Australian Government
The Treasury

TSY/AU

Modernising Business Communications

Improving the Technology Neutrality of Treasury Portfolio Laws

December 2020

Manager
Media and Speeches Unit
The Treasury
Langton Crescent
Parkes ACT 2600
Email: media@treasury.gov.au

Contents

Consultation Process

Request for Feedback and Comments

Interested parties are invited to comment on the issues raised in this paper by 28 February 2021.

While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please submit responses sent via email in a Word or RTF format. An additional PDF version may also be submitted.

Publication of submissions and confidentiality

All information (including name and address details) contained in formal submissions will be made available to the public on the Australian Treasury website, unless you indicate that you would like all or part of your submission to remain confidential. Automatically generated confidentiality statements in emails do not suffice for this purpose. Respondents who would like part of their submission to remain confidential should provide this information marked as such in a separate attachment.

Legal requirements, such as those imposed by the Freedom of Information Act 1982, may affect the confidentiality of your submission.

Further consultation process

The Treasury and the Deregulation Taskforce will also consult broadly with industry representatives and other interested parties on the topics discussed in this consultation paper. This may involve conducting targeted consultation with these stakeholders on specific issues where more information and views are required.

Closing date for submissions: 28 February 2021

Email	mbcomms@treasury.gov.au
Mail	Data Economy Unit Market Conduct Division The Treasury Langton Crescent PARKES ACT 2600
Enquiries	Enquiries can be initially directed to mbcomms@treasury.gov.au Media enquiries should be directed to medialiaison@treasury.gov.au or +61 2 6263 2300

The principles outlined in this paper have not received Government approval and are not yet law. As a consequence, this paper is merely a guide as to how the principles might operate.

Improving the Technology Neutrality of Treasury Portfolio Laws

Introduction

The world around us is changing dramatically with the widespread application and rapid uptake of digital technologies. It is redefining the way we live and work and how we engage with businesses and government.

This growth in digital technologies provides opportunities to modernise business communications to better reflect the way Australians want to engage and communicate digitally and to reduce business costs.

Consumers and businesses can miss out on the benefits of new technology when old methods of conducting business become entrenched in law and embedded in longstanding regulatory practice. It is therefore essential to ensure that laws and regulatory practices remain fit-for-purpose, necessary and relevant.

This is particularly relevant in the context of the COVID-19 pandemic, which has accelerated the adoption of digital technologies by Australian consumers and businesses and highlighted the need for businesses and consumers to be able to meet their obligations electronically.

The Government is committed to ensuring that Australian consumers and businesses are able to benefit from these new technologies. It is consulting with stakeholders to develop principles that will facilitate the removal of legal impediments to adopting both current and future technology, where appropriate.

Government Action

In July 2019, the Government established the Deregulation Taskforce (Taskforce) to progress the Government's renewed Deregulation Agenda. The focus of the Taskforce is to ensure that, where regulation is required, it is fit for purpose and has the lightest touch. The objective that any regulation seeks must be achieved in the most effective and efficient way, in a way that's easily understood, cost effective and timely.

On 15 June 2020, the Government announced the Taskforce would prioritise modernising business communications to reduce business costs and better reflect the way Australians want to engage and communicate digitally. The Taskforce is working alongside government agencies to improve technology neutrality across all Commonwealth laws, as well as partnering with states and territories to explore opportunities to achieve the same with their laws. The Government has already made significant progress to improve the technology neutrality of Commonwealth regulation:

- On 12 June 2020, the Government passed the *Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020* which will provide ongoing flexibility to adapt and respond to changes in technology to improve the user experience and simplify the way people interact with government business registers. In addition, as part of the 2020-21 Budget, the Government announced its JobMaker Digital Business Plan, investing almost $800 million to enable businesses to take advantage of digital technologies to grow their businesses and create jobs as part of its economic recovery plan — including $419.9 million to enable the full implementation of this legislation;
- On 30 July 2020, the number of exemptions to the *Electronic Transactions Act 1999* (ETA) in the *Electronic Transactions Regulations 2020* was reduced from 147 to 93. This facilitates electronic

communications, permits a number of banking and credit-related documents to be sent electronically and make communications with regulators more efficient;

- On 7 October 2020, the Government released exposure draft legislation on a package of reforms to streamline insolvency procedures. This legislation includes provisions that will allow businesses to use technology to conduct meetings relating to the external administration of a company; and
- On 19 October 2020, the Government released further exposure draft legislation to improve the technology neutrality of the *Corporations Act 2001* and associated regulations. This legislation, implementing part of the JobMaker Digital Business plan, will allow businesses and their officers to use technology to meet regulatory requirements in respect of meetings of directors, shareholders of companies and members of registered schemes, plus execute documents electronically.

The reforms in respect of meetings, documents related to meetings and document execution build on the temporary relief that the Treasurer provided using the temporary instrument-making power under the *Coronavirus Economic Response Package Omnibus Act 2020*, which will remain in effect until 21 March 2021. In progressing these reforms, the Government has responded to stakeholder feedback, and addressed relevant recommendations of the Interim Report of the Senate Select Committee on Financial Technology and Regulatory Technology, released in September 2020.

Consultation Objectives

This consultation process focuses on how best to improve the technology neutrality of Treasury portfolio laws, beyond the actions already being taken by the Government, to ensure they do not restrict the use of current and future technologies.

It is important that businesses benefit from consistency in the way the law treats similar types of business communication now and into the future. That is why the Government proposes to take a principles-based approach to legislative reform for business communications.

In line with this approach, the objectives of this consultation is to obtain feedback from stakeholders that will assist the government to:

- Identify and categorise the types of business communications that would benefit from technology neutrality changes, including those technology neutrality changes that will lower current compliance costs;
- Develop principles to guide subsequent legislative change;
- Identify legislative change that may be required to give effect to these principles and improve the technology neutrality for each category of communication;
- Address sensitivities and risks associated with technology neutrality; and
- Prioritise reform implementation.

The options the Government is considering are:

I. Maintaining the status quo if stakeholder consultation does not demonstrate that there is a problem.
II. Agreeing principles in one or more forms of communication to guide legislative change. The Government will then:
    a. Identify and prioritise the changes to provisions in Treasury portfolio legislation required to give effect to these principles.

b. Reduce or remove exemptions to the *Electronic Transactions Act 1999* for Treasury portfolio laws creating burden through a lack of technology neutrality.

Relevant Treasury laws, which may be within the scope of the reforms include, but are not limited to: the Corporations Act 2001, Australian Securities and Investments Commission Act 2001, Banking Act 1959, Insurance Act 1973, Life Insurance Act 1995, Superannuation Industry (Supervision) Act 1993, Consumer and Competition Act 2010 and National Consumer Credit Protection Act 2009.

Categories of Business Communication in Focus

The five categories of business communication which are the focus of this consultation are:

- written communications or transfers of information among stakeholders, including business, customers, and investors;
- communicating with regulators such as the Australian Securities and Investments Commission (ASIC), Australian Prudential Regulation Authority (APRA) and the Australian Competition and Consumer Commission (ACCC). Examples include lodging documents and attending hearings;
- written signature requirements, beyond the proposed permanent changes to the execution of company documents relating to meetings;
- record-keeping requirements, including the keeping of books and registers; and
- the making of payments by customers, investors, regulators or businesses.

Potential reforms to these categories of business communication will be a significant legislative undertaking. Given this, it will be necessary to scope, prioritise and plan a sequence of improvements.

Corporations and Insolvency Reforms

The Government has already sought stakeholder views on exposure draft legislation that makes permanent changes to the Corporations Act 2001 in relation to virtual meetings and electronic document execution. The proposed reforms make permanent the temporary relief provided earlier this year as part of the COVID-19 economic response[1], which allows companies to hold meetings virtually, send meeting-related materials electronically and validly execute documents electronically. Coupled with the proposed reforms to insolvency arrangements, these reforms cover the majority of Treasury portfolio legislation which places requirements on meetings involving entities.

As such, meetings, communication of written materials in relation to these meetings and the valid execution of documents by companies under s127 of the *Corporations Act 2001* are not within scope of this consultation paper. The principles that underpin these reforms will be considered for application across other Treasury portfolio laws, where appropriate.

An Evidenced-Based Approach to Prioritisation

The Government intends to prioritise reforms that will help businesses to comply with regulation more efficiently. Priority will be considered with regard to the:

- costs of satisfying current regulatory requirements; and
- expected benefits of enabling technology neutrality after taking into account the risks of undermining the relevant policy objectives.

1 Corporations (Coronavirus Economic Response) Determination (No. 1) 2020; Corporations (Coronavirus Economic Response) Determination (No. 3) 2020

Next Steps

You can respond to this consultation paper up until 28 February 2021. When drafting your submission please note that you may answer all the discussion questions raised or alternatively only the questions that are relevant to you. Once the consultation period has closed, Treasury will develop advice for Government consideration based on stakeholder feedback.

Submissions will be treated as public and may be published on the Treasury website, unless you specifically identify that you do not wish your submission to be made public.

Written Communication with Stakeholders

There are laws that require businesses to provide written information to their customers, shareholders and other stakeholders. These laws may impose limitations on the technologies that may be used to provide that information. Requirements may relate to, for example, product disclosures, reports, notices and meeting materials. Technology limitations may include requirements to provide hard copy materials. While the ETA often allows such requirements to be satisfied by electronic means, it requires the consent (which can be implied) of the recipient. The ETA does not currently apply to some laws in the Treasury portfolio as these have been exempted from its application. The exempted laws include the *Corporations Act 2001* and most of the *Superannuation Industry (Supervision) Act 1993*.

The Government has begun the process of making technology neutral requirements in the *Corporations Act 2001* in relation to the execution of company documents and other documents relating to a meeting, as well as documents relating to the external administration of a company. Earlier this year, the Government provided temporary relief allowing companies and registered schemes to use technology to send out meeting materials, as part of the COVID-19 economic response. [2]

The Government is also progressing permanent amendments related to meeting materials and documents relating to the external administration of a company in Chapters 2G and 5 of the *Corporations Act 2001*. [3] The Government also removed a number of exemptions to the ETA in order to facilitate the use of electronic communications.

