

31 January 2023

Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Submitted via online upload at:

https://www.aph.gov.au/Parliamentary_Business/Committees/OnlineSubmission/Submit

**Australian Retail Credit Association (ARCA) submission:
Treasury Laws Amendment (Modernising Business Communications and
other Measures) Bill 2022**

Thank you for the opportunity to provide our submission in relation to the Treasury Laws Amendment (Modernising Business Communications and other Measures) Bill 2022 (**the Bill**) which is currently before the Economics Legislation Committee for inquiry and report.

Australian Retail Credit Association

ARCA is the peak industry association for businesses using information for risk and credit management. Our Members include Australia's leading banks, credit unions, finance companies, fintechs and credit reporting bodies and, through our Associate Members, many other types of related businesses providing services to the industry. Collectively, ARCA's Members account for well over 95% of all consumer lending in Australia.

ARCA's submission

ARCA has previously provided submissions dated 9 September 2021 and 9 December 2021 in relation to the initial exposure draft legislation and the subsequent Treasury Laws Amendment (Modernising Business Communications) Bill 2021.

A copy of ARCA's previous submissions have been provided with this correspondence.

As noted in ARCA's earlier submissions, ARCA strongly supports the Government's reform of the Corporations Act which will make permanent a number of the temporary measures put in place to assist businesses during the COVID-19 pandemic.

We note that the Bill now expands a number of the measures proposed in the earlier versions of the Bill. ARCA is broadly supportive of these measures and in particular, we note our support for the following measures which are contained within the Bill:

- Permitting all documents which are required or permitted to be signed under the Corporations Act 2001 (**Corporations Act**) to be signed electronically or in wet-ink
- Permitting documents sent under Chapters 2A to 2M, 5 to 5D, 6 to 6C, 8A, 8B and 9 or Schedule 2 to the Corporations Act to be sent in either hard copy or electronic form
- Permitting companies to not send documents to certain individuals where the contact details for that member are known to be incorrect (provided certain conditions are met)
- Amending the Australian Prudential Regulation Authority Act 1998 (**APRA Act**), Australian Securities and Investments Commission Act 2001 (**ASIC Act**), Competition and Consumer Act 2010 (**CCA**), National Consumer Credit Protection Act 2009 (**NCCP Act**) and Tax Agent Services Act 2009 (**TASA**) to ensure that bodies established under or which administer these Acts (**the Regulator**) can use technology for hearings and examinations (noting however, our comments below); and
- amending various laws to modernise requirements that certain notices be published in newspapers (again, noting our comments below).

As the Bill is divided into four schedules, we have set out below under the headings Schedule 1 to 4, our detailed commentary and feedback in relation to the measures outlined above as well as others which are contained within the Bill.

Schedule 1

Schedule 1, part 1

Whilst ARCA is broadly supportive of the measures contained within Schedule 1, part 1, we provide the following comments:

- (a) We note that the category of documents which are able to be sent electronically or in hard copy following an 'election' by the relevant individual (s) is limited, in that:
 - (i) an individual is only able to make an 'election' where the individual is a 'member' of a company, a registered scheme, CCIVs and disclosing entities, Australian members of a notified foreign passport fund, holders of securities in the target for a takeover bid and any other person specified in the Regulations, and
 - (ii) the document to which the 'election' relates must be a document that is required or permitted to be sent under Chapters 2A to 2M, 5 to 5D, 6 to 6C, 8A, 8B or 9 or Schedule 2 to the Corporations Act (or as otherwise prescribed).

We consider that these limitations are appropriate and are supportive of the application of these provisions to the Corporations Act. We note though, the potential that arming the individual with the ability to make different elections does have the potential to increase the administrative and cost burden imposed on organisations.

For example, as currently drafted, under the Bill an individual could make an election so that documents which are required or permitted to be given under Chapter 2A of the Corporations Act are to be sent electronically for the period of 1 January 2023 to 31 December 2023 (when they revoke their consent to the document being issued electronically), but documents issued in relation to another specified Corporations Act chapter, are to be issued via post for the period of 1 January 2023 to 1 October 2023 and then electronically, for the period 2 October 2023 to 2 January 2024, with different postal and email addresses supplied. Such an arrangement could cause the issuing entity to expand substantial resources from a procedural and resourcing point of view, when ensuring compliance with the individual's election.

However, we consider that these potential challenges are likely to be managed somewhat by the limitations imposed on the types of documents and individual(s) who may make an election.

