



22 January 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au

CC: Senator the Hon Jane Hume, Assistant Minister for Superannuation, Financial Services and Financial Technology, Senator.Hume@aph.gov.au
Committeescrutiny@treasury.gov.au

Dear Treasurer,

ASIC Corporations (Stub Equity in Control Transactions) Instrument 2020/734 [F2020L01199]

Thank you for your response of 16 December 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 22 January 2021 and has resolved to seek your further advice about the issues outlined below.

Modification of primary legislation

Parliamentary oversight

The committee notes your advice that the instrument creates a regulatory environment protecting retail investors of widely held companies, and that it is appropriate for the instrument to apply for as long as possible to provide longer term regulatory certainty. You also advised that the government shares the committee's concerns about sufficient parliamentary oversight and will engage with the Australian Securities and Investments Commission to stress that the duration of instruments which amend primary legislation should have regard to the need for Parliamentary oversight.

While the committee appreciates that you share our views in relation to the importance of parliamentary oversight of these measures, the committee remains concerned that these measures appear to be intended to remain in force for ten years (until the instrument sunsets under the *Legislation Act 2003*). The committee's longstanding view is that provisions which modify or exempt persons or entities from the operation of primary legislation should cease to operate no more than three years after they commence.

As your advice is that the measures should apply as long as possible to ensure regulatory certainty, the committee's view is that these measures may therefore be more appropriate for primary legislation. The committee also reiterates its view that the instrument should be amended to specify that it ceases to operate three years after it commences. If it becomes necessary to extend the operation of these provisions, the committee considers that this should be done by amending the

primary legislation or via a subsequent legislative instrument that is subject to disallowance and parliamentary scrutiny.

In light of the above the committee therefore requests your further advice as to:

- **why it is not considered necessary or appropriate to provide for the instrument to cease after three years of operation to ensure sufficient parliamentary oversight of these measures which modify the operation of primary legislation; and**
- **whether these measures are more appropriate for primary legislation as they are intended to have long-term application.**

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. Noting that the 15th sitting day after the instrument was tabled in the Senate is 2 February 2021, the committee has resolved to give a notice of a motion to disallow the instrument on that day 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 **5 February 2021**.

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



22 January 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au

CC: Senator the Hon Jane Hume, Assistant Minister for Superannuation, Financial Services and Financial Technology, Senator.Hume@aph.gov.au
Committeescrutiny@treasury.gov.au

Dear Treasurer,

ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835 [F2020L01261]

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

Exemption from primary legislation

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be included in primary, rather than delegated, legislation). This may include instruments which provide continuing exemptions to primary legislation.

The instrument exempts credit providers from complying with subsection 16(1) of the National Credit Code in Schedule 1 to the *National Consumer Credit Protection Act 2009* (the Credit Protection Act), preserving the effect of ASIC Class Order [CO 10/1230]. This allows credit providers to give pre-contractual disclosure to consumers in the same electronic manner that applies to other credit disclosure documents.

While the committee welcomes the fact that the instrument will be repealed three years after commencing, the committee generally prefers that exemptions from primary legislation by delegated legislation do not continue in force for such time as to operate as a de facto amendment to the principal Act.

The committee notes that this instrument preserves the effect of ASIC Class Order [CO 10/1230] which commenced 1 January 2011 and sunsetted on 1 October 2020. These exemptions from primary legislation have therefore been enacted by delegated legislation for at least ten years, which will be extended to up to 13 years by this instrument. While the explanatory statement explains that these measures are more appropriate for delegated legislation as they remedy problematic regulations in the National Consumer Credit Protection Regulations 2010, the

committee remains concerned that these longstanding exemptions from primary legislation have not been implemented in primary legislation.

The committee therefore requests your advice as to whether the government intends to pursue the changes to primary legislation necessary to replace the exemptions provided for by this instrument and, if not, why not.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. Noting that the 15th sitting day after the instrument was tabled in the Senate is 2 February 2021, the committee has resolved to give a notice of a motion to disallow the instrument on that day 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 **5 February 2021**.

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



22 January 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au

CC: Senator the Hon Jane Hume, Assistant Minister for Superannuation, Financial Services and Financial Technology, Senator.Hume@aph.gov.au
Committeescrutiny@treasury.gov.au

Dear Treasurer,

ASIC Credit (Notice Requirements for Unlicensed Carried Over Instrument Lenders) Instrument 2020/834 [F2020L01259]

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

Modification to the operation of primary legislation

Significant penalties

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This includes where an instrument modifies or exempts persons or entities from the operation of primary legislation or provides for significant penalties.

