BCA
Business Council of Australia

Treasury Laws Amendment (Measures for Consultation) Bill 2021: Use of technology for meetings and related amendments

Submission to Treasury consultation process

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Contents

Overview

This is the Business Council of Australia's submission to the Treasury consultation process on the exposure draft of the *Treasury Laws Amendment (Measures for Consultation) Bill 2021: Use of technology for meetings and related amendments* (the Bill).

The Bill proposes a number of targeted and measured amendments to the *Corporations Act 2001* (the Act), to permanently enact measures relating to virtual meetings and the electronic execution of documents that were implemented on a temporary basis in 2020.

The urgent need for the Bill

The Business Council strongly supports all measures in the Bill and recommends its swift passage by the Parliament. Similar measures were previously included in the *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021* (the TLAB Bill). This Bill would have extended temporary measures put in place in 2020 that expired on 21 March 2021. As the Bill has not yet been passed, businesses have now been forced to revert to the pre-COVID rules relating to meetings and transactions. The expiry of the temporary measures caused significant disruption and continues to do so.

This situation is, and will continue to be, particularly problematic for those businesses that had anticipated being able to hold virtual Annual General Meetings in 2021 but will now be forced to hold such meetings in person. In some cases, this may not be physically possible, given that they may still be subject to COVID-19 limits on travel and the size of physical gatherings.

Further, many businesses that were moving to electronic processes in transactions, and streamlining their processes in contracting with suppliers and customers, have had to alter course or put changes on hold and revert to old methods.

The ongoing risk of COVID outbreaks, lockdowns and border closures increases the urgency of passing this legislation when Parliament returns. Regular disruptions to standard business practices and restrictions on movement make implementing these measures critical.

Given these pressing problems, the Business Council strongly encourages the Parliament to revisit these measures and pass the proposed amendments as soon as possible, either through the vehicle of the TLAB Bill or the new proposed Bill, or a consolidation of the measures into a single Bill.

We also note that the proposed reforms in the Bill have already been considered in some detail, as a result of the following extensive and detailed processes:

- the consultation process on exposure draft legislation conducted by the Government in 2020;
- during the operation of the temporary measures that the Bill would make permanent;
- the Senate Economics Legislation Committee inquiry into the TLAB Bill; and
- the Senate Economics References Committee inquiry into the TLAB Bill.

There is no reason to delay the implementation of these much-needed reforms. They do no more than update Australia's corporations law to reflect the reality of 21st century technology and corporate practices. Moreover, they are clearly required in an environment in which Australian businesses continue to remain subject to restrictions on movement and gatherings as a result of the COVID-19 pandemic.

Virtual meetings

The Business Council strongly supports the notion that a company should be able to hold a meeting of members in whole or in part through the use of technology, provided that the format of the meeting gives members as a

whole the same opportunity to participate in the meeting, and that accountability of the company is not diminished.

The Bill will enable companies to conduct 'virtual meetings' on an ongoing basis. This right was previously available to companies under the temporary measures that expired in March 2021.

These reforms recognise the current and future capacity for technology to facilitate the holding of company meetings in a more modern and efficient manner. They will also bring Australia into line with other comparable jurisdictions, such as the United Kingdom, Canada and parts of the United States.

The ability to hold 'virtual meetings' has been necessary as a result of limits on the size of physical gatherings since the onset of COVID-19. It is clear that such limits will continue to apply in some form for the foreseeable future. As such, it is not tenable for businesses to continue to be subject the pre-COVID position, which is now the case. Since the expiry of the temporary measures, many businesses have found themselves in the position of being required to conduct meetings in person but not being able to physically do so according to the law as it stands under the Act, due to limits on travel and/or physical distancing requirements. These restrictions often change quickly – sometimes daily – and are impossible to predict.

Recommended amendments to the Bill

1. Remove the requirement to amend company constitutions

The Bill as drafted provides that a company may hold a meeting of members on a virtual basis, if this *"is required or permitted by a company's constitution."* [1] The effect of this provision is that companies whose constitutions do not expressly provide for virtual meetings will be required to amend their constitutions to enable them to do so. This is notwithstanding the fact the Bill does not include a requirement to amend a company's constitution to enable hybrid meetings.[2]

The legislation should allow companies to hold wholly virtual general meetings without them first having to amend their constitution, unless their constitution specifically precludes such meetings. For a company to amend its constitution to enable virtual meetings, the members would need to pass a special resolution at a general meeting, attending in person. This may not be currently possible given existing COVID-19 restrictions on gatherings.

Companies and their boards should have the power to determine how they will hold a meeting: physical, hybrid or virtual. There seems to be no policy reason why hybrid and fully virtual meetings should be treated differently, as the Bill currently provides. The Act should be technology-neutral and not favour any kinds of meeting over others.

If the choice of meeting format is made in bad faith or disenfranchises certain shareholders, then ASIC and shareholders have ample existing rights to seek redress. The Act already provides sufficient protection for shareholders without the need for company constitutions to be amended for one kind of meeting only.

Electronic execution of documents

The Bill would make permanent changes to the Act to allow for the electronic execution of documents without physical documents or signatories being required to be present. The COVID-19 period provided an opportunity to trial changes to electronic execution of documents as a result of the temporary measures implemented in 2020. The response of Business Council members to this trial has been overwhelmingly positive, with no substantive concerns expressed.

