Monitor 3 of 2023 – Ministerial Responses

Contents

Chapter 1: New and ongoing matters

Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022 1

Corporations Amendment (Litigation Funding) Regulations 2022 6

Data Availability and Transparency Code 2022 9

Telecommunications Amendment (Disclosure of Information for the Purpose of Cyber Security) Regulations 2022 13

Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022 16

The Hon Anika Wells MP
Minister for Aged Care
Minister for Sport
Member for Lilley

Ref No: MC23-002982

Ms Fattimah Imtoual
Acting Committee Secretary
Senate Standing Committee for the Scrutiny of Delegated Legislation
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Dear Ms Imtoual

Thank you for your correspondence of 8 February 2023 regarding the Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022 (Instrument).

The Instrument sets out the minimum standards of behaviour for approved providers, their aged care workers and governing persons in order to help build confidence in the safety and quality of care for older Australians. The work performed in aged care is some of the most valuable work undertaken in our community, and the workforce is trusted to deliver services to support vulnerable older Australians.

While the majority of the dedicated aged care workforce exceed expectations in their care of older people, like in all industries, there will be occasions when individuals are not suited to this highly trusted work. This can be evidenced in the four banning orders made since 1 December 2022. Those named are currently subject to criminal justice processes in relation to alleged fraud and acts of physical violence directly involving care recipients. With approximately 380,000 people working in aged care this is a very small proportion of the workforce who may find themselves subject to a banning order. Never-the-less, the Government takes seriously the need for quality and safety in aged care and this regulatory option is an important tool in the suite of safeguards being delivered in line with the Royal Commission's recommendations.

This Instrument ensures that the Aged Care Quality and Safety Commission (Commission) is able to consider matters as they arise, investigate if required and respond to ensure ongoing compliance. This approach upholds principles of safety and dignity for both the workforce and care recipients. The introduction of the Instrument is a positive step forward for the sector and will support aged care providers, their governing persons and aged care workers to deliver safe and quality care to older Australians

Responses to each of the committee's queries are set out below.

Whether the types of action that the Commissioner may take under section 23BE can be specifically defined and included in the instrument

The types of action that the Aged Care Quality and Safety Commissioner (Commissioner) can take under section 23BE of the Instrument are intended to be dependent on the circumstances and the particular outcomes of the investigations relating to compliance with the Code of Conduct (Code). Given the wide range of circumstances in which the Commissioner may be required to act to protect older Australians receiving care, it is not feasible or preferable to specifically define all the types of actions that could be undertaken.

Specifically defining these actions may limit the Commissioner's discretion to take certain appropriate actions to respond to the outcomes of Code investigations in a risk based and proportionate manner. This discretion is necessary to ensure that the Commissioner can take the most reasonable action allowable to protect the health, safety and wellbeing of aged care recipients and is necessary to achieve the legitimate purpose of the Code, which is intended to promote the rights of aged care recipients, including protection from violence, exploitation, abuse and neglect.

If the Commissioner's discretion was limited, the Commissioner's ability to protect the health, safety and wellbeing of aged care recipients could be limited and could potentially cause harm.

If an investigation is carried out in relation to the compliance under paragraph 23BD(1)(d) or as required under paragraph 23BD(3)(a) or (b), the Commissioner may take any action available to them under the *Aged Care Quality and Safety Commission Act 2018* (Commission Act) or the *Aged Care Quality and Safety Commission Rules 2018* (Commission Rules) (whether in relation to compliance with the Code or otherwise) to deal with the outcome of the investigation that the Commissioner considers appropriate. The Department of Health and Aged care (department) has advised that in addition to the above all actions must be undertaken in accordance with the Commission Rules, the Commission Act, other relevant legislation and the principles of administrative law.

What factors the Commissioner must take into account when exercising their discretion under Section 23BE of the instrument

The specific action taken under section 23BE of the Instrument to deal with outcomes of investigations, and whether the action is appropriate in the circumstances, will be determined by and proportionate to the level of severity and immediacy of the risk to aged care recipients. The actions would be informed by an assessment of:

- the nature and/or seriousness of the non-compliance with the Code
- actions that would likely mitigate or remove the harm to aged care recipients
- the consequence of harm arising
- the likelihood of the harm being managed by an approved provider. This would include consideration of whether the approved provider demonstrates:
    - effective leadership and governance to prevent and manage risks to aged care recipients,
    - has a history of providing quality and safe care, and
    - monitors its own effectiveness and solves its quality problems.