The ASIC Credit (Notice Requirements for Unlicensed Carried Over Instrument Lenders) Instrument 2020/834 [F2020L01259] (the instrument) continues the effect of ASIC Class Order [CO 10/381] which sunsetted on 1 October 2020. The instrument provides that Part 3 of Schedule 2 to the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (the Transitional Credit Act) applies in relation to all persons as modified by section 5 of the instrument. This has the effect that carried over instrument lenders must continue to notify the Australian Securities and Investments Commission (ASIC) if they become unlicensed.

The committee has long been concerned with provisions in delegated legislation which modify the operation of primary legislation. The committee therefore expects the explanatory statement to any modification instrument to comprehensively justify the nature and scope of the relevant modifications.

The explanatory statement explains that this modification of the primary legislation is necessary to fix the problematic application of item 39A of Schedule 2 to the Transitional Credit Act as in force on 24 May 2010. Item 39A was repealed as a result of the repeal of the National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010. The explanatory statement notes that this notification obligation in item 39A is still required for ASIC to comply with obligations under section 213 of the Transitional Credit Act and regulation 30A of the National Consumer Credit Protection Regulations 2010.

It remains unclear why it was considered necessary and appropriate to address this matter in delegated legislation, rather than primary legislation. The instrument appears to be correcting a systemic issue in the Transitional Credit Act which would be more appropriate for amending primary legislation. The longstanding nature of the amendment also indicates that these changes may be more appropriate for primary legislation and the full range of parliamentary oversight. The committee notes that the explanatory statement justifies the inclusion of these matters in delegated legislation by reference to the fact that item 39A of the Transitional Credit Act was itself inserted by a legislative instrument.

In addition, the instrument provides for significant penalties including civil penalties to a maximum of 2,000 penalty units, an offence with maximum criminal penalties of 25 penalty units or 6 months imprisonment, and a strict liability offence with a maximum criminal penalty of 10 units. The explanatory statement provides no justification for these significant penalties and merely states that the relevant offence provisions reproduce those of item 39A of Schedule 2 to the Transitional Credit Act.

Where an instrument includes significant penalties, the explanatory statement should explain the nature and scope of the offence and what penalties apply, why it is necessary and appropriate to include the penalty in delegated legislation, and whether the Attorney-General was consulted in relation to the inclusion of custodial penalties, in accordance with the *Attorney-General's Department's Guide to Framing Commonwealth Offences*.

In this regard, the committee requests your advice as to:

- **why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to continue to preserve the effect of item 39A of Schedule 2 to the Transitional Credit Act; and**
- **why it is considered necessary and appropriate to include civil and criminal penalties in delegated legislation, and whether the Attorney-General was consulted in relation to the inclusion of custodial penalties, in accordance with the *Attorney-General's Department's Guide to Framing Commonwealth Offences*.**

Parliamentary oversight

Senate standing order 23(3)(k) requires the committee to scrutinise each legislative instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes whether an instrument limits parliamentary oversight.

The committee is concerned that the instrument provides for the modification of primary legislation and significant civil and criminal penalties and will not cease until it sunsets on 1 October 2030. This means that these measures would be provided for in delegated legislation for a total of at least 20 years, as the ASIC Class Order [CO 10/381] was registered on 24 May 2010. The explanatory statement explains that a shorter duration for the instrument is not appropriate as the original source of the problem was a regulation which is no longer in force.

The committee considers that instruments which provide for significant matters should specify a date by which the modifications will cease. This is to ensure an appropriate level of regular parliamentary oversight. In addition, it is not clear to the committee why this instrument cannot have a shorter duration just because the original source of the problem was a regulation which is no longer in force.

The committee therefore requests your advice as to whether the instrument could be amended to specify that the measures in the instrument will cease to operate within 3 years.

Conferral of discretionary powers

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

The instrument provides for offences of contravening the requirement in item 19A for specified credit lenders to lodge notices with ASIC. Paragraph 19A(2)(j) provides that ASIC may request 'any other information' to be included in the notices which must be lodged with ASIC.

Where an instrument provides for a person or entity to exercise discretionary powers in relation to decisions which affect an individual, the committee expects those discretionary powers to be sufficiently defined. In this instance, the committee considers that paragraph 19A(2)(j) provides ASIC with a broad discretionary power to determine matters of relevance to an offence carrying significant civil and criminal penalties.