[1] Clause 249R(c)
[2] Clause 249R(b)

Allowing for the electronic execution of documents means that company officers need not be physically located in the same place as other parties, which removes unnecessary costs and delays on a range of transactions and decisions. It reflects the reality that, prior to COVID-19, many businesses were increasingly entering into transactions and contracts electronically, where it was possible to do so, a trend that has significantly accelerated during COVID-19. Crucially, it reflects the "new normal" that corporate officers and other signers of documents may be working from home.

The Bill removes requirements for counterparties and their legal advisers to require proof of the technical and procedural matters that the Act would otherwise allow them to assume. Even in the absence of these measures as a result of COVID-19, such reforms to the Act were already desirable in order to keep pace with developments in technology that now enable businesses to execute documents without company officers or advisers being physically present.

Notably, these reforms are another major step forward in the shift to a digital economy. Australia needs to adapt and keep pace with other jurisdictions if we are to more fully unlock the productivity benefits that will flow from the use of digital technology. It is regrettable that such reforms have not previously been implemented. There is no reason why Australia's corporations law should not be updated on an as-required basis whenever this is necessary to keep pace with developments in technology.

Recommended amendments to the Bill

The Business Council supports the changes in the suggested drafting of amendments to sections 127 and 129 in both the Bill and the TLAB Bill, which have been made since the introduction of the temporary 2020 measures and the exposure draft Bill of October 2020. This includes the changes in the Bill dealing with single director companies, which will remove a common but unnecessary problem.

Nevertheless, there are some aspects of the drafting that could be improved. We recommend the following amendments to the Bill and/or the TLAB Bill to enhance the workability of the measures.

1. Remove the requirement that an entire document be signed in "split execution"

The drafting of the Bill assumes that the TLAB Bill is passed and, as such, the amendments in the Bill need to be read in conjunction with the TLAB Bill.

The TLAB Bill would introduce a new subsection 127(3A), as follows:

> *(3A) For the purposes of this section, a document is taken to have been 12 signed by a person if:*
>
> *(a) the person signs a copy or counterpart of the document that is in a physical form; and*
>
> *(b) the copy or counterpart includes the entire contents of the document.*

The proposed new subsection (3A), expressly allowing 'split execution', is very welcome. However, subsection (3A)(b) requires that the document signed includes the *entire* contents of the document. We suggest that this requirement be reconsidered. Documents can run to hundreds of pages, and in some cases, in relation to construction and infrastructure, they can be over one thousand pages. Where an agreement is being signed (as opposed to a deed), it is common practice, both internationally and in Australia, for the signers to print out and sign just the signature pages, and not to print out the entire document.

2. Clarify the terms relating to signing by sole directors

The drafting of proposed new subsections 127(1)(c) and s 127(2)(c) should be further clarified and simplified, by ending paragraph (c) in each case after the words *"that director"*.

The words that follow (*"if: (i) the director is also …"*) are potentially confusing and limiting. The new subsections can apply only if the relevant company has a "sole director". If this is the case, then it is the signature of that

person – the controlling mind of the company – that should be critical. It should not matter whether the sole director is also a sole company secretary, or whether the company does not have a company secretary.

3. Clarify that execution and documents can be electronic

The text of proposed subsection 127(3B) in the TLAB Bill should make clear that signatures and documents can be electronic. As currently drafted, the only reference to electronic document is in the heading ("*Signing an electronic copy or counterpart*"). The heading is not part of the Act.

4. Clarify that originals of documents can be executed as provided, as well as copies or counterparts

The proposed new provisions in section 127 in the TLAB Bill refer to execution of "copies" or "counterparts". To avoid doubt, the Bill should also make clear that they also apply to originals.

5. Clarify that the new provisions in section 127 are not exclusive

It should be made clear that proposed subsections 127(2A), (3A) and (3B) in the TLAB Bill do not limit the ways subsections 127(1), (2) or (3) can be satisfied.

6. Extend the provisions of the Bill to other types of corporations

The provisions of the Bill deal with companies. They do not extend to foreign and statutory corporations. Such corporations are very active in Australian commerce and should be able to sign documents (including deeds) in the same way. The measures in the Bill to facilitate electronic execution are an overdue modernising of the Act to enable Australian businesses to make use of technology to manage their affairs more efficiently. There is no reason why certain types of businesses operating in Australia should be denied this opportunity.

Further proposed amendment – shareholder rights to receive documents in hard copy

As outlined above, the BCA strongly believes that the corporations law should be modernised so that it is technology-neutral in relation to the ways in which documents can be executed and distributed. The TLAB Bill as currently drafted provides that documents may be provided to recipients electronically if:[3]

a) It is reasonable to expect that the document would be readily accessible by the recipient; and

b) An election by the recipient to receive documents in hard copy only is not in force.

However, the TLAB Bill requires companies to notify shareholders within two months of its commencement of their rights to receive documents in hard copy only.[4] This requirement is excessive and, in our view, unnecessary.

We propose that companies not be required to proactively notify existing shareholders of their right to opt to receive documents by hard copy only. The TLAB Bill should be amended to provide that shareholders will have the right to elect to receive documents in hard copy, but companies will not have a positive obligation to inform them of this right.

[3] Clause 253RA(3)(a)-(b)
[4] Clause 1679B

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