



AUSTRALIAN  
SENATE

Senate Standing Committee for the  
Scrutiny of Delegated Legislation

Parliament House, Canberra ACT 2600  
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11 June 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](mailto:Senator.Hume@aph.gov.au)

CC: [tsrdlos@aph.gov.au](mailto:tsrdlos@aph.gov.au); [committeescrutiny@treasury.gov.au](mailto:committeescrutiny@treasury.gov.au);  
[Shelby.Brinkley@treasury.gov.au](mailto:Shelby.Brinkley@treasury.gov.au)

Dear Assistant Minister,

**ASIC Corporations (Deferral of Design and Distribution Obligations) Instrument 2020/486 [F2020L00618]**

**ASIC Credit (Deferral of Mortgage Broker Obligations) Instrument 2020/487 [F2020L00623]**

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 instruments, and the committee seeks your advice in relation to this matter.

***Matters more appropriate for parliamentary enactment***

***Parliamentary oversight***

Senate standing order 23(3)(j) requires the committee to examine each legislative instrument as to whether it contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted by primary rather than delegated legislation). In addition, Senate standing order 23(3)(k) requires the committee to examine each instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes whether any instrument may exclude or limit parliamentary oversight.

The instruments were made under subsection 994L(2) of the *Corporations Act 2001* (Corporations Act) and subsection 163(3) of the *National Consumer Credit Protection Act 2009* (NCCP Act). Those provisions, respectively, allow ASIC to exempt persons and entities from the operation of specified provisions of the Corporations Act and the NCCP Act.

The ASIC Corporations (Deferral of Design and Distribution Obligations) Instrument 2020/486 exempts regulated persons from all provisions of Part 7.8A of the Corporations Act for the period from 5 April 2021 to 4 October 2021. Part 7.8A of the Corporations Act establishes the design and distribution obligations (DDO) regime which is intended to assist consumers to obtain appropriate financial products by requiring issuers and distributors to have a customer-centric approach to designing, marketing and distributing financial products.

The ASIC Credit (Deferral of Mortgage Broker Obligations) Instrument 2020/487 exempts a broad range of persons and entities from Divisions 2 and 4 of Part 3-5A of the *National Consumer Credit Protection Act 2009* (NCCP Act) for the period from 1 July 2020 to 1 January 2021. Part 3-5A of the NCCP Act sets out a series of new mortgage broker obligations, including a duty to act in the best interests of the consumer in relation to credit assistance, a requirement to prioritise consumers' interests when providing credit assistance, and a ban on conflicted remuneration.

By creating these exemptions from the DDO and mortgage broker obligations regimes, the instruments effectively defer the commencement of those regimes for six months. The committee's longstanding scrutiny view is that such significant changes to the operation of a regulatory regime are more appropriately enacted via primary legislation, unless the explanatory statement provides a sound justification for using delegated legislation. This is to ensure appropriate levels of parliamentary oversight.

In this instance, the explanatory statement explains that the subject matter and policy implemented by the instruments is more appropriate for a legislative instrument than primary legislation. In this respect, it explains that the instruments use powers given to ASIC by the Parliament, which allow ASIC to exempt persons from specified provisions in the NCCP Act and Corporations Act. The explanatory statement also states that a timely response is important to provide certainty to industry about the deferral of the DDO and broker obligation regimes before the scheduled commencement of those reforms.

The committee appreciates that COVID-19 is creating unprecedented challenges; however, the committee is concerned that using delegated legislation to effectively defer the commencement of the DDO and mortgage broker obligations regimes limits parliamentary oversight. In this respect, the committee notes that the recently enacted primary legislation establishing the new regimes specified the date that the Parliament intended the regimes to commence. The committee therefore considers that the deferral of the regimes should also be enacted via primary legislation.

Further, from a scrutiny perspective, the committee does not consider administrative certainty to be sufficient justification for using delegated legislation to defer the operation of the DDO and mortgage broker obligations regimes. Moreover, the committee notes that a greater level of certainty could be provided by the deferral of the regimes through the enactment of primary legislation. The committee therefore considers that it would be more appropriate to defer the operation of the regimes by amending commencement dates in the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* and the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020*. In this regard, the committee notes that other policy measures in response to COVID-19 have been

appropriately enacted via primary legislation, and that the relevant bills have passed the Parliament within a relatively short amount of time.

**With regard to the matters outlined above, the committee requests your detailed advice as to:**

- **why it was considered necessary and appropriate to use delegated legislation, rather than primary legislation, to defer the commencement of the new design and distribution obligations regime and mortgage broker obligations regime; and**
- **the appropriateness of amending the commencement dates of relevant provisions of the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* and the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020*, to give effect to the measures set out in the instruments in primary legislation.**

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 **25 June 2020**.

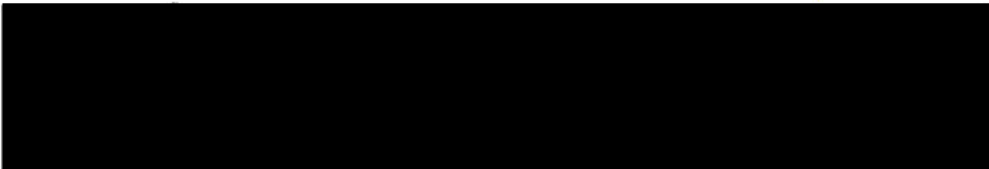
The committee also considers that the instruments raise significant policy matters relating to the Australian Government's response to the COVID-19 pandemic. The committee has determined that the instruments engage standing order 23(4) and accordingly has resolved to draw the instruments to the attention of the Senate and relevant Senate committees.

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](mailto: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: MS20-001218

Senator the Hon Concetta Fierravanti-Wells  
Chair  
Senate Standing Committee for the Scrutiny of Delegated Legislation  
Parliament House  
CANBERRA ACT 2600

Dear Senator ~~Fierravanti-Wells~~

*Connie*

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) regarding the *ASIC Corporations (Deferral of Design and Distribution Obligations) Instrument 2020/486* [F2020L00618] and the *ASIC Credit (Deferral of Mortgage Broker Obligations) Instrument 2020/487* [F2020L00623] (the Instruments).

In that letter, the Committee sought my advice as to:

- why it was considered necessary and appropriate to use delegated legislation, rather than primary legislation to defer the commencement of the new design and distribution obligations regime and mortgage broker obligations regime; and
- the appropriateness of amending the commencement dates of relevant provisions of the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* and the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020* to give effect to the measures set out in the instruments in primary legislation.

In preparing this response, I have sought advice from the Australian Securities and Investments Commission (ASIC), which has been incorporated into this response. I consider that it was necessary and appropriate for ASIC to use delegated legislation to defer the commencement of these regimes, and that it would not be necessary or appropriate to give effect to the measures set out in the instruments in primary legislation.

On 8 May 2020, the Treasurer announced changes to the commencement of certain reforms arising from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission) due to the significant effects of the Coronavirus.

However, the laws containing the design and distribution obligations (DDOs) and the best interest duty and remuneration reforms for mortgage brokers (mortgage broker reforms) had passed Parliament, but were yet to take effect. Having consulted with industry on draft guidance on both

reforms, as well as with the Treasurer and the Treasury, ASIC concluded that the rationale for the Treasurer's announcement was also relevant to these two reforms. In particular, ASIC concluded that a deferral would be justifiable to enable the financial services industry to focus their efforts on planning for the recovery and supporting their customers and their staff during the Coronavirus pandemic.

The feedback ASIC had previously received from industry aligned with their assessment that having any deferral of commencement dates for DDOs or the mortgage broker reforms in place as soon as possible would be particularly advantageous, as it would provide greater certainty in terms of industry's resource management during the Coronavirus pandemic.

To that end, ASIC notes:

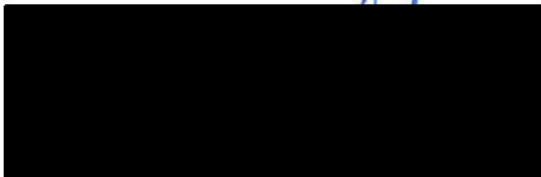
- the mortgage broker reforms were to commence on 1 July 2020, and until such time primary legislation amending that date received Royal Assent, the mortgage broking industry would have had to continue to prepare to comply from 1 July. The Coronavirus restrictions were making it particularly difficult for credit licensees to appropriately train mortgage brokers, and to make systems changes needed to comply with the reforms; and
- although the DDOs were to commence on 5 April 2021, the reforms are particularly significant and the feedback received from the industry was that they require a substantial amount of work to implement. Many of the new obligations will be owed by product issuers, who have had to dedicate additional resources to (for example) respond to consumer requests for hardship or early access to superannuation due to the Coronavirus. Given the scale of the disruption and the need to adjust existing staff workloads, it was particularly important to have certainty about any adjustment to the commencement of these reforms.

For both reforms, without prompt action, industry would have had to continue to prepare to comply by the existing legislated start dates. ASIC concluded that it was necessary and appropriate to use their exemption powers to effectively defer the commencement dates of these reforms, as that enabled a rapid response to the issues raised.

ASIC also concluded that using their exemption powers in this way was broadly consistent not only with recent Government decisions about reforms relating to the Royal Commission, but also other ASIC uses of power in response to significant disruptions to financial markets and/or the financial services sector.

I trust this information will be of assistance to you.

Yours sincerely

A large black rectangular redaction box covers the signature area. Above the box, there are faint blue handwritten initials, possibly 'AJ'.

Senator the Hon Jane Hume



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27 August 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](mailto:Senator.Hume@aph.gov.au)

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[Shelby.Brinkley@treasury.gov.au](mailto:Shelby.Brinkley@treasury.gov.au)

Dear Assistant Minister,

**ASIC Corporations (Deferral of Design and Distribution Obligations) Instrument 2020/486  
[F2020L00618]**

**ASIC Credit (Deferral of Mortgage Broker Obligations) Instrument 2020/487  
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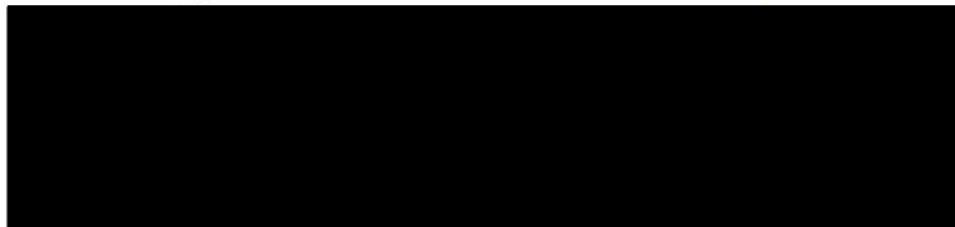
Thank you for your response of 29 June 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instruments.

The committee considered your response at its private meeting on 26 August 2020. On the basis of your advice, the committee has concluded its examination of the instruments.

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