The committee's scrutiny concerns in this regard are heightened by the fact that the explanatory statement does not provide a detailed explanation of each provision of the instrument.

The committee therefore requests your advice as to whether any further limits apply, in legislation or policy, to constrain the scope of ASIC's power under paragraph 19A(2)(j) to determine what information must be included in a notice lodged with ASIC under subsection 19A(2).

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. Noting that the 15th sitting day after the instrument was tabled in the Senate is 2 February 2021, the committee has resolved to give a notice of a motion to disallow the instrument on that day 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 **5 February 2021**.

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



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22 January 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au
CC: committeescrutiny@treasury.gov.au

Dear Treasurer,

**Australian Prudential Regulation Authority (confidentiality) determination No.1 of 2020
[F2020L00945]**

Thank you for your response of 1 December 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 22 January 2021. On the basis of your advice, the committee has concluded its examination of the instrument.

In relation to the instrument's compliance with legislative pre-conditions, the committee notes that advice that interested parties have, and continue to have, a reasonable opportunity to make representations as to whether or not the relevant reporting documents contain confidential information. The committee considers that, as a matter of best practice for the future, such information should be included in an instrument's explanatory statement.

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



22 January 2021

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

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

cc: Senator the Hon Simon Birmingham, Minister for Finance,
DLO-Finance@finance.gov.au
The Hon Keith Pitt MP, Minister for Resources, Water and Northern
Australia, minister.pitt@industry.gov.au
Department of Finance, FFSPRegs@finance.gov.au

Dear Chair,

Legislative instruments specifying Commonwealth expenditure—Exploring for the Future Program

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

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

The instrument listed in the table below, in combination with its enabling Act, authorises the Commonwealth to spend public money on the Exploring for the Future 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 (Exploring for the Future Program) Instrument 2020 [F2020L01299]	Exploring for the Future Program	\$124.5 million over four years from 2020-21	Funding will be provided to Geoscience Australia to produce a nationally significant minerals, energy and groundwater resources prospectus, including by: <ul style="list-style-type: none"> • acquiring and analysing geoscience data, including by using geophysical, geochemical, stratigraphic and other tools and techniques; • developing and delivering geoscience data products, including through an online portal; and • conducting comprehensive analysis of geoscience issues in prospective geological regions with clear development potential.

I note that under standing order 25(2)(a) your committee is empowered to conduct own-motion inquiries into legislative instruments which relate to the portfolios allocated to your committee, although there is no requirement to do so. Should your committee decide to further examine the above instrument, I note that (based on the current sitting pattern) the time for lodging a disallowance notice in the Senate expires on 15 February 2021.

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

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

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

Yours sincerely,

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



22 January 2021

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 Simon Birmingham, Minister for Finance,
DLO-Finance@finance.gov.au
The Hon Alan Tudge MP, Minister for Education and Youth,
Minister@education.gov.au
Department of Finance, FFSPRegs@finance.gov.au

Dear Chair,

Legislative instruments specifying Commonwealth expenditure

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

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

The instrument listed in the table below, in combination with its enabling Act, authorises the Commonwealth to spend public money on grants to support a company established to strengthen the national education evidence base for school and early childhood education. 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 (Education, Skills and Employment Measures No. 5) Regulations 2020 [F2020L01280]	Grants to support a company established to strengthen the national education evidence base for school and early childhood education	\$25 million over three years from 2020-21 (Commonwealth government contribution)	Funding will be provided for the ongoing operations of a company established to strengthen the national education evidence base for school and early childhood education. The company's functions will include: <ul style="list-style-type: none"> • collaborating with government, the school and early childhood education sector, the vocational education and training sector, the higher education and research sector and philanthropic organisations; • developing and implementing a national agenda for research relating to school and early childhood education; • mobilising high quality teaching and learning resources for school and early childhood education; and • supporting teaching and learning in school and early childhood education.

I note that under standing order 25(2)(a) your committee is empowered to conduct own-motion inquiries into legislative instruments which relate to the portfolios allocated to your committee, although there is no requirement to do so. Should your committee decide to further examine the above instrument, I note that (based on the current sitting pattern) the time for lodging a disallowance notice in the Senate expires on 3 February 2021.

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

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

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

Yours sincerely,

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



22 January 2021

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

Via email: attorney@ag.gov.au

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

Dear Attorney-General,

Disability (Access to Premises – Buildings) Amendment Standards 2020 [F2020L01245]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to these matters.

