

The stakeholder engagement and public submission process on the Australian federal government's proposed Treasury Laws Amendment (Modernising Business Communications) Bill 2022: Virtual hearings and examinations (Bill) closed on 26 September 2022.

The Bill seeks to amend the following Acts to clarify that bodies established under those Acts (together, the Regulators) can use technology for hearings and examinations:

- Australian Prudential Regulation Authority Act 1998
- Australian Securities and Investments Commission Act 2001
- Competition and Consumer Act 2010
- National Consumer Credit Protection Act 2009
- Tax Agent Services Act 2009

The amendments are technology neutral and intended to ensure that hearings and examinations can continue to be conducted expeditiously and either in response to, or anticipation of, key market, sector or entity-specific events.

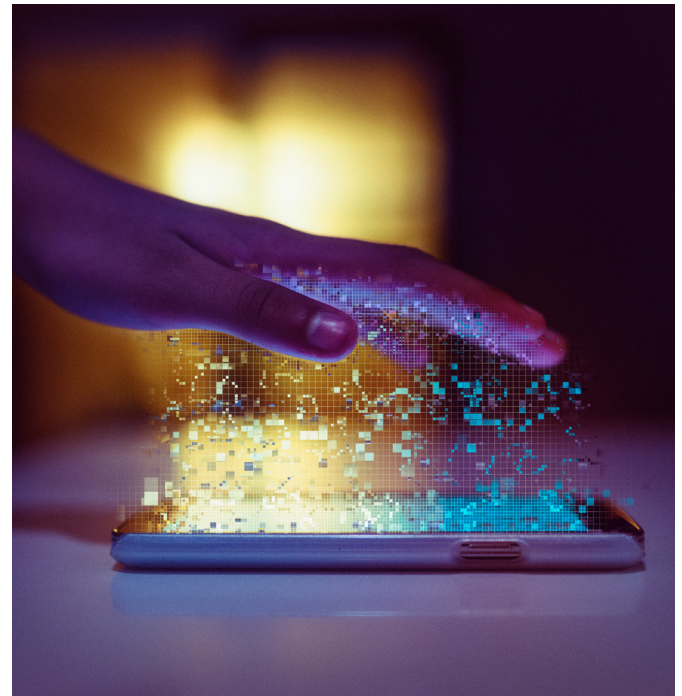
Changes Proposed by the Bill

The Bill concerns the following Regulators, which hold hearings or examinations under their relevant laws. Each regulator has the discretion whether to hold a hearing or examination in a physical, hybrid or virtual form:

- Australian Prudential Regulation Authority
- Australian Securities and Investments Commission
- The Financial Services and Credit Panels
- Australian Competition and Consumer Commission
- Australian Energy Regulator
- Companies Auditors Disciplinary Board

If a 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.

Further, 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.



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.

Rights to Procedural Fairness and Due Process

The changes proposed by the Bill are not intended to limit the application of procedural fairness or due process to virtual hearings. Rather, the Bill is intended to ensure that a 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, or to otherwise be afforded procedural fairness and due process.

The Bill also considers the standard of reasonableness required to protect the rights of a person to participate in, or be represented at, a hearing or examination using technology, while giving the regulator 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 engage. In such cases, the regulator would ordinarily be required to consider holding all or part of the hearing or examination in an open (physical) session.

Corresponding Regulations

The Bill is supplemented by a set of corresponding regulations that address procedural and some substantive matters, including:

- **Notice provisions** – to examinees, witnesses or third parties requiring them to appear before Regulators and alerting them to their obligation to provide evidence on oath and to render all reasonable assistance.
- **The right to privilege against self-incrimination** – and the circumstances in which evidence compelled to be given to a regulator is not admissible in evidence against the person in a criminal proceeding or a proceeding for the imposition of a penalty other than a proceeding in respect of the falsity of a statement or executed record.
- **Right to legal representation** – including the right for a legal representative to be present, address an examiner or inspector, or to examine the examinee and, conversely, the basis upon which the regulator might have power to curtail any obstruction.
- **Liability for a failure to attend or assist** – including by becoming liable to criminal prosecution or the imposition of significant penalty units or other penalties.

Enquiries and Examinations Likely to Become More Prevalent

Judiciaries across the globe, including in Australia, have demonstrated over the last three years that complex and hard-fought trials can be conducted virtually or in a hybrid format. Despite the success of those efforts, in some jurisdictions, courts are now imposing obligations on practitioners and parties to attend proceedings in person. Nonetheless, the reality is virtual hearings will continue to form a part of the regulatory and judicial process platforms going forward. The Bill demonstrates the federal government's preparedness to assist key market Regulators in conducting the investigations needed to ensure the integrity of the markets they oversee and the implementation of the laws they administer.

Following closure of the public consultation period, the federal government will review the submissions made and then determine when it wishes to introduce the Bill into Parliament, where it is likely to be waived through for the most part.

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