



13 May 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]

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.

Modifications to 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 modifications 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.

This instrument contains the administrative requirements of the *Bankruptcy Act 1966* (the Bankruptcy Act), and supports the administration of bankruptcies, debt agreements and other formal insolvency options governed by the Bankruptcy Act.

Schedules 2–4 to the instrument contain a significant number of modifications to the *Fringe Benefits Tax Assessment Act 1986* (FBTA Act) and the Bankruptcy Act, including the statutory formula for calculating the taxable value of car fringe benefits, amendments to regulations related to personal insolvency agreements, rules surrounding joint debtors and the administration of estates of deceased persons. Some of the modifications made appear to be considerable changes to the primary legislation and it is unclear if they are intended as a temporary measure or a longer-term de facto amendment to the primary legislation.

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.

In addition the committee's longstanding view is that provisions 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. The committee notes that the standard ten-year sunseting applies to the instrument.

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 relation to this instrument, while the explanatory statement explains the operation of each modification, it remains unclear why it is considered necessary and appropriate to introduce these modifications in delegated legislation, rather than primary legislation. The committee is particularly concerned as these measures are contained in an instrument which was made to address the sunseting of the Bankruptcy Regulations 1996. The explanatory statement advises that the intention is to remake the Regulations in 'substantially the same form', yet the instrument includes a large number of modifications to primary legislation.

In light of this, from a scrutiny perspective, the committee considers that the instrument should be amended to specify that Schedules 2–4 cease 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 introduce a significant number of modifications to the FBT Act and the Bankruptcy Act;**
- **whether the instrument 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 in the longer term, including whether it is appropriate to include the provisions in delegated legislation.**

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 **27 May 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