If the Committee is amenable to the above points being added to the explanatory statement for the Instrument, the department can facilitate this through a revised explanatory statement.

In addition to the factors listed above, the Commission's Operational Guidelines for Compliance and Enforcement includes the Commission's Regulatory pyramid, which illustrates the Commission's regulatory tools and factors to be considered in relation to the levels of interventions based on risk. Where there is an immediate and severe risk and a higher level of regulatory action needs to be taken in response, the Commissioner may consider:

- if relating to compliance with the Code by an individual – making a banning order
- if relating to compliance with the Code by an approved provider, for example, the responsibility of the approved provider to take reasonable steps to ensure their aged care workers and governing persons comply with the Code – issuing a sanction and/or a notice of requirement to agree to certain matters under Part 7B of the Commission Act.

Whether any safeguards or limitations apply to the exercise of these powers or functions, and whether these safeguards are contained in law or policy

The Commission always seeks to ensure that all relevant legislative requirements are adhered to in the exercise of its powers or functions. This includes having due regard to procedural fairness, in accordance with section 23BG of the Instrument and administrative law principles, to ensure that any action can be effectively taken and is legally defensible. For example, decision makers will make their decisions based on relevant considerations, will act in a manner that affords procedural fairness to those affected by a decision, and will explain those decisions in a clear way that people can understand.

Section 23BG was inserted following consultation on the exposure draft of the Instrument and explicitly states that the Commissioner must have due regard to the rules of procedural fairness in taking action under Division 3 of the Instrument. There are also a number of existing procedural fairness requirements embedded in the Commission's legislative framework regarding action that can be taken in relation to approved providers, particularly in respect of sanction pathways (see for example, section 63N of the Commission Act) and banning orders (see for example, section 74GE of the Commission Act). It is intended that these provisions provide acceptable safeguards for an individual throughout a Code compliance investigation and any other regulatory action that may be taken as a result of the outcome of such an investigation.

The department has advised that this is supported by the Commission's internal operational policies and processes which outline what decision-makers should consider in deciding whether to exercise a power or function, as well as any mandatory requirements or preferred/expected policy positions relating to the exercising of a specific power or function.

Additional safeguards are provided in section 76(1B) of the Commission Act which provides that the Commissioner must not delegate a function or power to a person under section 76(1) or (1A) unless the Commissioner is satisfied that the person has suitable training or experience to properly perform the function or exercise the power. Having regard to the requirement in section 76(1B) of the Commission Act, the Commissioner has delegated that power under section 23BE of the Instrument to Senior Executive Service Band 1, Executive Level 2 and Executive Level 1 Commission staff only. Through appropriate recruitment and performance management processes, there is ongoing oversight to ensure officers at these levels have suitable training and experience to perform their function.

How the Commissioner's investigative powers relate to the complaints mechanism under the *Aged Care Quality and Safety Commission Act 2018*

The Commissioner's investigative powers in relation to its Code functions and its complaints functions differ based on the purpose of the investigation.

Under section 23BD(1)(d) of the Instrument, the Commissioner may carry out an investigation in relation to compliance with the Code. The investigation powers of the Commissioner in relation to a failure to comply with the Code under new sections 74AB, 74AC and 74AD of the Commission Act are set out in section 74D of the Commission Act as a breach of sections 74AB-AD are civil penalty provisions. Section D(1)(c) of the Commission Act provides that civil penalty provisions of the Commission Act are subject to investigation under Part 3 of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act), which creates a framework for investigating whether a provision has been contravened including powers of entry, search and seizure.

The purpose of a Code investigation is to:

- further inform and better determine the ongoing risk to older Australians
- identify issues relating to a conduct, which includes evidence of any non-compliance with the Code (and the nature of non-compliance) by an aged care worker, governing person and/or approved provider
- support and inform a regulatory response to the outcome of the Code investigation that addresses the identified risk and non-compliance (if identified)
- determine the suitability of an individual to be involved in aged care for the purposes of determining whether to make a banning order against the individual.

