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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

[HOUSE OF REPRESENTATIVES/SENATE]

TREASURY LAWS AMENDMENT (MODERNISING BUSINESS
COMMUNICATIONS) BILL 2022

EXPOSURE DRAFT EXPLANATORY MEMORANDUM

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Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

Abbreviation	Definition
ACCC	Australian Competition and Consumer Commission
AER	Australian Energy Regulator
APRA	Australian Prudential Regulation Authority
APRA Act	<i>Australian Prudential Regulation Authority Act 1998</i>
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Bill	<i>Treasury Laws Amendment (Modernising Business Communications) Bill 2022</i>
CADB	Companies Auditors Disciplinary Board
CCA	<i>Competition and Consumer Act 2010</i>
FSCP	Financial Services and Credit Panels
NCCPA	<i>National Consumer Credit Protection Act 2009</i>
TASA	<i>Tax Agent Services Act 2009</i>
TPB	Tax Practitioners Board

Chapter 1: Virtual hearings and examinations

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Outline of chapter

1.1 Schedule 1 to the Bill amends the APRA Act, ASIC Act, CCA, NCCPA and TASA to clarify that bodies established under these Acts (the *regulator*) can use technology for hearings and examinations. The amendments are technology neutral and ensure that hearings and examinations can continue to be conducted in an efficient and expeditious manner.

Context of amendments

1.2 Regulators are empowered under the APRA Act, ASIC Act, CCA, NCCPA and TASA to hold hearings or examinations. These Acts, however, are largely silent on whether the regulator can use technology for all or part of a hearing or examination.

1.3 This issue was highlighted during the COVID-19 pandemic, when regulators were unable to hold in-person hearings or examinations due to public health orders and restrictions. Uncertainty caused by the absence of express provisions in the relevant legislation allowing for the use of technology at hearings and examinations resulted in regulators first obtaining consent from participants before holding virtual hearings.

1.4 This Schedule amends the relevant legislation by inserting express provisions clarifying that regulators can hold hearings or examinations using technology. The amendments provide legal certainty for regulators that decide to hold a hearing or examination using technology so that participants can appear at all or part of a hearing or examination without being physically present.

Summary of new law

- 1.5 Schedule 1 to the Bill amends the APRA Act, ASIC Act, CCA, NCCPA and TASA by inserting provisions to clarify that the regulator can hold a hearing or examination:
- at one or more physical venues (a physical hearing or examination); or
 - at one or more physical venues and using virtual enquiry technology (a hybrid hearing or examination); or
 - using virtual enquiry technology only (a virtual hearing or examination).
- 1.6 The relevant regulators are APRA, ASIC, FSCP, CADB, ACCC, AER and TPB, which hold hearings or examinations under the relevant legislation. The regulator has the discretion whether to hold a hearing or examination in a physical, hybrid or virtual form.
- 1.7 If the regulator decides to hold a hearing or examination using virtual enquiry technology, the regulator must ensure that the technology provides each participant in the hearing or examination with a reasonable opportunity to participate in or be represented at the hearing or examination.
- 1.8 If a hearing is to take place in public using virtual enquiry technology, the regulator must ensure that members of the public are provided with a reasonable opportunity to observe the hearing using the technology.

Detailed explanation of new law

- 1.9 The definition of ‘virtual enquiry technology’ is not prescriptive and does not limit the regulator to using a single type of technology. The only requirement is that the technology allows a person to participate in or be represented at all or part of a hearing, examination or other enquiry without being physically present at the hearing, examination or other enquiry.
- [Schedule 1, items 1, 3, 9, 12, and 16, subsection 3(1) of the APRA Act, subsection 5(1) of the ASIC Act, subsection 4(1) of the CCA, subsection 5(1) of the NCCPA and subsection 90-1(1) of the TASA]***

How hearings and examinations may be held

- 1.10 If the hearing or examination is held:
- at more than one physical venue; or
 - at one or more physical venues and using virtual enquiry technology; or
 - using virtual enquiry technology only;

the regulator may appoint a single place and time for the hearing or examination. This ensures that a single place and time for the hearing or examination can be determined for legal purposes, such as dispute resolution, even if participants are attending from multiple locations in different time zones.

- 1.11 Under the APRA Act, ASIC Act, NCCPA and TASA, the regulator may appoint a single place and time for the hearing or examination after the hearing or examination has been held. This avoids interaction with any notice provisions that operate before the hearing or examination is held. The rules to determine the single place and time for hearings and examinations under these Acts are summarised in Table 1.1.

