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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TREASURY LAWS AMENDMENT (MEASURES FOR A LATER SITTING) BILL
2021: USE OF TECHNOLOGY FOR MEETINGS AND RELATED
AMENDMENTS

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Treasurer, the Hon Josh Frydenberg MP)

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
ASIC	The Australian Securities and Investments Commission

General outline and financial impact

Treasury Laws Amendment (Measures for a later sitting) Bill 2021: Use of technology for meetings and related amendments

The Bill makes permanent changes allowing companies and registered schemes to hold hybrid meetings (which give shareholders the option of either attending in person or remotely) and use technology to execute company documents, sign meetings-related documents and provide those documents to their members.

Date of effect: The Bill applies to documents sent and meetings held after the Bill commences. Transitional provisions allow meetings to continue to be held wholly virtually until the end of 31 March 2021 if the notice of the meeting was sent before the commencement of the Bill.

Proposal announced: On 17 February 2021, the Government announced that it would conduct a 12 month opt-in review of hybrid meetings held by companies, and finalise permanent changes to provide a statutory mechanism for the electronic execution of company document and communication of meeting-related documents.

Financial impact: The Bill has no financial impact.

Human rights implications: The Bill does not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 2, paragraphs 2.1 to 2.5.

Compliance savings impact: Average \$450 million per year over 10 years.

Chapter 1

Use of technology for meetings and related amendments

Outline of chapter

1.1 This Bill creates a permanent statutory mechanism for the electronic execution of company documents. It also allows companies and registered schemes to sign and provide meetings-related documents electronically and use technology to hold meetings, including hybrid meetings on a permanent basis. Finally, other miscellaneous amendments are made to ensure that meetings are conducted effectively.

1.2 All references to the Act in this document refer to the *Corporations Act 2001*.

Context of amendments

1.3 Schedule 1 to the *Treasury Laws Amendment (2021 Measures No. 1) Act 2021* commenced on 14 August 2021. The Schedule allows companies and registered schemes to hold virtual meetings and electronically sign documents until 31 March 2022.

1.4 On 17 February 2021, the Government announced its intention to make permanent changes relating to the execution of company documents and the electronic communication of meetings-related materials. It also announced that it would conduct a 12-month review of hybrid meetings of companies and registered schemes.

1.5 The Bill makes changes to the Act to give effect to that announcement. It refines the drafting approach taken in the *Treasury Law Amendments (2021 Measure No. 1) Act 2021* by restructuring the rules so that they apply to all types of member meetings. It also moves the provisions relating to electronic communications and electronic signatures from Chapter 2G to Chapter 1 so that they can be extended in the future to include additional types of documents that do not relate to meetings.

Summary of new law

1.6 The Bill allows certain documents to be signed in flexible and technology neutral manners. This change applies to:

- the signing of certain documents (including deeds) by or on behalf of a company; and
- the signing of documents which relate to certain corporate meetings or resolutions.

1.7 Amendments are also made to extend the statutory document execution mechanisms to proprietary companies with a sole director and no company secretary.

1.8 The Bill allows companies and registered schemes to hold physical and hybrid meetings. Wholly virtual meetings may also be used if they are expressly required or permitted by the constitution.

1.9 All meetings, regardless of how they are held, must give the members as a whole a reasonable opportunity to participate. This includes holding the meeting at a reasonable time and place and using reasonable technology to conduct a virtual meeting and connect different physical locations together.

1.10 Documents relating to meetings may be signed and given using electronic means, regardless of whether the meeting is a virtual, physical or hybrid meeting.

1.11 The Bill also allows a member or group of members with at least 5 per cent of the voting power to require a listed company or registered scheme to appoint an independent person to observe or report on a poll.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Certain corporate documents, including documents which relate to meetings of members, can be signed in technology neutral and flexible manners.	Documents relating to a meeting may be signed electronically by using a method to identify the signatory and indicate the signatory’s intention until 31 March 2022.
Agents can make, vary, ratify or discharge contracts and execute documents (including deeds) on behalf of companies.	Agents can make, vary, ratify or discharge contracts on behalf of companies.
Companies can execute documents in flexible and technology neutral manners.	Company documents executed both with and without a seal may be executed using electronic means. If the document is executed by fixing a company seal, electronic means may

	<p>be used to witness the fixing of the seal.</p> <p>These changes remain in force until 31 March 2022.</p>
Proprietary companies with a sole director and no company secretary can use the statutory document execution mechanisms.	Proprietary companies with a sole director and no company secretary cannot use the statutory document execution mechanisms.
Members of companies and registered schemes can elect to receive meetings related documents electronically or in hard copy.	The Corporations Act only provides for members of companies and registered schemes to elect to receive meetings related documents until 31 March 2022.
Companies and registered schemes can hold meetings of members at one or more physical locations (a physical meeting), at one or more physical locations and using technology (a hybrid meeting), or if permitted by a company's constitution, a wholly virtual meeting.	Companies and registered schemes can hold wholly virtual meetings of members, regardless of requirements in the constitution until 31 March 2022.
A member or group of members of a company or registered scheme with at least 5% of the voting power can request to have an independent person appointed to observe and/or prepare a report on a poll conducted at a members meeting.	No equivalent.
Votes on resolutions which are set-out in the notice of a meeting of members of a listed company or listed registered scheme must be decided on by poll. A listed company's constitution is not capable of providing otherwise.	Votes on all resolutions at a meeting of a company or registered scheme's members are decided on by show of hands unless a company's constitution provides otherwise.

Detailed explanation of new law

Signing documents

1.12 Schedule 1 to the Bill allows certain documents to be signed in flexible and technology neutral manners. This allows for business communications to be conducted with greater ease and lower costs.

Technology neutral signing

1.13 Division 1 of Part 1.2AA of the Act sets out rules for how certain documents can be signed in a technology neutral manner.

1.14 Division 1 applies to:

- documents (including deeds) required or permitted to be signed by or on behalf of a company under sections 126 and 127 of the Act;
- documents required or permitted to be signed under the Act which relate to certain meetings or resolutions; and
- any document specified in the regulations.

[Schedule 1, item 1, section 110]

1.15 Division 1 does not limit the ways in which a person may sign a document (including a deed). A person may continue to sign documents in accordance with the meaning of ‘sign’ under the Act. *[Schedule 1, item 2, section 110]*

1.16 A person may sign documents to which Division 1 applies by signing a physical or electronic form of the document using the required method of signing under section 110A(2). The person may sign a physical form of the document by hand. *[Schedule 1, item 1, section 110A(1)]*

1.17 A person is taken to sign a document in accordance with Division 1 if:

- the method identifies the person and indicates the person’s intention in respect of the information recorded in the document; and
- the method used was either as reliable as appropriate for the purpose for which the information was recorded, or proven in fact to have fulfilled the functions described in the preceding point.

