

8 February 2023

Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Via email: economics.sen@aph.gov.au

Dear Committee Secretary

Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2022

Thank you for the opportunity to provide a submission to the Senate Economics Legislation Committee (**Committee**) on the Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2022 (**Bill**).

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of 50,000 reflects the diversity of Australia's director community, comprised of directors and leaders of not-for-profits (**NFPs**), large and small businesses and the government sector.

1. Executive summary

In recent years, the disruption caused by the COVID-19 pandemic highlighted the need to permanently modernise Australia's Corporations Act 2001 (Cth) (**Corporations Act**) requirements relating to document execution and communication requirements, in order to adapt to technology and changing work patterns.

The AICD has engaged extensively with government on recent initiatives to modernise business communications by improving the technology neutrality of Treasury portfolio laws and strongly supports the additional measures proposed by this Bill. In particular, we support amendments to:

- Expand the scope of documents that may be signed and sent electronically under the Corporations Act, while retaining flexibility for paper-based options should that be the preference;
- Enable documents relating to takeover bids to be sent electronically between entities and members under Chapter 6 of the Corporations Act, with appropriate safeguards in place to prevent the misuse of personal information by the bidder. However, to minimise the risk of data theft or loss, we encourage consideration of obligations on a bidder entity to securely dispose of personal and contact information of members acquired from a target entity where that information is no longer required for the purposes of a takeover bid;
- Provide entities with relief from an obligation to send a member communications and documents where that entity knows that the member's postal and electronic addresses are incorrect. To support best efforts to ascertain the current address of a member, we further support entities having the flexibility to use all contact details and methods of communication for the member

that are known to the sender, irrespective of the member's election to receive documents in a particular form; and

- Enable regulators to conduct hearings and examinations virtually, provided parties may request in-person hearings where such a format is preferred. On procedural fairness grounds, parties should have the right to elect to appear or be examined in-person should that be their preference.

We provide the following comments on those aspects of the Bill's proposed measures that are particularly relevant to AICD members.

2. Electronic signatures and communications

COVID-19 and the protracted lockdowns for many parts of Australia throughout 2020-2021 caused significant challenges for individuals and entities in complying with physical signature and mail requirements.

The AICD strongly supports the Bill's amendments to enable all documents under the Corporations Act to be signed and sent electronically, while retaining flexibility for paper-based options should that be the preference. While these measures may seem minor in nature, they will improve efficiency and reduce costs.

3. Documents which relate to takeovers

The AICD supports proposals to enable documents relating to takeover bids to be sent electronically between entities and members under Chapter 6 of the Corporations Act.

With electronic communication increasingly becoming the default method of communication for many organisations and their members, we support, in principle, amendments to section 641 of the Corporations Act to require a target entity to provide a bidder with the electronic addresses of its members.

However, it is critical that appropriate safeguards are in place to prevent the misuse of personal information by the bidder. To protect the integrity of electronic communications between entities and their members, it is important that bidder entities that are provided with personal contact information by a target ensure personal contact information received under section 641 is used only for purposes permitted under Chapter 6. Accordingly, the AICD supports the proposed introduction of a civil penalty provision for any misuse of personal information received under new section 641A.

Importantly, while the AICD is supportive, in principle, of amendments to enable a target entity to provide a bidder the electronic addresses of its members, we do not support broader, public disclosure of members' electronic address information – for example, on the register of members. We note that the public disclosure of members' nominated electronic address is not contemplated under the Bill.

Security of personal information

In today's digital world, personal identity and contact information is a key exploitation target of cyber and identity criminals. In light of recent high profile data breaches, there is intense public focus on Australian organisations' data governance and management practices. This has given momentum to Government reforms of the *Privacy Act 1988* (Cth) (**Privacy Act**), and most recently a strengthening of the penalty regime where an entity fails to adequately secure the personal information of individuals.

Separately the Government has signalled that an ongoing review of the Privacy Act will likely make recommendations to enhance the obligations on Australian businesses in collecting, storing and disposing of personal information.

The AICD in developing the recent [Cyber Security Governance Principles](#) (the **Principles**), in collaboration with the Cyber Security Cooperative Research Centre (**CSCRC**), recommended that organisations only collect and store the minimum amount of personal information that is legally required for its relevant services and operations to minimise the risk of data theft or loss.

In the context of personal contact information (e.g. postal and/or electronic addresses) being provided by a target entity to a bidder entity to facilitate a takeover bid, we note that the retention of members' personal contact information is only necessary for a "point in time" activity. After such time, we are of the view that a bidder entity should securely dispose of all sensitive information acquired from the bidder entity where that the data is no longer required for the purposes of a takeover bid. Accordingly, we strongly encourage this to be an additional requirement of a bidder entity included by way of amendment under section 641.

4. Lost members

The AICD strongly supports amendments in the Bill to provide entities with relief from an obligation to send a member communications and documents where that entity knows that the member's postal and electronic addresses are incorrect.

We consider the proposed changes provide a workable balance between the need for entities to undertake due diligence to attempt to ascertain a current address for members and an appropriate limit on the extent to which entities must continue attempting to contact those members.

To support best efforts to ascertain the current address of a member, we further support the flexibility proposed in the Bill to enable entities to use all contact details and methods of communication for the member that are known to the sender, irrespective of the member's election to receive documents in a particular form.

5. Virtual hearings and examinations

The AICD supports the Bill's proposed amendments to enable regulators to conduct hearings and examinations virtually, provided that a party may request in-person hearings where such a format is preferred.

We refer to our submission to Treasury on the Exposure Draft Bill in 2022 and reiterate that consistent with principles of procedural fairness, a party should be able to elect for an in-person hearing should they consider it would afford them the best opportunity to present their case effectively and for natural justice principles to be adhered to.

A risk of a virtual hearing could be the potential for a technological hurdle to compromise the integrity of a hearing - for example, an unstable internet connection which distorted accurate communication and prejudiced the presentation of evidence. While the Bill's Explanatory Memorandum states that in electing to hold a hearing or examination virtually the regulator must ensure that the use of the technology is "objectively reasonable", this does not allow for a subjective assessment of an individual's circumstances. There is a wide range of technological maturity levels in the Australian population which may make a virtual attendance at a hearing or examination prejudicial to an individual's interests.

Accordingly, we consider it appropriate that a party has the right to opt out of an in-person hearing or examination, or failing that, have a clear set of public principles for determining when procedural fairness considerations will favour physical attendance. Technology should not be used to weaken the legal safeguards afforded to individuals.

6. Other comments

The AICD commends the Australian Law Reform Commission's (**ALRC**) extensive and comprehensive review of Australia's financial services law. We support the ALRC's recommendations outlined in its Interim Report A and the Bill's proposals to simplify and streamline definitions in the Corporations Act, *Australian Securities and Investments Commission Act 2001* (**ASIC Act**) and *Corporations Regulations 2001* (**Corporations Regulations**) to improve the clarity and navigability of the legislative framework for all users.

7. Next Steps

We hope our submission will be of assistance. If you would like to discuss any aspects further, please contact Laura Bacon, Senior Policy Adviser [REDACTED]

Yours sincerely,

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Christian Gergis GAICD

Head of Policy