



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,

**Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020  
[F2020L01568]**

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.

***Matters more appropriate for parliamentary enactment***

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).

The instrument sets out a number of definitions for the purpose of the foreign investment framework. For example, item 6 of Schedule 1 to the instrument amends the Foreign Acquisitions and Takeovers Regulation 2015 (principal instrument) to insert new definitions for 'national security business' and 'national security land'. In addition, item 25 of Schedule 1 to the instrument amends the principal instrument to set out certain exemptions to the definitions of 'notifiable national security actions' and 'reviewable national security actions'.

These definitions appear to relate to significant elements of the foreign investment regime, including certain criminal offences punishable by up to 10 years imprisonment under Part 5 of the *Foreign Acquisitions and Takeovers Act 1975* (the Act).

The committee generally considers that significant matters, such as setting out key definitions which relate to core elements the foreign investment framework and which are relevant to the imposition of significant custodial penalties, are more appropriately enacted via primary legislation. Where significant matters are nevertheless left to delegated legislation, the committee would expect a sound justification for the use of delegated legislation to be provided in the explanatory statement. In this instance, the explanatory statement does not appear to provide any information as to the appropriateness of including these matters in delegated legislation.

In light of the above, the committee requests your advice as to why it is considered necessary and appropriate to set out key definitions relating to the foreign investment framework in delegated, rather than primary, legislation.

***Modification of primary legislation***

***Exemption from primary legislation***

***Parliamentary oversight***

As noted above, 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 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.

Item 18 of Schedule 4 to the instrument inserts new section 62 into the principal instrument. New section 62 modifies the operation of the Act to specify that it applies as if section 12 of the Act were omitted. In addition, item 1 of Schedule 5 to the instrument also inserts new section 41B into the principal instrument to provide for exemptions to sections 98C, 98D and 98E of the Act in relation to the requirement to notify after no objection notification or exemption certificate is given.

Provisions of delegated legislation that modify or exempt persons or entities from the operation of primary legislation may limit parliamentary oversight, and may subvert the appropriate relationship between Parliament and the executive. The committee considers that such measures should ordinarily be included in primary legislation, unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory statement does not appear to include any information about the appropriateness of including these exemptions and modifications in delegated legislation.

In addition, the committee is concerned that these measures appear to be intended to remain in force for at least five years (until the principal instrument sunsets under the *Legislation Act 2003*). 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.

In light of this, from a scrutiny perspective, the committee considers that, if it is not proposed to set out the exemptions and modifications on the face of the primary legislation, the instrument should at least be amended to specify that it ceases to operate three years after it commences. If it becomes necessary to extend the operation of the exemptions and modifications, 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 provide for the exemptions and modifications to the operation of the *Foreign Acquisitions and Takeovers Act 1975* in delegated, rather than primary, legislation; and**
- **if it is not proposed to set out these exemptions and modifications on the face of the primary legislation, whether the instrument could be amended to specify that the exemptions and modifications cease to operate after three years.**

***Compliance with Legislation Act 2003 - incorporation***

Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act and otherwise complies with all legislative requirements. This includes the requirements prescribed by paragraph 15J(2)(c) of the *Legislation Act 2003*, which provides that the explanatory statement to an instrument must contain a description of any incorporated documents and indicate how they may be obtained.

In this instance, the instrument appears to incorporate the Australian System of National Accounts (cat. 5204.0). However, neither the instrument nor the explanatory statement indicates whether the document is incorporated by reference and, if so, the manner of incorporation (that is, whether it is incorporated at a particular time or as in force from time to time) and where it may be obtained.

**The committee therefore requests your advice as to whether the Australian System of National Accounts (cat. 5204.0) is incorporated by reference and if so, the manner in which the document is incorporated and where it may be accessed free of charge.**

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](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: MS21-000642

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 *Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020* (the Amending Regulations) which amended the *Foreign Acquisitions and Takeovers Regulation 2015* (the Regulations).

In that letter, the Committee sought my advice as to:

- why it is necessary and appropriate to set out key definitions relating to the foreign investment framework in delegated, rather than primary, legislation;
- why it is necessary and appropriate to provide for the exemptions and modifications to the operation of the *Foreign Acquisitions and Takeovers Act 1975* (the Act) in delegated, rather than primary, legislation;
- if it is not proposed to set out these exemptions and modifications in the primary legislation, whether the instrument could be amended to specify that the exemptions and modifications cease to operate after three years; and
- whether the Australian System of National Accounts (cat. 5204.0) is incorporated by reference and if so, the manner in which the document is incorporated and where it may be accessed free of charge.

**Key definitions in delegated legislation**

This issue is materially the same as the one addressed in my letter to the Chair of the Senate Standing Committee for the Scrutiny of Bills regarding the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020, dated 1 December 2020.

Please refer to pages 1 and 2 of Annexure 1 to that letter (attached) for my advice about why it is necessary and appropriate to set out key definitions in delegated, rather than primary, legislation.

## **Exemptions and modifications to the operation of the Act in delegated legislation**

Modification: New section 62 of the Regulations modifies the operation of the Act, but only in relation to actions or proposed actions that are taken to occur because of the operation of subsection 18A(1) or (2) of the Act. These are actions that occur where a person is taken to have acquired an interest in securities in an entity in circumstances where the percentage of the interest in the entity held by the person increases without the person acquiring interests in securities in the entity.

The modification included in the Regulations by the Amending Regulations alleviates some of the potential consequences for persons where such an action may be taken to have occurred without their knowledge. This modification is manifestly appropriate. Such narrowly targeted modifications are expressly contemplated and authorised by subsection 18A(6) of the Act.

Exemptions: New section 41B of the Regulations exempts persons who take certain actions from the requirement to give the Treasurer notice about the taking of those actions. These particular actions are exempt because the Australian Taxation Office already gathers the necessary information about those actions. This exemption avoids the potential burden of double reporting for persons taking such actions.

If the range of actions on which information is gathered changes in the future, or if the range of information gathered under sections 98C, 98D or 98E of the Act changes, it may be necessary to alter the scope of this exemption. To avoid gaps in the gathered information and avoid the burden of double reporting, it may be necessary to make such changes quickly. Therefore, it is both necessary and appropriate to place the exemption in the Regulations to enable timely amendments.

## **Shortening the period of the operation of the exemptions and modifications**

As you are aware, all Commonwealth legislative instruments are subject to a default 10 year sunset period but may provide for a shorter sunset period. The appropriate length of the sunset period for individual legislative instruments will vary 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, and as previously advised, I consider that a 10 year sunset period will generally be appropriate 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 sunset 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.

In my view, where these principles are not met, a shorter sunset period such as five years will generally be more appropriate.

The Committee has also suggested that a three year sunset period would be appropriate for some instruments.

While there will be circumstances where it is appropriate for a legislative instrument to operate for a period of three years or less, for example where the instrument is required to address short-term transitory circumstances, this will not always be the case and there are a range of practical considerations with instruments sunset after three years. This is because remaking an expiring instrument is not a mere technical or procedural formality and each time an instrument approaches its sunset date, the instrument must be comprehensively reviewed to determine whether it remains fit-for-purpose.

There are a number of steps that need to be carried out as part of this review, including public consultation about the continuing need for the instrument, its regulatory impact and whether it needs to be modified or should be remade in its existing form. For more complex instruments, this process of review, consultation and assessment will begin around two years prior to the expiry date for the instrument, as recommended in the Attorney-General's Department's *Guide to managing sunset of legislative instruments*.

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.

For these reasons, I consider that a five year sunset period is a more appropriate duration for most instruments that do not meet the principles I have outlined above.

Modification: The modification in section 62 of the Regulations will remain necessary as long as the conditions in which it applies may arise. Since the potential for persons to be affected by actions of others through the operation of section 18A of the Act will remain, as long as the operation of that section remains unchanged, the modification is likely to remain necessary until that section is amended.

No changes to section 18A of the Act are currently anticipated. Therefore, imposing a shorter sunset period on the modification in section 62 of the Regulations would increase the risk of a situation arising where section 18A would deem a person to have taken an action in circumstances where it is not appropriate for such deeming to occur. This would impose unnecessary uncertainty and costs for persons subject to the Act.

Exemptions: The exemptions in section 41B of the Regulations will remain necessary as long as the relevant information is collected other than under sections 98C, 98D or 98E of the Act. Since there is currently no expectation that the relevant information gathering by the Australian Taxation Office will cease, there is no appropriate early end date for the exemption. Shortening the sunset period would incur an increased risk of imposing a potentially significant burden of double reporting on persons undertaking relevant transactions.

Applying the above principles, I consider that a 10 year sunset period is appropriate for both sections 41B and 62 of the Regulations.

I look forward to further discussing the Committee's ongoing concerns about delegated legislation that exempts or modifies the primary law in a meeting to be arranged between my office and the Committee.

### **Reference to the Australian System of National Accounts**

The Australian System of National Accounts is an annual Australian Bureau of Statistics publication that contains current and historical GDP information. It is free to access online at [abs.gov.au/statistics/economy/national-accounts/australian-system-national-accounts/latest-release](https://abs.gov.au/statistics/economy/national-accounts/australian-system-national-accounts/latest-release).

Comparing current and historical GPD implicit price deflator values for indexation is a common methodology. Anyone wishing to perform the calculation themselves would likely recognise or be familiar with the approach and would likely already be aware of how to access Australian Bureau of Statistics information. The inclusion of the particular catalogue number in the Regulations further assists in retrieving the particular data series.

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

Yours sincerely

THE HON JOSH FRYDENBERG MP

1 April 2021



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)

Dear Treasurer,

**Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020  
[F2020L01568]**

Thank you for your response of 30 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 13 April 2021 and has resolved to seek your further advice about the issues outlined below.

***Matters more appropriate for parliamentary enactment***  
***Modification of primary legislation***  
***Exemption from primary legislation***  
***Parliamentary oversight***

In relation to this matter, you advised that the committee should refer to your response to the Scrutiny of Bills Committee of 1 December 2020 in relation to the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020 regarding the committee's concerns about including key definitions in delegated legislation.

You also advised that the modifications the instrument makes to the *Foreign Acquisitions and Takeovers Act 1975* (the Act) alleviate some of the potential consequences for persons of actions or proposed actions that are taken to occur because of the operation of the Act, and that these potential consequences may arise from actions taken or occurring without the person's knowledge. In relation to exemptions from the operation of the Act, you advised that the ATO already gathers the relevant information and the exemption avoids the potential burden of 'double reporting' for persons taking such actions. If the range of actions changes in the future it may be necessary for the scope of the exemption to be altered, and therefore it is necessary and appropriate for the exemptions to be in delegated legislation.

In relation to shortening the duration of the instrument, you advised that 10 years sunseting is appropriate.

While noting this further information, 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.

***Compliance with Legislation Act 2003 – incorporation***

In relation to this matter, you advised that the Australian System of National Accounts is an annual Australian Bureau of Statistics publication that is free to access online and provided a weblink for access. The committee understands from this advice that the Australian System of National Accounts is incorporated by reference in the instrument, as you have explained that it is a common methodology used to compare current and historical GPD implicit price deflator values for indexation.

**The committee therefore requests that you amend the explanatory statement to the instrument to include the further information on the incorporation of the Australian System of National Accounts outlined in your letter of 30 March 2021, noting that this is a requirement of paragraph 15J(2)(c) of the *Legislation Act 2003*.**

The committee's expectation is to receive a response in time for it to consider and report on the instruments while they are still subject to disallowance. Noting that the 15<sup>th</sup> sitting day after this instrument was tabled in the Senate is 11 May 2021, the committee has resolved to give a notice of motion to disallow the instrument on that day as a precautionary measure to allow additional time for the committee to consider the outstanding matter in relation to incorporation of the Australian System of National Accounts.

Noting this, and to facilitate the committee's consideration of this matter, 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: MS21-000880

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 *Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020* (the Amending Regulations) which amended the *Foreign Acquisitions and Takeovers Regulation 2015*.

In that letter, the Committee requested amendment to the explanatory statement of the Amending Regulations to include further information on the incorporation of the Australian System of National Accounts as outlined in my previous letter of 30 March 2021.

In response to that request, I undertake to amend the explanatory statement to include the information as soon as possible.

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

Yours sincerely

~~THE HON JOSH FRYDENBERG MP~~

27 April 2021



AUSTRALIAN  
SENATE

**Senate Standing Committee for the  
Scrutiny of Delegated Legislation**

Parliament House, Canberra ACT 2600  
02 6277 3066 | [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au)  
[www.aph.gov.au/senate\\_sdlc](http://www.aph.gov.au/senate_sdlc)

13 May 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,

**Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020 [F2020L01568]**

Thank you for your response of 27 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 amend the explanatory statement to include further information on the incorporation of the Australian Systems of National Accounts. 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*.

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**