[Schedule 1, item 1, section 110A(2)]

1.18 These amendments mirror sections 10(1)(a) and (b) of the *Electronic Transactions Act 1999* and ensure documents can be signed in technology neutral manners whilst preserving the integrity of signature requirements. In establishing the person’s identity, the signature method need not be a unique identifier but rather it should identify the person signing the document. The intention of section 110A(2) for a physical signature is not to change any existing practices.

1.19 The information in respect of which a signatory is required to indicate their intention is all the information recorded in the document, apart from certain immaterial information about:

- other signatories or their signatures;
- any common seal which may be fixed to the document; or
- the signing of the document which arises in the normal course of communication, storage or display of the document.

[Schedule 1, item 1, section 110A(3)]

1.20 This ensures that minor differences that arise from the way a document is signed are disregarded and signatories do not need to repeatedly indicate their intention each time the document is signed.

1.21 To ensure documents can be signed in flexible manners, it is made clear that Division 1 does not require:

- persons to sign the same form of the document as another person;
- persons to sign the same page of the document as another person;
- persons to use the same method to sign the document as another person; or
- the document signed by a person to include all the information recorded in the document.

[Schedule 1, item 1, section 110A(4)]

1.22 Under Division 1, a person can sign documents in different capacities and in different ways for each capacity. If a person is required or permitted to sign a document in more than one capacity, then they are treated as a different person in each capacity they can sign in. This gives signatories extra flexibility in choosing the manner in which documents are signed. *[Schedule 1, item 1, section 110A(5)]*

1.23 Sections 127(3A), (3B) and (3C) of the Act are repealed. These sections contained rules about signatures under section 127 which have been superseded by Division 1. *[Schedule 1, item 10, sections 127(3A), (3B) and (3C)]*

Lodgement of documents

1.24 Documents lodged with ASIC or the Registrar are able to be signed in accordance with Division 1 of Part 1.2AA of the Act (concerning technology neutral signing).

1.25 If a document is required or permitted to be signed under the Act and has been signed in accordance with Division 1, then ASIC or the Registrar cannot refuse to receive or register the document on the mere basis the document has not been signed. *[Schedule 1, item 1, section 110B]*

Agents can make contracts and execute documents (including deeds)

1.26 Section 126 of the Act is amended to extend the functions of company agents and allow agents to exercise these functions more easily.

1.27 A company's power to make, vary, ratify or discharge a contract, or execute a document (including a deed), can be exercised by an individual acting with the company's express or implied authority and on behalf of the company. The power may be exercised without using a common seal. *[Schedule 1, item 3, sections 126(1) and (4)]*

1.28 The agent need not be appointed by deed. This abrogates the common law rule which requires an agent acting on behalf of a company to be appointed by deed in order for them to execute a deed on behalf of the company.¹ *[Schedule 1, item 3, section 126(3)]*

1.29 If the company's power is exercised under section 126 by signing a document, then Division 1 of Part 1.2AA of the Act may apply. Division 1 allows documents to be signed in flexible and technology neutral manners.

1.30 If a company executes a document through an agent under section 126, people will be able to rely on the assumptions in subsection 129(3) for dealings in relation to the company.

1.31 Section 126 does not affect the operation of other laws that requires a particular procedure to be complied with in relation to the contract or document, other than to the extent that the law is inconsistent with this section. *[Schedule 1, item 3, section 126(2)]*

Documents (including deeds) can be executed in technology neutral manners

1.32 Section 127 of the Act is amended to make clear that documents can be executed in flexible and technology neutral manners.

1.33 Division 1 of Part 1.2AA of the Act allows certain documents to be signed in flexible and technology neutral manners. Division 1 applies to documents (including deeds) that are required or permitted to be signed by a person under section 127 of the Act (concerning execution of documents by a company).

1.34 Legislative notes are inserted into sections 127(1), (2A) and (3) to make clear that the requirements to sign under those sections may be satisfied electronically under Division 1. *[Schedule 1, items 5, 6, 8 and 9, sections 127(1), (2A) and (3)]*

¹ See *Powell v London and Provincial Bank* [1893] 2 Ch. 555.

Fixing of common seals can be witnessed in technology neutral manners

1.35 Section 127(2A) is amended to provide that the fixing of a common seal to a document under section 127(2) can be witnessed electronically, provided:

- the person observes, by electronic means or by being physically present, the fixing of the seal; and
- the person signs the document; and
- a method is used to indicate that the person observed the fixing of the seal to the document.

[Schedule 1, item 8, section 127(2A)]

1.36 The requirement to sign the document may be satisfied electronically under Division 1 of Part 1.2AA of the Act (concerning technology neutral signing).

Sole director companies

1.37 Amendments are made to expand the statutory document execution mechanisms in section 127 of the Act to proprietary companies with a sole director and no company secretary.

1.38 For a proprietary company with a sole director and no company secretary, a document is validly executed if:

- the sole director signs the document; or
- the sole director witnesses the fixing of the company's common seal to the document.

[Schedule 1, items 4 and 7, sections 127(1)(c) and 127(2)(c)]

Entitlement to make assumptions

1.39 Section 129 of the Act is amended to account for the amendments to sections 126 and 127 of the Act discussed above. Section 129 contains the assumptions that persons are entitled to make in relation to dealings with a company.

1.40 As a result of the amendments to 126 of the Act, agents now have a specific set of assumptions which apply to dealings with them. A person may assume that anyone who is held out by the company to be an agent of the company:

- has been duly appointed; and
- has authority to exercise the company's powers described in subsection 126(1); and

- has authority to exercise the powers and perform the duties customarily exercised or performed by that kind of agent of a similar company.

[Schedule 1, items 11 to 14, sections 129(3) and (3A)]

1.41 A legislative note makes clear that agents need not be appointed by deed. This reflects the abrogation, by proposed section 126(3) of the Act, of any common law rule which requires company agents to be appointed by deed in order for them to execute a deed on behalf of the company. *[Schedule 1, item 14, section 129(3A)]*

1.42 Signatures under section 127 of the Act (concerning document execution by a company) may be done in accordance with Division 1 of Part 1.2AA of the Act (concerning technology neutral signing). Sections 129(5) and (6) of the Act are amended to account for this change. These sections concern the assumptions persons may make in relation to a company executing a document under section 127 of the Act.

1.43 A person may assume that a document has been duly executed by a company if:

- the document appears to have been signed in accordance with subsection 127(1); or
- the company's common seal appears to have been fixed to the document in accordance with subsection 127(2) and the fixing of the common seal appears to have been witnessed in accordance with that subsection and subsection 127(2A).

