



AUSTRALIAN
SENATE

**Senate Standing Committee for the
Scrutiny of Delegated Legislation**

Parliament House, Canberra ACT 2600
02 6277 3066 | sdlc.sen@aph.gov.au
www.aph.gov.au/senate_sdlc

8 October 2020

Senator the Hon Jane Hume
Assistant Minister for Superannuation, Financial Services and Financial Technology
Parliament House
CANBERRA ACT 2600

Via email: Senator.Hume@aph.gov.au

CC:

Dear Assistant Minister,

ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98 [F2020L00962]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to this matter.

Modification of primary legislation

Parliamentary oversight

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be included in primary, rather than delegated, legislation). This includes whether an instrument modifies or exempts persons or entities from the operation of primary legislation. In addition, Senate standing order 23(3)(k) requires the committee to examine each instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes whether any instrument may exclude or limit parliamentary oversight.

Section 7 of the instrument modifies the operation of specified provisions of the *Corporations Act 2001* (Corporations Act) and the *National Consumer Credit Protection Act 2009* (Credit Act) to provide that financial firms must comply with their internal dispute resolution procedures. Section 8 of the instrument modifies the definition of 'small business' in relation to internal dispute resolution in Chapter 7 of the Corporations Act so that it aligns with the definition of 'small business' in the rules of the Australian Financial Complaints Authority in relation to external dispute resolution.

Part 3 of the instrument is made under subsections 926A(2) and 1020F(1) of the Corporations Act and subsection 109(3) of the Credit Act. Those subsections allow ASIC to exempt persons, entities and classes of persons and entities from provisions of the Corporations Act or Credit Act, or to declare that certain provisions of the Acts apply as if modified or varied.

Provisions that modify or exempt persons or entities from the operation of primary legislation may limit parliamentary oversight, and may subvert the appropriate relationship between Parliament and the executive. The committee considers that such measures should be included in primary, rather than delegated, legislation. When an instrument nevertheless modifies the operation of primary legislation, the committee considers that a sound justification for the use of delegated legislation should be provided, and the instrument should be time-limited.

In this instance, the explanatory statement to the instrument states that it is appropriate to set out these matters in delegated legislation as it provides for greater flexibility to respond to market developments, and will ensure that primary legislation can respond to poor industry compliance practices in a way that is consistent with the legislative policy of promoting consumer protection.

While the committee acknowledges this explanation, it is concerned that these measures appear to be intended to remain in force for at least 10 years (until the instrument sunsets under the *Legislation Act 2003*). The committee's longstanding view is that provisions 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. This is to ensure a minimum degree of regular parliamentary oversight.

In light of this, from a scrutiny perspective the committee considers that Part 3 of the instrument should be amended to specify that it ceases to operate three years after it commences. If it becomes necessary to extend the operation of these provisions, the committee considers that this should be done by amending the primary legislation or via a subsequent legislative instrument that is subject to disallowance and parliamentary scrutiny.

The committee therefore requests your advice as to whether the instrument could be amended to specify that Part 3 ceases to operate three years after it commences.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **22 October 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



SENATOR THE HON JANE HUME
ASSISTANT MINISTER FOR SUPERANNUATION,
FINANCIAL SERVICES AND FINANCIAL TECHNOLOGY

Ref: MS20-002269

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Suite S1.111
Parliament House
CANBERRA ACT 2600

20 OCT 2020

Dear Senator ~~Fierravanti-Wells~~,

I am writing in response to your letter of 8 October 2020, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee). In your letter you have sought advice about the operation of the *ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98* (the Instrument).

The Instrument was made on 30 July 2020 and operates alongside the ASIC Regulatory Guide 271, *Internal dispute resolution* (RG 271). Under the *Corporations Act 2001* (Corporations Act) and the *National Consumer Credit Protection Act 2009* (Credit Act), financial firms are required to have internal dispute resolution (IDR) procedures that meet standards and requirements made or approved by ASIC.

The Instrument was made following a significant program of work undertaken by ASIC to review IDR standards and requirements. This program included consumer research, deep-dive onsite visits at 5 large banks and extensive industry and consumer consultation. ASIC understands that financial firms are currently making changes to their systems and procedures in order to comply with the new IDR standards and requirements set out in RG 271 that commence on 5 October 2021. ASIC advises that the current IDR Regulatory Guide (RG 165) has been in place for around 20 years.