In contrast, where the Commission receives a complaint or information about an approved provider's responsibilities under the *Aged Care Act 1997* (Aged Care Act) or the Aged Care Principles (including information or a complaint about compliance with an approved provider's obligation to comply with the Code (section 54-1(1)(g) of the Aged Care Act) and to take reasonable steps to ensure that their aged care workers and governing persons comply with the Code (section 54-1(1)(ga) of the Aged Care Act)), the Commission can, under section 65 of the Commission Act, exercise investigative powers in accordance with the Regulatory Powers Act. This includes entering and searching premises where the Commissioner considers that doing so is necessary for the purpose of resolving the complaint or dealing with the information (see section 65(1)(b) of the Commission Act).

Having said this, as noted in the explanatory statement, the Commissioner may become aware of issues relating to compliance with the Code through a range of different mechanisms, including complaints processes (see section 23BC of the Instrument).

Where the Commission receives a complaint or information about an approved provider's responsibilities in relation to section 54-1(1)(g) and/or (ga) of the Aged Care Act, Part 2 of the Commission Rules, which sets out the Commission's scheme for dealing with complaints or information about approved providers' responsibilities, will apply. When a complaint or information raises issues about compliance with the Code by either a worker, governing person or provider that is high risk and warrants an investigation the Commission would utilise powers under section 74D(1)(c) of the Commission Act. The Commission can then take action to deal with the outcome of that investigation under section 23BE of the Instrument.

In particular, section 23(1) of the Commission Rules provides that nothing in Part 2 prevents the Commissioner from taking action under the Commission Act in relation to an issue raised in a complaint or provider responsibility information (as defined in section 4 of the Commission Rules).

This means that in this instance, the Commissioner, in dealing with the complaint, can rely on its investigation powers under section 65 of the Commission Act. Alternatively, it could rely on its investigative powers under section 74D of the Commission Act where an approved provider, aged care worker or governing person has contravened section 74AB, 74AC or 74AD respectively. As a result, under the Commission's legislative framework it can receive a complaint and use information received in that complaint to take action under the Commission's Code functions, which could ultimately end in investigative action under section 23BD(1)(d) of the Instrument and potentially, in the most serious cases, application to a court to impose a civil penalty.

The Commission Act does not set out a range or minimum civil penalty amount for Code contraventions, rather it specifies the maximum amount, which is $55,500 for individuals and $277,500 for corporations. This is identical to the civil penalties available for breaches of the NDIS Code of Conduct. If the relevant court is satisfied that the person has contravened the civil penalty provision, the court may order the person to pay to the Commonwealth a pecuniary penalty for the contravention. The court would determine what amount is appropriate, having regard to all relevant factors including the nature and extent of the contravention (under sections 82(3) and (6) of the *Regulatory Powers (Standard Provisions) Act 2014*).

If the committee would like further clarification on the above, the department can provide a briefing to the committee.

Thank you for writing on this matter.

Yours sincerely

Anika Wells

24 February 2023

THE HON STEPHEN JONES MP

ASSISTANT TREASURER AND MINISTER FOR FINANCIAL SERVICES

Ref: MS23-000181

Senator Linda White
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
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 Monitor 1 of 2023, concerning the *Corporations Amendment (Litigation Funding) Regulations 2022* [F2022L01614] (the regulations).

The Committee has sought advice as to:

- the legal authority for exemptions from primary legislation contained in the regulations;
- why it is considered necessary and appropriate to include these exemptions to the *Corporations Act 2001* (the Corporations Act) in delegated legislation, rather than primary legislation;
- whether the measures could be included in the Corporations Act can be amended to provide that the exemptions to the primary law contained in the regulations cease to operate three years after they commence; and
- whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation.

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

Legal Authority

The regulations amend the *Corporations Regulations 2001* (principal regulations) to prescribe litigation funding schemes with explicit exemptions from the managed investment scheme (MIS) regime, Australian Financial Services Licence (AFSL) requirements, product disclosure regime and anti-hawking provisions under the Corporations Act.

Various sections of the primary law are relied on to make the regulations:

- The amendments providing an exemption to the MIS regime operate by excluding litigation funding schemes from the definition of a MIS, in reliance on paragraph (n) of the definition of managed investment scheme in section 9 of the Corporations Act.
- The amendments providing an exemption from AFSL requirements are made in reliance on paragraph 911A(2)(k) of the Corporations Act.

