



22 January 2021

The Hon Josh Frydenberg MP  
Treasurer  
Parliament House  
CANBERRA ACT 2600

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

CC: Senator the Hon Jane Hume, Assistant Minister for Superannuation, Financial Services and Financial Technology, [Senator.Hume@aph.gov.au](mailto:Senator.Hume@aph.gov.au)  
[Committeescrutiny@treasury.gov.au](mailto:Committeescrutiny@treasury.gov.au)

Dear Treasurer,

**ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835 [F2020L01261]**

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 the committee seeks your advice in relation to this matter.

***Exemption from primary legislation***

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be included in primary, rather than delegated, legislation). This may include instruments which provide continuing exemptions to primary legislation.

The instrument exempts credit providers from complying with subsection 16(1) of the National Credit Code in Schedule 1 to the *National Consumer Credit Protection Act 2009* (the Credit Protection Act), preserving the effect of ASIC Class Order [CO 10/1230]. This allows credit providers to give pre-contractual disclosure to consumers in the same electronic manner that applies to other credit disclosure documents.

While the committee welcomes the fact that the instrument will be repealed three years after commencing, the committee generally prefers that exemptions from primary legislation by delegated legislation do not continue in force for such time as to operate as a de facto amendment to the principal Act.

The committee notes that this instrument preserves the effect of ASIC Class Order [CO 10/1230] which commenced 1 January 2011 and sunsetted on 1 October 2020. These exemptions from primary legislation have therefore been enacted by delegated legislation for at least ten years, which will be extended to up to 13 years by this instrument. While the explanatory statement explains that these measures are more appropriate for delegated legislation as they remedy problematic regulations in the National Consumer Credit Protection Regulations 2010, the

committee remains concerned that these longstanding exemptions from primary legislation have not been implemented in primary legislation.

**The committee therefore requests your advice as to whether the government intends to pursue the changes to primary legislation necessary to replace the exemptions provided for by this instrument and, if not, why not.**

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 2 February 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 **5 February 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: MS21-000468

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 recent correspondence in relation to various legislative instruments made by the Australian Securities and Investments Commission (ASIC).

I would again like to thank you and the Committee for your ongoing engagement in resolving the Committee's concerns with the sunset period of legislative instruments made by ASIC and more broadly within the Treasury portfolio. In relation to the Committee's outstanding concerns with the *ASIC Credit (Notice Requirements for Unlicensed Carried Over Instrument Lenders) Instrument 2020/834* and the *ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835*, my response to these concerns is attached.

With this in mind and acknowledging my undertaking to continue to work with the Committee to find a long term resolution to the Committee's concerns, I would like to invite yourself and the Committee to a meeting between my office, the Treasury and ASIC following the tabling of the Committee's final report into *the exemption of delegated legislation from parliamentary oversight*. I understand the Committee anticipates tabling this report shortly.

Yours sincerely

THE HON JOSH FRYDENBERG MP

15 / 3 /2021

***ASIC Credit (Notice Requirements for Unlicensed Carried Over Instrument Lenders) Instrument 2020/834***

The Committee has requested my advice in relation to:

- Why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to continue to preserve the effect of item 39A of Schedule 2 to the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*;
- Why it is considered necessary and appropriate to include civil and criminal penalties in delegated legislation, and whether the Attorney-General was consulted in relation to the inclusion of custodial penalties, in accordance with the *Attorney-General's Department's Guide to Framing Commonwealth Offences*; and
- Whether any further limits apply, in legislation or policy, to constrain the scope of ASIC's power under paragraph 19A(2)(j) of the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* to determine what information must be included in a notice lodged with ASIC under subsection 19A(2) of the Act.

The instrument pertains to carried over instruments (COI) which are essentially credit contracts or consumer leases that existed at the time of the commencement of the *National Consumer Credit Protection Act 2009*. Lenders or lessors with such existing loan or lease portfolios were not required to obtain credit licences unless they entered into new loans or new leases on or after the commencement of the Act. However, such lenders or lessors were required to notify ASIC of their unlicensed status.

The Notice Requirements Instrument ensures carried over instrument lenders must continue to notify ASIC if they become unlicensed. This allows ASIC to maintain an up-to-date register of unlicensed COI lenders as required by the *National Consumer Credit Protection Act 2009*, the *National Consumer Credit Protection Regulations 2010* and the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*.

