



14 April 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,

ASIC Corporations (Amendment) Instrument 2020/1065 [F2020L01572]

ASIC Corporations (Amendment) Instrument 2020/1064 [F2020L01571]

Thank you for your response of 30 March 2021 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 13 April 2021 and has resolved to seek your further advice about the issues outlined below.

***Matters more appropriate for parliamentary enactment
Parliamentary oversight***

In relation to this matter, you advised that the Australian Securities and Investments Commission (ASIC) will review time-sharing schemes in 2022 and undertook to consider "as part this review, whether it is necessary and appropriate for the details of time-sharing arrangements to be included in the primary legislation". You also advised that the amendments made by the instruments will effectively sunset in six years and a shorter duration would create commercial uncertainty, require another round of extensive lengthy consultations, and would be inefficient and resource intensive.

The committee notes that these instruments provide for significant measures in the context of their regulatory environment. It is the committee's view that the advice you have provided, including that ASIC will be undertaking a review of time-sharing schemes in 2022, in fact indicates that these significant instruments are more appropriate for a shorter duration.

While noting this further information, the committee continues to have significant systemic scrutiny concerns relating to instruments which modify the operation of primary legislation. The committee welcomes your invitation to meet with your office, the Treasury, and ASIC to discuss these concerns. As this systemic issue is of deep, ongoing concern to the committee, as set out in separate correspondence from myself and the Deputy Chair, the committee considers this meeting should be held prior to the next parliamentary sitting week.

Availability of independent merits review

In relation to this matter, you advised that the responsible entity of a time-sharing scheme is required to hold an Australian Financial Services License, which requires holders to have a complying dispute resolution system and compensation arrangements. You advised that as a result, responsible entities of time-sharing schemes are required to be members of the Australian Financial Complaints Authority (AFCA), and that time-share members may lodge complaints for review of decisions made by responsible entities with AFCA.

The committee thanks you for this advice and requests that the explanatory statements to the instruments be amended to include this further information in relation to review of hardship withdrawal decisions made by responsible entities of a registered time-sharing scheme.

The committee's expectation is to receive a response in time for it to consider and report on the instruments while they are still subject to disallowance. Noting that the 15th sitting day after both instruments were tabled in the Senate is 11 May 2021, the committee has resolved to give notices of motion to disallow the instruments on that day as a precautionary measure to allow additional time for the committee to consider the outstanding matter in relation to the availability of independent merits review.

Noting this, and to facilitate the committee's consideration of this matter, the committee would appreciate your response by **28 April 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



14 April 2021

Senator the Hon Marise Payne
Minister for Foreign Affairs
Parliament House
CANBERRA ACT 2600

Via email: foreign.minister@dfat.gov.au

Dear Minister,

Australia's Foreign Relations (State and Territory Arrangements) Rules 2020 [F2020L01569]

Thank you for your response of 30 March 2021 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 13 April 2021 and has resolved to seek your further advice about the issues outlined below.

Matters more appropriate for parliamentary enactment

Clarity of drafting

You have advised that an 'exempt arrangement' as defined in section 4 of the Act was envisaged as a more flexible means of excluding arrangements where appropriate and necessary to ensure the effective administration of the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (the Act). Further, you note that the inclusion of the definition of an 'exempt arrangement' in the instrument was intended to reduce the regulatory burden of the Act where it is subsequently determined by the Minister that there is low foreign policy risk, or where arrangements must be entered in urgent circumstances.

In addition, you note that the Revised Explanatory Memorandum to the Act provides further information about exempt arrangements, including that exempt arrangements are excluded from provisions of the Act requiring the notification and approval of arrangements. You also note that the Minister retains the power to make declarations or decisions with respect to exempt arrangements, should the Minister become aware of those arrangements other than through their notification.

The committee notes the Senate's interest in this matter, and therefore welcomes your advice that you intend to keep the instrument and its explanatory statement under regular review. The committee considers that regular review of the instrument is important.

The committee also notes that section 63A of the Act requires that a review of the operation of the Act must be commenced as soon as possible after the third anniversary of the commencement of Parts 2 and 3 of the Act.

In light of this requirement, the committee proposes that including a review of the operation of the instrument as part of the statutory review prescribed under section 63A would assist in ensuring

the instrument is functioning as intended. The committee considers that the review should include consideration of whether significant matters prescribed in the rules would be more appropriate for inclusion on the face of the Act. The committee notes that, in addition to providing an appropriate level of parliamentary scrutiny, including significant matters on the face of the Act would provide increased certainty over the longer term for those entities subject to the Act.

In order to ensure that the measures in the instrument are subject to more frequent parliamentary oversight, the committee considers that a sunset period of 5 years, rather than 10 years, would be appropriate for this instrument. The committee notes that this sunset period would also allow any recommendations of the review of the operation of the instrument to be taken into account in the drafting of the instrument to replace the sunset instrument.

The committee therefore requests your advice as to:

- **whether the instrument can be amended to provide that it sunsets after 5 years; and**
- **whether the statutory review of the Act under section 63A will include consideration of the operation of the instrument, including consideration of whether significant matters prescribed in the rules would be more appropriate for inclusion on the face of the Act.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. Noting that the 15th sitting day after the instrument was tabled in the Senate is 11 May 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 **28 April 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



14 April 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au

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

Dear Treasurer,

Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2020 [F2020L01334]

Thank you for your response of 15 March 2021 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 13 April 2021.

Modification of primary legislation

Parliamentary oversight

The committee notes the further advice you have provided in relation to why it is considered necessary and appropriate for the matters prescribed by the instrument to be set out in delegated legislation. However, the committee remains concerned that these measures which modify the operation of primary law are intended to remain in force for ten years.

As you are aware, the committee continues to have significant scrutiny concerns relating to instruments which modify the operation of primary legislation. You have previously undertaken to engage with the committee to seek a resolution to its systemic scrutiny concerns about the duration of instruments in your portfolio which provide for exemptions to or modifications from primary legislation.