[Schedule 1, items 15 and 16, sections 129(5) and (6)]

1.44 Legislative notes are inserted into sections 129(5) and (6) to indicate that Division 1 may be relevant to any assumptions under the sections. *[Schedule 1, items 15 and 16, sections 129(5) and (6)]*

1.45 Sections 129(5) and (6) account for the amendments to section 127 which expand the statutory document execution mechanisms to proprietary companies with a sole director and no company secretary.

1.46 For the purposes of making the assumptions under sections 129(5) and (6) of the Act, a person may also assume that anyone who signs a document, or witnesses the fixing of the company's common seal to the document, and states next to their signature that they are the sole director and sole company secretary of the company occupies both offices. A similar assumption may be made in circumstances where the person is the sole director (and the company has no secretary). *[Schedule 1, items 15 and 16, sections 129(5) and (6)]*

Giving documents electronically

1.47 The Bill permanently allows a company or the responsible entity of a registered scheme to give meetings-related documents to a member electronically or in physical form.

1.48 It does this by establishing a general regime that covers the electronic communication of documents in a new Part in Chapter 1 of the Act. [*Schedule 1, item 1, Part 1.2AA*]

Documents covered by the regime

1.49 This new regime applies to any meetings-related document that a company or responsible entity is required or permitted to give, send or otherwise provide to a member. [*Schedule 1, item 1, sections 110C*]

1.50 Examples of such documents include (but are not limited to):

- notices of meetings;
- notices of a resolution or a record of a resolution;
- notices of a statement in relation to a meeting or a matter to be considered at a meeting; and
- minute books.

1.51 The intention is to expand the regime in the future to cover other types of documents as part of the ‘*Modernising Business Communications*’ reforms. Those proposed reforms will also allow electronic communications to be used to send documents from members to entities.

1.52 There is also a power for regulations to expand the list of documents that are covered by the regime. [*Schedule 1, item 1, section 110C(2)(c)*]

How a document may be sent

1.53 A document may be provided either by:

- sending the document in physical form;
- giving the document to the person by using electronic means (e.g., sending an email); or
- using electronic or traditional means to provide the person with details sufficient to allow them to view or download the document electronically (e.g., by giving them a card or sending them an email with a link to a website).

[*Schedule 1, item 1, section 110D(1)*]

1.54 However, a document can only be given electronically if it is reasonable to expect that the document would be readily accessible so as

to be useable for subsequent reference at the time that the document is given. This replicates the condition in the *Electronic Transitions Act 1999* that applies to the electronic provision of documents. [Schedule 1, item 1, section 110D(1)]

Elections by members

1.55 A member may elect to receive documents in physical form or electronically. Such an election may be made in respect of:

- all documents (a standing election)
- just specified classes or types of documents (a standing election); or
- a single specified document (a one-off request).

[Schedule 1, item 1, sections 110E, 110H and 110J]

1.56 A company or responsible entity of a registered scheme must take reasonable steps to provide the member with the document or class of documents in the form requested by the member (unless ASIC exercises its emergency powers and grants relief). A failure to do so is a strict liability offence with a penalty of 30 penalty units. [Schedule 1, items 1 and 50, sections 110F(1)-(3), 110G(1)-(3), 110H(4) and 110J(3) and Schedule 3]

1.57 The failure to provide a document in the required form is a different offence from the outright failure to provide a document in any form. The Act already includes offences for an outright failure to provide a document in any form, and for some documents, the penalties for these existing offences are greater than 30 penalty units.

1.58 A strict liability offence for failing to provide a document in the required form is appropriate as it ensures that ASIC can efficiently and expeditiously deal with low-level offending. This bolsters the integrity of the regime and encourages compliances. The strict liability offence meets all the conditions listed in the Attorney-General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

1.59 The failure to provide a document in the required form does not invalidate the giving of the document by the sender. A no invalidity clause is appropriate because there are serious consequences that attach to failing to provide some of the documents covered by the regime and these severe penalties are not appropriate in circumstances where the document was provided (but in the incorrect form). [Schedule 1, item 1 sections 110G(4) and 110F(4)]

1.60 Further detail on the process for making an election and ASIC's emergency powers is below.

Standing elections

1.61 A standing election is in place on the business day after it is received by the company and registered scheme (unless the election specifies a later start date). There is also a power for regulations to be made to specify a later date. *[Schedule 1, item 1, section 110E(3)]*

1.62 However, the company or registered scheme is not required to provide a document in hard copy if that document is required to be provided to the member within the next 10 business days. This ensures that the company or registered scheme has adequate time to print and post documents and allows enough time for the mail to reach the member. The delayed effect of an election also prevents a company or registered scheme from being in a position where it cannot comply with its obligation to notify members of a meeting within a stipulated timeframe. *[Schedule 1, item 1, section 110E(4)]*

1.63 A member who has elected to receive documents in hard copy may revoke their election. Such a revocation applies from the business day after it is received by the company or responsible entity. The company or responsible entity may send documents to the member electronically or in physical form from the date of the revocation. *[Schedule 1, item 1, section 110E(3)(b)]*

One-off request

1.64 A member may make a one-off request to receive a particular document electronically or in physical form. This request may be made within a reasonable time after receiving the document. *[Schedule 1, item 1, section 110H(1) and 110J(1)]*

1.65 If a member makes a request, the company or responsible entity must send the document in the requested form within 3 business days after receiving the request except in two situations. *[Schedule 1, item 1, sections 110H(2)(a), 110J(2)(b)]*

1.66 The first situation is where a request is made before the document is required or permitted to be sent. In this case, a company or registered scheme does not need to send the document sooner than required under the specific section in the Act that gives rise to the obligation. For example, if a member asks for their next meeting notice to be provided in physical form three months before the meeting, the company only needs to give them the notice of the meeting in physical form 21 days before the meeting as per section 252F. *[Schedule 1, item 1, section 110H(2)(b), 110J(2)(b)]*

1.67 The second situation is where ASIC exercises its existing powers to grant relief in section 1345 of the Act. *[Schedule 1, item 1, section 110H(1)(d), 110J(1)(d)]*

ASIC's relief powers

1.68 *Treasury Laws Amendment (2021 Measures No. 1) Act 2021* gave ASIC a new emergency relief power in section 1345. This power allows ASIC to relieve an individual or class of entities from providing a document in physical form or extend the timeframe for providing the document. The power can only be exercised if ASIC considers that it may not be reasonable to expect the entity to comply with the law due to circumstances beyond the entity's control.

1.69 This Schedule amends this power so that ASIC can also relieve an individual or class of entities from providing a document in electronic form. [*Schedule 1, items 42-44, sections 1345(3A), (5) and (6A)*]

1.70 It also clarifies that the power applies to situations where the Act uses a synonym for 'give', such as 'send'. [*Schedule 1, items 42, 45 46, sections 1345(3), (11) and (12)*]

1.71 The power is designed to be used only in exceptional circumstances, such as where an IT failure makes it unreasonable to expect a sender, or a class of senders, to provide an electronic document. Unless revoked earlier, an ASIC determination is repealed at the end of 12 months after the day on which it commences.

