



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

27 February 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; CommitteeScrutiny@treasury.gov.au


Dear Assistant Minister,

**ASIC Corporations (Hawking-Life Risk Insurance and Consumer Credit Insurance)
Instrument 2019/839 [F2019L01570]**

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 the 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 about this matter.

Matters more appropriate for parliamentary enactment

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 enacted via primary legislation rather than delegated legislation).

Subsection 992A(3) of the *Corporations Act 2001* (Corporations Act) makes it an offence punishable by six months' imprisonment for a person to offer to issue or sell a financial product via an unsolicited telephone call, unless that person satisfies the conditions in paragraphs (a) to (e). This instrument modifies subsection 992A(3) as it applies to life risk insurance products and consumer credit insurance products by substituting the conditions in paragraphs (a) to (e) with the requirement that the person offering to issue or sell the relevant product has already provided the other person with personal advice about that product.

The committee notes that the instrument appears to have been made in response to the recommendations of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission) relating to the hawking of insurance and superannuation products. However, it remains unclear why it was considered necessary and appropriate to address this matter in delegated legislation,

rather than primary legislation, particularly noting that the relevant provision is a criminal offence punishable by six months' imprisonment.

Accordingly, the committee requests your advice as to:

- **why it was considered necessary and appropriate to modify the hawking provision set out in the Corporations Act via delegated legislation, rather than primary legislation, noting that the provision modified is a criminal offence punishable by six months' imprisonment; and**
- **whether there is any intention to amend the Corporations Act to incorporate the modifications set out in the instrument and, if so, when this is likely to occur.**

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.

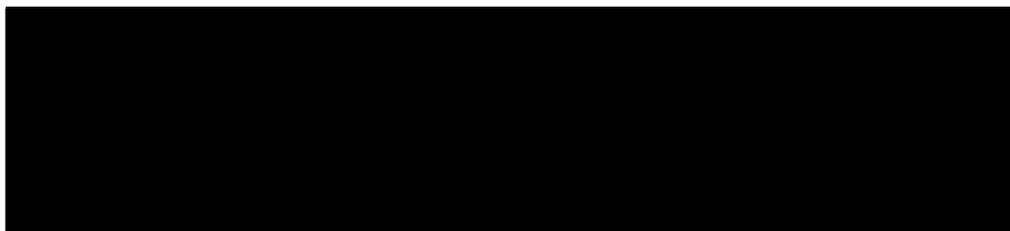
Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **12 March 2020**.

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: MS20-000409

24 MAR 2020

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

Dear Senator Fierravanti-Wells

I am writing in response to your letter dated 27 February 2020, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (Committee), requesting further information in relation to *ASIC Corporations (Hawking-Life Risk Insurance and Consumer Credit Insurance) Instrument 2019/839* [F2019L01570] (the Instrument).

The Committee has requested more detailed advice as to the reasons for the modification of subsection 992A(3) of the *Corporations Act 2001* (the Act) by the Instrument, rather than by parliamentary enactment. Separately, the Committee has requested information as to whether there is an intention to amend the Act to incorporate the modifications set out in the Instrument.

Modification of the Act by the Instrument

ASIC considers that it was necessary and appropriate to modify subsection 992A(3) of the Act via delegated legislation to reduce consumer harm.

Consumer harm

ASIC considers it has a robust evidence base to justify the use of its modification powers in this instance. ASIC's reviews of direct life insurance and consumer credit insurance (CCI) identified significant consumer harms associated with the design and sale of these products. In particular, ASIC identified a link between outbound telephone sales and poor consumer outcomes, given the complexity of the products and the lack of opportunity for the consumer to assess whether the product met their needs prior to making a purchase (see Report 587 *The Sale of Direct Life Insurance*, Report 588 *Consumers' Experiences with the Sale of Direct Life Insurance*, and REP 622 *Consumer Credit Insurance: Poor Value Products and Harmful Sales Practices*). These concerns were identified in the 'direct' sales context i.e. where no personal advice was provided to the consumer.

In 2019, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission), having considered case studies concerning the mis-selling of direct life insurance and CCI, recommended that the hawking of all insurance products should be prohibited (Recommendation 4.1).

Given ASIC's findings about consumer harm and those of the Royal Commission, ASIC considered it appropriate to take steps to prevent further consumer harm by restricting unsolicited sales of direct life insurance and CCI. While the government had accepted the recommendations of the Royal Commission, ASIC considered it necessary and appropriate to use its modification power to modify subsection 992A(3) of the Act to ban unsolicited telephone sales of CCI and direct life insurance sold without personal advice, to provide interim protections to consumers ahead of the primary legislative reform. Had ASIC not taken this action, consumers would have remained at risk of unsolicited sales, which were known to increase the risk of poor consumer outcomes where personal advice was not provided.

