

29 July 2022

Retail Complex Products and Investor Protection
Market Supervision
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001

By email: Market.Supervision.OTC@asic.gov.au

Consultation Paper 363 *Remaking ASIC class order on financial requirements for retail OTC derivative issuers (CP 363)*

The Corporations Committee and the Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committees**) appreciate the opportunity to comment on the proposal by the Australian Securities and Investments Commission (**ASIC**) in CP 363 to remake ASIC Class Order [CO 12/752] *Financial requirements for retail OTC derivative issuers* (the **Class Order**) and provide feedback as to whether the Class Order is currently operating effectively and efficiently.

The Committees agree that the Class Order forms a necessary and useful part of the legislative framework governing retail OTC derivative issuers. The Committees' view is that it strikes an appropriate balance between seeking to ensure that issuers maintain sufficient resources to support their businesses, without imposing an unreasonable burden on retail OTC derivative issuers or operating as an impediment to competition in the market. In particular, the Committees agree with the proposals to remake the Class Order for a further five years and also to retain the existing financial, reporting and audit requirements.

The Committees note that consequential updates will need to be made to ASIC regulatory guides which make reference to the Class Order (for example, ASIC Regulatory Guide 166 *AFS Licensing: financial requirements*) to make reference to its replacement instrument.

The Committees have observed that ASIC legislative instruments are now typically being remade for shorter periods of five years or less rather than continuing for their maximum ten-year term and would appreciate an explanation from ASIC as to what is driving this recent change in approach. The more frequent revisiting of legislative instruments will require more dedicated resources for the associated consultation, drafting of fresh instruments, preparation of regulatory impact statements and updating of related regulatory materials.

The Committees are concerned that this approach may:

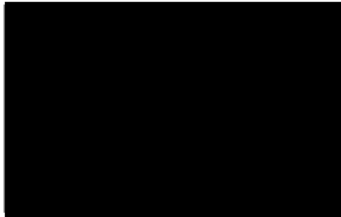
- impose an unnecessary burden on ASIC, including as it relates to the allocation of staffing resources and additional administrative needs to ensure that steps are taken

to evaluate and review legislative instruments and decide on their future (with industry consultation, where appropriate) in a timely fashion before their expiry date. If these steps are not taken, there is a risk of legislative instruments potentially lapsing inadvertently, which would potentially place the entities that rely on the relevant relief in breach of the law;

- divert ASIC resources and industry focus from a quickly evolving business and regulatory landscape, including the need to evaluate and respond to a substantial law reform agenda; and
- create greater uncertainty for the business activities of entities that rely on the relevant relief.

If you have any questions, please do not hesitate to contact Jeremy Williams [REDACTED] or Pip Bell [REDACTED]
[REDACTED]

Yours faithfully,



Philip Argy
Chairman, Business Law Section