- The amendments providing an exemption from the product disclosure regime are made in reliance on paragraph 1020G(1)(a) of the Corporations Act.

- The amendments providing an exemption from the anti-hawking provisions are made in reliance on paragraph 992A(2)(c) of the Corporations Act.

Appropriateness of delegated legislation

It remains my view that delegated legislation has an important role to play in removing prescriptive detail from the primary law so as to ensure that the key principles and obligations are transparent and applicable on their face value. Moreover, modification to the operation of the law is not undertaken in a vacuum, and as such new changes should fit within existing legal hierarchies.

The amendments reinforce the outcome from the Full Federal Court's decision in LCM Funding Pty Ltd v Stanwell Corporation Limited [2022] FCAFC 103, that litigation funding schemes are not regulated under the MIS regime. This is achieved by prescribing exemptions for litigation funders from the four regimes that are not designed or intended to regulate the litigation funding industry, consistent with other exemptions that apply to those legal regimes.

In the existing framework, the primary legislation provides wide general application provisions which are supplemented by regulations to address issues that were not contemplated at the time of drafting. This includes exemptions that relate to specific circumstances or a small number of industry participants (as is the case for the litigation funding industry), as contrasted with broad exemptions contained within the Corporations Act. The use of regulations in this instance ensures that the introduced exemptions are co-located alongside equivalent exemptions relating to litigation funding schemes arising in the insolvency context and litigation funding arrangements, which are also set out in the principal regulations.

I therefore do not intend to introduce these measures into the primary law.

Appropriateness of time limiting

While noting the Committee's position on provisions that modify or exempt persons from the operation of the primary law, I do not intend to include these exemptions in the primary legislation nor time-limit them.

These exemptions are placed in regulations as this is the most appropriate place for them in the legislative hierarchy. This assists stakeholders to find and understand their obligations and placing the exemptions in primary law would unnecessarily increase the complexity of the primary law and would create inconsistency with similar longstanding regulations that would remain in the principal regulations.

Likewise, I do not intent to amend the measures to cease within three years after commencement. The certainty and continuity of the exemptions introduced by these regulations are as important as those exemptions which already exist in the principal regulations and that are not time-limited. Time-limiting only the new exemptions would introduce uncertainty and confusion.

Appropriateness of review

The regulations reinstate the longstanding exemptions from the AFSL, MIS and other corporate regulatory regimes for litigation funders that existed prior to August 2020, which is consistent with the broader structure of the financial services law and its use of delegated legislation. Further, the regulations reflect the current status of case law in this area. As such, at this time I do not consider that a review of the location of the provisions is necessary.

I trust that the information attached provides further context about the drafting of the instruments and their explanatory documents and assists with the Committee's deliberations.

Thank you again for your letter.

Yours sincerely

The Hon Stephen Jones MP

Senator the Hon Katy Gallagher

Minister for Finance
Minister for Women
Minister for the Public Service
Senator for the Australian Capital Territory

REF: MC23-000160

Senator Linda White
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
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Dear Senator Linda

In the Delegated Legislation Monitor 1 of 2023, the Committee requested further information from me on scrutiny concerns relating to the *Data Availability and Transparency Code 2022*. As the Code was made by the National Data Commissioner, I sought her advice on the matters raised by the Committee. The Commissioner's advice is enclosed for the Committee's consideration.

Yours sincerely

Katy Gallagher

9.2.23

Encl

Data Availability and Transparency Code 2022

Committee comments on the Data Availability and Transparency Code 2022 (the Code) included in Delegated Legislation Monitor 1 of 2023

1) [**Paragraph 1.23**] "The committee requests the minister's advice as to why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to provide for the data sharing principles set out in Part 2 of the Code, noting the significance of these principles and the comments previously made by the Senate Standing Committee for the Scrutiny of Bills in relation to this matter."
2) [**Paragraph 1.31**] "The committee requests the minister's advice as to:

   - When seeking consent would be 'excessively burdensome' under section 21 of the Code;
   - What constitutes 'current consent' under the Code;
   - What constitutes an 'effective' system to identity and manage conflicts of interest in relation to accredited data users, and how this should be represented or demonstrated to the data custodian under section 9 of the Code."