Part 2 of the Instrument specifies the new enforceable IDR standards and requirements by reference to RG 271.

Part 3 of the Instrument modifies the Corporations Act and Credit Act in relation to two specific cases:

- the definition of small business in the Corporations Act for the purposes of IDR (the small business modification); and
- modification of the Corporations Act and the Credit Act to provide clarity on the face of the law that financial firms comply with the IDR standards and requirements (the clarification modification).

During consultation, ASIC was transparent to stakeholders about its intention to make both the small business and the compliance modifications.

The intention of the small business modification is to ensure an effective transition between IDR and AFCA for Australian small businesses that have a complaint about a financial firm. ASIC notes that the definition of small business under the AFCA Rules was approved by the then Minister as part of the authorisation of the AFCA scheme in April 2018. It is worth noting that there is no corresponding modification to the Credit Act as that legislation does not cover business lending.

ASIC understands that in practice this will have little material impact on the scope of IDR offered by many financial firms, but it will provide small businesses with certainty about their rights. ASIC expects that financial firms will now ensure that their procedures are updated with this definition.

In relation to the clarification modification, the financial sector legislation imposes an obligation on financial firms to have an IDR procedure that complies with the standards and requirements made or approved by ASIC and which covers complaints made by retail clients in relation to the financial services provided or the credit activities engaged in by the firm or its representatives. The clarification modification is intended to clarify the law, and to remove any doubt, that financial firms must not only have IDR procedures that meet ASIC's standards and requirements, they must also comply with those procedures. As contraventions of the primary IDR obligations may give rise to civil penalty consequences or constitute an offence under the existing legislation, the same civil penalty consequences or offences will flow through to the new modified clarificatory obligations.

ASIC believes that it would not be desirable to amend the Instrument to specify that it expires 3 years after commencement. ASIC believes that selecting these parts of the Instrument to operate for a shorter duration will increase financial firm uncertainty about their ongoing obligations. This includes uncertainty about the durability of systems and training changes that these financial firms are making now. Instead, Part 3 of the Instrument reflects an appropriate and efficient application of ASIC's powers.

In addition to this, the Instrument was registered and commenced on 30 July 2020. However, ASIC has confirmed, that the new IDR standards and requirements in RG 271, as well as the modifications that accompany them, do not effectively commence until 5 October 2021 because the instrument only applies to complaints received by financial firms on or after that date. ASIC published both the Instrument and RG 271 in June 2020 in order to give industry an effective transition period of more than 15 months.

I trust this information will be of assistance to you.

Yours sincerely

Senator the Hon Jane Hume



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Scrutiny of Delegated Legislation

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12 November 2020

Senator the Hon Jane Hume
Assistant Minister for Superannuation, Financial Services and Financial Technology
Parliament House
CANBERRA ACT 2600

Via email: Senator.Hume@aph.gov.au

CC: shelby.brinkley@treasury.gov.au

Dear Assistant Minister,

**ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution)
Instrument 2020/98 [F2020L00962]**

Thank you for your response of 20 October 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 11 November 2020 and has resolved to seek your further advice about the issues outlined below.

Modification of primary legislation

Parliamentary oversight

You have advised that the Australian Securities and Investment Commission (ASIC) considers that it is not desirable to amend the instrument to specify that Part 3 of the instrument expires three years after it commences. Your response indicates that ASIC considers that limiting the operation of those provisions would increase financial firm uncertainty about ongoing obligations as firms transition to the new internal dispute resolution (IDR) standards.

Your response further notes that the new IDR standards, and the modifications that accompany them, will not effectively commence until 5 October 2021 because the instrument only applies to complaints received by financial firms on or after that date.

While acknowledging this advice, the committee reiterates its longstanding scrutiny view that exemptions from, and modifications to, the operation of primary legislation should not ordinarily be included in delegated legislation. In this instance, the committee notes that Part 3 of the instrument makes substantive modifications to certain provisions of the *Corporations Act 2001* and the *National Consumer Credit Protection Act 2009*. Noting the significance of these modifications and ASIC's concerns about financial firm uncertainty, it

is unclear to the committee why the primary legislation could not be amended to include the modifications.

