



Delegated Legislation Monitor 4 of 2021

Tabling Statement

Wednesday, 24 February 2021

I rise to speak to the tabling of the Standing Committee for the Scrutiny of Delegated Legislation's *Delegated Legislation Monitor 4 of 2021*.

I would like to once again draw the chamber's attention to the committee's comments regarding legislative instruments made by the Australian Securities and Investments Commission. These instruments address a range of subject matters within ASIC's portfolio, by providing for exemptions from, and modifications to, certain provisions of the *Corporations Act 2001* and other Acts of Parliament.

At the outset, I take this opportunity to express the committee's concern that it has taken over four months to reach a resolution in relation to the committee's systemic scrutiny concerns about these instruments. However, as I have previously advised the chamber, excessive delays in resolving committee scrutiny concerns are not limited to any one portfolio. It is for this reason that yesterday I, jointly with the Deputy Chair, moved a motion in relation to the importance of constructive and timely engagement with the committee. I will further reflect on the terms of this motion shortly.

The instruments in question alter the operation of primary legislation made by this Parliament and were intended to remain in force for substantial periods of time—the majority up to 10 years. This contravenes the committee's longstanding expectation that instruments which modify or exempt persons or entities from the operation of primary legislation should cease to operate no more than three years after they commence. The committee considers that a shorter sunset period is essential to ensure that there is a minimum degree of regular parliamentary oversight of such instruments.

The committee also considers that these instruments raise systemic concerns about the application of ASIC's exemption and modification powers, and the application of similar powers across government more broadly. For this reason, the committee continues to apply its approach to instruments which modify the operation of primary legislation consistently across all portfolios. The fact that a legislative instrument is made by an independent agency does not, in any way, diminish the need for the Parliament to effectively exercise control over its delegated legislative power.

Noting this, on 4 February, the committee wrote to the Treasurer to request that the five ASIC instruments be amended to ensure that, in effect, they cease to operate three years after commencement. However, the committee did not receive a response to this request until the evening of 18 February. It is concerning that this lack of timely engagement prevented the committee from advising the Senate about its views on the instruments in its Delegated Legislation Monitor tabled last week.

Despite the delay in providing the response, the Treasurer's response recognised the importance of Treasury instruments being consistent with the committee's scrutiny principles and reiterated that he shares the committee's concerns in relation to the importance of parliamentary oversight of legislative instruments. The Treasurer's comments in this response also incorporated three further ASIC instruments, which the committee had raised separately with the Treasurer, and which had also been the subject of notices of motion to disallow.

In responding to the committee's systemic scrutiny concerns about the ASIC instruments, the Treasurer undertook to engage in further good faith discussions with the committee following the tabling of the committee's final report of its inquiry into the exemption of delegated legislation from parliamentary oversight. These discussions would address the ASIC instruments of current interest to the committee, in addition to other legislative instruments in the Treasury portfolio more broadly. This is very important given the fact that the Treasury portfolio has a very large number of legislative instruments—indeed, I believe it has the largest. The committee considers that the approach developed as a result of this engagement may serve as a model for addressing the committee's scrutiny concerns about

instruments which modify the operation of primary legislation in other portfolios in the future.

In addition, in response to the committee's scrutiny concerns, ASIC has amended the ASIC Corporations (Litigation Funding Schemes) Instrument 2020 to provide that it will cease five years after commencement. The committee considers that this amendment is a positive indication that the Treasurer and ASIC will continue to engage with the committee to resolve its systemic concerns about the application of ASIC's modification and exemption powers more broadly.

In light of the Treasurer's undertaking to engage with the committee to resolve the committee's scrutiny concerns in relation to legislative instruments across the Treasury portfolio, and the amendment of the Litigation Funding Schemes instrument, the committee has concluded its examination of six of the eight instruments.

However, the committee has not received a substantive response in relation to the specific scrutiny concerns raised with the Treasurer in relation to two remaining instruments: the ASIC Credit (Notice Requirements for Unlicensed Carried Over Instrument Lenders) Instrument 2020 and the ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020. While some aspects of the committee's scrutiny concerns about these two instruments have been addressed by the Treasurer's most recent correspondence, the committee considers that the remaining scrutiny concerns must be resolved before it can conclude its examination of the instruments.

The Treasurer's response to these ongoing scrutiny concerns will assist the committee in determining whether to withdraw the disallowance notices currently in place on the two instruments.

Finally, I welcome the Senate's agreement yesterday to a motion, which I moved jointly with the Deputy Chair, that re-emphasised the importance of the work of this committee. In the motion the Senate reiterated that one of its essential functions is to scrutinise the law-making power that the Parliament has delegated to the executive and endorsed the position that the Senate must hold the executive to account in this regard. Importantly, the Senate

affirmed the central part that the committee has played since 1932 in supporting the Senate in this fundamental role.

It also recognises that, to effectively fulfil its mandate, the committee relies on the constructive and timely engagement of ministers and agencies on the technical scrutiny concerns raised by the committee. Therefore, the Senate called on all ministers and agencies to respond to the committee's request for information in relation to its technical scrutiny concerns within the timeframe set by the committee; and to implement undertakings made to the committee in a timely manner. I thank the Senate for re-endorsing the importance of the committee's role and take this opportunity to draw the terms of the motion to the attention of all ministers, shadow ministers and agencies.

With these comments, I commend the committee's *Delegated Legislation Monitor 4 of 2021* to the Senate.