Monitor 4 of 2023 – Ministerial Responses

Contents

THE HON STEPHEN JONES MP

ASSISTANT TREASURER AND MINISTER FOR FINANCIAL SERVICES

Ref: MS23-000524

Senator Linda White
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

I am writing in relation to the Senate Standing Committee for the Scrutiny of Delegated Legislation's comments about the *Corporations Amendment (Litigation Funding) Regulations 2022* in Delegated Legislation Monitor 3 of 2023. Thank you also for meeting with me on 10 March 2023.

The Committee has sought advice as to:

- whether the explanatory statement can be amended to include the further information provided in my response to the Committee's previous enquiry, about the legal authority to make the instrument;
- why the exemptions are required noting that the LCM case (*LCM Funding Pty Ltd v Stanwell Corporation Limited* [2022] FCAFC 103) already reflects the current status of the law (I note that this was also raised in our meeting of 10 March);
- whether the Corporations Act can be amended to include the relevant exemptions;
- how the instrument differs from the *Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021*; and
- further detail about the 'existing legal hierarchies' referred to in my previous response.

I have provided information in response to the committee's questions below.

Amendments to the explanatory statement

I agree to the Committee's request to amend the explanatory statement so that it includes the information I provided in my previous response about the legal authority for the regulations.

Reason exemptions are required

The exemptions are necessary to provide certainty about the regulatory arrangements that apply for litigation funding schemes under the Corporations Act, which includes regulation under the managed investment scheme regime, Australian Financial Services Licence requirements, product disclosure regime and anti-hawking provisions.

The regulations have broader coverage than the LCM case, which only related to whether litigation funding schemes are subject to the managed investment scheme regime.

Whether the Corporations Act can be amended to include the relevant exemptions

The exemptions for litigation funding schemes inserted by the *Corporations Amendment (Litigation Funding) Regulations 2022* are consistent with similar pre-existing exemptions in the *Corporations Regulations 2001* relating to insolvency litigation funding schemes and litigation funding arrangements.

It would be significantly more complex to include bespoke exemptions for litigation funding schemes directly into the Corporations Act, which would affect the clarity and navigability of the law for all users.

How the instrument differs from the hawking regulations

The instrument makes a range of amendments to the *Corporations Regulations 2001*, including amending the exemptions to the prohibition on hawking, originally inserted by the *Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021*.

As referred to in my previous response to the Committee, time limiting the hawking exemptions was a show of good faith. I also noted that future legislation amendments would progress having regard to "legal hierarchies, existing frameworks and stakeholder needs". However, I can confirm that the exemptions to the hawking provisions for litigation funding schemes will also be subject to the three-year time limitation that will apply to the exemptions inserted by the *Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021*.

Further information on existing legal hierarchy

As referred to in my previous response to the Committee, the *Corporations Act 2001* provides legal authority to prescribe various matters in regulations, reflecting Parliament's intention that these details are appropriate for delegated legislation. Delegated legislation has an important role in removing prescriptive detail from the primary law. Decisions about where individual exemptions sit within the hierarchy established by the primary law are made on a case-by-case basis taking into account matters such as the application of the exemptions, the time available to progress the change, and the location of similar exemptions.

I trust that the information provides further context about the drafting of the regulations and assists with the Committee's deliberations.

Yours sincerely

The Hon Stephen Jones MP

THE HON STEPHEN JONES MP
ASSISTANT TREASURER AND MINISTER FOR FINANCIAL SERVICES

Ref: MS23-000525

Senator Linda White
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

I am writing in relation to the Senate Standing Committee for the Scrutiny of Delegated Legislation's comments about the *Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022* (the Regulations) in Delegated Legislation Monitor 3 of 2023. Thank you also for meeting with me on 10 March 2023.

The Committee has sought advice as to:

- whether the explanatory statement can be amended to include the further information provided in my response to the Committee's previous enquiry, about the legal authority to make the instrument;
- with reference to standing order 23(3)(l), why it is considered appropriate to move the ASIC exemptions from time limited individual instruments into principal regulations that are exempt from sunsetting and therefore operate indefinitely;
- whether the *Corporations Act 2001* can be amended to include the relevant exemptions;
- why the principal regulations are exempt from sunsetting, and if they could be amended to sunset to ensure a minimum level of parliamentary oversight;
- further detail about what is meant by 'existing legal hierarchies' referred to in my previous response.

I have provided information in response to the committee's questions below.

Amendments to the explanatory statement

I agree to the Committee's request to amend the explanatory statement so that it includes the information I provided in my previous response about the legal authority for the regulations.

Reason exemptions have been moved from ASIC-made legislation

The Regulations are part of the Treasury's Law Improvement Program, which includes incorporating matters contained in ASIC-made legislative instruments into the regulations and primary law. This is to improve oversight, the clarity and navigability of the law.

As explained in my previous response to the Committee, the exemptions set out in the Regulations are necessary on an ongoing basis. Therefore, we have not time-limited their operation. We considered the nature of the amendments and their content and decided to co-locate them with similar exemptions.

The Regulations remove the need for three ASIC-made legislative instruments by moving exemptions to the primary law into the regulations alongside existing exemptions in the *Corporations Regulations 2001* and the *National Consumer Credit Protection Regulations 2010*. The new exemptions apply in niche circumstances to a limited group of people and are best located in delegated legislation not the primary law. The new location of the exemptions in the regulations invites a higher degree of scrutiny and enhanced oversight than the former ASIC made legislative instruments. In addition to the usual parliamentary scrutiny that applies to most delegated legislation, the Office of Parliamentary Counsel must draft all regulations and the Governor General makes regulations following advice from the relevant Minister and the Federal Executive Council providing an additional layer of accountability. Moving matters from ASIC-made instruments into the appropriate location in the regulations better balances the need for improved clarity and navigability of the law with the need for responsiveness and flexibility, while maintaining and enhancing important parliamentary safeguards.

Whether the Corporations Act can be amended to include the relevant exemptions

The exemptions are located alongside and consistent with similar exemptions in the *Corporations Regulations 2001* and *National Consumer Credit Protection Regulations 2010*. Incorporating these specific exemptions directly into the primary law would be more complex and affect the clarity and navigability of the law for all users.

The exemptions from sunsetting

The exemptions from sunsetting that apply to the *Corporations Regulations 2001* and the *National Consumer Credit Protection Regulations 2010* have been in place since late-2017, with tabling of the regulations implementing the exemptions in both houses of the Parliament at that time .

Both regulations are integral to intergovernmental schemes between the Commonwealth, States and Territories and were exempt from sunsetting on that ground. The *Corporations Regulations 2001* are also exempt on the grounds of certainty to stakeholders, and the regular review and amendment of individual provisions. These factors have not changed since the grant of the exemptions in 2017.

Further information on existing legal hierarchy

As referred to in my previous response to the Committee, the *Corporations Act 2001* and *National Consumer Credit Protection Act 2009* provide legal authority for prescribing certain matters, including exemptions, in regulations, reflecting Parliament's intention that some details are appropriate for delegated legislation. Delegated legislation has an important role in removing prescriptive detail from the primary law. In this circumstance, the amendments are part of a broader package of Treasury's legislative stewardship workstream to improve the quality of Treasury legislation through the Law Improvement Program. The Government moved several instruments directly into the primary law, but in a small number of circumstances deemed that regulations more appropriate. Decisions about where individual exemptions sit within the legislative hierarchy established by the primary law occur on a case-by-case basis taking into account a range of matters such as the application of the exemptions, the time available to progress the change, and the location of similar exemptions.

I trust that the information provides further context about the drafting of the regulations and assists with the Committee's deliberations.

Yours sincerely

The Hon Stephen Jones MP

The Hon Anika Wells MP
Minister for Aged Care
Minister for Sport
Member for Lilley

Ref No: MS23-000387

Ms Fattimah Imtoual
Acting Committee Secretary
Senate Standing Committee for the Scrutiny of Delegated Legislation
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sdlc.sen@aph.gov.au

Dear Ms Imtoual

Thank you for your correspondence of 8 March 2023 regarding the Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022 (Instrument).

Responses to each of the committee's further queries are set out below.

Whether section 23BE of the instrument can be amended to expressly state that it is limited to actions that are available under the *Aged Care Quality and Safety Commission Act 2018* and the Aged Care Quality and Safety Commission Rules 2018, noting the minister's advice as to those limits

The Department of Health and Aged Care has advised that the Aged Care Quality and Safety Commission Rules 2018 (Commission Rules) can be amended through a new amending instrument to expressly state that section 23BE is limited to actions that are available under the *Aged Care Quality and Safety Commission Act 2018* (Commission Act) and the Commission Rules.

The department has advised that it will engage with the Aged Care Quality and Safety Commission and the Office of Parliamentary Counsel to have this new amending instrument drafted.

Whether the explanatory statement to the instrument can be amended to reflect those amendments

The explanatory statement for the new amending instrument will include information regarding the above.

The department will also include reference to the factors outlined in my previous response to the committee, dated 24 February 2023. Specifically, that actions taken under section 23BE of the Commission Rules would be informed by an assessment of:

- the nature and/or seriousness of the non-compliance with the Code of Conduct
- actions that would likely mitigate or remove the harm to aged care recipients
- the consequences of harm arising
- the likelihood of the harm being managed by an approved provider. This would include consideration of whether the approved provider:
    - demonstrates effective leadership and governance to prevent and manage risks to aged care recipients,
    - has a history of providing quality and safe care, and
    - monitors its own effectiveness and solves its quality problems.

The reasons for the differences in procedures under the Aged Care Quality and Safety Commission Rules 2018 and the National Disability Insurance Scheme (Code of Conduct) Rules 2018

As the committee notes, there are differences between the Commission Rules and the National Disability Insurance Scheme (Code of Conduct) Rules 2018.

The Australian Government is seeking to align worker regulation arrangements across the aged care and disability support sectors where it is reasonable and practical to do so. The two sectors, while similar, have some distinct differences and operate under different legislative frameworks and regulatory environments. As such, any alignment of regulation is subject to these parameters.

The Code of Conduct for Aged Care was based on the NDIS Code of Conduct, and in general terms, there is alignment between the two codes. As noted in the explanatory statement for the Instrument, differences between the two codes reflect the different nature of support provided in these sectors to appropriately meet the needs of recipients. The department consulted with the NDIS Quality and Safeguards Commission during the legislative drafting process to ensure alignment, where appropriate, of the Instrument with the NDIS regulatory framework. Some aspects of regulatory alignment are limited given the differences between the existing legislative frameworks.

If the committee would like further clarification on the above, the department is available to provide a briefing to the committee.

Thank you for writing on this matter.

Yours sincerely

Anika Wells

23 / 3 /2023

Senator the Hon Katy Gallagher

Minister for Finance
Minister for Women
Minister for the Public Service
Senator for the Australian Capital Territory

REF: MC23-000719

Senator Linda White
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Senator Linda

In the Delegated Legislation Monitor 3 of 2023, the Committee requested additional wording be included in the explanatory statement to the *Data Availability and Transparency Code 2022*. As the Code was made by the National Data Commissioner, I sought her advice on this request by the Committee. The Commissioner has advised me that additional wording is being included to supplement the explanatory statement as requested, and that a replacement explanatory statement will be published on the Federal Register of Legislation by 22 March 2023 for the Committee to consider.

Yours sincerely

Katy Gallagher

16.3.23

The Hon Michelle Rowland MP

Minister for Communications

Senator Linda White
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
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By email: sdlc.sen@aph.gov.au

Dear Chair

I am writing in relation to a request for further advice in the Scrutiny of Delegated Legislation Committee's Legislation Monitor 3 of 2023 on the *Telecommunications Amendment (Disclosure of Information for the Purposes of Cyber Security) Regulations 2022*, which introduced sections 15A and 15B into the *Telecommunications Regulations 2021* (the Regulations).

I thank the time the Committee for its consideration of the Instrument and for the opportunity to assist the Committee's scrutiny. Please find a response to the requests for further advice below.

The Committee requests the minister's further advice as to whether sections 15A and 15B of the instrument can be amended to enable the minister to specify and expand the class of disclosable information by legislative instrument, rather than notifiable instrument.

Section 276 of the *Telecommunications Act 1997* (the Act) provides a general prohibition on the use or disclosure of customer information by telecommunications providers to third parties. Contravention of the section is an offence punishable on conviction by two years imprisonment.

Subsection 292(1) of the Act provides an exception to this general prohibition, where a use or disclosure is not prohibited for circumstances that are prescribed in the Regulations.

Section 15A of the Regulations permit disclosures of '*specified information*' to financial services entities for the sole purpose of preventing, responding to, or addressing cyber security incidents, fraud, scam activity, identity theft or malicious cyber activity. Section 15B permits disclosures to Commonwealth and State authorities, only for the same purpose.

This narrows the class of documents or information that come within the scope of section 15A to the following documents or information held by the carrier or carriage service provider:

- government related identifiers of existing or past customers; and
- a form of 'personal information' of existing or past customers as specified by the Minister in a notifiable instrument under subsection 15A(5)(a) or (b).

For the second class, the type of information that is capable of being specified by the Minister is limited to 'personal information' as defined in the *Privacy Act 1988*. This covers a range of information about an individual such as names, addresses and dates of birth.

The ability of this information to be disclosed to a financial services entity, including any forms of personal information that would be specified by notifiable instrument, is tightly constrained by the conditions in subsection 15A(2), which must all be satisfied before disclosure can occur.

Paragraph 15A(2)(b) sets out the condition that the carrier or carriage service provider has received a written request from an officer of a financial services entity for the particular 'specified information' and/or 'specified document'. Paragraph 15A(2)(c) sets out a further condition about the particulars of the request, namely that the entity is seeking the information or document for the sole purpose of enabling the entity:

- to take steps to prevent a cyber security incident, fraud, scam activity or identity theft; or
- to take steps to respond to a cyber security incident, fraud, scam activity or identity theft; or
- to take steps to respond to the consequences of a cyber security incident, fraud, scam activity or identity theft; or
- to take steps to address malicious cyber activity.

If these two conditions are not properly satisfied (noting other conditions must still be satisfied), the disclosure remains prohibited by law, regardless of whether the '*specified information*' disclosed was a government related identifier, or information specified by notifiable instrument.

Noting disclosure relies upon a written commitment by a financial services entity that the information is required to protect compromised personal information from incidents such as identity theft or fraud, any expansion of the types of personal information that may be disclosed through notifiable instrument would only occur - and could only be disclosed - where it would serve to help protect the same personal information from being misused for criminal purposes.

A failure by a financial services entity to fulfil any of the positive written commitments given to the Australian Competition and Consumer Commission (ACCC) may constitute misleading and deceptive conduct pursuant to subsection 18(1) of the *Australian Consumer Law*, and the ACCC could take appropriate enforcement action.

Notwithstanding the information provided above, I appreciate that notifiable instruments may limit effective parliamentary scrutiny. Importantly, the Instrument is temporary – sections 15A and 15B of the Regulations automatically sunset after 12 months (13 October 2023).

While sections 15A and 15B of the Regulations may need to be remade at that point to ensure expiration does not create a gap in protecting Australians from fraudulent use of their personal information, it is my intention that any future measures to improve information security in these circumstances will occur in primary legislation where possible, and with regard to the findings of the Attorney-General's Privacy Act Review 2023.

The Committee requests the minister's further advice as to whether the explanatory statement can be amended to add the additional information the minister provided about other safeguards applying to the disclosure of relevant information.

I thank the Committee for its suggestion to amend the explanatory statement to outline the additional safeguards which apply to the disclosure of information under sections 15A and 15B of the Regulations.

These safeguards are currently drafted as conditions under section 15A(2) of the Regulations, which must all be satisfied in order for the exemption against the disclosure offence to apply. Information about these safeguards can be found in 'Attachment A – Notes to the *Telecommunications Amendment (Disclosure of Information for the Purposes of Cyber Security) Regulations 2022*' under 'New section 15A' and 'New section 15B'.

I trust this information is of assistance to the Committee.

Yours sincerely

Michelle Rowland MP
21 / 3 / 2023