(b) ARCA would caution against the expansion of the 'election' regime set out in Schedule 1, part 1 of the Bill to other legislation such as the NCCP Act, for a number of reasons including the following:

- (i) Under the NCCP Act there is currently no ability to limit the class of individuals who are able to make such an 'election' to 'members' of the relevant credit provider/organisations and as such, any extension of these measures to the NCCP Act, would have much wider (and potentially unintended) consequences.
- (ii) Under the Bill the types of documents for which a specified individual can make an 'election' is limited to those referenced within the relevant Corporations Act clauses. Again, we consider that this limitation is appropriate and we note that any extension of the relevant terms of the Bill to the NCCP Act would potentially result in unintended circumstances, given that documents which are required or permitted to be 'sent' or 'given', under the NCCP Act, have a very different impact on consumers when compared to those required or permitted to be given under the specified clauses of the Corporations Act.

For instance, documents required or permitted to be given under the NCCP Act can affect an individual's ability to take steps to avoid the repossession of their home. By contrast, many of the documents which are required or permitted to be given under the specified Corporations Act chapters are procedural in nature.

Schedule 1, Part 2

Whilst ARCA is supportive of moves which would enable the Regulator to use technology for certain types of hearings and examinations, the Bill does not address a number of the consequences which may arise as a result of these changes.

In particular, the Bill and the Treasury Laws Amendment (Modernising Business Communications and other Measures) Bill 2022 Explanatory Memorandum (**the Explanatory Memorandum**) do not deal with a circumstance in which a hearing or examination which is being enabled through the use of technology is impacted by an IT or technological issue relating to the performance of the relevant technology.

For instance, where a hearing or examination being held via internet video link (i.e., a Zoom or Microsoft Teams Meeting) is impacted by an IT or technological issue (so that the ability for all participants to engage with the meeting is compromised) it is unclear what impact, if any, this will have on the outcomes or decisions reached during the hearing or examination. Other potential issues which may arise in these circumstances, include the following;

- will an attendee be able to dispute the correctness or appropriateness of any decision or outcome reached in circumstances where they did not have audio or video access to important matters being discussed by the Regulator and/or other participants?
- If so, does the IT or technological issue have to impact all, some or a significant portion of the hearing or examinations?
- Does the IT or technological issue have to impact, all or just some of the participants in in the hearing or examination?
- Will, or should the Regulator be required to hold the hearing or examination again, in circumstances where there was an IT or technological issue (again, will the duration of the IT or technological issue and the number of participants impacted, be of relevance)?
- What, if any, obligation(s) will be imposed the Regulator should the IT or technological issue impact the Regulator alone, or where it is identified by the Regulator? For instance, is there an explicit obligation to notify other participants of the issue?

In relation to circumstances where it is unclear whether or not an IT or technological issue has actually impacted a hearing or examination, we would also consider it beneficial for either the Bill or the Explanatory Memorandum, to provide clarity regarding the rights of a participant to dispute any outcome or decision reached during the course of the hearing or examination, along with details about the dispute procedure which should be followed.

Such clarity may assist in reducing the resources which would need to be applied to the consideration of the dispute and could address matters such as:

- What evidential burden would the disputing participant to the hearing or examination, have to meet?

- What type of evidence would, or should be provided in support of a dispute? For instance, would it be enough for a disputant to state that they were unable to see or hear all, or some of the examination or hearing, or will some form of supporting evidence be required (for example, a document from the relevant internet or computer program provider, confirming the IT or technological issue)?
- Which individual or body would ultimately be the decision maker to such a dispute? Is it appropriate for the same Regulator which has issued the decision or outcome to also consider and determine any dispute raised in relation to the examination or hearing?
- What would be the consequence of a decision maker forming the view that a participant's access to an examination or hearing was impacted by a IT or technological issue? For instance, would there be a requirement for any decision or outcome to be set aside and a new examination or hearing scheduled?

Schedule 1, part 4

As noted above, ARCA is broadly supportive of the measures contained within Schedule 1, part 4 of the Bill and which amend various laws to replace provisions that require or permit notices to be published in newspapers with technology neutral rules.

However, we consider that the Bill fails to address a number of the issues which may arise in the event that an IT or technological issue impacts the visibility or access to the relevant notice, where the notice has been advertised online or otherwise electronically. Such issues include:

- Will a notice which is being advertised electronically, still be able to be deemed as accessible to the public and reasonably prominent, in the event that an IT or technological issue impacts the visibility or access to the relevant notice? If not, what consequences flow as a result of this determination?
- When determining whether or not there has been a failure to publish a notice in accordance with the requirements of the relevant law, does the duration of time during which visibility or access to the relevant notice is affected impact this assessment? Is the number of individuals who are unable to access or view the notice a relevant consideration? If so, how many people, or what % of individuals would have to be impacted for this to be a relevant consideration?
- Once the notice is published online or electronically, is there an obligation upon the publisher of the notice to ensure that availability and access to the notice is maintained? If so, how can this obligation be discharged and what are the consequences where the availability or access to the notice is impacted by an IT or technological issue? What sort of proof of notice or 'evidence' will a publisher of a notice be required to demonstrate that a notice has been published electronically in a manner which both meets the applicable legal requirements and which was not impacted by an IT or technological issue?