It is the committee's preference that these matters are included on the face of the primary legislation. However, if it is nevertheless considered necessary to include the matters in delegated legislation, the committee maintains the view that the instrument should at least be subject to more regular parliamentary oversight than other legislative instruments.

In light of your advice regarding the transition period, the committee considers that, if the matters are not included on the face of the primary legislation, the instrument should be amended to specify that Part 3 of the instrument ceases to operate five years after it commences. Amendments to this effect would guarantee that the relevant provisions would be able to operate for a significant period, whilst also ensuring more regular parliamentary oversight of the measures.

In light of the matters outlined above, the committee would appreciate your advice as to:

- **whether it would be appropriate to include the modifications made in Part 3 of the instrument in primary, rather than delegated, legislation, noting that this would provide certainty for financial firms; and**
- **if the modifications are not able to be set out in primary legislation, whether the instrument could be amended to specify that Part 3 of the instrument ceases to operate five years after its commencement.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **26 November 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



**THE HON JOSH FRYDENBERG MP
TREASURER**

Ref: MS20-002561

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Via email: sdlc.sen@aph.gov.au

Dear Senator Fierravanti-Wells

Thank you for your letter dated 12 November 2020, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee), requesting further advice in relation to *ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98* [F2020L00962] (the Instrument). I understand that the Committee agreed to provide an extension to 2 December 2020 to receive a reply on this matter.

The Committee has requested further advice in relation to the modification of primary legislation and parliamentary oversight. Specifically, the Committee has requested advice as to:

- whether it would be appropriate to include the modifications, which are made in Part 3 of the Instrument, in primary legislation rather than delegated legislation; and
- if the modifications are not able to be set out in the primary legislation, whether the Instrument could be amended to specify that Part 3 of the Instrument ceases to operate 5 years after its commencement.

Part 3 of the Instrument is intended to assist in providing certainty about the durability of systems, and procedural and training changes that firms are currently making to comply with the new internal dispute resolution standards and requirements which take effect from 5 October 2021.

That said, the Government shares the Committee's concerns that there be sufficient Parliamentary oversight. We will continue to engage with ASIC to stress that the period of operation of Instruments made by them should be consistent not only with the policy intent of the underlying primary legislation and the need to minimise any regulatory burden imposed on individuals or entities, but also importantly with the need for Parliamentary oversight of instruments that modify the operation of the primary legislation.

We will engage with ASIC as they monitor the operation of the Instrument and ensure that they take steps to amend the Instrument in the unlikely event it becomes unfit for purpose.

I trust this information will be of assistance to the Committee.

Yours sincerely

THE HON JOSH FRYDENBERG

2 / 12 / 2020



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Senate Standing Committee for the
Scrutiny of Delegated Legislation

Parliament House, Canberra ACT 2600
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10 December 2020

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: Josh.Frydenberg.MP@aph.gov.au

CC: Senator.Hume@aph.gov.au; tsrdlos@treasury.gov.au;
committeescrutiny@treasury.gov.au

Dear Treasurer,

ASIC Corporations – various instruments [F2020L00962] [F2020L01045] [F2020L01064] [F2020L01066] [F2020L01069]

Thank you for your responses of 2 December 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instruments. The committee considered your responses at its private meeting on 9 December 2020 and has resolved to seek your further advice about the issues outlined below.

Modification of primary legislation

Parliamentary oversight

The committee welcomes your advice that the government shares its concerns about the need to ensure appropriate parliamentary oversight of delegated legislation. It also welcomes your commitment to continuing to engage with the Australian Securities and Investments Commission (ASIC) to stress that the period in which the instruments are operational should be consistent with not only their policy intent and the need to reduce regulatory burdens, but also with the need to ensure regular parliamentary oversight.

Against this background, the committee notes your advice that it is not appropriate to amend these particular instruments to the time periods requested by the committee, as it is likely that the relevant measures will have ongoing relevance, and will therefore need to extend beyond those proposed periods. However, in this regard, it is unclear to the committee why ASIC could not simply amend the relevant instruments just prior to the time the instruments would cease, if the measures needed to be in place for a longer period.