Incorporation – compliance with Legislation Act and access and use

Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act and otherwise complies with all legislative requirements. These include the requirements prescribed by the *Legislation Act 2003* (Legislation Act) in relation to the incorporation of external documents. In addition, Senate standing order 23(3)(f) requires the committee to scrutinise each instrument as to whether it, and any document it incorporates, may be freely accessed and used.

The Disability (Access to Premises – Buildings) Amendment Standards 2020 (the instrument) amends the Disability (Access to Premises – Buildings) Standards 2010 to set performance requirements and technical specifications in relation to access and use of buildings for people with disability.

The instrument's explanatory statement explains that the following Australian Standards are incorporated by the instrument:

- Australian Standards 1428.1 (2009 Design for access and mobility, Part 1: General requirements for access—New building work);
- Australian Standards 1428.4.1 (2009 Design for access and mobility, Part 4: Means to assist the orientation of people with vision impairment – Tactile ground surface indicators);
- Australian Standards 1735.12 (1999 Lifts, escalators and moving walks (SAA Lift Code) Facilities for persons with disabilities (incorporating amendment 1)); and
- Australian Standards 2890 (2013 Slip resistance classification of new pedestrian surface materials (incorporating amendment 1)).

However, neither the instrument nor the explanatory statement explains how these standards may be accessed or obtained, and whether they are freely available.

The committee considers that all documents incorporated by reference into the instrument should be freely accessible to all people who wish to access them, including those outside the construction industry such as persons with a disability.

In addition, the instrument also appears to incorporate Volume Three of the National Construction Code (NCC Volume Three). However, the explanatory statement does not clarify whether this document is incorporated as in force from time to time or as existing at a particular date. In addition, although the instrument provides a link to access NCC Volume Three, it is not clear whether this material is freely available.

Paragraph 15J(2)(c) of the *Legislation Act 2003* requires the explanatory statement to an instrument that incorporates a document to contain a description of that document, the manner in which it is incorporated, and indicate how it may be obtained. In addition, subsection 14(2) of the *Legislation Act 2003* provides that legislative instruments may not incorporate documents other than provisions of an Act, a Commonwealth disallowable legislative instrument or rules of court as in force from time to time, unless a specific provision in the instrument's authorising Act (or another Act of Parliament) provides that the document can be incorporated in this manner.

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

- **how the Australian Standards incorporated by this instrument and Volume Three of the National Construction Code (NCC Volume Three) may be obtained free of charge; and**
- **whether NCC Volume Three is incorporated as in force at a particular point in time, or as in force from time to time, and, if so, whether this is authorised by the instrument's enabling Act.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. Noting that the 15th sitting day after the instrument was tabled in the Senate is 2 February 2021, the committee has resolved to give a notice of a motion to disallow the instrument on that day 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 **5 February 2021**.

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



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22 January 2021

Senator the Hon Simon Birmingham
Minister for Finance
Parliament House
CANBERRA ACT 2600

Via email: financeminister@finance.gov.au

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

Dear Minister,

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

Thank you for your response of 1 December 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 22 January 2021. On the basis of your advice, the committee has concluded its examination of the instrument.

The committee welcomes the undertaking to amend the instrument to provide more detail in relation to the eligibility requirements for the pandemic leave disaster payments and to update the instrument's explanatory statement accordingly. The committee also welcomes the undertaking to update the instrument's explanatory statement to provide further detail on consultation undertaken in relation to 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



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22 January 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au
CC: committeescrutiny@treasury.gov.au

Dear Treasurer,

Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers) (Mortgage Brokers) Regulations 2020 [F2020L01189]

Thank you for your response of 17 December 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 22 January 2021. On the basis of the advice that delegated legislation is necessary in this instance to allow the measures in the instrument to account for the variety and complexity of benefits, 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



22 January 2021

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

Via email: attorney@ag.gov.au

CC: DLO@ag.gov.au

Dear Attorney-General,

Legislation (Deferral of Sunsetting—Telecommunications Universal Service Obligation (Standard Telephone Service—Requirements and Circumstances) Determination) Certificate 2020 [F2020L01301]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to these matters.

Compliance with Legislation Act 2003

Adequacy of explanatory materials

Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act and otherwise complies with all legislative requirements. These include the requirements prescribed by the *Legislation Act 2003* (Legislation Act) that relate to the deferral of sunsetting. In addition, Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the explanatory statement is sufficiently comprehensive as to gain a clear understanding of the instrument, including how any legislative pre-conditions have been satisfied.

