



14 April 2021

The Hon Josh Frydenberg MP  
Treasurer  
Parliament House  
CANBERRA ACT 2600

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

CC: [committeescrutiny@treasury.gov.au](mailto:committeescrutiny@treasury.gov.au); [chris.reside@treasury.gov.au](mailto:chris.reside@treasury.gov.au)

Dear Treasurer,

**Corporations (Stay on Enforcing Certain Rights) Amendment (Corporate Insolvency Reforms) Declaration 2020 [F2020L01682]**

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument and has resolved to seek your advice in relation to these matters.

***Exemptions from the operation of primary legislation  
Parliamentary oversight***

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment. This may include instruments which provide continuing exemptions to primary legislation. In addition, Senate standing order 23(3)(k) requires the committee to scrutinise each legislative instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes whether an instrument limits parliamentary oversight.

The instrument amends the Corporations (Stay on Enforcing Certain Rights) Declaration 2018 (the 2018 declaration) to declare kinds of contractual and other rights that do not attract the stay on enforcing rights merely because the company has entered restructuring under the debt restructuring process under subsection 454N(1) of the *Corporations Act 2001* (the Act). While some of the provisions of the instrument appear to be technical, items 3 and 8 of Schedule 1 appear to provide for substantial exemptions to the operation of the Act.

Item 3 inserts subsection 5(3A) into the 2018 declaration, which provides that the exemptions in the 2018 declaration that apply to other provisions of the Act now also apply to subsection 454N(1) for companies being restructured. This appears to expand the list of exemptions that now apply to restructured companies to include many different types of financial rights.

Item 8 inserts subsection 6(3A) into the 2018 declaration which establishes an exemption to the appointment of a controller of property in identified circumstances.

The committee has long been concerned with provisions in delegated legislation which modify the operation of primary legislation, particularly where those modifications appear to substantially depart from the original provision. The committee therefore expects the explanatory statement to any modification instrument to comprehensively justify the nature and scope of the relevant modifications.

The committee's longstanding view is that provisions which modify the operation of primary legislation should cease to operate no more than three years after they commence. This is to ensure a minimum degree of regular parliamentary oversight.

In addition, as per the committee's guidelines, the committee considers that the explanatory statement should indicate whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation.

In this regard, the explanatory statement does not explain why it is necessary and appropriate for these measures to be included in delegated as opposed to primary legislation.

In light of this, from a scrutiny perspective, the committee considers that the instrument should be amended to specify that it ceases to operate three years after commencement. If it becomes necessary to extend the operation of these provisions, the committee considers that this should be done by amending the primary legislation or via a subsequent legislative instrument that is subject to disallowance and parliamentary scrutiny.

**The committee therefore requests your advice as to:**

- **why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to provide for exemptions to the operation of the *Corporations Act 2001*;**
- **whether the *Corporations (Stay on Enforcing Certain Rights) Amendment (Corporate Insolvency Reforms) Declaration 2020 [F2020L01682]* can be amended to provide that the measures cease within three years after commencement; and**
- **whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation.**

As the committee continues to have significant systemic scrutiny concerns relating to instruments which modify the operation of primary legislation, the committee welcomes your invitation to meet with your office, the Treasury, and ASIC to discuss these concerns. As this systemic issue is of deep, ongoing concern to the committee, as set out in separate correspondence from myself and the Deputy Chair, the committee considers this meeting should be held prior to the next parliamentary sitting week.

#### ***Consultation on specific instrument***

Senate standing order 23(3)(d) requires the committee to scrutinise each instrument as to whether persons likely to be affected by the instrument, including relevant experts, were adequately consulted in relation to the specific instrument.

Section 17 of the *Legislation Act 2003* (Legislation Act) requires that, prior to an instrument being made, the rule-maker must be satisfied that appropriate consultation was undertaken.

The committee therefore expects the explanatory statement to an instrument to address consultation that was undertaken in relation to the specific instrument. Where consultation has previously been undertaken in relation to a broader issue, a set of legislative reforms, or enabling

legislation, and no further consultation was undertaken in relation to the specific instrument, the committee expects that this should be identified in the explanatory statement to the instrument. The explanatory statement should also address what consultation was previously undertaken, and why it was considered unnecessary to undertake additional consultation in relation to the specific instrument.

In this regard, the explanatory statement explains that no public consultation was undertaken in relation to the instrument as it makes consequential amendments to the Corporations (Stay on Enforcing Certain Rights) Declaration 2018 to give further effect to the new debt restructuring process. The explanatory statement indicates that extensive public consultation was conducted in relation to the new formal debt restructuring process, and consultation was done on the related bill and the Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020.

However, it is not clear how this consultation relates to the measures in this instrument. Specifically, it is unclear whether the consultation that was held for the related bill and Regulations in 2020 included notice that the exemptions to be made by this instrument were included in the suite of reforms.

**In light of this, the committee requests your advice as to whether any consultation was undertaken in relation to the specific measures in the Corporations (Stay on Enforcing Certain Rights) Amendment (Corporate Insolvency Reforms) Declaration 2020 [F2020L01682] or, if not, why no consultation was undertaken.**

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. Noting that the 15th sitting day after the instrument was tabled in the Senate is 11 May 2021, the committee has resolved to give a notice of a motion to disallow the instrument on that day 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 **28 April 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](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**



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

Ref: MS21-000882

Senator the Hon Concetta Fierravanti-Wells  
Chair  
Senate Standing Committee for the Scrutiny of Delegated Legislation  
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Via email: [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au)

Dear Senator Fierravanti-Wells

Thank you for your correspondence, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation, requesting advice in relation to the *Corporations (Stay on Enforcing Certain Rights) Amendment (Corporate Insolvency Reforms) Declaration 2020*.

In that letter, the Committee requested my advice about:

- Why it is necessary and appropriate to use delegated legislation, rather than primary legislation, to provide for exemptions to the operation of the *Corporations Act 2001*;
- Whether the *Corporations (Stay on Enforcing Certain Rights) Amendment (Corporate Insolvency Reforms) Declaration 2020* [F2020L01682] can be amended to provide that the measures cease within three years after commencement;
- Whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation; and
- Whether any consultation was undertaken in relation to the specific measures in the *Corporations (Stay on Enforcing Certain Rights) Amendment (Corporate Insolvency Reforms) Declaration 2020* [F2020L01682] or, if not, why no consultation was undertaken.

**Use of delegated legislation**

The *Corporations Amendment (Corporate Insolvency Reforms) Act 2020* established the debt restructuring process to assist small businesses to remain in business and avoid being wound up. To ensure continuity for businesses and their creditors, the process adopted key provisions from other, existing forms of external administration processes where appropriate. This included the establishment of a blanket stay on the enforcement of rights that arise under contracts, agreements or arrangements, under section 454N of the *Corporations Act 2001*. The objective of the stay provisions is to protect a party from ipso facto clauses that allow a party to a contract to terminate

or modify the contract if the other party enters restructuring, thereby improving the opportunity for the party under restructuring to restructure their debts and go on trading.

I am also empowered under section 454N(6) of the *Corporations Act 2001* to exclude rights from the application of the stay on enforcement, which would otherwise apply to all rights under a contract. Some industry stakeholders have told the Government that in certain sectors, stay provisions hinder the making of financing arrangements and standstill or forbearance arrangement with a party after that party enters restructuring. For this reason, the *Corporations (Stay on Enforcing Certain Rights) Amendment (Corporate Insolvency Reforms) Declaration 2020* (Amendment Declaration) excludes financing arrangements and standstill or forbearance arrangement from the stay on enforcement. These types of arrangements typically involve parties that are sophisticated enough to price the risk of entering into a contract or arrangement with a party that is subject to restructuring.