In the committee's view, such an approach would facilitate appropriate parliamentary oversight of measures which modify primary legislation, without preventing ASIC from continuing those measures in a subsequent instrument, should they still be required.

In the interests of promoting parliamentary oversight of delegated legislation, the committee therefore requests your more detailed advice as to why it would not be possible for ASIC to amend each instrument to limit its duration to that previously suggested by the committee and, if necessary, subsequently amend the instruments if the relevant measures are still required beyond the cessation time.

The committee's expectation is to receive a response in time for it to consider and report on these instruments prior to consideration of the disallowance notices which are currently in place. Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **13 January 2020**.

The committee also notes that one of the instruments was made in response to the COVID-19 pandemic. The committee's views in relation to COVID-19 related delegated legislation are set out in detail in the interim report of the committee's inquiry into the exemption of delegated legislation from parliamentary oversight. The interim report highlights the importance of ensuring parliamentary oversight during times of emergency and notes that COVID-19 serves to shine a light on the deeper, systemic issues which inhibit Parliament from effectively overseeing delegated legislation at all times, not just during emergencies.

The committee will continue to closely monitor COVID-19 related delegated legislation in the future to ensure that it complies with the recommendations set out in the interim report.

A copy of the committee's interim report is available at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Interim_report.

Finally, please note that, in the interests of transparency this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS21-000070

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Via email: sdlc.sen@aph.gov.au

Dear Senator Fierravanti-Wells

Thank you for your letter dated 10 December 2020, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee), requesting further advice in relation to:

- *ASIC Corporations (Amendment) Instruments 2020/721* (the Amendment Instrument);
- *ASIC Corporations (IPO Communications) Instrument 2020/722* (the IPO Instrument);
- *ASIC Corporations (Hardship Withdrawals Relief) Instrument 2020/778* (the Hardship Instrument);
- *ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787* (the Litigation Instrument); and
- *ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98* (the IDR Instrument)(together, the instruments).

The Committee has asked whether these instruments could be amended to bring forward their respective sunseting dates to either three or five years after the relevant instrument is made. I understand that the Committee agreed to provide an extension to 29 January 2021 to receive a reply on this matter.

ASIC along with other regulators has a range of powers to make legislative instruments. For ASIC in particular this includes powers to make legislative instruments that modify the effect of the law or exempt a class of persons or products from requirements in the law (exemption and modification powers). Other powers provide ASIC and other regulators with the ability to set standards or make rules via legislative instrument. Legislative instruments made under these powers are, as with all Commonwealth legislative instruments, subject to a default 10 year sunseting period but may provide for a shorter sunseting period. The appropriate length of the sunseting period for

individual legislative instruments will vary depending on the nature of the instrument and the circumstances it addresses.

As I have noted in my previous correspondence with the Committee, the Government shares the Committee's objective that the period of operation of legislative instruments should be consistent with maintaining appropriate Parliamentary oversight, while also having consideration for the underlying policy intent of the relevant primary law and the regulatory burden imposed on individuals and entities. With these considerations in mind, in my view, a 10 year sunset period will generally be more appropriate where:

- a) The instrument is made under a specifically delegated power which is set out in the primary legislation and is intended to complement the requirements or objectives in the primary legislation.
- b) There would be appreciable business uncertainty about the treatment of, or framework for, business activities giving rise to significant commercial risks and/or costs if the sunset period was shorter. For example, uncertainty which impacts investment in compliance systems, or the effective operation of a market, are examples where this principle may apply.
- c) The legislative instrument deals with confined or unique circumstances affecting a particular class of entities or products which do not fit within the strict operation of the primary law but would result in anomalous or inconsistent outcomes given the intent of the primary legislation as set by Parliament.
- d) The legislative instrument makes minor and technical changes which support the practical operation of the legislative regime.

In my view, where these principles are not met a shorter sunset period, such as a five year sunset period, will generally be more appropriate.

These principles have been shared with ASIC and I have communicated to ASIC that I expect ASIC to take these principles into consideration in determining the appropriate sunset period for legislative instruments.

