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Dear Senator

Thank you for your letter of 13 May 2021 regarding the concerns of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) about Schedules 2-4 of the *Bankruptcy Regulations 2021* (the Regulations). I appreciate the time you have taken to bring these matters to my attention.

In the letter of 13 May 2021, the Committee requested my advice about:

- why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation to introduce a significant number of modifications to the *Fringe Benefits Tax Assessment Act 1986* (the FBTA Act) and the *Bankruptcy Act 1966*
- 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.

Remaking the Bankruptcy Regulations in substantially the same form

The Regulations were made to address the sunsetting of the *Bankruptcy Regulations 1996* on 1 April 2021 (the 1996 Regulations). The purpose of the sunsetting framework is to ensure that legislative instruments are kept up to date and remain fit for purpose. The Regulations remade the 1996 Regulations in substantially the same form. This included remaking the modifications to the FBTA Act and the Bankruptcy Act contained in Schedules 2-4 of the Regulations in substantially the same form as they were in Schedules 4, 6 and 7 of the 1996 Regulations. The updates made to Schedules 2-4 of the Regulations were not substantial in nature, but rather ensured they remain fit for purpose.

Amendments to the 1996 Regulations, including those now in Schedules 2-4 of the Regulations, modernise references, ensure alignment with the Bankruptcy Act and clarify provisions that had caused confusion or administrative inefficiencies. These amendments included:

- the removal of redundant or outdated definitions and references, including references to:
 - legislative schemes which have been repealed
 - individual industrial agreements which have expired
- updates to provisions which stipulate time requirements:
 - the conversion of total days (in terms of calendar weeks) to business days, to provide consistency and account for weekends and public holidays
 - ensuring that timeframes are precise and consistent with those in the Act, to provide certainty to users
- making consistent reference to ‘the Official Receiver, rather than ‘an Official Receiver’
- provision for the Bankruptcy Act and the Regulations to be administered in a technology-neutral manner to reflect current practices (e.g. references to ‘post’ and ‘facsimiles’ were updated to facilitate online transmission of information and services), and
- minor amendments to reflect changes to Office of Parliamentary Counsel drafting practices.

Use of delegated legislation

The provisions of Schedules 2-4 of the Regulations are necessary and appropriate for inclusion in delegated legislation as they:

- were generally supported by stakeholders during consultation
- satisfy the purpose of the Regulations as they are procedural in nature
- modify the FBTA Act and the Bankruptcy Act to the minimum extent required to ensure the efficient administration of the bankruptcy system, and
- are consistent with the existing legislative framework as they exercise specific powers to make the modifications to the FBTA Act and the Bankruptcy Act contained in Schedules 2-4.

Consultation

The Regulations, including Schedules 2-4, were the subject of extensive consultation in 2020 and 2021. This included a six-week public consultation on an Exposure Draft of the Regulations. This consultation process provided the Australian Government with valuable insights from personal insolvency stakeholders and helped ensure that the Regulations are fit for purpose.

Schedule 2 of the Regulations

The FBTA Act provides a regime for the assessment of the value of non-cash benefits provided by employers to employees and the levying of tax on the employer in respect of these benefits.

The Bankruptcy Act uses the assessment approach in the FBT Act as a setting off point to prescribe these types of benefits as income in relation to a bankruptcy when provided by any person to a bankrupt, not just an employer.

The Bankruptcy Act further provides that these benefits, as worked out using the assessment approach in the FBT Act, may be modified in the Regulations. Relevantly, these modifications are not to the FBT Act but rather modify the assessment approach used in the FBT Act to apply to the assessment of income in relation to a bankruptcy. These modifications make the various formulae for calculating the value of benefits relevant to bankruptcy by allowing for the tailoring of the assessment approach to the bankruptcy context. To make these modifications, the Regulations exercise an existing power to amend the FBT Act contained in paragraph 139L(1)(a)(v) of the Bankruptcy Act. The Regulations are therefore considered to be appropriate for containing these amendments and are consistent with the existing legislative framework.

I note your correspondence makes specific reference to the statutory formula for calculating the taxable value of car fringe benefits in the Regulations. This is a good example of the appropriate use of the specific regulation making power contained in paragraph 139L(1)(a)(v) of the Bankruptcy Act. The Bankruptcy Act uses the FBT Act as a base component to calculate income for bankruptcy purposes and the regulations modify this starting point for bankruptcy purposes only, the FBT Act is not modified. The statutory formulas in the FBT Act, as originally referenced by the 1996 Regulations, have since been amended. The change, contained in section 3 of Schedule 2 of the Regulations, was developed in consultation with the Australian Taxation Office and the Australian Financial Security Authority and simplifies the calculation of car fringe benefits in determining income for the purposes of the bankruptcy system by replacing a graduated valuation with a single rate. This modification to the bankruptcy rules simply reflects the intervening legislative changes in the FBT Act as the starting point and is in line with the current calculation method in the FBT Act.

Schedules 3 and 4 of the Regulations

Schedules 3 and 4 of the Regulations make modifications to Parts X and XI of the Bankruptcy Act respectively. Part X of the Bankruptcy Act provides the legislative framework for personal insolvency agreements (PIAs). Part XI of the Bankruptcy Act provides the legislative framework for the administration of the estates of deceased persons in bankruptcy.

The modifications contained in Schedule 3:

- make minor and technical amendments to provisions of the Bankruptcy Act so they apply to circumstances involving PIAs (e.g. by replacing reference to ‘debtor’ with ‘joint debtor’ in relation to PIAs with joint debtors), or
- provide for the administration of PIAs in much the same way as the *Insolvency Practice Rules (Bankruptcy) 2016* prescribe for matters assisting the administration of bankruptcies.

The modifications contained in Schedule 4 of the Regulations make minor and technical amendments to provisions of the Bankruptcy Act so they apply to circumstances involving the administration of deceased estates in bankruptcy. For example by replacing references to the ‘debtor’ with ‘deceased debtor’s estate’.

These changes are consistent with the existing legislative framework, as the Bankruptcy Act provides that the Regulations may modify the Bankruptcy Act for the purposes of PIAs and the administration of deceased estates in bankruptcy—for example, under:

- section 187A of the Bankruptcy Act in relation to PIAs and joint debtors
- sections 210 and 211 of the Bankruptcy Act in relation to controlling trusteeships
- section 231 of the Bankruptcy Act in relation to PIAs, and
- section 248 of the Bankruptcy Act in relation to deceased estates.

Sunsetting period

As outlined above, Schedules 2-4 of the Regulations are necessary and appropriate as they only modify the FBTA Act and the Bankruptcy Act to the extent necessary to ensure the efficient administration of the Bankruptcy System. The modifications do not substantially depart from the original provisions and are consistent with the existing legislative framework. Given this, and the extensive consultation to which the Regulations were subject, I consider the standard ten-year sunseting period remains appropriate.

While I consider the ten-year period is appropriate, the Government will give consideration to the Committee's concerns about Schedules 2-4 when developing future amendments to the Bankruptcy Act and the Regulations.

Thank you again for bringing your concerns to the Government's attention. I trust this information is of assistance to the Committee.

Yours sincerely

Senator the Hon Amanda Stoker