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

25 January 2022

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

Via email: financeminister@finance.gov.au

CC DLO-Finance@finance.gov.au

Dear Minister,

Advance to the Finance Minister Determinations [F2021L01581] [F2021L01771] [F2021L01795] [F2022L00028]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses legislative instruments against scrutiny principles outlined in Senate standing order 23.

The committee considers that the above instruments raise significant scrutiny concerns that should be brought to the attention of the Senate.

The committee's concluding advice is set out in Chapter 1 of its *Delegated Legislation Monitor 1 of 2022*, available on the committee's website at www.aph.gov.au/senate_sdlc, and **attached** to this letter.

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*.

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

Yours sincerely,

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

Part 2

Exempt instruments raising significant scrutiny issues

1.3 This part details those instruments exempt from disallowance which raise particularly significant scrutiny concerns in relation to the appropriateness of their exemption from disallowance under Senate standing order 23(4A). Where necessary, the committee additionally raises scrutiny concerns in relation to its scrutiny principles set out in Senate standing order 23(3)(3).

Advance to the Finance Minister Determinations

FRL No.	F2021L01581; F2021L01771; F2021L01795; F2022L00028[1]
Purpose	F2021L01581: to determine that the departmental item for Outcome 2 for the Department of Finance is increased by $218 million. F2021L01771: to determine that the administered item for Outcome 1 for the National Recovery and Resilience Agency is increased by $66 million. F2021L01795: to determine that the departmental item for Outcome 2 for the Department of Finance is increased by $403 million. F2022L00028: to determine that the administered item for Outcome 1 for the National Recovery and Resilience Agency is increased by $920 million.
Authorising legislation	*Appropriation Act (No. 1) 2021-2022* (F2022L00028) *Appropriation Act (No. 2) 2021-2022* (F2021L01581, F2021L01771 and F2021L01795)
Portfolio	Department of Finance
Source of exemption	Subsection 10(4) of *Appropriation Act (No. 1) 2021-2022* Subsection 12(4) of *Appropriation Act (No. 2) 2021-2022*

Overview

1.4 The Advance to the Finance Minister (AFM) is a provision in the annual Appropriation Acts which enables the Finance Minister to provide additional appropriation to agencies throughout the financial year. An AFM may only be issued by the Finance Minister if satisfied that there is an urgent need for expenditure that is either not provided for or has been insufficiently provided for in the existing

1 Accessible on the Federal Register of Legislation at https://www.legislation.gov.au/.

appropriations of the agency. The additional appropriation is provided by means of a determination that is exempt from disallowance by the Parliament.[2]

1.5 Section 10 of *Appropriation Act (No. 1) 2021-2022* permits the Finance Minister, by non-disallowable legislative instrument, to effectively amend Schedule 1 to the Act to make provision for urgent expenditure up to a total limit of $2 billion. Section 12 of *Appropriation Act (No. 2) 2021-2022* similarly permits the Finance Minister, by non-disallowable legislative instrument, to effectively amend Schedule 2 to that Act to make provision for certain urgent expenditure up to a total limit of $3 billion.

1.6 Advance to the Finance Minister Determination (No. 1 of 2021-2022) [F2021L01581] provides additional funding of $218 million to the Department of Finance to support the construction of Centres for National Resilience at Mickleham in Victoria, Pinkenba in Queensland and Bullsbrook in Western Australia to provide additional quarantine capacity for international travellers to Australia in light of the COVID-19 pandemic. A second allocation to support this construction was made by Advance to the Finance Minister Determination (No. 3 of 2021-2022) [F2021L01795], which provides a further $403 million.

1.7 Advance to the Finance Minister Determination (No. 2 of 2021-2022) [F2021L01771] provides additional funding of $66 million to the National Recovery and Resilience Agency to support the extension of the availability of the Pandemic Leave Disaster Payment until 30 June 2022. This figure is expanded by Advance to the Finance Minister Determination (No. 4 of 2021-2022) [F2022L00028], which provides a further $920 million.

1.8 The instruments are exempt from disallowance under subsection 10(4) of *Appropriation Act (No. 1) 2021-2022* and subsection 12(4) of *Appropriation Act (No. 2) 2021-2022*, as applicable.

Scrutiny concerns

Exemption from disallowance

1.9 Under standing order 23(4A) the committee will scrutinise instruments exempt from disallowance to determine whether the exemption is appropriate.

1.10 At a minimum, the committee expects all explanatory statements to exempt instruments to identify the source of the exemption and to justify why the exemption is appropriate in the context of the instrument. The committee's scrutiny concerns under standing order 23(4A) will be heightened where an instrument also engages the committee's scrutiny concerns under principles (a) to (m) of standing order 23.

2 For a list of AFMs see https://www.finance.gov.au/publications/advance-to-the-finance-minister.

Committee comment

1.11 The exemption of AFM determinations from disallowance in times of emergency was considered by the committee in its inquiry into the exemption of delegated legislation from parliamentary oversight. In particular, the interim report commented on the extraordinary amount of additional public funds that were made available under the AFM provisions to combat the COVID-19 pandemic, which had increased from $675 million to $40 billion.[3]

1.12 In the final report of the inquiry the committee also raised concerns about the use of AFMs more generally. When Parliament passes the enabling provisions for the making of AFM determinations, a constraint is imposed by providing that the power to make a determination can only be exercised 'if the Finance Minister is satisfied that there is an urgent need for expenditure'. However, a decision of the High Court in 2017 has watered down this constraint to the point where it is of no substantive effect.[4] The committee considers that the exemption of AFM determinations from disallowance leaves the Parliament with little recourse when the delegated power is used contrary to the expressed intent of the Parliament.

1.13 The committee notes the Finance Minister's advice, set out in his letter to the committee of 10 March 2021, in which he outlines a number of reasons as to why AFM determinations should not be subject to disallowance. The committee is not persuaded that providing for AFM determinations to be disallowable would delay otherwise urgent expenditure or would fundamentally frustrate the operation of the AFM mechanism. In this regard, the committee notes that additional funds would become available for urgent expenditure immediately after the relevant AFM determination was registered on the Federal Register of Legislation. Until such time as a disallowance motion was passed by either House, funds could be validly spent under the AFM.

