

EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 312

Issued by authority of the Parliamentary Secretary to the Treasurer

Mutual Assistance in Business Regulation Act 1992

Mutual Assistance in Business Regulation Amendment Regulation 2012 (No. 1)

Section 23 of the *Mutual Assistance in Business Regulation Act 1992* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed by regulations, or necessary or convenient to be prescribed by such regulations for carrying out or giving effect to the Act.

The Act and associated regulations permit Australian business law regulators – the Australian Securities and Investments Commission (ASIC), the Australian Competition and Consumer Commission (ACCC) and the Australian Prudential Regulatory Authority (APRA) – to respond to requests from foreign counterparts to gather information to assist foreign regulators in their administration or enforcement of foreign business laws.

Section 5 of the *Mutual Assistance in Business Regulation Regulations 1992* (the Principal Regulations) prescribes the information which must be provided by a foreign regulator as part of any request for information under the Act. The Act does not restrict the purpose of such requests to circumstances where the foreign regulator suspects an offence of their business law may have been committed. However, the prescribed information required under section 5 of the Principal Regulations includes: a description of the conduct under investigation (subparagraph (a)(i)); and a statement of the way in which the facts give rise to a belief or suspicion that the law has been, or may have been, contravened (subparagraph (d)(ii)). This implies that Australian business law regulators may only respond to a request from a foreign business law regulator if there is specific enforcement action being contemplated by the requesting foreign regulator.

The overall intent of the Act is to better facilitate sharing of information between Australian and foreign business regulators. Allowing the sharing of information outside the context of a specific contravention, such as for the regulatory purpose of supervising trading activity on financial markets, would allow Australian regulators to better engage with their foreign counterparts. Sharing general supervisory information would facilitate the detection of regulatory breaches, and achieve better enforcement outcomes for both domestic and foreign regulators.

The *Mutual Assistance in Business Regulation Amendment Regulation 2012 (No. 1)* (the Amendment Regulation) makes minor amendments to the Principal Regulations to remove this implied limitation, thereby allowing Australian business law regulators to share general supervisory information with their foreign counterparts. The Amendment Regulation also makes some minor drafting amendments to reflect current drafting practices.

The corporate regulator, ASIC, has been consulted on the Amendment Regulation. Given that it comprises a very minor amendment which is intended to clarify that the sharing of general supervisory information is permitted (consistent with the intent of the Act), the Amendment Regulation has not been exposed for public consultation.

The Act does not impose any conditions that need to be satisfied before the power to make the Amendment Regulation may be exercised.

The Office of Best Practice Regulation advised that a Regulation Impact Statement is not required.

The Amendment Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Amendment Regulation commences the day after it is registered on the Federal Register of Legislative Instruments.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

MUTUAL ASSISTANCE IN BUSINESS REGULATION AMENDMENT REGULATION 2012 (NO. 1)

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Mutual Assistance in Business Regulation Act 1992* (the Act) and associated regulations permit Australian business law regulators – the Australian Securities and Investments Commission (ASIC), the Australian Competition and Consumer Commission (ACCC) and the Australian Prudential Regulatory Authority (APRA) – to respond to requests from foreign counterparts to gather information to assist foreign regulators in their administration or enforcement of foreign business laws.

Section 5 of the *Mutual Assistance in Business Regulation Regulations 1992* (the Principal Regulations) prescribes the information which must be provided by a foreign regulator as part of any request for information under the Act. The Act does not restrict the purpose of such requests to circumstances where the foreign regulator suspects an offence of their business law may have been committed. However, the prescribed information required under section 5 of the Principal Regulations implies that Australian business law regulators may only respond to a request from a foreign business law regulator if there is specific enforcement action being contemplated by the requesting foreign regulator.

The overall intent of the Act is to better facilitate sharing of information between Australian and foreign business regulators. Allowing the sharing of information outside the context of a specific contravention, such as for the regulatory purpose of supervising trading activity on financial markets, would allow Australian regulators to better engage with their foreign counterparts.

The *Mutual Assistance in Business Regulation Amendment Regulation 2012 (No. 1)* makes minor amendments to the Principal Regulations to remove this implied limitation, thereby allowing Australian business law regulators to share general supervisory information with their foreign counterparts.

Human rights implications

This Legislative Instrument engages Article 17 of the International Covenant on Civil and Political Rights (ICCPR). Article 17 protects the right to privacy and reputation. This Legislative Instrument infringes on Article 17, as it allows Australian business law regulators to share personal information with foreign business law regulators for general supervisory purposes. Limitations to Article 17 must be authorised by law and must not be arbitrary.

The Legislative Instrument's limitation on the right to privacy is considered reasonable, necessary and proportionate to achieve the objectives of the Legislative Instrument. Further, the benefits to public order resulting from Australian business law regulators being able to share information with foreign counterparts for general supervisory purposes are considered to outweigh the limitation on the right to privacy. Sharing supervisory information would facilitate the detection of regulatory breaches, and achieve better enforcement outcomes for both domestic and foreign regulators. This would facilitate co-operation amongst international regulators and improve their capacity to effectively supervise international financial activity, especially in the early detection of market misconduct. Given the linkages and interdependencies inherent in modern financial markets, this would benefit domestic and foreign economies. This would also serve to improve investor confidence and stability in financial markets.

The Act already provides numerous safeguards to protect individuals' rights. For example, the information provided in response to a request under the Act is not to be used for the purposes of criminal proceedings (which is more appropriately dealt with under the *Mutual Assistance in Criminal Matters Act 1987*). As part of any request for information, foreign regulators are required to provide details of the confidentiality that they will accord the information provided to them; conditions may also be imposed on the foreign regulators to ensure the confidentiality of the information provided. Furthermore, the giving of evidence in relation to a request under the Act takes place in private, and persons have the right to legal representation.

Conclusion

This Legislative Instrument is compatible with human rights because to the extent that it may limit the right to privacy, this limitation is reasonable, necessary and proportionate. The benefits resulting from this Legislative Instrument are considered to outweigh the limitation it places on Article 17 of the ICCPR.

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