

# Improving the technology neutrality of Treasury portfolio laws

Submission to Treasury  
consultation on exposure draft  
legislation

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# Overview

This is the Business Council of Australia's submission to the Commonwealth Treasury consultation process on the exposure draft *Treasury Laws Amendment (Modernising Business Communications) Bill 2021 (the Bill)* and related amendments to Regulations (**the Exposure Drafts**).

The BCA strongly supports the measures in the Exposure Drafts, as a necessary updating of Australia's corporate law and other laws relating to regulation of financial transactions to reflect modern 21<sup>st</sup> century technology and business practices.

The Bill will amend a number of Acts to:

- enable documents to be sent in either electronic or physical forms;
- amend requirements to publish notices in newspapers in hardcopy form; and
- modernise communications in relation to consumer credit protections.

The Bill will make amendments to the following Commonwealth Acts:

- *Corporations Act 2001*, building on the amendments contained in the *Corporations Amendment (Meetings and Documents) Bill 2021 (the Corporations Amendment Bill)*
- *Life Insurance Act 1995*
- *National Consumer Credit Protection Act 2009*
- *Superannuation Industry (Supervision) Act 1993*

The Treasury Consultation process has also included the release of exposure draft Regulations to be made under these Act.

The Exposure Drafts include the following measures:

- expanding the scope of the "global regimes" that allow documents to be signed and sent electronically in the Corporations Amendment Bill.
- providing for targets to give bidders information on members' electronic addresses; and allows bidders to send documents electronically to members.
- legislating relief for companies, registered schemes and disclosing entities sending documents to "lost members" under the *Corporations Act 2001*.
- allowing notices published in newspapers to be published in any accessible and reasonably prominent manner across other Treasury legislation.
- updating payment provisions in Treasury legislation to ensure electronic payments can be made.
- updating the *National Consumer Credit Protection Act 2009* and associated legislation to give consumers and credit providers greater flexibility when updating their details and when sending documents.

The Treasury has also foreshadowed<sup>1</sup> that it intends to consider further reforms to improve technology neutrality including:

- communicating with regulators
- exemptions to the *Electronic Transactions Act 1999*
- product disclosure and record-keeping requirements

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<sup>1</sup> <https://treasury.gov.au/consultation/c2021-223249>

## The urgent need for the legislation

The BCA strongly supports all measures in the Exposure Drafts, which will extend reforms allowing for technological neutrality and electronic dealings. As the BCA has noted in previous submissions, there is no reason to not extend these principles wherever possible.

These proposed changes do nothing more than bring the relevant legislation into alignment with everyday 21<sup>st</sup> century technology and businesses practices. The BCA has previously discussed the manifest economic and other benefits of such reforms. It should be incomprehensible for these reforms to not be implemented as soon as possible.

Some elements of the Bill<sup>2</sup> are dependent on the passage of the **Corporations Amendment Bill**. At the time of writing that Bill was yet to be passed by the Senate and must wait for Parliament to resume next year. That Bill develops and renders permanent temporary and important amendments to the *Corporations Act* which expire at the end of March 2021, and the delay has caused disquiet amongst business. The BCA urges that it be passed at the first available opportunity in 2022 and notes that it is supported by both Government and Opposition parties.

We strongly support the Exposure Drafts. Nonetheless, there are some aspects which require further clarification or modification in order to achieve their objectives

## Amendments to the *Corporations Act 2001*

1. **Proposed sub-section 110C(5)** relating to the sending of documents provides that the new provisions will not apply to a document that is permitted to be sent by or to ASIC, the Registrar or the Takeovers Panel. This will mean that certain types of documents which are provided to these Commonwealth entities only, must be sent by hard copy. It is contrary to the spirit of the reforms, and may significantly reduce their benefit, if physical copies must be produced and delivered to ASIC, the Registrar and the Takeovers Panel when electronic copies suffice for all other parties. There appears to be no policy rational for this exception. We recommend that sub-section 110C(5) be removed.
2. **Proposed sub-section 110F(4A)** will introduce an exemption to the proposed section 110F in the Corporations Amendment Bill, which makes it a breach of the Act to send a document in a form (physical or electronic) that is contrary to a shareholder's election under section 110E. The proposed sub-section 110F(4A) will exempt a company from this provision if it reasonably believes that none of the addresses known to the company are a current address of the shareholder. However, section 648CA makes it a breach of the Act to fail to send information to a person in physical form within three days of receiving an electronic delivery failure notification. In practice, this will mean that a company is required to send a shareholder a physical copy of a document if an electronic copy 'bounces back', even though the shareholder has elected to receive all documents in electronic form. This is inconsistent with proposed sub-section 110F, which prohibit companies from sending a physical document when a person has elected to receive electronic documents only. This contradiction should be clarified.

## Amendments to the *Corporations Regulations 2001*

1. **Proposed Regulation 6.5.01A(2)** specifies the information that must be included in "the document (the Postcard)". Given this Regulation specifies the information that is "*mentioned in paragraph 110D(1(b) or (d))*", subparagraph (2) needs to define the Postcard as "*the document or electronic communication (the Postcard)*" to ensure it applies to each type of communication.

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<sup>2</sup> Schedule 1, which includes additional reforms relating to documents and meetings under the *Corporations Act*

2. **Proposed Regulation 6.5.01A subparagraph (3)** places a limit on what information may be included in the Postcard. In a scheme of arrangements context, it is now common practice for the Postcard to be sent together with personalised proxy appointment forms. In a takeover context, it would be preferable if the bidder had the flexibility to send both the Postcard and the personalised acceptance forms for the relevant takeover bid. This could be addressed through a note that clarifies that acceptance forms or other acceptance instructions would be "incidental information".
3. **Proposed Regulation 6.5.01A subparagraph (4)** requires that a Postcard include the same information as any Postcard sent to any other holder. It would be helpful to clarify that personalised shareholder information (eg the name of the registered holder, the identification number, number of shares, log-in information etc) may be included in the Postcard on an individual basis.

## Other Acts to be amended by the legislation

The Exposure Drafts also include amendments to the following Acts:

- *Life Insurance Act 1995*
- *National Consumer Credit Protection Act 2009*
- *Superannuation Industry (Supervision) Act 1993*

These proposed amendments are all supported and, in our view, do not require any modification.

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