[Schedule 1, items 2, 4, 5, 7, 8, 13, 14 and 15, subsection 58A(6) of the APRA Act, subsections 22A(4), 59A(5), 159A(5) and 218A(5) of the ASIC Act, subsections 256A(4) and 285A(5) of the NCCPA and subsection 60-105(7) of the TASA]

Table 1.1: Place and time of different types of hearings, examinations or other enquiries

<i>Type of hearing, examination or other enquiry</i>	<i>Place of hearing, examination or other enquiry</i>	<i>Time of hearing, examination or other enquiry</i>
Physical hearing, examination or other enquiry (one location)	Physical venue for the hearing, examination or other enquiry	Time at the physical venue
Physical hearing, examination or other enquiry (more than one location)	Place appointed by the regulator	Time at the place appointed by the regulator
Hybrid hearing, examination or other enquiry (one location at which to physically attend)		
Hybrid hearing, examination or other enquiry (more than one location at which to physically attend)		
Wholly virtual hearing, examination or other enquiry		

- 1.12 The rules to determine the single place and time for proceedings under the CCA are covered in paragraphs 1.27 to 1.29.
- 1.13 When appointing a single place for a wholly virtual hearing or examination, the regulator should appoint the regulator's closest office (whether the virtual enquiry technology is being used at that office or another location, such as a home address).

Reasonable opportunity to participate

- 1.14 If the regulator decides to use virtual enquiry technology at a hearing or examination, the technology must provide each participant in the hearing or examination with a reasonable opportunity to participate in or be represented in the hearing or examination.
[Schedule 1, items 2, 4, 5, 7, 8, 11, 13, 14 and 15, subsections 58A(4) and (5) of the APRA Act, subsections 22A(2), 22A(3), 59A(2), 59A(3), 159A(2), 159A(3), 218A(2) and 218A(3) of the ASIC Act, subsections 158A(3), 158A(4), 158B(4) and 158B(5) of the CCA, subsections 256A(2), 256A(3), 285A(2) and 285A(3) of the NCCPA and subsections 60-105(5) and (6) of the TASA]
- 1.15 This requirement is not intended to limit the application of procedural fairness to virtual hearings only. Rather, the requirement ensures that the regulator's use of virtual enquiry technology does not impair the ability of a person to participate in or be represented at a hearing or examination in comparison to physically attending the hearing or examination.
- 1.16 The standard of reasonableness protects the right of a person to participate in or be represented at a hearing or examination using technology, while giving the regulator the flexibility as to the form of the hearing or examination. In some circumstances, it may be inappropriate for the regulator to hold a virtual hearing or examination if doing so would not give the participant a reasonable opportunity to participate in or be represented at the hearing or examination. In these cases, the regulator should consider holding all or part of the hearing or examination at a physical venue (i.e. a physical or hybrid hearing or examination).
- 1.17 If the regulator holds hearings in public and uses virtual enquiry technology for such hearings, the regulator must ensure that the technology provides the public with a reasonable opportunity to observe the hearing. The regulator must also ensure that information sufficient to allow the public to observe the hearing using the technology is made publicly available in a reasonable way.
[Schedule 1, items 5, 7, 8, 11 and 14, subsections 59A(2), 59A(4), 159A(2), 159A(4), 218A(2) and 218A(4) of the ASIC Act, subsections 158A(3), 158A(5), 158B(4) and 158B(6) of the CCA and subsections 285A(2) and (4) of the NCCPA]

Examinations and investigations under the APRA Act

- 1.18 Schedule 1 to the Bill allows APRA, or an investigator or inspector appointed by APRA, to conduct all or part of the following examinations or investigations in a physical, hybrid or virtual form:
- an examination under Division 2 of Part VIII of the *Banking Act 1959*;
 - an examination under subsections 55(1), 62A(1) or 79(3) of the *Insurance Act 1973*;
 - an investigation under Division 3 of Part 7 of the *Life Insurance Act 1995*;
 - an examination under Division 3 of Part 6 of the *Private Health Insurance (Prudential Supervision) Act 2015*;
 - an examination under Division 5 of Part 25 of the *Superannuation Industry (Supervision) Act 1993*;
 - an examination under Division 4 of Part 10 of the *Retirement Savings Accounts Act 1997*.

[Schedule 1, item 2, subsections 58A(1), (3) and (7) of the APRA Act]

- 1.19 A reference to an examination in the new provisions is taken to include an investigation under Division 3 of Part 7 of the *Life Insurance Act 1995*.
[Schedule 1, item 2, subsection 58A(2) of the APRA Act]
- 1.20 The rules to determine the place and time of an examination or investigation under the APRA Act are summarised in Table 1.1.
[Schedule 1, item 2, subsection 58A(6) of the APRA Act]

