



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_sdlc

3 December 2020

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: Josh.Frydenberg.MP@aph.gov.au

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


Dear Treasurer,

**ASIC Corporations (Stub Equity in Control Transactions) Instrument 2020/734
[F2020L01199]**

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 prevents offers of stub equity in proprietary companies to retail investors and limits the circumstances in which mandatory custodial arrangements can be used by modifying Chapters 6 and 6D of the *Corporations Act 2003* (Corporations Act).

The instrument was made under sections 655A and 741 of the Corporations Act. These provisions allow ASIC to exempt persons, entities and classes of persons and entities from

provisions of the Corporations Act, or to declare that certain provisions of that Act apply as if modified or varied.

Provisions 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 to the instrument explains that the use of delegated legislation is appropriate as the instrument utilises powers given to ASIC by the Parliament and 'the matters contained in the instrument are a specific amendment designed to ensure the application of primary legislation remained flexible to adapt to market developments and applies in a way consistent with the intended policy and the enabling provisions in the primary legislation'.

While noting this explanation, the committee is concerned that these measures appear 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 the instrument could be amended to specify that it ceases to apply three years after the date the instrument 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 **17 December 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 JOSH FRYDENBERG MP
TREASURER**

Ref: MS20-002739

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA, ACT 2600

Via email: sdlc.sen@aph.gov.au

Dear Senator Fierravanti-Wells

Thank you for your letter dated 3 December 2020, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee), requesting advice in relation to the *ASIC Corporations (Stub Equity in Control Transactions) Instrument 2020/734* [F2020L01199] (the Instrument).

The Committee requested advice as to whether the Instrument could be amended to specify that it ceases to apply three years after the date the Instrument commences.

Background

The modifications under s655A and s741 of the *Corporations Act 2001* (Act) were made after an increase in the number of 'stub equity' control transactions was identified, in which:

- the consideration offered to holders, including retail investors, includes securities in a proprietary company; and
- the securities are offered on terms which require certain accepting holders (e.g. all retail investors, or all existing holders of the target other than specified institutions) to have those securities registered in the name of a custodian, rather than holding the securities directly.

Ordinarily, proprietary companies must have no more than 50 non-employee shareholders and are prohibited from activities which would require disclosure to investors under Chapter 6D of the Act. Accordingly, structuring control transactions (through the use of custodial arrangements) to keep the number of holders on the issuer's register artificially below 50 negatively impacts retail investors, who accept scrip consideration. They are deprived of the disclosure and governance protections that they would otherwise be entitled to if the issuer was required to convert to a public company due to the number of beneficial holders of its securities.

The purpose of the Instrument is to create a regulatory environment where retail investors in, what are in substance, widely-held companies, are entitled to the levels of investor protection available in public companies.

Expiry of the Instrument

The transaction structures observed may continue to be utilised in the absence of the modifications in the Instrument and may continue to deprive retail investors of the rights and protections that might otherwise be available to them. Further, in the interests of ongoing longer-term regulatory certainty for companies who may be impacted by the Instrument, it is appropriate for the Instrument to apply for as long as possible.

That said, the Government shares the Committee's concerns that there be sufficient Parliamentary oversight. We will continue to engage with ASIC to stress that the period of operation of instruments made by them should be consistent not only with the policy intent of the underlying primary legislation and the need to minimise any regulatory burden imposed on individuals or entities, but also importantly with the need for Parliamentary oversight of instruments that modify the operation of the primary legislation.

We will continue to engage with ASIC as it monitors stub equity transactions and, to the extent that the Instrument does not operate as intended, results in unintended outcomes, or is no longer needed, amends or withdraws the Instrument in advance of the sunset date.

I trust this information will be of assistance to the Committee.

Yours sincerely,

THE HON JOSH FRYDENBERG MP

16/12/2020 / 2020



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 Corporations (Stub Equity in Control Transactions) Instrument 2020/734 [F2020L01199]

Thank you for your response of 16 December 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 22 January 2021 and has resolved to seek your further advice about the issues outlined below.

Modification of primary legislation

Parliamentary oversight

The committee notes your advice that the instrument creates a regulatory environment protecting retail investors of widely held companies, and that it is appropriate for the instrument to apply for as long as possible to provide longer term regulatory certainty. You also advised that the government shares the committee's concerns about sufficient parliamentary oversight and will engage with the Australian Securities and Investments Commission to stress that the duration of instruments which amend primary legislation should have regard to the need for Parliamentary oversight.

While the committee appreciates that you share our views in relation to the importance of parliamentary oversight of these measures, the committee remains concerned that these measures appear to be intended to remain in force for ten 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.

As your advice is that the measures should apply as long as possible to ensure regulatory certainty, the committee's view is that these measures may therefore be more appropriate for primary legislation. The committee also reiterates its view 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.

In light of the above the committee therefore requests your further advice as to:

- **why it is not considered necessary or appropriate to provide for the instrument to cease after three years of operation to ensure sufficient parliamentary oversight of these measures which modify the operation of primary legislation; and**
- **whether these measures are more appropriate for primary legislation as they are intended to have long-term application.**

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: MS21-000114

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Via email: sdlc.sen@aph.gov.au

Dear Senator

Thank you for your correspondence, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation, concerning the following instruments that are subject to protective disallowance motions:

- *ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98* [F2020L00962] (the IDR Instrument), for which the motion expires on Monday 22 February 2021;
- *ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787* [F2020L01045] (the Litigation Instrument), for which the motion expires on Tuesday 23 February 2021;
- *ASIC Corporations (Hardship Withdrawals Relief) Instrument 2020/778* [F2020L01069], *ASIC Corporations (Amendment) Instrument 2020/721* [F2020L01064], *ASIC Corporations (IPO Communications) Instrument 2020/722* [F2020L01066], for which the motions expire on Monday 15 March 2021; and
- *ASIC Corporations (Stub Equity in Control Transactions) Instrument 2020/734* [F2020L01199], *ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835* [F2020L01261] and *ASIC Credit (Notice Requirements for Unlicensed Carried Over Instrument Lenders) Instrument 2020/834* [F2020L01259], for which the motions expire on Tuesday 11 May 2021.

I recognise that it remains important that instruments made within my portfolio are consistent with the principles outlined in the changes to the Senate's standing orders in November. Furthermore, as I have previously advised, the Government shares the Committee's concerns about ensuring there is appropriate Parliamentary oversight of legislative instruments.

Thank you for making the time to discuss these issues with my office yesterday. To allow us to resolve the Committee's concerns, and based on your discussion with my office, I am seeking the Committee's agreement to the following:

- The Committee will withdraw the motion to disallow the *ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98* before the expiration of the disallowance period on Monday 22 February 2021;
- The Committee will withdraw the motion to disallow the *ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787* prior to the expiration of the disallowance period on Tuesday 23 February 2021, on the basis that ASIC will amend the sunset period for this instrument by 22 February 2021 to provide that the instrument will cease 5 years after commencement;
- For those instruments subject to disallowance motions which expire on 15 March 2021, my office will engage with you and the Committee in good faith to seek a resolution to the Committee's concerns; and
- Following the tabling of the Committee's final report into the exemption of delegated legislation from Parliamentary oversight, my office will again engage with the Committee in good faith to find a longer-term solution to resolve the Committee's concerns in relation to those instruments, subject to disallowance motions which expire on 11 May 2021 and legislative instruments across the portfolio more broadly.

As you know, the Treasury portfolio is responsible for a significant number of delegated powers that modify or exempt persons or entities from the operation of primary laws, many of which are in the *Corporations Act 2001*. Improving the coherence of this framework and the consistency with which it has been managed has been a priority for the Treasury in recent years.

In response to the concerns of the Committee and others, the Treasury has been implementing improvements to ensure that the Committee's concerns are addressed in the development of legislation in a consistent way and are appropriately explained in the associated explanatory materials.

In relation to the broader legislative framework, the Government has commissioned the Australian Law Reform Commission (ALRC) to conduct a review of the corporations and financial services law to consider whether changes could be made to simplify and rationalise the *Corporations Act 2001* and the *Corporations Regulations 2001*.

As part of this review, the ALRC has been specifically asked to consider the coherence of the regulatory design and the hierarchy of laws, including the relationship between the primary law, regulations and delegated powers, including exemption and modification powers. I encourage the Committee to engage the ALRC on its review.

I look forward to continuing to work constructively with you to resolve these issues of mutual concern.

Yours sincerely

THE HON JOSH FRYDENBERG MP

CB / 2 / 2021



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25 February 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 Corporations – various instruments [F2020L00962] [F2020L01045] [F2020L01064] [F2020L01066] [F2020L01069] [F2020L01199] [F2020L01261] [F2020L01259]

Thank you for your response of 18 February 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instrument.

The committee has resolved to withdraw its notices of motion to disallow six of the eight ASIC instruments detailed in Chapter 1 of its *Delegated Legislation Monitor 4 of 2021*, on the basis of your undertaking to engage with the committee to resolve the committee's systemic scrutiny concerns in relation to legislative instruments across the Treasury portfolio, including the eight instruments referred to above.

The committee welcomes your advice that the government has commissioned the Australian Law Reform Commission (ALRC) to conduct a review of the corporations and financial services law. However, the committee would like to emphasise that it considers that this review is separate to and independent of your undertaking to engage with the committee in relation to our systemic scrutiny concerns, and anticipates that the outcome of this undertaking is not dependent on the outcome of the ALRC review.

As the committee has not yet received a response to all scrutiny concerns raised by the committee in relation to the ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835 [F2020L01261] (the Electronic Precontractual Disclosure Instrument) and the ASIC Credit (Notice Requirements for Unlicensed Carried Over Instrument Lenders) Instrument 2020/834 [F2020L01259] (the Carried Over Instrument Lenders Instrument), the committee is reiterating its previous requests for advice.

Your response to these ongoing scrutiny concerns will assist the committee in determining whether to withdraw the disallowance notices currently in place on these instruments. The committee has therefore resolved to retain its notices of motion to disallow the Electronic Precontractual Disclosure Instrument and the Carried Over Instrument Lenders Instrument.

The committee's systemic scrutiny concerns, and requests for advice, are set out in detail in Chapter 1 of its *Delegated Legislation Monitor 4 of 2021*, available on the committee's website at: [https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated Legislation/Monitor](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Monitor).

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*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email at sdlc.sen@aph.gov.au.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation