

Monitor 8 of 2019 - Committee correspondence

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22 October 2019

The Hon David Coleman MP
Minister for Immigration, Multicultural Affairs and Citizenship
Parliament House
Canberra ACT 2600
Via email: David.Coleman.MP@aph.gov.au
CC: dlo.immi@homeaffairs.gov.au

Dear Minister,

Immigration (Guardianship of Children) Regulations 2018 [F2018L01708]

Thank you for your letter dated 29 September 2019 in which you offered the committee a briefing about the above regulations.

Further to this invitation, the committee met with senior officers of your department on 14 October 2019 in order for the committee to further understand the background to, and operation of, the regulations and section 4AA of the *Immigration (Guardianship of Children Act) 1946* (the Act) relating to the making of orders for guardianship of certain children.

The committee has since received a written summary of that briefing, and answers to the questions taken on notice.

The information that you and your department has provided has assisted the committee in its scrutiny of the regulations. However, the committee remains concerned that sufficient consideration has not been given to whether it is appropriate to set out the relevant principles governing the making of orders for guardianship in delegated legislation, rather than primary legislation, notwithstanding the broad regulation making powers in section 12 of the Act.

In this respect, the committee's concerns have been exacerbated by the apparent lack of consultation in making the 2018 regulations and the *Immigration (Guardianship of Children) Regulations 2001* on which they are based, and the lack of information about the original purpose of inserting section 4AA and paragraph 12(aa) into the Act (which together allow for the relevant principles to be set out in delegated legislation).

In the interests of addressing these matters without recourse to disallowance, the committee requests that you give consideration to conducting a review of the regulations and the regulation-making powers in the Act, with a particular focus on:

- whether the matters provided for in the regulations have the potential to affect personal rights and liberties or other significant matters, such that they are matters more appropriate for parliamentary enactment; and

- whether the manner in which the regulations are drafted is consistent with the intention of the enabling Act.

The committee considers that such a review should involve consultation with interested or affected parties (for example, relevant child protection authorities).

To facilitate the committee's final consideration of this matter before the disallowance period expires on 13 November 2019, the committee would appreciate your response to the committee's request by **29 October 2019**.

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 regords.sen@aph.gov.au .

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



11 November 2019

The Hon David Coleman
Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs
Parliament House
Canberra ACT 2600
Via email: David.Coleman.MP@aph.gov.au
CC: dlo.immi@homeaffairs.gov.au

Dear Minister,

Immigration (Guardianship of Children) Regulations 2018 [F2018L01708]

Thank you for your letter of 7 November 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above legislative instrument.

The committee welcomes your undertaking to conduct a review of the Immigration (Guardianship of Children) Regulations 2018 and the regulation-making powers in the *Immigration (Guardianship of Children) Act 1946*, in accordance with the committee's request of 30 October 2019.

On the basis of your advice, the committee has concluded its consideration of the instrument, and intends to give notice of intention to withdraw the disallowance motion on Tuesday, 12 November 2019. The committee will publish its concluding remarks in *Delegated Legislation Monitor 8 of 2019*, noting your undertaking regarding the review. Monitor 8 of 2019 is due to be tabled in the Senate on Wednesday, 13 November 2019.

On behalf of the committee, I thank you and your department for your willingness to constructively engage with the committee about its scrutiny concerns.

Finally, in the interests of transparency, I note that all correspondence relating to this matter will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



14 November 2019

The Hon David Coleman MP
Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs
Parliament House
Canberra ACT 2600
Via email: David.Coleman.MP@aph.gov.au
CC: dlo.immi@homeaffairs.gov.au

Dear Minister,

Immigration (Guardianship of Children) Regulations 2018 [F2018L01708]

Further to my letter of 11 November 2019, I write to confirm that the committee has withdrawn the notice of motion to disallow the above legislative instrument, on the basis of your confirmation that the Department of Home Affairs will conduct a review of the instrument in accordance with the committee's request of 30 October 2019.

The committee looks forward to being informed of the outcome of the review at an appropriate time.

In the interests of transparency, I note that all correspondence relating to this matter 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 regords.sen@aph.gov.au.

