

EXPOSURE DRAFT

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Inserts for
**Treasury Laws Amendment (Measures
for a later sitting) Bill 2018: Mutual
entities (tranche 2)**

Commencement information

Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Schedule 1	The day after this Act receives the Royal Assent.	

EXPOSURE DRAFT

Schedule 1—Mutual capital instruments (MCIs)

Part 1—Main amendments

Corporations Act 2001

1 Section 9

Insert:

MCI (short for mutual capital instrument) has the meaning given by section 167AD.

MCI amendment resolution has the meaning given by section 167AJ.

MCI mutual entity has the meaning given by section 167AC.

non-shareholder mutual member of an MCI mutual entity means a person who is a member of the entity otherwise than as a holder of a share (whether or not the person also holds one or more shares in the entity).

2 At the end of Chapter 2B

Add:

Part 2B.8—Mutual capital instruments (MCIs)

Division 1—Preliminary

167AB Simplified outline of this Part

This Part provides for mutual capital instruments (MCIs).

An MCI is a share in a mutual entity that meets requirements relating to voting rights and other matters. Certain kinds of mutual entities may issue MCIs and become MCI mutual entities.

Division 3 sets out a special procedure for amending the constitution of a mutual entity that proposes to issue MCIs.

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1 Division 2—MCI mutual entities and MCIs

2 167AC Meaning of *MCI mutual entity*

3 A mutual entity is an *MCI mutual entity* if:

- 4 (a) the entity is a public company; and
- 5 (b) the entity does not have voting shares (other than MCIs)
6 quoted on a prescribed financial market; and
- 7 (c) the entity is not a registered entity within the meaning of the
8 *Australian Charities and Not-for-profits Commission Act*
9 *2012*; and
- 10 (d) the entity's constitution states that the entity is intended to be
11 an MCI mutual entity for the purposes of this Act; and
- 12 (e) the entity has issued one or more MCIs.

13 167AD Meaning of *MCI*

14 (1) A share in a mutual entity is an *MCI* (short for mutual capital
15 instrument) if:

- 16 (a) paragraphs 167AC(a), (b), (c) and (d) apply to the entity; and
- 17 (b) the share meets the requirements in sections 167AE to
18 167AG.

19 (2) To avoid doubt, if a share that is an MCI ceases to meet one or
20 more of those requirements, the share ceases to be an MCI.

21 (3) Nothing in this Division requires an MCI mutual entity to treat the
22 holders of MCIs in the same way as members of the entity who do
23 not hold MCIs.

24 Note: For example, this Division does not require an MCI mutual entity that
25 provides services to a class of members to provide those services to
26 holders of MCIs.

27 167AE MCI requirement—class rights

28 A share in a mutual entity meets the requirement in this section if
29 the rights attached to the share can be varied or cancelled only by
30 special resolution of the company and either:

- 31 (a) by special resolution passed at a meeting of the class of
32 members holding shares in the same class; or
- 33 (b) with the written consent of members with at least 75% of the
34 votes in the class.

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167AF MCI requirement—ranking of debts in respect of declared dividends in winding up

A share in a mutual entity meets the requirement in this section if the entity's constitution provides for a debt owed by the entity to the holder of the share by way of a dividend, in respect of the share:

- (a) to rank ahead, in a winding up of the entity, of any debt owed by the entity to a person in the person's capacity as a member of the entity other than as a holder of one or more MCIs; and
- (b) to rank behind, in a winding up of the entity, any debt owed by the entity other than:
 - (i) a debt of a kind mentioned in paragraph (a); or
 - (ii) a debt owed by the entity to the holder of one or more MCIs by way of dividends in respect of the MCIs.

Note: Section 254V provides for when debts by way of dividends are incurred.

167AG MCI requirement—other requirements

A share in a mutual entity meets the requirements in this section if the entity's constitution:

- (a) provides that the share is a fully paid share; and
- (b) provides that dividends in respect of the share are non-cumulative; and
- (c) sets out the rights attached to the share with respect to participation in surplus assets and profits.

167AH MCIs must be cancelled before MCI mutual entity demutualises

A resolution of an MCI mutual entity that would result in the entity ceasing to be an MCI mutual entity has effect only if:

- (a) there are no MCIs in the entity; or
- (b) the resolution provides for each MCI to be cancelled at or before the time the entity ceases to be an MCI mutual entity (whether or not the holders of the MCIs to be cancelled are to receive other securities in respect of those MCIs).

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1 Division 3—Special procedure for amending constitution of 2 mutual entity that proposes to issue MCIs

3 167AI Purpose and application of this Division

- 4 (1) This Division sets out a special procedure for the constitution of a
5 mutual entity to be amended to provide for the entity to issue
6 MCIs.
- 7 (2) This Division applies to a mutual entity that:
8 (a) is a public company; and
9 (b) does not have voting shares quoted on a prescribed financial
10 market; and
11 (c) is not a registered entity within the meaning of the *Australian
12 Charities and Not-for-profits Commission Act 2012*.

13 167AJ MCI amendment resolution

- 14 (1) An *MCI amendment resolution* is a resolution of the mutual entity
15 to amend the entity's constitution for one or more of the following
16 purposes, and for no other purpose:
17 (a) to include a statement that the entity is intended to be an MCI
18 mutual entity for the purposes of this Act;
19 (b) to provide for the entity to issue MCIs;
20 (c) to provide for the rights and obligations attached to MCIs;
21 (d) to make changes that are incidental or ancillary to the
22 purpose in paragraph (a), (b) or (c).
- 23 (2) An MCI amendment resolution must not result in the mutual entity
24 ceasing to be a mutual entity.

25 167AK Procedure for MCI amendment resolution

- 26 (1) This section applies to a meeting of the mutual entity's members if:
27 (a) notice of an MCI amendment resolution to be proposed at the
28 meeting is given in accordance with paragraph 249L(1)(c);
29 and
30 (b) the meeting is held during the period of 36 months beginning
31 on the day this section commences; and

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(c) no more than 2 MCI amendment resolutions have been proposed at previous meetings of the mutual entity's members.

(2) The MCI amendment resolution:

(a) must be passed at the meeting by at least 75% of the votes cast by or on behalf of members who are present at the meeting (including members who have appointed proxies who are present at the meeting) and entitled to vote on the resolution; and

(b) if so passed—has effect as a special resolution despite subsections 136(3) and (4) and anything in the mutual entity's constitution.

(3) Despite section 135 and anything in the mutual entity's constitution, section 249T (quorum) applies to the meeting to the extent that the meeting is considering or voting on the MCI amendment resolution.

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1 **Part 2—Consequential amendments of the**
2 **Corporations Act 2001**

3 *Corporations Act 2001*

4 **3 At the end of section 48**

5 Add:

- 6 (6) Any shares in the first body that are MCIs, and any powers
7 exercisable by a person by virtue of such shares, are to be
8 disregarded.

9 **4 At the end of section 124**

10 Add:

- 11 (4) Subsection (1) does not prevent a mutual entity that is a company
12 limited by guarantee issuing MCIs.

13 **5 At the end of Part 2F.2**

14 Add:

15 **246H Application of this Part to MCI mutual entities that are**
16 **companies limited by guarantee**

17 For the purpose of applying this Part to an MCI mutual entity that
18 is a company limited by guarantee, treat the entity:

- 19 (a) in relation to a person who holds MCIs in the entity—as a
20 company with a share capital; and
21 (b) in relation to a non-shareholder mutual member—as a
22 company without a share capital.

23 **6 At the end of Part 2H.5**

24 Add:

25 **254WA Application of this Part to MCI mutual entities**

- 26 (1) Section 254SA does not prevent an MCI mutual entity that is a
27 company limited by guarantee paying a dividend in respect of an
28 MCI.

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- 1 (2) Without limiting section 254T, an MCI mutual entity must not pay
2 a dividend unless the payment of the dividend is fair and
3 reasonable to the entity's members as a whole.