1.14 The committee acknowledges concerns that disallowance of an AFM could leave entities short of the funds that they need to carry out expenditure unrelated to the purposes of the AFM. Nevertheless, the committee maintains its view set out in the interim and final inquiry reports. If the AFM is used for a genuine emergency situation, the likelihood of it subsequently being disallowed would be virtually non-existent, and not sufficient to justify an exemption from disallowance. The potential for disallowance would simply operate to ensure that the AFM is only utilised in genuinely urgently circumstances, as intended by the Parliament.

---

3 Senate Standing Committee for the Scrutiny of Delegated Legislation, interim report of the inquiry into the exemption of delegated legislation from parliamentary oversight, 2 December 2020, 4.78. As noted above, the limit in the most recent Appropriation Bills was $5 billion in total.

4 *Wilkie v Commonwealth* (2017) 263 CLR 487. See Anne Twomey, 'A tale of two cases: Wilkie v Commonwealth and Re Canavan', *Australian Law Journal*, vol. 92, no. 1, 2018, pp. 17–21.

1.15 In this regard, the committee notes that senators and members, as elected representatives, would be made aware of any impact that disallowance would have and would consider such matters as part of their deliberations and their accountability to their electors. The committee considers that the disallowance process is an opportunity to work in a constructive manner with the executive to enhance delegated legislation to ensure that it operates and functions within the boundaries placed upon it by the Parliament.

1.16 The committee acknowledges and welcomes the transparency and accountability mechanisms announced by the former Finance Minister in relation to the extraordinary COVID-19 AFM provisions.[5] Although the committee has been concerned that these mechanisms are not enshrined in legislation, the committee welcomes the Finance Minister's indication that these transparency measures will be continuing practices.[6]

1.17 In his letter of 10 March 2021, the Finance Minister also noted that other accountability mechanisms may be utilised by parliamentarians should they wish to signal disagreement with an AFM, including member's or senator's statements, general business motions, urgency motions, matters of public importance and adjournment speeches. While acknowledging the value and importance of these general accountability mechanisms, as well as the specific AFM mechanisms described above, the committee considers that our system of representative democracy also requires elected representatives to have an opportunity to scrutinise and, if necessary, repeal executive-made law.

1.18 The committee therefore draws these instruments to the attention of the Senate as they effectively amend the relevant Appropriation Acts to increase the amount of funds available to:

- **the National Recovery and Resilience Agency by a total of $986 million, for the provision of the Pandemic Leave Disaster Payment; and**
- **the Department of Finance by a total of $621 million, to support the construction of quarantine facilities known as Centres for National Resilience**

without the opportunity for appropriate parliamentary oversight through the disallowance process.

---

5 These mechanisms include issuing a media release each week an AFM is allocated and seeking the concurrence of the Shadow Finance Minister, on behalf of the Opposition, for any proposed allocation of an AFM over $1 billion. The committee acknowledges that the agreement of the Shadow Finance Minister was sought, and received, prior to the making of Advance to the Finance Minister Determination (No. 4 of 2021-2022) [F2022L00028].

6 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2021*, pp 8-11 and *Scrutiny Digest 13 of 2021*, pp 20-21.

1.19 The committee also reiterates its recommendation, as set out in the final report of the inquiry into the exemption of delegated legislation from parliamentary oversight, that future Advance to the Finance Minister determinations be disallowable legislative instruments.

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

25 January 2022

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

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

CC: The Hon David Littleproud MP, Minister for Agriculture and Northern Australia, minister.littleproud@agriculture.gov.au; DLO-MO@agriculture.gov.au

Dear Minister,

Various instruments made under the *Biosecurity Act 2015*: [F2021L01462], [F2021L01463], [F2021L01484], [F2021L01555], [F2021L01572], [F2021L01578] and [F2021L01586]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses legislative instruments against scrutiny principles outlined in Senate standing order 23.

The committee considers that the above instruments raise significant scrutiny concerns that should be brought to the attention of the Senate.

The committee's concluding advice is set out in Chapter 1 of its *Delegated Legislation Monitor 1 of 2022*, available on the committee's website at www.aph.gov.au/senate_sdlc, and **attached** to this letter.

As set out in the Monitor, the committee maintains and reiterates its view that amendments should be made to the Biosecurity Amendment (Enhanced Risk Management) Bill 2021 to:

- section 44 of the Biosecurity Act to provide that any determinations setting out entry requirements in the future will be subject to disallowance;
- section 51 of the Biosecurity Act to provide that any determinations setting out preventative biosecurity measures in the future will be subject to disallowance;
- section 476 of the Biosecurity Act to provide that any future variations to extend a human biosecurity emergency period will be subject to disallowance; and
- section 477 of the Biosecurity Act to provide that any determinations setting out emergency requirements in the future will be subject to disallowance.

Further, as the committee has previously advised, if the government is not amenable to moving such amendments, the committee intends to move its own amendments to the Biosecurity Amendment (Enhanced Risk Management) Bill 2021 which is currently before the Parliament, and will continue to draw legislative instruments made under the Biosecurity Act which are exempt from disallowance to the attention of the Senate.

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*.

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

Yours sincerely,

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

Various instruments made under the *Biosecurity Act 2015*

FRL No.	F2021L01462; F2021L01463; F2021L01484; F2021L01555; F2021L01572; F2021L01578; F2021L01586[7]
Purpose	Various purposes responding to the COVID-19 pandemic
Authorising legislation	*Biosecurity Act 2015*
Portfolio	Health
Source of exemption	Subsections 44(3), 51(4) and 477(2) of the *Biosecurity Act 2015*

Overview

1.20 Subsections 44(2), 51(2) and 477(1) of the *Biosecurity Act 2015* (the Biosecurity Act) empower the minister to determine entry requirements, preventative biosecurity measures and emergency requirements during a human biosecurity emergency period, respectively. These seven instruments were made under the Biosecurity Act in response to the COVID-19 pandemic and introduce a range of measures, including specifying the requirements to travel in and out of Australian territories, and measures to prevent persons from entering or leaving designated remote areas in the Northern Territory.[8]

1.21 These instruments are exempt from disallowance by subsections 44(3), 51(4) and 477(2) of the Biosecurity Act.

7 Accessible on the Federal Register of Legislation at https://www.legislation.gov.au/.

8 Biosecurity Legislation Amendment (Incoming International Flights) Determination 2021 [F2021L01462], Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 2) Determination 2021 [F2021L01463], Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2021 [F2021L01484], Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Retail Outlets at International Airports) Repeal Determination 2021 [F2021L01555], Biosecurity (Emergency Requirements—Remote Communities) Determination 2021 [F2021L01572], Biosecurity (Emergency Requirements—Remote Communities) Amendment (No. 1) Determination 2021 [F2021L01578] and Biosecurity (Emergency Requirements—Remote Communities) Amendment (No. 2) Determination 2021 [F2021L01586].

Scrutiny concerns

Exemption from disallowance[9]

1.22 The committee has set out its significant scrutiny concerns in relation to legislative instruments made under the Biosecurity Act which are exempt from disallowance in detail in Chapter 1 of *Delegated Legislation Monitor 14 of 2021*[10]and *Delegated Legislation Monitor 16 of 2021*.[11] The committee's broader concerns about the exemption from disallowance of emergency legislative instruments are set out in detail in the interim report of the committee's inquiry into the exemption of delegated legislation from parliamentary oversight.[12]

1.23 It remains the committee's view that emergency delegated legislation should be subject to appropriate parliamentary oversight, with limited exemptions from disallowance. Where an instrument is exempt from disallowance, the committee expects that a detailed justification will be included in the explanatory statement.

1.24 As the committee has previously emphasised, this approach upholds the Parliament's constitutional role as the primary institution responsible for making law and scrutinising possible encroachments on personal rights and liberties.

1.25 These seven instruments made under the Biosecurity Act introduce significant measures which impact the public, including temporarily imposing stringent requirements to travel and restricting the movement of people in and out of certain remote communities in the Northern Territory, effectively 'locking down' identified areas. The justification provided for the exemption from disallowance remains the same for each instrument—that the risk of disallowance would inhibit the Commonwealth's ability to act urgently on public health advice to manage a

---

9 Scrutiny principle: Senate standing order 23(3)(4A).

10 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 14 of 2021*, 29 September 2021, pp. 14–21. Accessible at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Monitor.

11 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 16 of 2021*, 25 November 2021, pp. 3–10. Accessible at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Monitor.

12 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Exemption of delegated legislation from parliamentary oversight: Interim Report*, 2 December 2020. Accessible at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Interim_report.

human biosecurity risk that could threaten or harm human health, as it would create uncertainty as to whether the instrument might be disallowed.[13]

1.26 As set out in the committee's previous Delegated Legislation Monitors, the committee does not accept the need to act urgently or to avoid potential uncertainty on their own to be an adequate justification for the exemption of delegated legislation from parliamentary oversight. In particular, the committee notes that the disallowance procedure would not inhibit the immediate commencement of the instruments. In this regard, the committee does not consider that making a legislative instrument subject to disallowance would, of itself, prevent the government from taking immediate and decisive action in response to a significant emergency.

1.27 The committee considers the disallowance process to be an opportunity to work in a constructive manner with the executive to enhance delegated legislation to ensure that it operates and functions within the boundaries placed upon it by the Parliament. In relation to these instruments, which impose significant requirements on the Australian public, the committee considers that the disallowance process is necessary to facilitate appropriate debate and scrutiny of the use of emergency powers and would operate to ensure that such powers are not misused.

1.28 The committee appreciates that during an emergency it is necessary for governments to take urgent and decisive action. However, Parliament must also have effective oversight of these critical decisions and retain the ability to scrutinise the actions of governments.

1.29 The committee notes that to date, the government has failed to substantively engage with the committee's significant concerns and continues to make instruments under the Biosecurity Act which are exempt from disallowance and fails to provide an adequate explanation for why it is necessary to do so.

1.30 Further, the committee is deeply concerned that the government has advised that it does not support any of the committee's recommendations in relation to providing for the disallowance of instruments made under the Biosecurity Act as set out in the interim report of the committee's inquiry into the exemption of delegated legislation from parliamentary oversight. Of the 18 recommendations in the interim report, the committee regrets that the government only agreed to one.

13 In addition, for the Biosecurity (Emergency Requirements—Remote Communities) Determination 2021 [F2021L01572] and the Biosecurity (Emergency Requirements—Remote Communities) Amendment (No. 1) Determination 2021 [F2021L01578], the justification for the exemption also indicates that the risk of disallowance is more significant as the 'remote communities are made up of Aboriginal and Torres Strait Islander peoples who are at a high risk of adverse human health outcomes as a result of exposure to a listed human disease'.

1.31 The committee will continue to rigorously pursue this matter in accordance with the mandate provided by the Senate when it agreed to amend standing order 23 to allow the committee to consider exempt instruments and report on instruments made the Biosecurity Act which are exempt from disallowance.

1.32 In light of the above, the committee reiterates its view that amendments should be made to:

- **section 44 of the Biosecurity Act to provide that any determinations setting out entry requirements in the future will be subject to disallowance;**
- **section 51 of the Biosecurity Act to provide that any determinations setting out preventative biosecurity measures in the future will be subject to disallowance;**
- **section 476 of the Biosecurity Act to provide that any future variations to extend a human biosecurity emergency period will be subject to disallowance; and**
- **section 477 of the Biosecurity Act to provide that any determinations setting out emergency requirements in the future will be subject to disallowance.**

1.33 If the government is not amenable to moving such amendments, the committee intends to move its own amendments to the Biosecurity Amendment (Enhanced Risk Management) Bill 2021 which is currently before the Parliament, to ensure that future legislative instruments made under the Biosecurity Act are subject to disallowance.[14]

1.34 Additionally, the committee will continue to draw legislative instruments made under the Biosecurity Act which are exempt from disallowance to the attention of the Senate in future Delegated Legislation Monitors, as necessary.

14 The committee's proposed amendments to the bill were circulated in the Senate on 2 December 2021, see sheet 1475 available at: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6776.

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

25 January 2022

The Hon Alex Hawke MP
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs
Parliament House
CANBERRA ACT 2600

Via email: dlo.immi@homeaffairs.gov.au

Dear Minister,

Australian Citizenship (special residence requirement) Instrument (LIN 21/069) 2021 [F2021L01422]

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

Compliance with the 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.

The instrument appears to incorporate the 'S&P/ASX 200 share market index'. The committee understands from informal correspondence that your department's position is that this material is not incorporated by reference in the instrument.

However, the committee considers that this external material is incorporated due to the manner in which it is referred to in the instrument. For example, section 6 of the instrument provides that work that is done in the course of duty by an employee of an S&P/ASX All Australian 200 listed company in certain positions constitutes a specified kind of work for the purposes of paragraph 22B(1)(a) of the *Australian Citizenship Act 2007*. In order to understand what work constitutes a specified kind of work under paragraph 6(2)(c), a user of the instrument must therefore have regard to the S&P/ASX 200 share market index. In addition, note 2 to section 3 of the instrument appropriately provides a link for accessing the S&P/ASX 200 share market index. This is a further indication that the index should be read in conjunction with the instrument and is therefore incorporated.

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

- **whether the 'S&P/ASX 200 share market index' is incorporated in the instrument; and if so**
- **whether the 'S&P/ASX 200 share market index' is incorporated as in force from time to time or at a fixed point in time, including, if applicable, the authority in the enabling legislation for the instrument to incorporate external materials as in force from time to time (noting the general prohibition on time to time incorporation in subsection 14(2) of the *Legislation Act 2003*).**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 14th 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 timely consideration of the matters above, the committee would appreciate your response by **8 February 2022**.

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

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

25 January 2022

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. 1) 2021 [F2021L01392]

Competition and Consumer (Consumer Data Right) Amendment Rules (No. 2) 2021 [F2021L01561]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instruments, and the committee seeks your advice in relation to 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. This includes whether an instrument imposes significant penalties.

Both of these instruments provide for civil penalties of $50,000 for an individual and $250,000 for a body corporate for certain breaches, as inserted into the Competition and Consumer (Consumer Data Right) Rules 2020 by the instruments. The committee has previously raised these concerns in relation to Competition and Consumer (Consumer Data Right) Amendment Rules (No. 1) 2021 [F2021L01392] (the No 1 instrument) with your department via informal correspondence.

The committee's view is that serious criminal offences and significant civil penalty provisions should ordinarily be included in primary, rather than delegated legislation. This is to ensure appropriate parliamentary oversight of the scope of such offences and penalties. Generally, the committee's view is that delegated legislation should not contain custodial penalties, or penalties exceeding a maximum penalty of 50 penalty units for individuals and 250 penalty units for corporations. As one penalty unit currently equates to $222, the individual penalties in these instruments are the equivalent of approximately 225 penalty units, which far exceeds both the committee's threshold and the guidance set out in the Attorney-General's *Guide to Framing Commonwealth Offences*, *Infringement Notices and Enforcement Powers*.

Where an instrument imposes significant penalties, the committee expects the explanatory statement to include a justification of why the penalty is appropriate to the relevant breach, and why it is necessary and appropriate to include such penalties in delegated legislation (as opposed to primary legislation).

The explanatory statements for both instruments indicate that the penalties are justified as they are commensurate with other existing penalties that apply in relation to record keeping and data under the consumer data right (CDR) rules. While noting this, the committee does not consider this a sufficient justification in light of the significance of the penalties in question.

You may recall that the committee wrote to you on 14 April 2021 and 13 May 2021 regarding a similar instrument, being the Competition and Consumer (Consumer Data Right) Amendment Rules (No. 3) 2020 [F2020L01688] (the No. 3 Rules). This instrument also contained significant penalties in delegated legislation about which the committee raised scrutiny concerns.

In relation to the No. 3 Rules, on 27 May 2021 you advised that the penalties were included in delegated legislation as opposed to primary legislation because the *Competition and Consumer Act 2010* (the Act) provides that where a civil penalty does apply to a breach of the rules, the rules may specify a lower penalty amount than the default maximum in the Act. If the rules do not specify an amount, then the maximum civil penalty is as per the amount worked out under paragraph 76(1A)(b) of the Act. Therefore, including the penalty in the rules means that a lower penalty than the default maximum applies for the relevant breach.

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

- **the justification for including significant penalties in the Competition and Consumer (Consumer Data Right) Amendment Rules (No. 1) 2021 [F2021L01392] and the Competition and Consumer (Consumer Data Right) Amendment Rules (No. 2) 2021 [F2021L01561], and whether the justification is the same as the justification provided in relation to the Competition and Consumer (Consumer Data Right) Amendment Rules (No. 3) 2020 [F2020L01688]; and if so**
- **whether the explanatory statements for both instruments can be amended to include this justification.**

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. If the committee has not concluded its consideration of an instrument before the expiry of the 14th 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 timely consideration of the matters above, the committee would appreciate your response by **8 February 2022**.

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

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

25 January 2022

The Hon Alex Hawke MP
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs
Parliament House
CANBERRA ACT 2600

Via email: dlo.immi@homeaffairs.gov.au

Dear Minister,

Migration Amendment (Humanitarian Response to Events in Afghanistan) Regulations 2021 [F2021L01546]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses 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.

Parliamentary oversight

Senate standing order 23(3)(m) 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 Migration Regulations 1994 (the Regulations) to facilitate onshore applications for Refugee and Humanitarian (Class XB) visas by persons evacuated to Australia for temporary safe haven following the crisis in Afghanistan in August 2021.

Item 4 of Schedule 1 inserts subitem 1402(3C) into Schedule 1 to the Regulations. Subitem 1402(3C) provides that the minister may, by legislative instrument, specify a class of persons who do not need to be outside Australia to apply for a Refugee and Humanitarian (Class XB) visa if they are satisfied that doing so is appropriate to assist persons residing temporarily in Australia as a result of Australia's response to the humanitarian crisis in Afghanistan in 2021. Such a declaration has already been made in the Migration (Class of persons—Refugee and Humanitarian (Class XB) visa) Instrument (LIN 21/080) 2021 [F2021L01569] under new subitem 1402(3C) of the Regulations.

The explanatory statement states:

> The requirement for the applicant to be in a class of persons specified in a legislative instrument provides flexibility to define the cohort covered by the concession and make adjustments if necessary. This is appropriate given the limited and targeted nature of the concession and the need to further consider the circumstances of the large contingent of evacuees from Afghanistan who have arrived in Australia during recent months.[1]

---

1 Explanatory statement, p. 10

The explanatory statement further explains that the legislative instrument specifying the class of persons is not subject to disallowance as a result of table item 20 in regulation 10 of the Legislation (Exemptions and Other Matters) Regulation 2015. At a general level, the committee has significant concerns about the use of delegated legislation to exempt other legislative instruments from parliamentary oversight mechanisms, such as disallowance or sunsetting. Such measures may undermine parliamentary oversight and subvert the appropriate relationship between the Parliament and the executive.

While the committee recognises the need to act quickly and flexibly to the emerging humanitarian situation in Afghanistan, the definition of the class of persons eligible to apply for a humanitarian visa onshore is a significant matter which should not be contained in a legislative instrument exempt from parliamentary disallowance. The committee also notes that the need for urgency to provide for visa eligibility conditions for this specific class of applicants now appears to have passed, given the class is defined to that cohort already onshore in Australia.

In light of the above, the committee requests your advice as to whether the Migration Regulations 1994 can be amended to incorporate the measures in the Migration (Class of persons—Refugee and Humanitarian (Class XB) visa) Instrument (LIN 21/080) 2021 [F2021L01569] in order to provide robust parliamentary oversight of the measures through the disallowance processes.

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 timely consideration of the matters above, the committee would appreciate your response by **8 February 2021**.

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

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

25 January 2022

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

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

Dear Minister,

Therapeutic Goods (Standard for Human Cell and Tissue Products—Donor Screening Requirements) (TGO 108) Order 2021 [F2021L01326]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses 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.

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.

The instrument establishes a ministerial standard for the therapeutic goods that comprise, contain or are derived from human cells or human tissues in relation to donor screening.

The table in Schedule 1 to the instrument includes several items which use key terms or phrases that are not defined. This may make it difficult for a person to understand whether they are ineligible to donate. For instance, it is unclear what the following terms or phrases in Schedule 1 refer to:

- 'recipient of viable animal cells or tissues' in table item 7;
- 'sexual activity that puts the person at an increased risk of acquiring infectious diseases' in table item 12; and
- 'travelled to another country or region within Australia with exposure to particular epidemiological situations' and 'ineligible for a period of time based on a risk assessment using the most up-to-date epidemiological data' in table item 15.

The committee understands from informal correspondence with your department that the drafting and policy intention in relation to each of the terms listed above was not to provide definitions for the terms in the instrument, and that it is appropriate for these terms to be understood by reference to their ordinary and natural meaning.

However, the committee remains concerned about the lack of clarity for these terms in both the instrument and its explanatory statement. In addition, there appears to be no justification for this lack of clarity in the explanatory statement.

The committee acknowledges that if further clarity in relation to these terms is included in the instrument it may be necessary to periodically update the instrument to reflect scientific developments. The committee considers that this is appropriate and notes that the ability of instruments to be amended quickly to respond to changing circumstances and information is one of the key rationales put forward for the use of delegated, as opposed to primary, legislation.

The committee also has significant concerns that the intended vagueness of the terminology exacerbates safety and quality risks rather than minimises them. The ambiguity of the terms may result in meaning of the terms being determined on a case-by-case basis and consequently there is a risk of variability of application.

In light of the above, the committee requests your advice as to whether the items identified in the table in Schedule 1 to the Therapeutic Goods (Standard for Human Cell and Tissue Products—Donor Screening Requirements) (TGO 108) Order 2021 can be redrafted to provide greater clarity as to their 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 14th 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 timely consideration of the matters above, the committee would appreciate your response by **8 February 2022**.

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

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

27 January 2022

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au

CC: committeescrutiny@treasury.gov.au

Dear Treasurer,

Treasury Laws Amendment (Greater Transparency of Proxy Advice) Regulations 2021 [F2021L01801]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses 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.

Matters more appropriate for parliamentary enactment

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.

The Treasury Laws Amendment (Greater Transparency of Proxy Advice) Regulations 2021 (the Regulations) amend the Corporations Regulations 2001 (the Corporations Regulations) to specify:

- circumstances in which voting advice is proxy advice; and
- new obligations for financial services licensees who provide proxy advice to:
  - provide any proxy advice to the entity that is the subject of the proxy advice on the same day it is provided to the client (the advice obligation); and
  - be independent of their clients (the independence obligation).

Requirement to hold an Australian Financial Services Licence

As a result of the amendments set out in items 2 and 3 of Schedule 1 to the Regulations, proxy advice is being included under the financial services regime in Chapter 7 of the Corporations Act and therefore providers of proxy advice must hold an Australian financial services licence covering the provision of that service. Furthermore, new subregulation 7.1.28AB(3) prescribes proxy advice that is not financial product advice as a financial service under paragraph 766A(1)(f) of the Corporations Act. Accordingly, certain obligations that apply to financial services under the Corporations Act will apply to proxy advice.

New advice obligation

Item 4 of Schedule 1 to the Regulations inserts new subregulation 7.6.03D(1) into the Corporations Regulations to create a new 'advice obligation' on financial services licensees that provide proxy advice. The obligation requires relevant licensees to provide proxy advice to the body which is the subject of the advice on the same day the advice is provided to the licensee's client.

New independence obligation

Item 4 of Schedule 1 to the Regulations also inserts new subregulation 7.6.03D(3) into the Corporations Regulations to introduce a new 'independence obligation' on financial services licensees that provide proxy advice. This new obligation requires financial services licensees that provide a financial service that is proxy advice relating to the exercise of voting rights attaching to a security or an interest in a managed investment scheme must be independent of any entity of a kind referred to in subparagraph 7.1.28AB(2)(b)(i),(ii) or (iii), if that entity holds the security or interest, or a beneficial interest in the security or interest, to which the proxy advice relates. Additionally, under subregulation 7.6.03D(3) the financial services licensee must be independent of 'any other entity that makes decisions affecting the exercise of voting rights'.

Committee comment

From a scrutiny perspective, the committee is concerned that the significant new obligations outlined above, which may have a major impact on the business model and operation of existing businesses that provide proxy advice, are being implemented through delegated legislation. While not commenting on the policy merit or otherwise of these changes, the committee considers that it would be more appropriate for such significant matters to be dealt with by way of primary legislation so that these matters can receive full parliamentary scrutiny.

In this regard, the committee notes the guidance in the *Legislation Handbook*[1] in relation to whether a matter is more suited to primary or delegated legislation. In particular, paragraph 1.10(d) provides:

> … the following are examples of matters generally implemented only through Acts of Parliament:
>
> (d) provisions imposing obligations on individuals or organisations to undertake certain activities (e.g. to provide information or submit documentation, noting that the detail of the information or documentation required may be included in subordinate legislation) or desist from activities (e.g. to prohibit an activity and impose penalties or sanctions for engaging in an activity).

The committee notes that despite the Regulations imposing obligations that have a significant effect on licensees that provide proxy advice there is no justification in the explanatory statement as to why it is appropriate for the relevant matters to be dealt with by delegated legislation as opposed to primary legislation.

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 significant new obligations on financial services licensees that provide proxy advice, noting in particular that this approach appears to be inconsistent with the guidance provided in the Department of the Prime Minister and Cabinet's *Legislation Handbook*.