Thank you again for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



14 November 2019

Senator the Hon Jane Hume
Assistant Minister for Superannuation, Financial Services and Financial Technology
Parliament House
Canberra ACT 2600
Via email: Senator.Home@aph.gov.au
CC: Shelby.brinkly@treasury.gov.au

Dear Assistant Minister,

ASIC Corporations (Unclaimed Superannuation—Former Temporary Residents) Instrument 2019/873 [F2019L01213]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. Noting that ASIC has not chosen to register the instrument as exempt from disallowance, the committee has identified scrutiny concerns in relation to the above instrument, and requests your advice in relation to this matter.

Matters more appropriate for parliamentary enactment

Scrutiny principle 23(3)(d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This may include instruments which provide continuing exemptions to primary legislation.

The instrument provides a conditional exemption to superannuation fund trustees from the requirements to provide notice and exit statements under sections 1017B and 1017D of the *Corporations Act 2001* (Corporations Act), where a fund member ceases to hold a superannuation product in the circumstances set out in Part 3A of the *Superannuation (Unclaimed Money and Lost Members) Act 1999*. In doing so, it extends the exemption provided by ASIC Class Order [CO 09/437] Departed former temporary residents superannuation – Disclosure relief, which commenced on 10 July 2009 and was repealed on 19 September 2019 by the current instrument.

The committee notes that the exemptions appear to be authorised by subsection 1020F(1) of the Corporations Act, which provides that ASIC may exempt a person or financial product (or a class of persons or financial products) from all or specified provisions of Part 7.9 of the Act, or declare that Part 7.9 applies to a person or financial product (or a class of persons or financial products) as if specified provisions were omitted, modified or varied as specified in the declaration.

Nevertheless, the committee generally prefers that exemptions from primary legislation by delegated legislation do not continue in force for such time as to operate as a de facto amendment to the principal Act. Accordingly, where a lawmaker intends to extend exemptions in delegated legislation, the committee expects a sound explanation to be included in the explanatory materials. In this instance, the explanatory statement to the instrument explains that the exemption has been continued on the basis of concerns expressed by the superannuation industry that:

trustees will generally not be aware which of their members have been temporary residents until advised by the Australian Taxation Office (ATO). Trustees will also generally not have overseas addresses for departed former temporary resident members. If the trustee has no address, or only has an Australian address, there will generally be no opportunity for them to obtain the member's correct address.

However, the explanatory statement does not appear to explain why it is necessary to continue to enact the exemptions via delegated legislation, instead of amending the Corporations Act.

In light of these matters, the committee requests your advice as to why it is considered necessary and appropriate to use delegated legislation to conditionally exempt superannuation fund trustees from sections 1017B and 1017D for a further 10 years, instead of amending the Corporations 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 **28 November 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response 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 regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



14 November 2019

The Hon Paul Fletcher MP
Minister for Communications, Cyber Safety and the Arts
Parliament House
Canberra ACT 2600
Via email: Paul.Fletcher.MP@aph.gov.au
CC: dlo@communications.gov.au

Dear Minister,

Broadcasting Services (Transmitter Access) Regulations 2019 [F2019L01248]

The Senate Standing Committee on Regulations and Ordinances (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 seeks your advice in relation to this matter.

Significant matters in delegated legislation
Privilege against self-incrimination

Senate standing order 23(3)(b) requires the committee to ensure that instruments do not trespass unduly on personal rights and liberties. In addition, Senate standing order 23(3)(d) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary legislation rather than delegated legislation).

The instrument provides for the conduct of arbitrations by the Australian Competition and Consumer Commission (ACCC) in relation to access to telecommunications transmission towers and associated facilities. Division 3 of Part 3 of the instrument provides for the powers of the ACCC in relation to such arbitrations. These include powers to require persons to give information and to produce documents, and to summon persons to give evidence.¹ A failure to provide information or documents, or to appear before the ACCC, may be an offence punishable by 10 penalty units (\$2,100).²

The committee's consistent scrutiny view is that coercive powers with the potential to impact personal rights and liberties may be more appropriate for enactment in primary legislation. Where such powers are included in delegated legislation, the committee expects a sound justification to be included in the explanatory materials. In this instance, the explanatory statement does not provide such a justification. It merely restates the operation and effect of the relevant provisions.³