The committee seeks to consider this instrument as part of this ongoing engagement. As this systemic issue is of deep, ongoing concern to the committee, as set out in separate correspondence from myself and the Deputy Chair, the committee considers this meeting should be held prior to the next parliamentary sitting week. In the meantime, the committee has resolved to retain the disallowance notice currently in place on the instrument.

Independent merits review

The committee has concluded its consideration of this matter on the basis of your advice that a decision by the ACCC to withdraw the benefit of a class exemption in a particular case is reviewable by the Tribunal in accordance with subsection 102(5G) of the Act.

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



14 April 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,

**Competition and Consumer (Consumer Data Right) Amendment Rules (No. 3) 2020
[F2020L01688]**

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.

Significant penalties in delegated legislation

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This includes whether an instrument imposes significant penalties.

The instrument amends the Competition and Consumer (Consumer Data Right) Rules 2020 (principal instrument) to expand and build on the functionality of the consumer data right (CDR) regime, in line with the recommendations of the Open Banking Review.

Items 49 and 69 of Schedule 1 to the instrument insert new sections 5.34 and 9.3 into the principal instrument. These sections set requirements in relation to refraining from processing CDR requests and keeping and maintaining records relating to CDR data disclosure. Failure to comply with these requirements incurs a maximum civil penalty of \$50,000 (equivalent to approximately 225 penalty units) for an individual and \$250,000 (equivalent to approximately 1,125 penalty units) for a body corporate.

The committee considers that significant penalties should ordinarily be included in primary, rather than delegated legislation. This is to ensure appropriate parliamentary oversight of the scope of the penalty. Generally, the committee's view is that delegated legislation should not contain custodial penalties or pecuniary penalties exceeding a maximum penalty of 50 penalty units for individuals and 250 penalty units for corporations.

Where an instrument nevertheless imposes significant penalties, the committee expects a justification of why it is necessary and appropriate to include such penalties in delegated

legislation. In this instance, the explanatory statement to the instrument does not provide any information as to why the penalties are necessary and appropriate.

The committee therefore requests your advice as to why it is considered necessary and appropriate to impose significant civil penalties in delegated legislation.

Clarity of drafting

Senate standing order 23(3)(e) requires the committee to scrutinise each instrument as to whether its drafting is defective or unclear.

Item 28 of Schedule 1 to the instrument inserts new subsection 2.4(6) into the principal instrument. This new subsection sets out the definition of 'disclosure document' for the purpose of disclosing product data in response to a product data request. This has the effect of broadening the category of documents which may prescribe required product data. These documents include a Product Disclosure Document within the meaning of the *Corporations Act 2001*, a key facts sheet within the meaning of the *National Consumer Credit Protection Act 2009*, or 'a similar document that is required by law to be disclosed to a customer prior to entering into a contract with that customer'.

The committee is typically concerned with instruments which are not drafted clearly to the extent that this affects the meaning or interpretation of the instrument. Instruments and their explanatory statements should be clear and intelligible to all persons interested in or affected by them, not only those with particular knowledge or expertise.

In the absence of further information on the face of the instrument or in its explanatory statement, it is unclear what 'a similar document that is required by law to be disclosed to a customer prior to entering into a contract with that customer' may include. The committee is particularly concerned in this instance, noting that failure to provide product data prescribed by such documents incurs a maximum civil penalty of \$50,000 for individuals and \$250,000 for corporations under section 2.5 of the principal instrument.

The committee would therefore appreciate your advice as to what types of 'similar documents' may be prescribed within the definition of a 'disclosure document' under subsection 2.4(6).

Conferral of discretionary powers

Availability of independent merits review

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. This includes instruments which confer discretionary powers on a person. In addition, Senate standing order 23(3)(i) requires the committee to consider whether an instrument unduly excludes, limits or fails to provide for the independent review of decisions affecting rights, obligations or interests.

Item 49 of Schedule 1 to the instrument inserts new section 5.33 into the principal instrument. New subsection 5.33(1) provides that the Accreditation Registrar may take steps to prevent the Register of Accredited Persons and associated database from being used to make consumer data requests to a data holder, for a period of up to 10 days, if the Accreditation Registrar reasonably believes it is necessary to do so in order to ensure the security, integrity and stability of the Register or associated database.

This appears to require the Accreditation Registrar to exercise discretion in determining when it is necessary to exercise powers under subsection 5.33(1) and what subsequent steps to take. Subsection 5.33(2) provides that the steps taken by the Registrar may include amending the

information in the associated database relating to a data holder that is used to facilitate the making and processing of requests. However, the committee notes it does not provide a clear description of the full scope of the power.

The committee considers that instruments that confer discretionary powers on a person should set out the factors which the person must consider in exercising the discretion. The explanatory statement should also address the purpose and scope of the discretion and why it is necessary, and explain who will be exercising the discretion, including whether they possess the appropriate qualifications and necessary skills. The committee also expects the explanatory statement to explain the nature and source of any relevant limitations and safeguards, including whether they are contained in law or policy.

In this instance, while noting that subsection 5.33(2) provides an example of the types of steps that may be taken, the instrument does not provide clear limits on the exercise of this discretionary power. The committee's concerns with regard to the conferral of this discretionary power are heightened noting that exercise of the powers under subsection 5.33(1) will not be subject to independent merits review.

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

- **whether there are any factors that the Accreditation Registrar must consider in exercising their discretionary powers under subsection 5.33(1); and**
- **whether any safeguards or limitations apply to the exercise of these powers or functions, and whether these safeguards are contained in law or policy.**

Compliance with Legislation Act 2003 - incorporation

Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act and otherwise complies with all legislative requirements. This includes the requirement in paragraph 15J(2)(c) of the *Legislation Act 2003* (Legislation Act) that the explanatory statement to an instrument that incorporates a document contains a description of that document, including the manner in which it is incorporated and how it may be obtained. In addition, under Senate standing order 23(3)(f) the committee expects any incorporated documents to be freely accessed and used.

