



13 May 2021

Senator the Hon Richard Colbeck
Minister for Senior Australians and Aged Care Services
Parliament House
Canberra 2600 ACT

Via email: Minister.Colbeck.DLO@health.gov.au
CC: parliamentary.committees@health.gov.au

Dear Minister,

Aged Care Legislation Amendment (Serious Incident Response Scheme) Instrument 2021 [F2021L00222]

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.

Significant matters in delegated legislation
Parliamentary oversight

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment, which should be included in primary, rather than delegated, 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 makes arrangements relating to the Serious Incident Response Scheme (SIRS) for residential aged care.

Division 4 of the instrument relates to reportable incidents. Section 15NA defines or clarifies the meaning of 'reportable incidents' for the purposes of subsection 54-3(4) of the *Aged Care Act 1997* (Aged Care Act), and section 15NB sets out what is not a 'reportable incident'. The remainder of Division 4 prescribes related measures such as how and when providers must report any reportable incidents.

As a matter of technical scrutiny, the committee is required to scrutinise each legislative instrument as to whether it contains matters more appropriate for parliamentary enactment.

Providers of residential aged care must report such reportable incidents to the Aged Care Quality and Safety Commission (the Commission). The committee is concerned that the instrument deals with significant matters arising from defining the scope of a reportable incident, which appears to

be integral to the operation of the SIRS and its objective of preventing abuse and neglect of older Australians in residential aged care.

From a scrutiny perspective, the committee is particularly concerned about section 15NB which modifies the definition of 'reportable incident' in section 54-3 of the Aged Care Act by providing that, despite the provisions of the Act, the following are not 'reportable incidents':

- the use of physical restraint or chemical restraint in relation to a residential care recipient if:
 - the use of physical restraint or chemical restraint is in a transition care program in a residential care setting; and
 - the use is in the circumstances in sections 15F and 15G (relating to the use of physical and chemical restraints as a last resort); and
- an incident that results from the residential care recipient deciding to refuse to receive care or services offered by the approved provider.

The committee notes that the explanatory statement explains that it is appropriate for these matters to be in delegated legislation as they 'relate to operational matters such as process and procedure', and 'allow for responsiveness in the changing aged care environment'. The explanatory statement further explains that this flexibility will protect residential aged care recipients from abuse by facilitating prompt responses to unforeseen risks.

However, given the seriousness of such events occurring in the aged residential care context, the committee considers that the matters set out in sections 15NA and 15NB are more appropriate for parliamentary enactment. In relation to the modifications to the definition of 'reportable incident' in section 15NB in particular, it is not clear why flexibility is required in relation to these modifications given that it appears that these exceptions to the definition of 'reportable incident' may not change over time. The committee therefore considers that these modifications should be included in the primary legislation to enable full parliamentary scrutiny of what may be enduring exceptions to the definition of 'reportable incident'.

The committee therefore requests your advice as to:

- **why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to define the concept of a 'reportable incident' for the purposes of the Serious Incident Response Scheme; and**
- **whether the modifications to the definition of 'reportable incident' in section 15NB of the instrument can instead be set out on the face of the Aged Care 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. 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 **27 May 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



13 May 2021

The Hon Greg Hunt MP
Minister for Health and Aged Care
Parliament House
Canberra 2600 ACT

Via email: Minister.Hunt.DLO@health.gov.au

CC: rezana.berman@health.gov.au

Dear Minister,

National Health (Data-matching) Principles 2020 [F2021L00006]

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. As advised in my letter dated 28 April 2021, the committee secretariat has been liaising with your department in relation to potential scrutiny concerns in the above instrument. The committee has now considered the instrument with the benefit of the department's advice, and has resolved to seek further formal advice from you in relation to the matters outlined below.

Availability of independent merits review

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.

Subsection 18(6) of the instrument provides that the Chief Executive Medicare must take such steps (if any) as are reasonable in the circumstances to correct personal information that has been matched by the Chief Executive Medicare or by an authorised Commonwealth entity if the relevant individual requests that the Chief Executive Medicare corrects the information. This appears to enable the Chief Executive Medicare to exercise discretion in determining what reasonable steps may be taken.

However, neither the instrument nor the explanatory statement indicates whether such decisions are subject to independent merits review.

