

26 February 2020

Data Economy Unit
Market Conduct Division
The Treasury
Langton Crescent
PARKES ACT 2600

via email: mbcomms@treasury.gov.au

Dear Sir/Madam

Improving the Technology Neutrality of Treasury Portfolio Laws

Thank you for the opportunity to provide comments on the Treasury and Deregulation Taskforce consultation on how best to improve the technology neutrality of Treasury portfolio laws.

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership reflects the diversity of Australia's director community, our membership of more than 45,000 is drawn from directors and leaders of not-for-profits, large and small businesses and the government sector.

The AICD strongly supports the Government's initiatives to modernise and upgrade Treasury's portfolio laws. COVID-19 and the resulting need for emergency legislative relief in relation to virtual meetings and electronic signatures has revealed where regulation has become dated and inflexible. To accelerate economic recovery, Australia needs to step away from incrementally adapting to developments in technology and innovation, towards an agile, updated and fit-for-purpose regulatory environment.

The AICD considers that modernising Australia's governance and corporate law settings is an obvious and critical priority, with benefits to stakeholders and organisations across the community. By making regulation technology-neutral, organisations will be nimbler in adapting to business and shareholder/member needs and will encourage innovation and reinvigoration of corporate governance regulation.

1. Executive Summary

The AICD strongly supports the Government's proposals to modernise Treasury's portfolio laws by introducing technology neutrality changes. In particular, we support flexibility under the legislation to permit:

- entities to use electronic communications as the 'default' method of communication, while retaining the ability for recipients to elect to receive hard copy mail on an 'opt-in' basis;
- regulators to use electronic communications as the 'default' method to collect information and receive communications, while retaining flexibility for regulators to prescribe an alternative format where there is a sound policy rationale;

- regulators to conduct hearings virtually as the 'default' format, provided parties retain an ability to request in-person hearings where such format is preferred;
- electronic signatures be made permanent for a broader range of legal and company documents across all Treasury portfolio laws, and that further consideration be given to harmonising the approach to signing deeds electronically across all Australian jurisdictions; and
- entities to elect the manner in which they record and retain records, including in electronic form, more broadly under Treasury portfolio laws.

The AICD remains committed to working in consultation with Treasury on these important changes. We provide the following comments on those areas identified in Treasury's consultation paper that are particularly relevant to AICD members.

2. Written communications

Written communications with stakeholders

We support the Government's proposal to adopt technology neutrality in how business meets legal requirements to provide written information to their customers, shareholders and other stakeholders.

In our view, allowing entities to use electronic communications as the 'default' method of communication is preferable. At the same, we believe stakeholders should still be able to elect to receive communications via hard copy mail. We consider this would be best achieved via an 'opt-in' to receive hard copy mail, or in other words, an 'opt-out' of receiving communications electronically by default.

As outlined in the consultation paper, we support the approach of entities notifying its stakeholders via post, email (provided the entity has these details) and/or telephone, for example, seeking permission from stakeholder's to use electronic methods of communication such as email or via mobile applications. If the stakeholder is not contactable or no response is otherwise received within a reasonable timeframe, then consent to receive electronic communication should be implied and the default mode of communication (email) should apply.

We note that this should be balanced by a consistent requirement throughout Treasury's portfolio laws for stakeholders to have a 'nominated electronic address', which indicates that stakeholders have access to receiving electronic communications.

For completeness, we note that feedback from our members has indicated that an 'opt-in' to receive communications electronically, rather than an 'opt-out' of receiving communications electronically, has in the past generally not created the cost savings and efficiencies that had been anticipated. For example, in the context of electronic notice of meeting materials (albeit the subject of a separate consultation), a small to medium sized company seeking to put a resolution to shareholders for a reorganisation of capital were only able to email a notice of meeting to 1,500 of its 5,000 membership base due to the requirement for shareholders to 'opt-in' to receive communications electronically. As a result, the cost for printing and hard copy mailing the notice of meeting and prospectus documents for a membership base of 3,500 was approximately \$300,000.

3. Communicating with regulators

Consistent with our view that electronic communications should be the 'default' method for entities to communicate with their stakeholders, we consider the same approach should apply to communicating

with regulators. Accordingly, we would support the adoption of technology neutrality to enable regulators to collect information and receive communications electronically as the 'default method'.

However, we consider this should be balanced by providing flexibility in the legislation to enable regulators to prescribe an alternative format, such as hard copy, where there is a sound policy rationale behind collecting information or receiving communications in such manner.

To remove the administrative burden on entities having to utilise multiple channels of communicating with regulators, we suggest a consistent approach be adopted across all regulatory bodies, where practicable.

Hearings

We support the Government's proposal for regulators to be able to conduct hearings virtually as the 'default' format.

However, consistent with procedural fairness principles, a party should be able to elect for an in-person hearing should they consider it would afford them the best opportunity to present their case effectively and for natural justice principles to be adhered to. A risk of a virtual hearing could be the potential for a technological problem to compromise the integrity of a hearing – for example, an unstable internet connection which distorted accurate communication and prejudiced the presentation of evidence. Accordingly, we consider it appropriate that a party have the right to elect for an in-person hearing.

4. Written signature requirements

In consulting on the Government's recent proposals on virtual AGMs and electronic communications¹, the AICD strongly supported permanently amending the regulatory requirements relating 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.

Accordingly, we support making electronic signatures permanent for a broader range of legal and company documents across all Treasury portfolio laws, including:

- permitting all documents and deeds to be created and signed in electronic form by organisations and individuals; and
- where required by law, permitting remote witnessing of documents and deeds to be legally valid.

As previously raised with Government, this will improve efficiency and reduce costs, which will ultimately benefit all stakeholders.

In addition, we understand that local regulations in NSW, Queensland and Victoria have provided welcome clarity to assist transacting parties to sign deeds electronically, although the approach varies from state to state. Conversely in the case of other Australian jurisdictions, specific legislation for electronic deeds and remote witnessing does not yet exist (temporary or otherwise).

¹ Corporations Amendment (Virtual Meetings and Electronic Communications) Bill 2020 and Treasury Laws Amendment (2021 Measures No.1) Bill 2021.

We suggest further consideration be given to harmonising the approach to signing deeds electronically across the States and Territories. This could be by way of consistent or standard form regulations to be adopted in each of the States and Territories, noting this would greatly assist in reducing the administrative burden for those parties who transact across jurisdictions.

5. Record-keeping requirements

The AICD strongly supported the Government's separate, complementary proposal to permit an entity's minute book to be recorded in electronic form, provided it is reasonably accessible for inspection by members and the integrity of the information can be maintained over a relevant period.

Accordingly, we support the Government's proposal in this consultation to allow entities flexibility in their approach for recording and retaining records, including in electronic form, more broadly under all Treasury portfolio laws.

Next steps

We hope our response will be of assistance. If you would like to discuss any aspects further, please contact Laura Bacon, Policy Adviser at lbacon@aicd.com.au.



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