Law Council
OF AUSTRALIA

Business Law Section

21 March 2023

Consumer Credit Unit
Financial System Division
Treasury
Langton Crescent
Parkes ACT 2600

By email: creditreforms@treasury.gov.au

Dear Sir/Madam

Treasury Laws Amendment (Measures for Consultation) Bill 2023: Anti-avoidance rule for product intervention orders

1. This submission has been prepared on behalf of the Financial Services Committee (the **Committee**) of the Business Law Section of the Law Council of Australia in response to the consultation on the exposure draft *Treasury Laws Amendment (Measures for Consultation) Bill 2023: Anti-avoidance rule for product intervention orders* (the **Bill**) and accompanying exposure draft Explanatory Memorandum, which was released for public consultation on 21 February 2023.

2. The Bill proposes to amend the *Corporations Act 2001* (Cth) to introduce anti-avoidance measures relating to credit product intervention orders

3. Although it falls within the separate "Consumer Credit Regulations" consultation as to the proposed *National Consumer Credit Protection Amendment (Financial Sector Reform) Regulations 2023*, the Committee notes that the proposed Regulation 41 (the **Regulation**) would be made under powers that the Bill would introduce into the Corporations Act.

4. The Committee wishes to make a short submission as to the Bill and the Regulation, and thanks Treasury for the opportunity to do so.

5. Please note that the Committee has also provided a separate submission in response to the consultation relating to the "Consumer Credit Regulations", which was released the day before the consultation relating to the Bill.

Part 1—Legislation which substantially comprises a power to make regulations that define an activity subject to a civil penalty

6. In the following paragraphs under this heading, the Committee expresses fundamental rule of law and philosophical good governance concerns about the suitability of relatively unconstrained regulation making powers, particularly in

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circumstances where the regulations are able to effectively impose a very substantial sanction.[1]

7. The Committee acknowledges that the preparation and passage of legislation through the Australian Parliament can be time consuming, and that a government may not always be able to pass all the legislation that it would choose to pursue within the limited time which Parliamentary sittings allow.

8. Having acknowledged this matter, the Committee submits that it is essential for good governance that legislative requirements which are given effect receive appropriate scrutiny, particularly where those requirements impose substantial sanctions. The Committee submits having substantive penal enactments made only by regulation, without effective parliamentary scrutiny, has the potential to jeopardise the good governance of Australia.

9. If the enactment of regulation-making powers is considered necessary, the Committee submits that it would be appropriate for the Parliament to consider, and provide for, explicit objects and limitations on the regulations that may be made.

10. While the Committee notes the Parliament's ability to disallow regulations, this Committee does not consider this to be an adequate substitute for effective scrutiny.

11. The Committee submits that the possibility that an Executive might make choose to make regulations as to controversial matters which could not be achieved through legislation (for example, if the expectation is that the Senate will not support the measure) raises unacceptable risks of disruption to organisations in the real economy. This is because, even if such a regulation is ultimately disallowed, organisations must, in the meantime, develop compliance arrangements on the basis that it has or will have the force of law (breach of which in some cases could involve the imposition of substantial penalties) until that disallowance occurs, and then rapidly vary these systems. Depending on when such a regulation is made, formal disallowance (even if, objectively, it is very likely to occur) may not actually occur for many months.

12. In particular, proposed section 1023T allows regulations to be made which reverse the onus of proof in relation to avoidance, in circumstances where a person who is found to have engaged in avoidance activity could incur a civil penalty. The Committee has previously raised concerns that the current maximum civil penalties provided for in financial services laws will in many, if not most, cases be grossly disproportionate to the objective seriousness of relevant conduct. The point the Committee wishes to make is that, in a worst-case scenario, a poorly-drafted or poorly-considered regulation could pose an existential threat to entire industry sectors.

13. In this particular case, the Committee considers the justification for enacting a regulation making power to be finely balanced. The subject matter relates to product intervention order powers of the Australian Securities and Investments Commission (**ASIC**), which are able to be used where ASIC believes there are real risks of consumer harm.

[1] See, e.g., Law Council of Australia, *Rule of Law Principles* *Policy Statement* (2011), which provides that Executive powers should be carefully defined by law, such that it is not left to the Executive to determine for itself what powers it has and when and how they may be used. Further, where legislation allows for the Executive to issue subordinate legislation in the form of regulations etc, the scope of that delegated authority should be carefully confined and remain subject to parliamentary supervision (Principle 6).

14. The Committee notes that:

    (a) there appears to be a concern that the entities that are the targets of product intervention orders made by ASIC could rapidly vary their offerings so that they remain harmful, yet may technically fall outside the scope of the relevant product intervention order; and

    (b) regulations may be made relatively quickly, and at any time of year (including outside of Parliamentary sittings), and have a benefit over legislation for that reason.

15. However, in the context of product intervention orders, a separate regime for anti-avoidance regulations seems curious, given that the ASIC product intervention power regime is a flexible one, which is intended to be able to be varied or added to without parliamentary oversight. If a particular ASIC product intervention order is not fully effective in preventing harmful conduct, the appropriate remedy might instead be for ASIC to make alternative or additional product intervention orders, rather than to introduce a new and substantial penalty for conduct that falls outside the technical scope of the prohibition of the existing order.

Part 2—The Regulation

16. The Committee has expressed its concerns, as a matter of principle, about implementing anti-avoidance mechanisms through the use of regulation-making powers in the section above.

17. That aside, having had the opportunity to review the proposed Regulation, the Committee considers that it is measured and proportionate to the reasonable aims of managing avoidance activity.

18. In particular, the Committee agrees with the main criteria to which the Court must have regard under the proposed Regulation, namely:

    (a) whether the person subject to the order has changed their business operation following the order, from order-contravening activity to similar activity that on some basis is claimed to be non-order-contravening; and

    (b) whether the new business operation imposes similar consumer harms.

19. If you have any questions, please do not hesitate to contact Pip Bell, Chair of the Financial Services Committee (pbell@pmclegal-australia.com).

Yours faithfully

Philip Argy
Chairman
Business Law Section