- What is the consequence of an IT or technological issue which impacts the visibility or access to the relevant notice, but which is caused entirely by the conduct or omissions of a third party, such as an internet provider? Alternatively, what is the consequence where the issue is caused either wholly or in part, by the publisher of the notice?

Whilst we consider that there is benefit in the matters outlined above being addressed, we appreciate that inclusion of all of these (and any other relevant) matters within the Bill itself may not be practical and as such, we would be supportive of their inclusion in a format such as guideline or guidance document which sits separate to the Bill. However, if this approach is adopted then we consider that the Bill will need to be amended to ensure that the matters dealt with by such a guideline or guidance document are binding and of legal force.

Schedule 2

ARCA is supportive of the changes proposed to financial services law, as set out in Schedule 2 of the Bill, and which reflect a number of the recommendations and other suggested improvements identified by the ALRC in Interim Report A.

For further information about ARCA's position on this point, we have provided with this correspondence a copy of our submission to the ALRC dated 25 February 2022 and which sets out our (qualified) support for a number of the recommendations and suggested improvements contained within Report A.

Schedule 3

As set out in the Explanatory Memorandum, Schedule 3 to the Bill amends the Corporations Act and the National Credit Act to transfer amendments to/exemptions from those acts currently contained in ASIC legislative instruments into the primary law.

At a conceptual level ARCA is supportive of amendments to move longstanding, settled exemptions and modifications from ASIC legislative instruments into primary legislation. Such changes:

- reduce the overall complexity of the legal framework, making it easier for entities to determine and comply with their obligations;
- mitigate against the risk that the legislative instruments will not be fully considered by subsequent law reforms, leading to inconsistencies and practical challenges for industry;
- reduce the effort required by ASIC, and others, to maintain the status quo and review/re-make the instruments as required; and
- provide additional certainty to all parties about whether the exemptions and modifications will be retained.

The Bill has the effect of transferring five ASIC legislative instruments to the primary legislation. We consider that there are likely many more instruments suitable for a transfer in this manner, and support further work to review and transfer additional instruments into the primary law in this way.

Of the five ASIC legislative instruments being transferred to primary legislation, ARCA is most familiar with [ASIC Class Order \[CO 14/41\]](#) ([CO 14/41]), which provides exemptions from the requirement to give certain 'hardship notices' under the National Credit Code. Those exemptions apply where the credit provider (or lessor) and the debtor (or lessee) agree to reduce or defer the debtor (or lessee)'s obligations for up to 90 days. This exemption has been extended by ASIC on numerous occasions.¹ We consider that items 35-40 of Schedule 3 have the effect of replicating [CO 14/41] within the National Credit Code and associated transitional legislation; that is, we consider the amendments have their intended effect.

When ASIC last reviewed [CO 14/41] in December 2021, ARCA provided a submission in response dated 1 February 2022 highlighting some issues with the underlying provisions in the National Credit Code, as well as some matters that could be improved through additional clarity about what those provisions mean and how they operate. A copy of this submission has been provided with this correspondence.

We continue to consider that these matters would be beneficial. In particular:

- The concept of a 'hardship notice' under section 72 of the National Credit Code is nebulous and uncertain, and the resulting legal risk can affect when and how lenders provide assistance to their customers. Government may wish to consider whether they can make the obligations clearer; we note that paragraph 8A of the [Privacy \(Credit Reporting\) Code 2014](#) gives credit providers more clarity about what they must do in respect of consumers requesting hardship assistance for the purposes of the credit reporting laws. This paragraph may provide a useful starting point for clarification of the underlying obligations amended by items 35-40 of Schedule 3.
- Guidance about when an agreement to defer or reduce the obligations of a debtor or lessee involve a change to the relevant contract would be helpful. Where there is no contractual change, the exemptions currently provided by [CO 14/41] are not relevant, as the primary obligations in the National Credit Code are not triggered. There appear to be discrepancies between what amounts to a contractual variation for the purposes of the Privacy Act and the ASIC-administered regime, so additional guidance by ASIC would help remove this confusion and ensure industry can comply with their obligations, including in respect of deferrals/reductions exceeding 90 days in duration.

Schedule 4

ARCA is supportive of the various miscellaneous and technical amendments to Treasury portfolio legislation contained within Schedule 4 of the Bill.

If you have any questions about this submission, please feel free to contact me on [REDACTED]
[REDACTED]

Yours sincerely,

Mary Vancea

General Manager - Legal & Policy
Australian Retail Credit Association