Notification requirements

1.72 Members must be notified of their right to elect to receive a document in a specified form (physical form or electronic form), or request that a particular document be provided in a specified form. The company must take reasonable steps to provide this notice every time a document is sent to the member. It could take the form of a separate notice or text that is included in the document itself. [*Schedule 1, item 2, sections 110K(1)-(3)*]

1.73 A failure to notify a member of their right to make an election is a strict liability offence carrying a penalty of 30 penalty units. This is the same as the penalty that applies if a company does not notify its members of their right to receive an electronic or hard copy of the annual report. [*Schedule 1, items 1 and 50, sections 110K(4) and Schedule 3*]

1.74 A strict liability offence is appropriate in this circumstance as it is necessary to strongly deter companies or registered schemes from failing to advise members of their right to elect to receive a hard copy. The imposition of a strict liability offence reduces non-compliance by ensuring that ASIC can efficiently and expeditiously deal with low-level offending, thereby bolstering the integrity of the regime.

1.75 The strict liability offence meets all the conditions listed in the Attorney-General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. It does not exceed 300 penalty units for a body corporate and preserves the defence

of honest and reasonable mistake of fact to be proved by the accused on the balance of probabilities.

Elections made before commencement

1.76 If a member has notified a company or responsible entity that they wish to receive documents in physical or electronic form prior to the commencement of the Bill then that member will be taken to have made an election for the purposes of the new law and will not need to re-make the election. This effectively converts any elections made under a contract in a statutory election under the Act. [*Schedule 1, item 49, sections 1687C and 1687D*]

1.77

Other consequential amendments

1.78 The Bill also makes the following consequential amendments to facilitate the giving and signing of documents electronically:

- section 249J is amended to ensure that members can be notified of meetings electronically; [*Schedule 1, items 20-22, section 249J*]
- the rules in relation to the receipt of proxy documents by companies and responsible entities for registered schemes are amended to ensure that they continue to operate effectively; [*Schedule 1, items 24 and 34, sections 250B(3) and 252Z(4)*]
- the rules relating to when notices of meetings are taken to be received are updated to state that electronic notices are taken to be received on the business day after they are sent; [*Schedule 1, item 29-31, sections 252G(3)(c) and 252G(4)*]
- the heading of Part 2G.5 is updated to more accurately reflect the contents of the Part; and [*Schedule 1, item 37, heading to Part 2G.5*]
- Divisions 1, 2 and 3 of Part 2G.5 is repealed. [*Schedule 1, item 38, Divisions 1, 2 and 3 of Part 2G.5*]

Hybrid meetings of shareholders of a company or registered scheme

1.79 The Bill also makes permanent changes to clarify that companies and registered schemes can use technology to hold meetings.

How meetings may be held

1.80 Companies may hold a meeting at:

- one or more physical locations (a physical meeting);
- one or more physical locations and using technology to allow persons to attend virtually (a hybrid meeting); or

- using technology to allow members to attend virtually if this is expressly permitted or required by the constitution (a wholly virtual meeting).

[Schedule 1, items 23 and 32, sections 249R and 252P]

1.81 The Bill also clarifies that companies registered as bodies corporate under the *Australian Charities and Not-for-profits Commission Act 2012* may hold physical, hybrid or wholly virtual meetings. *[Schedule 1, item 2, subsection 111L(1)(table item 9, column 1)]*

1.82 The new law is not prescriptive about how a meeting should be conducted. It does not mandate a particular format for a meeting or a particular way in which a show of hands or a vote on a poll is to be conducted. It recognises that the meeting rules apply to a broad range of companies, from small not-for-profit companies to large listed companies, and allows each company to select the format for the meeting that is most appropriate for that company.

1.83 All persons participating in the meeting (whether by being physically present or using electronic means) are taken to be ‘present’. This means that all persons attending virtually at the time that the quorum is called must be counted for the purposes of determining whether there is a quorum. *[Schedule 1, items 23 and 32, sections 249RA(3) and 252PA(3)]*

1.84 The Bill also sets out the place and time of a meeting. These rules are summarised below:

Table 1.1: Place and time of different types of meetings

<i>Type of meeting</i>	<i>Place of meeting</i>	<i>Time of meeting</i>
Physical meetings and hybrid meetings	Physical venue for the meeting (or if there is more than one physical venue, the main venue as set out in the meeting notice)	Time at the physical venue or main physical venue
Wholly virtual meetings	Registered office of the company or responsible entity	Time at the registered office

[Schedule 1, items 23 and 32, sections 249RA(1)-(2) and 252PA(1)-(2)]

Reasonable opportunity to participate

1.85 Regardless of how a meeting is conducted, the members as a whole must be given a reasonable opportunity to participate. *[Schedule 1, items 23 and 32, sections 249S(1) and 252Q(1)]*

1.86 This requirement has several components.

1.87 First, for a physical meeting or a hybrid meeting, the physical venue for the meeting must be reasonable. If there is more than one physical venue, only the main physical venue (as set out in the meeting notice) needs to be reasonable. [*Schedule 1, items 23 and 32, sections 249S(4)-(5) and 252Q(4)-(5)*]

1.88 The reasonableness of a physical venue could be determined by considering where the company or registered scheme is registered, where the members reside or where the directors are located.

1.89 Second, the meeting must be held at a reasonable time. The reasonableness of the time for a physical or hybrid meeting is determined by having regard to the place at which the meeting is held (that is, it may not be the same as the time that the meeting is deemed to be held as per Table 1.1). A wholly virtual meeting is held at a reasonable time if that time would have been reasonable at any physical venue where it would have been appropriate to hold the meeting. [*Schedule 1, items 23 and 32, sections 249S(3) and 252Q(3)*]

1.90 Third, reasonable technology must be used to connect more than one physical venue or facilitate virtual attendance. For instance, the technology used to facilitate virtual attendance would need to be sufficient to allow members to vote. The directors should also consider whether the technology needs to give members as a whole the right to observe the directors or the main proceedings. [*Schedule 1, items 23 and 32, sections 249S(6)-(7) and 252Q(6)-(7)*]

1.91 The new law also makes explicit that the technology used to facilitate virtual attendance must allow members to exercise any pre-existing right that they may have to ask questions or make comments (such as under sections 250S and 250T) both verbally and in writing. For example, the company could satisfy this requirement by offering members both the opportunity to ask questions orally by dialling into a phone hook-up and the opportunity to type their questions into a chat function. To avoid doubt, this provision does not create any new right for members to ask questions or comments, but simply relates to the manner in which any pre-existing rights can be exercised. [*Schedule 1, items 23 and 32, sections 249S(7) and 252Q(7)*]

1.92 Prior to these amendments, sections 249R, 249S, 252P and 252Q included a requirement for meetings to be held at a reasonable time and place, and for reasonable technology to be used to connect more than one physical venue. The new law clarifies that these rights are part of the general right to give the members as a whole a reasonable opportunity to participate.

