

26 September 2022

Market Conduct Division
The Treasury
Langton Crescent
PARKES ACT 2600

via email: mbcomms@treasury.gov.au

Dear Treasury

Treasury Laws Amendment (Modernising Business Communications) Bill 2022

Thank you for the opportunity to comment on the draft Modernising Business Communications Bill (**the Bill**).

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership reflects the diversity of Australia's director community, with over 49,000 members drawn from directors and leaders of not-for-profits, large and small businesses and the government sector.

The AICD strongly supports the Government's initiatives to modernise and upgrade Treasury's portfolio laws. However, we consider that the Bill could be further enhanced by providing parties with the right to present their case during in-person hearings or examinations, rather than leaving that decision to the regulator's discretion.

1. Executive Summary

- The AICD broadly supports the Government's draft legislation to modernise Treasury's portfolio laws by clarifying that relevant Treasury portfolio regulators have the discretion whether to hold a hearing or examination in a physical, hybrid or virtual form.
- The AICD resubmits its previous position that, on procedural fairness grounds, parties should have the right to elect to appear or be examined in-person should that be their preference.
- The AICD considers that the ability for parties to have the 'best' rather than a 'reasonable' opportunity to present their case effectively is the standard that should be enshrined in legislation.

2. Virtual hearings and examinations

We support the Government's draft legislation that clarifies regulators can conduct hearings and examinations virtually. In our 2021 submission to the Treasury and Deregulation Taskforce consultation on Improving the Technology Neutrality of Treasury Portfolio Laws (**2021 Modernising Business Communications consultation**)¹, we supported flexibility under the legislation to permit regulators to conduct hearings virtually as the 'default' format, provided parties could request in-person hearings where such a format is preferred. The Explanatory Memorandum states that in some circumstances, it

¹ 2021 Modernising Business Communications consultation — AICD Submission
<https://treasury.gov.au/sites/default/files/2022-02/c2020-129713-aicd.pdf>

may be inappropriate for regulators to hold a virtual hearing or examination if doing so would not provide a reasonable opportunity for parties to participate and that the regulator *should* (emphasis added) consider holding all or parts of them at a physical venue.

However, we refer to our submission to the 2021 Modernising Business Communications consultation and resubmit that consistent with procedural fairness principles, a party should be able to *elect* for an in-person hearing or examination should they consider it would afford them the best opportunity to present their case effectively and for natural justice principles to be adhered to.

A risk of a virtual hearing could be the potential for a technological problem to compromise the integrity of a hearing – for example, an unstable internet connection which distorted accurate communication and prejudiced the presentation of evidence. Similarly, there is a wide range of technological maturity levels in the Australian population which may make a virtual attendance at a hearing or examination prejudicial to an individual's interests. Accordingly, we consider it appropriate that a party have the right to elect for an in-person hearing or examination.

We further note that the Explanatory Memorandum recognises that there may be circumstances where a physical examination or hearing may be preferable on procedural grounds, without outlining when that might be the case.

A preferable approach would be to provide individuals with the legislated right to opt for an in person hearing or examination, or failing that, have a clear set of public principles for determining when procedural fairness considerations will favour physical attendance. Technology should not be used to weaken the legal safeguards afforded to individuals.

3. Next steps

We hope our response will be of assistance. If you would like to discuss any aspects further, please contact Chris Gergis, Head of Policy at cgergis@aicd.com.au or Laura Bacon, Senior Policy Adviser at lbacon@aicd.com.au.



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