4 **7 At the end of Part 2J.1**

5 Add:

6 **Division 4—Application of this Part to MCI mutual entities**

7 **258G Application of this Part to MCI mutual entities**

- 8 (1) For the purpose of applying this Part to an MCI mutual entity, a
9 reference (other than in section 258B) to a shareholder of the entity
10 is taken to include a non-shareholder mutual member of the entity.
- 11 (2) For the purpose of applying Division 1 to an MCI mutual entity:
12 (a) any reduction of the entity's share capital that relates to MCIs
13 is taken to be a selective reduction; and
14 (b) the reference to all ordinary shareholders in
15 paragraph 256C(2)(b) is taken to be a reference to all
16 members of the entity.
- 17 (3) For the purpose of applying Division 2 to an MCI mutual entity:
18 (a) any scheme to buy back MCIs is taken not to be an equal
19 access scheme; and
20 (b) subsections 257B(4) and (5) (the 10/12 limit) have effect in
21 relation to MCIs issued by a mutual entity as if each MCI
22 were a voting share with one vote attached to it; and
23 (c) the reference to all ordinary shareholders in
24 paragraph 257D(1)(b) is taken to be a reference to all
25 members of the entity.
- 26 (4) To avoid doubt, this section does not have the effect of treating a
27 non-shareholder mutual member's membership of an MCI mutual
28 entity as a share.

29 **8 At the end of Part 2J.3**

30 Add:

31 **260DA Application of this Part to MCI mutual entities**

- 32 (1) For the purpose of applying this Part to an MCI mutual entity:
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- 1 (a) a reference to a shareholder of the entity is taken to include a
2 non-shareholder mutual member of the entity; and
3 (b) the reference to all ordinary shareholders in
4 paragraph 260B(1)(b) is taken to be a reference to all
5 members of the entity.

- 6 (2) To avoid doubt, this section does not have the effect of treating a
7 non-shareholder mutual member's membership of an MCI mutual
8 entity as a share.

9 **9 Section 910A (paragraph (b) of the definition of *control*)**

10 After "either profits or capital", insert ", and not including MCIs".

EXPOSURE DRAFT

1 **Part 3—Consequential amendments of other Acts**

2 *Financial Sector (Shareholdings) Act 1998*

3 **10 After paragraph 9(4)(b) of Schedule 1**

4 Insert:

5 or (c) is an MCI mutual entity (within the meaning of the
6 *Corporations Act 2001*);

7 *Income Tax Assessment Act 1936*

8 **11 At the end of subsection 121AB(1)**

9 Add:

10 ; or (d) if the insurance company is a mutual entity (within the
11 meaning of the *Corporations Act 2001*)—that would be
12 covered by paragraph (a), (b) or (c) if the following were
13 disregarded:

- 14 (i) any MCIs (within the meaning of that Act) issued by the
15 entity;
- 16 (ii) any dividends or profits paid or payable in respect of
17 such MCIs;
- 18 (iii) any members of the entity who are members by virtue
19 of holding such MCIs.

20 **12 Section 121AC**

21 Before “A”, insert “(1)”.

22 **13 At the end of section 121AC**

23 Add:

24 (2) If the company is a mutual entity (within the meaning of the
25 *Corporations Act 2001*) then, for the purposes of subsection (1),
26 disregard the following:

- 27 (a) any MCIs (within the meaning of that Act) issued by the
28 company;
 - 29 (b) any dividends or profits paid or payable in respect of such
30 MCIs;
 - 31 (c) any members of the company who are members by virtue of
32 holding such MCIs.
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14 After subsection 326-10(1) of Schedule 2H

Insert:

(1A) If the entity is a mutual entity (within the meaning of the *Corporations Act 2001*), then, for the purposes of subsection (1), disregard the following:

- (a) any MCIs (within the meaning of that Act) issued by the entity;
- (b) any dividends or profits paid or payable in respect of such MCIs;
- (c) any members of the entity who are members by virtue of holding such MCIs.

Income Tax Assessment Act 1997

15 Subsection 995-1(1)

Insert:

demutualise: a mutual entity (within the meaning of the *Corporations Act 2001*) that issues one or more MCIs (within the meaning of that Act) is not taken to *demutualise* by doing so.

Note: MCI is short for mutual capital instrument (see section 167AD of the *Corporations Act 2001*).

Insurance Acquisitions and Takeovers Act 1991

16 After paragraph 13(4)(b)

Insert:

or (c) is an MCI mutual entity (within the meaning of the *Corporations Act 2001*);