1.93 These requirements are not an exhaustive list of what is involved in giving the members as a whole a reasonable opportunity to participate. [*Schedule 1, items 23 and 32, sections 249S(2) and 252Q(2)*]

1.94 A Court may declare that a meeting is invalid if the members as a whole do not have a reasonable opportunity to participate and the Court is of the opinion that a substantial injustice has occurred and cannot be remedied by a Court order. *[Schedule 1, item 41, section 1322(3A)]*

1.95 Consequential amendments have also been made to ensure that there are no ongoing changes to the requirements relating to using technology in directors' meetings. *[Schedule 1, item 1, section 248D]*

Review

1.96 The provisions relating to meetings and electronic communication must be reviewed no later than the earliest practicable day after the end of two years after this Bill commences. The review of different provisions can be conducted at different times. *[Schedule 1, item 49, sections 1687E(1)-(2) and (4)]*

1.97 A written report must be prepared and tabled in Parliament within 15 sitting days after the report is given to the Treasurer. *[Schedule 1, item 49, sections 1687E(3) and (5)]*

Requests for independent reports on polls

1.98 The Bill provides that certain members of listed companies and registered schemes may request that the company or responsible entity appoint an independent person to observe and/or prepare a report on the conduct and validity of the polls at the meeting of the members. *[Schedule 1, item 39 section 253T]*

1.99 A member or group of members with at least 5 per cent of the voting power may request that an independent person be appointed. The request must be made in writing and specify the meeting to which it relates. If the request relates to the observation of a poll then the request must be made no later than five business days before the meeting. If the request relates to a report on a poll then the request can be made up to five business days after the meeting. *[Schedule 1, item 39, sections 253U(1)-(2), 253V(1)-(2), 253U(1)-(2) and 253V(1)-(2)]*

1.100 The company or responsible entity of a registered scheme must take reasonable steps to appoint an independent person after receiving the request. If the request is in relation to the observance of a poll then the company or responsible entity should take reasonable steps to ensure that the independent person observes the poll. *[Schedule 1, item 39, sections 253U(3), 253V(4) and (5), 253W(3) and 253X(4)]*

1.101 There is a presumption that the auditor or registry service provider of the company or registered scheme is an independent person. However, this presumption would be rebutted if the poll was in respect of an issue that related to the auditor or registry service provider, such as a

vote to remove the person. [Schedule 1, item 39, sections 253U(6), 253V(7), 253W(6) and 253X(7)]

1.102 The company or responsible entity of the registered scheme is responsible for paying any fees associated with appointing the independent person. [Schedule 1, item 39, sections 253U(5), 253V(6), 253W(5) and 253X(6)]

1.103 It is expected that where a company or registered scheme has an independent person observe and/or prepare a report on polls as part of their standard meeting practices this will satisfy these requirements and there will be no additional burden on these entities. Similarly, if a scrutineer is appointed under Chapter 14 of the ASX Listing Rules and a request is made by a member or group of members it is expected that the scrutineer and the independent person would be the same person and only one report would need to be prepared.

1.104 An independent person may request information from the company or responsible entity if they reasonably believe that the information is necessary for the preparation of the report. The company or registered scheme must provide the independent person with the information that the independent person requests. As the Bill does not alter any fundamental common law rights, a company or responsible entity will not be required to provide the independent person with the information if the document is privileged or would incriminate its directors. [Schedule 1, item 39, section 253Y]

1.105 After the report has been completed the company or responsible entity must make the report available to the members within a reasonable time. In line with the requirements for keeping a record of meeting minutes, the company or responsible entity must keep a record of the report. [Schedule 1, item 39, sections, 253V(4), 253X(4) and 253Z]

1.106 A company or responsible entity commits a strict liability offence if it breaches its obligations in relation to taking reasonable steps to appoint an independent person, provide access to information, publish the report or keep a record of the report. The maximum penalty for these offences is 40 penalty units. Strict liability offences are appropriate in this circumstance, as it is necessary to strongly deter misconduct that can have serious detriment for members. [Schedule 1, items 39 and 50, sections 253U(4), 253V(5) 253W(4), 253X(4) and (5), 253Y(3) and (4) and Schedule 3]

1.107 Strict liability offences reduce non-compliance, which bolsters the integrity of the regulatory regime enforced by ASIC. Strict liability is particularly beneficial to regulators as they need to deal with offences expeditiously to maintain public confidence in the regulatory regime.

1.108 The strict liability offences in this Schedule meet all the conditions listed in the Attorney-General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement*

Powers. For example, the fines for the offences do not exceed 60 penalty units for persons other than a body corporate or 300 penalty units for a body corporate. The application of strict liability, as opposed to absolute liability, preserves the defence of honest and reasonable mistake of fact to be proved by the accused on the balance of probabilities. This defence maintains adequate checks and balances for persons who may be accused of such offences.

Voting on substantive resolutions

1.109 The Bill also provides that votes on resolutions which are set out in a meeting notice paper for a meeting of a listed entity's members must be conducted by way of a poll. These resolutions are usually substantive in nature and polls are more accurate, reliable and better reflects the voting power of all shareholders than votes which are conducted by a show of hands. A resolution will not be on a meeting notice paper if it is procedural in nature. *[Schedule 1, items 27 and 35, sections 250J(1), 250JA, 253J(1A) and 250M]*

1.110 This requirement is not a replaceable rule and will need to be complied with even if there is a contrary clause in the company's constitution.

1.111 The default method for conducting votes at a meeting has been removed. The replaceable rule now provides that a resolution may be decided on a show of hands if a poll has not been demanded. This is no longer a mandatory requirement that applies for all companies that have adopted the replaceable rule and for all ordinary resolutions put to vote at a meeting of a scheme's members. *[Schedule 1, item 36, sections 250J(1) and 253J(2)-(2A)]*

1.112 These changes implement recommendation 6.4 of the 4th edition of the ASX Corporate Governance Principles and Recommendations. This recommendation was made on the basis that a poll is the only way that the chair of a meeting can ascertain the true will of all security holders. The ASX recommendation also notes that votes which are determined by a show of hands fail to uphold the 'one security, one value' principle.

