

3 February 2023

Senate Standing Committee on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: economics.sen@aph.gov.au

Dear Committee Members

Treasury Laws Amendment (Modernising Business Communications and Other Measures Bill 2022 [Provisions] Inquiry

1. This submission has been prepared on behalf of the Financial Services Committee and the Corporations Committee (collectively, the **Committees**) of the Business Law Section of the Law Council of Australia in response to the Inquiry into the *Treasury Laws Amendment (Modernising Business Communications and Other Measures Bill 2022 (Cth) (the Bill)*. On 24 November 2022, the Senate referred the Bill to the Senate Economics Legislation Committee for inquiry and report.
2. The Committees thank the Senate Economics Legislation Committee for giving the Committees the opportunity to comment on the Bill, and for granting the Committees' request for an extension of time within which to respond.
3. The Committees seek only to comment on those of the legislative changes within the Bill covering subject matters in which Committee members have expertise and wish to comment.
4. The Bill appears to amalgamate a number of Bills which were previously released in exposure draft form for consultation. Where one or both of the Committees responded to previous consultation on relevant provisions, a copy of the relevant submission is attached to this letter for reference. This is intended to assist the Senate Economics Legislation Committee to assess the extent to which previous feedback which the Committees provided in response to consultation has been reflected in the Bill before Parliament.

Schedule 1—Modernising Business Communications

Part 2—Virtual hearings and examinations

5. Treasury released an exposure draft *Treasury Laws Amendment (Modernising Business Communications) Bill 2022* and Explanatory Memorandum for consultation on 29 August 2022.

6. The Committees made a submission to Treasury’s Market Conduct Division in response to the Treasury consultation process on 27 September 2022. A copy of that document is attached as **Annexure 1**.

Part 4—Publication requirements and other amendments

7. In principle, the Committees agree that requirements to publish certain notices in “national newspapers” should be replaced with a more flexible and modern alternative.
8. However, the Committees are concerned that the proposed replacement wording in the Bill, requiring a notice to be published “in a manner which would result in it being publicly available and reasonably prominent” could be interpreted as not encompassing publication of the notice in a national newspaper per the status quo. The Committees do not believe that this is an intended outcome.
9. The Committees consider that the Australian Securities and Investments Commission (**ASIC**) would need to positively conclude that newspaper advertisements in the form used since the late 1990s are “reasonably prominent” in order to make a determination under proposed subsection 127(9) of the National Credit Code (and equivalent proposed provisions in the *Corporations Act 2001* (Cth) (**Corporations Act**) relating to other notice requirements. The Committees submit, that even in 1994, when the Uniform Consumer Credit Code provisions that became section 64 of the National Credit Code were drafted, newspaper notices would probably not have been regarded as being “reasonably prominent”. While newspapers might be read by those whose business is to find out about interest rate changes or insolvencies, the Committees believe that the majority of the population rely on other news sources.
10. The Committees submit that, if it were determined as a matter of fact that newspaper notices are not “reasonably prominent”, this could trigger a need for a majority of consumer lenders to revise all of their customer facing terms and conditions simultaneously and on a fairly urgent basis.
11. The Committees submit that it would be helpful for the Bill and/or the Explanatory Memorandum to clarify that existing methods of publishing notices in national newspapers will be taken to comply with each respective notice publication obligation.

Schedule 2—ALRC Financial Services Interim Report

12. Treasury released an exposure draft *Treasury Laws Amendment (Measures for Consultation) Bill 2022* and Explanatory Memorandum on 24 August 2022.
13. The Law Council, on behalf of the Committees and the Law Society of New South Wales, made a submission to the Legislation Policy and Delivery Branch within the Law Division of Treasury in response to the Treasury consultation process on 20 September 2022. A copy of that document is attached as **Annexure 2**.
14. In paragraphs 13 to 18 of Annexure 2, in commenting on previous exposure draft legislation, a problem with the proposed definition of “extraordinary resolution” due to the use of “votes cast” rather than “votes that may be cast” in that draft definition was articulated. No comment was made on the “special resolution” definition in the exposure draft legislation (because it was considered correct).
15. The Law Council was only ever asking for the relevant change to be made with respect to the “extraordinary resolution” definition in the exposure draft legislation, so

that the effect of the current law could be maintained. The Law Council did not in any way wish to suggest or imply that any change ought to be made to the definition of “special resolution” that was used in the exposure draft legislation.