I note that the Committee has also suggested that a three year sunset period would be appropriate for some instruments. While there will be circumstances where it is appropriate for a legislative instrument to operate for a period of three years or less, for example where the instrument is required to address short-term transitory circumstances, this will not always be the case and there are a range of practical considerations with instruments sunset after three years.

Amending and remaking of an expiring instrument is not a mere technical or procedural formality and each time an instrument approaches its sunset date, the instrument must be reviewed and consulted upon to determine whether it remains fit-for-purpose. This process of unmaking or remaking an instrument imposes costs on those affected by or concerned with the instrument. This includes costs associated with engaging with consultation processes and commercial uncertainty for businesses about whether an instrument will be extended or what its future form will be. For more complex instruments, the review, consultation and assessment process will typically begin 18 months to two years before the sunset date for the instrument.

For these reasons, a five year sunset period is, in my view, a more appropriate duration for most instruments that do not meet the principles I have outlined above.

Parliamentary Oversight of the Instruments

Applying the above principles, I consider that the default length of ten years remains appropriate for the Amendment Instrument, IPO Instrument and the IDR Instrument for the reasons set out below. I note that the Hardship Instrument already has a sunset period of 5 years which I also consider to be appropriate. However, in assessing the Litigation Instrument against the principles, I support the Committee's suggestion for a shorter sunset period and consider it appropriate for it cease to operate 5 years after commencing.

Litigation Instrument

While the Litigation Instrument was made to address business uncertainty while litigation funders were transitioned into the managed investment scheme (MIS) regime, it was not made under a specifically delegated power and the changes, particularly when considered in the cumulative, are more than minor.

The Litigation Instrument was made on 22 August 2020, on the same day that Government regulations, through *Corporations Amendment (Litigation Funding) Regulations 2020*, removed the exemption for litigation funders from the MIS and Australian Financial Services License regimes. ASIC's Explanatory Statement for the Litigation Instrument clarifies that the instrument provides relief to facilitate the implementation of the new regulatory framework for litigation funding schemes. As my letter of 2 December 2020 stated, the matters addressed will have ongoing application and relevance to litigation funding schemes.

The Litigation Instrument makes some exemptions from the MIS regime that are technical and support the operation of the legislative regime, but some of them are exemptions from significant components of the MIS regime. Some of the core requirements for most MISs relate to the provision and content requirements of Product Disclosure Statements, the process for withdrawing from a MIS, and to maintain a register of members – all of which are amended for litigation funding schemes through the instrument. The exemptions from these requirements provided in this instance are therefore more suited to sunset after five years, rather than ten.

My support of the Committee's view that a shorter sunset period is appropriate for this instrument has been communicated to ASIC.

The IDR Instrument

The IDR Instrument updates standards and requirements for internal dispute resolution processes under specific powers provided by the Parliament, with only minor and technical modifications to the primary law. Industry is now undertaking planning, systems development and training to ensure compliance with the requirements of the instrument which represents a significant undertaking for financial firms. Given the scale of investment and training required, I consider a shorter sunset period would be lead to uncertainty and additional cost for businesses such that the default 10-year sunset period remains appropriate for the IDR Instrument.

The Amendment and IPO Instruments

As outlined in my letter of 2 December 2020, the Amendment Instrument provides relief to disregard the relevant interests of the issuer, underwriter or lead manager for the purposes of takeover provisions where those relevant interests arise because of voluntary escrow arrangements. As ASIC has stated in the Explanatory Statement, these types of relief applications are minor and technical in nature and involve the application of existing policy to new situations. Voluntary escrow – where existing security holders agree to hold their securities for a certain period of time in order to promote investor confidence in the IPO – is not a method of takeover and ASIC's

instrument makes a technical change that supports the effective functioning of the IPO market and is consistent with the intent of the takeover provisions.

The IPO Communications Instrument is similarly focussed on reducing the costs associated with an IPO, by providing relief from advertising restrictions in the Act to enable issuers to communicate limited information to security holders before a disclosure document is lodged with ASIC. This information is limited to non-promotional factual material. This remains consistent with the intent of the law – to prevent issuers from seeking to induce investors without adequate disclosure being made – while allowing issuers to undertake the necessary preparatory work. This technical change provides certainty to businesses and allows for consistent and efficient outcomes in IPOs without contradicting the intent of the legislation.