1.113 Consequential amendments have also been made to:

- extend the obligation on companies to record the details of members and proxies voting on polls to all polls which are required, whether demanded or on a meeting notice paper; *[Schedule 1, items 17-18, sections 225 and 201R]*
- ensure that proxies with 2 or more appointments who have received conflicting instructions on how to vote from appointees do not vote by show of hands; and *[Schedule 1, item 25, section 250BB(1)(b)]*

- preserve the rules for when a chair is deemed to have been appointed as a proxy for a resolution. [Schedule 1, item 26, sections 250BC(c)]

Application and transitional provisions

1.114 Schedule 1 implements the changes following the commencement of the *Treasury Laws Amendment (2021 Measures No. 1) Act 2021*.

1.115 It makes permanent the changes in that Act by repealing the sunset provision and then making the necessary consequential amendments. [Schedule 1, item 47, note to section 1679A and item 48, sections 1679E and 1679F]

1.116 The changes do not apply to meetings if:

- the notice of the meeting is given before commencement; and
- the meeting is held before the expiration of the temporary relief in *Treasury Laws Amendment (2021 Measures No. 1) Act 2021* on 1 April 2022. [Schedule 1, item 49, sections 1687B]

1.117 This ensures that companies and registered schemes that have sent meeting notices before the commencement of this Bill but after the commencement of *Treasury Laws Amendment (2021 Measures No. 1) Act 2021* can continue to hold wholly virtual meetings until the date when those temporary changes were due to sunset. [Schedule 1, item 49, sections 1687 and 1687A]

1.118 The amendments to sections 127 and 129 of the Act by Schedule 1 to the Bill, and the insertion of Division 1 of Part 1.2AA (concerning technology neutral signing) into the Act by Schedule 1 to the Bill, apply in relation to the signing of a document (including a deed) on or after the commencement of Schedule 1 to the Bill. [Schedule 1, item 49, section 1687A]

Chapter 2

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Treasury Laws Amendment Bill 2021: Use of technology for meetings and related amendments

2.1 This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

2.2 The Bill allows companies and registered schemes to hold hybrid meetings (which give shareholders the option of either attending in person or remotely), to sign and execute certain corporate documents in flexible and technology neutral manners, and provide meetings related documents to members on a permanent basis.

Human rights implications

2.3 The Bill does not engage any of the applicable rights or freedoms.

Conclusion

2.4 The Bill is compatible with human rights as it does not raise any human rights issues.

Attachment A Regulation Impact Statement – Electronic document execution and meeting materials

BACKGROUND

On 5 May 2020, the Treasurer used his temporary instrument making power to issue a determination that temporarily allowed companies to satisfy legal obligations concerning meetings and document execution electronically. This determination supported companies so they could continue to operate while still meeting social distancing requirements brought about by the Coronavirus crisis. The temporary reforms allow companies and their officers to:

- validly execute documents electronically;
- hold wholly virtual meetings; and
- provide meeting-related materials electronically.

Due to the ongoing challenges posed by the Coronavirus crisis, the Treasurer subsequently remade the determination to extend the relief until 21 March 2021. On 10 August 2021, the Government renewed the temporary measures which will now expire on 31 March 2022.

In the meantime, the Government announced as part of the Digital Business Plan in the 2020-21 Budget, that it would consult on making permanent reforms. Following consultation, on 17 February 2021, the Government announced that it would also progress:

- permanent reforms that will facilitate companies and their officers to validly execute documents and send meeting-related materials electronically; and
- conduct a 12-month opt-in review of annual general meetings to enable a proper assessment of the shareholder benefits of technology.

The permanent reforms in respect of document execution and sending meeting-related materials are the subject of this Regulation Impact Statement.

Following the review of annual general meetings, a separate Regulation Impact Statement will be drafted in respect of meetings, covering the rules that are being consulted on as part of this exposure draft legislation, drawing on the information obtained as part of the review.

What is the policy problem you are trying to solve?

Prior to the temporary determination, companies were restricted in their ability to use different technologies to comply with the requirements related to document execution and meeting documents, respectively found under section 127 and Chapter 2G of the *Corporations Act 2001*.

Valid document execution requirements

Section 127 of the *Corporations Act 2001* provides a process for companies to validly execute a document containing legal rights and/or obligations, such as a contract or a deed. It provides that a company will have validly executed the document if two directors of a company, a director and secretary of a company or a sole director for a proprietary company sign the document, or witness the affixation of the common seal of the company to the document.

The purpose of prescribing this process is to provide certainty for counterparties transacting with companies of their legal rights and obligations in respect of a company and to set expectations that companies set up internal corporate governance mechanisms to ensure that documents are only executed when a company intends be bound by legal rights and obligations.

The current process does not align with the Government's plans to enable businesses to take advantage of digital technologies. To be able to rely on section 127 to validly execute documents, it is generally taken that the physical presence of company officers to sign a paper document using wet ink or to witness the affixation of the common seal is required. This requires company officers to physically meet or for companies to pay for the document to be transported in hard copy. These costs are incurred unnecessarily, because there is technology available that allows company officers to sign or witness documents without meeting or transporting a hard copy document, and it is well within the capabilities of any company to ensure that these technologies are not used where a company does not intend for rights and obligations to be legally binding.

Meeting-related documents requirements

Chapter 2G of the *Corporations Act 2001* requires companies to provide a series of documents to shareholders that are related to meetings. These include notices of the meeting, resolutions and member statements, proxy forms and when requested, minute books.

The purpose of these requirements is to encourage shareholder engagement with the operations of the companies in which they are invested.

Again, these requirements do not align with the Government's plans to enable businesses to take advantage of digital technologies. If a company must provide

notices of meetings and other meeting-related material via post, unless a member has nominated an electronic address, they cannot take advantage of modern technologies that could be more cost efficient for sending meeting notices than postal services.

This means that companies are unnecessarily incurring significant costs, given how widespread the use of technology is:

- In its 2018-19 Communication Report, the Australian Communications and Media Authority highlight the widespread use and growth of electronic communication, stating that approximately 91 per cent of Australians have home internet connection and over 83 per cent of Australians own a smart phone.
- This is reflected among the shareholding population – in consultation, one major share registry indicated that over 90 per cent of their interactions with shareholders are via digital channels, not telephone or mail, and other industry data suggests that voting in respect of companies in the ASX50 and ASX300 is primarily executed digitally (54 per cent and 60 per cent respectively).

In previous consultations, industry provided the following examples to illustrate this point:

- an ASX10 company that sent 600,000 notifications to advise shareholders that meeting materials (including proxy forms) were available online, and only received 100 requests to send proxy forms via post.
- Link Group indicated that the average return rate of proxy forms sent by post, in 2019 was 3.87 per cent, despite the inclusion of business reply envelopes.
- an ASX20 company with a 35 per cent retail shareholder base, who reported that out of 60,880 hard copy forms that were posted, only 2,381 proxy forms were returned by mail: and
- at least 20,000 notices of meeting and other documents are being posted to addresses that are incorrect, and therefore are incurring these costs even though shareholders are not reading this material.

