

20 September 2022



Mr Andre Moore
Assistant Secretary
Legislation Policy and Delivery Branch
Law Division
Treasury
Langton Cres
Parkes ACT 2600

By email: [REDACTED]

Dear Mr Moore

IMPROVING CORPORATIONS AND FINANCIAL SERVICES LAW

1. The Law Council is pleased to make this submission in response to the Treasury's consultation on improving corporations and financial services law.
2. This submission has been developed with the assistance of the Corporations Committee and Financial Services Committee of the Law Council's Business Law Section, and the Law Society of New South Wales.

Law Council position

3. The Law Council appreciates the opportunity to comment on the Treasury Laws Amendment (Measures for Consultation) Bill 2022 (**draft Bill**), the Treasury Laws Amendment (Measures for Consultation) Regulations 2022 (**draft Regulations**) and the accompanying explanatory materials.
4. The Law Council supports the proposed implementation by the draft Bill and draft Regulations of the recommendations and suggestions made by the Australian Law Reform Commission (**ALRC**) in Interim Report A of its Review of the Legislative Framework for Corporations and Financial Services Regulation (**Inquiry**).
5. As part of its submission to the ALRC in March 2022 following the release of Interim Report A of the Inquiry,¹ the Law Council expressed strong support for measures to simplify the *Corporations Act 2001* (Cth) (**Corporations Act**), *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and the *Corporations Regulations 2001* (Cth) (**Corporations Regulations**) to increase navigability and certainty for users of the corporations and financial services legislative framework.
6. As outlined in its submission to the ALRC, the Law Council reiterates that there is a much broader design problem in the corporations and financial services legislative framework, particularly Chapter 7 of the Corporations Act, which cannot be addressed by way of the minor technical amendments envisioned in Interim Report A.² Whilst these changes may

¹ Law Council of Australia, [Interim Report A: Review of the Legislative Framework for Corporations and Financial Services Regulation](#) (Submission to the ALRC, 11 March 2022).

² Ibid 8–9.

assist with navigability, most of the substantive challenges in the existing regime can only be met by way of broader policy changes, which are currently excluded from the Inquiry's Terms of Reference.

7. Whilst the Law Council continues to submit that broader policy changes to the Corporations Act, ASIC Act and Corporations Regulations will be required to address their inherent design problems, it considers the measures proposed to be an essential 'spring clean' of the currently unkempt and complex 'pathway' that is the corporations and financial services legislative framework.
8. As such, the Law Council considers that the practical changes proposed in the draft Bill and draft Regulations will have a beneficial effect by improving the clarity and navigability of Australia's corporations and financial services laws while the ALRC's Inquiry continues.

General observations

9. The Law Council supports the removal of redundant definitions and erroneous references in the corporations and financial services legislation. To follow on from the intricate 'pathway' mentioned above, it would be helpful to improve and unify the pathway's signage and to block off some of its dead ends so that users of the legislation can navigate better and not spend time searching for terms that are not used.

Removal of definitions

10. To mitigate the potential for definitional gaps to arise within the legislative framework, the Law Council suggests revisiting and updating any cross-references made by other pieces of legislation to definitions in the Corporations Act that the draft Bill seeks to remove. To promote clarity and navigability, consideration should be given to defining the relevant term in the other piece of legislation, if appropriate.
11. The Law Council notes that the draft Bill seeks to move some definitions from section 9 to another section of the Corporations Act. The Law Council submits it may also be useful to include a table which provides whether a term is defined in section 9 or in a different section. This is because users who have been directed to a definition in the Corporations Act from another instrument may only search for the term in section 9. If there is a defined term located elsewhere, this should be clarified to enhance user certainty when navigating the legislation.
12. In future, to ensure that redundant definitions are not retained in the legislation, causing unnecessary confusion, the Law Council suggests that when a section of the Corporations Act is being repealed, the process should involve considering:
 - whether the defined terms used within the section are to be repealed; and
 - whether they are used elsewhere, whether in the corporations and financial services laws or other legislation that refers to the Corporations Act definition.

If the definition is not used elsewhere, then the definition should be repealed.