1 Sections 18 and 19 of the instrument.

2 Section 4AA of the *Crimes Act 1914* provides that the value of one penalty unit is \$210.

3 Explanatory statement, p. 13.

Additionally, where a person is required to give information or to produce a document, questions arise as to whether the person would be required to provide the information or document notwithstanding that to do so may incriminate the person or expose them to a penalty. In this regard, the committee notes that the common law privilege against self-incrimination provides that a person cannot be required to answer questions or produce material which may incriminate them. The privilege is an important aspect of the right to be presumed innocent until proven guilty, and will be available unless removed expressly or implicitly by statute.

With regard to these matters, the committee notes that while the instrument does not expressly override the privilege against self-incrimination, neither the instrument nor the explanatory statement appears to confirm whether the privilege would be available.

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

- **whether, under the instrument, a person could be required to give information, produce a document or give evidence, notwithstanding that to do so could incriminate the person or expose them to a penalty; and**
- **why it is considered necessary and appropriate to include coercive powers, including the powers to require a person to give information, produce documents, and attend before the ACCC to give evidence, in delegated legislation, rather than primary legislation.**

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

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **28 November 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response 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 regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



14 November 2019

The Hon Michael McCormack MP
Minister for Infrastructure, Transport and Regional Development
Parliament House
Canberra ACT 2600
Via email: Michael.McCormack.MP@aph.gov.au
CC: Cameron.rimington@infrastructure.gov.au

Dear Minister,

CASA EX101/19 — Helicopter Aerial Application Endorsements Exemption 2019 [F2019L01132]

Thank you for your response of 7 November 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument. The committee considered your response at its private meeting on 13 November 2019.

The committee welcomes your undertaking to amend the Civil Aviation Safety Regulations 1998 (CASR) in 2020 to incorporate the exemptions set out in the present instrument, in accordance with the committee's request.

While this amendment remains outstanding, the committee has resolved to place a protective notice of motion to disallow the instrument, to ensure that the undertaking is implemented. The committee will withdraw the notice once the CASR is amended in accordance with your undertaking.

In this regard, please inform the committee if you envisage any difficulties in making the amendments before the revised disallowance period is due to expire in mid-February 2020 (subject to confirmation of the 2020 sitting calendar).

Finally, please note that, in the interests of transparency, all correspondence relating to this matter 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 regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



14 November 2019

Senator the Hon Mathias Cormann
Minister for Finance
Parliament House
Canberra ACT 2600
Via email: Senator.Cormann@aph.gov.au
CC: DLO-Finance@finance.gov.au

Dear Minister,

Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Cities and Regional Development Measures No. 1) Regulations 2019 [F2019L01344]

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23.

Constitutional authority for expenditure

Scrutiny principle 23(3)(a) of the committee's terms of reference requires the committee to ensure that an instrument is made in accordance with statute. This principle requires that instruments are made in accordance with their authorising legislation as well as any constitutional or other applicable legal requirements.

The instrument adds three new items to Parts 2, 3 and 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FFSP Regulations), to specify expenditure for grants relating to road safety and the inclusion of women in the aviation sector.

Item 2 of Schedule 1 to the instrument inserts new table item 35 into Part 3 of Schedule 1AB to the FFSP Regulations to authorise expenditure relating to 'Grants to improve road safety in Australia'. The explanatory statement explains that the objective of this item is 'to realise economic and social benefits through the safe and timely introduction of specific road safety initiatives'. It also identifies the following constitutional bases for the expenditure:

- the interstate and international trade and commerce power (s 51(i));
- the territories power (s 122);
- the Commonwealth executive power and the express incidental power (s 61 and s 51(xxxix)), including the nationhood aspect;
- the census and statistics power (s 51(xi));
- the external affairs power (s 51(xxix));

- the races power (s 51(xxvi));
- the aliens power (s 51(xix)); and
- the communications power (s 51(v)).