This indicates that companies are incurring costs associated with posting hard copy materials, while only engaging a relatively small minority of shareholders.

Why is government action needed?

The social distancing requirements because of the Coronavirus outbreak has caused companies to invest in their technological capabilities. The public has also mirrored this investment in digital literacy, to stay in touch with their

family, friends, and workplaces – and the companies in which they have an interest, as facilitated by the temporary reform.

The main objective of the Government's reforms is to ensure that where substantive statutory requirements can be met using digital technologies, the law allows companies and their officers to satisfy the statutory requirements for legal purposes.

As the conditions of validly executing documents and obligations to send meeting-related materials are articulated in statute, they can only be amended through Government action to amend legislation.

What policy options are you considering?

The Government sought informal feedback on the temporary reforms from industry groups, companies, share registries, the legal profession and investor representatives and conducted a three-week public consultation on the proposed options. This consultation process has informed the identification of the following options:

1. Continue with the law as it stood prior to the introduction of temporary reforms (status quo).
2. Make permanent the temporary reforms as is, which will allow the use of technology to meet legal requirements in respect of document execution and send meeting-related materials.
3. Make permanent the measures in the temporary reforms with some modifications to improve the operation of the reforms.

Option 1 – Maintain the status quo

Option 1 involves companies adhering the provisions under the *Corporations Act 2001* that were in place prior to the temporary determination.

In relation to document execution, this means that counterparties to a transaction may not be able to legally rely on the rights and obligations contained in a document if a company has used technology to execute it. Section 127 only provides a mechanism for valid document execution if:

- the document is physically signed (wet ink signature) by either two directors of a company, a director and secretary of a company or a sole director for a proprietary company: or
- the common seal of the company is fixed to the document and the fixing of the seal is physically witnessed (wet ink signature) by either two

directors of a company, a director and secretary of a company or a sole director for a proprietary company.

In relation to meeting-related materials, this means that unless a shareholder has consented to receiving documents (such as meeting notices, and certain resolutions and statements) electronically, a company can only satisfy regulatory requirements by posting hard copies. Where required, they must also sign a hard copy of these documents using wet ink. They must also keep, retain, and provide minute books in hard copy.

Option 2 – Make permanent the temporary reforms

Option 2 involves permanently implementing the temporary reforms introduced on 5 May 2020, in respect of sending meeting materials and document execution.

These temporary reforms allowed company officers to validly execute a document, by signing it or a copy of the document electronically. It does not allow company officers to use technology to validly execute a document, by witnessing the affixing of the common seal of the company.

These temporary reforms also allowed companies and their officers to satisfy statutory requirements to send meeting-related materials electronically, regardless of whether shareholders previously provided consent. However, the temporary reforms did not allow meeting minutes to be kept, retained or provided electronically.

Option 3 – Make permanent the temporary reforms with modifications to improve the operation of the reforms

Option 3 has been developed following feedback from consultation with stakeholders with personal experience of the temporary reforms. As with Option 2, it involves modifying the requirements in the *Corporations Act 2001*, in respect of the execution of company documents and meeting-related materials.

In respect of execution of company documents, reforms will be expanded to explicitly:

- clarify that companies and their officers (including company agents) will be able to create and sign deeds, as well as other documents, electronically; and
- allow the use of technology to execute documents with a common seal electronically, including by allowing witnesses to validly witness the fixing of a company seal electronically.

In relation to the requirements in respect of meetings, the measures differ from the temporary reforms, in that they:

- require companies to provide hard or electronic copies of meeting materials to shareholders upon request, or through an opt-in mechanism;
- clarify that alternative technologies may be used to sign all materials related to a meeting; and
- allow documents such as meeting minutes to be kept, retained, and provided electronically.

The legislation also includes reforms that expands the statutory validation for the execution of company documents to cover circumstances where these documents are executed by sole directors who are not also appointed as the company secretary.

This option also legislates a review clause which requires the Government to review the effectiveness of this legislation as soon as practicable, two years after its commencement.

What is the likely net benefit for each option?

Option 1 – Maintain the status quo

This option does not achieve the Government’s objectives of ensuring that where substantive statutory requirements can be met using digital technologies, the law allows companies and their officers to satisfy the statutory requirements for legal purposes.

Document execution

Without reforms, companies must generally execute documents in person using wet-ink on hard copies. Accordingly, company officers will have to execute documents in hard copy, with a wet-ink signature, in person. Companies will continue to incur the costs associated with directors having to travel locally, from interstate or overseas and the printing costs to execute a document in person. There may also be postal delays that may impose on the documents being executed in a timely manner.

Meeting-related materials

Companies must also post meeting-related materials where shareholders have not consented to receiving documents electronically; keep, retain, and provide meeting minutes in hard copy and sign meeting-related documents using wet ink on hard copies.

The costs of posting meeting materials are significant. According to industry estimates, around 50 per cent of a company’s shareholder base have actively

lected to receive notices of meeting via email. For the remaining portion of shareholders, companies are required to send a paper notice of meeting, and meeting materials by post. This requirement is costly and unnecessary for companies.

For example, of the 600,000 notifications that were sent to shareholders from an ASX10 company advising the availability of the notice of meeting and proxy form online, only 100 requested hard copies. Industry estimates suggest that the costs could range between \$250,000 and \$1,000,000 per meeting. One industry source suggested that the ASX20 alone spends around \$13 million on mail-outs per AGM season. For example, Telstra printed and posted approximately 650,000 hard copy notices of meetings for its 2019 AGM, which was estimated to cost between \$800,000 and \$1,000,000. AMP Limited estimated the cost in printing and posting notices of meeting is approximately \$400,000 per year. These costs do not include labour costs.

Smaller companies, including not-for-profits, also incur significant costs. An estimate from one club suggested that they spent approximately \$70,000 on posting paper notices to its 41,000 members per year. As post becomes less common in society overall, in turn, printing and postage costs are increasing.

Option 2 – Make permanent the temporary reforms

Stakeholders generally welcomed the temporary reforms in the context of the Coronavirus crisis. However, as a permanent measure, stakeholders suggested that this option may not fully achieve the Government’s objectives of ensuring that where substantive statutory requirements can be met using digital technologies, the law allows companies and their officers to satisfy the statutory requirements for legal purposes.

Document execution

This option permits a more effective use of technology, particularly if the trend of working from home continues. As a result of the Coronavirus crisis and social distancing measures, companies have invested significantly in their IT infrastructure to facilitate their staff to work from home. Making permanent changes to allow valid document execution to occur electronically will not require staff to travel to work or between offices to execute documents.

