



14 July 2021

Senator the Hon Marise Payne
Minister for Foreign Affairs
Parliament House
CANBERRA ACT 2600

Via email: foreign.minister@dfat.gov.au


Dear Minister,

Charter of the United Nations Listings

I am writing, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee), in relation to Charter of the United Nations Listings made under section 15 of *Charter of the United Nations Act 1945* or regulation 7 of the Charter of the United Nations (Anti-terrorism Measures) Regulations 2001.

On 26 May 2021, 21 legislative instruments were registered on the Federal Register of Legislation (the FRL) which list a number of individuals and entities as subject to United Nations counter-terrorism sanctions (the listings instruments). The explanatory statements to these instruments advise that they are giving effect to UN Security Council resolution 1373, which requires Australia, as a UN Member State, to freeze the assets of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts, or entities owned or controlled by such persons.

Disallowance status of the listings instruments

The committee notes that the explanatory statements for the instruments state that the instruments are not subject to disallowance due to the operation of subsection 44(1) of the *Legislation Act 2003* (the Legislation Act).

Subsection 44(1) of the Legislation Act provides that a legislative instrument, or a provision of a legislative instrument is not subject to disallowance if it:

- facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States or Territories; and
- authorises the instrument to be made by the body or for the purposes of the body or scheme, unless the instrument is a regulation, or the enabling legislation or some other Act has the effect that the instrument is disallowable.

After considering the instruments registered, it is unclear to the committee how they facilitate the establishment or operation of an intergovernmental body or scheme involving the Commonwealth *and* one or more States or Territories. It is the committee's understanding that the exemption in subsection 44(1) applies only to intergovernmental bodies or schemes at the domestic level.

As it appears that there is no other authority to exempt the listings instruments from the usual disallowance process, the committee requests your advice as to why it is considered that the instruments are not subject to disallowance by the Parliament.

Delayed registration of the listings instruments

The committee notes that the Parliamentary Joint Committee on Human Rights (PJCHR) has raised concerns in relation to the fact that the listings instruments were made between 2001 and 2020 but were only registered on the Federal Register of Legislation (the FRL) on 26 May 2021. The PJCHR noted that, due to the operation of subsection 12(2) of the *Legislation Act 2003* (the Legislation Act), the effect of this delayed registration appears to be that before they were registered the listings instruments did not apply to a person to the extent that they disadvantaged or imposed liabilities on the person.¹

In this regard, the committee notes that there is a discrepancy in the explanation of the effect of subsection 12(2) of the Legislation Act in the explanatory statements for the listings instruments. For instruments made under the *Charter of the United Nations Act 1945* (the Charter of the UN Act), the explanatory statement provides as follows:

This instrument was published in the Commonwealth Gazette on making and is stated to commence on gazettal. However, in accordance with subsection 12(2) of the *Legislation Act 2003* (the Act), to the extent that it disadvantages or imposes liabilities on a person, a listing instrument only applies in relation to a person (other than the Commonwealth or an authority of the Commonwealth) until it has been registered on the Federal Register of Legislation.

Whereas for instruments made under the Charter of the United Nations (Anti-terrorism Measures) Regulations 2001 (the Regulations), the explanatory statement provides:

This instrument was published in the Commonwealth Gazette on making and is stated to commence on gazettal. However, in accordance with subsection 12(2) of the *Legislation Act 2003* (the Act), to the extent that it disadvantages or imposes liabilities on a person, a listing instrument only applies in relation to a person (other than the Commonwealth or an authority of the Commonwealth) once registered on the Federal Register of Legislation.

The committee considers that the latter explanation is correct and requests that the relevant section of the explanatory statement for the listings instruments made under the Charter of the UN Act be amended so that it is consistent with the explanation set out in the explanatory statement for the listings instruments made under the Regulations.

Subsection 15G(1) of the Legislation Act provides that a rule-maker must lodge a legislative instrument for registration as soon as practicable after it is made. Subsection 15K(1) further provides that a legislative instrument is not enforceable by or against any person unless the instrument is registered as a legislative instrument. As noted above, the listings instruments were made between 2001 and 2020 but were only registered on the FRL on 26 May 2021.

In the absence of further information in the explanatory materials, it is unclear why the registration of the listings instruments was delayed and, accordingly, how this complies with the requirements of subsection 15G(1) of the Legislation Act. The committee is very concerned about this significant delay and, in particular, the impact that it may have on the validity of any action that has been taken pursuant to the listings instruments prior to their registration.

1 Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny report 8 of 2021*, 23 June 2021, pp. 28 and 34.

The committee therefore requests your advice as to:

- **why the listings instruments have only recently been registered on the Federal Register of Legislation, noting that the instruments were made up to almost 20 years ago; and**
- **the consequences of this delay, including on the validity of any actions taken pursuant to the instruments prior to their registration.**

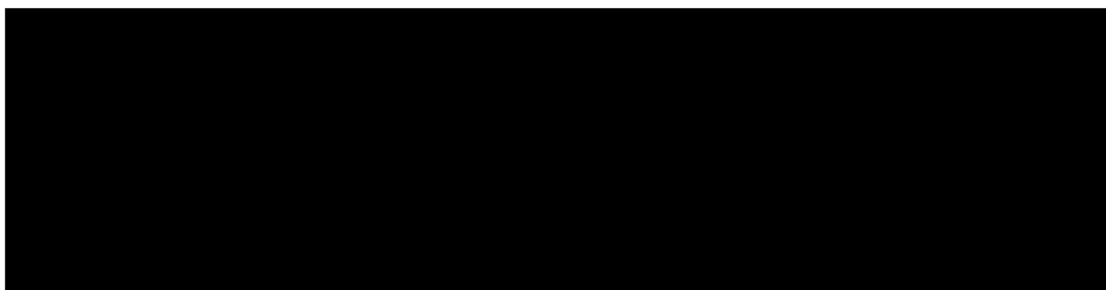
To facilitate the committee's timely consideration of the matters above, the committee would appreciate your response by **28 July 2021**.

Finally, please note that, in the interests of transparency this correspondence and your response may 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