



Delegated Legislation Monitor Tabling Statement

Wednesday 8 March 2023

I rise to speak to the tabling of the Senate Standing Committee for the Scrutiny of Delegated Legislation's *Delegated Legislation Monitor 3 of 2023*.

This monitor reports on the committee's consideration of **54** legislative instruments registered between 1 February 2023 and 20 February 2023, as well as the committee's ongoing consideration of instruments registered in previous periods.

I would first like to draw the Chamber's attention to the committee's scrutiny of two instruments in the Treasury portfolio.

The **Corporations Amendment (Litigation Funding) Regulations 2022** provide litigation funding schemes with explicit exemptions from the Corporations Act, including the product disclosure regime and anti-hawking provisions. The **Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022** similarly inserts ongoing exemptions to requirements in the Corporations Act and the Consumer Credit Protection Act.

It is the committee's long-standing view that modifications to or exemptions from primary law should be set out in the primary law itself. When these measures are in delegated legislation, the committee expects they will be time limited to ensure frequent parliamentary oversight. This also provides the executive with the ability to assess whether the measures remain appropriate and necessary.

Not only do these instruments insert a number of exemptions to primary legislation, but they are in place on an ongoing basis, as the measures are not subject to the usual 10-year sunset period.

It is of particular concern that the **Rationalising ASIC Instruments Regulations** have the effect of shifting exemptions previously contained in individual legislative instruments, usually time limited to a period of 3-5 year, or at a minimum, subject to sunset period, into the Principal Regulations which are exempt from sunset. This means that these exemptions from primary law are being placed in delegated legislation indefinitely, which is a significant scrutiny concern for the committee.

For this reason, the committee sought the Assistant Treasurer's advice as to why it was necessary and appropriate to introduce these exemptions in delegated rather than primary legislation. Further, the committee asked whether there is any intention to move the exemptions into primary legislation and if not, whether the instrument can be time-limited.

The Assistant Treasurer advised that there is no intention to introduce the exemptions in primary law or to time limit them. He advised that delegated legislation is the most appropriate place for the exemptions. He also advised that including the exemptions in the instrument would ensure they are co-located with existing exemptions, and time-limiting them would only introduce uncertainty and confusion.

Unfortunately, this response did not address the committee's scrutiny concerns about this matter. For this reason, the committee is now seeking the Assistant Treasurer's

further advice, including whether the primary legislation could be amended to include these exemptions.

The other instrument I would like to draw the Chamber's attention to is the **Telecommunications Amendment (Disclosure of Information for the Purpose of Cyber Security) Regulations 2022**. This instrument has the effect of permitting carriers and carriage service providers to disclose government identifiers to financial services entities and government agencies. It also enables the minister to *expand* and specify by notifiable instrument the class of information that can be disclosed. The minister has since confirmed this involves the disclosure of **personal information**.

The committee considered the use of notifiable instruments in its *Inquiry into the exemption of delegated legislation from parliamentary oversight*. It formed the view that classifying instruments as notifiable, rather than legislative instruments significantly limits Parliament's scrutiny function. This is because notifiable instruments are not subject to the usual tabling, disallowance or sunseting processes. This concern is heightened when the subject matter of the notifiable instrument is significant.

For this reason, the committee sought the Minister for Communications' advice about why it was necessary and appropriate to use notifiable rather than legislative instruments to expand the classes of personal information that can be disclosed.

The minister advised that the instrument aims to provide a degree of flexibility so that they can quickly respond to emerging data breaches. Further, she advised that notifiable instruments are inherently more 'certain' than legislative instruments because they do not face the prospect of disallowance. The minister also noted that

while parliamentary scrutiny is 'normally desirable', it can create delay and uncertainty when swift and decisive action is needed.

While the committee appreciates the need to swiftly respond to data breaches as they emerge, the committee reiterates that a potential for disallowance does not prevent the government from acting quickly and decisively. The disallowance process does not inhibit the immediate commencement and enforceability of instruments, nor does it invalidate any actions taken under the instrument prior to disallowance. Further, the committee has not previously accepted justifications such as the need for certainty, flexibility, and the need to act urgently on their own to be an adequate justification for an exemption from parliamentary oversight. Further, the committee considers the disclosure of personal information to be a serious matter and expanding the types of information that can be disclosed is not a mere matter of detail.

For this reason, the committee reiterates its scrutiny concerns about the use of notifiable instruments in this instance and is seeking the minister's advice as to whether the instrument can be amended to enable the use of legislative, rather than notifiable instruments, to expand the class of disclosable information.

With these comments, I commend the committee's *Delegated Legislation Monitor 3 of 2023* to the Senate.