The Legislation (Deferral of Sunsetting—Telecommunications Universal Service Obligation (Standard Telephone Service—Requirements and Circumstances) Determination) Certificate 2020 (the instrument) defers the sunsetting of the Telecommunications Universal Service Obligation (Standard Telephone Service—Requirements and Circumstances) Determination (No. 1) 2011 (the determination) for an additional two years.

The instrument's explanatory statement explains that the reason for the deferral of sunsetting is that the policy content of the determination is still required. It also notes that deferring the sunset date will ensure that the determination will not need to be remade in its current form, nor will it need to be repealed in two years' time when the measures end.

Subparagraph 51(1)(b)(i) of the *Legislation Act 2003* provides that the sunsetting date of an instrument may be deferred where the Attorney-General is satisfied that, on written application

by the rule maker, the instrument would be likely to cease to be in force within 24 months after the sunseting date. The committee notes that the explanatory statement, including the statement of reasons for the issue of the deferral certificate required by subsection 51(5) of the Legislation Act, suggests that the requirements of subparagraph 51(1)(b)(i) of the *Legislation Act 2003* are met in relation to this instrument. However, the committee considers that that explanatory statement does not sufficiently explain how or why it is considered likely that the determination will cease within 24 months after the sunseting date.

In light of these concerns, the committee requests your advice as to how the deferral of the sunseting of the determination meets the requirements of subparagraph 51(1)(b)(i) of the *Legislation Act 2003*.

Consultation with persons affected

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

In this instance, the explanatory statement to the instrument states that no consultation was undertaken. The explanatory statement notes that the Minister for Communications, Cyber Safety and the Arts (the rule-maker) advised you of the reasons in support of issuing the deferral certificate and explains that 'the Certificate is consistent with the policy intent of the sunseting arrangements and does not significantly alter existing arrangements. Accordingly, further consultation was unnecessary'. However, the committee is concerned that persons likely to be affected by the instrument, including members of the general public, do not appear to have been consulted in relation to the instrument. In this regard, without further advice, the committee does not consider that the provision of reasons for deferring sunseting amounts to adequate consultation.

The committee therefore requests your further advice as to why it was considered that consultation with persons likely to be affected by the instrument was not required.

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 **5 February 2021**.

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



22 January 2021

The Hon Paul Fletcher MP
Minister for Communications, Urban Infrastructure, Cities and the Arts
Parliament House
CANBERRA ACT 2600

Via email: dlo@communications.gov.au

Dear Minister,

Radiocommunications (Police Forces – Disruption of Unmanned Aircraft) Exemption Determination 2020 [F2020L01296]

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

***Compliance with authorising legislation
Matters more appropriate for parliamentary enactment***

Senate standing order 23(3)(a) requires the committee to scrutinise each legislative instrument as to whether it accords with its enabling Act and otherwise complies with all legislative requirements. In addition, Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be included in primary, rather than delegated, legislation).

The Radiocommunications (Police Forces – Disruption of Unmanned Aircraft) Exemption Determination 2020 (the instrument) provides exemptions for Australian Federal Police and State and Territory police from the requirements set out in Parts 3.1, 4.1 and 4.2 of the *Radiocommunications Act 1992* (the Act), to enable the use of devices designed to disrupt or disable unmanned aircraft and unmanned aircraft systems (counter-drone devices). Section 7 of the instrument also exempts relevant third-party contractors from these requirements of the Act in certain circumstances.

The instrument was made under subsection 27(2) of the Act, which provides that defence, law enforcement and emergency personnel, including members of the Australian Federal Police and State and Territory police, may be exempted from particular provisions of the Act. It is unclear whether this provision also authorises determinations to be made which exempt third-party contractors from the specified provisions of the Act. In this regard, the committee notes that the explanatory statement to the instrument does not identify the authority on which this exemption for third-party contractors purports to rely.

In addition, the committee notes that the instrument deals with significant matters arising from exempting police members and relevant contractors from the requirements of the Act. In this regard, the explanatory statement does not indicate why it is considered necessary and

appropriate to leave these matters to delegated legislation, rather than primary legislation. The committee generally expects such information to be included in the explanatory statement to the instrument.

In light of the above, the committee requests your advice as to the legislative authority under which the instrument provides that relevant third-party contractors are exempt from Parts 3.1, 4.1 and 4.2 of the *Radiocommunications Act 1992*.

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 **5 February 2021**.

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



22 January 2021

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

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

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

Dear Chair,

Matters of interest to the Senate

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

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

Noting that the instruments listed in **Attachment A** appear to contain significant policy matters, the committee has determined that the instruments engage standing order 23(4) and accordingly has resolved to draw them to the attention of your committee.

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

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

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

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

Yours sincerely,

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

Matters of interest to the Senate – Instrument list

Instrument	Purpose	Last day to lodge disallowance notice
Coronavirus Economic Response Package (Payments and Benefits) Alternative Decline in Turnover Test Amendment Rules 2020 [F2020L01295]	To set out an additional alternative decline in turnover test to gain access to the JobKeeper payment where there is not an appropriate relevant comparison period in 2019.	15/02/2021
National Consumer Credit Protection Amendment (Responsible Lending Obligations) Regulations 2020 [F2020L01277]	To make a targeted adjustment to the regulatory settings pertaining to the responsible lending obligations contained in the <i>National Consumer Credit Protection Act 2009</i> .	02/02/2021



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

Parliament House, Canberra ACT 2600

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www.aph.gov.au/senate_sdlc

22 January 2021

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

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

cc: The Hon Alan Tudge MP, Minister for Education and Youth,
Minister@education.gov.au

Dear Chair,

Matters of interest to the Senate

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

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

Noting that the following instrument appears to contain significant policy matters, the committee has determined that the instrument engages standing order 23(4) and accordingly has resolved to draw it to the attention of your committee:

Instrument	Purpose	Last day to lodge disallowance notice
Child Care Subsidy Amendment (Coronavirus Response Measures No. 7) Minister's Rules 2020 [F2020L01276]	To extend the relaxation of the Child Care Subsidy activity test to help individuals impacted by COVID-19 to get back into their workforce participation activities, and to increase the cap on the appropriation in section 233 of the <i>A New Tax System (Family Assistance) (Administration) Act 1999</i> for payments under the Community Child Care Fund Special Circumstances Grant Opportunity program for the 2020-2021 financial year from \$623 million to \$949 million.	02/02/2021

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 identifies the last day (based on the current sitting pattern) for lodging a disallowance notice in the Senate.

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

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

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

Yours sincerely,

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



22 January 2021

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

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

cc: The Hon Josh Frydenberg MP, Treasurer, tsrdlos@treasury.gov.au
The Hon Alan Tudge MP, Minister for Education and Youth,
Minister@education.gov.au

Dear Chair,

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

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

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

Noting that the instruments listed in **Attachment A** appear to contain significant policy matters, the committee has determined that the instruments engage standing order 23(4) and accordingly has resolved to draw them to the attention of your committee.

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

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

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

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

Yours sincerely,

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

Matters of interest to the Senate – Instrument List

Instrument	Purpose	Last day to lodge disallowance notice
Child Care Subsidy Amendment (Coronavirus Response Measures No. 7) Minister's Rules 2020 [F2020L01276]	To extend the relaxation of the Child Care Subsidy activity test to help individuals impacted by COVID-19 to get back into their workforce participation activities, and to increase the cap on the appropriation in section 233 of the <i>A New Tax System (Family Assistance) (Administration) Act 1999</i> for payments under the Community Child Care Fund Special Circumstances Grant Opportunity program for the 2020-2021 financial year from \$623 million to \$949 million.	02/02/2021
Coronavirus Economic Response Package (Payments and Benefits) Alternative Decline in Turnover Test Amendment Rules 2020 [F2020L01295]	To set out an additional alternative decline in turnover test to gain access to the JobKeeper payment where there is not an appropriate relevant comparison period in 2019.	15/02/2021
National Consumer Credit Protection Amendment (Responsible Lending Obligations) Regulations 2020 [F2020L01277]	To make a targeted adjustment to the regulatory settings pertaining to the responsible lending obligations contained in the <i>National Consumer Credit Protection Act 2009</i> .	02/02/2021



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www.aph.gov.au/senate_sdlc

22 January 2021

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,

**Social Security (Administration) — various instruments [F2020L01221] [F2020L01223]
[F2020L01224] [F2020L01225] [F2020L01226]**

Thank you for your response of 18 December 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 22 January 2021. 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



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www.aph.gov.au/senate_sdlc

22 January 2021

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

Via email: dlo@homeaffairs.gov.au

Dear Minister,

**Telecommunications (Interception and Access) (Communications Access Co-ordinator)
Instrument 2019 [F2020L01141]**

Thank you for your response of 2 December 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 22 January 2021. On the basis of the advice that all powers were exercised validly under the 2018 instrument and that none of the powers delegated via the instrument may be further subdelegated, 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