



18 March 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au
CC: committeescrutiny@treasury.gov.au

Dear Treasurer,

ASIC Corporations (Amendment) Instrument 2020/1064 [F2020L01571]

ASIC Corporations (Amendment) Instrument 2020/1065 [F2020L01572]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against 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 these matters.

***Matters more appropriate for parliamentary enactment
Parliamentary oversight***

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This may include instruments which provide exemptions to primary legislation. In addition, Senate standing order 23(3)(k) requires the committee to scrutinise each legislative instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes whether an instrument limits parliamentary oversight.

ASIC Corporations (Amendment) Instrument 2020/1064 (the Timeshare Instrument) amends existing obligations and imposes new obligations on licensees who are responsible entities of time-sharing schemes and their associates, and provides conditional relief from the managed investment, licensing and product disclosure provisions of the *Corporations Act 2001* (Corporations Act). ASIC Corporations (Amendment) Instrument 2020/1065 (the Fees and Costs Instrument) introduces modified fees and costs disclosure requirements tailored to the different types of time-sharing schemes.

The Timeshare Instrument makes a range of modifications to the operation of the Corporations Act by amending ASIC Corporations (Time-sharing Schemes) Instrument 2017/272 and ASIC Class Order [CO 13/760]. The Fees and Costs Instrument amends ASIC Corporations (Time-sharing Schemes) Instrument 2017/272 to provide transitional exemptions from the ongoing disclosure of material changes and significant events requirements in subsection 1017B(1) of the Corporations

Act. In this instance, the explanatory statement to the instruments explains that "since 1993, ASIC has provided technical relief from certain licensing, managed investment and product disclosure provisions, and modified the Act in some circumstances." The explanatory statement also explains that these measure are not in the primary legislation as they are complex and detailed and therefore more suited to delegated legislation, and that "time-sharing schemes are unable to operate as they do currently without relief from various provisions of the Act".

The committee's longstanding view is that provisions 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. This is to ensure a minimum degree of regular parliamentary oversight and that legislative power delegated to the executive by the parliament is not abused.

The committee's views in this regard, including in relation to ASIC instruments, are set out in its final report of its inquiry into the exemption of delegated legislation from parliamentary oversight.¹ In that report the committee notes that it considers that a three year timeframe for such instruments is appropriate as it allows ASIC to rapidly address issues in relation to the operation of primary legislation, while providing a significant period of time while the instrument is in force to consider whether the modification or exemption provided by the instrument will be required for a longer period. If it is determined that a modification or exemption is required for a longer period, the committee considers that certainty for industry and the market can be best provided by incorporating the modification or exemption onto the face of the primary legislation.

In this context, while the Timeshare Instrument repeals in May 2021, the measures it inserts into ASIC Corporations (Time-sharing Schemes) Instrument 2017/272 will not cease until that instrument repeals on 1 April 2027. The committee also notes that modifications to the time-sharing scheme will have been in force via delegated legislation from 1993 until 2027, a period of 34 years. From a scrutiny perspective, this instrument represents a substantive and particularly egregious contravention of the committee's guidelines. The committee considers that these modifications clearly operate as de facto amendments to the Corporations Act, and in fact appear to be intended to do so.

In addition, as per the committee's guidelines, the committee considers that the explanatory statement should indicate 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.

The fact that the operation of primary law has been modified in this manner since 1993 is, in the committee's view, a long-running misuse of the legislative power that Parliament has delegated to ASIC. The committee welcomes your commitment to addressing the committee's systemic scrutiny concerns about ASIC instruments which provide for modifications to and exemptions from primary legislation and looks forward to discussing the Timeshare Instrument as a key example of the committee's significant scrutiny concerns about ASIC's use of their delegated legislative power.

This systemic issue is of deep concern to the committee, and the committee considers that this ongoing engagement is integral to the committee's role in providing oversight of delegated legislation on behalf of the Senate.

¹ Senate Standing Committee for the Scrutiny of Delegated Legislation, Final report: Exemption of delegated legislation from parliamentary oversight, March 2021
<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Final_report>.

The committee therefore requests your advice as to:

- why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to amend the time-sharing scheme arrangements of the *Corporations Act 2001*, noting that these modifications to the Corporations Act have been in force since 1993;
- whether the instruments can be amended to provide that the measures cease within three years after commencement; 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.

The committee also notes your ongoing engagement in relation to the committee's scrutiny concerns about parliamentary oversight of ASIC instruments and anticipates that this instrument will be further considered as part of this ongoing engagement.

Availability of independent merits review

Senate standing order 23(3)(i) requires the committee to scrutinise each instrument as to whether it unduly excludes, limits or fails to provide for the independent review of decisions affecting rights, liberties, obligations or interests.

Section 7A of the Timeshare Instrument modifies the operation of Part 5C.3 of the Corporations Act to provide that a responsible entity of a registered time-sharing scheme may determine whether a member of the scheme who has made a hardship application to withdraw meets the hardship criteria in subsection 601GA(1C). If a responsible entity considers that the hardship criteria are met, and the scheme's constitution contains provisions to the effect of paragraphs 601GA(1A)(b)–(l) and provides the responsible entity with a discretion to decide whether to allow or refuse withdrawal requests, then the responsible entity has the discretion to determine whether the member may withdraw from the scheme. Subsection 601GAH(2) requires that the responsible entity must act reasonably in exercising this discretion.