On the basis of the information provided in the explanatory statement, the committee is concerned that there may not be sufficient constitutional authority for the full scope of the expenditure proposed under new table item 35. The committee has therefore resolved to further consider this matter and, if necessary, seek external advice. In the meantime, the committee will continue to record the instrument as 'ongoing' in the *Delegated Legislation Monitor*, and may request your formal advice at a future date. Noting the complex issues involved in this matter, the committee may also lodge a protective notice of motion to disallow the instrument, to provide it with additional time in which to consider the relevant issues.

In the interests of transparency, all correspondence relating to this matter 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 regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



14 November 2019

Senator the Hon Jane Hume
Assistant Minister for Superannuation,
Parliament House
Canberra ACT 2600
Via email: Senator.Hume@aph.gov.au
CC: Shelby.brinkley@treasury.gov.au

Dear Assistant Minister,

**Financial Sector (Collection of Data) (reporting standard) determination No. 30 of 2019
[F2019L01196]**

The Senate Standing Committee on Regulations and Ordinances (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 seeks your advice in relation to this matter.

Merits review

Senate standing order 23(3)(c) requires the committee to ensure that instruments do not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

The above instrument permits the Australian Prudential Regulation Authority (APRA) to make a number of discretionary decisions. For example, it provides that APRA may change reporting periods for an authorised deposit-taking institution (ADI) (paragraph 9), or grant an extension of time for an ADI to provide information to APRA (paragraph 11). Neither the instrument nor the explanatory statement indicates whether the decisions are subject to independent merits review.

Part 3A of the *Financial Sector (Collection of Data) Act 2001* (FSCD Act) provides that applications may be made to the Administrative Appeals Tribunal for the review of 'reviewable decisions'. Section 31 of that Act defines a 'reviewable decision' to include 'a decision to vary a reporting standard determined under section 13 for a particular financial sector entity'. Explanatory statements to similar instruments have previously stated that APRA's discretionary decisions under the reporting standards are 'reviewable decisions' within the meaning of the FSCD Act. This position was confirmed in advice provided to the committee in your letter dated 16 July 2019:

Broadly, decisions to determine thresholds, change reporting periods and grant extensions under the reporting standards are reviewable decisions under the *Financial Sector (Collection of Data) Act 2001* (the Act) and subject to merits review by the Administrative Appeals Tribunal.

However, the committee has since been informed that, having reviewed and considered the issue, APRA has now changed its position, and considers that the relevant decisions are *not* subject to merits review.

Accordingly, the committee requests your detailed advice as to why APRA's decisions under the instrument are no longer considered to fall within the definition of 'reviewable decision' in section 31 of the *Financial Sector (Collection of Data) Act 2001*.

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

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **28 November 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response 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 regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



14 November 2019

Senator the Hon Anne Ruston
Minister for Families and Social Services
Parliament House
Canberra ACT 2600
Via email: senator.ruston@aph.gov.au
CC: dlos@dss.gov.au

Dear Minister,

**Social Security (Reasonable Excuse – Student Payments) Determination 2019
[F2019L01287]**

The Senate Standing Committee on Regulations and Ordinances (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 seeks your advice in relation to this matter.

Matters more appropriate for parliamentary enactment

Senate standing order 23(3)(d) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This may include instruments which set out significant elements of a regulatory scheme.

Under the *Social Security Act 1991*, certain payments are not payable to a person who commits a participation failure, unless the secretary is satisfied that the person had a reasonable excuse for committing the failure. This instrument specifies matters that the secretary must take into account when determining whether a person has a reasonable excuse for committing a participation failure in regard to youth allowance or austudy payment.

The instrument is similar to the Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018 (2018 Determination). The committee commented on the 2018 Determination in its *Delegated Legislation Monitor 8 of 2018*. The committee concluded that matters going to whether a person's social security payments may be reduced or cancelled are more appropriate for enactment in primary legislation.¹

In reaching that conclusion the committee drew on the comments by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) about the enabling

1 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 8 of 2018*, pp. 77-80.

provisions under which the 2018 determination was made, which are similar to the enabling provisions for the present instrument.² The Scrutiny of Bills committee expressed the view that safeguards and principles guiding whether a person's social security payments are to be reduced or temporarily cancelled are matters that would appear to be more appropriate for inclusion in primary legislation to allow for greater parliamentary scrutiny of the processes and of any future amendments to them.³

In light of the above matters, the committee requests your advice as to why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to specify the matters which must be taken into account in determining whether a person has committed a participation failure in regard to youth allowance or austudy payment.

