THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS21-000070

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

Dear Senator Fierravanti-Wells

Thank you for your letter dated 10 December 2020, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee), requesting further advice in relation to:

- *ASIC Corporations (Amendment) Instruments 2020/721* (the Amendment Instrument);
- *ASIC Corporations (IPO Communications) Instrument 2020/722* (the IPO Instrument);
- *ASIC Corporations (Hardship Withdrawals Relief) Instrument 2020/778* (the Hardship Instrument);
- *ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787* (the Litigation Instrument); and
- *ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98* (the IDR Instrument)(together, the instruments).

The Committee has asked whether these instruments could be amended to bring forward their respective sunsetting dates to either three or five years after the relevant instrument is made. I understand that the Committee agreed to provide an extension to 29 January 2021 to receive a reply on this matter.

ASIC along with other regulators has a range of powers to make legislative instruments. For ASIC in particular this includes powers to make legislative instruments that modify the effect of the law or exempt a class of persons or products from requirements in the law (exemption and modification powers). Other powers provide ASIC and other regulators with the ability to set standards or make rules via legislative instrument. Legislative instruments made under these powers are, as with all Commonwealth legislative instruments, subject to a default 10 year sunsetting period but may provide for a shorter sunsetting period. The appropriate length of the sunsetting period for

individual legislative instruments will vary depending on the nature of the instrument and the circumstances it addresses.

As I have noted in my previous correspondence with the Committee, the Government shares the Committee's objective that the period of operation of legislative instruments should be consistent with maintaining appropriate Parliamentary oversight, while also having consideration for the underlying policy intent of the relevant primary law and the regulatory burden imposed on individuals and entities. With these considerations in mind, in my view, a 10 year sunsetting period will generally be more appropriate where:

a) The instrument is made under a specifically delegated power which is set out in the primary legislation and is intended to complement the requirements or objectives in the primary legislation.

b) There would be appreciable business uncertainty about the treatment of, or framework for, business activities giving rise to significant commercial risks and/or costs if the sunsetting period was shorter. For example, uncertainty which impacts investment in compliance systems, or the effective operation of a market, are examples where this principle may apply.

c) The legislative instrument deals with confined or unique circumstances affecting a particular class of entities or products which do not fit within the strict operation of the primary law but would result in anomalous or inconsistent outcomes given the intent of the primary legislation as set by Parliament.

d) The legislative instrument makes minor and technical changes which support the practical operation of the legislative regime.

In my view, where these principles are not met a shorter sunsetting period, such as a five year sunsetting period, will generally be more appropriate.

These principles have been shared with ASIC and I have communicated to ASIC that I expect ASIC to take these principles into consideration in determining the appropriate sunsetting period for legislative instruments.

I note that the Committee has also suggested that a three year sunsetting period would be appropriate for some instruments. While there will be circumstances where it is appropriate for a legislative instrument to operate for a period of three years or less, for example where the instrument is required to address short-term transitory circumstances, this will not always be the case and there are a range of practical considerations with instruments sunsetting after three years.

Amending and remaking of an expiring instrument is not a mere technical or procedural formality and each time an instrument approaches its sunsetting date, the instrument must be reviewed and consulted upon to determine whether it remains fit-for-purpose. This process of unmaking or remaking an instrument imposes costs on those affected by or concerned with the instrument. This includes costs associated with engaging with consultation processes and commercial uncertainty for businesses about whether an instrument will be extended or what its future form will be. For more complex instruments, the review, consultation and assessment process will typically begin 18 months to two years before the sunsetting date for the instrument.

For these reasons, a five year sunsetting period is, in my view, a more appropriate duration for most instruments that do not meet the principles I have outlined above.

Parliamentary Oversight of the Instruments

Applying the above principles, I consider that the default length of ten years remains appropriate for the Amendment Instrument, IPO Instrument and the IDR Instrument for the reasons set out below. I note that the Hardship Instrument already has a sunsetting period of 5 years which I also consider to be appropriate. However, in assessing the Litigation Instrument against the principles, I support the Committee's suggestion for a shorter sunsetting period and consider it appropriate for it cease to operate 5 years after commencing.

Litigation Instrument

While the Litigation Instrument was made to address business uncertainty while litigation funders were transitioned into the managed investment scheme (MIS) regime, it was not made under a specifically delegated power and the changes, particularly when considered in the cumulative, are more than minor.