ASIC engaged in robust public consultation on its proposal (see CP 317 Unsolicited Telephone Sales of Direct Life Insurance and Consumer Credit Insurance). The responses from stakeholders provided further evidence of consumer harm associated with unsolicited telephone sales of these products. Amongst the 15 non-confidential responses ASIC received from insurers, industry associations, professional bodies, community legal centres, state legal aid commissions and consumer groups, no respondents opposed the introduction of a ban through the use of ASIC's modification powers. Additionally, no industry stakeholders made submissions that the ban would have a significant negative effect on competition or the cost of compliance.

ASIC provided a comprehensive public response to the submissions received and any concerns raised in those submissions (see Report 640 Response to Submissions on CP 317 Unsolicited Telephone Sales of Direct Life Insurance and Consumer Credit Insurance). We note that nine submissions called on ASIC to go further in the use of its modification powers to extend the ban to other products not already covered under the proposal. While some submissions provided anecdotal evidence of this harm, ASIC decided not to broaden the ban given a lack of evidence to suggest a similar degree of systemic harm in relation to these products.

Significant penalty

ASIC's modification power in paragraph 992B(1)(c) of the Act, which allows it to modify section 992A, reflects a parliamentary intention that ASIC would use this power if it is necessary and appropriate, subject to the relevant processes and requirements. That a breach of section 992A creates a criminal offence does not, of itself, present a reason for ASIC to not consider the use of the power in paragraph 992B(1)(c).

The penalties contained in section 992A of the Act reflect a legislative view that breaches of hawking provisions are serious. The provision, which the Instrument modifies, created an exception to an offence, requiring firms to meet a range of procedural and mostly disclosure-based requirements in order to be allowed to engage in unsolicited telephone calls which would otherwise be prohibited (paragraphs 992A(3)(a) to (e)). The modification effected by the Instrument removes this exception for two classes of products.

ASIC considers that the use of its modification powers was consistent with the intent of the legislature, as the obligations in the Act relating to hawking differ depending on the nature (including the complexity and potential risk) of the financial product. In particular, section 992AA regulates the hawking of interests in managed investment schemes and does not contain exemptions equivalent to those in paragraphs 992A(3)(a) to (e). A breach of section 992AA is also a criminal offence.

We also note that the public consultation process did not reveal any concerns by industry or other stakeholders regarding the modification of a provision that creates a criminal offence.

Parliamentary oversight

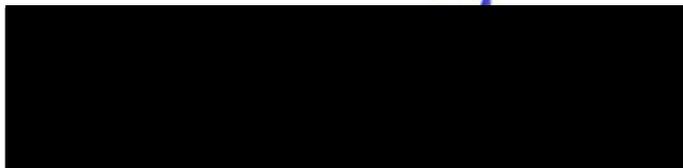
The Guidelines accompanying Senate Standing Order 23(3)(j) (*Principle (j): Matters more appropriate for parliamentary enactment*) state that:

where an instrument nevertheless includes such provisions [which modify primary legislation], it should cease to operate no more than three years after the commencement date for the instrument. This is to ensure a minimum degree of parliamentary oversight.

ASIC advises that once primary legislation has taken effect, it plans to repeal the Instrument. With regard to primary legislation, the Treasury released the exposure draft of the *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2020 Measures) Bill 2020: Hawking of financial products* for public consultation on 31 January 2020. The proposed changes to the hawking regime in the exposure draft include replacing section 992A (including subsection 992A(3)) of the Act with a revised general hawking prohibition which applies to all financial products. The Government expects the Bill to be introduced into Parliament in the 2020 Winter sittings as set out in the Financial Services Royal Commission Implementation Roadmap released by the Government in August 2019.

I trust this information will be of assistance to you.

Yours sincerely



Senator the Hon Jane Hume



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3 April 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; CommitteeScrutiny@treasury.gov.au

Dear Assistant Minister,

**ASIC Corporations (Life Risk Insurance and Consumer Credit Insurance) Instrument
2019/839 [F2019L01570]**

Thank you for your response of 24 March 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 1 April 2020.

The committee takes this opportunity to reiterate its scrutiny view that delegated legislation should not modify provisions of primary legislation, particularly where the relevant provision modified is a criminal offence punishable by imprisonment.

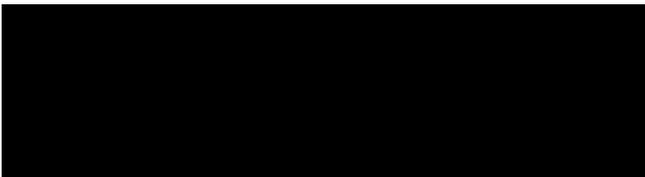
However, the committee welcomes your advice that the government intends to introduce the Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures) Bill 2020 into the Parliament this year, and that ASIC intends to repeal the instrument once that bill is passed.

On the basis of this advice, the committee has concluded its examination of the instrument.

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*.

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