

# Monitor 6 of 2023 – Ministerial Responses

## Contents

### Chapter 1: New and ongoing matters

Corporations Amendment (Litigation Funding) Regulations 2022 .....	2
Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022 .....	3
Corporations Amendment (Design and Distribution Obligations—Income Management Regimes) Regulations 2023 .....	5



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

Ref: MS23-000693

Senator Linda White  
Chair  
Senate Standing Committee for the Scrutiny of Delegated Legislation  
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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 in Delegated Legislation Monitor 4 of 2023. The Committee has sought advice in relation to the following regulations:

- the *Corporations Amendment (Litigation Funding) Regulations 2022*;
- the *Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022*; and
- the *Corporations Amendment (Design and Distribution Obligations—Income Management Regimes) Regulations 2023*.

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

Thank you again for your letter.

Yours sincerely

The Hon Stephen Jones MP

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## ATTACHMENT A

In Delegated Legislation Monitor 4 of 2023, you sought my advice on the following aspects of the *Corporations Amendment (Litigation Funding) Regulations 2022*:

- why the amendments this instrument make to the managed investment scheme regime (MIS), Australian Financial Services Licence (AFSL) requirements and product disclosure regime cannot be time-limited to three years or at least subject to sunseting, when the hawking-related amendments will be, noting the concerns around clarity and consistency in the law; and
- noting my previous advice that creating bespoke exemptions in the Act for litigation funding schemes would affect clarity and navigability, whether it is possible to move not only these exemptions but also other exemptions into the *Corporations Act 2001*.

### *Time-limiting the MIS, AFSL and product disclosure regime exemptions*

As I advised previously, the intention is that the amendments have ongoing operation and therefore they have no time limit. Time limiting the amendments would create significant commercial uncertainty for litigation funders and other market participants. Consistent with the broader *Corporations Regulations 2001*, the amendments are exempt from sunseting because it is part of an intergovernmental scheme, and it would be inappropriate for the Commonwealth to unilaterally sunset the regulations.

In two other responses to the Committee, I have advised that time limiting the hawking regulations was a once-off following discussions with the Committee to facilitate the resolution of that particular matter. I do not intend to time-limit the existing regulations that relate to the MIS regime, AFSL requirements or the product disclosure regime.

### *Moving all exemptions into the Corporations Act*

For more than two decades, successive Governments have enacted and amended the existing regulations relating to MISs, the AFSL requirements and the product disclosure regime, and the existing regulations are lengthy and complex. Moving them into the *Corporations Act 2001* would not improve the clarity and consistency of the primary law.

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, aiding with clarity and navigability of the law. Locating these and other exemptions in regulations reflects deliberate policy decisions and they reflect Parliament's will. As such, I do not intend to move additional parts of these measures into the primary law.

## ATTACHMENT B

You sought my advice regarding the *Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2023*, as to:

- further detail about the Law Improvement Program mentioned in my previous correspondence of 23 March 2023;
- whether the committee's principles were considered in developing the Law Improvement Program, particularly in relation to the principle in Senate standing order 23(3)(1);
- what factors were considered when deciding to shift time-limited exemptions from primary legislation into ongoing measures which are not subject to sunseting; and
- noting my previous advice that the exemption from sunseting provides 'certainty to stakeholders, and the regular review and amendment of individual provisions', further detail about what 'regular review' means in this context, including any formal review mechanisms that apply and the frequency of such reviews to ensure the measures remain fit for purpose and up to date.

### *Law Improvement Program*

The Treasury Law Improvement Program supports the regulatory stewardship of Treasury portfolio legislation. The Government intends to pursue regular improvement and maintenance opportunities under this Program to ensure that Treasury portfolio laws remain current, fit-for-purpose and transparent. The Rationalisation of Ending ASIC Instrument Measures (REAIM) work forms part of the Law Improvement Program. Other parts of the program include for example the longstanding Minor and Technical Amendments work.

### *Consideration of the committee's principals*

The REAIM stream of work is, in part, in response to earlier concerns by the Committee about ASIC's use of 'Henry VIII' powers to make legislative instruments that override the operation of the *Corporations Act 2001*. The measures in *Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2023* (and Schedule 3 of the Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2023) mitigate the use of these broad exemption powers by relocating the matters in the ASIC-made instruments into the most appropriate location in the primary law or regulations, as appropriate.

As outlined in my previous correspondences, the exemptions in the *Treasury Laws Amendment (Rationalising of ASIC Instruments) Regulations 2023* appropriately belong in the *Corporations Regulations 2001* and the *National Consumer Credit Protection Regulations 2010*, which as you are aware are exempt from sunseting. The regulations are exempt by virtue of regulations made under the *Legislation Act 2003*, which were subject to Parliamentary oversight and considered appropriate.

While Treasury takes into account the Committee's principles when designing new law, it is also necessary to balance the application of those principles with the policy intent of any particular legislative measure, the needs of stakeholders and complexities in designing functional and effective law across the portfolio's legislation.

### *Factors considered*

As explained in my previous response to the Committee, the decision to move the ASIC-made legislative instruments into the regulations occurred after an assessment of their most suitable location in the existing legislative hierarchy. I considered the content and nature of the necessary amendments and decided to co-locate these with similar exemptions. As the exemptions set out in these regulations are necessary on an ongoing basis, I did not consider sunseting them.

