



Delegated Legislation Monitor Tabling Statement

Wednesday 29 March 2023

I rise to speak to the tabling of the Senate Standing Committee for the Scrutiny of Delegated Legislation's *Delegated Legislation Monitor 4 of 2023*.

This monitor reports on the committee's consideration of **91** legislative instruments registered between 21 February and 15 March 2023. It also details the committee's ongoing consideration of instruments registered in previous periods and concludes its engagement with the relevant minister in relation to three instruments.

I would firstly like to draw the Chamber's attention to the committee's comments on three instruments in the Treasury portfolio which create exemptions to primary legislation. The committee's long-standing view is that modifications to, or exemptions from, primary legislation should be set out in the primary legislation itself. However, when these measures are in delegated legislation, they should be time limited, in order to facilitate regular parliamentary scrutiny and so that they do not operate as a de facto amendment to primary legislation. This is a significant and ongoing scrutiny concern for the committee more broadly, and accordingly it continues to closely engage with the Assistant Treasurer in relation to this issue.

The first two of these instruments are the **Corporations Amendment (Litigation Funding) Regulations 2022** and **Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022**, which I mentioned in my tabling statement on 8 March 2023. Both instruments introduce exemptions to primary legislation which

appear to be ongoing, as they are inserted into regulations that are exempt from sunseting. Further, the rationalising ASIC regulations have the effect of moving exemptions that were previously time limited, or at least subject to sunseting, into principal regulations which have no such time limits.

For this reason, the committee sought the Assistant Treasurer's advice about the appropriateness of including such exemptions in delegated legislation that is exempt from sunseting, and whether they could instead be included in primary legislation. The Assistant Treasurer's advice in response was that placing the exemptions in delegated legislation is necessary for reasons of certainty, to create consistency with similar exemptions which would assist with clarity and navigability. He also indicated that the rationalising ASIC regulations are part of the Treasury's law improvement program which will incorporate matters in ASIC-made legislative instruments into the Corporations Regulations and primary law. Unfortunately, these responses did not address the committee's scrutiny concerns and the committee continues its engagement, including to seek further advice about the location of the exemptions, the appropriateness of time-limiting some exemptions to the Corporations Act but not others, and further details about the Law Improvement Program.

Finally, in this delegated legislation monitor, the committee has commented on the **Corporations Amendment (Design and Distribution Obligations—Income Management Regimes) Regulations 2023**. This instrument similarly inserts ongoing exemptions to certain obligations in the Corporations Act for issuers of income management accounts. The committee notes that the explanatory statement indicates that the exemptions it introduces are consistent with those in the ASIC Corporations (Design and Distribution Obligations Interim Measures) Instrument 2021/784. However, while the ASIC instrument appears to be both subject to sunseting and to self-repeal in October 2023, it was unclear to the committee why this instrument does not appear to be similarly time limited. Accordingly, the

committee is seeking the Assistant Treasurer's advice as to the appropriateness of including the exemptions in delegated legislation that is exempt from sunseting, and the inconsistency with the ASIC instrument.

The committee will continue its engagement with the Assistant Treasurer on this issue and carefully scrutinise delegated legislation which contains ongoing measures that modify or create exemptions to primary legislation., Parliamentary oversight and the duration of such instruments are key considerations for the committee under the Senate standing orders.

I would next like to draw the Chamber's attention to the three instruments of which the committee has concluded its examination. This includes the **Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022**. While this instrument grants a broad discretionary power to the Aged Care Commissioner, in response to the committee's request, the Minister for Aged Care undertook to make further legislative amendments to reflect the limitations provided under the relevant Act and rules, and to prepare an explanatory statement to reflect these limits. I thank the minister for her helpful engagement on this issue.

I am also pleased to report that the committee has concluded its examination of the **Data Availability and Transparency Code 2022**, following constructive engagement with the Minister for Finance and the Data Commissioner. In response to the committee's requests, the Minister provided advice about the meaning of a number of discretionary terms in the Code and undertook to include this information in the explanatory statement. With the inclusion of this information in the explanatory statement, the committee has resolved to conclude its examination of this instrument.

Finally, I would like to mention the **Telecommunications Amendment (Disclosure of Information for the Purpose of Cyber Security) Regulations 2022**. The committee initially raised concerns about this instrument because it had the effect of enabling the minister to expand by a notifiable instrument, the type of personal information which could be disclosed to financial services entities and government agencies. The committee's view is that classifying instruments as notifiable, rather than legislative instruments, significantly limits Parliament's scrutiny function as these instruments are not subject to processes including tabling, disallowance and sunseting. These concerns are heightened where the subject matter is significant, such as where it relates to privacy.

However, the committee resolved to conclude its examination of this instrument, in light of advice provided by the Minister for Communications that the measures will self-repeal in October 2023. Further, in acknowledgement of the potential limits notifiable instruments have on parliamentary scrutiny, the minister indicated that if similar measures were introduced in future, they would be included in primary legislation, where possible, and with regard to the Attorney-General's Privacy Act review. I thank the minister for her constructive engagement on these issues and welcome her undertakings.

With these comments, I commend the committee's *Delegated Legislation Monitor 4 of 2023* to the Senate.