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

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **28 November 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response 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 regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances

2 See Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 8 of 2018*, pp. 77-80.

3 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2017*, pp. 28-31.



14 November 2019

Senator the Hon Zed Seselja
Assistant Minister for Finance, Charities and Electoral Matters
Parliament House
Canberra ACT 2600
Via email: Senator.Seselja@aph.gov.au
CC: Dlo-amf@finance.gov.au; CommitteeScrutiny@treasury.gov.au

Dear Assistant Minister,

Taxation Administration (Private Ancillary Fund) Guidelines 2019 [F2019L01227]

The Senate Standing Committee on Regulations and Ordinances (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 requests your advice in relation to this matter.

Consultation

Section 17 of the *Legislation Act 2003* (Legislation Act) provides that, before a legislative instrument is made, the rule-maker must be satisfied that there has been undertaken any consultation in relation to the instrument that is considered by the rule-maker to be appropriate and reasonably practicable to undertake. Paragraph 15J(2)(d) of the Legislation Act further requires the explanatory statement to a legislative instrument to contain a description of the nature of any consultation that has been carried out in relation to it.

The committee notes that the explanatory statement to the instrument does not appear to contain a separate description of the nature of any consultation undertaken, as required by the Legislation Act. After making preliminary inquiries with Treasury, the committee understands that consultation in relation to the instrument was undertaken, consistent with the usual practices for remaking sunseting instruments.

In light of this advice, the committee requests that the explanatory statement to the instrument be revised to describe the nature of the consultation undertaken, in accordance with the requirements of the Legislation Act.

Merits review

Senate standing order 23(3)(c) requires the committee to ensure that instruments do not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

The instrument appears to permit the Commissioner of Taxation to make certain discretionary decisions, which may affect certain financial rights and interests. For example,

subsections 15(7) to 15(10) of the instrument provide that the Commissioner may reduce the minimum annual distribution rate for a fund, subject to certain conditions. Neither the instrument nor its explanatory statement indicates whether the discretionary decisions of the Commissioner are subject to independent merits review.

After making preliminary inquiries with Treasury, the committee understands that the *Taxation Administration Act 1953* only provides for the independent merits review of certain decisions made under a taxation Act or regulations, but not other legislative instruments, including this instrument.

Where independent merits review of decisions made under a legislative instrument is not available, the committee generally expects the explanatory statement to expressly identify established grounds for excluding merits review, by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.

The committee therefore requests your advice as to what characteristics of the Commissioner's decisions under the instrument justify 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?*.

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

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **28 November 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response 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 regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



14 November 2019

The Hon Paul Fletcher MP
Minister for Communications, Cyber Safety and the Arts
Parliament House
Canberra ACT 2600
Via email: Paul.Fletcher.MP@aph.gov.au
CC: dlo@communicationss.gov.au

Dear Minister,

**Telecommunications (Protecting Australians from Terrorist or Violent Criminal Material)
Direction (No. 1) 2019 [F2019L01159]**

Thank you for your letter of 3 November 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee has resolved to accept your offer of a private briefing with the eSafety Commissioner regarding the committee's scrutiny concerns. Accordingly, I have directed the committee secretariat to liaise directly with the Office of the eSafety Commissioner to arrange a mutually convenient time for such a briefing.

I note that, in the interests of transparency, all correspondence relating to this matter 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 regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



14 November 2019

The Hon Michael McCormack MP
Minister for Infrastructure, Transport and Regional Development
Parliament House
Canberra ACT 2600
Via email: Michael.McCormack.MP@aph.gov.au
CC: cameron.rimington@infrastructure.gov.au

Dear Minister,

Air Services Regulations 2019 [F2019L00371]

Thank you for your letter of 21 October 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

As noted in your letter, on 11 September 2019 the committee placed a protective notice of motion to disallow the instrument to ensure that it was amended to limit immunity from civil liability to Airservices Australia and its employees in a timely manner.

