THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS21-000661

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 on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) regarding *AISC Corporations (Amendment) Instrument 2020/1064* and *ASIC Corporations (Amendment) Instrument 2020/1065* relating to time-sharing schemes.

In that letter, the Committee requested my advice about:

- why it is necessary and appropriate to use delegated legislation, rather than primary legislation, to amend the time-sharing scheme arrangements under the *Corporations Act 2001*;
- whether the instruments can be amended to provide that the measures cease within three years after commencement;
- if there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate; and
- whether a review mechanism is available for members where the responsible entity of a time-sharing scheme does not agree to the member's hardship request.

Regulating time-sharing schemes through delegated legislation

Time-sharing schemes are complex in nature, often involving multi-year contracts and requiring financing. Successive governments have formed the view that time-sharing schemes are generally best regulated as managed investment schemes, which are subject to robust consumer protections and regulatory oversight. However, while time-sharing schemes exhibit a number of features that are similar to a managed investment scheme, they have specific characteristics that do not fit into the regulatory framework for managed investment schemes.

Accordingly, the Australian Securities and Investments Commission (ASIC), as the regulator, has been using its instrument making powers to provide regulatory relief to time-sharing schemes where it considers it to be appropriate.

As you note, ASIC's instruments have been used to modify the regulatory framework for time-sharing schemes for a number of years.

ASIC has publicly announced that it will conduct a review of time-sharing arrangements in early 2022. I will ask Treasury to engage with ASIC through the review process. As part of this process, Treasury can consider whether it is necessary and appropriate for the details of the time-sharing arrangements to be included in the primary legislation.

Sunsetting periods

As I have noted in my previous correspondence to 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 considering the underlying policy intent of the relevant primary law and the regulatory burden imposed on individuals and entities.

In this case, the measures in these instruments effectively sunset in six years, consistent with the sunsetting date of the *ASIC Corporations (Time-sharing Schemes) Instrument 2017/272*, which is amended by these instruments.

I consider that the sunsetting period for the measures in these instruments is appropriate as the instruments deal with unique circumstances affecting a particular class of entities. Time-sharing products do not fit within the strict operation of the *Corporations Act 2001*.

Furthermore, I note that ASIC's instruments were made after an extensive consultation process which started in late 2016 and involved numerous meetings with industry and consumer representatives. If the measures in the instruments were to sunset after three years, the measures would only be in effect for just over two years after the conclusion of the transition period. Given the extensive consultation, commencing that process again would be inefficient and resource intensive, and create significant commercial uncertainty about the treatment of timeshare products.

For these reasons, I consider that these instruments do not meet the criteria for a shorter sunsetting period. This is also consistent with the principles I have previously provided to the Committee about when the default sunsetting period will generally be appropriate.

I look forward to discussing these instruments further with the Committee, in a meeting to be arranged between my Office and the Committee.

Review of the time-sharing arrangements

As I noted above, ASIC is planning to review the time-sharing arrangements in 2022 and I will ask Treasury to consider, as part of this review, whether it is necessary and appropriate for the details of the time-sharing arrangements to be included in the primary legislation.

In this instance, I do not consider that multiple concurrent reviews are necessary.

Review of decisions made by the responsible entity of a time-sharing scheme

As time-sharing schemes are regulated as managed investment schemes and categorised as complex financial products, the responsible entity of a time-sharing scheme is required to hold an Australian Financial Services Licence (AFSL). Among a range of obligations, the AFSL holder must have a complying dispute resolution system and compensation arrangements. This means responsible

entities of time-sharing schemes are required to be members of the Australian Financial Complaints Authority (AFCA) scheme.

As you are aware, the AFCA scheme is a free and independent dispute resolution scheme which considers complaints about financial products and services. AFCA's role is to assist consumers to resolve their complaints with financial firms and AFCA's decisions are binding on the financial firms involved in the complaint.

If a member is not satisfied with a decision made by the responsible entity of a time-sharing scheme, including in relation to hardship withdrawal decisions, the member can lodge a complaint with AFCA.

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

Yours sincerely

THE HON JOSH FRYDENBERG MP

30 / 3 / 2021

CC: Minister for Superannuation, Financial Services and the Digital Economy

Senator the Hon Marise Payne
Minister for Foreign Affairs
Minister for Women

MC21-001753

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

Dear Chair

Thank you for your letter of 23 March 2021 regarding your consideration of Australia's Foreign Relations (State and Territory Arrangements) Rules 2020 (the Rules) and, in that context, the power to exempt arrangements from the notification provisions set out in the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (the Act).

You have requested advice as to:

- why it is considered necessary and appropriate to establish the definition of an 'exempt arrangement' via delegated legislation, rather than primary legislation; and
- whether the definition of an 'exempt arrangement' can instead be included in primary legislation.

You have also suggested that, if it is inappropriate to define exempt arrangement in primary legislation, further clarity should be provided on exempt arrangements prescribed by the Rules either on the face of the instrument or in the explanatory statement.

As you have observed, the Act empowers the Minister for Foreign Affairs to make rules exempting arrangements from the notification and approval provisions of the Act. Section 54 enables the Minister to make rules prescribing matters required or permitted to be prescribed by the Act, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. Further, section 4 of the Act defines an 'exempt arrangement' as an arrangement of a kind that is prescribed by the rules.

There are several reasons why I am of the view that the power to specify exempt arrangements should remain within the rules.

At the time the Act was drafted, certain entities were exempted from the operation of the Act by their exclusion from the relevant definitions of 'State/Territory entity' or 'foreign entity'. Therefore, arrangements by State and Territory 'hospitals' or by 'corporations that operate on a commercial basis' are excluded from the Foreign Arrangements Scheme. This is the means by which arrangements considered appropriate to be more permanently excluded from the Scheme were exempted; that is, through the primary legislation.

An 'exempt arrangement' as defined in section 4 of the Act, was envisaged as a more flexible means of excluding arrangements where appropriate and necessary to ensure the effective administration of the Act. Specifically, it was intended to reduce the regulatory burden of the Act where it is subsequently determined by the Minister that there is low foreign policy risk, or where arrangements must be entered in urgent circumstances. The Revised Explanatory Memorandum to the Act provides information about exempt arrangements (at paragraphs 100-104). This includes that exempt arrangements are excluded from provisions of the Act requiring the notification and approval of arrangements. Importantly (and distinct from arrangements involving State and Territory 'hospitals' or 'corporations that operate on a commercial basis'), the Minister retains the power to make declarations or decisions in respect of exempt arrangements should the Minister become aware of those arrangements other than through their notification.

The legislation should position the Government to reduce the administrative burden on State/Territory entities in situations where the Minister determines there is low foreign policy risk. This is a new Act which, for the first time, will provide the Federal Government with full visibility of the arrangements with foreign governments (or foreign universities that lack institutional autonomy from their government) entered by States and Territories, Australian public universities and local governments. Once I have received and considered the initial stocktake of pre-existing arrangements entered by those entities, and obligations in respect of prospective arrangements are well underway, the Government will be better placed to judge whether categories of arrangements pose less foreign policy risk and may be exempted so as to reduce the administrative burden of the Act. Retaining the power to exempt arrangements through the rules allows for this. However, arrangements exempted by the rules remain subject to the Minister's declaration and decision-making powers under the Act.

Some categories of arrangements which I have already prescribed as exempt, such as those relating to sharing of information or resources for the management of an emergency in Australia which has been declared by the Commonwealth, or a State or Territory, are time-critical and in the public interest. I have judged that these arrangements are less likely to pose a risk from a foreign relations or foreign policy perspective, and to require their notification—and, if a core prospective arrangement, their approval—could unduly delay these arrangements and hinder beneficial State or Territory activity.

I have also exempted from notification arrangements that solely deal with minor administrative and logistical matters and minor variations that do not alter the substance of an arrangement. These exemptions responded to State/Territory entity feedback that it would be administratively burdensome for State/Territory entities to notify me of these types of arrangements. I have assessed that such arrangements are relatively inconsequential, and less likely to pose a risk from a foreign relations or foreign policy perspective. The exemption is deliberately drafted to enable flexible application to arrangements that differ in nature, purpose and participants. It is intended that State/Territory entities consider the application of this exemption on a case-by-case basis,

and consult with the Department of Foreign Affairs and Trade should there be a question as to whether the exemption applies.

Further, exemptions may be necessary to respond to changing foreign policy risk, including the power to exempt arrangements in the rules provides the necessary flexibility to respond to such changes.

The Rules and their accompanying explanatory statement remain appropriate in their description, and justification, of the relevant exempt arrangements. I appreciate the Committee's desire to provide as much specificity as possible, and will keep the rules, and explanatory statement under regular review, and will be happy to ensure my officials provide relevant updates to your committee.

Thank you, once again, for your interest in the Rules. I would also like to thank you for your strong engagement on the Committee that inquired into the Bill.

