Law Council
OF AUSTRALIA

Business Law Section

10 December 2021

Market Analysis and Deregulation Unit
Market Conduct Division
Treasury
Langton Cres
Parkes ACT 2600

Attention: Manager

By email: mbcomms@treasury.gov.au

Dear Mesdames and Sirs

Consultation: Exposure Draft of the Treasury Laws Amendment (Modernising Business Communications) Bill 2021 (Exposure Draft Bill)

This submission is made by the Business Law Section of the Law Council of Australia in response to the Commonwealth Treasury's consultation in relation to "Improving the technology neutrality of Treasury portfolio laws".

This submission has been prepared with the assistance of members of the Business Law Section's specialist committees, including members of the Corporations Committee, Digital Commerce Committee and Financial Services Committee.

In general terms, the Business Law Section supports the overall approach of the Exposure Draft Bill of seeking to facilitate electronic business transactions and making Treasury portfolio laws more technology neutral.

The Business Law Section supports the following amendments to the *Corporations Act 2001* (Cth) (**Corporations Act**):

- in principle, the facilitation of sending documents associated with takeovers under Chapter 6 of the Corporations Act electronically (but have a number of specific comments in relation to the Exposure Draft Bill provisions);
- reform so that companies and schemes do not need to send documents to "lost" members; and
- amendment of section 248D to remove unnecessary impediments to the use of technology for directors' meetings.

However, the Business Law Section has comments, concerns or reservations in relation to the Exposure Draft Bill about the following key issues:

- the "lost" member provision (proposed section 110JA) should not be time limited;

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- the reference to addresses “known” to the sender in proposed section 110JA should be clarified so that only addresses provided by the member for the purposes of communication relating to the securities held by that member need to be considered;
- electronic addresses given to a bidder should be available for use by the bidder for any purpose in connection with the takeover bid, not just for documents required by Chapter 6 to be sent to members;
- there should be an explicit link between the electronic addresses given to a bidder under section 641 and the service rules in section 648C so that sending a document to the electronic address provided by the target is taken to be good service;
- there should be a specific and prescriptive time of service rule for the purposes of Chapter 6 (and mirrored for Chapter 6A) for electronic communications due to the importance of certainty to the validity of certain takeover bid steps;
- the proposed provision for sending hard copy documents after a “bounce back” from an electronic communication should be omitted or revised to provide a more reasonable time limit – and a document should be expressly deemed to be served despite the “bounce back”; and
- the expression used to replace newspaper public notices is of uncertain application and may give rise to difficulties in practice.

Annexed to this letter is a table setting out more detailed comments and submissions in relation to certain provisions of the Exposure Draft Bill.

For further information or if you would like to discuss any aspect of this submission, please contact John Keeves, Member of the Executive of the Business Law Section john.keeves@jws.com.au 0419 039 019.

Yours faithfully

Philip Argy
Chairman, Business Law Section

#	Provision	Description	Submission
Schedule 1 – Documents and meetings under the *Corporations Act 2001* (Cth)			
1.	110JA	Sender does not need to send document if member uncontactable	We strongly support in principle a reform to allow a company or scheme, not to send documents to a "lost" member. However, we have some concerns in relation to the structure of the proposed reform. The timing under the draft provision is triggered in part by a reasonable belief of the sender. That is a subjective matter with the usual attendant difficulties of proof (especially since it will require attribution of a belief to a corporation at a particular point in time). This will make application of the provision in practice difficult, because the ability to rely on the provisions will be wholly dependent on having acted within a time limit that will be difficult to precisely define and establish. Moreover, in our submission, there is no real logic in imposing a time limit of 6 months after the 12 month period starts. That is, if the conditions are satisfied, the "relief" should be available at any time. Further, it is not at all clear what "reasonable steps" to advise the recipient would mean here, if none of the addresses is current and the sender has already tried using all available contact details. Does the Government intend that a public notice should be published (as to which see below)? Or that the Government gazette be utilised? There would be a benefit in providing more prescriptive guidance to companies and schemes by providing easy to understand rules and applying a "bright line" test wherever possible. This would be preferable, in this instance at least, to general principles that may be uncertain until there are judicial pronouncements – which typically is expensive and takes many years, and even longer until there is a definitive interpretation from an appellate court. In our submission, subsection (4) would be better cast in the positive – that a sender will have taken reasonable steps if they have attempted to communicate using all available contact details. Further, sections 110JA(3)(a)(ii) and 110JA(4) refer to electronic addresses "known to the sender". Without some qualification, this is presumably not limited to those advised by the member to the company or scheme for purposes connected with the shareholding or interest but would appear to include any electronic address used by the member to communicate with the sender. For example, "known to the sender" could include a mobile phone number given that electronic messages can be sent to such a number, and perhaps even other messaging systems and apps. Also, would a bank, insurer or telco (for example) have to consider all data provided by the member as a customer for this purpose? Use of such addresses for purposes other than those for which they have been provided might be an unintended and unwelcome obligation on the part of the company or scheme concerned. There may also be difficulties with data matching on the basis of names only leading to confusion over

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			the identity of members and conceivably leading to opportunities for fraud and identity theft, if an address is mistakenly identified as that of a member. In our submission, there should be some delimitation of addresses "known" for this purpose, to those provided by the member in connection with their membership for the purpose of communications, on the basis that the fundamental assumption should be that a member is responsible for keeping their address details up to date. However, if they do not do so, it should not be the company or scheme's, obligation to manage the consequences of the member's failure. The same issue arises in relation to section 641(1)(aa).
2.	248D	Use of technology (by directors)	We strongly support this proposed amendment, to remove unnecessary impediments to the use of technology for directors' meetings. In 2021, the world of commerce has reached a point where a directors' meeting using technology is completely mundane and any impediments to the use of such technology should be removed.
Chapter 6 and 6A Provisions			
3.	641(1)(a)	[Provision of electronic addresses and election details to bidder]	See our submission above in relation to item 1 concerning the expression "where the target knows". We submit this expression should also be limited.
4.	641A	Use or disclosure of information obtained from target	This provision limits the use of electronic addresses for the purposes of sending a document or complying with an obligation under Chapter 6 or 6A (and certain other provisions). We support in principle a limitation on use of electronic addresses but this provision should be amended to enable electronic addresses to be used for **any communications in connection with a bid or compulsory acquisition**, in the same way that physical addresses can be used by a bidder for such a purpose, Such an approach would be consistent with the provisions of Chapter 2C dealing with the use of information from registers generally, where communications relevant to the holding of the interests concerned are permitted (see section 177(1A)). That is, sending communications to members electronically should be facilitated whether or not they are required by Chapter 6 or 6A. For example, a supplementary bidder's statement for a listed company or scheme does not need to be sent to members under section 647, but it is generally regarded as better practice to do so.

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			In our submission, this provision does not warrant being a civil penalty provision. We suggest that a further exception be made to section 641A to allow information to be used or disclosed where the member consents or the target company or scheme gives approval.
5.	648C and 669A	Sending documents to holders of securities - general	There is no explicit link between the electronic address provided under section 641(1)(a) and the mode of service under section 648C or 669A. That is, the provisions should expressly state that a document is deemed to be sent by a bidder if it is sent to an electronic address obtained from the target under section 641(1)(a). In particular, a document should be deemed to be sent if sent to such an address but "bounces back". That should not be a risk for the bidder, given the fundamental importance of the validly of certain steps in a takeover bid to the validity of the bid itself – the validity of certain steps is dependent on the document being "sent" to all members (for example notices of variation under section 650D). A sender who receives a "bounce back" should practically be in no different position when compared to a letter sent by post which has been "returned to sender". If the member has not kept their contact details current, that should not be a risk or an additional responsibility borne by the bidder. To achieve technology neutrality, the consequences for a sender in the case of a recipient failing to receive a communication by post or electronically through no fault of the sender should be the same. In our submission, section 648C should confirm the generally accepted understanding of the basic timing rule of Chapter 6 namely, that a document is sent (etc.) when it is despatched rather than when it is received. In the Draft Explanatory Memorandum (**Draft EM**) (at [1.20]) it states that "the provisions also include a new rule which states that an electronic communication is taken to have been sent when it is received by the address", which is contrary to the long-standing market practice under Chapter 6 and not explained. Under Chapter 6, the giving or sending of a notice is effected when the notice is posted not when it is received. The reference to section 105A in the note to section 648C(3) could actually confuse the position rather than clarify. Indeed, there is very little helpful case law on the provision section 105A is modelled on – section 14 of the *Electronic Transactions Act 1999* (Cth) (**Electronic Transactions Act),** and the reference to section 105A may create uncertainty. It is possible that when section 105A is considered by a superior court, the outcome could be unpredictable, partly because the key term "information system" is not defined in the Corporations Act, in contrast to the Electronic Transactions Act (and although we submit