Response to the Committee

1. Question at paragraph 1.23

In response to comments made by the Senate Standing Committee for Scrutiny of Bills (the Committee) on the Data Availability and Transparency Act 2020 (the Bill), extensive Government amendments were made to the Bill to include additional privacy protections in the primary legislation.

Part 2.4 of the *Data Availability and Transparency Act 2022* (the Act) includes detailed privacy protections about the sharing of personal information under the Act. The Act does not authorise the sharing of data if the sharing would be inconsistent with the privacy protections built into the Act (for example, see paragraphs 13(1)(g), 13(1)(i) and 13(2)(d)).

The Code, as subordinate legislation, provides more detail about the data sharing principles, and fulfils the requirement of paragraph 126(2A)(a) of the Act that the National Data Commissioner (the Commissioner) may make one or more data codes about the data sharing principles set out in section 16 of the Act. The data codes provide further clarity to entities using the DATA Scheme. The Act requires the Commissioner to provide this additional guidance about the data sharing principles for potential DATA Scheme entities. While the Code provides further detail about each data sharing principle, it cannot be inconsistent with section 16 of the Act.

Part 2 of the Code provides that DATA Scheme entities consistently apply the data sharing principles. As the DATA Scheme matures and new types of data sharing arrangements are negotiated, it may be necessary to supplement or amend Part 2 to ensure DATA Scheme entities continue to have clarity about the application of the data sharing principles. Section 126 of the Act provides that delegated legislation like the Code, which can be more easily amended or supplemented over time in response to changing circumstances or technology, will set out further detail about how these data sharing principles are applied. An example where this works well is the *Privacy (Australian Government Agencies — Governance) APP Code 2017*, which helps agencies to apply and comply with one of the Australian Privacy Principles located in the *Privacy Act 1988* (the Privacy Act).

The Commissioner will also provide non-binding guidance to DATA Scheme entities to assist them to apply the data sharing principles and, if required, may also make Guidelines (which are disallowable legislative instruments) under section 127 of the Act.

2. Questions at paragraph 1.31

When seeking consent would be 'excessively burdensome'

In data sharing projects for the data sharing purpose of informing government policy and programs, or research and development, subsections 16B(3) and (4) of the Act provide that personal information about an individual may be shared without the individual's consent in very limited circumstances. One such circumstance is where the project cannot proceed without the personal information, and where the public interest served by the project justifies the sharing of the personal information about individuals without their consent. Even then, subparagraph 16B(3)(a)(ii) of the Act requires that only the minimum amount of personal information necessary for the project to proceed can be shared. A permitted circumstance set out in subsections 16B(4) or (5) must also apply, including that it must be 'unreasonable or impractical' to seek the individual's consent.

The test of 'unreasonable or impractical to seek consent' is intended to align with the test of 'unreasonable or impractical to obtain the individual's consent' in section 16A of the Privacy Act. Section 21 of the Code, provides for circumstances where consent is 'excessively burdensome' to obtain, and broadly aligns with guidance published by the Australian Information Commissioner on the operation of the words 'unreasonable or impractical to obtain the individual's consent' in section 16A of the Privacy Act.

The expression 'unreasonable or impractical', like 'excessively burdensome', is an objective test that sets a high bar and requires consideration of all the relevant facts. It would be applied by a court from the standpoint of a hypothetical reasonable person. Neither paragraph 16B(4)(a) of the Act, or subsection 21(2) of the Code, confer an administrative discretion on data custodians or any other person. The provisions are part of a statutory test that applies to permit the sharing of personal information in limited circumstances.

While subsection 21(2) of the Code flags that it may be (objectively) unreasonable or impractical to seek consent from an individual if doing so would be excessively burdensome, it is not the case that just because it is the subjective view of a data sharing entity that seeking consent would be burdensome, or excessively burdensome, that the 'unreasonable or impractical' test is satisfied. Generally, a DATA Scheme entity is likely to consider that seeking consent might be burdensome because seeking advice would be inconvenient, time consuming or costly, or because consent would need to be sought from a very large number of individuals. All of these matters are expressly provided for in subsections 21(3) and 21(4) of the Code, which specify that such grounds are not sufficient to meet the 'unreasonable or impractical' standard.

