Go Digital Program | One-off grant of \$3 million | Funding will be provided to support a non-government organisation to increase the awareness, and promote the adoption, of digital electronic communications amongst small businesses. |

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 instruments, I note that (based on the current sitting pattern) the time for lodging a disallowance notice for these instruments expires on the following dates:

- Financial Framework (Supplementary Powers) Amendment (Education, Skills and Employment Measures No. 3) Regulations 2020—6 October 2020;
- Industry Research and Development (Empowering Business To Go Digital Program) Instrument 2020—12 November 2020.

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



27 August 2020

Senator the Hon Eric Abetz
Chair
Senate Foreign Affairs and Trade Legislation Committee
Parliament House
CANBERRA ACT 2600

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

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

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

Department of Finance, FFSPRegs@finance.gov.au

Dear Chair,

Legislative instruments specifying Commonwealth expenditure

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

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

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

| Instrument | Grant/Program | Amount | Description |
|---|------------------------------|--|--|
| Financial Framework (Supplementary Powers) Amendment (Foreign Affairs and Trade Measures No. 1) Regulations 2020 [F2020L00661] | Support for the Cook Islands | \$8 million over four years from 2020-21 | Funding will be provided to support the Cook Islands' continued engagement in Australia-led Pacific regional development programs, including the Pacific Agreement on Closer Economic Relations Plus Implementation Package. |

I note that under standing order 25(2)(a) your committee is empowered to conduct own-motion inquiries into legislative instruments which relate to the portfolios allocated to your committee, although there is no requirement to do so. Should your committee decide to further examine the above instrument, I note that (based on the current sitting pattern) the time for lodging a disallowance notice expires on 6 October 2020.

Further details about the instrument are published on the Federal Register of Legislation at <https://www.legislation.gov.au/Details/F2020L00661>.

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 August 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 (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 11 June 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee), in relation to the above instruments, and for your willingness to engage constructively with the committee on this matter.

The committee considered your response at its private meeting on 26 August 2020, and, on the basis of your response, has resolved to seek your further advice about the issues outlined below.

Exemptions from primary legislation

Modification of primary legislation

Parliamentary oversight

Your response indicates that the Australian Securities and Investments Commission (ASIC) has provided a two year transition period for Foreign Financial Service Providers (FFSPs) to transition to the new regulatory framework provided for in the instruments. As such, you have advised that, if the instruments were to cease operation after three years, the majority of FFSPs would have only had one full year of operation in Australia under the new framework. You stated that this may undermine the extensive consultation that was undertaken in the development of the instruments, and will create undue regulatory burden for industry and for ASIC. You further advised that ASIC considers the standard sunsetting period of 10 years to be appropriate for the instruments.

While acknowledging this advice, the committee reiterates its longstanding scrutiny view that exemptions from, or modifications to, the operation of primary legislation should generally be set out on the face of the relevant primary legislation. However, where such matters are nevertheless included in delegated legislation, the relevant instruments should at least be subject to more regular parliamentary oversight than other legislative instruments. In this regard, the committee generally considers that such instruments should cease to operate no more than three years after they commence.

In this instance, in light of your advice, the committee considers that the instruments should be amended to specify that they cease to operate five years after they commence. Amendments to this effect would ensure that the instruments would be able to operate for three years beyond the transitional period.

The committee therefore requests your further advice as to whether the instruments could be amended to specify that they cease to operate five years after they commence.

The committee's expectation is to receive ministerial responses in time for it to consider and report on instruments while they are still subject to disallowance. As the disallowance periods for these instruments expire on 27 August 2020, the committee has resolved to give a notice of motion to disallow the instruments as a precautionary measure to allow additional time for the committee to consider the further information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **10 September 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

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

Thank you for your assistance with this matter.

Yours sincerely,

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



27 August 2020

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

Via email: Christian.Porter.MP@aph.gov.au
CC: attorney@ag.gov.au; dlo@ag.gov.au

Dear Minister,

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

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.

Compliance with the Legislation Act 2003 – consultation

Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it complies with all legislative requirements. This includes the requirements in paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003*, which provide 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 consultation was undertaken.

The Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020 [F2020L00702] (the repeal instrument) repeals amendments made by the Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020 to access periods for employees in relation to variations to enterprise agreements.

The explanatory statement to the repeal instrument does not appear to provide any information about consultation, as required by paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003*.

The committee therefore requests your advice as to how the current explanatory statement for the repeal instrument complies with the requirements of paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003*.

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 **10 September 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

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

Thank you for your assistance with this matter.

Yours sincerely,

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



27 August 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]**

Thank you for your response of 29 June 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 26 August 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



27 August 2020

The Hon Peter Dutton MP
Minister for Home Affairs
Parliament House
CANBERRA ACT 2600

Via email: Peter.Dutton.MP@aph.gov.au
CC: dlo@homeaffairs.gov.au

Dear Minister,

Australian Crime Commission Establishment Regulations 2020 [F2020L00162]

Thank you for your response of 11 June 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 August 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



27 August 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,

Child Care Subsidy Amendment (Coronavirus Response Measures No. 2) Minister's Rules 2020 [F2020L00406]

Thank you for your response of 8 July 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 26 August 2020. On the basis of your advice that the instrument has ceased to have effect, 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



27 August 2020

Senator the Hon Linda Reynolds CSC
Minister for Defence
Parliament House
CANBERRA ACT 2600

Via email: Senator.Reynolds@aph.gov.au
CC: parliamentary.business@defence.gov.au

Dear Minister,

Defence Amendment (2020 Measures No. 1) Regulations 2020 [F2020L00120]

Thank you for your response of 6 July 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 26 August 2020. On the basis of your advice, the committee has concluded its examination of the instrument, and has resolved to withdraw the protective notice of motion to disallow the instrument.

The committee welcomes your undertaking to amend the Defence Regulation 2016 to insert a note to clarify that the common law requirements of procedural fairness continue to apply to termination decisions made under section 24 of the Defence Regulation 2016.

In the interests of transparency, I note that your undertaking will be recorded in the *Delegated Legislation Monitor*, and that this correspondence will be published on the committee's website.

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 August 2020

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

Via email: Christian.Porter.MP@aph.gov.au
CC: attorney@ag.gov.au; dlo@ag.gov.au

Dear Minister,

**Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020
[F2020L00432]**

Thank you for your response of 9 June 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 August 2020. Noting that the instrument has since been repealed, 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**



27 August 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,

**Financial Sector (Collection of Data) (reporting standard) determination No. 3 of 2020
[F2020L00328]**

Thank you for your response of 11 June 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 August 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**



27 August 2020

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

Via email: Dan.Tehan.MP@aph.gov.au
CC: Rob.Mason@dese.gov.au; Amanda.Gilkes@dese.gov.au

Dear Minister,

Higher Education Provider Amendment (Tuition Protection and Other Measures) Guidelines 2019 [F2019L01699]

Thank you for your response of 22 June 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 August 2020. On the basis of your advice, the committee has concluded its examination of the instrument.

The committee welcomes your amendment to the instrument to provide for independent merits review, which addresses the committee's scrutiny concerns. This action has been listed as an implemented undertaking in *Delegated Legislation Monitor 9 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



27 August 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]**

Thank you for your response of 21 July 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 26 August 2020. On the basis of your advice, the committee has concluded its examination of the instrument.

The committee welcomes the Tertiary Education Quality and Standards Agency's amendment to the instrument to provide for independent merits review, which addresses the committee's scrutiny concerns. This action has been listed as an implemented undertaking in *Delegated Legislation Monitor 9 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