---

[1] Department of the Prime Minister and Cabinet, *Legislation Handbook*, February 2017, paragraph 1.10(d).

Modification of the operation of primary legislation

Parliamentary oversight

Senate standing order 23(3)(l) requires the committee to consider whether an instrument contains provisions which amend or modify the operation of primary legislation. In addition, Senate standing order 23(3)(m) 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. As outline above, the Regulations make amendments to the Corporations Regulations, which in turn modify the operation of the Corporations Act. These amendments are significant and impose serious obligations on licensees the provide proxy advice and as detailed further below are underpinned by substantial criminal offences and civil penalties.

As you are aware, the committee has long been concerned with provisions in delegated legislation which amend or modify the operation of primary legislation. If, however, such provisions are included in delegated legislation, it is the committee's view that the instrument should operate no longer than strictly necessary. This view was clearly set out in the final report of the committee's inquiry into the exemption of delegated legislation from parliamentary oversight, tabled in the Senate on 16 March 2021, and discussed with Treasury officials at a private briefing with the committee on 28 April 2021.

In addition, the committee referred to similar concerns in its correspondence with you regarding the Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021 [F2021L01080]. In particular, these views are set out in the committee's letters dated 30 September 2021 and 25 November 2021.

The committee considers that in most cases such instruments should cease to operate no more than three years after commencement to ensure a minimum degree of regular parliamentary oversight. In this case, the committee is particularly concerned as the Corporations Regulations are exempt from sunsetting and therefore there is potential for the measures to remain in force indefinitely through delegated legislation.

In recent months, the committee has been pleased to see the majority of the Treasury portfolio instruments have been accompanied by a thorough justification regarding the appropriateness of including modifications to or exemptions from primary legislation in delegated legislation, and shorter durations for instruments which contain such provisions. Therefore, it is unclear to the committee why a similar approach has not been taken in relation to the Regulations. If a shorter duration is not appropriate in these circumstances as the measures are intended to be ongoing, the committee considers that this provides further support for its scrutiny view that the measures are more appropriately contained in primary legislation.

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 explanatory statement states that 'Ongoing dialogue, both through formal consultation rounds on associated matters and ad-hoc meetings will present an opportunity for stakeholders to provide feedback regarding the reforms.' However, it is unclear from this whether a specific review of the provisions will occur.

The committee therefore requests your advice as to:

- **whether the Corporations Regulations 2001 can be amended to provide that the measures cease within three years after commencement; and**

- **whether there is any intention to conduct a review specific to the relevant provisions to determine if they remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation.**

Significant penalties in delegated legislation

Under Senate standing order 23(3)(j) the committee is also required to consider whether an instrument imposes significant penalties, which might be more appropriate to include in primary legislation. As noted above, the Regulations impose significant new obligations on financial services licensees that provide proxy advice, which are underpinned by both criminal offence provisions and civil penalties.

In terms of criminal offences, as noted above, the Regulations will result in proxy advice being included under the financial services regime in Chapter 7 of the Corporations Act. Providers of proxy advice must therefore hold an Australian financial services licence covering the provision of that service. Failure to comply with this requirement is a criminal offence under the Corporations Act. For individuals, the maximum penalty is five years imprisonment and/or a fine of up to 600 penalty units (currently $133,200). For corporations, the penalties are up to 6,000 penalty units (currently $1.332 million).

The committee is also concerned by the significant civil penalties that are imposed by the operation of the Regulations, for example in relation to section 911A. Further, the new proxy advice obligations in regulation 7.6.03D are subject to maximum civil penalties of 5,000 penalty units for individuals (currently $1.11 million) and 50,000 penalty units for corporations (currently $11.1 million).

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

The committee acknowledges the Regulations do not themselves prescribe any penalty. Instead, the Regulations modify the general obligations of financial services licensees under the Corporations Act, allowing the amendments to utilise existing criminal offences and civil penalties contained in the Corporations Act. However, considering the seriousness of the offences and quantum of penalties the Regulations would give effect to, the committee considers it would be more appropriate for the amendments to be made by primary legislation.

From a scrutiny perspective, the committee is concerned the Regulations function in such a way as to impose significant offences and civil penalties on conduct which was not previously subject to such sanctions. The committee notes there is no justification of why the penalty is appropriate to the relevant offence or provision, and why it is necessary and appropriate to include provisions which give effect to such penalties in delegated legislation instead of primary legislation.

In addition, the committee expects the explanatory statement to state whether the Attorney-General's Department was consulted in relation to the effective inclusion of custodial penalties, in accordance with section 3.3 of the Attorney-General's Department's *Guide to Framing Commonwealth Offences*.[2]

---

[2] Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, Part 3.3.

The committee therefore requests your advice as to:

- **the justification for the Regulations giving effect to significant offences and civil penalties, as opposed to these penalties being given effect to by primary legislation;**
- **why the penalties are appropriate, and in particular why custodial penalties are appropriate, with reference to the Attorney-General's Department's *Guide to Framing Commonwealth Offences*;**
- **whether the Attorney-General's Department was consulted in relation to the effective inclusion of custodial penalties in the Regulations, in accordance with Part 3.3 of the *Guide to Framing Commonwealth Offences*.**

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.

Meaning of 'independent'

Item 4 of the Regulations inserts new subregulation 7.6.03D(3) into the Corporations Regulations, which provides for an 'independence obligation' for proxy advisers. This subregulation, in effect, provides that proxy advisers must be 'independent' of the entities which they advise.

However, the meaning of 'independent' is not defined in the Regulations nor is it defined in the Corporations Regulations or the Corporations Act. The explanatory statement makes reference to the meaning of 'independent' provided by the *Macquarie Dictionary* and provides a list of factors and examples that 'the word independent should also be understood by'. However, it is unclear what authority these factors and examples have. Further, the committee does not consider commentary in the explanatory statement to be a substitute for clarity of drafting in an instrument.

Meaning of 'any other entity'

Subparagraph 7.6.03D(3)(ab)(iii) provides that a licensee must 'be independent of' 'any other entity that makes decisions affecting the exercise of those voting rights'. The term 'any other entity' is not defined in the Regulations. In this regard the explanatory statement provides:

> In practice, financial service licensees may have to make inquiries of prospective clients' affairs to ascertain whether there are additional entities that make decisions with respect to the exercise of voting rights.

