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Modernising Business Communications, Improving the Technology Neutrality of Treasury Portfolio Laws — Submission

Allens welcomes the opportunity to provide comments to Treasury in response to its Consultation Paper *Modernising Business Communications: Improving the Technology Neutrality of Treasury Portfolio Laws*.

1 Introduction

We very strongly support the move to allow processes to occur electronically, and not by paper.

The advantages of doing so are readily apparent. Electronic communication and information storage are rapidly becoming the norm in general life and commerce. There are significant savings in cost and environmental impact. Processes are speedier, easier, more convenient and more efficient. Generally they are more accessible. Regional Australia is not as burdened by the tyranny of distance. Records are often more accessible, secure and reliable — it is easier to store and locate documents executed electronically. In practice often it is easier to establish that documents and communications have been properly signed, or received and opened — there is a clear trail. Paper communication is not becoming any easier or more reliable — Australia Post is cutting down its services.

We have four general observations:

- (a) In view of the above, when looking at requirements and processes, the default should be to allow them to be satisfied electronically. A suggestion that a process require paper should bear the burden of establishing why.
- (b) The Consultation Paper deals only with legislation administered by the Treasurer. That is welcome and extremely important, particularly for the finance and corporate sector. But it is only part of the picture. Reform of Treasury laws may free business processes of some requirements for paper but the processes may still be shackled by other requirements. Requirements for paper can fall within the purview of other Commonwealth departments. More particularly they may arise in the different and often inconsistent laws and regulatory practices of the various states and territories. This can

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impose a significant burden on businesses that operate across Australia. Examples include requirements in relation to real property dealings, and deeds.

We urge the Federal Government to show leadership in driving reform at all levels of government, and itself adopt a whole-of-government approach. The reforms mooted in the paper can and should be instituted without needing to wait for movement elsewhere, but there is no reason that there should not also be movement in other areas.

- (c) One aspect that can slow regulatory, business and consumer embrace of electronic processes is that in venturing into the new there is a greater focus on risk. While this is understandable it can occur to a degree that does not arise with existing familiar processes and requirements. Analysis raises concerns that at least are no greater than those currently accepted.

For example there can be a focus on the authenticity of electronic signatures when what appear to be wet-ink signatures are accepted without any effort to check authenticity. There can be concerns as to whether consumers read documents available electronically when there is no greater assurance they read them in hard copy.

- (d) Permitting business processes to occur electronically does not compel their adoption. Businesses will continue to be able to provide services in traditional ways.

We give answers to the specific consultation questions at the end of this submission, but we thought it useful to discuss the issues as set out below.

2 Approaches across the board

- (a) *Exceptions from the Electronic Transactions Act — and the requirement of consent*

We suggest that the starting approach should be to remove all the relevant legislation from the exemptions into the Electronic Transactions Act (**ETA**) except where there is a compelling reason to the contrary. The legislation is expressed in general terms and is principles-based — as it should be if it is to achieve true technological neutrality and to keep pace with developments in technology. Over the last two decades a helpful body of case law has built up as to how it is interpreted.¹

There are significant advantages in having one consistent set of well-understood provisions applicable across the economy, rather than a plethora of separate provisions in different legislation and in different jurisdictions. The ETA has the advantage of being virtually identical with equivalent state or territory law.

As the consultation paper points out, the ETA has requirements of consent. On occasions it may be necessary to provide that consent to electronic signatures etc is not necessary, or is taken to have been given. But without undertaking a full survey of the legislation, we would be surprised if there were many, if any, such occasions. The courts have given wide latitude as to what constitutes consent. And it can easily be obtained or provided at the outset of a relationship, eg in an application, or in standard terms and conditions.

It will still be necessary to make further changes to legislative or regulatory requirements in various areas, for example to provide for electronic notices and addresses.

- (b) *Remove requirements for witnesses except qualified ones*

We suggest that generally requirements that signatures be witnessed give very little if any benefit or protection to parties, and can cause practical difficulties in electronic processes. They should be removed. The only exceptions are those particular areas where witnesses

¹ See Diccon Loxton, 'Not Worth the Paper They're not Written on? Executing Documents (Including Deeds) Under Electronic Documentation Platforms: Part A' 91 ALJ 133.

are required to have special qualifications, such as solicitors and justices of the peace. These arise in three main areas:

- in affidavits and statutory declarations and the like, to reinforce through solemnity the need for truth;
- in documents like enduring powers of attorney, where the witness is required to explain the relevant document; and
- where the qualified witness is seen as belonging to a trustworthy category of people, and is verifying the identity of the relevant person or documents.