Where an instrument empowers a decision-maker to make discretionary decisions with the capacity to affect rights, liberties, obligations or interests, the committee ordinarily expects that those decisions should be subject to independent merits review. The committee therefore expects the explanatory statement to any instrument including such powers to explain whether independent merits review is available.

If merits review is not available, the committee expects the explanatory statement to identify the characteristics of the relevant decisions which justify their exclusion from merits review with reference to the Administrative Review Council's guide, *What decisions should be subject to merit review?*

The committee understands that the view of the Department is that decisions made under subsection 18(6) of the instrument are not appropriate for merits review and that this is in line with the Administrative Review Council's guidelines. However, the committee's scrutiny concerns remain in relation to this matter.

The committee notes that the privacy of individuals may be impacted through the use of personal information under subsection 18(6). It is unclear from the explanatory statement whether the Information Commissioner may have oversight and review obligations in relation to the use and correction of personal information under this subsection.

The committee would therefore appreciate your advice as to:

- **whether decisions made by the Chief Executive Medicare under subsection 18(6) are subject to independent merits review; and if not, what characteristics of the decision justifies the exclusion of independent merits review, by reference to the established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*; and**
- **whether the Information Commissioner has a merits review function in this context.**

Parliamentary oversight – technical standards are not legislative instruments

Senate standing order 23(3)(k) requires the committee to consider whether an instrument complies with any other ground relating to the technical scrutiny of delegated legislation. This includes where significant elements of a scheme are set out in non-legislative instruments.

Section 6 of the instrument provides that the Chief Executive Medicare must prepare and maintain, in writing, technical standards to govern the conduct of each authorised data-matching program. In matching information under subsection 132B(1) of the *National Health Act 1953* for an authorised data-matching program, the Chief Executive Medicare and an authorised Commonwealth entity must comply with the technical standards for the program. Further, the committee understands that the technical standards are not intended to be published.

The committee understands that the Department's position is that these technical standards are administrative as opposed to legislative in character. However, the committee notes subparagraph 8(4)(b)(i) of the *Legislation Act 2003* (Legislation Act) which specifies that an instrument is a legislative instrument if any provision of the instrument "determines the law or alters the content of the law, rather than determining particular cases or particular circumstances in which the law, as set out in an Act or another legislative instrument or provision, is to apply, or is not to apply".

The committee considers that the technical standards appear to be determining the content of the law, as subsection 132B(3) of the *National Health Act 1953* requires an authorised Commonwealth entity to comply with the technical standards. Therefore, it is the committee's view that the technical standards provided for by this instrument ought to be considered legislative instruments as they appear to satisfy the above definition in the Legislation Act.

The committee would therefore appreciate your advice as to:

- **why it is considered that the technical standards are not legislative instruments; and**
- **why it is considered appropriate that the technical standards are not subject to publication.**

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. As previously advised, noting that the 15th sitting day after the instrument was tabled in the Senate was 11 May 2021, the committee gave 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 **27 May 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



13 May 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 (Consumer Data Right) Amendment Rules (No. 3) 2020 [F2020L01688]

Thank you for your response of 28 April 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 12 May 2021 and has resolved to seek your further advice about the issues outlined below.

Significant penalties in delegated legislation

In relation to this matter you advised that under Part IVD of the *Competition and Consumer Act 2010* (the Act), the rules may provide for civil penalty provisions and that the penalties in rules 5.34 and 9.3 are 'the lower maximum penalties available' under the Consumer Data Right (CDR) regime. The maximum penalties inserted are a maximum of \$50,000 (approximately 225 penalty units) for an individual and \$250,000 (approximately 1,125 penalty units) for a body corporate.

In relation to the penalty in rule 5.34, you advised that the penalty, which you describe as being 'at the lower end of the scale', is appropriate and proportionate to the potential impact on the CDR system if the rule was breached.

In relation to the penalty in rule 9.3, you advised that the penalty is consistent with penalties for similar offences, is consistent with the CDR regime and that penalties at 'the lower end of the scale' for certain record keeping provisions recognise the importance of record keeping for ensuring transparency and compliance.

