

27 September 2022

Mr Kym Malycha
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Langton Cres
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By email: mbcomms@treasury.gov.au

Dear Mr Malycha

**Treasury Laws Amendment (Modernising Business Communications) Bill 2022:
Virtual hearings and examinations**

1. This submission relates to the exposure draft *Treasury Laws Amendment (Modernising Business Communications) Bill 2022* (Cth) (**Draft Bill**) and exposure draft *Treasury Laws Amendment (Modernising Business Communications) Regulations 2022* (Cth) (**Draft Regulations**), together with the accompanying exposure draft Explanatory Memorandum and Explanatory Statement documents, which were released by Treasury for consultation on 29 August 2022.
2. The purpose of the Draft Bill and the Draft Regulations is to clarify that relevant Treasury portfolio regulators can hold hearings and examinations virtually.
3. The Financial Services Committee and the Corporations Committee of the Business Law Section of the Law Council of Australia (the **Committees**) appreciate the opportunity to provide feedback on the Draft Bill and the Draft Regulations and the granting of an extension to do so until 30 September 2022.
4. The Committees consider that, in principle, it is appropriate for regulators to be able to use virtual technology methods to conduct hearings and examinations in circumstances where attendance in person by all parties is not practicable (for example, where a natural disaster or severe weather event has impacted the home or business address of a participant, or where a public health emergency declaration that restricts close person to person contact is in place) provided that an appropriate minimum level of procedural fairness can be maintained.
5. The Draft Bill contemplates that the relevant regulator may only use a virtual technology method if each participant in the relevant process has a “reasonable opportunity” to participate in and be represented at the hearing or examination.

6. However, for the reasons articulated below, the Committees consider that:
 - (a) the parameters within which the use of virtual technology methods is permitted for future hearings and examinations should be carefully considered; and
 - (b) there are other relevant and important matters not canvassed in the consultation documents which should be taken into account in developing the proposed new legislation.

Procedural fairness considerations

7. The Financial Services Committee submits that, in designing the proposed laws, the following relevant matters ought to be considered.
8. When hearings and examinations are conducted, the rights, freedoms and/or livelihood of individuals could be impacted (for example, suspension or cancellation of a licence or registration).
9. It is important to recognise that there are limitations associated with the use of virtual technology methods. For example, there is not the same opportunity to engage on a human level and observe body language as there is when proceedings are conducted with all participants in the same physical location. It is also difficult to tell whether there may be someone else present in the same room as a participant who is outside the view of the camera and therefore cannot be seen on screen.
10. The Financial Services Committee therefore considers that it would be appropriate to reconsider the breadth of circumstances in which virtual technology methods should be permitted and, in designing new laws, ask the following relevant questions:
 - (a) If a regulator schedules a virtual rather than in-person hearing or examination:
 - (i) should participants be given the opportunity to request that the hearing or examination be held in person; and
 - (ii) where it is not impracticable to meet the request (that is, no extenuating circumstances outside the participants' control would prevent an in-person hearing or examination occurring), should the regulator be required to conduct the hearing or examination in person?
 - (b) Should the ability for regulators to hold a hearing or examination using virtual technology methods be restricted to circumstances where the regulator is reasonably satisfied that it is not practicable, due to circumstances beyond the reasonable control of the affected participant/s, for the hearing or examination to be held in person within a prescribed period of the date on which the circumstances arose that have triggered the need for a hearing or examination?
 - (c) Should there be a requirement that the same method be used for all participants, so that, if one participant cannot attend in person, then the entire proceeding is held using a virtual technology method, rather than having some participants present in person and others present only virtually?

11. The Financial Services Committee submits that the law should ensure that a virtual technology may not be used if the ability of any participant in the relevant hearing or examination proceeding to participate and/or be represented could be unfairly compromised as a consequence of such proceeding not being held in person.
12. Some observations about the drafting of the proposed new provisions are made by the Corporations Committee below.

Drafting considerations

13. The Corporations Committee makes the following observations on the drafting of “reasonable opportunity to participate or be represented” in the Draft Bill.

Reasonable opportunity to participate

14. The Corporations Committee is concerned that the nature of examination processes may not have been fully appreciated in preparing the draft legislation.
15. The expression “reasonable opportunity to participate” has been transplanted from the provisions relating to virtual company meetings in the *Corporations Act 2001* (Cth) (**Corporations Act**) (see section 249S). However, the context of an examination is different.
16. In the Corporations Act meeting-of-members context, the reasonable opportunity to participate in a virtual meeting applies to the members as a whole, rather than to an individual member. And it is qualified by the adjective “reasonable” because there needs to be scope for the chairperson to chair the meeting efficiently, and this might have the consequence that not all members have the opportunity to speak, or speak to the extent that they might wish. The risk of the members (collectively) not having a reasonable opportunity to participate is ameliorated somewhat by the ability of the Court under section 1322 of the Corporations Act to declare the meeting invalid in those circumstances, if a substantial injustice is caused that cannot be remedied by a court order.
17. An examination raises the converse issue. Rather than wishing to participate, the examinee attends the examination involuntarily. Therefore, the Corporations Committee considers that the use of the expression “reasonable opportunity to participate” may not necessarily be appropriate in this context.
18. The Corporations Committee therefore submits that, in each case where the expression applies to a “participant in the proceedings”, references to “reasonable opportunity” should be deleted and the language used in the definition of “virtual enquiry technology”, which refers to “technology that allows a person to participate” should instead be used consistently throughout the relevant pieces of legislation.

“Or” be represented

19. It is not clear to the Corporations Committee as to why “or” appears between “participate” and “be represented”. The Corporations Committee submits that:
 - (a) the ability to participate and to be legally represented should not be alternatives; and
 - (b) the examinee should be entitled to have their legal representative present at the virtual examination with them (for example, in case there is a need to make an objection).
20. Therefore, the Corporations Committee submits that the word “and” should be substituted for “or” in each place where this expression appears (including in the definitions of “virtual enquiry technology”).

Other observations

21. In an ideal world, the Committees would have liked to provide a more detailed and comprehensive response. However, due to the significant volume of different law reform proposals simultaneously released by Treasury since the beginning of August 2022, it has not been possible for Committee members to spend the required amount of time to engage with the process in a suitably thorough fashion.
22. The Committees are concerned that:
 - (a) releasing a large number of significant and complex law reform proposals for consultation over limited periods of time which overlap with one another could result in a compromise to the volume, depth, and quality of stakeholder feedback that Treasury receives; and
 - (b) this in turn could adversely impact the fitness for purpose of the laws that are ultimately developed in response to consultation processes.
23. In future Treasury law reform proposals, the Committees would welcome a substantial improvement in the balance between speed of proposal and adoption of new laws, on the one hand, and quality of the final product, on the other.
24. 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,



Philip Argy
Chairman
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