In this instance, the instrument appears to incorporate ASAE 3150 and the *CDR Accreditation Guidelines*. However, neither the instrument nor the explanatory statement indicates whether the documents are incorporated, and if so the manner in which they incorporated (that is, as in force from time to time or as in force at a particular time).

The committee therefore requests your advice as to:

- **whether ASAE 3150 and the *CDR Accreditation Guidelines* are incorporated by reference in the instrument, and if so;**
 - **the manner in which the documents are incorporated (that is, as in force at a particular time or as in force from time to time);**
 - **if the documents are incorporated as in force from time to time, whether there is the power in the enabling legislation or other primary legislation to incorporate the documents in this manner.**

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 11 May 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 **28 April 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



14 April 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au

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

Dear Treasurer,

Competition and Consumer Amendment (AER Functions) Regulations 2020 [F2020L01606]

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.

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. This includes where discretionary powers and functions are delegated under the instrument.

The instrument broadens the functions of the Australian Energy Regulator (AER) as a designated data holder under the Consumer Data Right regime to include "such functions as are necessary to enable the AER to operate as a data holder of CDR data in accordance with the CDR provisions (as those provisions apply as described in subsection 56AR(4) of the *Competition and Consumer Act 2010*)".

The explanatory statement states that the instrument makes a minor, technical amendment to the *Competition and Consumer Regulations 2010* to give effect to the AER's role as a data holder by virtue of the Energy Designation, however, it does not specify what functions or powers are conferred, including whether any rights and obligations may be affected by conferring additional functions or powers on the AER.

The committee considers that explanatory statements to instruments that confer discretionary powers should address the purpose and scope of the discretion, why it is necessary, and explain how those powers and functions will be exercised. Further, the explanatory statement should set out the factors which must be considered in exercising those powers and functions. The committee also expects the explanatory statement to explain the nature and source of any relevant limitations and safeguards, including whether they are contained in law or policy.

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

- the specific rights and obligations that are affected by the designation of the Australian Energy Regulator to operate as a data holder of CDR data in accordance with the CDR provisions; and
- whether any safeguards or limitations apply to the exercise of these powers or functions, and whether these safeguards are contained in law or policy.

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 11 May 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 **28 April 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



14 April 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au

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

Dear Treasurer,

Corporations (Stay on Enforcing Certain Rights) Amendment (Corporate Insolvency Reforms) Declaration 2020 [F2020L01682]

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 has resolved to seek your advice in relation to these matters.

***Exemptions from the operation of primary legislation
Parliamentary oversight***

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment. This may include instruments which provide continuing exemptions to primary legislation. In addition, 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 instrument amends the Corporations (Stay on Enforcing Certain Rights) Declaration 2018 (the 2018 declaration) to declare kinds of contractual and other rights that do not attract the stay on enforcing rights merely because the company has entered restructuring under the debt restructuring process under subsection 454N(1) of the *Corporations Act 2001* (the Act). While some of the provisions of the instrument appear to be technical, items 3 and 8 of Schedule 1 appear to provide for substantial exemptions to the operation of the Act.

Item 3 inserts subsection 5(3A) into the 2018 declaration, which provides that the exemptions in the 2018 declaration that apply to other provisions of the Act now also apply to subsection 454N(1) for companies being restructured. This appears to expand the list of exemptions that now apply to restructured companies to include many different types of financial rights.

Item 8 inserts subsection 6(3A) into the 2018 declaration which establishes an exemption to the appointment of a controller of property in identified circumstances.

The committee has long been concerned with provisions in delegated legislation which modify the operation of primary legislation, particularly where those modifications appear to substantially depart from the original provision. The committee therefore expects the explanatory statement to any modification instrument to comprehensively justify the nature and scope of the relevant modifications.

The committee's longstanding view is that provisions which modify the operation of primary legislation should cease to operate no more than three years after they commence. This is to ensure a minimum degree of regular parliamentary oversight.

In addition, as per the committee's guidelines, the committee considers that the explanatory statement should indicate whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation.

In this regard, the explanatory statement does not explain why it is necessary and appropriate for these measures to be included in delegated as opposed to primary legislation.

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

The committee therefore requests your advice as to:

- **why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to provide for exemptions to the operation of the *Corporations Act 2001*;**
- **whether the *Corporations (Stay on Enforcing Certain Rights) Amendment (Corporate Insolvency Reforms) Declaration 2020 [F2020L01682]* can be amended to provide that the measures cease within three years after commencement; and**
- **whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation.**

As the committee continues to have significant systemic scrutiny concerns relating to instruments which modify the operation of primary legislation, the committee welcomes your invitation to meet with your office, the Treasury, and ASIC to discuss these concerns. As this systemic issue is of deep, ongoing concern to the committee, as set out in separate correspondence from myself and the Deputy Chair, the committee considers this meeting should be held prior to the next parliamentary sitting week.

Consultation on specific instrument

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

Section 17 of the *Legislation Act 2003* (Legislation Act) requires that, prior to an instrument being made, the rule-maker must be satisfied that appropriate consultation was undertaken.

The committee therefore expects the explanatory statement to an instrument to address consultation that was undertaken in relation to the specific instrument. Where consultation has previously been undertaken in relation to a broader issue, a set of legislative reforms, or enabling

legislation, and no further consultation was undertaken in relation to the specific instrument, the committee expects that this should be identified in the explanatory statement to the instrument. The explanatory statement should also address what consultation was previously undertaken, and why it was considered unnecessary to undertake additional consultation in relation to the specific instrument.

In this regard, the explanatory statement explains that no public consultation was undertaken in relation to the instrument as it makes consequential amendments to the Corporations (Stay on Enforcing Certain Rights) Declaration 2018 to give further effect to the new debt restructuring process. The explanatory statement indicates that extensive public consultation was conducted in relation to the new formal debt restructuring process, and consultation was done on the related bill and the Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020.

However, it is not clear how this consultation relates to the measures in this instrument. Specifically, it is unclear whether the consultation that was held for the related bill and Regulations in 2020 included notice that the exemptions to be made by this instrument were included in the suite of reforms.