In those cases the qualified witness should be able to conduct the relevant process by audio-visual link and attest completion by signing electronically. States are starting to reform their laws accordingly.²

In all other cases, we suggest that the requirement for witnesses be removed. Where a witness simply verifies a signature, it is of very little practical value. The perceived benefits are largely illusory. Witnesses can be a total stranger at random off the street. They may not know the signer, or know or check the signer's identity. They may not be aware of the type or contents of the document. They may have no idea as to whether the signer is signing freely or understands the relevant document. They do not need to know or check any those things — the law does not require it.

The law requires only that witnesses actually see the signer sign (and we suspect that in reality many do not), and then attest that fact by signing themselves. They may be untraceable. In our experience, having witnesses gives little or no benefit in proving execution. Forgers or fraudsters may forge the witness's signature, or get a crony or innocent dupe to witness their purported signature.

But the requirement that a document be witnessed can impose significant procedural burdens on electronic processes, in accommodating the presence (even virtual) of the witness during signing, and in arranging for the witness to sign.

For parties concerned as to authenticity there are many other means of verifying electronic signing

(c) *Filings and communications with regulatory agencies*

In general, we see no reason that these should not be electronic, and that should be the default rule.

There are still a significant number of requirements for documents to be physically lodged. For example, there are the documents required by ASIC in the attached table. We suggest that they should be able to be lodged electronically.

3 Specific burdens and areas of reform

(a) *Bid and response documents under Chapter 6 of the Corporations Act in mergers and acquisitions, and other communications to shareholders under that part, and service more generally.*

These are currently required to be sent in hard copy by 'snail mail' (s648C) to physical addresses (s648B).

² Most recently, Victoria (Justice Legislation Amendment (System Enhancements and Other Matters) Bill 2021 (Vic)

This means that the target company and bidders may need to print out and post tens of thousands of documents to shareholders, most of whom have given their email addresses to the company for the services of notices and have elected to receive reports electronically. Parties often seek modification from ASIC to email documents to shareholders.

Schemes of arrangement referred to in (c) below are often used in mergers and acquisitions. Scheme documents setting out the proposal, which can be very long and need to be sent to shareholders or creditors. The same should apply to them.

More generally s109X requires hard copy service of documents and notices.

(b) *Requiring email or other electronic addresses from shareholders*

It is common practice for companies and registered managed investment schemes to seek from shareholders/unitholders consent to send documents to them electronically, and to get their email addresses. That still leaves a rump receiving hard copy documents, at disproportionate expense. That rump will often comprise shareholders/unitholders who have simply not given their consent from inertia or oversight rather than people who actually want to receive hard copy. It is not unreasonable for a company or registered scheme to be able to specify that all shareholders/unitholders who choose to hold shares in the company or interests in the scheme must receive communications from it electronically.

(c) *Signing of deeds by statutory corporations and foreign corporations*

The amendments currently before the Parliament in relation to s127 deal with the electronic execution of documents by companies, and are very welcome, particularly in allowing electronic deeds. The current section 127(3) already simplifies the way companies execute deeds (so instead of requiring a common seal, or witnesses, certain officers may sign for the company) but many people regard the section, in its current form, as requiring a paper document.

These provisions only relate to companies, they do not cover other corporations, in particular, foreign corporations and statutory corporations. There are large numbers of such corporations involved in the Australian economy, many of them significant. In our own practice we regularly encounter difficulties in relation to their execution of deeds, adding delays and legal costs to transactions.

The difficulty is that state and territory legislation relation to the requirements for deeds often excludes corporations, leaving a gap. For example s38(5) of the *Conveyancing Act 1919* (NSW) excludes corporations, and so also s38A allowing electronic deeds, does not apply to them.

The Commonwealth has clear constitutional power to address this and achieve consistency across Australia.

(d) *Meetings in relation to insolvency administrations*

There are a number of provisions in which the Corporations Act requires meetings of creditors or other stakeholders in relation to the insolvency administration of companies, or schemes of arrangement. Convening the meetings physically can involve a significant and unnecessary cost burden. These should be able to be held virtually.

(e) *Consumer credit protection*

There are a number of notice requirements excluded from the ETA. Of particular relevance is s88 notices which are commonly required.

(f) *Compliance plans for registered managed investment schemes and establishment of schemes*

Section 601HC of the Corporations Act requires a copy of the scheme's compliance plan that is lodged with ASIC to be signed by all the directors of the responsible entity. There is some limited relief in reg 5C.4.01, which allows an agent to sign on behalf of a director, but in that case the agent's authority to do so, or a copy of the authority verified by a director of the responsible entity, must be attached to the plan. In our experience, ASIC has traditionally required wet ink signatures on the compliance plan / agent's authority. This causes difficulties because compliance plans are frequently updated, and responsible entities may have a large number of directors.