The Litigation Instrument was made on 22 August 2020, on the same day that Government regulations, through *Corporations Amendment (Litigation Funding) Regulations 2020*, removed the exemption for litigation funders from the MIS and Australian Financial Services License regimes. ASIC's Explanatory Statement for the Litigation Instrument clarifies that the instrument provides relief to facilitate the implementation of the new regulatory framework for litigation funding schemes. As my letter of 2 December 2020 stated, the matters addressed will have ongoing application and relevance to litigation funding schemes.

The Litigation Instrument makes some exemptions from the MIS regime that are technical and support the operation of the legislative regime, but some of them are exemptions from significant components of the MIS regime. Some of the core requirements for most MISs relate to the provision and content requirements of Product Disclosure Statements, the process for withdrawing from a MIS, and to maintain a register of members – all of which are amended for litigation funding schemes through the instrument. The exemptions from these requirements provided in this instance are therefore more suited to sunsetting after five years, rather than ten.

My support of the Committee's view that a shorter sunsetting period is appropriate for this instrument has been communicated to ASIC.

The IDR Instrument

The IDR Instrument updates standards and requirements for internal dispute resolution processes under specific powers provided by the Parliament, with only minor and technical modifications to the primary law. Industry is now undertaking planning, systems development and training to ensure compliance with the requirements of the instrument which represents a significant undertaking for financial firms. Given the scale of investment and training required, I consider a shorter sunsetting period would be lead to uncertainty and additional cost for businesses such that the default 10-year sunsetting period remains appropriate for the IDR Instrument.

The Amendment and IPO Instruments

As outlined in my letter of 2 December 2020, the Amendment Instrument provides relief to disregard the relevant interests of the issuer, underwriter or lead manager for the purposes of takeover provisions where those relevant interests arise because of voluntary escrow arrangements. As ASIC has stated in the Explanatory Statement, these types of relief applications are minor and technical in nature and involve the application of existing policy to new situations. Voluntary escrow – where existing security holders agree to hold their securities for a certain period of time in order to promote investor confidence in the IPO – is not a method of takeover and ASIC's

instrument makes a technical change that supports the effective functioning of the IPO market and is consistent with the intent of the takeover provisions.

The IPO Communications Instrument is similarly focussed on reducing the costs associated with an IPO, by providing relief from advertising restrictions in the Act to enable issuers to communicate limited information to security holders before a disclosure document is lodged with ASIC. This information is limited to non-promotional factual material. This remains consistent with the intent of the law – to prevent issuers from seeking to induce investors without adequate disclosure being made – while allowing issuers to undertake the necessary preparatory work. This technical change provides certainty to businesses and allows for consistent and efficient outcomes in IPOs without contradicting the intent of the legislation.

Given the two instruments facilitate business certainty, deal with anomalous outcomes, and are minor and technical changes that support the practical operation of the legislative regime, I consider the default 10 year period to be appropriate.

The Hardship Instrument

The Hardship Instrument is currently scheduled to sunset after five years. This relief is intended to respond to the immediate and further possible medium-term effects of the COVID-19 pandemic, by allowing funds to respond to the hardship faced by their investors without seeking individual relief from ASIC. Providing general relief rather than relief on a case-by-case basis is a minor change that gives businesses certainty that they can respond to hardship claims quickly. It does not impose an obligation on the entity, but rather provides flexibility during the particular set of circumstances that may arise during a period of economic volatility. A five year duration for this instrument is an appropriate length of time to evaluate these particular circumstances, based on the experience during the Global Financial Crisis.

I trust this information will be of assistance to the Committee.

Yours sincerely

THE HON JOSH FRYDENBERG MP

29 / 1 /2021

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

PAUL FLETCHER MP

Federal Member for Bradfield
Minister for Communications,
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MS20-000983

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

Dear Senator Fierravanti-Wells

Thank you for your letter dated 10 December 2020, concerning the motion by the Senate Standing Committee for the Scrutiny of Delegated Legislation to disallow the Australian Competition and Consumer Commission's (ACCC) *Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020* (class exemption).

Your letter indicated that the Committee thought the class exemption should be amended so that its duration was reduced from ten years to five years after commencement.

The ACCC intends to amend the class exemption so that it has a five year duration. The ACCC also plans to register the amending instrument on the Federal Register of Legislation prior to the date that you have proposed to move that the class exemption be disallowed. Given the ACCC's stated intent, I would be grateful if you would please consider withdrawing the disallowance motion.

Thank you for bringing your concerns to my attention.

Yours sincerely

Paul Fletcher

14 / 1 / 2021

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