In light of this, the committee requests your advice as to whether any consultation was undertaken in relation to the specific measures in the Corporations (Stay on Enforcing Certain Rights) Amendment (Corporate Insolvency Reforms) Declaration 2020 [F2020L01682] or, if not, why no consultation was undertaken.

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 11 May 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 **28 April 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



14 April 2021

The Hon Alan Tudge MP
Minister for Education and Youth
Parliament House
CANBERRA ACT 2600

Via email: alan.tudge.mp@aph.gov.au

CC: DLO.Tudge@dese.gov.au

Dear Minister,

Education Services for Overseas Students (TPS Levies) (Risk Rated Premium and Special Tuition Protection Components) Instrument 2020 [F2020L01672]

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.

Levying 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). This includes whether an instrument imposes a tax or levy. 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.

This instrument specifies a method for working out the amount payable by all non-exempt Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) registered providers for the risk rated premium and special tuition protection components of the Tuition Protection Service (TPS) levy. The explanatory statement notes that the instrument assists the TPS Director in exercising functions under the *Education Services for Overseas Students Act 2000* by ensuring sufficient funds are credited to the Overseas Student Tuition Fund to refund or place students in the event of provider closures.

The committee considers that one of the most fundamental functions of the Parliament is to levy taxation. In this regard, the committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. In this instance, it does not appear there is a cap on the face of the Act as to the amount of tax that may be imposed, which

compounds the committee's scrutiny concerns in relation to this tax due to the limited parliamentary oversight afforded to it.

As the levying of taxation in delegated legislation is a systemic technical scrutiny matter, the committee has resolved draw these instruments to the attention of the Senate in its *Delegated Legislation Monitor 6 of 2021*. However, the committee is not seeking any further information or advice from you in relation to this particular 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.

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.

Yours sincerely,

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



14 April 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,

**Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020
[F2020L01568]**

Thank you for your response of 30 March 2021 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 13 April 2021 and has resolved to seek your further advice about the issues outlined below.

Matters more appropriate for parliamentary enactment
Modification of primary legislation
Exemption from primary legislation
Parliamentary oversight

In relation to this matter, you advised that the committee should refer to your response to the Scrutiny of Bills Committee of 1 December 2020 in relation to the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020 regarding the committee's concerns about including key definitions in delegated legislation.

You also advised that the modifications the instrument makes to the *Foreign Acquisitions and Takeovers Act 1975* (the Act) alleviate some of the potential consequences for persons of actions or proposed actions that are taken to occur because of the operation of the Act, and that these potential consequences may arise from actions taken or occurring without the person's knowledge. In relation to exemptions from the operation of the Act, you advised that the ATO already gathers the relevant information and the exemption avoids the potential burden of 'double reporting' for persons taking such actions. If the range of actions changes in the future it may be necessary for the scope of the exemption to be altered, and therefore it is necessary and appropriate for the exemptions to be in delegated legislation.

In relation to shortening the duration of the instrument, you advised that 10 years sunseting is appropriate.

While noting this further information, the committee continues to have significant systemic scrutiny concerns relating to instruments which modify the operation of primary legislation. The committee welcomes your invitation to meet with your office, the Treasury, and ASIC to discuss these concerns. As this systemic issue is of deep, ongoing concern to the committee, as set out in separate correspondence from myself and the Deputy Chair, the committee considers this meeting should be held prior to the next parliamentary sitting week.

Compliance with Legislation Act 2003 – incorporation

In relation to this matter, you advised that the Australian System of National Accounts is an annual Australian Bureau of Statistics publication that is free to access online and provided a weblink for access. The committee understands from this advice that the Australian System of National Accounts is incorporated by reference in the instrument, as you have explained that it is a common methodology used to compare current and historical GPD implicit price deflator values for indexation.

The committee therefore requests that you amend the explanatory statement to the instrument to include the further information on the incorporation of the Australian System of National Accounts outlined in your letter of 30 March 2021, noting that this is a requirement of paragraph 15J(2)(c) of the *Legislation Act 2003*.

The committee's expectation is to receive a response in time for it to consider and report on the instruments while they are still subject to disallowance. Noting that the 15th sitting day after this instrument was tabled in the Senate is 11 May 2021, the committee has resolved to give a notice of motion to disallow the instrument on that day as a precautionary measure to allow additional time for the committee to consider the outstanding matter in relation to incorporation of the Australian System of National Accounts.

Noting this, and to facilitate the committee's consideration of this matter, the committee would appreciate your response by **28 April 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**



14 April 2021

The Hon Angus Taylor MP
Minister for Energy and Emissions Reduction
Parliament House
CANBERRA ACT 2600

Via email: DLOTaylor@environment.gov.au

CC: legislation@environment.gov.au

Dear Minister,

**Greenhouse and Energy Minimum Standards (Registration Fees) Instrument (No. 2) 2020
[F2021L00039]**

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.

Levying 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). This includes whether an instrument imposes a tax or levy. 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 instrument is made under the *Greenhouse and Energy Minimum Standards (Registration Fees) Act 2012* and specifies the fees payable in relation to applications to register models of Greenhouse and Energy Minimum Standards products under the *Greenhouse and Energy Minimum Standards Act 2012*. Section 8(2) of the Act provides that regulations made under the Act impose registration fees as taxes.

The explanatory statement to the instrument states these fees are set with reference to the identified costs of registration staff and the registration system, as well as costs incurred in the inspection and monitoring program, such as purchasing and testing equipment.

The committee considers that one of the most fundamental functions of the Parliament is to levy taxation. In this regard, the committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. In this instance, it does not appear there is a cap on the face of the Act as to the amount of tax that may be imposed, which

compounds the committee's scrutiny concerns in relation to this tax due to the limited parliamentary oversight afforded to it.

As the levying of taxation in delegated legislation is a systemic technical scrutiny matter, the committee has resolved draw these instruments to the attention of the Senate in its *Delegated Legislation Monitor 6 of 2021*. However, the committee is not seeking any further information or advice from you in relation to this particular 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.