There is also a requirement that every director must sign the Form 5103 (wet ink required) when an application is made to register a managed investment scheme with ASIC — see s601EA(4)(c). This may be less onerous, as it is a one-off per scheme, but still imposes burdens.

(g) *Meetings of members of registered managed investment schemes*

Unlike shareholders of proprietary companies, members of registered schemes are unable to pass resolutions of members by way of a written resolution. There is no equivalent to s249A for registered schemes. This is often an issue for schemes that are registered but only have a small number of wholesale clients. ASIC has been prepared to grant relief in these circumstances to permit resolutions to be passed by written resolution, but often there is insufficient time to apply for such relief.

(h) *Product Disclosure Statements, Financial Services Guides and Statements of Advice*

The Corporations Act requires these documents to be 'given' to a person (eg in relation to PDSs, s1012B), and there is some further detail in the regulations. This does not go far enough to permit electronic delivery by way of a hyperlink to a website, etc. ASIC has provided class order relief to allow electronic delivery, but it is convoluted and conditional. This should be simplified and incorporated into the legislation.

(i) *Assignment of life policies*

Section 200 of the Life Insurance Act deals with the assignment of a life policy. It can only occur legally by execution of a transfer document which is signed by transferee and transferor and then the principal executive officer of the life company.

(j) *Death benefit nominations*

Regulation 6.17A of the *Superannuation Industry (Supervision) Regulations* requires a binding death benefit nomination to be witnessed, when the regulations make no similar requirements for other directions for payment of funds.

We would be very happy to discuss the above

Yours sincerely

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Consultation questions

1. Do the business communication requirements in Treasury laws create a burden on business?

Yes

- 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?

See above. All categories are affected.

- b. Are there non-regulatory requirements that inhibit businesses, consumers or regulators from using their preferred method of communication? If so, please provide examples.

Converting to electronic processes can require significant investment of time and resources in setting up the relevant systems and policies, and in assessing the relevant risks and impacts. Client confidentiality prevents us giving 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.

We have not conducted a survey of costs, and most of the costs involved would be internal to our clients. We would not know the figure.

When we are involved in bespoke transactions we are more aware of some of the costs, though our knowledge is still incomplete —we only see some of the external costs. The issues described above would occur in dozens of such transactions that cross our desks each year, and the external costs in relation to those transactions, in terms of legal, printing costs etc. would easily run into many hundreds of thousands of dollars. Those costs include not only compliance, but the considerable cost to the client of seeking the necessary modifications to allow for electronic processes.

- 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.

Yes. As to breakdowns of savings, see the previous answer.

3. Do you agree with the categories of communication outlined in the consultation paper?

Broadly, yes, subject to the below. But we wonder whether the division into categories has utility, say, in allocating priorities of reform as between them

- a. Are there other types of business communication that should be considered?

Contractual documents including deeds signed by foreign and statutory corporations. We are unsure whether the first category would include documents sent by external parties to shareholders and investors, like offers and bidder statements.

- b. Do you agree with the proposed principles outlined in the consultation paper or are there additional or alternative principles that should be considered?

We are concerned with the following description, which seems to suggest that a sender be responsible for ensuring the technology possessed and used by the recipient is adequate, and knowing what that technology may be. If the recipient has consented to a certain method of communication, or the method employed is commonly used, that should be sufficient. Though any duties of the sender to the recipient would remain.

'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'.*

The paper suggests that the requirement for consent leads to a hard copy default. For the reasons set out in 2(a)2(a) above we do not agree. The need for consent is not a practical barrier.

- c. What, if any, barriers would restrict implementation of the proposed principles?
See b above

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.

We are unable to provide data, but the benefits for both sides are outlined above, and include speed, convenience and a lower cost.

As to disadvantages, see the general remarks on risk in 1(c).

There has been some focus on the authenticity of signatures, on the risk of fraud or forgery. Such risks already occur with wet-ink processes, but there can be new opportunities, for example where partners living together have access to each other's' mailboxes. In dealings between businesses and consumers the risk of inauthenticity is generally borne by the business. Businesses are able to impose requirements to deal with any such risk, and currently do so, for example, in two-factor authentication or confirmations. Irreversible consumer action, in the form of indefeasible Torrens Title mortgages are subject to state verification of identity requirements. Businesses should be free to continue to make their own assessment and requirements.

Another concern may be that paper documents, or face-to-face contact may give consumers more time to consider a proposal. We query whether that works in practice, for example whether consumers are more inclined to read paper more than a screen. In any event, the duties of the business to the consumer, for example, as part of its Australian Financial Services License conditions, remain, regardless of the delivery technology.

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

For reasons outlined above we think the default should be neutrality. Requirements for paper or a specific technology should only be imposed where there is a demonstrated reason.

We suggest considering removal of exemptions from the ETA should be the starting point. See 2(a) above. It is a useful list to work from as a good start.

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?

The choice of whether, when, and how, to introduce the reforms will be one for the business. Competitive pressure and the advantages of doing so will bring it forward. The level of investment and time involved in adopting electronic systems, and the attitudes described above may hold it back

7. What transitional issues do you foresee for businesses, consumers and regulators in moving to technology neutral communication methods?

It may require investment by businesses and regulators. Consumers may be under pressure from some businesses to adopt technological solutions, but we suspect the vast majority of consumers already have the relevant technology. We see few transitional issues for consumers other than the need to do what is necessary to establish accounts, apps etc.

SCHEDULE

DOCUMENTS REQUIRED TO BE LODGED WITH ASIC IN HARD COPY

ASIC Form	Description	Method of lodgement
201	Application for registration as an Australian company (if price per share is more than two decimal places)	Manual lodgement
206	Application for change of company type	Manual lodgement
384	Resolution by directors of a small proprietary company controlled by a foreign company which is not part of a 'large group'	Manual lodgement
394	Notice of cessation of reliance on ASIC Corporations (Foreign-Controlled Company Reports) Instrument 2017/204	Manual lodgement
488	Application to change the review date of a company or registered scheme	Manual lodgement
492	Request for correction of an ASIC Form 201 or previously lodged manual form	Manual lodgement
410	Application for reservation of name of a foreign company	Manual lodgement
402	<p>Application for registration as a foreign company</p> <p>Certification requirements of the documents which must be provided to ASIC when registering a foreign branch in Australia:</p> <p><u>Certificate of Incorporation or Registration in the corporation's place of origin</u></p> <p>A certified copy of the current Certificate of Incorporation or Registration in the corporation's place of origin, which <u>must be</u> certified as a true copy by whoever has lawful custody of the original document in the place of incorporation, that is, a person who exercises under law functions similar to those exercised by ASIC (i.e. the equivalent of ASIC).</p> <p>The certification should be dated no more than 3 months before the copy is lodged with ASIC.</p> <p>OR</p> <p><u>Certificate of Status</u></p> <p>A certified copy of a current certificate of registration or a document with similar effect that confirms that the company is currently registered.</p>	Manual lodgement

	<p>This certificate or document of similar effect must be issued by the governing body equivalent to ASIC in the country of registration and the issue date must be no more than 3 months prior to it being received by ASIC.</p> <p>The certification should be dated no more than 3 months before the copy is lodged with ASIC.</p> <p>AND</p> <p><u>Company's Constitution</u> A certified copy of the Company's Constitution, Memorandum and Articles of Association or By-Laws, etc. certified as a true copy by either:</p> <p>a) the ASIC equivalent b) a notary public; or c) a duly witnessed affidavit by a director or secretary of the foreign company.</p>	
490	Notification of change to directors of a registered body of foreign company	Manual lodgement
404	Notification of change of local agent of foreign company	Manual lodgement
405	Statement to verify financial statements of foreign company	Manual lodgement
406	Annual return of a foreign company	Manual lodgement
407	Notification of cessation, winding up or dissolution of a foreign company or registered Australian body	Manual lodgement
409	Notification of change of name of foreign company	Manual lodgement
418	Memorandum of appointment of local agent	Manual lodgement
489	Notification of change of registered office address in Australia and change of address in place of origin of foreign company	Manual lodgement
280	Notification of share buy-back details	Email lodgement available only to approved service providers
281	Notification of intention to carry out a share buy-back	Email lodgement available only to approved service providers
2560	Notification of reduction in share capital details	Email lodgement available only to approved service providers
2601	Notification of intention to give financial assistance	Email lodgement available only to approved service providers
2602	Notification of Financial assistance details	Email lodgement available only to approved service providers
2205	Notification of resolutions regarding shares - Reduction in share capital	Email lodgement available only to approved service providers
CF06	Deeds of cross-guarantee and related documents	Email lodgement temporarily available
389	Opt-in/change of holding entity notice by wholly-owned company relieved from financial reporting obligations	Email lodgement temporarily available

399	Opt-out notice by wholly-owned company relieved from financial reporting obligations	Email lodgement temporarily available
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