What constitutes 'current consent'

It is a requirement of subsections 126(2A), (2B) and (2C) of the Act that the Commissioner must make one or more data codes about the privacy protections in sections 16A and 16B of the Act, including where those provisions set out how individuals give consent. The Code meets this requirement by providing clarity for DATA Scheme entities when they are applying the Act. Subsections 17(5), 18(5), 19(8) and 20(8) of the Code refer to consent being 'current' at a particular time. This requirement is intended to align with the Australian Information Commissioner's guidance on the operation of consent in the Privacy Act.

The word 'current' in subsections 17(5), 18(5), 19(8) and 20(8) of the Code is intended to have its ordinary dictionary meaning – thus, these provisions mean that the consent must

be in effect at the time of sharing. Subsections 17(6), 18(6), 19(9) and 20(9) of the Code clarify that consent cannot be current at a particular time if it has been withdrawn prior to that time. The requirement that consent be 'current' at a particular time reflects the position that consent, once given, does not remain in effect indefinitely.

The drafting of the Code recognises that when consent should be regarded as having ongoing effect or not depends on the context and may, for example, depend on the period of time that has passed since giving that consent.

The Commissioner may also issue non-binding guidance to assist DATA Scheme entities to understand the requirements in the Act and the Code relating to consent.

What constitutes an 'effective' system to identity and manage conflicts of interest

Subsection 9(2) of the Code relates to data sharing projects for the data sharing purpose of the delivery of government services. In this context, the accredited user will be a Commonwealth or a State or Territory government body. In many cases, it would be impractical for a Commonwealth data custodian to assess the operation of the internal conflict of interest processes of another Commonwealth agency or a State or Territory government agency. Subsection 9(2) enables a data custodian or an accredited data service provider (ADSP) to rely upon written representations in a data sharing agreement by the accredited user that:

- the accredited user has a system in place within the entity to identify and manage conflicts of interest in relation to the collection and use of data; and
- that internal system operates effectively.

The word 'effectively' is intended to have its ordinary dictionary meaning. The accredited data user will represent an effective system to the data custodian in the data sharing agreement.

More broadly:

1) the accreditation authority (the Minister or Commissioner as applicable), when deciding to accredit the data user, considers whether the entity has appropriate data governance and management practices, including arrangements for identifying and managing conflicts of interest in relation to the collection or use of data.

2) Section 32 of the Act provides that Scheme entities must not provide false or misleading information to the Minister, the Commissioner, or another Scheme entity when operating in the DATA Scheme.

Gayle Milnes
National Data Commissioner

The Hon Michelle Rowland MP

Minister for Communications
Federal Member for Greenway

MC23-025407

Senator Linda White
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation

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Dear Senator White

I am writing in relation to comments by the Senate Standing Committee for the Scrutiny of Delegated Legislation in Delegated Legislation Monitor 1 of 2023 relating to the *Telecommunications Amendment (Disclosure of Information for the Purposes of Cyber Security) Regulations 2022* (the Regulations). The Committee asked for further information about the types of documents that could be disclosed under the Regulations and why it was considered necessary and appropriate for the Minister to be able to expand the types of personal information that may be disclosed by way of a notifiable rather than a legislative instrument.

The Regulations specify that, in addition to government-related identifiers, carriers and carriage service providers may disclose to certain financial services entities and government entities information of a kind specified by the Minister in a notifiable instrument. The information must be 'personal information' within the meaning of the *Privacy Act 1988* (Privacy Act) about one or more individuals who are, or were, customers of the carrier or carriage service provider. The Privacy Act provides that personal information is 'information or an opinion about an identified individual, or an individual who is reasonably identifiable; whether the information or opinion is true or not; and whether the information or opinion is recorded in a material form or not'.

The *Legislation Act 2003* makes provision for notifiable instruments to be made on matters of detail. The Ministerial power provided for by the Regulations goes to a matter of detail relating to the scope of information that may be disclosed by a telecommunications provider in response to a specific data breach, and is therefore within the usual purposes for which notifiable instruments may be used.

The Regulations aim to constrain the classes of information that telecommunications providers will be permitted to securely and confidentially supply to financial services and government entities. However, they also provide a degree of flexibility so that the Minister can quickly respond to emerging data breaches where new classes of data have been compromised.

The Hon Michelle Rowland MP
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The Explanatory Statement highlights that the Minister's power to add types of information that may be disclosed is intended only to be used in compelling circumstances. At this time, I have not needed to use the power conferred on me to expand the types of personal information that can be disclosed under the Regulations.

