Law Council
OF AUSTRALIA

Business Law Section

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Treasury
Langton Crescent
PARKES ACT 2600

By email: mg-ccpd-m@treasury.gov.au

Dear Treasury

Consultation on ACCC service of documents—Exposure draft amendment

Introduction

1. The Competition and Consumer Law Committee of the Business Law Section of the Law Council of Australia (the **Committee**) welcomes the opportunity to comment on Treasury's exposure draft amendment to the *Competition and Consumer Amendment (Service of Documents) Regulations 2026* (the **Draft Regulations**).

2. The *Competition and Consumer Act 2010* (Cth) (the **Act**) aims to enhance the welfare of Australians by promoting competition, ensuring fair trading and providing robust consumer protection. To enforce the Act and fulfil its statutory responsibilities, the Australian Competition and Consumer Commission (the **ACCC**) is empowered, among other things, to obtain information, documents and evidence through the issuance of compulsory notices under sections 95ZK and 155 of the Act.

3. To support this, the *Competition and Consumer Regulations 2010* (Cth) (the **Principal Regulations**) prescribe methods for the valid service of documents or notices required or permitted to be served or given to a person in connection with matters under the Act. The Draft Regulations would amend the Principal Regulations to enhance the ACCC's ability to gather information including by specifying some of the ways in which the ACCC may effectively serve documents or notices on persons in or outside Australia.

4. The Draft Regulations expand the ways in which the ACCC may effectively serve documents or notices on persons in or outside Australia. While this may provide improved clarity, the Committee is concerned that a number of the proposed amendments significantly expand the ACCC's ability to serve notices outside Australia in ways that are not adequately justified or safeguarded, as set out in this submission.

Telephone +61 2 6246 3788 • *Email* mail@lawcouncil.au
PO Box 5350, Braddon ACT 2612 • Level 1, MODE3, 24 Lonsdale Street, Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

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5. Section 12 of the Draft Regulations broadens the ways in which the ACCC can serve a notice, to enable it to effectively serve a notice:

   (a) on a person who may have no involvement in the matter;

   (b) on a person who may not be authorised by the person to whom the notice is addressed; and

   (c) in the case of electronic service, to an email address that may no longer be in use.

6. The Committee submits that, if the methods by which the ACCC can validly serve notices are to be expanded as proposed, service should only be effective where the ***recipient of*** the ***notice*** or document (or, for a corporation, an 'eligible recipient' as defined in the Draft Regulations) has acknowledged receipt. This safeguard is particularly important for statutory notices issued under sections 95ZK or 155 of the Act, which generally require the recipient to comply within short response times. A recipient should not be placed at risk of breaching significant statutory requirements because relevant persons within its organisation were not aware that a notice had been served.

7. The rules for the service of documents or process exist to ensure procedural fairness in legal proceedings. A fundamental principle underlying these rules is that all individuals or entities against whom relief is sought must be given notice of the proceedings and an adequate opportunity (with fair notice) to respond or defend themselves.[1]

8. This principle is reflected in the common law doctrine of "*audi alteram partem*," which translates to "hear the other side" or the hearing rule.[2] This right necessarily requires a right to receive notice of proceedings. The *Federal Court Rules 2011* (Cth) reflect this principle carefully in the context of electronic service. Under rule 10.31(d), ordinary service by electronic communication is only available where the person has filed a notice authorising service by that means. Similarly, rule 11.01(4) provides that a party represented by a lawyer agrees to receive documents at the lawyer's email address.

9. While all methods of service of documents are intended to bring the document to the attention of the person served, it is clear that the standard of service will vary depending on the nature of the document (for example, to account for practical considerations where strict personal service may be impractical or impossible).[3] As the Explanatory Statement conveys, section 12 of the Draft Regulations is intended to set out "some of the ways" in which documents may be served and is "not intended to be an exhaustive list".