However, due to the vagueness of the concept of 'any other entity' it is unclear how a licensee would go about the process of making such inquiries. It is also unclear to what extent a licensee must take action to discharge this duty that appears to be created by subparagraph 7.6.03D(3)(ab)(iii). For example, is this apparent duty to identify 'any other entity' absolute or based on what is reasonably practicable?

It appears to the committee that the concept of 'any other entity' exacerbates an already unclear provision and has the potential to cause a licensee to simply not know what is required of them and creates uncertainty for regulators trying to enforce the provision. There is also the issue of possible uncertainty for other interested parties, including entities that are the subject of proxy advice. Ultimately, key terms should be clearly defined in the Regulations to remove any potential confusion or misunderstanding, or the potential for inconsistent application.

The committee therefore requests your advice as to whether subregulation 7.6.03D(3) can be redrafted to provide greater clarity as to:

- **the meaning of the term 'independent'; and**

- **the meaning of the term 'any other entity', including clarification of the requisite test or threshold for determining which entities will fall within the concept of 'any other entity'.**

The committee's expectation is to receive a response in time for it to consider and report on the Regulations while they are 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 timely consideration of the matters above, the committee would appreciate your response by **10 February 2022.**

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

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

25 January 2022

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

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

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

CC: parliamentary.committees@health.gov.au

Dear Ministers,

Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923]

Thank you for your response of 15 December 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 24 January 2022 and has resolved to seek your further advice about the issues outlined below.

Clarity of drafting—definition of 'emergency'
Conferral of discretionary powers

The committee welcomes your advice that you have asked the Department of Health and the Office of Parliamentary Counsel to consider options for including the definition of the term 'emergency' in the instrument, as part of the upcoming amendments to the Quality of Care Principles 2014.

The committee appreciates this undertaking, noting its significant concern that such a critical term which will allow coercive and restrictive practices to take place under the instrument is currently not defined in the instrument. The committee considers that it is not sufficient for this definition to only be contained in the explanatory statement or the Aged Care Quality and Safety Commission's website. As expressed in the committee's previous correspondence, the definition should be included on the face on the instrument but could be drafted broadly to be inclusive and ensure no situations of genuine emergency are excluded.

The committee therefore requests an update in relation to the outcome of the Department of Health and the Office of Parliamentary Counsel's consideration of including the definition of 'emergency' in the Quality of Care Principles 2014, noting that the committee intends to retain its notice of motion to disallow this instrument until it is satisfied that its significant scrutiny concerns have been resolved.

Clarity of drafting—Charter of Aged Care Rights

The committee notes your advice that you remain hesitant to amend the instrument to require it to be 'consistent with' the Charter of Aged Care Rights (the Charter) as requested by the committee in our previous correspondence, without carefully considering the implications of this change. In particular, you have advised that 'not inconsistent with' is the preferred drafting over 'consistent with' because it accounts for the fact that some elements of the Charter may be irrelevant, and it would not be possible to be 'consistent' with them.

The committee considers that if parts of the Charter are irrelevant to a restrictive practice, there would be no requirement to act consistently with those parts, noting that relevance is a key part of assessing whether rights are engaged or not.

Additionally, the committee does not consider that progressing amendments to the Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021 would put the other measures in that bill at risk, noting that government amendments are routinely moved to bills as they progress through the Parliament, often under very short timeframes. Indeed, the committee notes that the bill has been before the Parliament since 1 September 2021 and other government amendments relating to restrictive practices were agreed to in the House of Representatives on 25 October 2021.

The committee therefore requests further advice as to why it is considered that including a requirement that the use of a restrictive practice is 'consistent with' the Charter of Aged Care Rights would be inappropriate, noting that there would be no need to act consistently with irrelevant parts of the Charter.

Pending this further advice, the committee reiterates its view that amendments to the *Aged Care Act 1997* and the Quality of Care Principles 2014 to require consistency with the Charter of Aged Care Rights should be progressed before the commencement of the new Aged Care Act and ideally via government amendments to the Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021, which is currently before the Parliament.

Please note that the committee expects to be in a position to finally report on the instrument while it is still subject to disallowance. Therefore, on 18 October 2021 the committee gave notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received. This disallowance notice is currently scheduled to be considered in the Senate on 29 March 2022. Please note that the committee intends to retain this notice until the information requested in this letter is provided and the committee's scrutiny concerns are resolved.

Noting this, and to facilitate the committee's timely consideration of the matters above, the committee would appreciate your response by **8 February 2022**.

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

Thank you for your ongoing 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

25 January 2022

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au

CC: Committeescrutiny@treasury.gov.au

Dear Treasurer,

Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021 [F2021L01080]

Thank you for your response of 10 December 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 24 January 2022 and has resolved to seek your further advice about the issues outlined below.

Exemptions from the operation of primary legislation

Parliamentary oversight

You advised that it was not appropriate for the exceptions contained in the Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021 (the instrument) to cease after three years. In particular, you advised that the permanency of the exceptions was appropriate so that the hawking prohibitions apply only in situations where there is a risk of consumer harm. You also advised that repealing the exceptions after three years would undermine certainty for businesses that rely on these exceptions.

While the committee acknowledges your view that it is important to provide certainty for business the committee considers it would be more appropriate to provide these exceptions through primary legislation, which would seem to be better suited to provide certainty to stakeholders. This is especially so as delegated legislation is easier to amend and repeal, and is not subject to the same robust debate as primary legislation.

Further, while the committee acknowledges the importance of regulatory certainty for business it notes that regulatory changes are a consideration that many different stakeholders across a range of sectors and industries need to consider. Again, the committee notes that should the certainty provided by the exceptions be of such a critical nature to industry this certainty would be best provided through primary legislation. On this point, the committee notes there appears to be an inconsistency in the response provided. On the one hand it is argued there is a need for certainty, which would suggest primary legislation is a more appropriate vehicle while on the other the letter

emphasises the use of regulations is appropriate as it 'allows the Government to quickly respond to new and different financial products are required to mitigate the risk to consumer harm.'

Thank you also for confirming your view that is appropriate for these exceptions to be included the Corporations Regulations 2001 (the Regulations). However, the committee queries the extent to which the exceptions set out in the instrument apply in limited circumstances or to a 'niche and defined group'. In particular, it appears to the committee that the ten exceptions in regulation 7.8.21A of the instrument appear in their totality to be quite broad. For example, the exception in paragraph 7.8.21A(a) appears to apply to any offer for the issue or sale of listed securities or an interest in a listed managed investment scheme that is made by telephone.

