

Senate Standing Committee for the Scrutiny of Delegated Legislation

Inquiry into the exemption of delegated legislation

Questions on Notice to ASIC

Background

The most common kind of legislative instrument made by ASIC are legislative instruments that exempt from or modify parts of various financial sector laws, including:

- the *Corporations Act 2001* (the **Corporations Act**);
- the *National Consumer Credit Protection Act 2009* (the **Credit Act**); and
- the *Superannuation Industry (Supervision) Act 1993* (the **SIS Act**).

ASIC considers there is doubt about whether the disallowance regime applies to certain kinds of these instruments – namely instruments that “relate to superannuation” (whether made under the Corporations Act or the SIS Act), and instruments made under the Credit Act. The doubt affects ASIC because it creates uncertainty about whether ASIC could claim a disallowance exemption. The doubt also affects Parliament because it creates uncertainty about whether a disallowance motion, if passed, would be effective in any event.

ASIC legislative instruments

Subject	Approx. No.
Total number of current instruments	275
Number of current instruments (“relating to superannuation”)	14
Number of current instruments (made under the Credit Act)	15

Question 1: Can you please describe the types of instruments currently made by ASIC which are not subject to disallowance?

Noting the point above, and in response to Question 4 below, about ASIC’s doubt over the operation of certain parts of the regime, ASIC currently does not claim an exemption for any legislative instrument made by ASIC. In the past, ASIC generally has not claimed exemptions from disallowance.¹

Question 2: Is it appropriate to continue to exempt instruments made by a body or scheme established pursuant to intergovernmental agreements from disallowance?

This is a policy question for Government. ASIC is not in a position to comment on all types of intergovernmental schemes.

¹ ASIC claimed a disallowance exemption in 2017 for the *ASIC Superannuation (RSE Websites) Instrument 2017/570* and *ASIC Corporations (Urgent Superannuation Advice) Instrument 2017/530* (now repealed) on the basis that they relate to superannuation. Since 2017, ASIC has generally ceased claiming such an exemption because of doubt about whether the disallowance exemption applies.

ASIC's observations in relation to the particular type of intergovernmental scheme that is given effect to by the Corporations Act and the Credit Act is set out in our answer to Question 4.

Question 3: In your submission, you note that 'commercial uncertainty' is not a relevant justification for exempting superannuation instruments from disallowance. In ASIC's view, is it necessary and appropriate to exempt superannuation instruments from disallowance?

There will be many different kinds of legislative instruments that might properly be described as "relating to superannuation".

In ASIC's experience, we consider there is limited benefit for exempting from disallowance the legislative instruments made by ASIC that relate to superannuation. ASIC is not in a position to comment on legislative instruments relating to superannuation made by other agencies, Ministers and statutory officer-holders.

Question 4: Your submission notes that there is a lack of clarity regarding whether certain instruments are disallowable, can you elaborate on why the confusion exists?

To confirm, ASIC considers that there is 'doubt' because of the drafting of the *Legislation Act 2003* and the *Legislation (Exemptions and Other Matters) Regulation 2015*, and the limited explanation in the accompanying extrinsic materials.

Intergovernmental schemes

Subsection 44(1) of the Legislation Act provides an exemption from disallowance for instruments made under legislation that facilitates the operation of an intergovernmental scheme involving the Commonwealth and one or more States and which authorises a legislative instrument to be made for the purposes of the scheme.

Both the Corporations Act and the Credit Act rely on a referral of powers from the States to the Commonwealth. These laws give effect to Council of Australian Governments agreements between the Commonwealth and the States in relation to these national laws. It could be considered that both the Corporations Act and the Credit Act facilitate the operation of an intergovernmental scheme involving the Commonwealth and one or more States in relation to the subject matter dealt with in each respective Act, and authorise ASIC to make instruments for the purposes of that subject matter.