Notifiable instruments are more inherently certain than legislative instruments, insofar as they do not face the prospects of parliamentary disallowance. While parliamentary scrutiny is normally desirable, it can create delay and uncertainty in circumstances when swift and decisive action is needed. Information compromised in data breaches can be distributed almost instantly, and the damage caused by data theft can begin within hours. When individuals fall victim to criminal activities following data breaches, the impact can be devastating. Many people may be affected.

If a legislative instrument were required to expand the types of personal information that may be disclosed in those circumstances, it could create doubt in the minds of telecommunications providers and financial services entities about the risks of acting immediately in reliance on the instrument, including about what they may need to do in the event of a notice of disallowance.

In addition, if the instrument were subject to a notice of disallowance or disallowed, it could lead to a gap in protection, insofar as a similar instrument in the same substance could not be remade:

- within seven days after tabling (or, if the instrument has not been tabled, within seven days after the last day on which it could have been tabled) (unless both Houses approve);
- while it is subject to an unresolved notice of disallowance; and
- within six months after being disallowed (without the approval of the House that disallowed the regulation).

It is worth noting that a range of other safeguards apply to any information/data provided to financial services and government entities, including that:

- those entities must have a clear and justifiable reason for collecting the personal information/data and it can only be used for the sole purposes of preventing or responding to cyber security incidents, fraud, scam activity or identity theft;
- financial services entities that wish to receive the information/data must provide written commitments to the Australian Competition and Consumer Commission that they will comply with their obligations under the Privacy Act, attest to the Australian Prudential Regulatory Authority that they meet the relevant information security standard, and confirm in writing that the information they are seeking is necessary and proportionate;
- government entities requesting the data would be subject to comprehensive laws that protect the confidentiality of the information/data and impose strict limitations on its use;
- approved recipients must satisfy information security requirements and protocols for the transfer and storage of the information/data (and may be also subject to additional requirements under other laws regarding the collection of the data/information); and
- information/data received must be destroyed once it is no longer required.

In advance of the making of the Regulations, my Department consulted with entities in the telecommunications and banking sector, as well as a range of government stakeholders. These consultations confirmed that the regulations strike the right balance between protecting personal information and providing confidence that the information could be quickly shared if necessary to protect consumers. The Regulations have operated effectively to allow Optus, financial entities and governments to work together to limit further cyber security incidents and harm to those affected by the Optus breach.

The Government will consider whether the provisions identified by the Committee should continue in their current form before the Regulations' first year anniversary.

I thank the Standing Committee for bringing its concerns to my attention. I trust that the advice contained in this letter will assist the Committee's consideration of this matter.

Yours sincerely

Michelle Rowland MP

28 /2/ 2023

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

Ref: MS23-000181

Senator Linda White
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
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 Monitor 1 of 2023, concerning the *Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022* [F2022L01629] (the regulations).

The Committee has sought advice as to:

- the legal authority for exemptions from primary legislation contained in the regulations;
- why it is considered necessary and appropriate to include these exemptions to the *Corporations Act* and *Consumer Credit Protection Act* in delegated legislation, rather than primary legislation; and
- whether the regulations can be amended to provide that the exemptions to the primary law contained in the regulations cease to operate three years after they commence.

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

Legal Authority

The regulations amend the *Corporations Regulations 2001* and the *National Consumer Credit Protection Regulations 2010* to prescribe circumstances when sections of the *Corporations Act 2001* (Corporations Act) and the *National Consumer Credit Protection Act 2009* (NCCP Act) do not apply.

Items 1 and 2 of Schedule 1, and item 1 of Schedule 2 provide exemptions from the requirement to hold an Australia financial services license (AFSL) under section 911A of the Corporations Act. Paragraph 911A(1) of the Corporations Act creates a broad obligation that a person who carries on a financial services business must hold an Australian financial services licence. Paragraph 911A(2) exempts a person from this requirement if they meet any of the circumstances listed in the subparagraphs to 911A(2). Subparagraph 911A(2)(k) indicates that the provision of a service is exempt if it is covered by an exemption prescribed in regulations made for the purposes of this paragraph. The exemptions to the Corporations Act introduced in these regulations are made for the purpose of this subparagraph.