It is necessary and appropriate to use delegated legislation, rather than primary legislation, to provide for exemptions from the stay on enforcement to ensure that any unintended consequences of the blanket stay could be remedied quickly to minimise disruption of commercial undertakings. For example, where a medical company has a contract for the delivery of equipment from a supplier, and that supplier enters restructuring, the company would be unable to enforce ipso facto clauses under the contract. This could lead to the medical company being unable to fulfil certain obligations, such as the provision of services to government under tender. It is appropriate that I have the power to provide for a quick resolution should concerns of this nature appear.

### **Sunsetting Period**

All Commonwealth legislative instruments are subject to a default 10-year sunseting period but may provide for a shorter sunseting period. The appropriate length of the sunseting period for individual legislative instruments varies 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, I consider that a 10-year sunseting period is appropriate for instruments 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 sunseting 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.

The Committee has asked whether the Amendment Declaration could sunset after three years. As I have set out in previous correspondence, a three-year sunset period may be appropriate, for example where an instrument is required to address short-term transitory circumstances. This is not the case with the Amendment Declaration, which is part of a permanent reform and has been comprehensively designed to remain fit-for-purpose for at least 10 years. The Amendment Declaration is part of the 2020 reforms to Australia's corporate insolvency framework, which were carefully considered prior to implementation.

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. My preference is to allow time for the new insolvency processes to settle, and for industry to familiarise themselves with the new provisions before the provisions are remade.

Applying the above principles, I consider that a 10-year sunset period is appropriate for the Amendment Declaration.

#### **Review of the relevant provisions**

There is no intention to review the provisions because the justification for making them will not fade with the passing of time. The provisions in the Amendment Declaration continue to be appropriate to be included in delegated legislation. However, given this is a new reform, my Department will be seeking regular feedback on the new insolvency processes in regular meetings with key stakeholders for the foreseeable future.

#### **Consultation**

In October 2020 my Department consulted on the Corporations Amendment (Corporate Insolvency Reforms) Bill 2020. Included in this Bill and at paragraph 1.98 of the Explanatory Memorandum were the provisions providing the Minister with the power to declare certain rights as enforceable on a company under restructuring.

Consultation was not undertaken on the specific measures in the Amendment Declaration because it simply brings the restructuring process into alignment with the other insolvency processes in relation to stays on enforceable rights. The Amendment Declaration provides clarity to a part of the reforms consulted on under the Corporations Amendment (Corporate Insolvency Reforms) Bill 2020.

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

Yours sincerely

THE HON JOSH FRYDENBERG MP

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13 May 2021

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Dear Treasurer,

**Corporations (Stay on Enforcing Certain Rights) Amendment (Corporate Insolvency Reforms) Declaration 2020 [F2020L01682]**

Thank you for your response of 26 April 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 12 May 2021. On the basis of your ongoing, good faith engagement with the committee in relation to Treasury portfolio instruments which modify or exempt persons or entities from the operation of primary legislation, the committee has resolved to conclude its examination of the instrument as part of its regular scrutiny process.

However, as you are aware, the committee continues to have significant systemic scrutiny concerns relating to instruments which modify the operation of primary legislation, and the operation of these instruments for a ten year period. The committee will therefore consider this instrument as part of this ongoing engagement. In light of these ongoing discussions, the committee has resolved to withdraw the notice of motion to disallow the instrument.

While the committee has resolved to withdraw the disallowance notice in place on this instrument, I advise that the committee will give disallowance notices on similar Treasury portfolio instruments which raise these concerns in the future if the committee's systemic scrutiny concerns are not satisfactorily resolved through the current ongoing discussions.

In addition, the committee appreciates your advice that specific consultation was not undertaken on the instrument due to prior consultation on the Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 and the fact that the instrument brings the restructuring process into alignment with other insolvency processes. The committee considers that, as a matter of best practice, this additional information on consultation should have been included in the instrument's explanatory statement.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

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**