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From: David Travers <[REDACTED]>
Sent: Monday, 31 January 2022 8:59 AM
To: [REDACTED]
Cc: CI.REFORMS; [REDACTED]
Subject: Exposure Draft Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022 Submission

Categories: [REDACTED] Submissions

Dear [REDACTED]

Thank you for confirming earlier this month that Home Affairs is working with Treasury towards creating an exemption for custodians so that they have no reporting obligation regarding an asset under the Security of Critical Infrastructure Act 2018, recognising that a custodian does not exercise any decision making in relation to interests in critical infrastructure sector assets which they acquire as custodians.

I have consulted with the ACSA Regulatory Working Group. In drafting the exemption, the feedback is that it is not suitable to exempt any person who provides a "custodial or depository service" as defined in the Corporations Act. On the one hand, that definition is too broad and actually captures not just those who are acting in a pure custodial capacity but any person who is acting as a trustee holding financial products for others. It does not seem that it was the Government's intention to carve all trustees out of compliance with the Critical Infrastructure Act, in circumstances where they have an active decision-making capacity in relation to the asset.

The Corporations Act definition of "custodial or depository service" also has some exceptions which would mean that its use would not always exempt from the Act custodians who find themselves holding interests in critical infrastructure sector assets. For example, the definition would not cover wholly-owned nominee companies used by custodians to act as the registered proprietor of assets (to ensure segregation of assets held by a custodian from its own assets). It also would not cover circumstances where a custodian is holding an interest in a critical infrastructure sector asset for a registered managed investment scheme.

Instead, we propose that an exemption for custodians use the same concept as is contained in the Corporations Act provisions which prescribe situations which do not give rise to "relevant interests". The concept of relevant interest is used in the Corporations Act provisions which deal with matters such as reporting of substantial holdings and takeovers.

The relevant situations which do not amount to "relevant interests" are described at section 609. Sub-section 609(1) deals with money lending and financial accommodation.

Sub-section 609(2) deals with a circumstance where a person who would otherwise have a relevant interest in securities as a bare trustee is not to have a relevant interest in the securities where a beneficiary under the trust has a relevant interest in the securities because of a presently enforceable and unconditional right of the kind referred to at section 608(8). Section 608(8) refers to circumstances where another person has an enforceable right in relation to the securities that would give them a relevant interest in the securities were the agreement were performed, the right enforced or the option exercised. Under a custody agreement, the "client" of the custodian will have an enforceable right to call for or direct dealings in the securities and as it is generally accepted that a custodian is merely a bare trustee, a custodian is not then taken to have a relevant interest in the securities that it holds in that capacity.

If this concept is acceptable, we would be happy to propose some drafting for inclusion in rules to be made by the Minister under section 61 for the purposes of section 27 of the Act. If you would like us to do this, could you please provide the format for the drafting and we can propose some language.

About ACSA.

The Australian Custodial Services Association (“ACSA”) is the peak industry body representing members of Australia’s custodial and investment administration sector. Our mission is to promote efficiency and international best practice for members, our clients and the market. Collectively, the members of ACSA hold securities and investments in excess of AUD \$4 trillion in value in custody and under administration. Members of ACSA include NAB Asset Servicing, J.P. Morgan, HSBC, State Street, BNP Paribas Securities Services, Citi Security Services and Northern Trust.

Kind regards

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