The exemption from disallowance for intergovernmental schemes is expressed *not to apply* where the enabling legislation is the Corporations Act. There is no guidance on why this specific "carve-out" exists in relation to the Corporations Act. A referral of powers also underpins the Credit Act and, as there is no equivalent to the carve-out that exists for the Corporations Act, there is doubt about whether the intergovernmental scheme disallowance exemption applies to legislative instruments made under the Credit Act.

Instruments "relating to superannuation"

The Legislation (Exemptions and Other Matters) Regulation provides an exemption from disallowance for instruments "relating to superannuation". This phrase "relating to superannuation" is not defined, and there is limited guidance for determining the intended scope of the exemption. The limited guidance suggests that the exemption exists "because exposure

of superannuation instruments to disallowance would cause commercial uncertainty” and “these instruments are intended to have enduring operation and are not suitable for the disallowance process”.

ASIC makes legislative instruments that affect how the law applies in relation to superannuation trustees, superannuation funds (including SMSFs), members of superannuation funds, and superannuation products. For example, ASIC has made legislative instruments that affect fees and costs disclosure in Product Disclosure Statements for superannuation products. It is not clear to ASIC whether the disallowance exemption was meant to apply to such an instrument despite there being a reasonable argument that such instruments are properly described as “relating to superannuation”.

Question 5: Do you think the lack of clarity regarding the circumstances for exempting delegated legislation from disallowance would be improved by published guidance materials?

ASIC agrees that published guidance materials would assist in providing clarity regarding the circumstances for disallowance exemptions.

Question 6: Which branch of government should be responsible for issuing guidance on the circumstances in which it may be appropriate for delegated legislation to be exempt from parliamentary oversight?

This is a matter for Government. As it is Parliament that confers the power on the Executive to make legislative instruments it should be Parliament who decides if and how the exercise of such powers by the Executive should be scrutinised.

Question 7: Currently, a number of grounds for exempting delegated legislation from disallowance and sunsetting are set out in delegated legislation, rather than primary legislation. Does ASIC have a view on whether this appropriate, or should the grounds for exemptions only be set out in primary legislation?

From ASIC’s experience, we consider that there are practical benefits for the grounds for exemptions from disallowance and sunsetting being set out in primary legislation. However, given the diversity of legislative instruments, ASIC also considers that there are practical benefits if additional exemptions from sunsetting and disallowance were set out in delegated legislation, provided there are appropriate parameters for determining the exemptions that could be made by the delegated legislation.

Question 8: Approximately 19% of delegated legislation made in response to COVID-19 has been exempt from disallowance. Are exemptions from parliamentary oversight necessary for the Government to respond effectively to the pandemic?

ASIC is not in a position to comment on legislation, and legislative instruments made under legislation, that we do not administer e.g. *Biosecurity Act 2015*.

To date, ASIC has made 8 legislative instruments in direct response to COVID-19. ASIC did not claim any exemption from disallowance. The application of the disallowance regime did not affect ASIC’s ability to respond effectively to COVID-19 in relation to the legislation that we administer. These 8 legislative instruments dealt with the following subject matter:

1. Trading Suspensions Relief;
2. Financial Advice-related Relief;

3. Extension of Financial Reporting Deadlines (Listed Companies) Relief;
4. Extension of Financial Reporting Deadlines (Unlisted Companies) Relief;
5. Distribution of Debit Cards Relief;
6. Deferral of New Mortgage Broker Obligations Relief;
7. Deferral of New Design and Distribution Obligations Relief;
8. Managed Funds Hardship Withdrawals Relief.

Question 9: Are there any circumstances in which you consider that it is appropriate to exempt delegated legislation from parliamentary oversight mechanisms, such as disallowance?

In relation to legislation administered by ASIC, it is a matter for Government to determine the circumstances in which exemptions from parliamentary oversight mechanisms are appropriate. ASIC would observe that our practical experience is that the absence of exemptions has not hindered our regulatory work.