The committee welcomes the implementation of this undertaking through the Air Services Amendment Regulations 2019 and has therefore resolved to withdraw the notice of motion to disallow the instrument. The committee takes this opportunity to thank you for engaging with the committee in a positive manner to address its scrutiny concerns.

The committee has now formally concluded its examination of the instrument, although it looks forward to receiving further advice when the explanatory statement to the instrument has been amended, as outlined in your letter of 20 August 2019.

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, or wish provide further information in relation to this matter, please contact the committee secretariat on (02) 6277 3066 or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



14 November 2019

Senator the Hon Jane Hume
Assistant Minister for Superannuation, Financial Services and Financial Technology
Parliament House
Canberra ACT 2600
Via email: Senator.Hume@aph.gov.au
CC: Shelby.brinkley@treasury.gov.au

Dear Assistant Minister,

ASIC Corporations (Changing Scheme Constitutions) Instrument 2019/700 [F2019L01185]

Thank you for your response of 7 November 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

The committee considered your response at its private meeting on 13 November 2019. On the basis of your advice, and your undertaking to amend the explanatory statement to the instrument, the committee has concluded its examination of the instrument.

However, the committee takes this opportunity to reiterate its preference that the modification of primary legislation by delegated legislation does not continue in force for such a time as to operate as a de facto amendment to the primary Act.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, or wish provide further information in relation to this matter, please contact the committee secretariat on (02) 6277 3066 or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



14 November 2019

The Hon Michael McCormack MP
Minister for Infrastructure, Transport and Regional Development
Parliament House
Canberra ACT 2600
Via email: Michael.McCormack.MP@aph.gov.au
CC: cameron.rimington@infrastructure.gov.au

Dear Minister,

Road Vehicle Standards Rules 2018 [F2019L00198]

Thank you for your letter of 29 October 2019 to the Senate Standing Committee on Regulations and Ordinances, in relation to the above instrument.

As noted in your letter, on 11 September 2019 the committee placed a protective notice of motion to disallow the instrument to ensure that it was amended to address the committee's scrutiny concerns in relation to the incorporation of intergovernmental agreements.

The committee welcomes the implementation of this undertaking through the Road Vehicle Standards Amendment (2019 Measures No. 1) Rules 2019 and has therefore resolved to withdraw the notice of motion to disallow the instrument. The committee takes this opportunity to thank you for engaging with the committee in a positive manner to address its scrutiny concerns.

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, or wish provide further information in relation to this matter, please contact the committee secretariat on (02) 6277 3066 or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



14 November 2019

The Hon Christian Porter MP
Minister for Industrial Relations
Parliament House
Canberra ACT 2600
Via email: attorney@ag.gov.au
CC: DLO@ag.gov.au

Dear Minister,

**Seafarers Rehabilitation and Compensation Levy Amendment Regulations 2019
[F2019L01247]**

At the committee's private meeting on 13 November 2019 the committee considered the above instrument.

In the interests of promoting future compliance with the committee's scrutiny principles, the committee has resolved to draw your attention to the following matter.

Significant matters in delegated legislation

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

The instrument sets the quarterly rate of levy payable in relation to a seafarer berth at \$50. It was made under section 7 of the *Seafarers Rehabilitation and Compensation Levy Act 1992* (Levy Act). Section 5 of the Levy Act provides that the rate of levy imposed on each seafarer berth is the amount as prescribed. The Act does not otherwise set a limit on the amount of levy that may be imposed.

The explanatory statement explains that it is appropriate for the rate of levy to be set by delegated legislation, as this enables the levy to be adjusted to support the Seafarers Safety Net Fund (the Fund), as assessed by the Seacare Authority and depending on claims made against the Fund from time to time. It also explains that the minister consulted the Seacare Authority before making the instrument (in accordance with the requirements of the Levy Act), and that the Authority recommended that the levy be increased to \$50 per seafarer berth.¹

1 Explanatory statement, p. 1.

While recognising that the instrument is lawfully made, and noting that consultation with the Seacare Authority occurred in accordance with the enabling Act, the committee takes this opportunity to draw to your attention its scrutiny concerns regarding the setting of rates of tax in delegated legislation. In general, the committee considers that setting the rates of tax is more appropriate for enactment in primary legislation.

Finally, in the interest of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances