



Law Council
OF AUSTRALIA

Business Law Section

18 October 2021

Law Division
Treasury
Langton Cres
Parkes ACT 2600

By email: MiscAmendments@treasury.gov.au

Dear Sir/Madam,

Second round of miscellaneous amendments to Treasury portfolio laws 2021

1. This submission relates to the following materials issued by Treasury for consultation on 24 September 2021:
 - a. the exposure draft *Treasury Laws Amendment (Measures for Consultation) Bill 2021: Miscellaneous and Technical Amendments No. 2 (Cth)* (**Draft Bill**) and exposure draft explanatory materials (**Draft EM**); and
 - b. the exposure draft *Treasury Laws Amendment (Measures for Consultation) Regulations 2021: Miscellaneous and Technical Amendments No. 2 (Cth)* (**Draft Regulations**) and exposure draft explanatory statement (**Draft ES**).
2. The content of the submission relating to the Regulatory Framework Bill has been prepared by the Financial Services Committee of the Business Law Section of the Law Council of Australia.
3. We thank Treasury for the opportunity to comment on these exposure draft materials.
4. This submission focuses on the proposed amendments to:
 - a. the *Corporations Act 2001 (Cth)* (**Corporations Act**) and the *Corporations Regulations 2001 (Cth)* (**Corporations Regulations**); and
 - b. the *National Consumer Credit Protection Act 2009 (Cth)* (**NCCP Act**) and the *National Consumer Credit Protection Regulations 2010 (Cth)* (**NCCP Regulations**).

Amendments supported

5. We support and welcome the substantive amendments to the law contained in the Draft Bill introducing:
 - a. proposed new subsection 912D(6) of the Corporations Act; and
 - b. proposed subsection 50A(5A) of the NCCP Act,

which would allow the regulations to prescribe parts of a civil penalty obligation, so that particular parts of a provision might be treated as a “core obligation” while others might not. We consider this desirable to ensure the optimal functioning of the

new breach reporting regime under the Corporations Act and the NCCP Act, which has just commenced.

6. We support the proposed insertion of new paragraph 50A(3)(d) into the NCCP Act, which would allow the NCCP Regulations to specify additional legislation breach of which a credit licensee would need to report to ASIC, and welcome the proposed consistency in approach between the Corporations Act and the NCCP Act that such regulations would enable.
7. We have no particular comments on the other proposed amendments, but wish to share some further observations.

Other observations

8. Firstly, we note that amendments to section 916B of the Corporations Act incorporate regulation 7.6.08(1) and (2) of the Corporations Regulations (which modify that section) into the Corporations Act itself.
9. We strongly support this rationalisation of the legislation, and consider that the reform should be extended, at least, to also incorporate regulation 7.6.08(3), which modifies subsection 916F(1AA) of the Corporations Act, into the Corporations Act itself.
10. Secondly, we note that the proposed new subsection 912D(6) of the Corporations Act and subsection 50A(5A) of the NCCP Act would introduce regulation-making powers such that the relevant regulations could then be made to prescribe the relevant civil penalty provisions. We consider that it is the correct approach to specify the regulation-making power in the enabling legislation.
11. We wish to bring Treasury's attention to an apparently divergent approach that we have observed within the Corporations Regulations. We note that regulation 7.9.16O(1) purports to introduce a new subsection 1017D(8) into the Corporations Act, which states that the regulations may specify requirements as to the presentation, structure and format of a periodic statement, and then regulation 7.9.16O(2) purports to be made pursuant to that subsection 1017D(8).
12. In our view, the preferable approach would be to have the regulation making power under subsection 1017D(8) contained within the Corporations Act itself (rather than in a regulation which purports to modify the Corporations Act). We question whether it is strictly valid for regulations to purport to amend the Corporations Act to allow regulations to be made thereunder.
13. If this is an anomaly, we would suggest that the Draft Bill also include an insertion of subsection 1017D(8) into the Corporations Act and that regulation 7.9.16O(1) be repealed by the Draft Regulations.
14. Please note that we have not conducted an exhaustive search of the Corporations Regulations to check if any other regulations that purport to introduce a regulation making power into the Corporations Act have been made. If it were the case that other regulations sought to introduce a regulation making power into the Corporations Act, we would recommend the same approach be taken as we have suggested above.

Conclusion and further contact

7. The Financial Services Committee would be pleased to discuss any aspect of this submission as it relates to the Regulatory Framework Bill. Please contact the Chair of the Financial Services Committee Pip Bell at pbell@pmclegal-australia.com, if you would like to do so.

Yours faithfully

A handwritten signature in black ink that reads "Greg Rodgers". The signature is written in a cursive style with a large, looping 'G' and 'R'.

Greg Rodgers
Chair, Business Law Section