Hearings and examinations under the ASIC Act

- 1.21 Schedule 1 to the Bill allows bodies established under the ASIC Act to conduct all or part of a hearing or examination in a physical, hybrid or virtual form. The relevant bodies are ASIC, FSCP and CADB.
[Schedule 1, items 4, 5, 7 and 8, subsections 22A(1), 22A(5), 59A(1), 59A(6), 159A(1), 159A(6), 218A(1) and 218A(6) of the ASIC Act]
- 1.22 For the purposes of an examination under Division 2 of Part 3 of the ASIC Act, the examinee appears before the inspector, who is a specified member or staff member of ASIC (see sections 19 and 20 of the ASIC Act).
- 1.23 The ASIC Act contains some existing provisions that permit the use of technology by ASIC at a hearing. This Schedule repeals those provisions so that the new provisions apply.
[Schedule 1, item 6, subsections 159(3) and 159(4) of the ASIC Act]
- 1.24 The rules to determine the place and time of a hearing or examination under the ASIC Act are summarised in Table 1.1.
[Schedule 1, items 4, 5, 7 and 8, subsections 22A(4), 59A(5), 159A(5) and 218A(5) of the ASIC Act]

Proceedings under the CCA

- 1.25 Schedule 1 to the Bill allows bodies established under the CCA to conduct all or part of the following proceeding in a physical, hybrid or virtual form:
- an arbitration of an access dispute under Part IIIA by the ACCC as constituted by members of the ACCC under section 44Z of the CCA;
 - an inquiry under Part VIIA of the CCA by an inquiry body before an inquiry Chair;
 - a conference convened under subsection 151AZ(1) of the CCA by the ACCC;
 - an appearance to give evidence or produce documents under section 44AAFA of the CCA before the AER or a person assisting the AER;
 - a conference held under subsection 90A(6) of the CCA by the ACCC as represented by a member or members of the ACCC under paragraph 90A(7)(a) of the CCA;
 - a conference held under subsection 93A(5) of the CCA by the ACCC as represented by a member or members of the ACCC under paragraph 93A(6)(a) of the CCA;
 - a conference held under Subdivision A or B of Division 3 of Part XI by the ACCC as represented by a member or members of the ACCC under paragraph 132H(1)(a) of the CCA;
 - an appearance to give evidence or produce documents under paragraph 155(1)(c) of the CCA before the ACCC, an associate member of the ACCC who is an AER member or a member of the staff assisting the ACCC.
- [Schedule 1, item 11, subsections 158A(1), 158A(2), 158A(7), 158B(1), 158B(2) and 158B(7) of the CCA]***
- 1.26 The CCA contains an existing provision that permits the ACCC to use telephone, closed circuit television or any other means of communication in an arbitration hearing about an access dispute. This Schedule repeals that provision so that the new provisions apply.
- [Schedule 1, item 10, subsection 44ZF(4) of the CCA]***
- 1.27 For proceedings under the CCA that are or will be held:
- at more than one physical venue; or
 - at one or more physical venues and using virtual enquiry technology; or
 - using virtual enquiry technology only;

the new provisions provide rules to determine the single place and time of a proceeding. Different rules apply depending on whether the proceedings are initiated by a notice. The rules are summarised in Table 1.2.

- 1.28 For proceedings without an initiation notice, the regulator may, before or after the proceedings, appoint a single place and time for the proceedings.
[Schedule 1, item 11, subsections 158A(1) and (6) of the CCA]
- 1.29 For proceedings with an initiation notice, the single place and time at which the proceedings are taken to be held is that specified in the notice for the proceedings.
[Schedule 1, item 11, subsections 158B(1) and (3) of the CCA]

Table 1.2: Place and time of proceedings under the CCA

<i>Type of proceeding</i>	<i>Place of proceeding</i>	<i>Time of proceeding</i>
Proceeding without initiation notice	Place appointed by the regulator	Time at the place appointed by the regulator
Proceeding with initiation notice	Place specified in the notice for the proceedings	Time at the place specified in the notice for the proceedings

Proceedings under the NCCPA

- 1.30 Schedule 1 to the Bill allows ASIC to conduct all or part of a hearing or examination under the NCCPA in a physical, hybrid or virtual form.
[Schedule 1, items 13 and 14, subsections 256A(1), 256A(5), 285A(1) and 285A(6) of the NCCPA]
- 1.31 For the purposes of an examination under Part 6-2 of the NCCPA, the examinee appears before the inspector, who is an ASIC member or ASIC staff member (see sections 253 and 254 of the NCCPA).
- 1.32 The rules to determine the place and time of proceedings under the NCCPA are summarised in Table 1.1.
[Schedule 1, items 10 and 11, subsections 256A(4) and 285A(5) of the NCCPA]

Appearances before the TPB under the TASA

- 1.33 Schedule 1 to the Bill allows the TPB to hold all or part of a proceeding at which a person is to appear before the TPB in a physical, hybrid or virtual form.
[Schedule 1, item 15, subsections 60-105(4) and (8) of the TASA]
- 1.34 The rules to determine the place and time of an appearance before the TPB under the TASA are summarised in Table 1.1.
[Schedule 1, item 15, subsection 60-105(7) of the TASA]

Commencement provisions

1.35 The amendments commence on the day after Royal Assent.

