



22 January 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au

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

Dear Treasurer,

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

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.

Modification to the operation of primary legislation

Significant penalties

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 includes where an instrument modifies or exempts persons or entities from the operation of primary legislation or provides for significant penalties.

The ASIC Credit (Notice Requirements for Unlicensed Carried Over Instrument Lenders) Instrument 2020/834 [F2020L01259] (the instrument) continues the effect of ASIC Class Order [CO 10/381] which sunsetted on 1 October 2020. The instrument provides that Part 3 of Schedule 2 to the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (the Transitional Credit Act) applies in relation to all persons as modified by section 5 of the instrument. This has the effect that carried over instrument lenders must continue to notify the Australian Securities and Investments Commission (ASIC) if they become unlicensed.

The committee has long been concerned with provisions in delegated legislation which modify the operation of primary legislation. The committee therefore expects the explanatory statement to any modification instrument to comprehensively justify the nature and scope of the relevant modifications.

The explanatory statement explains that this modification of the primary legislation is necessary to fix the problematic application of item 39A of Schedule 2 to the Transitional Credit Act as in force on 24 May 2010. Item 39A was repealed as a result of the repeal of the National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010. The explanatory statement notes that this notification obligation in item 39A is still required for ASIC to comply with obligations under section 213 of the Transitional Credit Act and regulation 30A of the National Consumer Credit Protection Regulations 2010.

It remains unclear why it was considered necessary and appropriate to address this matter in delegated legislation, rather than primary legislation. The instrument appears to be correcting a systemic issue in the Transitional Credit Act which would be more appropriate for amending primary legislation. The longstanding nature of the amendment also indicates that these changes may be more appropriate for primary legislation and the full range of parliamentary oversight. The committee notes that the explanatory statement justifies the inclusion of these matters in delegated legislation by reference to the fact that item 39A of the Transitional Credit Act was itself inserted by a legislative instrument.

In addition, the instrument provides for significant penalties including civil penalties to a maximum of 2,000 penalty units, an offence with maximum criminal penalties of 25 penalty units or 6 months imprisonment, and a strict liability offence with a maximum criminal penalty of 10 units. The explanatory statement provides no justification for these significant penalties and merely states that the relevant offence provisions reproduce those of item 39A of Schedule 2 to the Transitional Credit Act.

Where an instrument includes significant penalties, the explanatory statement should explain the nature and scope of the offence and what penalties apply, why it is necessary and appropriate to include the penalty 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*.

In this regard, the committee requests your advice as 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 Transitional Credit Act; and**
- **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*.**

Parliamentary oversight

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 committee is concerned that the instrument provides for the modification of primary legislation and significant civil and criminal penalties and will not cease until it sunsets on 1 October 2030. This means that these measures would be provided for in delegated legislation for a total of at least 20 years, as the ASIC Class Order [CO 10/381] was registered on 24 May 2010. The explanatory statement explains that a shorter duration for the instrument is not appropriate as the original source of the problem was a regulation which is no longer in force.

The committee considers that instruments which provide for significant matters should specify a date by which the modifications will cease. This is to ensure an appropriate level of regular parliamentary oversight. In addition, it is not clear to the committee why this instrument cannot have a shorter duration just because the original source of the problem was a regulation which is no longer in force.

The committee therefore requests your advice as to whether the instrument could be amended to specify that the measures in the instrument will cease to operate within 3 years.

Conferral of discretionary powers

Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers.

The instrument provides for offences of contravening the requirement in item 19A for specified credit lenders to lodge notices with ASIC. Paragraph 19A(2)(j) provides that ASIC may request 'any other information' to be included in the notices which must be lodged with ASIC.

Where an instrument provides for a person or entity to exercise discretionary powers in relation to decisions which affect an individual, the committee expects those discretionary powers to be sufficiently defined. In this instance, the committee considers that paragraph 19A(2)(j) provides ASIC with a broad discretionary power to determine matters of relevance to an offence carrying significant civil and criminal penalties.

The committee's scrutiny concerns in this regard are heightened by the fact that the explanatory statement does not provide a detailed explanation of each provision of the instrument.

The committee therefore requests your advice as to whether any further limits apply, in legislation or policy, to constrain the scope of ASIC's power under paragraph 19A(2)(j) to determine what information must be included in a notice lodged with ASIC under subsection 19A(2).

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.

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

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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


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