



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_sdsc

12 November 2020

The Hon Michael Sukkar MP
Assistant Treasurer
Parliament House
CANBERRA ACT 2600

Via email: Michael.Sukkar.MP@aph.gov.au

CC: tsrdlos@aph.gov.au; committeescrutiny@treasury.gov.au

Dear Assistant Treasurer,

Taxation Administration (Remedial Power – Certificate for GST-free supplies of Cars for Disabled People) Determination 2020 [F2020L01079]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate 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 of 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 includes where an instrument modifies or exempts persons or entities from the operation of 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 was made under section 370-5 of Schedule 1 to the *Taxation Administration Act 1953* (TA Act). Section 370-5 provides that the Commissioner for Taxation (Commissioner) may, by legislative instrument, determine a modification of the operation of a provision of a taxation law if the modification is not inconsistent with the intended purpose or operation of the provision, and the Commissioner considers that it is reasonable.

The instrument modifies paragraph 38-510(1)(a) of *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to provide that certain disabled individuals may obtain a current certificate of medical eligibility from a registered medical practitioner to qualify for access to the GST-free supply of cars or car parts. The explanatory statement notes that the modification supports the intent of paragraph 38-510(1)(a) as it ensures that a person who is medically qualified is certifying that an individual meets the existing medical requirement in the provision.

While the instrument appears to be within the scope of the enabling provision, the committee is concerned that provisions of delegated legislation that modify primary legislation may limit parliamentary oversight, and may subvert the appropriate relationship between Parliament and the executive. In this regard, the committee notes concerns raised by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) when it considered provisions of the *Tax and Superannuation Laws Amendment (2016 Measures No. 2) Act 2016*. The Scrutiny of Bills committee raised concerns about the broad conferral of legislative power on an unelected official to modify the operation of significant primary legislation.

In addition, the committee is concerned that the modification appears to be intended to remain in force for at least 10 years (until the 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 the instrument should be amended to specify that it ceases to operate three years after it commences. 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:

- **whether there are plans to include the modification implemented by the instrument in future amendments to the GST Act; and**
- **whether the instrument could be amended to specify that the instrument ceases to operate three years after it commences.**

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 **26 November 2020**.

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 MICHAEL SUKKAR MP
Minister for Housing and Assistant Treasurer

Ref: MS20-002576

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 regarding the *Taxation Administration (Remedial Power – Certificate for GST free supplies of Cars for Disabled People) Determination 2020* (the Determination).

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

- whether there are any plans to include the modification implemented by the Determination in future amendments to the GST Act; and
- whether the Determination could be amended to specify that the Determination ceases to operate three years after it commences.

The Australian Taxation Office (ATO), who drafted the Determination, was consulted in the preparation of this response.

As you may be aware, the Determination modifies the operation of paragraph 38-510(1)(a) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to ensure continued access to GST-free supplies of cars and car parts for people who:

- have lost the use of one or more limbs to such an extent that they are unable to use public transport; and
- intend to use the car for personal transportation to or from gainful employment.

The Determination enables this continued access by allowing a registered medical practitioner to issue a certificate, now titled 'certificate of medical eligibility', certifying that the individual has lost the use of one or more limbs to such an extent that they are unable to use public transport.

Amending the GST Act to include the modification implemented by the Instrument

In regards to the Committee's first listed concern, I have been advised that an amendment, in line with the modification by the Instrument, to paragraph 38-510(1)(a) of GST Act is currently on Treasury's Miscellaneous and Technical Amendments (MTA) Register.

The amendment was intended to be included in the final MTA Bill for this year however due to other drafting priorities this did not occur. It is expected that the amendment will therefore form part of a future MTA Bill.

Until this time, the Determination will allow the continuity of access to GST-free supplies of cars and car parts for people who live with disabilities and meet the criteria in the Determination.

Amending the instrument to specify that it ceases three years after commencement

I note the Committee's concerns relating to the Determination ceasing to operate within three years after the commencement. ATO have advised that they have taken these comments into consideration and noting that there are plans to amend the GST Act to include the modification, the ATO have undertaken to amend the Determination to specify that it ceases three years after commencement. The ATO have indicated that this amendment may be made to the Determination by including a self-repealing provision to this effect.

The Commissioner of Taxation proposes to make this amendment by issuing an amending instrument after the Determination commences. This will ensure the modification commences as soon as possible whilst addressing the Committee's concerns. The Commissioner considers that it remains important for the modification to commence as soon as possible for the following reasons:

- legislative change is required as soon as possible to provide certainty to affected individuals. The modification will deliver tangible benefits for disabled persons that need to access GST-free supplies of cars and car parts into the future; and
- the modification changes the entity responsible for certifying that the individual meets the medical requirement of paragraph 38-510(1)(a) of the GST Act whilst maintaining the other requirements of that provision. This change ensures that a medically qualified person continues to certify that an individual meets the medical eligibility requirement. It also streamlines the process for the individual compared with the process under the current law because the certifying entity also issues the certificate of medical eligibility rather than two different entities being involved. The individual also has reduced compliance costs by not having to pay fees to two separate entities.

The ATO will commence work on amending the Determination with a plan to register the amending instrument early next year, following any legislative requirements under the *Legislation Act 2003* and consultation processes.

I trust this information will be of assistance to you.

Yours sincerely

The Hon Michael Sukkar MP



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3 December 2020

The Hon Michael Sukkar MP
Minister for Housing and Assistant Treasurer
Parliament House
CANBERRA ACT 2600

Via email: Michael.Sukkar.MP@aph.gov.au

CC: tsrdlos@aph.gov.au; committeescrutiny@treasury.gov.au

Dear Assistant Treasurer,

Taxation Administration (Remedial Power – Certificate for GST-free supplies of Cars for Disabled People) Determination 2020 [F2020L01079]

Thank you for your response of 25 November 2020 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 Wednesday, 2 December 2020. On the basis of your advice, the committee has concluded its examination of the instrument.

The committee welcomes your undertaking to amend the instrument to provide that it ceases three years after commencement, in response to the committee's scrutiny concerns.

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