

2 November 2022

Economics Legislation Committee
Senate Standing Committee on Economics
By email to economics.sen@aph.gov.au

Dear Senators

Thank you for the opportunity to provide a submission to the Economics Legislation Committee on:

Schedule 5 of Treasury Laws Amendment (2022 Measures No. 3) Bill 2022.

In the course of my testimony on 18 October 2022 I was asked by Senator Dean Smith whether my submission was aligned with the concerns raised by the Senate Scrutiny of Bills Committee (SSBC) in relation to the above *Bill*. I informed that Committee that I was unaware of the report of the SSBC at that time. I have now had an opportunity to review and reflect on the concerns raised by the SSBC in its report.

My views in relation to the SSBC's concerns about Schedule 5 of the *Bill* are the following:

- I agree with the minister's preference for specifying the mathematical formulae and assumptions in the *Regulations*.
- I continue to be concerned that the *Bill* and the proposed *Regulations* treat as uncontroversial the concept of a 'faith-based' product. This undermines the *Bill's* attempt to render the application of the test automatic and therefore beyond merits review. I believe that in the absence of legislative guidance on the definition of what that phrase means, the conclusion that the test to be applied by APRA pursuant to Part 6A can be shielded from review because it does not require APRA to exercise judgment, is unsustainable.
- I agree with the SSBC's contention that the permissive drafting of subsections 60L(4) and 60N(1) does not achieve the objective of providing APRA with a limited discretion to reject applications only where the applicant has provided false or misleading information. I say this for two reasons: an application containing false or misleading information could surely be rejected by APRA as incomplete without APRA having a formal discretion; and secondly, the permissive drafting undoubtedly characterises the decision as discretionary without articulating the basis of the discretion. Not only does this grant APRA power to determine the criteria it will apply in exercising the discretion, it opens the door for disappointed applicants to challenge APRA's decision on the basis that it is expressly a discretionary decision.

Please do not hesitate to contact me if you have any questions or require any further information or elaboration.

Yours sincerely

M Scott Donald PhD CFA

Associate Professor

School of Private and Commercial Law

Faculty of Law and Justice

UNSW Sydney