10. However, for electronic service specifically, we submit that the Draft Regulations should include a requirement of acknowledgment or, at a minimum, a mechanism analogous to that in the Federal Court Rules whereby electronic service is predicated on the recipient's prior consent to receive documents at the relevant address. Without this safeguard, the Draft Regulations would authorise service to electronic addresses that may be outdated, unmonitored, or unknown to the recipient as a channel for receiving compulsory legal

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1 *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ) at [82]; *Ex parte Rossi* [1956] 1 All ER 670, 674; Willowgreen Ltd v Smithers [1994] 2 All ER 533 at 537.

2 *Ward v McFarlane & Co* (1917) 22 CLR 488 per Griffith CJ at 488.

3 *Porter v Freudenberg* [1914-15] All ER Rep 918, 934: an order for substituted serviced will be granted if "the writ is likely to reach the defendant or to come to his knowledge".

process. This may result in recipients having less time to respond than the ACCC intended when issuing the notice. This result is difficult to reconcile with the procedural fairness rationale that service rules are designed around.

11. For the reasons set out above, the Committee submits that the Draft Regulations do not adequately have regard to the fundamental principle that a person being served with documents should have a genuine opportunity to be heard.

Inconsistency with other Australian regulatory regimes

12. The Draft Regulations would give the ACCC powers to effect service that are significantly broader in scope than the powers of other Commonwealth regulators. **Appendix A** sets out service provisions that apply to selected Commonwealth regulators that the Committee has reviewed.

13. In particular, the Committee notes that:

    (a) Sections 12(2)(c)–(d) and 12A(2) permit service on an 'indirectly-notified address', being an address for service provided to another Commonwealth agency. No other Commonwealth regulator examined by the Committee is permitted to serve documents on addresses provided to other Commonwealth agencies.

    (b) Section 12(4)(a) permits personal service on 'eligible recipients' who have never had any previous interaction with the ACCC or any Australian regulator. The 'eligible recipient' concept is defined in section 12A(4) to include directors, secretaries, chief executive officers and chief financial officers, 'whether or not the person or the body corporate is located in Australia'. No other Commonwealth regulator has an equivalent power to serve documents personally on a chief executive officer or chief financial officer, or on directors or secretaries who reside outside Australia.

14. This creates significant inconsistency between the proposed powers of the ACCC and the powers of other Australian regulators, creating increased regulatory burden for businesses, which are required to navigate multiple regulatory regimes. This inconsistency and burden are heightened by the introduction of novel defined terms that do not exist in any other Australian legislation, including 'directly-notified addresses', 'indirectly-notified addresses' and service on 'eligible recipients'.

15. The Committee submits that Treasury has not identified a clear basis for conferring on the ACCC service powers that substantially exceed those of other regulatory agencies, including ASIC and APRA. The Committee recommends that the scope of the Draft Regulations be reconsidered by reference to the comparative powers set out in Appendix A.

Broad scope of 'directly' and 'indirectly' notified addresses'

16. Sections 12(2)(a) and 12(2)(c) of the Draft Regulations allow the ACCC to serve documents on an individual by electronic address as well as to an indirectly-notified address. An indirectly-notified address is an electronic address that the ACCC has obtained from another Commonwealth agency. This would enable the ACCC to serve a statutory notice on a corporation by emailing the notice to an email address that the other agency received up to 24 months previously, and for another purpose.

17. The Committee raises the following concerns with this proposal:

    (a) An email address for a corporation used 24 months ago for any purpose may no longer be in use, or the user of the email address may have no authority to receive documents from the ACCC, and may not draw the notice to the attention of the relevant persons within the corporation to which the notice is addressed.

    (b) The Explanatory Statement provides the example of 'foreign companies registering to carry on business in Australia under the Corporations Act 2001 (Cth)'. This example suggests that the intended scope of the provision is relatively narrow and directed at addresses specifically registered under Commonwealth legislation for formal regulatory purposes. However, the drafting of section 12A(2) is broader than necessary to achieve that stated purpose. The provision captures any address provided 'for any purpose' to any 'Commonwealth agency', which is defined expansively in section 12A(3) to include the Commonwealth itself, any Commonwealth entity within the meaning of the Public Governance, Performance and Accountability Act 2013 (Cth), and any agency within the meaning of the Public Service Act 1999 (Cth).