Whilst noting that it is appropriate for ASIC to address this anomalous outcome in the application of primary legislation by way of this instrument, as it is authorised by Parliament to do so, prior to the sunseting of the Notice Requirements Instrument, I will ask my Department to consider if amendments to primary legislation may be brought before the Parliament.

It is necessary and appropriate to include civil and criminal penalties in the instrument because the declaration in the Notice Requirements Instrument substantially reproduces the effect that item 39A of Schedule 2 to the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (as notionally inserted by regulation 16E of the *National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010* as in force on 24 May 2010) was intended by Parliament to achieve, but which fails to do so due to drafting anomalies. The Notice Requirements Instrument merely replicates the penal consequences that were originally intended by Parliament. The Attorney-General was not consulted when continuing the effect of ASIC Class order CO 10/381 through the Notice Requirements Instrument.

ASIC uses Form COI1 to obtain information under subsection 19A(2) *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* and this form does not ask for additional information under paragraph 19A(2)(j) of the Act, other than for basic identity information about the entity (e.g. name and email of a contact person and identifying information about the entity's managers). There are no further legislative limits on what information must be included.

*ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835*

The Committee has requested advice as to whether the government intends to pursue the changes to primary legislation necessary to replace the exemptions provided for by the Electronic Precontractual Disclosure Instrument and, if not, why not.

The Electronic Precontractual Disclosure Instrument allows credit licensees and representatives to give pre-contractual disclosure to consumers in the same electronic manner that is allowed for other credit disclosure documents.

The purpose of the Electronic Precontractual Disclosure Instrument is to preserve the effect of ASIC Class Order [CO 10/1230] which is due to sunset on 1 April 2021. The class order fixed the problematic interaction between regulations 26 and 28L of the *National Consumer Credit Protection Regulations 2010*.

Regulation 28L of the *National Consumer Credit Protection Regulations 2010* permits licensees and credit representatives to give “disclosure documents” electronically to consumers if the conditions in the regulation are met. “Disclosure document” is defined in regulation 26 to include credit guides, proposal documents and quotes required to be given under Chapter 3 of the *National Consumer Credit Protection Act 2009* and pre-contractual statements required to be given under section 16 of the National Credit Code. Subregulation 28L(1) lists the provisions of the *National Consumer Credit Protection Act 2009* under which the regulation is purportedly made. The list includes section 18 of the National Credit Code (credit provider’s contract document) but does not refer to pre-contractual disclosure.

Whilst noting that it is appropriate for ASIC to address this anomalous outcome in the application of primary legislation by way of this instrument, as it is authorised by Parliament to do so, prior to the sunset of the Electronic Precontractual Disclosure Instrument, I will ask my Department to consider if amendments to primary legislation may be brought before the Parliament.



AUSTRALIAN  
SENATE

Senate Standing Committee for the  
Scrutiny of Delegated Legislation

Parliament House, Canberra ACT 2600

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18 March 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)

  
Dear Treasurer,

**ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835 [F2020L01261]**

**ASIC Credit (Notice Requirements for Unlicensed Carried Over Instrument Lenders) Instrument 2020/834 [F2020L01259]**

Thank you for your response of 15 March 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instruments.

The committee considered your response at its private meeting on 17 March 2021, and has concluded its examination of the instruments, on the basis of your advice that you will request your department to consider pursuing amendments to the primary legislation in response to the committee's scrutiny concerns about parliamentary oversight.

The committee welcomes your invitation to the committee to meet with your office, the Treasury and the Australian Securities and Investments Commission (ASIC) in relation to the committee's ongoing systemic scrutiny concerns about ASIC instruments which modify the operation of primary law. This systemic issue is of deep concern to the committee, and the committee considers that this ongoing engagement is integral to the committee's role in providing oversight of delegated legislation on behalf of the Senate.

In this regard, I request that the relevant officials please liaise with the committee secretariat to arrange a mutually convenient time to meet in the sitting fortnight beginning **Tuesday, 15 June 2021**.

In light of this, earlier today the committee withdrew the disallowance notices in place on the instruments. 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