Yours sincerely

MARISE PAYNE 31 MAR 2021

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS21-000468

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

Dear Senator

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation regarding the *Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2020* (the Determination).

In that letter, you sought my advice as to:

- why it is considered necessary and appropriate for the exemptions set out in the instrument to be provided for in delegated legislation rather than primary legislation;
- whether the instrument could be amended to specify that it ceases to operate three years after commencement, or if not, why not;
- whether any decisions made under the instrument, including under section 12, are subject to independent merits review;
  - if so, the scope of merits review provided for decision made under the instrument; and
  - if no independent merits review is available for decision made under this instrument, why not.

By way of background, the Australian Competition and Consumer Commission (ACCC) has the power to grant businesses with legal protection for arrangements which may otherwise risk breaching the *Competition and Consumer Act 2010* (Cth) (the Act) but are not harmful to competition and/or are likely to result in a net public benefit.

Ordinarily, situations where competitors come together to collectively bargain against a target business can raise competition issues under the Act. The ACCC is able to grant individual exemptions for such conduct on a case-by-case basis through the authorisation and notification processes set out in Part VII of the Act.

In addition, in 2017 as part of the Harper Competition Review amendments, the ACCC was given the power to grant class exemptions for this conduct. The purpose is to provide a more efficient and streamlined process for businesses to obtain exemptions for conduct that could otherwise be permitted on an individual basis via authorisation or notification.

The collective bargaining class exemption is a beneficial deregulatory measure for small businesses as it reduces small business compliance costs (by removing the need to lodge a formal application

to the ACCC and pay a fee) and provides legal certainty for the ability to collectively bargain. The collective bargaining class exemption is expected to be particularly beneficial to franchisees negotiating with a common franchisor, as well as to farmers who have made extensive use of the collective bargaining notification process in order to be able to collectively negotiate contracts with the processors they supply.

While the proposal to introduce a class exemption for collective bargaining conduct is new, the ACCC's other power to exempt such arrangements has been in place since the *Trade Practices Act 1974* (Cth) and has been often exercised. Taking this into account together with the 2017 amendments to specifically permit the ACCC to determine to grant class exemptions, it is wholly consistent and appropriate for a class exemption for collective bargaining to be provided for in delegated legislation rather than primary legislation. Further, providing this kind of bespoke exemption through primary legislation would be cumbersome and run counter to the policy objectives of providing a simple and more streamlined process for small businesses.

In relation to whether the instrument could be amended to specify that it ceases to operate three years after commencement, for the reasons set out below, I consider that a 10 year sunsetting period remains appropriate for the Determination.

The Determination is made under a specifically delegated power which is set out in primary law. The delegated power is intended to complement the requirements or objectives in the primary law. This is evidenced by section 95AA(4) of the Act which provides that a determination made under this section may remain in force for a period of up to 10 years.

Whilst the 10 year period provided for under the Act is a maximum, the use of the maximum period in the Determination is necessary and appropriate in these circumstances to enable the benefits of the class exemption to be realised. This is because very few bargaining groups are likely to see utility in relying on a class exemption that is limited to three years on the basis that it provides insufficient time in which to organise a group, negotiate with the target, sign contracts and give effect to those contracts; in many cases the contract itself would exceed three years, meaning that a class exemption limited to three years would not provide legal protection for the duration of the contract.

For small businesses, such as groups of farmers, a longer period of legal protection is more efficient and provides them with greater certainty. An insufficient exemption period may significantly reduce the benefits to be realised from any collective bargaining, as well as undermining targets' incentives and willingness to engage with collective bargaining groups. It could also result in small business groups continuing to incur the burden of seeking authorisation for specific collective bargaining conduct or lodging notifications in order to obtain the longer exemption period available under those processes.

The ACCC considered 25 collective bargaining notifications over the three years to 31 December 2020. Of these, 21 groups sought, and were granted, case-by-case exemptions for more than three years and 17 were provided exemptions for 10 years.

Prior to making the class exemption, the ACCC considered over 10 years of data about collective bargaining arrangements entered into by small businesses relying on exemptions provided on a case-by-case basis through the authorisation and notification processes. The ACCC also engaged in extensive public consultation over 17 months to ensure the appropriate formulation of the instrument. The making of a collective bargaining class exemption has widespread support from farming and small business groups, as well as State and Territory Governments.

There are safeguards in place to address any unintended consequences that may arise before the end of the sunsetting period. These include:

- the ACCC's ability to disapply the class exemption for a specific collective bargaining in particular cases, if it considers that conduct, when engaged in by a particular person, would

not give rise (or no longer gives rise) to a net public benefit and is likely to substantially lessen competition;

- the ACCC's ability to vary or revoke the class exemption as a whole if it is concerned that it is not operating as intended; and
- the ACCC's ability to review the operation of the class exemption at any stage.

It should also be noted that the exemption does not impose any legal obligation for the target business to negotiate with the collective bargaining group if it chooses not to (and the class exemption does not apply to arrangements that include collective boycott conduct to force the target to negotiate), minimising any public detriment from such arrangements.

Notwithstanding the above, as noted in my previous correspondence there will be broader good faith discussions in relation to the sunsetting periods for legislative instruments in the Treasury portfolio following the tabling of the Committee's final report into the *Exemption of delegated legislation from parliamentary oversight.*

In relation to the Committee's queries on whether decisions made under the instrument are subject to independent merits review, I note that as the class exemption is a legislative instrument, it is subject to disallowance by Parliament. The ACCC's decision to determine the class exemption is not subject to merits review by the Australian Competition Tribunal (the Tribunal). However, a decision by the ACCC to withdraw the benefit of a class exemption in a particular case is reviewable by the Tribunal (in accordance with section 102(5G) of the Act).

Thank you for bringing the Committee's concerns to my attention.

Yours sincerely

THE HON JOSH FRYDENBERG MP

05 / 3 /2021

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15 March 2021

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

By email: sdlc.sen@aph.gov.au

Dear Senator

RE: Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01361]

Federal Circuit Court Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01362]

I refer to your letter of 18 February 2021 in relation to recent amendments to the *Family Law Rules 2004* and the *Federal Circuit Court Rules 2001*, to introduce the Notice of Child Abuse, Family Violence or Risk, which responded to my letter of 12 February 2021.

I understand that, on the basis of the advice in my letter of 12 February 2021, the Committee has concluded its examination of the instruments in relation to the retrospective effect matter. I appreciate your prompt consideration of that matter given the significance of the harmonised Notice of Risk.

The Committee has sought further advice from the Family Court of Australia and the Federal Circuit Court of Australia ('the Courts') in relation to the remaining issue of compliance of the instruments with the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

The Family Court and the Federal Circuit Court, together with the Federal Court of Australia, have always proceeded on the basis that a statement of compatibility with human rights is not required in respect of amendments to each Court's rules of court. Accordingly, a paragraph to that effect is included in Explanatory Statement relating to each rule amendment.

The consistent approach adopted by the Courts is based on advice from the Office of Parliamentary Counsel that section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) does not require a statement of compatibility to be prepared in respect of rules of court made under relevant Court legislation. In the case of the Family Court and Federal Circuit Court, the *Family Law Act 1975* (Cth) or the *Federal Circuit Court of Australia Act 1999* (Cth) respectively. This is because the enabling provisions for the rules of court, which in this case

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are section 123 of the *Family Law Act 1975* (Cth) and section 81 of the *Federal Circuit Court of Australia Act 1999* (Cth), only provide that the *Legislation Act 2003* (Cth) (other than particular specified provisions of that Act) applies in relation to rules of court as if a reference to a legislative instrument were a reference to rules of court. As a result, the enabling provisions do not have the effect of translating a reference to a legislative instrument in legislation other than the *Legislation Act 2003* (Cth) into a reference to rules of court.

While this is the basis upon which we have not included a statement, for the benefit of the Committee we have **attached** details of how the amendments to the *Family Law Rules 2004* and the *Federal Circuit Court Rules 2001* are not only compatible with human rights, but would enhance human rights **(Attachment A)**.

As detailed in my letter of 12 February 2021, the Courts are concerned that a disallowance will result in a delay to implementation, impacting on the ability of the Courts to more fully identify risks in parenting proceedings directly relevant to the welfare of children, as well as resulting in disruption and costs to amend data systems.

Rules of court are critical for the proper administration of justice and the effective operation of each court. Rules of court can only be made by a majority of judges of the relevant court, and are a manifestation of the Judges' collective intention for the court's practice and procedure. It is fundamental that they are able to be amended, modernised and improved as considered necessary and appropriate by the Judges, in a timeframe appropriate to the urgency or importance of the amendment.

Notwithstanding the matters noted above, the Courts have provided information so as to allow the Committee to be confident that there are no negative human rights consequences and for the issue to be swiftly resolved. I trust that the information provided will enable the Committee to satisfactorily conclude its consideration of this matter, such that it will be in a position to give notice of its intention to withdraw the disallowance notices.

Should you have any further queries in relation to these rule amendments, please contact my Chambers via email to Ms Jordan Di Carlo, Executive Legal and Policy Adviser: jordan.dicarlo@familycourt.gov.au

Yours sincerely

The Honourable Justice Alstergren
Chief Justice
Family Court of Australia
Chief Judge
Federal Circuit Court of Australia

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Attachment A

Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01361]

Federal Circuit Court Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01362]

These legislative instruments are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

This Legislative Instrument engages applicable human rights or freedoms, including the following:

- ***The best interests of the child:*** Article 3(1) of the *Convention on the Rights of the Child* (CRC) provides that in all actions concerning children, including by courts, the best interests of the child shall be a primary consideration. Article 7(2) of the *Convention on the Rights of Persons with Disabilities* (CRPD) provides for this right in relation to children with disabilities. Article 3(2) of the CRC requires all legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

- ***The protection of children from exploitation, violence and abuse:*** Article 20(2) of the *International Covenant on Civil and Political Rights* (ICCPR) provides for the right to protection from exploitation, violence and abuse. Article 19(1) of the CRC provides for the right to protection of children from exploitation, violence and abuse and article 34 of the CRC provides for the right of protection of children against sexual exploitation. Article 24(1) of the ICCPR also provides for the protection of all children, without discrimination, by virtue of their status as minors. Article 16(1) of the CRPD provides the protection in relation to persons with disabilities. As stated in article 19(1) of the CRC, this right provides that States are required to 'take all appropriate legislative, administrative, social and educational measures to protect the child or people from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person'.

The provisions in the *Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020* and the *Federal Circuit Court Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020* broadly replicate existing provisions in the respective Rules. The Notice in the new form is filed at the commencement of family law parenting proceedings where parties must report any allegations of child abuse, family violence or other risks to children. Where allegations of child abuse, risk of child abuse, or family violence amounting to child abuse, are made in the Notice, the Courts must refer it to the relevant child welfare authority pursuant to subsection 67Z(2) or 67ZBA(2) of the *Family Law Act 1975* (Cth). The new form includes additional questions about a broader variety of risk factors, which will enable to Courts to better understand and respond to those risks.

The new form for the first time requires the provision of risk-related information at the earliest possible stage across both Courts to assist the Courts to respond to child abuse, family violence

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and other risk factors relevant to parenting proceedings, protect children from violence and abuse and to inform judicial decision-making in the best interests of the child.

It thereby further supports and enhances the treatment of the rights listed above.

These legislative instruments are therefore compatible with human rights as they do not raise any human rights issues.

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS21-000642

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 on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) regarding the *Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020* (the Amending Regulations) which amended the *Foreign Acquisitions and Takeovers Regulation 2015* (the Regulations).

In that letter, the Committee sought my advice as to:

- why it is necessary and appropriate to set out key definitions relating to the foreign investment framework in delegated, rather than primary, legislation;
- why it is necessary and appropriate to provide for the exemptions and modifications to the operation of the *Foreign Acquisitions and Takeovers Act 1975* (the Act) in delegated, rather than primary, legislation;
- if it is not proposed to set out these exemptions and modifications in the primary legislation, whether the instrument could be amended to specify that the exemptions and modifications cease to operate after three years; and
- whether the Australian System of National Accounts (cat. 5204.0) is incorporated by reference and if so, the manner in which the document is incorporated and where it may be accessed free of charge.

Key definitions in delegated legislation

This issue is materially the same as the one addressed in my letter to the Chair of the Senate Standing Committee for the Scrutiny of Bills regarding the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020, dated 1 December 2020.

Please refer to pages 1 and 2 of Annexure 1 to that letter (attached) for my advice about why it is necessary and appropriate to set out key definitions in delegated, rather than primary, legislation.

Exemptions and modifications to the operation of the Act in delegated legislation

Modification: New section 62 of the Regulations modifies the operation of the Act, but only in relation to actions or proposed actions that are taken to occur because of the operation of subsection 18A(1) or (2) of the Act. These are actions that occur where a person is taken to have acquired an interest in securities in an entity in circumstances where the percentage of the interest in the entity held by the person increases without the person acquiring interests in securities in the entity.

The modification included in the Regulations by the Amending Regulations alleviates some of the potential consequences for persons where such an action may be taken to have occurred without their knowledge. This modification is manifestly appropriate. Such narrowly targeted modifications are expressly contemplated and authorised by subsection 18A(6) of the Act.

Exemptions: New section 41B of the Regulations exempts persons who take certain actions from the requirement to give the Treasurer notice about the taking of those actions. These particular actions are exempt because the Australian Taxation Office already gathers the necessary information about those actions. This exemption avoids the potential burden of double reporting for persons taking such actions.

If the range of actions on which information is gathered changes in the future, or if the range of information gathered under sections 98C, 98D or 98E of the Act changes, it may be necessary to alter the scope of this exemption. To avoid gaps in the gathered information and avoid the burden of double reporting, it may be necessary to make such changes quickly. Therefore, it is both necessary and appropriate to place the exemption in the Regulations to enable timely amendments.

Shortening the period of the operation of the exemptions and modifications

As you are aware, all Commonwealth legislative instruments are 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 view that the period of operation of legislative instruments should be consistent with maintaining appropriate Parliamentary oversight, while also taking into account the underlying policy intent of the relevant primary law and the regulatory burden imposed on individuals and entities. With these considerations in mind, and as previously advised, I consider that a 10 year sunsetting period will generally be appropriate in the following circumstances:

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, for example by specifying administrative or technical detail consistent with the principles of 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 that would be inconsistent with 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 five years will generally be more appropriate.

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. This is because remaking an expiring instrument is not a mere technical or procedural formality and each time an instrument approaches its sunsetting date, the instrument must be comprehensively reviewed to determine whether it remains fit-for-purpose.

There are a number of steps that need to be carried out as part of this review, including public consultation about the continuing need for the instrument, its regulatory impact and whether it needs to be modified or should be remade in its existing form. For more complex instruments, this process of review, consultation and assessment will begin around two years prior to the expiry date for the instrument, as recommended in the Attorney-General's Department's *Guide to managing sunsetting of legislative instruments*.

Further, the process of remaking an instrument imposes costs on industry, including through involvement in consultation processes and commercial uncertainty about whether an instrument will be extended or what its future form will be.

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

Modification: The modification in section 62 of the Regulations will remain necessary as long as the conditions in which it applies may arise. Since the potential for persons to be affected by actions of others through the operation of section 18A of the Act will remain, as long as the operation of that section remains unchanged, the modification is likely to remain necessary until that section is amended.

No changes to section 18A of the Act are currently anticipated. Therefore, imposing a shorter sunsetting period on the modification in section 62 of the Regulations would increase the risk of a situation arising where section 18A would deem a person to have taken an action in circumstances where it is not appropriate for such deeming to occur. This would impose unnecessary uncertainty and costs for persons subject to the Act.

Exemptions: The exemptions in section 41B of the Regulations will remain necessary as long as the relevant information is collected other than under sections 98C, 98D or 98E of the Act. Since there is currently no expectation that the relevant information gathering by the Australian Taxation Office will cease, there is no appropriate early end date for the exemption. Shortening the sunsetting period would incur an increased risk of imposing a potentially significant burden of double reporting on persons undertaking relevant transactions.

Applying the above principles, I consider that a 10 year sunsetting period is appropriate for both sections 41B and 62 of the Regulations.

I look forward to further discussing the Committee's ongoing concerns about delegated legislation that exempts or modifies the primary law in a meeting to be arranged between my office and the Committee.

Reference to the Australian System of National Accounts

The Australian System of National Accounts is an annual Australian Bureau of Statistics publication that contains current and historical GDP information. It is free to access online at abs.gov.au/statistics/economy/national-accounts/australian-system-national-accounts/latest-release.

Comparing current and historical GPD implicit price deflator values for indexation is a common methodology. Anyone wishing to perform the calculation themselves would likely recognise or be familiar with the approach and would likely already be aware of how to access Australian Bureau of Statistics information. The inclusion of the particular catalogue number in the Regulations further assists in retrieving the particular data series.

Thank you for bringing the Committee's concerns to my attention.

Yours sincerely

THE HON JOSH FRYDENBERG MP

1 April 2021

The Hon Nola Marino MP

Assistant Minister for Regional Development and Territories
Federal Member for Forrest

Ref: MC21-001630

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

30 MAR 2021

Dear Senator Fierravanti-Wells Bonnie

Thank you for your letter of 17 March 2021 regarding the Norfolk Island Employment Rules 2020 (the Employment Rules).

The Employment Rules prescribe certain matters to support the administration of the Norfolk Island Workers' Compensation Scheme (the Scheme) and regulation of safe working practices under the *Employment Act 1988* (NI)(the Act).

Section 10 of the Employment Rules requires employers to keep records of employee first-aid training, employment-related injuries and information provided to the minister in relation to the death or permanent incapacitation of an employee. This information supports the administration of the Scheme under Part 3 of the Act and the regulation of safe working practices under Part 4.

These arrangements are the same as those in place in other states and territories, where information about employment-related accidents and injuries is collected under work health and safety laws to support the administration of workers' compensation schemes and to allow improvements to be made to workplace safety.

I acknowledge the point you have made about information provided in the Explanatory Statement which says that this information is not generally covered by the *Privacy Act 1988* (Cth) (the Privacy Act) and the Australian Privacy Principles (Principles). This statement reflects the fact the Privacy Act and Principles only apply to certain types of businesses and to people's personal information when it is not being used for the purpose of their employment. Where this is not the case, the Privacy Act, Principles and other safeguards do apply in Norfolk Island in the same way they apply in the rest of Australia.

It is important to note that the same safeguards which protect employees' information in the rest of Australia also apply in Norfolk Island. This ensures that the personal information collected by employers under section 10 of the Employment Rules is protected in the same way as it would be elsewhere in Australia.

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Safeguards under the Privacy Act

The Privacy Act and Principles apply to businesses with an annual turnover of $3 million or more, all private health service providers, a limited range of small businesses, and all Australian Government agencies.

The Privacy Act sets out requirements for collecting, storing, using and disclosing personal information. Under the Privacy Act the Principles act to protect the privacy of personal information by:

- regulating the collection, use and disclosure of personal information,
- setting out internal governance requirements, and
- allowing for individuals to access their personal information and correct it in order to protect its accuracy and integrity.

On Norfolk Island, the largest employer is the Norfolk Island Regional Council (NIRC). As a local government body, the Privacy Act and Principles apply to the handling by the NIRC of any personal information in current and past employee records, effectively safeguarding employees' personal information.

For businesses on Norfolk Island which are subject to the Privacy Act, personal information relating to someone's current or former employment is safeguarded by the Privacy Act and Principles when it is used for a purpose which is not directly related to their employment.

Other safeguards under the Fair Work Ombudsman's Best Practice Guide

The Fair Work Ombudsman also recommends all Australian businesses make a commitment to meet the requirements of the Principles in relation to employee records regardless of whether the Principles apply to them.

In Norfolk Island, the kinds of safeguards that businesses which are not covered by the Privacy Act would therefore have in place include:

- securing records containing personal information,
- having policies which manage the collection and handling of personal information,
- providing training and resources to managers, and
- communicating with staff and employees about privacy issues to ensure they understand how personal information should be treated.

Thank you for bringing your concerns to my attention and I trust this is of assistance.

Yours sincerely

Nola Marino

The Hon Michael McCormack MP

Deputy Prime Minister
Minister for Infrastructure, Transport and Regional Development
Leader of The Nationals
Federal Member for Riverina

Ref: MC21-000670

14 MAR 2021

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

Connie

Dear Senator

Thank you for your letter of 4 February 2021 regarding Part 138 (Aerial Work Operations) Manual of Standards 2020 [F2020L01402].

The Civil Aviation Safety Authority (CASA) has provided the following answers to the questions posed by the Committee:

Why it is considered necessary and appropriate for the substantive terms of the law in section 3.01 and 5.02 to be provided at a later, unspecified date?

Regulation 138.010(5)(g) of the Civil Aviation Safety Regulations 1998 provides that an aerial work operation does not include the following: *(g) any other operation of a kind prescribed by the Part 138 Manual of Standards for the purposes of this paragraph*. Section 3.01 of the Manual Of Standards (MOS) is currently reserved as all operations that were known and considered not to be an aerial work operation at the time of making of the MOS were included in Part 138 of the *Civil Aviation Safety Regulations 1998*. Should a new type of operation be developed in the future that is not required to be regulated as an aerial work operation, CASA will be able to prescribe the operation as not being aerial work at section 3.01 of the MOS. Regulation 138.140 of CASR provides a list of known types of operations where the complexity and risk of the operation requires a Safety Management System (SMS). Regulation 138.140(2) provides that the Manual of Standards (MOS) may prescribe certain types of operations as not requiring a SMS. Should a new type of operation be developed in the future that is not required to have a SMS, CASA is able to prescribe the operation at section 5.02 of the MOS.

While sections 3.01 and 5.02 presently have no operation, they are at least a flag to the relevant sector of the aviation industry that the MOS can express when a specific type of operation will not be taken to be an aerial work operation, or prescribe when a SMS is not required. The provisions will not cause confusion in the current terms as neither of these matters are expressed.

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Why it is considered necessary and appropriate for Chapters 10, 19 and 20 to be reserved in case they are needed for future provisions?

These Chapters were omitted in the final stages of the preparation of the MOS in response to industry comments received during the consultation process. The requirements were consolidated into other Chapters of the MOS or omitted entirely. Rather than renumbering the MOS with the associated issues of renumbering the cross references, the Chapter numbering was retained. A post implementation review of the MOS is underway, in consultation with relevant parts of the aviation industry, which may result in amendments to the MOS including to insert content into Chapters 10, 19 and 20 as appropriate.

Whether a clearer explanation for the approach could be set out in notes to the relevant provisions of the instrument?

A Supplementary Explanatory Statement will be lodged explaining the above matters.

Thank you for bringing your concerns to my attention and I trust this information is of assistance.

Yours sincerely

Michael McCormack

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS21-000468

Senator the Hon Concetta Fierravanti-Wells
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Via email: sdlc.sen@aph.gov.au

Dear Senator

Thank you for your letter dated 4 February 2021, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation, requesting advice in relation to the *Tax Agent Services (Specified BAS Services No. 2) Instrument 2020* [F2020L01406] (Instrument).

The use of delegated legislation

You have requested my advice as to why it is considered necessary and appropriate to prescribe BAS Services in delegated, rather than primary, legislation.

The use of delegated legislation is justified in recognition of the need to account for the variety and complexity of services that may be provided by BAS agents. I note that in dealing with the circumstances in which a BAS agent is providing certain services, the regulations only have applicability in relation to a limited class of persons. Therefore, it is appropriate that the detail of these matters is dealt with in regulations, rather than in the primary law.

If these matters were to be inserted into the *Tax Agent Services Act 2009*, they would insert, into an already complex statutory framework, a set of specific provisions that would apply only to a relatively small group of persons. This would result in unnecessary complexity for other users of that Act.

Subsection 90-10(1A) and services related to the Superannuation Guarantee Charge

You have also requested further advice as to whether, and if so, how, subsection 90-10(1A) of the *Tax Agent Services Act 2009* enables the definition of a 'BAS service' to be extended to services related to the superannuation guarantee charge.

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On 30 June 2013, the *Tax Agent Services Act 2009* was amended to give the Tax Practitioners Board (TPB) the ability to declare a service, by way of a legislative instrument, to be a BAS service.

In early 2019, the TPB identified that the *Tax Agent Services (Specified BAS Services) Instrument 2016* did not adequately define the scope of services provided by BAS agents in relation to the superannuation guarantee and the superannuation guarantee charge. In particular, the TPB identified that representing a client in their dealings with the Commissioner of Taxation was limited to services insofar as they related to a payroll function or payments to contractors, and therefore, did not extend to representing a client in their dealings with the Commissioner of Taxation in relation to the superannuation guarantee charge.

The Instrument was introduced to allow BAS agents to lawfully provide certain services (including services related to the superannuation guarantee charge) that extend beyond the legislative definition of BAS provisions but which the TPB considers appropriate that BAS agents be permitted to provide.

Shortening the sunsetting period

The Committee has expressed concern regarding the legislative instrument remaining in force for a total of 10 years after commencement, noting that the Committee's view is that insturments which modify or exempt persons or entities from the operation of primary legislation should cease to operate no more than three years after they commence.

The use of a 10 year sunsetting period is necessary and appropriate for the Instrument on the basis that there would be appreciable business uncertainty around the treatment of, or framework for, business activities giving rise to significant commercial risks and costs if the sunsetting period was shorter. For instance, BAS agents require certainty around what services they can offer into the future so as to make appropriate investment decisions (business development costs, training etc).

Furthermore, the instrument deals with confined and unique circumstances affecting a particular class of entities (BAS agents) 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.

Notwithstanding the above, as noted in my previous correspondence with the Committee, there will be broader good faith discussions with the Committee in relation to the sunsetting period for legislative instruments in the Treasury portfolio following the tabling of the Committee's final report into the *Exemption of delegated legislation from parliamentary oversight*.

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

Yours sincerely

THE HON JOSH FRYDENBERG MP

15 / 3 /2021