While noting this further information, the committee continues to have scrutiny concerns in relation to the inclusion of these penalty provisions, which significantly exceed what the committee considers appropriate for inclusion in delegated legislation. The committee's views in relation to this matter align with the guidance set out in the *Guide to Framing Commonwealth Offences* published by the Attorney-General's Department.

While also noting the explanation that the inclusion of penalty provisions in the rules are enabled by the Act, from a scrutiny perspective, the committee remains concerned with the inclusion of such significant penalties in delegated legislation.

The committee therefore requests your further advice as to:

- why it is considered necessary and appropriate to include these significant penalty provisions in the rules (not merely why it is necessary for the Act to enable penalties to be set out in rules);
- whether including these penalty provisions in primary legislation was considered when the CDR regime and rules were being developed; and
- whether the *Guide to Framing Commonwealth Offences* was considered when including these penalty provisions in the rules.

Clarity of drafting

Thank you for your explanation of what is meant by ‘similar documents’ and the limitations of that term in relation to this instrument.

You advised that ‘similar documents’ is ‘to be interpreted narrowly, in that the information contained in such a document will be of a similar kind to that contained in a PDS or key fact sheet for a product, and will be in a document ‘required by law’ to be provided to consumers’ and that the information required to be provided is the kind of information that must ordinarily be made available to consumers.

You also advised there is a constraint on the kind of product data that is required to be disclosed, as the definition of ‘required product data’ is limited to the scope defined in subsection 56BF(1) of the Act and the rules therefore, cannot ‘require the disclosure of data unless it is about the eligibility criteria, terms and conditions, price, or already publicly available information about availability or performance of a product’. The committee understands this also limits what is considered a ‘similar document’.

The committee therefore requests that the Australian Competition and Consumer Commission amend the explanatory statement to the instrument to include the further information regarding ‘similar documents’ as outlined in your letter of 28 April 2021.

Conferral of discretionary powers

Availability of independent merits review

Thank you for your advice regarding the limits to the Registrar’s discretionary power. You advised that:

- the Registrar must only issue a written notice if they have a reasonable belief it is necessary to do so to ensure the security, integrity and stability of the register or associated database,
- a direction may only be issued for a maximum of 10 days; and
- that the Registrar is required to provide participants with a reasonable opportunity to be heard in relation to any direction (procedural fairness).

Based on this advice, the committee has concluded its examination of this matter.

Compliance with Legislation Act 2003 – incorporation

Thank you for your advice that the ASAE 3150 and the CDR Accreditation Guidelines are incorporated as existing from time to time and this is permitted by section 56G of the Act.

The committee therefore requests that the Australian Competition and Consumer Commission amend the explanatory statement to the instrument to include this further information, as outlined in your letter of 28 April 2021, including details of where both documents can be accessed, 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 instrument while it is still subject to disallowance. Noting that the 15th sitting day after the instrument was tabled in the Senate was 11 May 2021, the committee gave 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 **27 May 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



13 May 2021

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

Via email: dlo@communications.gov.au

Dear Minister,

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

Thank you for your response of 1 May 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 12 May 2021 and has resolved to seek your further advice about the issues outlined below.

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

Thank you for your advice that the measures in the instrument are in delegated legislation due to a need for flexibility and because of the complexity of the measures. The committee notes your advice that this is as was envisaged in the explanatory memorandum for the originating bill (the Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011).

You further advised that the 10-year duration of the instrument is necessary for business certainty and that the exemptions in the instrument will be an ongoing feature of the regime. In addition, you noted that a review of the instrument is likely in the next 12 months and that the review could consider whether the measures could be incorporated into Part 20A of the *Telecommunications Act 1997*.

The committee appreciates this advice, yet remains of the view that these measures remain more appropriate for primary legislation. The committee notes, in particular, your position that the exemption provided for "will need to be an ongoing feature of the regime" and considers that this supports the committee's views that the measures appear to be intended to remain in force for some time and would therefore be more appropriate for primary legislation.

If the measures are to remain in delegated legislation, the committee reiterates its view that the instrument should be amended to provide that it cease no later than three years from commencement. In your response you advised the committee that emerging issues in the industry may require the exemption measures to be modified. In light of this, the committee considers that a three-year duration would provide you with the opportunity to review the efficacy of the exemption in context with emerging industry changes, and seek stakeholder and user consultation as to what changes may be required or retained.