Given the two instruments facilitate business certainty, deal with anomalous outcomes, and are minor and technical changes that support the practical operation of the legislative regime, I consider the default 10 year period to be appropriate.

The Hardship Instrument

The Hardship Instrument is currently scheduled to sunset after five years. This relief is intended to respond to the immediate and further possible medium-term effects of the COVID-19 pandemic, by allowing funds to respond to the hardship faced by their investors without seeking individual relief from ASIC. Providing general relief rather than relief on a case-by-case basis is a minor change that gives businesses certainty that they can respond to hardship claims quickly. It does not impose an obligation on the entity, but rather provides flexibility during the particular set of circumstances that may arise during a period of economic volatility. A five year duration for this instrument is an appropriate length of time to evaluate these particular circumstances, based on the experience during the Global Financial Crisis.

I trust this information will be of assistance to the Committee.

Yours sincerely

THE HON JOSH FRYDENBERG MP

23 / 1 /2021



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Scrutiny of Delegated Legislation**

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4 February 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au
CC: committeescrutiny@treasury.gov.au

Dear Treasurer,

ASIC Corporations – various instruments [F2020L00962] [F2020L01045] [F2020L01064] [F2020L01066] [F2020L01069]

Thank you for your response of 28 January 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instruments.

The committee considered your response at its private meeting on 3 February 2021. Whilst noting your advice, the committee remains concerned that these five instruments raise significant scrutiny concerns that should be brought to the attention of the Senate.

The committee's scrutiny concerns are detailed in Chapter 1 of its *Delegated Legislation Monitor 2 of 2021*, available on the committee's website at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Monitor.

As set out in the Monitor, the committee welcomes your constructive engagement in relation to the committee's scrutiny of these instruments. However, the committee remains of the view that each of the five ASIC instruments should be amended to limit their duration to that previously suggested by the committee.

The committee has already given protective notices of motion to disallow each of the five instruments to provide the Senate with sufficient time to consider the committee's scrutiny concerns. The committee has resolved not to withdraw these notices of motion in order to highlight the significance of its concerns.

Your response to the committee's request for further advice in relation to the instruments, as set out in the Monitor, will inform the committee's consideration of whether to withdraw the notices of motion to disallow these instruments.

To facilitate the committee's timely consideration of these matters and noting that the disallowance period for the ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98 [F2020L00962] expires on 22 February 2021, the committee would appreciate your response by **11 February 2021**.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email at sdlc.sen@aph.gov.au.

Yours sincerely,

Senator ~~the~~ Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS21-000114

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Via email: sdlc.sen@aph.gov.au

Dear Senator

Thank you for your correspondence, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation, concerning the following instruments that are subject to protective disallowance motions:

- *ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98* [F2020L00962] (the IDR Instrument), for which the motion expires on Monday 22 February 2021;
- *ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787* [F2020L01045] (the Litigation Instrument), for which the motion expires on Tuesday 23 February 2021;
- *ASIC Corporations (Hardship Withdrawals Relief) Instrument 2020/778* [F2020L01069], *ASIC Corporations (Amendment) Instrument 2020/721* [F2020L01064], *ASIC Corporations (IPO Communications) Instrument 2020/722* [F2020L01066], for which the motions expire on Monday 15 March 2021; and
- *ASIC Corporations (Stub Equity in Control Transactions) Instrument 2020/734* [F2020L01199], *ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835* [F2020L01261] and *ASIC Credit (Notice Requirements for Unlicensed Carried Over Instrument Lenders) Instrument 2020/834* [F2020L01259], for which the motions expire on Tuesday 11 May 2021.

I recognise that it remains important that instruments made within my portfolio are consistent with the principles outlined in the changes to the Senate's standing orders in November. Furthermore, as I have previously advised, the Government shares the Committee's concerns about ensuring there is appropriate Parliamentary oversight of legislative instruments.