Section 29 of the NCCP Act provides that a person must not engage in a credit activity if the person does not hold a licence. Paragraph 110(1)(a) of the NCCP Act provides that the regulations may exempt a person or class of persons from all or specific provisions to which this Part applies, which includes section 29.

Item 5 of Schedule 1 relies on this paragraph to introduce an exemption for rural financial counselling services from the licensing obligation within the regulations.

Appropriateness of delegated legislation

It remains my view that delegated legislation has an important role to play in removing prescriptive detail from the primary law so as to ensure that the key principles and obligations are transparent and applicable on their face value. Moreover, modification to the operation of the law is not undertaken in a vacuum, and as such new changes should fit within existing legal hierarchies.

Corporations Act exemptions

As you are aware, the Corporations Act is a complex Act containing a great volume of operative provisions across thousands of pages of legislation. Section 911A(2) includes a large number of exemptions to the general requirement to hold an AFSL license, covering more than 6 pages alone. The exemptions contained in the Act are broad exemptions that cover a great number of circumstances, while regulations made under section 911A(2)(k) provide specific exemptions that relate to smaller categories of persons, operate under limited circumstances, or contain technical matters that would clutter the primary law.

The exemptions to the AFSL requirements in Schedule 1 are appropriate for regulations. The regulations relate to members of a number of specific associations that would not be appropriate to include in the primary law. Item 1 of the regulations adds sub-subregulation 7.6.01(1)(zb) to the *Corporations Regulations 2001* (Corporations Regulations), which exempts the provision of financial product advice to a client by a financial counselling agency. As part of meeting this exemption, however, the financial counselling agency must take reasonable steps to ensure that persons who provide the financial counselling service are members or are eligible to be a member of a 'financial counselling association'. Item 2 of the regulation provides the definition of financial counselling association to mean a list of 8 specific entities. As noted above, this level of specificity is inappropriate to include within the primary law, especially where – for example – an entity on the list may change name while otherwise continuing operations.

The exemption to the AFSL requirements in Schedule 2 is similarly appropriate to include within the regulations. As noted in the explanatory statement to the regulations, this exemption seeks to exempt the underlying dealing of the trustee of a superannuation funds, which may overlap with the behaviour they undertake whilst providing a superannuation trustee service. Existing regulation 7.6.01 of the Corporations Regulations contains a number of exemptions relating to superannuation services (see subregulation 7.6.01(b)-(da)). In particular, subregulation 7.6.01(b) provides an exemption for dealing by trustees of a pooled superannuation trustee in specific circumstances. By containing these dealing exemptions in proximity with each other, the regulations ensure that entities within the superannuation sector can find relevant dealing exemptions in one location, which simplifies and improves the navigability of the legislation.

NCCP Act exemption

The changes made to the *National Consumer Credit Protection Regulations 2010* (NCCP Regulations) place new exemptions in place with existing regulations to ensure consistency of drafting and accessibility for industry-specific participants.

Subregulation 20(5) of the NCCP exempts a person from having a credit licence if the person engages in credit activity as a part of a financial counselling service. The regulations introduce a new subregulation 25(5A), which relates specifically to rural financial counselling service providers who provide free and independent rural financial counselling services. It appropriately follows that rural specific financial counselling service exemptions be contained in proximity to broader financial counselling service exemptions.

Appropriateness of time limiting

While noting the Committee's position on provisions that modify or exempt persons from the operation of the primary law, I do not intend to include these exemptions in the primary legislation nor time-limit them.

These exemptions are placed in regulations as this is the most appropriate place for them in the legislative hierarchy. This assists stakeholders to find and understand their obligations and placing the exemptions in the Acts would unnecessarily increase the complexity of the primary law and would create inconsistency with similar longstanding regulations that would remain in the respective regulations.

Likewise, I do not intent to amend the measures to cease within three years after commencement. The certainty and continuity of the exemptions introduced by these regulations are as important as those exemptions which already exist in the respective principal regulations and that are not time-limited. Time-limiting only the new exemptions would introduce uncertainty and confusion.

I trust that the information attached provides further context about the drafting of the instruments and their explanatory documents and assists with the Committee's deliberations.

Thank you again for your letter.

Yours sincerely

The Hon Stephen Jones MP