    (c) An 'indirectly-notified address' could capture an address that may have been incidentally provided to a Commonwealth agency in the course of any interaction (for example, an address appearing in a document produced in response to a regulatory inquiry, an address included in a grant application, or an address contained in a tax return). There is no mechanism for a person to be notified, at the time they provide their address to another Commonwealth agency, that the address may subsequently be used by the ACCC for service of compulsory notices. The Draft Regulations and the Explanatory Statement do not consider how confidentiality or privacy obligations attaching to information provided to different Commonwealth agencies may interact with the expanded use permitted by proposed sections 12 and 12A, or whether these sections conflict with those obligations. As currently drafted, the Draft Regulations undermine reasonable expectations as to how information provided to the Commonwealth will be used.

    (d) Similarly, sections 12(1)(a)–(b) and 12A(1) permit service on a 'directly-notified address', being an address provided to the ACCC. As above, on its face, a 'directly-notified' address could capture any address that may have been incidentally provided to the ACCC (for example, an address appearing on the face of an email produced to the ACCC). The Committee submits that there is a material distinction between an address deliberately provided to the ACCC as an address for service and an address that incidentally appears in documents produced under compulsion. The Explanatory Statement's interpretation would blur this distinction, creating a risk that service may be purportedly effected at addresses that the person never intended or expected to be used for that purpose.

18. The breadth of these proposed regulations would create uncertainty for a person or company seeking to verify, upon receipt of a section 155 notice from the ACCC, whether they had previously given any indirect or direct notice of their address. A recipient of a notice served at an 'indirectly-notified address' would have no practical means of determining which of their interactions with any Commonwealth agency gave rise to the address that the ACCC relied upon for service.

Inconsistency in the use of key defined and undefined terms

19. Proposed sections 12(2)(e), (3) and (4) of the Draft Regulations permit service on 'the most recent electronic address … known to the Commission'.

20. Our concerns with this drafting are that:

    (a) The Draft Regulations do not define the phrase 'known to the Commission'. This allows scope for interpretation by the ACCC, creating uncertainty for businesses as to what addresses the ACCC may regard itself as having 'known'.

    (b) The term 'known to the Commission' also appears to be used inconsistently with the defined terms 'directly-notified address' and 'indirectly-notified address' in Sections 12(1) and (2). The relationship between these concepts is unclear. It is also unclear whether an address may be 'known to the Commission' without having been 'directly' or 'indirectly' notified, or vice versa. This inconsistency serves to create greater uncertainty about the scope of the ACCC's service powers under the Draft Regulations.

21. For the above reasons, a recipient of a section 155 notice would also have no means to verify whether an address was 'known to the Commission' within the meaning of the legislation. This inability to verify the basis for service undermines the capacity of recipients to assess whether service has been validly effected.

22. Relatedly, the term 'most recent electronic address' does not specify a time limitation or confirm the currency of the electronic address. This is likely to result in notices being served to stale email addresses and deprecated mailboxes, and should instead be limited to electronic addresses provided for the purpose of service of the particular document being served. It is also inconsistent with the 24-month period specified in the defined terms 'directly-notified address' and 'indirectly-notified address' in sections 12(1) and (2).

Inconsistency with the existing meaning of key terms under Australian legislation

23. Proposed regulation 12(4)(f) permits service on a registered office or principal place of business outside Australia. The Explanatory Statement states that:

> *Outside Australia, the term [registered office] is intended to have its ordinary meaning of the address of a body corporate where official and legal documents are sent. The intention is to target addresses that have been registered in a foreign jurisdiction, in a way that is equivalent to registration under the Corporations Act, and that receive the official correspondence of the target corporation. The inclusion of 'principal place of business' serves to empower the service of documents on target corporations at a broader range of locations where it has a physical presence. Enabling service at a principal place of business may be necessary in jurisdictions without an equivalent registration process or, where doing so, may facilitate service in a timely manner.*[4]

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[4] Exposure Draft Explanatory Statement, *Competition and Consumer Amendment (Service of Documents) Regulations 2026* 5.

24. The terms ‘registered office’ and ‘principal place of business’ have existing and well-understood meanings under the Corporations Act. While the Explanatory Statement accepts that there may not be a ‘registered office’ in certain foreign jurisdictions,[5] it does not acknowledge the broad scope for interpretation in determining what an equivalent foreign registration process may be, or what a ‘principal place of business’ in a foreign country may constitute. This broad scope for interpretation creates uncertainty for foreign businesses seeking to understand where the ACCC may purport to effect service. This uncertainty is likely to lead to disputes about the validity of service, increasing the regulatory burden on foreign recipients.

25. The Committee notes that section 28A of the *Acts Interpretation Act 1901* (Cth) (**AIA**) already permits service on a body corporate by leaving a document at, or sending it by pre-paid post to, the head office, a registered office or a principal office of the body corporate. The Committee recommends that Treasury consider the extent to which existing powers under section 28A already address the service challenges the Draft Regulations seek to resolve, and whether the additional provisions in proposed regulation 12(4)(f) are necessary and proportionate having regard to that existing legislative framework.

Service on agents and related bodies corporate does not reflect commercial reality

26. Section 12(2)(e) of the Draft Regulations provides for service of documents at the address of an agent authorised to act for a person in connection with the proceeding or matter before the ACCC, whether or not the agent has instructions to accept service. The Explanatory Statement confirms that ‘agents’ is intended to include legal representatives, and that the provision is restricted to agents authorised ‘in connection’ with the relevant proceeding or matter, ‘whether or not the agent has instructions to accept service of the document’. This unduly broadens the ACCC’s service powers, because an agent may be authorised to act generally in relation to a matter without having instructions to receive compulsory legal process. This is a particular concern for lengthy matters, where an agent’s authority may lapse during the life of the matter. The Committee recommends that service on an agent should only be permitted where the agent is authorised to accept service of the particular document being served.

27. Similarly, section 12(4)(g) provides for a document to be served on the registered office or principal place of business of a related body corporate in Australia. The Exposure Draft Explanatory Statement notes at page 5 that “[d]elivery of a document to an office of a related body corporate is effective service as it is sufficiently connected to the person being served, and it would be reasonably expected that the person would receive notification of the service”. The Committee raises the following concerns with this proposal:

28. The Draft Explanatory Statement assumes that a related body corporate would notify the person being served, simply because they are related bodies corporate. This does not reflect the practical reality of corporate organisations and matrix structures, particularly for large Australian and global corporations.

29. The proposal also does not have regard to the different, and potentially adverse, interests that a related body corporate may have with respect to matters the ACCC is inquiring into or investigating. This risks disclosing confidential information about the ACCC’s investigation of the primary body corporate to the related body corporate, potentially without the knowledge or consent of the primary body corporate, and may prejudice its interests. It also raises

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[5] Exposure Draft Explanatory Statement, *Competition and Consumer Amendment (Service of Documents) Regulations 2026* 5.

conflict of interest concerns, particularly for a large corporate group with multiple operating entities in Australia.

Undermining cross-border service mechanisms

30. The Explanatory Statement notes that 'it is increasingly common for the ACCC to need to serve or give documents or notices to persons located outside Australia'.[6] However, neither the Explanatory Statement nor the Draft Regulations consider whether the ACCC should be given express power to make use of existing international frameworks for cross-border service, such as the *1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (the **Hague Convention**).

31. Foreign companies or natural persons served with ACCC notices may seek to challenge purported service under their own country's laws, including in countries that require service of regulatory processes to be effected under the Hague Convention. The risk of such challenges is not addressed in the Draft Regulations or the Explanatory Statement.

32. The proposed approach is also inconsistent with the approach taken by other Australian regulators. For example, the Australian Taxation Office has legislation permitting it to serve documents on persons outside Australia 'in accordance with an agreement between (a) a foreign country or a constituent part of a foreign country; or (b) a foreign territory that deals with the service of documents on tax matters'.[7] This framework expressly requires service to be effected in accordance with international agreements, reflecting a commitment to established cross-border service mechanisms. The Committee recommends that the Draft Regulations similarly recognise, and where appropriate require use of, existing international frameworks such as the Hague Convention for service on persons located outside Australia.

33. The proposed powers also go beyond the scope of comparative competition regulators in foreign jurisdictions to serve documents in Australia, raising international comity risks.[8] This is particularly so where proposed regulation 12(4)(a) permits personal service on individuals, including directors, secretaries, chief executive officers and chief financial officers, 'whether or not the person or the body corporate is located in Australia'.[9] Treasury should consider the potential comity issues that may arise from the ACCC purporting to exercise jurisdiction over foreign citizens who are in their own jurisdiction, particularly where those individuals have not previously interacted with the ACCC or submitted to its jurisdiction.

Significant compliance burden and consequences with no clear public policy benefit

34. The Draft Regulations shift real legal risk on to notice recipients (particularly foreign entities), having regard to potential penalties and criminal liability that attach to non-compliance with compulsory ACCC notices. They also reduce certainty and increase the administrative burden for the recipients of notices.

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6 Exposure Draft Explanatory Statement, *Competition and Consumer Amendment (Service of Documents) Regulations 2026* 1.

7 *Taxation Administration Act 1953* (Cth), Schedule 1, section 255-40; *Taxation Administration Regulations 2017* (Cth) regulation 8(3).

8 We reviewed, at a high-level, guidance from the United States Federal Trade Commission, United States Department of Justice, United Kingdom Competition and Markets Authority and New Zealand Commerce Commission.

9 Draft Regulations, regulation 12A(4).

35. The proposed amendments may create a gap between deemed service and actual receipt of the notice by the relevant responsible business unit within a company. This means that deadlines may lapse, and non-compliance offences may be committed, before a notice comes to the attention of the relevant responsible officer. This is particularly so where a company's processes for receiving and responding to notices are built around generally accepted methods of service, which may not extend to emails and almost certainly would not extend to addresses that may fall within the meaning of a 'directly-notified address' or 'indirectly-notified address' in sections 12A(1) and (2). For example, under the proposed amendments, notices may be:

    (a) sent to stale email addresses, mailboxes that are not regularly monitored or otherwise used for the purpose of sending or receiving legal documents;

    (b) directed to individuals or teams that do not have responsibility for or familiarity with the subject matter of the notice; and/or

    (c) sent to representatives or agents that are no longer acting for the notice recipient, do not have authority to act with respect to the notice being served or instructions to accept service.

36. To mitigate these risks, notice recipients would be required to actively monitor a large number of potential service channels that are not established or used for that purpose. The Committee submits that this would create significant administrative burden for large corporate entities with no clear public policy benefit, contrary to the guiding principle that regulation should be proportionate and impose no more than a reasonable compliance burden.

37. The proposed amendments may also reduce the willingness of individuals and bodies corporate to engage voluntarily with the ACCC and other Commonwealth agencies for fear of inadvertently providing them with addresses that could be used for service that would then need to be monitored for that purpose, or may force companies to use less convenient methods of communications, such as sending letters by post or fax.

Risk of undermining confidentiality in Notices

38. Finally, the Committee notes the expanded service methods may also undermine the confidentiality of compulsory notices. By permitting service on a broad range of persons and entities, the Draft Regulations increase the likelihood that an ACCC investigation or inquiry will be disclosed to persons beyond the intended recipient, including individuals in related entities who have no connection with the subject matter of the notice. That outcome is inconsistent with the ACCC's practice of requesting that recipients treat both the existence and substance of compulsory notices as confidential.

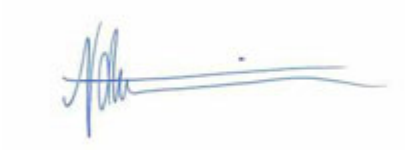
39. The Draft Regulations and Explanatory Statement neither address this inconsistency nor provide safeguards against further dissemination of a notice once served. Given the sensitivity of enforcement investigations, merger reviews and other ACCC inquiries, the Committee recommends that Treasury consider whether safeguards are required to protect those processes and the interests of affected parties.

Conclusion and further contact

40. The Committee would be pleased to discuss any aspect of this submission.

41. Please contact Simon Muys (Chair) [redacted] if you would like to do so.

Yours faithfully



Adrian Varrasso
Chair
Business Law Section