



24 June 2021

Senator the Hon Amanda Stoker
Assistant Minister to the Attorney-General
Parliament House
CANBERRA ACT 2600

Via email: AMO.DLO@ag.gov.au

Dear Assistant Minister,

Bankruptcy Regulations 2021 [F2021L00261]

Thank you for your response of 4 June 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instrument. The committee considered your response at its private meeting on 23 June 2021 and has resolved to seek your further advice about the issues outlined below.

***Modifications to primary legislation
Parliamentary oversight***

Thank you for your advice that the instrument remakes the modifications to the *Fringe Benefits Tax Assessment Act 1986* (FBTA Act) and the *Bankruptcy Act 1996* (Bankruptcy Act) in substantially the same form as contained in Schedules 4, 6 and 7 of the Bankruptcy Regulations 1996 (the 1996 Regulations). You also advised that the instrument modifies the FBTA Act and the Bankruptcy Act to the minimum extent required to ensure the efficient administration of the bankruptcy system.

While the committee acknowledges this advice, the committee has significant scrutiny concerns that delegated legislation is being used to modify the application of primary legislation. This is particularly concerning if the modifications are substantially in the same form as the modifications contained in the 1996 Regulations, as this suggests that the modifications to the primary legislation are intended to operate on an ongoing basis.

As previously advised, the committee has significant systemic scrutiny concerns relating to instruments which modify the operation of primary legislation, and the duration of these instruments across a number of portfolios.

This reflects the committee's longstanding view that longer term modifications to primary legislation should be set out in the primary legislation, rather than in delegated legislation. Where this is not possible, or otherwise appropriate, the committee's general expectation is that modifications contained in delegated legislation should repeal in three years to ensure a minimum degree of regular parliamentary oversight. The committee also considers that there should be a plan in place to review the modifications to assess whether they remain appropriate. Such a review should specifically consider whether it would be appropriate for the modifications to be included in primary legislation.

As you would be aware, on 16 June 2021 the Senate resolved to amend standing order 23 to reinforce the committee's scrutiny principles regarding delegated legislation which amends or modifies the operation of primary legislation. After these changes come into effect on 1 July 2021, the committee intends to rigorously pursue this type of scrutiny concern in accordance with the mandate provided by the Senate. For this reason, the committee is keen to ensure the scrutiny concerns identified in this instrument are addressed as soon as possible.

Therefore, the committee therefore requests your further detailed advice as to:

- **why it would not be appropriate to provide for a three-year repeal date for the provisions of the instrument which modify the operation of the FBT Act and the Bankruptcy Act; and**
- **whether a targeted review can be undertaken of the legislative framework underpinning the regulation of Australia's personal insolvency system which specifically addresses the appropriate balance between including measures on the face of the primary legislation and the regulations.**

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 **8 July 2021**.

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.

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