



**THE HON JOSH FRYDENBERG MP**  
**TREASURER**

Ref: MS21-001063

Senator the Hon Concetta Fierravanti-Wells  
Chair  
Senate Standing Committee for the Scrutiny of Delegated Legislation  
Parliament House  
CANBERRA ACT 2600

Via email: [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au)

Dear Senator Fierravanti-Wells

Thank you for your correspondence of 5 May 2021, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation regarding Treasury portfolio instruments that modify or exempt persons or entities from the operation of primary law. In that correspondence, the committee requested:

- 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 maximum 10-year sunseting; and
  - whether any amendments to the relevant enabling Act(s) may be pursued in the future; and
- 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 I have previously indicated, I value the Committee's continuing engagement in good faith to ensure there is appropriate Parliamentary oversight for legislative instruments in the Treasury portfolio, including for those instruments that modify or exempt persons or entities from the operation of the primary law.

In this regard, I appreciate your offer at your meeting with representatives from my Office, Treasury and ASIC on 28 April 2021 to make the Committee Secretariat available for further

discussion of the issues of concern to the Committee. I am advised that Treasury officials will meet with the Secretariat on Friday, 21 May 2021.

*Inclusion of additional information in explanatory statements*

I welcome the opportunity to provide an undertaking to the Committee that explanatory statements to instruments in the Treasury portfolio that modify or exempt persons or entities from the operation of the primary law, will include the information requested by the Committee for instruments made from 1 July 2021.

In relation to providing an assessment for whether amendments to enabling Acts may be pursued in the future, many of the legislative instruments made within the Treasury portfolio are made by Treasury portfolio regulators and pursuing such amendments would be a matter for the Government and for the Parliament. For this reason, I believe it would be appropriate for explanatory statements to clarify that the Government will consider the merits of making future amendments to the relevant enabling Acts and regulations as part of the review process for the instrument prior to its sunseting date.

My Office and the Treasury will continue to engage with Treasury regulators to ensure the Committee's concerns are addressed in explanatory statements and that regulators are exercising their modification and exemption powers appropriately and consistent with ensuring sufficient parliamentary oversight. Treasury will also continue to improve its own approach to these instruments.

*Other measures to critically examine the use of delegated legislation*

I welcome the opportunity to provide you with further information about 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.

The Treasury will be increasing its engagement with its portfolio agencies to ensure that their legislative instruments address the Committee's concerns before they are made, and a key focus of this work will be the flow of instruments made by ASIC. In doing that, the Treasury will be working with ASIC to that its instruments apply coherent and consistent design principles that address the Committee's concerns and ensure that the instruments integrate effectively with the primary law.

As a consequence of engagement with the Committee and as part of broader work being undertaken in the Treasury portfolio, I expect the Treasury to consider and advise the Government on the merits of amending the Act or regulations to address the specific policy issues raised by the sunseting of the instrument.

While the decision of whether or not to pursue such amendments is ultimately a matter for Government and needs to be balanced against other reform priorities that may be before the Government and the Parliament at the time, this type of analysis will be standard practice within the Treasury portfolio. I would like to inform the Committee that as a result of this analysis, opportunities to progress primary law amendments and reduce the reliance on delegated legislation in the Treasury portfolio have already been identified:

- The Committee has previously raised with me its concerns regarding the Tax Agent Services (Specified BAS Services No. 2) Instrument 2020 which extends the definition of a BAS service to also include services related to the superannuation guarantee charge effectively broadening the regulatory framework for tax agent services. I have asked my Department to incorporate the effect of this instrument into the *Tax Agent Services Act 2009* as part of the work being done to implement the Government's response to the Review of the Tax Practitioners Board.
- As part of reforms to streamline and improve access to employee share schemes, the government took the opportunity to prepare primary law amendments to give effect to exemptions that are currently provided for in two delegated instruments made by ASIC. These instruments were made by ASIC in 2015 and provide for exemptions from some obligation in the *Corporations Act 2001*. Public consultation on the primary law changes is expected to occur over the coming weeks prior to the legislation being introduced into Parliament.
- As announced in the Budget on 13 May 2021, the Government has committed to undertake public consultation about whether exemptions from the requirement to hold an Australian Financial Services Licence for certain foreign financial services providers, which were previously provided by way of delegated legislation, should be incorporated into the *Corporations Act 2001*.

Treasury is also engaging closely with the Australian Law Reform Commission (ALRC) on its review of the legislative framework for the corporations and financial services law. One of the three topics referred to the ALRC for consideration was the legislative design and 'hierarchy of the law', that is, the division between primary law, regulations and ASIC instruments. I would encourage the Committee to engage with the ALRC on these issues and understand that the Commission will be in contact with you. The ALRC are required to release an interim report on the structure and hierarchy of the law by 30 September 2022 and a consolidated final report by 30 November 2023.

There is also the process to make twice annual minor and technical amendments to Treasury laws, including amendments which improve the legislative design and hierarchy of the law. Given the size and complexity of laws in the Treasury portfolio, the Government must continue to find a balance between the competing priorities of ensuring proper maintenance and stewardship of the Treasury statute book and progressing its broader legislative agenda to support the economy as it recovers from the coronavirus pandemic.

I have asked the Treasury to continue to explore more options to address the systematic issues raised by the committee (such as expanding the current minor and technical amendments process). As this work is further developed, I would welcome the opportunity to share this with the Committee.

Yours sincerely

THE HON JOSH FRYDENBERG MP

13 / 5 / 2021