Where an instrument empowers a decision-maker to make discretionary decisions with the capacity to affect rights, liberties, obligations or interests, the committee ordinarily expects that those decisions should be subject to independent merits review. However, neither the instrument nor the explanatory statement to the instrument provides information as to whether independent merits review is available for these discretionary hardship decisions.

The committee notes that responsible entities of time-sharing schemes are public companies which hold an Australia financial services license authorising the management of managed investment schemes, as per section 601FA of the Act. While review by the Administrative Appeals Tribunal may not be appropriate as these are not administrative decisions of government officials, the committee nevertheless considers that some form of review should be available, such as internal or external dispute resolution.

The committee therefore requests your advice as to whether review is available for hardship withdrawal decisions made by responsible entities of a registered time-sharing scheme.

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 **1 April 2021**.

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.

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



THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS21-000661

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

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) regarding *AISC Corporations (Amendment) Instrument 2020/1064* and *ASIC Corporations (Amendment) Instrument 2020/1065* relating to time-sharing schemes.

In that letter, the Committee requested my advice about:

- why it is necessary and appropriate to use delegated legislation, rather than primary legislation, to amend the time-sharing scheme arrangements under the *Corporations Act 2001*;
- whether the instruments can be amended to provide that the measures cease within three years after commencement;
- if there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate; and
- whether a review mechanism is available for members where the responsible entity of a time-sharing scheme does not agree to the member's hardship request.

Regulating time-sharing schemes through delegated legislation

Time-sharing schemes are complex in nature, often involving multi-year contracts and requiring financing. Successive governments have formed the view that time-sharing schemes are generally best regulated as managed investment schemes, which are subject to robust consumer protections and regulatory oversight. However, while time-sharing schemes exhibit a number of features that are similar to a managed investment scheme, they have specific characteristics that do not fit into the regulatory framework for managed investment schemes.

Accordingly, the Australian Securities and Investments Commission (ASIC), as the regulator, has been using its instrument making powers to provide regulatory relief to time-sharing schemes where it considers it to be appropriate.

As you note, ASIC's instruments have been used to modify the regulatory framework for time-sharing schemes for a number of years.

ASIC has publicly announced that it will conduct a review of time-sharing arrangements in early 2022. I will ask Treasury to engage with ASIC through the review process. As part of this process, Treasury can consider whether it is necessary and appropriate for the details of the time-sharing arrangements to be included in the primary legislation.

Sunsetting periods

As I have noted in my previous correspondence to the Committee, the Government shares the Committee's objective that the period of operation of legislative instruments should be consistent with maintaining appropriate Parliamentary oversight, while also considering the underlying policy intent of the relevant primary law and the regulatory burden imposed on individuals and entities.

In this case, the measures in these instruments effectively sunset in six years, consistent with the sunset date of the *ASIC Corporations (Time-sharing Schemes) Instrument 2017/272*, which is amended by these instruments.

I consider that the sunset period for the measures in these instruments is appropriate as the instruments deal with unique circumstances affecting a particular class of entities. Time-sharing products do not fit within the strict operation of the *Corporations Act 2001*.

Furthermore, I note that ASIC's instruments were made after an extensive consultation process which started in late 2016 and involved numerous meetings with industry and consumer representatives. If the measures in the instruments were to sunset after three years, the measures would only be in effect for just over two years after the conclusion of the transition period. Given the extensive consultation, commencing that process again would be inefficient and resource intensive, and create significant commercial uncertainty about the treatment of timeshare products.

For these reasons, I consider that these instruments do not meet the criteria for a shorter sunset period. This is also consistent with the principles I have previously provided to the Committee about when the default sunset period will generally be appropriate.

I look forward to discussing these instruments further with the Committee, in a meeting to be arranged between my Office and the Committee.

Review of the time-sharing arrangements

As I noted above, ASIC is planning to review the time-sharing arrangements in 2022 and I will ask Treasury to consider, as part of this review, whether it is necessary and appropriate for the details of the time-sharing arrangements to be included in the primary legislation.

In this instance, I do not consider that multiple concurrent reviews are necessary.

Review of decisions made by the responsible entity of a time-sharing scheme

As time-sharing schemes are regulated as managed investment schemes and categorised as complex financial products, the responsible entity of a time-sharing scheme is required to hold an Australian Financial Services Licence (AFSL). Among a range of obligations, the AFSL holder must have a complying dispute resolution system and compensation arrangements. This means responsible

entities of time-sharing schemes are required to be members of the Australian Financial Complaints Authority (AFCA) scheme.

As you are aware, the AFCA scheme is a free and independent dispute resolution scheme which considers complaints about financial products and services. AFCA's role is to assist consumers to resolve their complaints with financial firms and AFCA's decisions are binding on the financial firms involved in the complaint.

If a member is not satisfied with a decision made by the responsible entity of a time-sharing scheme, including in relation to hardship withdrawal decisions, the member can lodge a complaint with AFCA.

I trust this information will be of assistance to the Committee.

Yours sincerely

THE HON JOSH FRYDENBERG MP

30 / 3 / 2021

CC: Minister for Superannuation, Financial Services and the Digital Economy



14 April 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au
CC: committeescrutiny@treasury.gov.au

Dear Treasurer,

ASIC Corporations (Amendment) Instrument 2020/1065 [F2020L01572]

ASIC Corporations (Amendment) Instrument 2020/1064 [F2020L01571]

Thank you for your response of 30 March 2021 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 13 April 2021 and has resolved to seek your further advice about the issues outlined below.

***Matters more appropriate for parliamentary enactment
Parliamentary oversight***

In relation to this matter, you advised that the Australian Securities and Investments Commission (ASIC) will review time-sharing schemes in 2022 and undertook to consider "as part this review, whether it is necessary and appropriate for the details of time-sharing arrangements to be included in the primary legislation". You also advised that the amendments made by the instruments will effectively sunset in six years and a shorter duration would create commercial uncertainty, require another round of extensive lengthy consultations, and would be inefficient and resource intensive.

The committee notes that these instruments provide for significant measures in the context of their regulatory environment. It is the committee's view that the advice you have provided, including that ASIC will be undertaking a review of time-sharing schemes in 2022, in fact indicates that these significant instruments are more appropriate for a shorter duration.

While noting this further information, the committee continues to have significant systemic scrutiny concerns relating to instruments which modify the operation of primary legislation. The committee welcomes your invitation to meet with your office, the Treasury, and ASIC to discuss these concerns. As this systemic issue is of deep, ongoing concern to the committee, as set out in separate correspondence from myself and the Deputy Chair, the committee considers this meeting should be held prior to the next parliamentary sitting week.

Availability of independent merits review

In relation to this matter, you advised that the responsible entity of a time-sharing scheme is required to hold an Australian Financial Services License, which requires holders to have a complying dispute resolution system and compensation arrangements. You advised that as a result, responsible entities of time-sharing schemes are required to be members of the Australian Financial Complaints Authority (AFCA), and that time-share members may lodge complaints for review of decisions made by responsible entities with AFCA.

The committee thanks you for this advice and requests that the explanatory statements to the instruments be amended to include this further information in relation to review of hardship withdrawal decisions made by responsible entities of a registered time-sharing scheme.

The committee's expectation is to receive a response in time for it to consider and report on the instruments while they are still subject to disallowance. Noting that the 15th sitting day after both instruments were tabled in the Senate is 11 May 2021, the committee has resolved to give notices of motion to disallow the instruments on that day as a precautionary measure to allow additional time for the committee to consider the outstanding matter in relation to the availability of independent merits review.

Noting this, and to facilitate the committee's consideration of this matter, the committee would appreciate your response by **28 April 2021**.

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.

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



**THE HON JOSH FRYDENBERG MP
TREASURER**

Ref: MS21-000917

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

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation regarding the *ASIC Corporations (Amendment) Instrument 2020/1064* and *ASIC Corporations (Amendment) Instrument 2020/1065* (the ASIC Corporations Amendment Instruments).

In that letter, the Committee requested amendment to the explanatory statements of the ASIC Corporations Amendment Instruments to include further information in relation to review of hardship withdrawal decisions made by responsible entities of a registered time-sharing scheme as outlined in my previous letter dated 30 March 2021.

In response to that request, ASIC has undertaken to register replacement explanatory statements as soon as possible.

I trust this information will be of assistance to the Committee.

Yours sincerely

THE HON JOSH FRYDENBERG MP

26 / 4 /2021

CC: Minister for Superannuation, Financial Services and the Digital Economy



AUSTRALIAN
SENATE

**Senate Standing Committee for the
Scrutiny of Delegated Legislation**

Parliament House, Canberra ACT 2600
02 6277 3066 | sdlc.sen@aph.gov.au
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13 May 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au

CC: committeescrutiny@treasury.gov.au; Chris.Reside@treasury.gov.au

Dear Treasurer,

ASIC Corporations (Amendment) Instrument 2020/1064 [F2020L01571]

ASIC Corporations (Amendment) Instrument 2020/1065 [F2020L01572]

Thank you for your response of 26 April 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 12 May 2021. On the basis of your ongoing, good faith engagement with the committee in relation to Treasury portfolio instruments which modify or exempt persons or entities from the operation of primary legislation, the committee has resolved to conclude its examination of the instruments as part of its regular scrutiny process.

However, as you are aware, the committee continues to have significant systemic scrutiny concerns relating to instruments which modify the operation of primary legislation, and the operation of these instruments for a ten year period. The committee will therefore consider these instruments as part of this ongoing engagement. In light of these ongoing discussions, the committee has resolved to withdraw the notices of motion to disallow these instruments.

While the committee has resolved to withdraw the disallowance notices in place on these instruments, I advise that the committee will give disallowance notices on similar Treasury portfolio instruments which raise these concerns in the future if the committee's systemic scrutiny concerns are not satisfactorily resolved through the current ongoing discussions.

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