Further, the committee queries the advice provided that:

> the exemption in subregulation 7.8.21A(j) only applies to persons making offers to sell or issue a *general insurance product* to a person who has held a substantially similar product in the 30 day period before the offer is made, usually this will be an offer to renew a *lapsed insurance policy* (emphasis added).

The committee notes that subregulation 7.8.21A(j) appears to be silent on insurance. The explanatory statement refers to insurance as an example of something the subregulation would apply to, but the provision seems to be drafted more broadly. It would appear the above example provided would support the committee's conclusion that the provision is not limited to a 'niche and defined group' as subregulation 7.8.21A(j) applies to all financial products. This supports the committee's view that the exceptions in s 7.8.21A are in their totality broad in application.

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

- **how the exceptions apply to a 'niche and defined group' when it appears the exceptions in s 7.8.21A are in their totality quite broad in application;**
- **noting that your previous response emphasised the importance of providing certainty to business, whether the exceptions can be included in primary legislation, and if not, given the importance of providing certainty to stakeholders, further detail as to why it would not be more appropriate for the exceptions to be provided for in primary legislation; and**
- **should you maintain your view that the exceptions should not be included in primary legislation, whether the Corporations Regulations 2001 can be amended to provide that the exceptions set out in the instrument cease to operate after five years, and if not, the committee would appreciate your detailed advice as to why, even with a longer timeframe, self-repeal after five years would be inappropriate.**

As outlined in the committee's previous correspondence of 25 November 2021, the committee expects to be in a position to finally report on the instrument while it is still subject to disallowance. Therefore, on 22 November 2021, the committee gave 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 timely consideration of the matters above, the committee would appreciate your response by **8 February 2022**.

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

Thank you for your ongoing 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

25 January 2022

The Hon Sussan Ley MP
Minister for the Environment
Parliament House
CANBERRA ACT 2600

Via email: DLOley@environment.gov.au

CC: legislation@environment.gov.au

Dear Minister,

Great Barrier Reef Marine Park Amendment (No-Anchoring Areas) Regulations 2021 [F2021L00843]

Thank you for your response of 13 December 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 24 January 2021 and has resolved to seek your further advice about the issues outlined below.

Compliance with the Legislation Act 2003
Parliamentary oversight

Thank you for your further response in relation to the committee's scrutiny concerns about item 1 of Schedule 1 to the instrument, which provides that no-anchor areas will be set out in notifiable instruments declared under paragraph 5(2)(b) of the Great Barrier Reef Marine Park Regulations 2019 (the Principal Regulations).

Your response provides a range of arguments in support of your position that the declaration of a no-anchor area is suitable for inclusion in a notifiable instrument. These arguments include:

- the need for flexibility to make urgent changes in light of changing conditions such as weather;
- support from stakeholders;
- environmental factors;
- that the matter is already provided for via notifiable instrument;
- the relatively small impact of the instrument;
- consistency with similar instruments; and
- the expertise of the Great Barrier Reef Authority.

With respect, the committee does not consider that any of these factors suggest that the measures in the instrument are more appropriate for a notifiable instrument as opposed to a legislative instrument. As noted in previous correspondence, the committee's view is that the measures in the

instrument are legislative in character, not administrative, and the arguments put forth in your recent correspondence have not dissuaded the committee of this view. Measures should only be included in a notifiable instrument if they are purely administrative in character, and the committee remains of the firm view that the measures in this instrument are legislative in character as they are of relevance to a strict liability offence. This view is supported by paragraph 8(4)(b) of the *Legislation Act 2003* (the Legislation Act), and the arguments put forth as summarised above do not support the view that the instrument as purely administrative.

The committee notes that in your response you have referred to subsection 11(1) of the Legislation Act which provides that if the primary law gives the power to do something by notifiable instrument, then it must be so done. However, your response has also referred to subsection 5(2) of the Principal Regulations as the enabling provision for declaring a no-anchor area by notifiable instrument. As the enabling provision is in the Principal Regulations and not primary law, the committee does not consider this provision of the Legislation Act is of relevance in this instance.

You also noted that if the instrument was to be disallowed, this would "seem contrary to the intention of Parliament in enacting the Principal Regulations…". However, as delegated legislation is not enacted by the Parliament it is unclear how disallowance of the instrument would be contrary to Parliament's intentions, given that disallowance is a process to facilitate parliamentary control of executive-made law. Disallowance is a mechanism for the Parliament to express its view that an instrument should be repealed so it does not follow that disallowance could ever be contrary to the Parliament's intention.

The committee draws your attention to its recently completed inquiry into the exemption of delegated legislation from parliamentary oversight. During this inquiry the committee put forth its views that as notifiable instruments are not subject to tabling, disallowance or sunsetting, they significantly circumscribe the Parliament's scrutiny function, particularly when misused.[1] The committee's view is that disallowance does not prevent governments acting urgently, as disallowance does not operate to invalidate actions taken under an instrument prior to it being disallowed.

In light of the above, the committee reiterates its request that the Great Barrier Reef Marine Park Regulations 2019 be amended to provide that no-anchor areas may only be declared in a disallowable legislative instrument or primary legislation, as opposed to a notifiable instrument.

Please note that the committee expects to be in a position to finally report on the instrument while it is still subject to disallowance. Therefore, on 18 October 2021 the committee gave notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received. This disallowance notice is currently scheduled to be considered in the Senate on 29 March 2022.

Noting this, and to facilitate the committee's timely consideration of the matters above, the committee would appreciate your response by **8 February 2022**.

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

---

1 Senate Standing Committee for the Scrutiny of Delegated Legislation, final report of the inquiry into the exemption of delegated legislation from parliamentary oversight, 16 March 2021, para 7.120.

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

Thank you for your ongoing assistance with this matter.

Yours sincerely,

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

- Federal Financial Relations (National Partnership Payments—2021-22 Payment No. 6) Determination 2021 [F2021L01577]

The committee acknowledges that substantive explanations as to why these instruments are exempt from disallowance has been provided, however the committee does not consider that the instruments meet the very high threshold for when an exemption from disallowance is appropriate. These instruments are therefore being drawn to the attention of the Senate by the committee in Chapter 4 of *Delegated Legislation Monitor 1 of 2022*, available on the committee's website at www.aph.gov.au/senate_sdlc.

In light of the fact that standing order 23(4A) is new, the committee does not request a response to these concerns at this stage.

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*.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email at 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