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			that a definition should be inserted, this will not entirely overcome the risk of confusion). One situation would be emails sent by a sender to an address in the same domain: in this instance section 105A would deem the message to be sent when it was received, rather than when sent. If an email was sent to an "invalid" email address in the same domain, it would arguably not be taken to be received because it would not be capable of being retrieved by the addressee at the addressee's nominated address (see section 105A(4)). In our submission, there should be a "stand alone" time of service provision for Chapter 6 (mirrored for Chapter 6A) that makes it clear that "sent" means "sent" not "received" and that the sending of an electronic communication by the bidder to an electronic address provided under section 641 by the target is taken to be sent at the time the message is sent by the bidder i.e., when the sender presses "send".. There is a strong policy reason for having a specific and prescriptive time of service rule for takeovers, rather than relying on general provisions. This is because of the need for certainty and "bright line" tests in relation to the completion and timing of key steps in a takeover bid or compulsory acquisition. These considerations are not present or not present to the same degree in relation to other areas of the Corporations Act.
6.	648C(4)(b) and Reg 6.5.01A(3)	Sending information allowing access to documents … ("postcards")	While we support in principle the facilitation of sending "postcards" to make takeover documents available, these provisions are too "hair trigger" and could invalidate the sending of a document for no good reason, if any additional information is included in the postcard apart from very limited incidental information. The approach of the draft provisions is too prophylactic. For the reasons noted above, if documents are not validly sent, there can be significant (and sometimes catastrophic) consequences for the validity of the bid – but the members of the company or scheme concerned (rather than the bidder) may actually suffer the consequences. In other words, the proposed measure could backfire and harm the very people it is designed to protect. The provisions go much further than the very reasonable purpose stated in the draft explanatory statement for the draft regulation - to prohibit advertising or unrelated communications. In our submission, the misleading and deceptive conduct (etc) provisions of general application in the Corporations Act should provide sufficient protection, along with the undoubted ability of the Takeovers Panel to intervene in cases of misleading conduct with substantive effects on a takeover bid.

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			However, if the provisions were to be retained, the policy objective of the proposed measure could be achieved by simply prohibiting the unwanted conduct, without the provision deeming a breach to cause invalidity.
7.	648CA and 669B	Sending documents to holders of securities – subsequent sending of document or information in physical form	In our submission, these provisions should be omitted. If a target member does not maintain the nominated electronic address, that should not be a risk for the bidder. At a minimum, the provisions should simply be an obligation on the part of the bidder to send an alternative form of document, but not within 3 days (merely allowing for collation, printing and postage could take more than 3 days for a company or scheme of any size) and not resulting in a strict liability offence. In our submission, where the target member has failed to maintain their electronic address, resulting in a "bounce back", the bidder should not be at risk of committing a strict liability offence simply because it fails to send an alternative form of document. There is no corresponding obligation on the part of a sender who has had its letter sent by post returned to do anything further.
8.	110C(3)(d), 641A(1)(d) and 648CB(3)	[Coverage of provisions beyond documents "required or permitted" by Ch 6 or for complying with an obligation under Ch 6]	The drafting of these provisions would not facilitate sending documents that are not required or expressly permitted to be sent under Chapter 6, for example supplementary bidder's statements (sections 643 and 647 do not require or permit them to be sent for listed targets). Sending supplementary bidder's statements and other takeover communications to members of a company or scheme electronically should be encouraged. These provisions should allow for sending of all documents in connection with a takeover bid under Chapter 6.
9.	Other possible amendments to Ch 6		In our submission, consistent with the facilitating business transactions and "cutting red tape" philosophy of the Modernising Business Communications reform agenda, section 650D should be simplified so that a notice of variation of a takeover does not need to be sent to target members to be valid (that is section 650D(1)(c) should be deleted). Target shareholders will effectively have notice of the variation through the ASX company announcements platform for listed targets. This amendment would mean that bidders did not need to print notices of variation in advance in order to have the ability to, for example, extend or increase an offer should it decide to do so, meaning that it is common for unused documents to be pulped. This approach would be consistent with the supplementary bidder's statement regime in section 643 (which does not require supplementary bidder's statements to be sent to target members in the case of listed entities) as well as other provisions requiring notices from bidders such as sections 630 and

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			650F (which relate to the status of conditions) which notices are not required to be sent to target members. We would also be happy to provide details of other technical and procedural amendments to Chapter 6 that could be considered in due course.
Other provisions			
10.	Schedule 2, Part 1 - Amendments to National Credit Code	[Sending documents]	Schedule 3 Part 1 of the Exposure Draft Bill is also generally supported, subject to the following comments. The amendment of section 9 of the Electronic Transactions Act to remove the requirement for positive consent (item 1) is welcomed, particularly for the many lenders that have a purely online presence. The amendments do not, however, allow for a person who is unable for any reason to receive notices electronically. This may be for medical reasons that make it difficult for a person to use a keyboard or read information on a screen, or where the person is prevented from doing these things for practical reasons such as a lack of computer equipment or access to the internet. This, in our view can be addressed by amendments to section 9(1)(a) of the Electronic Transactions Act to clarify that the information must be readily accessible so as to be useable for subsequent reference by both electronic and alternate means. In practice, this just means the document has to be able to be downloaded and printed. It should be acknowledged that this will make some products inaccessible to those without electronic means of access.
11.	Schedule 3	[Publication requirements - various]	In our submission, these draft amendments are generally acceptable except the expression "manner that results in the notice being accessible to the public and reasonably prominent" is vague and uncertain in the context of electronic dissemination. The Draft EM itself gives no examples of what could be regarded as a notice being "accessible to the public and reasonably prominent". What is "reasonably prominent" intended mean in the context of the world wide web? Is this to be determined in the context of a particular website or the ease with which a website can be found by searching? In our submission, the drafting is likely to give rise to significant practical difficulties when the time comes to apply the provisions. The possibility of uncertainty is alluded to in the Draft EM at [3.10]. The problem will be most acute with public notices that are required for the validity of some step or action under a piece of legislation. The absence of a clear test may cast doubt (for no good reason) on the validity of the step or action merely due to possible non-compliance with a formality.

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			The ability of a regulator to make a determination as to what is required in one sense will provide for additional certainty but may also itself cause inconsistency and confusion if the approach by different regulators is not uniform. While it might seem a retrograde step, it may be preferable to clearly state that the ability to use the traditional newspaper public notices was retained, but technology neutral alternatives were also facilitated. The changes proposed by the draft amendments may even have the unintended effect of creating some uncertainty as to whether or not a notice in the public notice section of a newspaper is "reasonably prominent". It would be helpful if the Draft EM contained some example of what is "accessible to the public and reasonably prominent". Moreover, in our submission, there may be a role for a public facility to be provided by the Commonwealth, analogous to an electronic version of a government gazette notice facility, to provide a central, simple and universally accessible facility for giving and searching for electronic public notices. We note that ASIC provides a somewhat analogous facility for the notification of company strike-offs under section 601AA(4)(d) and regulation 5.6.75.