

Treasury Laws
Amendment
(Measures for
Consultation) Bill
2021: Use of
technology for
meetings and related
amendments (2nd
draft Bill)

Submission to Treasury
consultation process

September 2021

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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)*. This is the second such draft bill released for consultation in 2021. The Business Council previously made a submission¹ in support of the first draft Bill in July 2021.

The Bill proposes a number of targeted 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 and again in 2021.

The urgent need for the Bill

The Business Council strongly supports all measures in the Bill to make permanent a number of legislative arrangements that are currently only temporary.

The current temporary measures were included in the *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 (the TLAB Bill)*, which was recently passed by the Parliament and commenced on 14 August 2021.

The TLAB Bill included the following amendments:

- Virtual meetings: allow for businesses to conduct virtual or 'hybrid' meetings until 31 March 2022
- Electronic execution of documents: allow for the electronic execution of certain documents until 31 March 2022.

These amendments were strongly welcomed by Australian businesses. Whilst they were initially implemented as temporary COVID-19 'emergency' measures, they are also a long-overdue modernisation of Australia's Corporations Law, which should now be implemented on a permanent basis.

These changes do nothing more than bring the Corporations Law into alignment with everyday 21st century technology and businesses practices. It should be incomprehensible for them to not be implemented on a permanent basis.

The measures in the Bill are highly desirable and should be completely uncontroversial. As such, the Business Council strongly encourages the Government and the Parliament to proceed with the Bill as soon as possible.

We also note that the proposed reforms in the Bill have already been considered extensively, as a result of the following processes:

1. the consultation process on exposure draft legislation conducted by the Government in 2020;
2. during the operation of the temporary COVID-19 'emergency' measures introduced in 2020;
3. the Senate Economics Legislation Committee inquiry into the TLAB Bill;
4. the Senate Economics References Committee inquiry into the TLAB Bill;
5. The Parliamentary debate on the TLAB Bill; and
6. The consultation process on the previous exposure draft legislation conducted by Treasury earlier in 2021.

¹<https://www.bca.com.au/treasury-laws-amendment-measures-for-consultation-bill-2021-use-of-technology-for-meetings-and-related-amendments>

Virtual meetings

The Business Council strongly supports the principle 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. It has been available once more since 14 August 2021 following the passage of the TLAB Bill but is currently due to lapse once more on 31 March 2022 unless new legislation is passed.

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. There is a clear risk that such limits will continue to apply in some form for the foreseeable future. As such, it is not tenable for businesses to revert back to the pre-COVID position.

In any event, conducting meetings through ‘virtual’ technology has now increasingly become the ‘new normal’ for those businesses that are able to do so. This process has merely been accelerated by COVID-19. The Business Council is not aware of any evidence to suggest that the holding of meetings in this way has diminished the accountability of companies or disenfranchised shareholders. It has, in fact, enabled all shareholders to have equal access to meetings, and has made the holding of such meetings more efficient for all parties.

We note that the amendments passed by the TLAB Bill currently allow companies to hold ‘virtual meetings’ until 31 March 2022 whether or not their constitution allows for this. However, the Bill will have the effect of restricting public companies and schemes from holding virtual AGMs unless authorised by their constitutions. If their constitution does not currently allow for such meetings then it will need to be amended in order to do so after the Bill takes effect. This will potentially create transitional problems for businesses that are required to amend their constitutions. A solution to this issue is set out under **Recommended amendment 5** below.

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.

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 possible. This trend 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 and, in many cases, are likely to continue to do so in the post-COVID-19 era.

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 necessary 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 and that the evolution of the Corporations Law has conspicuously lagged behind the evolution in technology and business practices. 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.

Nonetheless, there are several aspects of the drafting that could be improved. We recommend the following amendments to the Bill to enhance the workability of the measures.

1. Make it crystal-clear that deeds executed under the amended provisions may be effective despite not being on paper

In order for the reforms to be effective in the market there will need to be widespread acceptance that they work and will not be open to challenge.

A number of law firms have raised doubts as to whether the TLAB Bill removed the 'paper rule' requiring deeds to be on paper. This should now be clarified by the Bill.

The amendments to section 126 are very welcome in authorising agents to sign deeds on behalf of a company, even if not appointed by deed. They should also authorise such agents to deliver deeds. They should also provide that the agent's signature to a deed should not need to be witnessed. Sections 110A(1) and (2) should not limit methods of physical signing for the purposes of ss126 and 127.

2. The second parts of sections 129(5) and (6), allowing counterparties to make assumptions concerning sole directors, should extend to other directors and secretaries
3. A new assumption should be added in section 129 to allow parties dealing with agents to assume their signatures comply with s110A

This will bring it closer to the position applying in relation to signatures under s127(1), which have the benefit of the assumption in s129(5).

4. Remove the requirement in section 110B(c) that the signer of a document submit it for lodgement

Section 110B(c) seems to require that the signer of a document must submit it for lodgement, in order for ASIC to be required to accept it. This raises the obvious question of what happens if it is lodged by another party, or there are two signers? We do not see why this should be a requirement and suggest it be removed.

5. Change the transitional provisions to allow companies to have virtual AGMs without amending their constitution until a definite sunset date

Under the amendments passed by the TLAB Bill, companies may hold 'virtual meetings' until 31 March 2022 regardless of whether their constitution allows for such meetings.

Under the Bill as currently drafted, proposed sections 1687B and 249R(c) will require companies to amend their constitutions to allow for virtual AGMs if they do not already do so. This provision of the Bill is due to

come into effect upon royal assent to the Bill. This will create uncertainty for a number of businesses that are currently free to hold virtual meetings but will need to amend their constitutions in order to do so once the Bill is passed. However, the date on which this may occur is uncertain. This will make it difficult for businesses to plan meetings and also creates uncertainty as to how soon they will need to amend their constitutions.

We propose that this issue be addressed by amending the Bill to provide that the requirement to amend company constitutions comes into effect at a fixed date and that this date align with the current expiry date of 31 March 2022. Companies will then have certainty that they can conduct 'virtual meetings' under the current rules until this time and give them sufficient time to amend their constitutions prior to the new regime coming into effect.

6. Extend the reforms 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. We do not see any policy reason why such corporations should be denied the benefits of the Bill.

BUSINESS COUNCIL OF AUSTRALIA

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