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.

Yours sincerely,

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



14 April 2021

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

Via email: minister.marino@infrastructure.gov.au

CC: rob.terry@infrastructure.gov.au

Dear Assistant Minister,

Norfolk Island Employment Rules 2020 [F2020L01536]

Thank you for your response of 30 March 2021 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 13 April 2021 and has resolved to seek your further advice about the issues outlined below.

Privacy

The committee appreciates your advice that the *Privacy Act 1988* (the Act) and the Australian Privacy Principles (the Principles) do apply to some Norfolk Island employers, in the same way the Act and the Principles apply to employers in the rest of Australia, depending of type and size of business, and annual turnover.

You have advised that for Norfolk Island businesses which are subject to the Act, personal information relating to someone's current or former employment is safeguarded by the Act and the Principles, when it is used for a purpose which is not directly related to their employment. If a business is not covered by the Act or the Principles, you have advised the Fair Work Ombudsman recommends the Principles be applied, but the committee understands this is not enforceable.

The explanatory statement for this instrument currently provides that 'employee records such as the ones referred to above are generally not covered by the *Privacy Act 1988* and are exempt from the Australian Privacy Principles'.

However, based on your advice, the committee understands that the safeguards in the Act and Principles may apply to the information handled under section 10 of the Employment Rules, if the employer is covered by the Act and the Principles.

The committee therefore requests that the explanatory statement to the instrument be amended to include this further information, clarifying the circumstances when the Privacy Act and the Principles will apply to personal information collected and used under the Employment Rules, as outlined in your letter of 30 March 2021.

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. The committee therefore gave notice of a motion to disallow the instrument on 17 March 2021 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 **28 April 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



AUSTRALIAN
SENATE

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

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

14 April 2021

The Hon Michael McCormack MP
Deputy Prime Minister
Minister for Infrastructure, Transport and Regional Development
Parliament House
CANBERRA ACT 2600

Via email: dlo.mccormack@infrastructure.gov.au
CC: government.relations@casa.gov.au

Dear Minister,

Part 138 (Aerial Work Operations) Manual of Standards 2020 [F2020L01402]

Thank you for your response of 14 March 2021 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 Tuesday 13 April 2021. Based on your advice regarding the purpose of the sections in the instrument marked as 'RESERVED' as possible sections identified for additional information to be inserted following a post-implementation review of the standards, the committee has concluded its examination of the instrument.

The committee welcomes your undertaking to amend the explanatory statement to include this further information. This undertaking has been listed in Appendix D of *Delegated Legislation Monitor 6 of 2021*.

In light of this, the committee has resolved to withdraw the disallowance notice in place on the instrument in the sitting week commencing on 11 May 2021.

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



14 April 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 (Receiver Licence Tax) Amendment Determination 2021 (No. 1)
[F2021L00086]**

**Radiocommunications (Transmitter Licence Tax) Amendment Determination 2021 (No.1)
[F2021L00088]**

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.

***Levying 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). This includes whether an instrument imposes a tax or levy. 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.

These instruments are made under the *Radiocommunications (Receiver Licence Tax) Act 1983* and the *Radiocommunications (Transmitter Licence Tax) Act 1983* and specify the receiver and transmitter license tax rates. The explanatory statements to both instruments note that these instruments decrease the rate of tax payable, based on the decrease in the consumer price index (CPI) over the year to 30 June 2020.

The committee considers that one of the most fundamental functions of the Parliament is to levy taxation. In this regard, the committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. In this instance, it does not appear there is a cap on the face of either Act as to the amount of tax that may be imposed which compounds the committee's scrutiny concerns in relation to this tax due to the limited parliamentary oversight afforded to it.

As the levying of taxation in delegated legislation is a systemic technical scrutiny matter, the committee has resolved draw these instruments to the attention of the Senate in its *Delegated Legislation Monitor 6 of 2021*. However, the committee is not seeking any further information or advice from you in relation to these particular 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.

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.

Yours sincerely,

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



14 April 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au

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

Dear Treasurer,

Takeovers Panel Procedural Rules 2020 [F2021L00131]

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.

Adequacy of explanatory materials

Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument.

The instrument provides the procedural rules to be followed by the Takeovers Panel in proceedings.

In the committee's view, the explanatory statement to the instrument is too general and brief to sufficiently explain the operation of the instrument. The lack of detail in the clause-by-clause analysis makes it particularly difficult for the committee to undertake its routine scrutiny of the instrument and has heightened the scrutiny concerns identified by the committee below. In addition, the statement of compatibility with human rights fails to identify that any rights may be engaged under the instrument, which, in the committee's view, is not an accurate representation of the instrument's measures which may impact on or limit common law rights in relation to trials.

The committee generally expects explanatory statements to fully explain the purpose and operation of each section of the relevant instrument. This accords with the requirements of paragraph 15J(2)(b) of the *Legislation Act 2003*, as well as the more general expectation that an explanatory statement will be sufficiently comprehensive as to assist with the interpretation of the law.

The committee would therefore appreciate your advice as to whether the explanatory statement to the instrument could be amended to include further information as to the purpose and operation of each section of the instrument, including the specific information identified in relevant sections of this correspondence.

Clarity of drafting

Scope of administrative powers

Senate standing order 23(3)(e) requires the committee to scrutinise each instrument as to whether its drafting is defective or unclear. In addition, 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. This includes where instruments confer discretionary powers or functions on a person.

Subsection 7(4)

Subsection 7(4) of the instrument provides that a party must comply with any direction of the Panel and where necessary, cooperate with other parties in good faith for the purposes of complying with any direction. However, there is no guidance on the face of the instrument nor in the explanatory statement as to what may constitute cooperating with other parties in good faith, nor what the consequences may be for failing to do so or who has the discretion to determine whether parties have acted in good faith.

