



5 May 2021

The Hon Josh Frydenberg MP  
Treasurer  
Parliament House  
CANBERRA ACT 2600

Via email: [tsrdlos@treasury.gov.au](mailto:tsrdlos@treasury.gov.au)

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Dear Treasurer,

### **Treasury portfolio exemption and modification instruments**

The committee appreciated meeting with officials from your office, the Treasury and the Australian Securities and Investments Commission on 28 April 2021 as part of the ongoing engagement about instruments in the Treasury portfolio that modify or exempt persons or entities from the operation of primary legislation.

The committee welcomes your continued commitment to work with the committee to resolve its scrutiny concerns about these instruments, and notes that this commitment was reflected in the discussions at the meeting. At this stage in the ongoing discussions the committee appreciates that you are cognisant of our significant concerns in this matter, which are set out in detail in Chapter 1 of *Delegated Legislation Monitor 2 of 2021*.

This engagement is very important to the committee given the fact that the Treasury portfolio makes a very large number of legislative instruments—indeed, almost 16 per cent of all instruments in 2020. The committee wishes to emphasise, however, that these scrutiny concerns are not limited to instruments made within the Treasury portfolio. The committee considers that the approach developed as a result of this engagement may serve as a model for addressing the committee's scrutiny concerns about instruments which modify the operation of primary legislation in other portfolios in the future.

In this context, I take this opportunity to emphasise that one of the essential functions of the Senate is to scrutinise the law-making power that the Parliament has delegated to the executive and the Senate must hold the executive to account in this regard. Importantly, the Senate affirmed the central part that the committee has played since 1932 in supporting the Senate in this fundamental role by adopting a resolution on 23 February 2021 which re-emphasised the importance of the work of this committee. The committee sees the ongoing engagement with your department and portfolio agencies as contributing to the fulfilment of its essential mandate in ensuring that the Parliament's role as lawmaker-in-chief is respected.

### **Following the discussions, the committee requests that you:**

- **make an undertaking that the explanatory statements to instruments made in the Treasury portfolio registered after 1 July 2021 that modify or exempt persons or entities from the operation of primary legislation should provide an assessment of the following:**

- **why the measures are being included in delegated legislation as opposed to primary legislation;**
- **the appropriateness of the duration of the instrument, including whether a shorter duration was considered for instruments subject to the standard 10-year sunseting; and**
- **whether any amendments to the relevant enabling Act(s) may be pursued in the future; and**
- **provide further information about any measures that are being implemented in the Treasury portfolio to critically examine the appropriateness of providing for modifications in delegated legislation and the duration of such instruments, including whether the option of including such modifications in primary legislation (possibly as part of the regular minor and technical amendments to Treasury portfolio laws) is being actively considered.**

As advised at the meeting, the committee secretariat remains at your disposal to assist in resolving these matters.

To facilitate the committee's timely consideration of the matters above, the committee would appreciate your response by **19 May 2021**.

I also take this opportunity to advise that the committee will consider its approach to the disallowance notices on the instruments which raise this issue at its next meeting in the Budget sitting week.

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

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto: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**