16. However, regrettably, and for reasons the Committees cannot fathom, a corresponding amendment to the definition of “special resolution” appears to have been inappropriately made, such that the definition of “special resolution” in the Bill fails to reflect the current law.
17. The Committees have commented on this particular matter below.

Part 3—Other amendments

Division 2—Definitions about resolutions

18. The Committees *strongly recommend* that the words “that may be” are removed from the definition of “special resolution” in each of proposed new sections 250MA and 253LA of the Corporations Act (see items 111–113 of the Bill) for the following reasons.
19. Paragraph 5.30 of the Explanatory Memorandum to the Bill states that the changes “do not alter the effect of the current definitions”. Unfortunately, as currently drafted, the Committees are of the firm view that the Bill *would* have this (unintended) effect.
20. By way of background, under the current law there are three types of resolutions for companies (including corporate collective investment vehicles) and registered managed investment schemes:
 - (a) an ordinary resolution—which is not currently defined in the Corporations Act and under its ordinary meaning will be passed if more than 50% of the votes cast by members eligible to vote on the resolution are in favour;
 - (b) a special resolution—which is passed if at least 75% of the votes cast by members eligible to vote on the resolution are in favour; and
 - (c) an extraordinary resolution—which is only passed if at least 50% of the total votes *that may be* cast by members eligible to vote on the resolution (including members who are not present) are in favour.
21. By way of example, let’s assume that:
 - (a) a company has 100 members;
 - (b) each member holds one share worth \$1;
 - (c) all 100 members are eligible to vote on resolutions;
 - (d) a meeting is held; and
 - (e) 60 members vote at the meeting.

22. Set out below is an example of what the approval thresholds at that meeting would be for each respective kind of resolution under the current law set out in the Corporations Act and summarised above versus the proposed law in the Bill:

Kind of resolution	Current law	Proposed law in the Bill
Ordinary resolution	More than 30 of the 60 members voting need to vote in favour	No change
Special resolution	At least 45 of the 60 members voting need to vote in favour	At least 75 of the total 100 members would need to vote in favour Even if all 60 votes cast at the meeting were favour of the resolution, it would still not be passed.
Extraordinary resolution	At least 50 of the total members would need to vote in favour	No change

23. The Committees consider this to be a matter of significant importance and are willing to assist in any way to ensure that the unintended outcome that the Bill in its current form would deliver is avoided, rather than having to be fixed later.

Schedule 3—Rationalisation of ending ASIC instruments

24. Treasury released an exposure draft *Treasury Laws Amendment (Measures for consultation) Bill 2022: Rationalisation of ASIC Instruments and Explanatory Memorandum* on 24 August 2022.
25. The Financial Services Committee made a submission to Treasury’s Legislation Policy and Delivery Branch of the Law Division in response to the Treasury consultation process on 20 September 2022. A copy of that document is attached as **Annexure 3**.

26. If you have any questions, please do not hesitate to contact Pip Bell, Chair of the Financial Services Committee (pbell@pmclegal-australia.com) or Robert Sultan, Chair of the Corporations Committee (robert.sultan@nortonrosefulbright.com).

Yours faithfully

A handwritten signature in black ink, appearing to read 'P. Argy', with a long, sweeping flourish extending to the right.

Philip Argy
Chairman
Business Law Section

Annexure 1—Submission in response to Treasury Laws Amendment (Modernising Business Communications Bill 2022: Virtual hearings and examinations (27 September 2022)

Annexure 2—Submission in response to Treasury consultation relating to Improving Corporations and Financial Services Law (20 September 2022)

Annexure 3—Submission in response to Treasury consultation relation to Rationalisation of Ending ASIC Instrument Measures (20 September 2022)