Thank you for making the time to discuss these issues with my office yesterday. To allow us to resolve the Committee's concerns, and based on your discussion with my office, I am seeking the Committee's agreement to the following:

- The Committee will withdraw the motion to disallow the *ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98* before the expiration of the disallowance period on Monday 22 February 2021;
- The Committee will withdraw the motion to disallow the *ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787* prior to the expiration of the disallowance period on Tuesday 23 February 2021, on the basis that ASIC will amend the sunset period for this instrument by 22 February 2021 to provide that the instrument will cease 5 years after commencement;
- For those instruments subject to disallowance motions which expire on 15 March 2021, my office will engage with you and the Committee in good faith to seek a resolution to the Committee's concerns; and
- Following the tabling of the Committee's final report into the exemption of delegated legislation from Parliamentary oversight, my office will again engage with the Committee in good faith to find a longer-term solution to resolve the Committee's concerns in relation to those instruments, subject to disallowance motions which expire on 11 May 2021 and legislative instruments across the portfolio more broadly.

As you know, the Treasury portfolio is responsible for a significant number of delegated powers that modify or exempt persons or entities from the operation of primary laws, many of which are in the *Corporations Act 2001*. Improving the coherence of this framework and the consistency with which it has been managed has been a priority for the Treasury in recent years.

In response to the concerns of the Committee and others, the Treasury has been implementing improvements to ensure that the Committee's concerns are addressed in the development of legislation in a consistent way and are appropriately explained in the associated explanatory materials.

In relation to the broader legislative framework, the Government has commissioned the Australian Law Reform Commission (ALRC) to conduct a review of the corporations and financial services law to consider whether changes could be made to simplify and rationalise the *Corporations Act 2001* and the *Corporations Regulations 2001*.

As part of this review, the ALRC has been specifically asked to consider the coherence of the regulatory design and the hierarchy of laws, including the relationship between the primary law, regulations and delegated powers, including exemption and modification powers. I encourage the Committee to engage the ALRC on its review.

I look forward to continuing to work constructively with you to resolve these issues of mutual concern.

Yours sincerely

THE HON JOSH FRYDENBERG MP

CB / 2 / 2021



AUSTRALIAN
SENATE

**Senate Standing Committee for the
Scrutiny of Delegated Legislation**

Parliament House, Canberra ACT 2600
02 6277 3066 | sdlc.sen@aph.gov.au
www.aph.gov.au/senate_sdlc

25 February 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au
CC: committeescrutiny@treasury.gov.au


Dear Treasurer,

ASIC Corporations – various instruments [F2020L00962] [F2020L01045] [F2020L01064] [F2020L01066] [F2020L01069] [F2020L01199] [F2020L01261] [F2020L01259]

Thank you for your response of 18 February 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instrument.

The committee has resolved to withdraw its notices of motion to disallow six of the eight ASIC instruments detailed in Chapter 1 of its *Delegated Legislation Monitor 4 of 2021*, on the basis of your undertaking to engage with the committee to resolve the committee's systemic scrutiny concerns in relation to legislative instruments across the Treasury portfolio, including the eight instruments referred to above.

The committee welcomes your advice that the government has commissioned the Australian Law Reform Commission (ALRC) to conduct a review of the corporations and financial services law. However, the committee would like to emphasise that it considers that this review is separate to and independent of your undertaking to engage with the committee in relation to our systemic scrutiny concerns, and anticipates that the outcome of this undertaking is not dependent on the outcome of the ALRC review.

As the committee has not yet received a response to all scrutiny concerns raised by the committee in relation to the ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835 [F2020L01261] (the Electronic Precontractual Disclosure Instrument) and the ASIC Credit (Notice Requirements for Unlicensed Carried Over Instrument Lenders) Instrument 2020/834 [F2020L01259] (the Carried Over Instrument Lenders Instrument), the committee is reiterating its previous requests for advice.

Your response to these ongoing scrutiny concerns will assist the committee in determining whether to withdraw the disallowance notices currently in place on these instruments. The committee has therefore resolved to retain its notices of motion to disallow the Electronic Precontractual Disclosure Instrument and the Carried Over Instrument Lenders Instrument.

The committee's systemic scrutiny concerns, and requests for advice, are set out in detail in Chapter 1 of its *Delegated Legislation Monitor 4 of 2021*, available on the committee's website at: [https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated Legislation/Monitor](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Monitor).

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email at sdlc.sen@aph.gov.au.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation