

## **EXPLANATORY STATEMENT**

### **Issued by authority of the Assistant Treasurer and Minister for Financial Services**

*Australian Securities and Investments Commission Act 2001*

*Corporations Act 2001*

*Treasury Laws Amendment (Modernising Business Communications and Other Measures) Regulations 2022*

Section 251 of the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) and section 1364 of the *Corporations Act 2001* (the Corporations Act) provide that the Governor-General may make regulations prescribing matters required or permitted by those Acts to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to those Acts.

The *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Regulations 2022* (the Regulations) makes amendments to the *Australian Securities and Investments Commission Regulations 2001* (the ASIC Regulations) and *Corporations Regulations 2001* (the Corporations Regulations) that are consequential to the *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Act 2023* (the Amendment Act).

Schedule 1 to the Regulations implements recommendations and other suggested improvements identified by the Australian Law Reform Commission (ALRC) in Interim Report A of its Review of the Legislative Framework for Corporations and Financial Services Regulation (ALRC Report 137). Interim Report A, and the ALRC's Review more broadly, forms part of the formal response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry in 2019, which noted the law needed to be simplified to ensure its intent is met.

Schedule 1 amends the Corporations Regulations to clarify the meaning of several defined terms, remove redundant definitions, and make broad improvements in relation to the use of definitions. These changes facilitate a more adaptive, efficient, and navigable legislative framework which help ensure that the legislative intent is met.

Schedule 2 to the Regulations amends one prescribed form in the ASIC Regulations (Form 1) and two prescribed forms in the Corporations Regulations (Forms 5249 and 588) (ASIC Forms) so they align with the ASIC Act, which allows the Australian Securities and Investments Commission to hold hearings and examinations using virtual enquiry technology.

The ASIC Act and Corporations Act do not specify any conditions that need to be met before the power to make the Regulations may be exercised.

Exposure drafts of Schedule 1 to the Regulations and accompanying explanatory materials were released for public consultation from 24 August 2022 to 20 September 2022. Ten written submissions were received through the consultation process and further minor changes were made in response to the feedback to ensure the Regulations would work as intended.

Exposure drafts of Schedule 2 to the Regulations and accompanying explanatory materials were released for public consultation from 29 August 2022 to 26 September 2022. Eight written submissions were received, none of which suggested changes to the amendments relating to ASIC Forms. All submissions received were broadly supportive of the Regulations.

The Office of Best Practice and Regulation has advised that the amendments do not require a Regulation Impact Statement (OBPR references OBPR22-02647 and OBPR22-02189). There are no compliance costs or additional regulatory burdens associated with the Regulations.

Details of the Regulations are set out in Attachment A.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence at the later of the start of the day after registration on the Federal Register of Legislation and the commencement of the relevant Schedule or Part of the Amendment Act.

A Statement of Compatibility with Human Rights is at Attachment B.

**Details of the *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Regulations 2022***

**Section 1 – Name of the Regulations**

This section provides that the name of the Regulations is the *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Regulations 2022* (the Regulations).

**Section 2 – Commencement**

This section provides that the Regulations commence at the later of the start of the day after registration on the Federal Register of Legislation and the commencement of the relevant Schedule or Part of the Amendment Act. This ensures that the Regulations do not commence retrospectively. If the Amendment Act does not commence, then the Regulations will not commence.

**Section 3 – Authority**

This section provides that Regulations are made under the *Australian Securities and Investments Commission Act* (the ASIC Act) and the *Corporations Act 2001* (the Corporations Act).

**Section 4 – Schedules**

This section provides that each instrument that is specified in the Schedules to this instrument is amended or repealed as set out in the applicable items in the Schedules, and any other item in the Schedules to this instrument has effect according to its terms.

**Schedule 1 – ALRC Financial Services Interim Report**

***Corporations Act 2001***

Item 1 inserts into sub-regulation 1.0.02(1) of the *Corporations Regulations 2001* (the Corporations Regulations) the terms ‘cash management trust interest’ and ‘quarter day’. The Amendment Act will repeal these definitions from the Corporations Act as they are used only in the Corporations Regulations. Moving the definitions to the Corporations Regulations will facilitate navigability in the Corporations Regulations by removing the need to refer to the Corporations Act to locate the meaning of these terms. It is also consistent with modern drafting conventions. The terms are not used in the Corporations Act.

Item 2 repeals regulation 7.1.02 of the Corporations Regulations. This regulation modifies the definition of ‘participant’ in section 761A of the Corporations Act. Following the commencement of the Amendment Act, the definition of ‘participant’ is no longer in section 761A of the Corporations Act.

Item 3 repeals regulation 7.1.07I of the Corporations Regulations. This is a spent regulation that provides that Australian carbon credit units and eligible international

emissions units were not financial products, until 1 July 2012, from which point they became financial products.

Item 4 repeals the definition of quarter day in sub-regulation 7.5A.73(3) of the Corporations Regulations. As noted above, the definition of quarter day is now located in sub-regulation 1.0.02(1).

Item 5 repeals regulation 7.6.02AGA of the Corporations Regulations. This regulation is directed at applying a transitional regime for providers of financial services in relation to carbon credit units, which commenced on 1 May 2012 and ceased operation 31 December 2012. This regulation has been superseded by the obligation to hold an Australian Financial Services Licence.

Item 6 repeals the definition of ‘review fee’ in sub-regulation 9.10.01(3) of the Corporations Regulations. Following the commencement of the Amendment Act, the term is defined in section 9 of the Corporations Act, making the definition’s inclusion in the Corporations Regulations unnecessary.

Item 7 amends sub-regulation 9.12.02(6) of the Corporations Regulations to incorporate the substance of the definition of ‘Australian bank’ from the Corporations Act into the definition of ‘Australian entity’ in the Corporations Regulations. The term ‘Australian bank’ is not used in the Corporations Act and is only used as part of the definition of ‘Australian entity’ in the Corporations Regulations. Incorporating the definition of ‘Australian bank’ into ‘Australian entity’ clarifies the meaning of Australian entity and allows the term to be repealed from the Corporations Act without changing the effect of the law.

Items 8 to 21 amend the heading of regulations which contain a definition, so that the headings of the regulation have a consistent structure with each other and with definition sections in the Corporations Act. That structure is ‘Meaning of [defined term]’. This consistent structure helps users to find definitions.

Items 22 to 32 align the Corporations Regulations with changes to the defined term ‘rules’ in the Corporations Act following the commencement of the Amendment Act. These changes will clarify when ‘rules’ are used in a defined sense to mean ‘rules of court’ and when ‘rules’ carries its ordinary meaning.

Items 22 to 28 and 31 substitute references in the Corporations Regulations to ‘rules’ or ‘court rules’ with references to ‘rules of court’. ‘Rules of court’ is more intuitive than ‘rules’ and removes confusion as to whether the word is being used in its defined sense. The Regulations adopt ‘rules of court’ over ‘court rules’ for the sake of consistency. Item 29 moves the substance of a differently defined ‘rules’ into the only regulation in which it is used. Item 30 repeals the defined term.

Item 32 provides that the substitution of the term ‘rules’ with ‘rules of court’ in Form 509H in Schedule 2 to the Corporations Regulations (a form used to make statutory demands on companies under section 459E of the Corporations Act) only affects the form of statutory demands made after the date the Regulations commence.

## Schedule 2 – Updating forms

### *Australian Securities and Investments Commission Regulations 2001*

Item 1 replaces Form 1 in Schedule 1 to the *Australian Securities and Investments Commission Regulations 2001* (ASIC Regulations) with a new form. The new form has been updated to account for hearings held using virtual enquiry technology.

### *Corporations Regulations 2001*

Items 2 to 3 renumber Form 5249 in Schedules 1 and 2 to the Corporations Regulations to Form 586 so that it becomes part of the same sequence of forms and updates the form to account for hearings held using virtual enquiry technology.

Item 4 replaces Form 588 in Schedule 2 to the Corporations Regulations with a new form. The new form has text under the heading ‘Opportunity to be heard’ that is consistent with Form 586.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **Treasury Laws Amendment (Modernising Business Communications and Other Measures) Regulations 2022**

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### **Overview of the Legislative Instrument**

Schedule 1 to Regulations simplifies and rationalises the *Corporations Regulations 2001* (the Corporations Regulations) by clarifying the meaning of defined terms, removing redundant definitions, and making broad improvements in relation to the use of definitions. These changes facilitate a more adaptive, efficient, and navigable legislative framework. The changes are technical changes and do not alter the effect of the law.

Schedule 2 to the Regulations updates three prescribed forms to account for hearings or examinations held by the Australian Securities and Investments Commission (ASIC) using virtual enquiry technology. Schedule 2 amends the prescribed forms by inserting the following additional information:

- Form 1—an instruction for the delegate to provide details of the virtual enquiry technology to be used (if the examination is virtual or hybrid);
- Forms 586 (previously 5249) and 588—a clarification that the delegate will inform the person if the hearing takes place at one or more physical venues and/or by means of virtual enquiry technology.

### **Human rights implications**

Schedule 1 to the Regulations does not engage any of the applicable human rights or freedoms.

Schedule 2 to the Regulations may engage the following human rights contained in the International Covenant on Civil and Political Rights (ICCPR):

- the right to a fair hearing under article 14(1);
- the prohibition on interference with privacy under article 17.

#### *Right to a fair hearing*

Article 14(1) of the ICCPR protects the right to a fair and public criminal trial, and public hearing in civil proceedings. It provides that all persons shall be equal before the courts and tribunals, and, in the determination of criminal charges, or any suit at

law, the right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law.

Schedule 2 to the Regulations promotes and protects the right to a fair hearing by ensuring that ASIC notifies a person about the use of virtual enquiry technology and provides sufficient details for the person to access and use the technology. The *Australian Securities and Investments Commission Act 2001* (ASIC Act), as amended by the *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Act 2023*, sets out rules for hearings and examinations including that ASIC must ensure the use of virtual enquiry technology is reasonable.

#### *Right to privacy*

Article 17 of the ICCPR prohibits unlawful or arbitrary interference with a person's privacy, family, home and correspondence, and prohibits unlawful attacks on a person's reputation. The United Nations Human Rights Committee has interpreted the right to privacy as comprising freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy.

Schedule 2 to the Regulations amends prescribed forms that relate to hearings or examinations that are, or may be, held in private under the ASIC Act and *Corporations Act 2001*. The Regulations do not affect those provisions and existing rights to privacy of the participants at those hearings and examinations continue to be maintained.

#### **Conclusion**

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.