



AUSTRALIAN  
SENATE

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

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11 June 2020

The Hon Josh Frydenberg MP  
Treasurer  
Parliament House  
CANBERRA ACT 2600

Via email: [Josh.Frydenberg.MP@aph.gov.au](mailto:Josh.Frydenberg.MP@aph.gov.au)

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Dear Treasurer,

**Corporations (Coronavirus Economic Response) Determination (No. 2) 2020  
[F2020L00611]**

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

***Matters more appropriate for parliamentary enactment***

Senate standing order 23(3)(j) requires the committee to examine each legislative instrument as to whether it contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted by primary rather than delegated legislation).

The instrument modifies the operation of the continuous disclosure provisions in sections 674, 675 and 677 of the *Corporations Act 2001* (Corporations Act). These provisions provide that information must be disclosed to financial markets or to ASIC if a reasonable person would expect the information to have a material effect on the price or value of securities. The modifications in the instrument replace this reasonable person test with a test based on the whether the relevant entity or its officers had knowledge of, or were reckless or negligent as to, whether the information would have a material effect on the price or value of securities. Breach of the continuous disclosure obligations attracts both civil and criminal penalties. However, the modifications made by the instrument only affect the operation of the civil penalty provisions. The modifications made by the instrument will remain in force for six months.

The instrument was made under section 1362A of the Corporations Act, which was inserted by item 1 of Schedule 8 to the *Coronavirus Economic Response Package Omnibus Act 2020*. Section 1362A provides that the Treasurer may, by disallowable legislative instrument, temporarily modify specified provisions of the Corporations Act. The Treasurer must first be satisfied that it would not be reasonable to expect persons to comply with the relevant provisions because of the impact of COVID-19.

Section 1362A of the Corporations Act appears to be a Henry VIII clause, as it enables delegated legislation to modify the operation of legislation which has been passed by the Parliament. The committee notes that the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) commented on section 1362A when the Coronavirus Economic Response Package Omnibus Bill 2020 was before the Parliament. In doing so, the Scrutiny of Bills committee emphasised that there are significant scrutiny concerns with Henry VIII clauses, as such clauses impact on levels of parliamentary scrutiny and may subvert the appropriate relationship between Parliament and the Executive.


This committee shares the views of the Scrutiny of Bills committee regarding Henry VIII clauses, and takes this opportunity to draw your attention to its concerns regarding the modification of primary legislation by delegated legislation.

The committee also considers that the instruments raise significant policy matters relating to the Australian Government's response to the COVID-19 pandemic. The committee has determined that the instruments engage standing order 23(4) and accordingly has resolved to draw the instruments to the attention of the Senate and relevant Senate committees.

Finally, 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**