



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

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Committee Secretary
Senate Scrutiny of Delegated Legislation
Committee
Parliament House
Canberra ACT 2600

22 June 2020

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Dear Committee Secretary

**Senate Standing Committee for the Scrutiny of Delegated Legislation
Inquiry into exemptions of delegated legislation from Parliamentary oversight**

The Australian Securities and Investments Commission (**ASIC**) welcomes the opportunity to make a submission to the Senate Standing Committee for the Scrutiny of Delegated Legislation (the **Committee**) in relation to an inquiry into exemptions of delegated legislation from Parliamentary oversight.

1. SUMMARY

ASIC makes legislative instruments under various financial sector laws that have the effect of granting exemptions to classes of persons or otherwise affect how those laws apply to classes of persons who are subject to them. These legislative instruments are commonly known as 'exemption or modification instruments'.

ASIC considers there is doubt about whether the disallowance regime in the *Legislation Act 2003* (the **Legislation Act**) applies to certain kinds of exemption or modification instruments. ASIC wishes to draw the matter to the attention of the Committee. ASIC would not be concerned if such instruments were brought into the general disallowance regime.

2. ASIC's SUBMISSIONS

ASIC, by legislative instrument, can exempt or modify the operation of some provisions of the financial sector legislation, including the:

- *National Consumer Credit Protection Act 2009* (the **Credit Act**);
- *Corporations Act 2001* (the **Corporations Act**);
- *Superannuation Industry (Supervision) Act 1993* (the **SIS Act**).

ASIC wishes to draw to the Committee's attention that there may be doubt about whether the disallowance regime applies to certain kinds of these exemption or modification instruments, in particular:

- ASIC instruments made under the Credit Act; and
- ASIC instruments made under either the Corporations Act or the SIS Act that relate to superannuation.

2.1 Facilitating the operation of an intergovernmental scheme

Subsection 44(1) of the Legislation Act has the effect that the disallowance regime does not apply in relation to a legislative instrument (not being a regulation) made under enabling legislation that facilitates the operation of an intergovernmental scheme involving the Commonwealth and one or more States and authorises the instrument to be made for the purposes of the scheme.

Both the Corporations Act¹ and the Credit Act² rely on a referral of powers from the States to the Commonwealth under s51 (xxxvii) of the Australian Constitution. These are national laws. These laws give effect to Council of Australian Governments (COAG) agreements between the Commonwealth and the States in relation to these national laws: see Corporations Agreement 2002 and the National Credit Law Agreement 2009.

Arguably, both these Acts facilitate the operation of an intergovernmental scheme involving the Commonwealth and one or more States in relation to the subject matter dealt with in each respective Act, and authorise ASIC to make instruments for the purposes of that subject matter.

Legislative instruments made under the Corporations Act are specifically carved out from the exemption in s44(1) of the Legislation Act (i.e. instruments made under the Corporations Act are not exempt from the disallowance regime merely because of s44(1)). However there is no specific carve out for the Credit Act. Therefore, it might be the case that legislative instruments made under the Credit Act are exempt from disallowance because of s44(1) of the Legislation Act.

¹ Subsection 3(1), Corporations Act.

² Subsection 18(1), Credit Act.

ASIC considers that it is a matter for Government to determine whether ASIC legislative instruments made under the Credit Act should be exempt from disallowance. ASIC would not be concerned if such instruments were brought into the general disallowance regime.

ASIC also notes that s54(1) of the Legislation Act provides an exemption from the sunseting regime on similar terms to the exemption from the disallowance regime in s44(1) of the Legislation Act. ASIC would also not be concerned if such ASIC instruments were brought into the general sunseting regime.

2.2 Legislative instruments 'relating to superannuation'

The disallowance regime under the Legislation Act also does not apply to 'an instrument (other than a regulation) relating to superannuation'.³

The Explanatory Statement for this exemption from disallowance said:

'... This exemption exists because exposure of superannuation instruments to disallowance would cause commercial uncertainty, as well as uncertainty for superannuation fund members and providers. These instruments are intended to have enduring operation and are not suitable for the disallowance process.'

A 'superannuation product' is a kind of financial product that is regulated by Chapter 7 of the Corporations Act⁴, which deals with, among other things, licensing and disclosure in relation to financial products and financial services.

Under Chapter 7 of the Corporations Act, ASIC has made, and is likely to continue to make, legislative instruments that either exempt or affect the operation of the law and which could be described as 'relating to superannuation'. Typically, these legislative instruments affect the operation of disclosure provisions, such as for Product Disclosure Statements, periodic statements, significant event notices or the choice product dashboard and portfolio holdings disclosure regime, in relation to superannuation products, regulated superannuation funds and superannuation trustees.

ASIC considers that it is a matter for Government to determine whether ASIC legislative instruments 'relating to superannuation' should be exempt from disallowance. ASIC would not be concerned if such ASIC instruments were brought into the general disallowance regime.

ASIC also notes that 'instruments (other than regulations) relating to superannuation' are also exempt from the sunseting regime.⁵ ASIC would also not be concerned if such ASIC instruments were brought into the general sunseting regime.

³ Section 9 (item 3), *Legislation (Exemptions and Other Matters) Regulation 2015*.

⁴ Paragraph 764A(1)(g), Corporations Act.

⁵ Section 11 (item 6), *Legislation (Exemptions and Other Matters) Regulation 2015*.



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