AUSTRALIAN SENATE

Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House, Canberra ACT 2600
02 6277 3066 | sdlc.sen@aph.gov.au
www.aph.gov.au/senate_sdlc

18 March 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au

CC: committeescrutiny@treasury.gov.au

Josh

Dear Treasurer,

Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020 [F2020L01654]

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 these matters.

Exemptions from and modification 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 (that is, matters that should be enacted via primary rather than delegated legislation). 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 Regulations 2001 and the Corporations (Fees) Regulations 2001 to enable the debt restructuring and simplified liquidation regimes established by the *Corporations Amendment (Corporate Insolvency Reforms) Act 2020*.

Section 5.5.04 and subsection 5.5.08(4) modify the operation of the *Corporations Act 2001* (the Corporations Act). Section 5.5.04 provides for circumstances in which a transaction in a simplified liquidation process is not voidable under subsection 588FE(2) of the Corporations Act. Subsection 5.5.08(4) modifies the operation of paragraph 533(1)(d) of the Corporations Act when it appears to a liquidator during the simplified liquidation process that one or more circumstances in paragraphs 533(1)(a), (b) or (c) existed.

The committee has long been concerned with provisions in delegated legislation which modify or exempt persons from 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 this regard, the committee notes that the explanatory statement does not explain why it was considered necessary and appropriate to address this matter in delegated legislation, rather than primary legislation.

In addition, it is unclear from the instrument and the explanatory statement whether any time limits apply to the modifications made to the Corporations Act by these provisions. The committee's longstanding view is that provisions 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. This is to ensure a minimum degree of regular parliamentary oversight. The committee's views in this regard are set out in its final report of its inquiry into the exemption of delegated legislation from parliamentary oversight.[1]

Further, 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.

The committee therefore requests your advice as to:

- **why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation to modify the operation of the *Corporations Act 2001*;**
- **how long the measures in section 5.5.04 and subsection 5.5.08(4) are intended to remain in force, and, if they are intended to remain in force for longer than three years, whether the instrument can be amended to provide that they cease within three years of 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.**

Clarity of drafting

Senate standing order 23(3)(e) requires the committee to scrutinise each instrument as to whether its drafting is defective or unclear.

Subsection 5.3B.25(3) provides that a person commits an offence if they give, or agree or offer to give, to an affected creditor any valuable consideration with the intention of securing the affected creditor's acceptance or non-acceptance of the restructuring plan. Subsection 5.3B.25(4) provides that the offence in subsection 5.3B.25(3) is an offence of strict liability.

Under general principles of criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). The application of strict liability removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent.

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1 Senate Standing Committee for the Scrutiny of Delegated Legislation, Final report: Exemption of delegated legislation from parliamentary oversight, March 2021 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Final_report>.

Noting that the purpose of strict liability is to remove the requirement for the prosecution to prove the defendant's fault, the committee requests your advice as to how strict liability can apply to this offence in circumstances where paragraph 5.3B.25(3)(b) appears to explicitly apply the fault element of intention to the offence.

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 **1 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.

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: MS21-000656

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 *Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020*.

In that letter, the Committee requested my advice about:

- why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to modify the operation of the *Corporations Act 2001*;
- how long the relevant provisions are intended to remain in force, and if they are intended to remain in force for longer than three years, whether the instrument can be amended to provide that they cease within three years of commencement;
- whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate; and
- the clarity of the drafting of an offence provision.

Given the number of matters to be covered, I have set my response in the Annexure to this letter.

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

Yours sincerely

THE HON JOSH FRYDENBERG MP

9 / 4 /2021

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Annexure

Use of delegated legislation

The *Corporations Amendment (Corporate Insolvency Reforms) Act 2020* established subsection 500AC(4) to enable regulations made for the purposes of subsection 500AC(2) to modify the effect of the *Corporations Act 2001.*

This power is not a 'blank cheque' to modify the *Corporations Act 2001* in ways that are extraneous to the scope and purpose of that Act, that undermine the purpose and scheme of that Act by effectively suspending its operation, or that are so far-reaching as to be an excess of power.

In subsection 500AC(2), the Parliament has limited the scope of the modification power to circumstances concerning the transition of a company from simplified liquidation to another Chapter 5 insolvency process. In subsection 500AC(3), the Parliament outlined the types of issues that would need to be dealt with in regulations made under subsection 500AC(2) when a company transitions from simplified liquidation to another insolvency process.

The ability to modify the Act within these clear limits is necessary and appropriate to ensure that distressed companies can transition from simplified liquidation at any point in that process to a corresponding point in another insolvency process. Currently, the only regulation made under subsection 500AC(2) – regulation 5.5.08 – modifies the timing of the submission of a report to ensure the period within which the report has to be provided is suitable for a company that is transitioning from simplified liquidation into the full liquidation process. Regulation 5.5.08 preserves an important integrity feature of the liquidation process.

Sunsetting period

The Committee has asked whether regulations 5.5.04 and 5.5.08(4) of the Regulations could sunset after three years.

As I have set out in previous correspondence, a three year sunsetting period may be appropriate where, for example an instrument is required to address short-term transitory circumstances. This is not the case with these provisions, which are part of a permanent reform and have been comprehensively designed to remain fit-for-purpose for at least 10 years.

Regulation 5.5.04, made for the purposes of paragraph 500AE(3)(b) of the *Corporations Act 2001*, implements a key policy feature by narrowing the range of transactions that a registered liquidator needs to look into for the simplified liquidation process. This benefits the small business undertaking the simplified liquidation as it reduces the costs of the process associated with investigating these transactions.

Given the links between regulation 5.5.04 and the objectives of the reform – to provide a faster and lower-cost liquidation, increasing returns for both creditors and small businesses – the intention is that this regulation remains in place for at least 10 years. This aspect of the reform was recommended by the Productivity Commission in its 2015 report into Business Set-up, Transfer and Closure, which was based on extensive stakeholder consultation.

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.

Therefore, I consider that a 10 year sunsetting period is appropriate for both regulations 5.5.04 and 5.5.08(4) of the Regulations. This is 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 this issue further with the Committee, in a meeting to be arranged between my office and the Committee.

Review of the relevant provisions

There is no intention to review the provisions as the justification for making them will not fade with the passing of time. The modification in regulation 5.5.08(3) of the *Corporations Regulations 2001* continues to be appropriate to be included in delegated legislation. However, given this is a new reform, my Department will continue to seek feedback from stakeholders on the new insolvency processes implementation of the reforms.

Clarity of drafting of an offence provision

Regulations 5.3B.25 of the *Corporations Regulations 2001* deals with when a restructuring plan is accepted. Subregulation (3) makes it an offence for a person to give, or agree or offer to give, to an affected creditor any valuable consideration with the intention of securing the affected creditor's acceptance or non-acceptance of the restructuring plan.

The inclusion of the fault element of intention in paragraph 5.3B.25(3)(b) is key to the offence provision. A small business in a restructuring process will continue to trade, and therefore will continue to make payments to creditors in the ordinary course of business. Separately, those creditors will be voting on the restructuring plan. Without the fault element of intention, these small businesses undertaking normal business practices may be caught under the offence provisions.

Subregulation (4) provides that the offence in subregulation (3) is an offence of strict liability. The Committee is correct to note that because the fault element of intention is included in subregulation (3), the offence is not technically an offence of strict liability. The inclusion of subregulation (4) was an oversight which I will seek to rectify.

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13 May 2021

The Hon Josh Frydenberg MP

Treasurer

Parliament House

CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au

CC: committeescrutiny@treasury.gov.au; Chris.Reside@ treasury.gov.au

Dear Treasurer,

Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020 [F2020L01654]

Thank you for your response of 9 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.

The committee welcomes your undertaking to remove subregulation 5.3B.25(4) which provides that the offence in subregulation 5.3B.25(3) is a strict liability offence. This undertaking has been listed in Appendix C of *Delegated Legislation Monitor 7 of 2021*.

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

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