Comments on technical aspects

Registered managed investment schemes

13. The Law Council notes there are three types of resolution in the context of registered managed investment schemes:

- **Ordinary resolution:** Passed if more than 50 per cent of the votes cast by members eligible to vote are in favour.
 - A concept at general law, not mentioned in the legislation.
 - **Special resolution:** Passed if a threshold of at least 75 per cent of the votes cast by members eligible to vote are in favour.
 - Currently provided for in section 9 of the Corporations Act.
 - Provided for in proposed new subsection 253LA(1) at clause 105 of the draft Bill.
 - **Extraordinary resolution:** Passed if at least 50 per cent of all units held on issue held by members eligible to vote are cast in favour, which is effectively a much higher threshold.
 - Currently provided for in section 9 of the Corporations Act.
 - Provided for in proposed new subsection 253LA(2) at clause 105 of the draft Bill.
14. It appears that there would be an unintentional change to the definition of “extraordinary resolution” if clause 105 of the draft Bill were to be passed in its current form. Proposed subsection 253LA(2) provides:
- For a resolution of the members of a registered scheme to have effect as an extraordinary resolution, the resolution must be otherwise valid and passed by at least 50% of the votes cast by members of the scheme who are entitled to vote on the resolution (including members who are not present in person or by proxy).*
15. The current definition of “extraordinary resolution” is in section 9 of the Corporations Act. That definition includes a reference to the “votes *that may be* cast”. The words “that may be” have been omitted from the proposed definition in the draft Bill. The Law Council considers that this omission would change the meaning of the term, effectively providing for the same approval threshold as that which applies for an ordinary resolution.
16. The Law Council accordingly suggests adding the phrase “that may be” to the definition of “extraordinary resolution” in proposed subsection 253LA(2), as follows:
- ...and passed by at least 50% of the votes **that may be** cast by members of the scheme who are entitled to vote on the resolution...*
17. The Law Council also considers it may be helpful to include a definition of “ordinary resolution” in the Corporations Act for the sake of clarity.
18. Additionally, the current definitions of “extraordinary resolution” and “special resolution” in section 9 of the Corporations Act are explicitly defined to apply to a registered scheme, a Corporate Collective Investment Vehicle (**CCIV**), or a sub-fund of a CCIV. However, the draft Bill does not mention the CCIV or sub-fund of a CCIV context in relation to the proposed definitions in proposed section 253LA. The Law Council expects this has inadvertently occurred because, when the ALRC released Interim Report A, the changes

made to the Corporations Act by the *Corporate Collective Investment Vehicle Framework and Other Measures Act 2022* (Cth) were not yet in force.³

19. Noting the proposed definitions do not refer to CCIVs or sub-funds of CCIVs, the Law Council submits it may be problematic if the existing definitions are removed from section 9 and specific provisions are not created for CCIVs and sub-funds of CCIVs.
20. The Law Council also suggests it would be prudent for the Treasury to examine whether any amendments to the Corporations Act have come into force since the release of the ALRC's Interim Report A which ought to be addressed or dealt with differently in the draft Bill.

Headings in Schedule 10 of the Corporations Regulations

21. The Law Council notes that clauses 19, 20 and 21 of the draft Regulations propose to amend the headings of regulations 102, 103 and 104 respectively of Schedule 10 to the Corporations Regulations.
22. The Law Council notes that Schedule 10 has been modified by the ASIC Corporations Instrument (Disclosure of Fees and Costs) Instrument 2019/1070 (**ASIC Instrument**). As such, the proposed draft Regulations are seeking to make changes to headings of items in Schedule 10 which have already been amended by the ASIC Instrument. For instance:
 - for regulation 103, the heading in the current Corporations Regulations is '**Transactional and operational costs**', while the modified heading in the ASIC Instrument is '**Transaction costs**'; and
 - for regulation 104, the heading in the current Corporations Regulations is '**Indirect cost ratio**', while the modified heading in the ASIC Instrument is '**Calculating costs in administration fees and costs and investment fees and costs**'.
23. While the Law Council broadly supports ensuring headings in the legislative framework are consistent and clear, it questions the utility of changing the headings of provisions that are not currently in use due to the operation of the ASIC Instrument.

Contact

24. The Law Council would be pleased to discuss any aspect of this submission with the Treasury. In the first instance, please contact Ms Leonie Campbell, Director of Policy, at [REDACTED]

Yours sincerely,

Mr Tass Liveris
President

³ This legislation commenced on 1 July 2022, while the ALRC's Interim Report A was released on 30 November 2021.