### *Regular review*

You have also asked what “regular review” means in the context of the sunseting exemption that applies to the *Corporations Regulations 2001*. The explanatory statement to the *Legislation (Exemptions and Other Matters) Amendment (Sunsetting Exemptions) Regulations 2017*, which exempted the *Corporations Regulations 2001* from sunseting, relevantly states that:

[The *Corporations Regulations 2001*] are currently being reviewed as part of other reform processes (including implementation of the recommendations of the Financial System Inquiry). Due to the size of the *Corporations Regulations*, the current approach to updating the Regulations to ensure they remain fit for purpose is to review and reform discrete sections of the Regulations on a thematic basis. These amendments have been supported by extensive consultation and often follow a comprehensive public review. This ensures that there is strong stakeholder engagement in the review process that enables stakeholders to more easily adapt to any change, as the reforms are limited to a particular set of issues each time.

As well as the continued need for stakeholder certainty and reliance on intergovernmental agreements, the above arrangements continue to apply to the review and amendment of the *Corporations Regulations 2001*. Relevant Government-initiated reviews since 2017 have included:

- the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019);
- the Review of insolvent trading safe harbour (2021);
- the Review of the Legislation Act (2021-2022); and
- the Quality of Advice Review (2023).

Additionally, there are the following ongoing reviews:

- the Review of the Australian Payments System;
- the Australian Law Reform Commission’s Review of the Legislative Framework for Corporations and Financial Services Regulation; and
- the review of bankruptcy law, announced by the Prime Minister in September 2022.

## ATTACHMENT C

You sought my advice regarding the *Corporations Amendment (Design and Distribution Obligations—Income Management Regimes) Regulations 2023* (DDO Regulations), as to:

- why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to introduce this exemption to requirements in the Corporations Act;
- how the exemption in this instrument is consistent with the exemptions in the ASIC Corporations (Design and Distribution Obligations Interim Measures) Instrument 2021/784, noting that the ASIC instrument appears to self-repeal on 5 October 2023 and is subject to sunseting while the *Corporations Regulations 2001* are not; and
- whether there is any intention to include these exemptions in the *Corporations Act 2001* and, if not, whether the instrument can be amended to provide that the measures cease within three years after commencement.

*Why it is considered necessary and appropriate to use delegated legislation*

The *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (DDO Act) amended the *Corporations Act 2001* to include the powers relied on to make the DDO regulations. The explanatory memorandum to the DDO Act states that the regulation making power was necessary to both include and exclude products from the DDO regime. The inclusion of the regulation making power was for “future proofing the new regime by providing flexibility to exempt products where appropriate.” Paragraph 1.36 of the explanatory memorandum lists matters that the government proposed to exclude from the regime using this regulation making power.

When regulations first made using this power, the Senate Standing Committee for the Scrutiny of Delegated Legislation raised scrutiny concerns with the then-Treasurer about the use of the regulations to exempt financial services from the primary law. The response to the Committee at that time noted:

“Given the breadth of the coverage of the design and distribution obligations, the number and technical nature of financial products within its scope and the variety of ways in which those products are distributed, it is desirable that limits to and expansions of the regime in relation to specific types of products may be effected by delegated legislation.”

This justification applies equally to the exemptions provided with these regulations, as the DDO regulations carve out specific financial products not intended to fit within the scope of the regime. Like the 2019 regulations, it is necessary and appropriate to achieve these exemptions via regulations.

I have previously provided additional information on how and why delegated legislation is necessary across the Treasury portfolio in my private letter to the Committee of 23 March 2023.

*Consistency*

The DDO set out in Part 7.8A of the *Corporation Act 2001* promote the provision of suitable financial products to consumers. The obligations require the issuer of a financial product to determine an appropriate target market for their financial product by making a target market determination. Target market determinations describe the class of consumers who are the target market and sets out arrangements for the distribution of the product.

The income management accounts and cashless welfare restricted bank accounts established under the *Social Security (Administration) Act 1999*, and their associated access products, were exempt financial products under subclause 7(4) of the *ASIC Corporation (Design and Distribution Obligation Interim Measures) 2021/784* (ASIC Interim Instrument). These financial products were exempt as the design and distribution features of the products were set out in the *Social Security (Administration) Act 1999* and not determined by the issuer of the financial product. The explanatory statement to the ASIC Interim Instrument notes that

“...these interim measures provide certainty on the application of the DDO ahead of legislative changes proposed to be made by the Government to give effect to its intended operation.”

The *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Act 2022* repealed the cashless welfare restricted bank account and introduced the BasicsCard bank account, which became available on 6 March 2023. Income management accounts under the *Social Security (Administration) Act 1999* were not repealed and continue to operate.

The purpose of the DDO regulations is to provide an exemption to issuers of an income management account and provide an exemption to the new BasicCard bank account from the obligation to make a target market determination under Part 7.8A of the Act. These accounts manage certain welfare payments to eligible people under the *Social Security (Administration) Act 1999*.

These exemptions are consistent with the rationale for the exemption provided to cashless welfare restricted bank accounts and income management accounts under the ASIC Interim Instrument. That is, the design and distribution features of these financial products are set out in the *Social Security (Administration) Act 1999*, and they are not determined by the issuer of the financial product. This is consistent with other financial products that are subject to product specific legislation and are also exempt from the obligation to make a target market determination, including for example, MySuper products.

#### *Amending the Act or time limiting the measures*

For the reasons set out above, I do not intend to amend the *Corporations Act 2001* to include the above matters nor amend the *Corporations Regulations 2001* to provide that these measures cease after three years.