



Delegated Legislation Monitor 3 of 2021

Tabling Statement

Thursday, 18 February 2021

I rise to speak to the tabling of the Scrutiny of Delegated Legislation Committee's *Delegated Legislation Monitor 3 of 2021*.

I would like to take this opportunity to draw attention to a number of key issues and developments arising from this Monitor.

In particular, I would like to provide the Senate with an update on the committee's engagement with the Treasurer in relation to five legislative instruments made by the Australian Securities and Investments Commission.

These instruments address a range of subject matters within ASIC's portfolio, by providing for exemptions from, and modifications to, the operation of certain provisions of the *Corporations Act 2001* and other Acts of Parliament.

While they alter the operation of primary legislation made by this Parliament, these instruments appear to be intended to remain in force for substantial periods of time – ranging from five to 10 years. As I have previously advised the chamber, this contravenes the committee's longstanding expectation that instruments 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. The committee considers that a shorter sunset period is essential to ensure that there is a minimum degree of regular parliamentary oversight of such instruments. These instruments raise broader, systemic concerns about the application of ASIC's exemption and modification powers.

The committee acknowledges that there are circumstances where it may be appropriate for ASIC to use delegated legislation to quickly address anomalous or inconsistent outcomes in the application of primary legislation. However, the committee considers that a three-year timeframe for such instruments is appropriate.

This allows ASIC to rapidly address such issues, while providing a significant period of time while the instrument is in force to consider whether the modification or exemption provided by the instrument will be required for a longer period. If it is determined that a modification or exemption is required for a longer period, the committee considers that certainty for business and the market can be best provided by incorporating the modification or exemption onto the face of the primary legislation. At a minimum, the committee considers that Parliament should at least be given a regular opportunity to review and scrutinise modifications or exemptions to primary legislation that it has enacted. Indeed, the concerns regarding these ASIC instruments raise a much broader systemic problem across government. For this reason, the committee continues to apply its approach consistently.

I take this opportunity to note that this committee has advised the Senate in relation to scrutiny concerns in executive-made law since 1932. It is one of the oldest Senate committees and has played a marked role in the Senate's history.

I remind the chamber that the committee is, and has always been, a non-partisan committee. The committee has consistently considered the technical scrutiny aspects of delegated legislation in a bipartisan manner, to support the Senate in its role in overseeing the law-making actions of the government of the day.

It is incumbent on the committee to bring these issues to the attention of the Senate in accordance with standing orders and long-established practice. I also remind the chamber that there have been no votes—I stress no votes—in the history of this committee. The committee, in its entire history since 1932, has never had a formal vote. This reflects the gravity and importance of the committee's work to senators from across the political spectrum.

Since October last year, the committee has been corresponding with both the Treasurer and the Assistant Minister for Superannuation, Financial Services and Financial Technology to resolve its scrutiny concerns regarding these instruments. The committee has also lodged notices of motion to disallow each of the instruments in order to provide it with additional time to resolve its scrutiny concerns. Most recently, the committee drew its scrutiny concerns to the attention of the Senate in *Delegated Legislation Monitor 2 of 2021* and requested that the Treasurer amend each of the instruments to ensure that, in effect, they cease to operate three years after commencement.

The committee is concerned that the Treasurer has yet to respond to the committee's most recent correspondence.

This lack of timely engagement prevents the committee from fulfilling its vital role of advising the Senate about technical scrutiny issues arising in delegated legislation. The committee is simply asking the Treasurer to amend these five instruments so that they will cease to have effect after three years. This will not preclude the instrument being remade at the end of the three-year period and being renewed thereafter if it is determined that the modification is still required.

This is a relatively minor change to each instrument which would represent a major increase in the ability of the Parliament to scrutinise these measures which affect the operation of primary legislation.

As the Treasurer has not yet responded, the committee is unable to conclude its examination of these instruments and will keep the Senate informed in relation to any future developments, including whether the committee recommends that the Senate disallow these instruments.

By contrast, I also take this opportunity to emphasise that other members of the executive have continued to engage productively and collaboratively with the committee in resolving its technical scrutiny concerns. In particular, I draw the chamber's attention to a significant undertaking outlined in this Monitor in relation to the Veterans' Affairs (Treatment Principles – Rehabilitation in the Home and Other Amendments) Determination 2020.

The committee has corresponded extensively with the Minister for Veterans' Affairs and his department in relation to concerns about the lack on independent merits review of decisions made under the instrument.

I am pleased to inform the chamber that as a result of this engagement, this instrument has been revoked and will be remade to ensure that the committee's scrutiny concerns are addressed. I take this opportunity to thank the Minister for Veterans' Affairs and his department, as well as the Military Rehabilitation and Compensation Commission and the Repatriation Commission, for their willingness to engage constructively with the committee to resolve this matter.

The satisfactory resolution of this matter provides a model for how ministers and agencies can engage with the committee in the future, to ensure that delegated legislation is made in a manner that protects personal rights and liberties and ensures effective parliamentary oversight of executive-made laws.

With these comments, I commend the committee's *Delegated Legislation Monitor 3 of 2021* to the Senate.