The committee would therefore appreciate your further advice as to:

- whether the instrument can be amended to provide that it ceases within three years from commencement; and
- whether the upcoming review of the instrument will include consideration as to whether, in light of the committee's scrutiny views outlined above, it would be more appropriate to insert these measures into Part 20A of the *Telecommunications Act 1997*.

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 will be 15 June 2021, the committee intends to give 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 **27 May 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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**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

13 May 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,

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

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

Thank you for your response of 26 April 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 12 May 2021. On the basis of your ongoing, good faith engagement with the committee in relation to Treasury portfolio instruments which modify or exempt persons or entities from the operation of primary legislation, the committee has resolved to conclude its examination of the instruments as part of its regular scrutiny process.

However, as you are aware, the committee continues to have significant systemic scrutiny concerns relating to instruments which modify the operation of primary legislation, and the operation of these instruments for a ten year period. The committee will therefore consider these instruments as part of this ongoing engagement. In light of these ongoing discussions, the committee has resolved to withdraw the notices of motion to disallow these instruments.

While the committee has resolved to withdraw the disallowance notices in place on these instruments, I advise that the committee will give disallowance notices on similar Treasury portfolio instruments which raise these concerns in the future if the committee's systemic scrutiny concerns are not satisfactorily resolved through the current ongoing discussions.

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



13 May 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,

ASIC Corporations (Design and Distribution Obligations—Exchange Traded Products) Instrument 2020/1090 [F2020L01600]

Thank you for your response of 9 April 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 12 May 2021. On the basis of your ongoing, good faith engagement with the committee in relation to Treasury portfolio instruments which modify or exempt persons or entities from the operation of primary legislation, the committee has resolved to conclude its examination of the instrument as part of its regular scrutiny process.

However, as you are aware, the committee continues to have significant systemic scrutiny concerns relating to instruments which modify the operation of primary legislation, and the operation of these instruments for a ten year period. The committee will therefore consider this instrument as part of this ongoing engagement. In light of these ongoing discussions, the committee has resolved to withdraw the notice of motion to disallow the instrument.

While the committee has resolved to withdraw the disallowance notice in place on this instrument, I advise that the committee will give disallowance notices on similar Treasury portfolio instruments which raise these concerns in the future if the committee's systemic scrutiny concerns are not satisfactorily resolved through the current ongoing discussions.

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.

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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**Senate Standing Committee for the
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Parliament House, Canberra ACT 2600
02 6277 3066 | sdlc.sen@aph.gov.au
www.aph.gov.au/senate_sdlc

13 May 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,

Commonwealth Grant Scheme Guidelines 2020 [F2020L01609]

Thank you for your response of 12 April 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 12 May 2021. Based on your advice regarding the necessity of setting out the national priorities in an instrument to ensure flexibility in responding to changing education and workforce needs and confirmation that the Australian Bureau of Statistics' *Australian Standard Classification of Education* is incorporated in the instrument as in force from time to time, 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 7 of 2021*.

In light of this, the committee has resolved to withdraw the disallowance notice in place on 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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13 May 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]

Further to my letter of 14 April 2021 in relation to the above instrument, I write to advise that, on the basis of your ongoing, good faith engagement with the committee in relation to Treasury portfolio instruments which modify or exempt persons or entities from the operation of primary legislation, the committee has resolved to conclude its examination of the instrument as part of its regular scrutiny process.

However, as you are aware, the committee continues to have significant systemic scrutiny concerns relating to instruments which modify the operation of primary legislation, and the operation of these instruments for a ten year period. The committee will therefore consider this instrument as part of this ongoing engagement. In light of these ongoing discussions, the committee has resolved to withdraw the notice of motion to disallow the instrument.

While the committee has resolved to withdraw the disallowance notice in place on this instrument, I advise that the committee will give disallowance notices on similar Treasury portfolio instruments which raise these concerns in the future if the committee's systemic scrutiny concerns are not satisfactorily resolved through the current ongoing discussions.

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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13 May 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]

Thank you for your response of 28 April 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 12 May 2021. On the basis of your advice that Part IVD of the *Competition and Consumer Act 2010* includes obligations that will apply to the Australian Energy Regulator, and the more detailed rules that will apply to the Australian Energy Regulator have not yet been made, the committee has concluded its examination of the instrument.

In light of this, the committee has resolved to withdraw the disallowance notice in place on 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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13 May 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]

Thank you for your response of 26 April 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 12 May 2021. On the basis of your ongoing, good faith engagement with the committee in relation to Treasury portfolio instruments which modify or exempt persons or entities from the operation of primary legislation, the committee has resolved to conclude its examination of the instrument as part of its regular scrutiny process.

However, as you are aware, the committee continues to have significant systemic scrutiny concerns relating to instruments which modify the operation of primary legislation, and the operation of these instruments for a ten year period. The committee will therefore consider this instrument as part of this ongoing engagement. In light of these ongoing discussions, the committee has resolved to withdraw the notice of motion to disallow the instrument.

While the committee has resolved to withdraw the disallowance notice in place on this instrument, I advise that the committee will give disallowance notices on similar Treasury portfolio instruments which raise these concerns in the future if the committee's systemic scrutiny concerns are not satisfactorily resolved through the current ongoing discussions.

In addition, the committee appreciates your advice that specific consultation was not undertaken on the instrument due to prior consultation on the Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 and the fact that the instrument brings the restructuring process into alignment with other insolvency processes. The committee considers that, as a matter of best practice, this additional information on consultation should have been included in the 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



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13 May 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 Amendment (Corporate Insolvency Reforms) Regulations 2020 [F2020L01654]

Thank you for your response of 9 April 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 12 May 2021.

The committee welcomes your undertaking to remove subregulation 5.3B.25(4) which provides that the offence in subregulation 5.3B.25(3) is a strict liability offence. This undertaking has been listed in Appendix C of *Delegated Legislation Monitor 7 of 2021*.

In addition, on the basis of your ongoing, good faith engagement with the committee in relation to Treasury portfolio instruments which modify or exempt persons or entities from the operation of primary legislation, the committee has resolved to conclude its examination of the instrument as part of its regular scrutiny process.

However, as you are aware, the committee continues to have significant systemic scrutiny concerns relating to instruments which modify the operation of primary legislation, and the operation of these instruments for a ten year period. The committee will therefore consider this instrument as part of this ongoing engagement. In light of these ongoing discussions, the committee has resolved to withdraw the notice of motion to disallow the instrument.

While the committee has resolved to withdraw the disallowance notice in place on this instrument, I advise that the committee will give disallowance notices on similar Treasury portfolio instruments which raise these concerns in the future if the committee's systemic scrutiny concerns are not satisfactorily resolved through the current ongoing discussions.

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.

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

12 May 2021

The Hon Justice William Alstergren
Chief Justice, Family Court of Australia
Chief Justice, Federal Circuit Court of Australia
GPO BOX 9991
MELBOURNE VIC 3001

Via email: Associate.ChiefJudgeAlstergren@federalcircuitcourt.gov.au

CC: Senator the Hon Michaelia Cash, Attorney-General
attorney@ag.gov.au; DLO@ag.gov.au

Dear Chief Justice,

**Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020
[F2020L01361]**

**Federal Circuit Court Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020
[F2020L01362]**

Thank you for your letter of 29 April 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above rules. The committee considered your letter at its private meeting earlier today.

The committee appreciates your advice that, as an interim measure to resolve the current technical scrutiny matter relevant to these rules, replacement explanatory statements which include statements of compatibility with human rights have been registered on the Federal Register of Legislation. As this resolves the committee's technical scrutiny concerns, I will today advise the Senate of the committee's intention to withdraw the notices of motion to disallow the rules. The committee takes this opportunity to thank you for your constructive engagement on this matter.

At this stage, the committee also notes the broader issues that you have raised and appreciates your willingness to further engage on the matters that the committee has raised with the Commonwealth Attorney-General in relation to the technical operation of the relevant provisions. In this regard, the committee may write again once it has had an opportunity to consider correspondence received from the Attorney-General.

Please note that in the interests of transparency this correspondence will be published on the committee's website.

Thank you again for your continued assistance to the committee 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

13 May 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,

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

Thank you for your response of 27 April 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 12 May 2021.

The committee welcomes your undertaking to amend the explanatory statement to include further information on the incorporation of the Australian Systems of National Accounts. This undertaking has been listed in Appendix C of *Delegated Legislation Monitor 7 of 2021*.

In addition, on the basis of your ongoing, good faith engagement with the committee in relation to Treasury portfolio instruments which modify or exempt persons or entities from the operation of primary legislation, the committee has resolved to conclude its examination of the instrument as part of its regular scrutiny process.

However, as you are aware, the committee continues to have significant systemic scrutiny concerns relating to instruments which modify the operation of primary legislation, and the operation of these instruments for a ten year period. The committee will therefore consider this instrument as part of this ongoing engagement. In light of these ongoing discussions, the committee has resolved to withdraw the notice of motion to disallow the instrument.

While the committee has resolved to withdraw the disallowance notice in place on this instrument, I advise that the committee will give disallowance notices on similar Treasury portfolio instruments which raise these concerns in the future if the committee's systemic scrutiny concerns are not satisfactorily resolved through the current ongoing discussions.

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

13 May 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.terrell@infrastructure.gov.au

Dear Assistant Minister,

Norfolk Island Employment Rules 2020 [F2020L01536]

Thank you for your response of 28 April 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 12 May 2021. Based on your advice about the application of the *Privacy Act 1988* and the Australian Privacy Principles, the committee has concluded its examination of the instrument.

The committee thanks you for registering a replacement explanatory which includes this additional information on the Federal Register of Legislation on 30 April 2021. In light of this, the committee has resolved to withdraw the disallowance notice in place on 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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13 May 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]

Thank you for your response of 28 April 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 12 May 2021. Based on your further advice about the scrutiny issues raised by the committee, the committee has concluded its examination of the instrument.

The committee welcomes your undertaking to amend the explanatory statement to include this further information, including further information about the scope of administrative powers under the instrument, procedural fairness, legal professional privilege, privacy and clarity of drafting. This undertaking has been listed in Appendix C of *Delegated Legislation Monitor 7 of 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



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13 May 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,

Taxation Administration (Remedial Power – Seasonal Labour Mobility Program) Determination 2020 [F2020L01474]

Thank you for your response of 22 April 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 12 May 2021. On the basis of your advice and noting that the instrument will repeal in three years, the committee has concluded its examination of the instrument and has resolved to withdraw the disallowance notice in place on this 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



13 May 2021

Senator the Hon Amanda Stoker
Assistant Minister to the Attorney-General
Parliament House
CANBERRA ACT 2600

Via email: AMO.DLO@ag.gov.au

Dear Assistant Minister,

Bankruptcy Regulations 2021 [F2021L00261]

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.

Modifications to 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 modifications 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.

This instrument contains the administrative requirements of the *Bankruptcy Act 1966* (the Bankruptcy Act), and supports the administration of bankruptcies, debt agreements and other formal insolvency options governed by the Bankruptcy Act.

Schedules 2–4 to the instrument contain a significant number of modifications to the *Fringe Benefits Tax Assessment Act 1986* (FBTA Act) and the Bankruptcy Act, including the statutory formula for calculating the taxable value of car fringe benefits, amendments to regulations related to personal insolvency agreements, rules surrounding joint debtors and the administration of estates of deceased persons. Some of the modifications made appear to be considerable changes to the primary legislation and it is unclear if they are intended as a temporary measure or a longer-term de facto amendment to the primary legislation.

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.

In addition the committee's longstanding view is that provisions 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. The committee notes that the standard ten-year sunseting applies to the instrument.

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 relation to this instrument, while the explanatory statement explains the operation of each modification, it remains unclear why it is considered necessary and appropriate to introduce these modifications in delegated legislation, rather than primary legislation. The committee is particularly concerned as these measures are contained in an instrument which was made to address the sunseting of the Bankruptcy Regulations 1996. The explanatory statement advises that the intention is to remake the Regulations in 'substantially the same form', yet the instrument includes a large number of modifications to primary legislation.

In light of this, from a scrutiny perspective, the committee considers that the instrument should be amended to specify that Schedules 2–4 cease 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 introduce a significant number of modifications to the FBT Act and the Bankruptcy Act;**
- **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 in the longer term, 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 **27 May 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



13 May 2021

Senator the Hon Amanda Stoker
Assistant Minister to the Attorney-General
Parliament House
CANBERRA ACT 2600

Via email: AMO.DLO@ag.gov.au

Dear Assistant Minister,

Law Enforcement Integrity Commissioner Amendment (Law Enforcement Agencies) Regulations 2020 [F2020L01506]

Thank you for your response of 14 April 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 12 May 2021 and has resolved to seek your further advice about the issues outlined below.

As you are aware, the committee previously emphasised its significant concern that delegated legislation is being used to significantly expand the jurisdiction of a Commonwealth integrity body and effectively broaden the application of its investigative powers.

The committee notes your advice that the government considered implementing the measures introduced by the instrument via primary legislation but determined it was more appropriate to use delegated legislation at the time. You advised that the government intends to introduce the Commonwealth Integrity Commission (CIC) Bill into Parliament this year and once the CIC is operational, it will subsume the Australian Commission for Law Enforcement Integrity (ACLEI).

While the committee appreciates this further information, it remains concerned about the use of delegated legislation to introduce such significant measures. The committee is particularly concerned as there does not appear to be a clear timeframe for the introduction of the CIC Bill to Parliament. There also does not appear to be a clear timeframe for the CIC commencing its operations, or when ACLEI will be subsumed.

Further, the committee is concerned that the measures in this amendment instrument will remain in force until the Law Enforcement Integrity Commissioner Regulations 2017 (the principal instrument) sunsets on 1 April 2027. It is generally expected that such significant measures will be introduced via primary legislation, and where this is not possible or appropriate, a shorter sunset period will apply to ensure regular Parliamentary oversight.

The committee considers that a shorter sunset period is particularly appropriate in this instance given the intention that the CIC will subsume ACLEI if the CIC Bill is passed by the Parliament. In the event that the CIC Bill is not passed by the Parliament, a shorter sunset period would provide an opportunity for this significant expansion of ACLEI's jurisdiction to be set out in standalone primary

legislation prior to the sunset date, or at least in a further regulation which would provide an opportunity for further parliamentary consideration of this significant measure.

The committee therefore requests your further advice as to:

- **when it is expected that the CIC Bill will be introduced into the Parliament and, should the bill be passed by the Parliament, the anticipated timeframe for the CIC to commence operations; and**
- **whether the principal instrument can be amended to provide that the measures in this amendment instrument cease after 3 years.**

The committee's expectation is to be able 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 23 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 over, the committee would appreciate your response by **27 May 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



13 May 2021

The Hon Michael Sukkar MP
Assistant Treasurer
Parliament House
CANBERRA ACT 2600

Via email: atdlo@treasury.gov.au

CC: minister.sukkar@treasury.gov.au

Dear Assistant Treasurer,

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

Thank you for your response of 30 April 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 12 May 2021.

You advised that the power to make the instrument is within the scope of subsection 90-10(1A) of the *Tax Agent Services Act 2009* (the Act). You advised that subsection 90-10(1A) includes the power to specify that services under the *Superannuation Guarantee Charge Act 1992* (the Superannuation Act) are 'BAS services' via delegated legislation.

You also advised that "the Act does not require that the specified service be related to those already covered in subsection 90-10(1)", and that the content of the subsection "does not itself limit the services that can be prescribed". The committee understands your position to be that there is nothing in subsection 90-10(1) (which only lists services related to Business Activity Statements) that limits the scope of the power in subsection 90-10(1A) to specify a service as a BAS service by delegated legislation.

From a scrutiny perspective, the committee is concerned that your response suggests that there is essentially no limit on the power of the Tax Practitioners Board to determine a BAS service under these provisions.

The committee's view is that statutory provisions must be read in context,¹ and that the terminology used in the provision of 'BAS services' and the context of subsection 90-10(1) indicates the limits on the power to specify a service as a 'BAS service'. In addition, the committee considers that, in general, delegated legislation can fill out the detail of an Act but not extend it. Where the power to extend the operation of an Act is claimed, then it would need to be clear that the enabling provision is a Henry VIII power. The committee's view is that does not seem to be the case in subsection 90-10(1A).

¹ As per *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28, para [69].

The committee emphasises that a challenge to the validity of the instrument on the basis set out above may result in a court finding the instrument invalid. This could have significant consequences for persons acting in good faith under the instrument.

However, in accordance with the committee's past practice in circumstances where there is a difference of opinion about the validity of an instrument, the committee has resolved to conclude its examination of the instrument. In light of this, the committee has also resolved to withdraw the disallowance notice in place on this 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



13 May 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 Christian Porter MP, Minister for Industry, Science and
Technology, industrydlo@industry.gov.au

Department of Finance, FFSPRegs@finance.gov.au

Dear Chair,

**Legislative instruments specifying Commonwealth expenditure—Support for
Industry Service Organisations 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 Support for Industry Service Organisations 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 (Support for Industry Service Organisations Program) Instrument 2021 [F2021L00218]	Support for Industry Service Organisations Program	\$2.1 million in 2020-2021	The Program provides financial support to Australia's three peak non-government technical infrastructure organisations: Standards Australia, the National Association of Testing Authorities, and the Joint Accreditation System of Australia and New Zealand. The Program funding provided to these three organisations will enable them to assist Australia, and Australian businesses, to influence, apply and conform to international standards. Initially, the financial support provided will be for the specific purpose of supporting the influence or uptake of digital, critical technology or critical minerals standards work both domestically and internationally.

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 4 August 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



13 May 2021

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

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

cc: Senator the Hon Simon Birmingham, Minister for Finance,
DLO-Finance@finance.gov.au

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

Instrument	Grant/Program	Amount	Description
Industry Research and Development (Temporary Refinery Production Payment Program) Instrument 2021 [F2021L00202]	Temporary Refinery Production Payment Program	\$83.5 million in 2020-2021	Funding, to be calculated on a cent-per-litre basis, will be available to major Australian oil refineries that produce eligible transport fuels relevant to Australia's fuel security. Eligible refineries are entities with ownership of the Lytton refinery in Queensland and the Geelong refinery in Victoria.
Industry Research and Development (Electric Vehicle Manufacturing Program) Instrument 2021 [F2021L00204]	Electric Vehicle Manufacturing Program	\$5 million in 2020-2021	The Program provides \$5 million as part of the Australian Government's commitments to advanced manufacturing, increasing consumer choice for future fuels technologies, and supporting technologies to integrate battery electric vehicles into the grid. The initial funding available is for an ad hoc grant to Loddon Clean Energy Pty Ltd, trading as Australian Clean Energy Electric Vehicle Group, to establish an advanced manufacturing facility to assemble electric vehicles and to conduct a bidirectional vehicle-to-grid charging trial.
Industry Research and Development (Portland Aluminium Smelter Program) Instrument 2021 [F2021L00244]	Portland Aluminium Smelter Program	Up to \$19.2 million per year over four years from 2021-22	The purpose of the Program is to: <ul style="list-style-type: none"> • ensure the Portland Aluminium Smelter can provide grid reliability services to the national electricity market; and • contribute to the reliability and security of the National Electricity Market.

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

- 4 August 2021 for the Industry Research and Development (Temporary Refinery Production Payment Program) Instrument 2021 [F2021L00202] and Industry Research and Development (Electric Vehicle Manufacturing Program) Instrument 2021 [F2021L00204]; and
- 11 August 2021 for the Industry Research and Development (Portland Aluminium Smelter Program) Instrument 2021 [F2021L00244].

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



13 May 2021

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

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

cc: Senator the Hon Richard Colbeck, Minister for Senior Australians and
Aged Care Services, Minister.Colbeck@health.gov.au

Dear Chair,

Matters of interest to the Senate—Serious Incident Response Scheme

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 relating to the operation of the Serious Incident Response Scheme for residential aged care, 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
Aged Care Legislation Amendment (Serious Incident Response Scheme) Instrument 2021 [F2021L00222]	To prescribe arrangements relating to the Serious Incident Response Scheme for residential aged care, including flexible care delivered in a residential care setting. This includes arrangements relating to an approved provider's responsibility to manage incidents and take reasonable steps to prevent incidents. The instrument includes arrangements on the implementation and maintenance of incident management systems including the notification and management of reportable incidents by approved providers.	4 August 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