Policy Goals

The policy goal of requiring businesses to provide information in writing is to:

- help stakeholders make informed decisions about their interests — for example, whether to buy or sell their interests in a company; and
- substantiate the legal rights and obligations of the business and their stakeholders, by ensuring that information is provided in a verifiable form that can be retained.

These policy goals have often been achieved by mandating provision of a hard copy document to a physical address, which generally ensured that stakeholders received the required information in a verifiable form that could be used and retained. Developments in digital technology and practices means that it is no longer necessary for businesses to post hard copies of documents to all stakeholders to achieve these outcomes. Instead, it is now generally effective and convenient for documents to be provided electronically.

More technology neutral laws would remove regulatory barriers to sending out electronic communications, while ensuring that stakeholders are able to access relevant information to ensure they can make informed decisions and that the entity meets its regulatory obligations.

2 Corporations (Coronavirus Economic Response) Determination (No. 1) 2020; Corporations (Coronavirus Economic Response) Determination (No. 3) 2020

3 For further information relating to the consultation process on the regulatory requirements for sending of meeting materials during COVID-19 please visit the Select Committee on Financial Technology and Regulatory Technology September 2020 interim report.

Examples

Notifications

Changes to laws could provide for notifications to be sent via text message or mobile application to direct stakeholders to generic online content and/or notify of information provided via email.

Publishing notices in newspapers

There are some provisions in Treasury laws that require businesses to publish notices in a newspaper or other publications. Since these laws were introduced, there have been material shifts in the way news is consumed, which leads to questions about the effectiveness of this requirement.

A policy objective of publishing material in newspapers is to provide transparency to the general public on matters of importance in a convenient way. Some jurisdictions have shifted to utilising public registers to replace requirements to publish materials in newspapers. We are interested in stakeholder feedback on what publishing requirements are particularly cumbersome and what alternate options could be explored.

Proposed Principles

As a starting point, the Government is proposing to adopt technology neutrality in how businesses meet legal requirements to provide written information to their customers, shareholders and other stakeholders unless policy objectives are best achieved by limiting technology choice.

Where a default method is not specified in the law, it is intended that any technology may be used to communicate in writing provided that:

- the sender is assured the recipient can access the information; and
- the information can be stored by the sender and receiver in a way that it can be readily accessed and reusable for subsequent reference.

This will allow for entities to choose a default means of providing 'in writing' communications that is appropriate to their circumstances and will allow recipients to receive information in other formats (such as paper) where digital formats are not practical.

In considering how to achieve technology neutrality, one option is to remove exemptions in the *Electronic Transactions Regulations 2020* to the ETA in respect of business communications. If these exemptions are removed, the ETA will apply, and businesses will be able to meet regulatory requirements in respect of written communications if:

- at the time the information was given, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference;
- if the entity receiving the communication is a Commonwealth entity — the information is given in accordance with particular information technology requirements (if any) and particular action is taken by the person to verify the receipt of the information (if applicable); and
- if the entity receiving the communication is not a Commonwealth entity — the recipient entity consents to the information being given by way of electronic communication.

A limitation of the ETA is that it allows a business to use electronic means only if the recipient has provided consent. This requires businesses to operate by using a 'default' method of communication (such as hard copy mail) and seek permission from recipients to use more contemporary methods such as email or via mobile applications. However, as Australia continues to shift to a digital economy the default of using paper is no longer convenient for most consumers and investors.

Consumers and investors now expect information to flow faster and to have responses sooner to allow them to continue to make informed and timely decisions. As such, it is becoming increasingly common for digital communications to be the default. This approach means that if a business has an electronic means of notifying a recipient of the availability of information in a way that is as reliable or more reliable than a posted hard copy, they may use those means to both notify and provide that information.

Case Study 1

Subsection 329(5) of the *Corporations Act 2001* allows the auditor of a company to resign if, among other things, the auditor provides written notice of their resignation to the company.

As the ETA does not apply to the *Corporations Act 2001*, this requirement can only be satisfied by the provision of a physical document. This requirement for a written notice is not technology neutral.

Applying the proposed principles would involve revising the requirement either:

- so that this notice need not be provided in writing but may instead be provided in any form provided it is expected to be at least equally effective; or
- by removing the exception exemption to the ETA so that electronic communication may be used where both parties consent.
- **Note**: Consent does not necessarily need to be provided in writing. It may even be implied. One way that consent can be provided is through engaging electronically. This may be in the form of communicating via email, submitting an application through an online portal, or providing an email address on a personal details form.

Case Study 2

Section 37 of the *Insurance Contracts Act 2004* provides, broadly, that an insurer may not rely on a term of a contract of insurance that would not usually be included in similar contracts of insurance unless, before the contract was entered into, the insurer informed the other party in writing of the effect of the provision.

Section 37 specifies that the disclosure must be provided in writing. Section 11 of the ETA provides that documents can be produced by electronic communications, should the recipient provide their consent to receive documents electronically.

The current provisions leave it unclear whether the requirement can be satisfied by providing the other party with clear directions about where material is publically available (such as a link to an electronic version of a document on a website) or if this is not sufficient to constitute providing the information.

Case Study 3

Sections 223 and 224 of the *Life Insurance Act 1995* set out requirements that apply to life insurers in the event that a life insurer is advised that a life insurance policy document is destroyed and the insurer is requested to issue a replacement policy document or pay a claim under such a document. Among other things, life insurers are required to publish notice of their intention to issue the replacement document or put the claim in a newspaper circulating in certain areas at least ten days before issuing or paying.

This requirement is not technology neutral because it provides for notice to be given only using one very specific means, even if other means would be equally or more effective to achieve the policy intention of informing persons whose interests may be affected.

Applying the proposed principles would involve revising the requirement to provide notice so that it can be satisfied if the notice is given in a way that the insurer is reasonably satisfied will be similarly effective in providing notice to affected persons.

Communicating with Regulators

The law may require entities to provide written information to regulators in the Treasury portfolio including ASIC, APRA and the ACCC, or other Commonwealth entities. It also provides for regulators to give information to regulated entities and other stakeholders.

Examples of the information required may be relevant to licensing and registration, breach reporting, investigations, and applications for regulatory relief. Current laws tend to prescribe how regulators will receive this information from entities — for example, the entity is required to provide the information to the regulator in hard copy.

The Government has already made a number of these requirements technology neutral as part of the Modernising Business Registers program, by passing legislation to allow a registrar to prescribe the manner in which it collects registry-related information in respect of a number of statutes, including the *Corporations Act 2001*, *Superannuation Industry (Supervision) Act 1993*, *A New Tax System (Australian Business Number) Act 1999*, *Business Names Registration Act 2011* and *National Consumer Credit Protection Act 2009*. To support implementation, the Government has provided $419.9 million over four years in the 2020-21 Budget to build a modernised registry platform.

The Government is considering extending the flexibility provided through the Modernising Business Registers program to allow regulators to prescribe the manner in which it collects other pieces of information across Treasury portfolio laws.

The Government is not considering any changes or reduction to the information provided to regulators through this process. Regulators will continue to receive the information they require to carry out their regulatory functions effectively.

There are a number of issues that must be considered to ensure businesses, consumers and regulators can benefit from technology neutrality. These include:

- ensuring the information is provided in a manner which allows it to be readily accessible and useable by regulators;
- ensuring that regulators can appropriately specify the means through which it receives communications; and
- ensuring that regulated entities can comply with these requirements at the lowest cost.

Policy Goals

The policy goals of these requirements include:

- providing an administrative and evidential basis for regulator decision-making; and/or
- assisting the regulator to prioritise and conduct regulatory activities.

As regulators receive large volumes of information, it is necessary that they are able to prescribe how they receive that information so that information can be used efficiently to carry out their regulatory mandate.

For example, there are a number of provisions in the corporate law which require financial services licensees to provide written statements or reports, either upon a request by ASIC or an occurrence of a prescribed event. However, in practice, the information provided to regulators can be made in different formats. Any changes to the law should also acknowledge the regulatory burden imposed on businesses when multiple channels of communicating with regulators exist. Where practicable, reform should also provide a more consistent and streamlined process for the regulated population.

Hearings

A number of provisions in Treasury legislation, including the *Corporations Act 2001*, require a regulator to offer an affected person, or their representative, an opportunity to appear at a hearing before the regulator exercises its power or functions. Often these provisions either expressly or implicitly require that the hearing must be conducted in person.

The policy goal of a hearing is to afford affected people the opportunity to understand why a regulator is considering the exercise of a power and to be able to respond to these issues and raise relevant evidence relating to their case. It ensures that certain significant powers are not exercised without the affected person having the chance to make their case in possession of full information about the reasoning of the regulator.

To achieve this purpose, it is important that hearings are conducted in a way to allow for communication that is effective and adapted to the needs of participants. It is also important to ensure that the manner of communication does not limit the capacity of parties to participate or compromise the fairness of proceedings.

In some cases, the purpose of a hearing is also to ensure that this process is open and subject to public scrutiny. However, this is not universal. In some cases, hearings may involve private or sensitive information and therefore may not be able to be held publically.

Proposed Principles

As a starting point the Government proposes that regulators and their clients should be able to interact in a manner that provides the regulator with the maximum ability to use the information to assist them in their regulatory responsibilities as well as providing regulated entities with a streamlined process to meet their responsibilities.

There are two options available to implement this principle. They are:

- Removing exemptions to the ETA; and
- Amending relevant Treasury legislation.

Additionally, many Commonwealth Acts contain their own bespoke electronic communication regimes that displace the ETA when there is a conflict between the relevant Act and the ETA. For example, section 11B of the *Superannuation Industry (Supervision) Act 1993* provides that the electronic lodgement of certain forms is 'taken to constitute written notice'.

Hearings

As a starting point, the Government proposes that regulators should be able to conduct hearings without requirements for the parties being physically present provided:

- the highest standards of procedural fairness can be achieved;
- the parties have the fullest opportunity to obtain information, present their views and evidence and to be represented;
- either:
  - if the hearing is not public, there are appropriate protections to ensure the confidentiality of proceedings; or
  - if the hearing is public, the hearing is conducted in a way that allows members of the public the same opportunity to witness the proceedings; and
- there is a clearly defined place for the hearing for jurisdictional purposes.

This could be achieved by allowing regulators to offer options for how a hearing is conducted (i.e. in person or virtually). One way that regulators could satisfy the principles outlined above would be for the regulator to offer options it believes would best suit its purposes, while also providing regulated entities with the most flexibility that can be afforded.

Alternatively, the law could provide for physical meetings by default and afford the regulator with the ability to offer alternatives provided that the regulator is satisfied that:

- There will be no disadvantage to the party; and
- Conducting the hearing in person is not practical in the circumstances or would result in a significant delay.

Case study 4

Section 12GXF of the Australian Securities and Investments Commission Act 2001 allows a person who has been given an infringement notice to make written representations to ASIC within 28 days seeking withdrawal of the notice.

Applying the proposed principles to the section would involve making amendments to the legislation to clearly allow ASIC to receive the representations electronically, provided ASIC consents to this.

Case study 5

Division 6 of Part 3 of the Australian Securities and Investments Commission Act 2001 deals with hearings. While these provisions do not state that hearings must be conducted in person, section 57 provides that there must be a place for the hearing and section 59, which regulates the conduct of proceedings, excludes powers that would clearly permit physical presence to be dispensed with.

As a result, in practice hearings are typically conducted at a single physical location which leads to higher costs for attendees of hearings.

Applying the proposed principles would involve making amendments to the Act to clarify that a hearing could be conducted without the parties being physical present, provided that the highest standard of procedural fairness is maintained.

Signatures

Laws requiring a signature generally require the signee to physically sign documents as a statement of both their identity and agreement to the terms outlined in the document. Treasury portfolio legislation includes many obligations requiring a physical signature.

There are provisions in Treasury laws that still require a physical signature and do not allow for the use of electronic means of identification and verification of agreement, most notably in the *Corporations Act 2001* as the Act is exempt from the application of the ETA.

There are also other requirements connected to signatures, including that the signature be witnessed. While such requirements are less common, they can require the witness to be physically present for the signing of the document.

Earlier this year, the Government provided temporary relief for companies to electronically execute documents as part of the COVID-19 economic response.[4] This allowed companies to execute documents without a seal or physical signature.

The Government has also recently consulted on exposure draft legislation, which proposes permanent amendments to the regulatory requirements related to the execution of documents for companies in section 127 of the *Corporations Act 2001*, and the use of electronic means to sign documents related to a meeting or the external administration of a company in Chapters 2G and 5 of the *Corporations Act 2001*.[5]

Policy Goals

The purpose of signature and witnessing requirements are to ensure the objectives of identification and confirmation of agreement can be met. In the past, this has been done through the signing of a hard copy document, which for higher risk transactions has been physically witnessed. However, the growth in digital technology and security provides for the use of electronic means of achieving these objectives while improving efficiencies and reducing costs compared with physical signatures.

Online methods of verifying identity and confirming agreement are now readily available and used extensively, providing the same or higher levels of assurance.

Proposed Principles

As a starting point, the Government proposes adopting an overarching principle that technology may be used to verify a person's identity and receive their agreement, provided that the electronic method used provides at least the same level of validity as a physical signature.

Following the precedent of section 10 of the *Electronic Transactions Act 1999*, the proposed principles are:

- ensuring that the electronic method of signature provides, at least, an equally reliable indication of the person's identity and their intention in respect of the document; and
- where a signature is given to an individual or a business, that individual or business must consent to the use of that method to verify identity and receive agreement.

4 Corporations (Coronavirus Economic Response) Determination (No. 1) 2020; Corporations (Coronavirus Economic Response) Determination (No. 3) 2020

5 For further information relating to the consultation process on the regulatory requirements related to the execution of documents during COVID-19 please visit the Select Committee on Financial Technology and Regulatory Technology September 2020 interim report.

In considering how these principles are applied to provisions, consideration should also be given to the regulatory costs for businesses and individuals to comply and risks, for example, with the consent requirement.

Case Study 6

Regulation 6.17A of the *Superannuation Industry (Supervision) Regulations 1994* provides that the rules of a superannuation fund may permit a member of the fund to give notice requiring the trustee of the fund to provide any benefits held in the fund in respect of the member to the member's legal representative or dependent of the measure in the event of the members death.

This notice, referred to as a binding death benefit nomination, must, among other things, be signed by the member. As the *Superannuation Industry (Supervision) Regulations 1994* is exempt from the application of the ETA, this requirement can only be satisfied by providing a physical signature.

Applying the proposed principles could involve removing the current exemption to the ETA from the *Electronic Regulations 2020*, allowing the use of alternative forms of identity verification and agreement. Importantly, any alternative form adopted must provide a clear indication that the signatory has understood and assented to the nomination and address risks of fraud or misuse.

Note: The ETA provides an option for the use of electronic communication to satisfy obligations under Commonwealth law. The ETA does not compel or mandate the use of electronic communications by a government body or regulator.

Record-Keeping Requirements

Various provisions across Treasury portfolio laws require entities to record or retain information. Many of these provisions create an obligation to record or retain certain information without specifying how this information is to be held. However, some provisions require information to be recorded or retained in writing. For example, section 286 of the *Corporations Act 2001* requires entities to keep written financial records for a period of seven years.

For most Commonwealth laws, section 12 of the ETA provides that a requirement for a person to record or retain information in writing is taken to have been met if the person records or retains the information in electronic form. This applies generally to Commonwealth laws unless an exemption to the ETA is requested by the responsible agency. Section 12 allows the person to record the information using technology most appropriate to them including new technologies such as blockchain. However, a number of Treasury Acts, including the *Corporations Act 2001* and most of the *Superannuation Industry (Supervision) Act 1993* are exempt from the ETA.

Policy Goals

The policy goal of requiring information to be retained is to ensure that the information can be readily accessed in the future for a variety of regulatory and evidentiary purposes.

A technology neutral approach to achieving this policy goal would avoid prescribing the manner in which information is recorded or retained. Instead, it would prescribe the outcome of having both the information being held in a form that is able to be readily accessed in the future if needed and the integrity of the information being maintained when it is recorded and stored. This provides entities with greater ease and flexibility in regard to how they engage and comply with the relevant law.

This outcome is generally given effect across Commonwealth legislation by the ETA but not for some Treasury portfolio laws, as they are exempt from the application of the ETA.

Proposed Principles

As a starting point, the Government proposes that written records are able to be stored by any means as long as:

- The information is readily accessible, in a format that can be easily reused; and,
- Where the integrity of the information can be maintained over a relevant period.

The Government is not considering any changes to the policy underpinning record-keeping requirements through this process, which is proposing that requirements for written records to be created or retained would be satisfied by making or holding information in a physical, electronic or other form.

In general, this could be achieved by removing the current exemptions to the ETA which are in place for certain provisions of Treasury laws, so that the ETA applies to those laws. The ETA provides a well-established and robust model for a technology neutral approach to recording and retaining information in Treasury portfolio laws.

The application of section 12 of the ETA to requirements to retain documents and electronic communication is conditional on the information being recorded or retained in a method that will maintain its 'integrity'. In this context, 'integrity' means that the information is maintained in a substantively complete and unaltered form.

The application of section 12 is also conditional on the information being recorded or retained in a manner such that it would be reasonable to expect that the information would be readily accessible

so as to be useable for subsequent reference. Given that electronic technology is ever evolving and can potentially fail, this condition is framed as an objective point in time test.

Case study 7

Regulation 13.18AA of the *Superannuation Industry (Supervision) Regulations 1994* prescribes how certain kinds of assets held by self-managed superannuation funds can be used or stored. Broadly, these assets include artwork, jewellery, antiques and similar items.

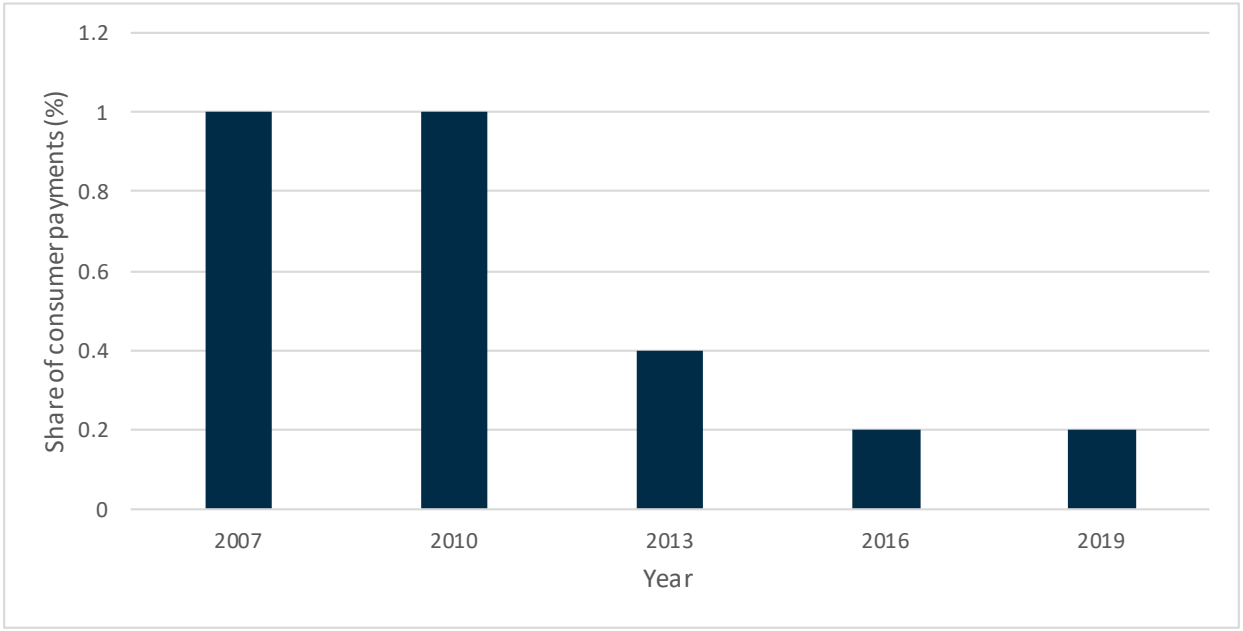
Among other things, it requires trustees to make written records of decisions about the storage of these assets and retain these records for at least 10 years.

As the *Superannuation Industry (Supervision) Regulations 1994* is exempt from the application of the ETA, this requirement can only be satisfied by a physical written document. This approach can be costly and imposes a greater regulatory burden than if the person was able to record and store the information electronically.

Payment Methods

Payment methods have changed significantly over the last several decades. Technological improvements coupled with the globalisation of trade and commerce have driven a dramatic shift toward faster, digital forms of payment. In Australia, this has been evidenced by monthly debit card transactions rising from about 150 million per month as recently as 2011, to nearly 600 million per month by 2019. More broadly, total card transactions (including credit and other card payments, such as gift cards) totalled almost 850 million per month in 2019. Meanwhile, the use of cash continues to decline — the proportion of in-person payments made using cash has fallen from nearly 75% in 2007 to about 30% in 2019. The use of cheques also continues to decline. Today, only around 0.2% of payments are made with cheques (see Figure 1), and this is expected to continue to decline due to the rise of more accessible and efficient payment methods.

Figure 1: Declining Use of Cheques as a Method of Payment



Source: Reserve Bank of Australia

Legislation has historically taken different approaches to payment provisions. In some cases, legislation has specified what form payment to or by government or other parties should take. For example, cheques were historically common forms of payment for certain payments to or from government, which several provisions across the Treasury portfolio laws still provide for. Nevertheless, in other areas, government payments have changed with the times — Medicare payments, for example, are now commonly electronic. With continuing technological change, it is likely that payment methods will change further.

Treasury legislation currently contains many provisions regarding payments. The most common provisions are simple requirements for payment to be made, without prescribing the manner in which the payment can be made, or the form the payment can take. However, a small number either prescribe the means of payment or permit it to be prescribed by an entity (usually a Commonwealth regulator).

There is scope to modernise legislation and instead make legislation neutral for payment methods. This would allow the Commonwealth to make and receive payments using the easiest and most efficient methods available, both for payers and payees, including as payment methods change over time. Some stakeholders have expressed the view that certain provisions require them to accept certain payment methods and, as a result, offer those payment options at significant cost relative to

their use. As such, there may be a rationale to clarify whether these provisions are working as intended and remain appropriate.

Examples

One example of a restriction related to payment in Treasury legislation exists in paragraph 254P(2)(c) of the *Corporations Act 2001*.

> **254P No liability companies—calls on shares**
>
> *Notice of call*
>
> (2) At least 7 days before a call on shares in a no liability company becomes payable, the company must give the holders of the shares notice of:
>
> (a) the amount of the call; and
>
> (b) the day when it is payable; and
>
> (c) the place for payment.
>
> The notice must be sent by post. If the notice is not given, the call is not payable.

This provision requires that, prior to a call on certain shares becoming payable, the company must notify the shareholders of a number of matters, including the place for payment. This implicitly requires that there must be a physical place at which payment can be made.

For completeness, it should also be noted that the provision also prescribes the manner of the communication by specifying that notice must be provided by post in a way that is not technology neutral.

Another example exists in subsection 32(2) of the *Small Superannuation Accounts Act 1995*.

> **32 Deposit form may deal with multiple payments**
>
> *Method of payment*
>
> (2) If a deposit form deals with 2 or more payments made by the same person, the person may give the Commissioner of Taxation, in respect of the sum of the payments:
>
> (a) one or more valid cheques; or
>
> (b) one or more money orders; or
>
> (c) cash; or
>
> (d) any combination of the above.
>
> If the person does so, this Act has effect as if the person had given the Commissioner of Taxation a separate cheque for each of the payments.

This provision requires that payment in relation to a deposit form containing two or more payments by the same person must be made by cheque, money order, cash or a combination of those forms of payment.

The Government is separately reviewing the regulatory architecture of the Australian payments system to ensure the payments system remains fit for purpose and is capable of supporting continued innovation for the benefit of both businesses and consumers. This review is due to report to the Treasurer by April 2021.

Policy Goals

Payment method neutrality would provide both the Commonwealth, businesses and consumers with flexibility in choosing the most accessible and efficient payment methods in different circumstances. There is a wide variety of payment methods available today that are not reflected across many existing

legislative provisions. There is therefore an opportunity to modernise the law and introduce greater flexibility.

However, notwithstanding legislative provisions, some businesses and consumers prefer to use certain payment methods out of habit and familiarity, and may struggle to transition to other payment methods in the short-to-medium term. In other instances, some consumers have indicated they are forced to use certain payment methods because of a lack of alternatives. For example, consumers with limited internet access may struggle to use digital forms of payment.

Proposed Principles

As a starting point, the Government proposes that, the law should only prescribe or restrict the means by which a payment is made where this achieves a policy outcome.

More generally, a technology neutral approach to legislation would require that legislative provisions do not mandate any particular payment method (e.g. payment by cheque, bank order or cash). However, there are circumstances where it may be appropriate for legislation to still govern how certain payment methods are executed or regulated.

Case Study 8

Section 32(2) of the *Small Superannuation Accounts Act 1995* provides that certain payments to the Commissioner of Taxation must, if they are dealt with in a single deposit form, be made by cheque, money order, cash or a combination of these methods.

This is not technology neutral — only payments made in that form will satisfy the requirements of the legislation.

Applying the proposed principles would involve removing the specific references to forms of payment and instead providing that payment may be made in any form acceptable to the Commissioner of Taxation (the relevant regulator).

Consultation questions

1. Do the business communication requirements in Treasury laws create a burden on business?
    a. If so, what categories of communication (as outlined in this paper) or legislative provisions are creating a burden and should be prioritised for reform?
    b. Are there non-regulatory requirements that inhibit businesses, consumers or regulators from using their preferred method of communication? If so, please provide examples.

2. What is the cost of complying with the current regulations? Please provide a breakdown of costs and an indication of the frequency at which these communications occur.
    a. Would these costs be reduced if the law was technology neutral? Please provide a breakdown of any anticipated savings and any non-monetary benefits.

3. Do you agree with the categories of communication outlined in the consultation paper?
    a. Are there other types of business communication that should be considered?
    b. Do you agree with the proposed principles outlined in the consultation paper or are there additional or alternative principles that should be considered?
    c. What, if any, barriers would restrict implementation of the proposed principles?

4. How could stakeholders (such as consumers and investors) benefit or be disadvantaged from greater technology neutrality in Treasury laws? Please provide any relevant data, if available.

5. Which of the options identified on page 3 do you consider would provide the biggest benefits while appropriately managing risk?

6. If technology neutral reforms are introduced, what should businesses do to manage the impact of these changes, to ensure that benefits are realised and disadvantages overcome?

7. What transitional issues do you foresee for businesses, consumers and regulators in moving to technology neutral communication methods?
    a. What are the key implementation risks and their likelihood of occurring? How can we mitigate these risks? Please provide examples.

Appendix A: International Reform Processes

International jurisdictions such as the European Union (EU), New Zealand (NZ), the United Kingdom (UK) and United States (US) have recently undertaken a range of changes to facilitate the modernising of business communication methods within their respective jurisdictions with some of these changes in response to COVID-19.

Written communications

The EU,[6] UK,[7] NZ[8] and US[9] all have laws that electronic forms will satisfy legal requirements relating to written communications.

Communicating with regulators

The EU applies 'single digital gateway' regulation that allows citizens and businesses to conduct a range of regulatory exchanges entirely online.[10] The single digital gateway embodies the 'tell us once' principle. NZ provides that any requirement in writing can be satisfied electronically.[11] The UK[12] and US[13] have both expanded the amount of documents that can be lodged electronically in response to COVID-19.

Signature requirements

The EU,[14] NZ[15] and UK[16] allow for the use of digital signatures in most circumstances whereas the US,[17] provides digital signatures with the same legal equivalence as physical signatures.

---

6 'Council directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')' Official Journal of the European Union L178

7 Law Commission, *Electronic execution of documents* (law Com No 386, 2019)

8 Contract and Commercial Law Act 2017 s222

9 The Uniform Electronic Transactions Act 1999

10 'Regulation 2018/1724 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending Regulation (EU) No 1024/2012' Official Journal of the European Union L295/1

11 *Contract and Commercial Law Act* 2017 Part 4 Electronic transactions

12 James Lewis and Bhavul Haria, 'Coronavirus — a guide to electronic signatures during the COVID-19 UK lockdown', May 2020, https://www.fieldfisher.com/en/insights/a-guide-to-electronic-signatures-during-coronavirus, (accessed 27/10/2020)

13 U.S. Securities and Exchange Commission, 'SEC Provides Additional Temporary Regulatory Relief and Assistance to Market Participants Affected by COVID-19', March 2020, https://www.sec.gov/news/press-release/2020-74. (accessed 27/10/2020)

14 Andrew Liptak, 'The European Union is updating its electronic signature laws', June 2016, *https://www.theverge.com/2016/6/30/12066886/eu-european-union-electronic-signature-laws-eidas*, (accessed 27 October 2020)

15 Duncan Cotterill, 'Electronic signatures — when can I use them and when can't I?', March 2020, https://duncancotterill.com/publications/electronic-signatures-when-can-i-use-them-and-when-cant-i, (accessed 27 October 2020)

16 Pippa Whitmore, 'E-signatures in England and Wales', July 2020, https://www.pinsentmasons.com/out-law/guides/e-signatures-england-wales , (accessed 27/12/2020)

17 The Uniform Electronic Transactions Act 1999

Record-keeping documents

The UK,[18] US,[19] and NZ,[20] all allow for the use of electronic storage of records. The EU has enacted electronic commerce legislation, which includes provisions relating to record-keeping.[21]

18 Companies Act 2006 s 1135
19 The Uniform Electronic Transactions Act 1999
20 Contract and Commercial Law Act 2017 s 223
21 J. Benjamin Lambert, 'The U.N. convention on electronic contracting: back from the dead?', 2017, *https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1214&context=ilr*, Michigan State International Law Review