Subsection 10(3)

Subsection 10(3) of the instrument provides that an application under section 657C of the *Corporations Act 2001* for a declaration of unacceptable circumstances or an order must be provided by the applicant to the Australian Securities and Investments Commission (ASIC) and, using the applicant's reasonable endeavours, any person identified in the application as an interested person. However, there is no guidance on the face of the instrument nor in the explanatory statement as to what may constitute reasonable endeavours, nor what the consequences may be for failing to do so or who has the discretion to determine whether parties have made reasonable endeavours.

The committee is typically concerned with instruments which are not drafted clearly to the extent that this affects the meaning or interpretation of the instrument. Instruments and their explanatory statements should be clear and intelligible to all persons interested in or affected by them, not only those with particular knowledge or expertise. Key terms should be clearly defined to remove any potential confusion or misunderstanding.

The committee would therefore appreciate your advice as to:

- **what may constitute cooperating with other parties in good faith, the consequences for failing to do so, and who is empowered to determine whether parties have acted in good faith under subsection 7(4);**
- **whether subsection 7(4) of the instrument can be redrafted to provide greater clarity as to its operation, purpose and meaning (or, at a minimum, further clarifying detail can be set out in the explanatory statement);**
- **what may constitute reasonable endeavours, the consequences for failing to do so, and who is empowered to determine whether parties have made reasonable endeavours under subsection 10(3); and**
- **whether subsection 10(3) of the instrument can be redrafted to provide greater clarity as to its operation, purpose and meaning (or, at a minimum, further clarifying detail can be set out in the explanatory statement).**

Personal rights and liberties—procedural fairness (section 11)

Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties, including whether the instrument abrogates procedural fairness.

Subsection 11(1) of the instrument provides that a person may request the Panel to withhold information from a party for confidentiality or other reasons. Paragraph 11(1)(c) provides that the person making the request should include all of the information necessary for the Panel to consider any adverse effect to the person in providing the information to it.

The common law right to procedural fairness is underpinned by the fair hearing rule and the rule against bias. The fair hearing rule requires a person who may be adversely affected by a decision to be given an adequate opportunity to put their case before the decision is made.

The committee is concerned that section 11 of the instrument may limit procedural fairness for parties to the proceedings. As drafted, while certain information should be provided to the Panel, there does not appear to be any criteria as to what would constitute an acceptable reason for an application under section 11 to be granted. It is therefore unclear whether the Panel is required to consider any matters raised in relation to procedural fairness by the party making the application when deciding whether information will be withheld.

Further, the instrument does not provide for the party seeking to withhold information to include everything necessary for the Panel to consider any adverse effect of withholding the information on the party from which the information is being withheld. In this regard, it appears that procedural fairness considerations would only be considered for the party making the application to withhold information and not any parties affected by such withholding. The instrument also fails to specify whether the party from whom information is withheld will have an opportunity to present their case as to why such information should be disclosed to them. It is also unclear from the provisions whether parties from whom information is being withheld would be aware that the withholding has occurred.

Where an instrument limits or denies the right to procedural fairness, the committee expects the explanatory statement to provide a comprehensive justification for the relevant exclusion or limitation. The committee notes that the explanatory statement does not provide any further clarification or explanation of these provisions, which prevents the committee from properly scrutinising their effect.

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

- **whether the Panel is required to consider whether withholding information will abrogate the rights of any party to procedural fairness in making a decision to withhold such information;**
- **whether a party from whom information is withheld will have an opportunity to present their case against the decision of the Panel to withhold information; and**
- **whether subsection 11(1) of the instrument and the relevant sections of the explanatory statement can be redrafted to provide greater clarity as to the section's operation, purpose and meaning.**

Personal rights and liberties—legal professional privilege

Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties, including whether the instrument abrogates the right to legal professional privilege.

Subsection 11(2) provides that a party wishing to claim legal professional privilege over advice given in a document and who wishes to withhold the document or part of it should identify the holder of the privilege, the circumstances in which the advice was given, and the subject matter or questions to which the advice was directed.

The implication of subsection 11(2) appears to be that legal professional privilege only applies when an application has been made and granted. The instrument does not set out the circumstances in which a decision would be made to either grant or deny such an application for legal professional privilege including the factors that would be taken into account by the decision maker, nor who would make this decision.

The committee's view is that legal professional privilege is an important common law right which should only be abrogated in exceptional circumstances. As such, a sound justification should be provided for any provision that seeks to limit this fundamental right. The committee notes that no such justification is provided in the explanatory statement.

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

- **why it is considered necessary and appropriate for subsection 11(2) of the instrument to limit legal professional privilege;**
- **what factors will be considered by the Panel in deciding whether to grant an application for legal professional privilege; and**
- **whether subsection 11(2) of the instrument and the relevant sections of the explanatory statement can be redrafted to provide greater clarity as to the section's operation, purpose and meaning.**

Scope of administrative power—insufficiently defined power (section 15)

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. This includes where instruments confer discretionary powers or functions which are insufficiently defined.

Section 15 provides that an applicant may only withdraw its application with the consent of the Panel.

The committee considers that instruments that confer discretionary powers on a person or body should set out the factors which must be considered in exercising the discretion. The explanatory statement should also address the purpose and scope of the discretion and why it is necessary. The committee also expects the explanatory statement to explain the nature and source of any relevant limitations and safeguards, including whether they are contained in law or policy.

The explanatory statement does not address why it is necessary for a party to obtain consent from the Panel to withdraw an application that they themselves have made. In addition, neither the instrument nor the explanatory statement explains what factors will be considered by the Panel when deciding to consent to the withdrawal of an application. The lack of explanation in the

explanatory statement prevents the committee from properly scrutinising the purpose, scope and effect of section 15.

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

- **why it is considered necessary and appropriate for section 15 of the instrument to require the Panel to consent to a request from the applicant to withdraw their application;**
- **what factors may be considered by the Panel in determining whether to consent to an application made under section 15; and**
- **whether section 15 of the instrument and the relevant sections of the explanatory statement can be redrafted to provide greater clarity as to the section's operation, purpose and meaning.**

Scope of administrative power—insufficiently defined power (section 16)

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. This includes where instruments confer discretionary powers or functions which are insufficiently defined.

Subsection 16(1) of the instrument provides that a party may apply to the Panel to become a party to proceedings, with the exception of ASIC who does not need to apply. Subsection 16(5) provides that the Panel may withdraw its acceptance for a party to become party to proceedings if, in the Panel's opinion, the person is not or no longer an interested party, is not a proper or necessary party to the proceedings, or it is otherwise appropriate to do so.

The committee considers that instruments that confer discretionary powers on a person or body should set out the factors which must be considered in exercising the discretion. The explanatory statement should also address the purpose and scope of the discretion and why it is necessary. The committee also expects the explanatory statement to explain the nature and source of any relevant limitations and safeguards, including whether they are contained in law or policy.

Neither the instrument nor the explanatory statement explains what factors will be considered by the Panel when deciding to accept a person as party to proceedings. The lack of explanation in the explanatory statement prevents the committee from properly scrutinising the purpose, scope, and effect of section 16.

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

- **what factors may be considered by the Panel in determining whether to consent to an application made under section 16 by a person to become party to proceedings; and**
- **whether section 16 of the instrument and the relevant sections of the explanatory statement can be redrafted to provide greater clarity as to the section's operation, purpose and meaning.**

Privacy

Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties, including the right to privacy.

Section 18 of the instrument sets out confidentiality requirements which provide that parties must not disclose specified confidential information except as permitted under the instrument, or within the proceedings as permitted under the instrument, or as required by law or the rules of a securities exchange. Subsection 18(5) provides that the confidentiality requirements of section 18 do not apply to ASIC.

The committee's view is that provisions which enable the collection, use or disclosure of personal information may trespass on an individual's right to privacy, and should generally be included in primary legislation, rather than delegated legislation. Where an instrument nevertheless contains such provisions, the committee expects that the explanatory statement should explain the nature and scope of the provisions. The explanatory statement should also address the nature and extent of the information that may be disclosed and the persons or entities to whom disclosure is permitted. The committee also expects the explanatory statement to justify why the provisions are necessary and appropriate, and what safeguards are in place to protect this personal information, and whether these safeguards are in law or policy. Explanatory statements should also indicate whether the safeguards in the *Privacy Act 1988* apply.

In this regard, the explanatory statement does not explain why it is necessary for ASIC to be excluded from the confidentiality requirements in section 18, and what limitations or safeguards apply in relation to ASIC's use, collection and disclosure of confidential information.

In light of the above, we would appreciate your advice as to:

- **the nature, scope and extent of personal information that may be collected, used or disclosed by ASIC under the instrument;**
- **who, or which entities, can this information be disclosed to; and**
- **whether any statutory safeguards apply to protect this personal information, including whether the *Privacy Act 1988* applies.**

Freedom of expression

Clarity of drafting

Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties. This may include where instruments prevent freedom of expression. In addition, Senate standing order 23(3)(e) requires the committee to scrutinise each instrument as to whether its drafting is defective or unclear.

Subsection 19(1) provides that parties must not directly or indirectly cause, participate in or assist the canvassing in any media of any issue that is before, or is likely to be before the Panel in proceeding, within certain circumstances. Subsection 19(5) provides that this requirement does not apply to ASIC.

It appears that subsection 19(1) may have the effect of limiting the freedom of expression of parties to the proceedings, by preventing them from causing issues that are before the Panel from being discussed in the media. It is unclear why ASIC is however not similarly restricted. The explanatory statement does not justify why it is necessary and appropriate for this limitation to be placed on all parties but not ASIC, nor does it identify who may decide whether a party has breached section 19. In addition, neither the instrument nor the explanatory statement provides guidance on what may constitute 'indirectly' causing, participating or assisting the canvassing of such issues in the media, nor what the penalties or consequences may be for failing to meet the requirements in section 19.

In light of the above, we would appreciate your advice as to:

- **why it is considered necessary and appropriate for section 19 to provide that parties to proceedings, with the exception of ASIC, must not directly or indirectly cause, participate in or assist the canvassing in any media of any issue that is before, or is likely to be before the panel in proceeding, within certain circumstances;**
- **what may constitute 'indirectly' causing, participating or assisting the canvassing of such issues in the media; and**
- **what the penalties or consequences may be for failing to meet the requirements in section 19.**

Personal rights and liberties—procedural fairness (section 20)

Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties, including whether the instrument abrogates procedural fairness.

Subsection 20(1) provides that parties can make preliminary submissions to the Panel about whether the Panel should conduct proceedings in relation to an application, but parties cannot make rebuttal submissions to preliminary submissions unless so approved by the Panel. Subsection 20(2) provides that an applicant must not make preliminary submissions, and subsection 20(3) provides that the Panel may accept preliminary submissions from persons not party to the proceedings.

The common law right to procedural fairness is underpinned by the fair hearing rule and the rule against bias. The fair hearing rule requires a person who may be adversely affected by a decision to be given an adequate opportunity to put their case before the decision is made.

The committee is concerned that section 20 of the instrument may limit procedural fairness for parties to the proceedings. It is unclear why rebuttals to preliminary submissions are not permitted, and it is also unclear why the applicant cannot make preliminary submissions. It is particularly concerning to the committee that subsection 20(3) provides that the Panel may accept preliminary submissions from any person who is not party to the proceedings, without specifying the factors or grounds upon which the Panel will decide whether to accept such a submission. Section 20 does not appear to require the Panel to consider whether the person is connected to the proceedings on foot.

Where an instrument limits or denies the right to procedural fairness, the committee expects the explanatory statement to provide a comprehensive justification for the relevant exclusion or limitation. The committee notes that the explanatory statement does not provide any further clarification or explanation of these provisions, which prevents the committee from properly scrutinising their effect. In addition, the explanatory statement fails to justify why any person or party to the proceedings except the applicant can make preliminary submissions.

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

- **whether the Panel is required to consider the rights of any party to procedural fairness in making a decision under section 20;**
- **why it is considered necessary and appropriate for subsection 20(3) to provide that any person not party to the proceedings may make preliminary submissions with Panel**

approval, noting that the parties have no opportunity to rebut these submissions as per subsection 20(1); and

- whether section 20 of the instrument and the relevant sections of the explanatory statement can be redrafted to provide greater clarity as to the section's operation, purpose and meaning.

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 **28 April 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



14 April 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au

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

Dear Treasurer,

Tax Agent Services (Specified BAS Services No. 2) Instrument 2020 [F2020L01406]

Thank you for your response of 15 March 2021 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 13 April 2021 and has resolved to seek your further advice about the issues outlined below.

Compliance with authorising legislation

Modification of primary legislation

Parliamentary oversight

The committee requested your advice as to how subsection 90-10(1A) of the *Tax Agent Services Act 2009* (the Act) enables the definition of a BAS service to be extended to services related to the superannuation guarantee charge. You advised that the Tax Agent Services (Specified BAS Services) Instrument 2016 did not extend the scope of services provided by BAS agents to services related to the superannuation guarantee charge. You further advised that the Tax Agent Services (Specified BAS Services No. 2) Instrument 2020 (the instrument) was therefore introduced to allow BAS agents to lawfully provide services such as those related to the superannuation guarantee charge extending beyond the legislative definition of BAS provisions which the Tax Practitioners Board considers appropriate for BAS agents.

You also advised that it is appropriate for the measures in the instrument to be in delegated legislation as to insert them into the Act would insert provisions which apply to a relatively small group of persons into an already complicated legislative framework. You further advised that the 10-year sunset period is appropriate to prevent business uncertainty and shorter sunset would give rise to significant commercial risks and costs.

However, the committee's view remains that the measures in the instrument are not so complicated that it would be inappropriate to insert them into the Act, and that any potential uncertainty can be alleviated by including these measures in the primary legislation.

The instrument appears to be a substantial extension of the provisions of the Act and appears to be intended to remain in force for at least 10 years. The committee therefore reiterates its concerns that the instrument, which modifies the operation of primary legislation, is intended to remain in force until it sunsets. The committee's longstanding view is that provisions which modify the

operation of primary legislation should cease to operate no more than three years after they commence, to ensure a minimum degree of parliamentary oversight.

The committee's scrutiny concerns in this regard are underscored by the fact that it remains unclear to the committee whether subsection 90-10(1A) of the Act provides the legislative authority for the meaning of BAS services to be extended to include services beyond services dealing with business activity statements (such as services relating to superannuation), by legislative instrument.

The committee notes in particular your advice that the instrument is extending the legislative definition of BAS services to include services relating to the superannuation guarantee charge. It is unclear to the committee based on your advice whether to do so is within the scope of the enabling Act.

Subsection 90-10(1A), when read in its legislative context, appears to require the extension of services provided by BAS agents to relate to business activity statements, as all the services referred to in subsection 90-10(1) as BAS services relate to BAS provisions. This is relevant context for the scope of power to specify another service as a BAS service by legislative instrument made under subsection 90-10(1A). In the absence of any information to the contrary it therefore appears to the committee that the instrument may be beyond the scope of its enabling provision.

The committee would therefore appreciate your further advice as to how subsection 90-10(1A) of the *Tax Agent Services Act 2009* authorises delegated legislation to extend BAS services to those relating to the superannuation guarantee charge, noting that subsection 90-10(1) appears to limit such delegated legislation to specifying services that relate to business activity statements.

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. The committee therefore gave notice of a motion to disallow the instrument on 15 February 2021 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 **28 April 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



14 April 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,

Telecommunications (Fibre-ready Facilities — Exempt Real Estate Development Projects) Instrument 2021 [F2021L00105]

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.

***Exemption from the operation of primary legislation
Parliamentary oversight***

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment. This may include instruments which provide continuing exemptions to primary legislation. In addition, Senate standing order 23(3)(k) requires the committee to scrutinise each legislative instrument as to whether it complies with any other ground relating to the technical scrutiny of delegated legislation. This includes whether an instrument limits parliamentary oversight.

The instrument exempts certain real estate development projects from the requirements in Part 20A of the *Telecommunications Act 1997* (the Act) to install fibre-ready pit and pipe. The exemption applies to real estate developments which satisfy certain conditions and are located outside a National Broadband Network (NBN) fixed line rollout region. The instrument will sunset in 2031.

The committee generally prefers that exemptions from primary legislation by delegated legislation do not continue in force for such time as to operate as a de facto amendment to the principal Act. In this regard, the committee notes that the standard ten-year sunseting applies to the instrument. However, the previous iteration of this instrument, the Telecommunications (Fibre-ready Facilities— Exempt Real Estate Development Projects) Instrument 2016 [F2016L01871], had a four-year repeal provision. As the measures in this instrument replicate the previous instrument, it is unclear to the committee why this instrument does not also repeal in four years, given the substantive measures are the same.

The committee notes that the explanatory statement explains the exemption from the requirement to lay pit and pipe is needed for these developments as it can be very costly and pit and pipe facilities are unlikely to be required for the foreseeable future, or perhaps may never be required for these types of developments. In light of this, the committee considers that these measures appear to be intended to remain in force for a significant amount of time and would therefore be more appropriate for primary legislation.

The committee's longstanding view is that provisions which exempt persons or entities from the operation of primary legislation should cease to operate no more than three years after they commence. This is to ensure a minimum degree of regular parliamentary oversight.

In addition, as per the committee's guidelines, the committee considers that the explanatory statement should indicate whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation. The committee notes that no such information is provided in the explanatory statement.

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

The committee therefore requests your advice as to:

- **why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to exempt certain real estate developments from the requirements in Part 20A of the *Telecommunications Act 1997*;**
- **whether the instrument can be amended to provide that the measures cease within three years after commencement; and**
- **whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **28 April 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