However, further flexibility could be provided for companies to use technology. This option does not allow companies to execute documents using the common seal of the company, which may be preferable to the signature method. In addition, stakeholders suggested that clarification as to whether the legislative reforms applied to deeds, would further support for companies to use technology.

Some stakeholders raised concerns about fraud in using electronic means to execute documents. In theory, a person may execute a document without appropriate authority. However, whether this is done electronically or physically, such an execution will not be valid and could entail criminal consequences depending on the circumstances. However, initial stakeholder feedback has indicated that the same methods used to confirm that a company officer has in fact physically signed or witnessed the application of a seal to a document under current law, can be used to confirm that a company officer has done so electronically. Furthermore, the use of electronic technologies is also more likely to leave an audit trail if need be.

Methodology used to estimate regulatory burden for document execution – Option 2

To determine the costs associated with executing a document in person, the following assumptions have been incorporated into the methodology:

- An estimate of 918,000 active companies operate in Australia.
- On average, 50 per cent of businesses execute one document every fortnight.
- If directors are working from home or in disparate locations, two directors are required to commute one hour each to execute a document at the same location.
- OBPR work-related labour cost of \$73.05 per hour.
- Time cost of printing and other mailroom activities involved in sending a letter is approximately two minutes.
- Printing and postal costs per actual letter are respectively \$1.50 and \$2.20.

As for electronic document execution, the following assumptions have been incorporated into the methodology:

- Sophisticated web-based signing services are an optional extra which are not required by companies that wish to electronically execute documents
- 50 per cent of directors will use electronic document execution methods.
- 50 per cent of directors will be working from home or in different offices (and therefore are required to travel to execute documents); over a 10-year period, this number would fall to 25 per cent.
- It takes one minute to send an electronic document.
- The directors who work from home will save on postal costs to send documents between companies as well as travel costs.
- The directors who will execute documents from their workplace will save only on postal costs.

The estimated average regulatory saving as a result of allowing electronic document execution is estimated at **\$392 million** a year.

Meeting-related materials

This option permits companies to electronically satisfy requirements to provide meeting-related materials, without shareholders having positively elected to receive electronic documents. This reduces regulatory costs, as the costs of sending electronic notices is much cheaper than the post. One estimate suggested that it costs approximately \$0.045 per electronic notice, compared to \$2.20 per posted notice.

However, it does not require companies to provide meeting materials in hard copy, nor does it allow companies to use technology in respect of signing meeting-related materials, and keeping, retaining, or providing meeting minutes. As such, there is potential for there to be even more effective uses of technology than this option permits.

Methodology used to estimate regulatory savings for meeting-related materials – Option 2

Regulatory savings come from companies signing and sending documents electronically.

Based on the range of industry estimates provided through consultation, the following assumptions were made to determine the regulatory savings of allowing legal requirements in respect of sending meeting-related materials to be met using technology:

- Listed companies will be able to email meeting materials to around half of the approximately 50 per cent of 20 million shareholders per year.
- OBPR work-related labour cost of \$73.05 per hour.
- Time cost of printing and other mailroom activities involved in sending a letter is approximately two minutes.
- Printing and postal costs per actual letter are respectively \$1.50 and \$2.20.
- All shareholders who haven't provided an email address receive a postcard with directions to access meeting materials online.

To permanently allow companies to send meeting-related materials would result in an average regulatory saving of approximately **\$20 million a year for businesses**. The regulatory savings are calculated as an average over 10 years.

Overall, Option 2 results in an average saving of **\$412 million per year**. This is a result of combining the savings associated with electronically sending

meeting-related materials (\$20 million) and electronic document execution (\$392 million).

Regulatory burden estimate (RBE) table

Average annual regulatory costs (relative to status quo)				
Change in costs (\$ million)	Business	Community organisations	Individual	Total change in cost
Total, by sector	-412	0	0	-412

Option 3 – Making permanent the temporary reforms with modifications to improve the operation of the reforms

This option goes further to achieve the Government’s objectives of ensuring that where substantive statutory requirements can be met using digital technologies, the law allows companies and their officers to satisfy the statutory requirements for legal purposes.

Document execution

In relation to document execution, companies and shareholders will continue to have the advantages of the measures related to document execution outlined under Option 2.

However, Option 3 provides further flexibility and clarity as to the methods that companies may use to execute documents, which will further reduce regulatory burden. This option clarifies that deeds can be validly executed electronically, and deem documents as validly executed even if the witnessing of a common seal of the company occurred via electronic means. This provides companies a greater range of choices to validly execute documents, so that they can choose the most efficient one, and whatever they chose, counterparties can rely on the rights and obligations in the executed document.

Methodology used to estimate regulatory savings for document execution – Option 3

The same assumptions as in Option 2 have been used for Option 3 about the number of companies and the postal costs.

The new assumption included in the methodology are as follows:

- On average, businesses execute one deed every year.
- The regulatory savings for deeds are calculated using the same method for the electronic execution of documents. By allowing for electronic execution of deed there is an average regulatory saving of \$30 million per year (over 10 years).
- There are an estimated 70,000 active proprietary companies with a sole director and no company secretary. Assumes 50 per cent of directors have already provided for electronic execution in their constitution and do so already.
- The estimated savings do not include savings associated with being able to execute documents with a common seal by allowing witnesses to validly witness the fixing of a company seal electronically. It is assumed that if companies choose an electronic method, they will choose the more efficient between the signature and common seal methods.

Combining the regulatory savings relating to electronic execution of documents from the temporary measures with the new regulatory savings results in an overall regulatory saving of **\$430 million per year²** (over 10 years).

Meeting-related materials

The differences between this option and Options 1 and 2, means that shareholders will have substantively the same legal rights, in terms of receiving meeting materials. This option provides a means for shareholders to opt-in to obtain hard copies of meeting-related materials.

This option also provides additional opportunities for companies to use technology because it:

- require companies to provide hard or electronic copies of meeting materials to shareholders upon request, or through an opt-in mechanism;

² Numbers may not add due to rounding.

- clarifies that alternative technologies may be used to sign materials related to a meeting; and
- allows documents such as meeting minutes to be kept, retained, and provided electronically.

These opportunities will allow companies to save costs associated with meeting these regulatory requirements.

This option also requires a post-implementation review in two years. This will provide the opportunity to assess the effectiveness of these reforms and to determine whether they are operating as intended.

These savings will be offset by the costs associated with mandating companies to provide hard copies of meeting-related materials to shareholders that make this request.

Methodology used to estimate regulatory savings for meeting-related materials – Option 3

The same assumptions as in Option 2 are used for Option 3 in regards to sending meeting-related materials, as well as the following new assumptions in the methodology:

- A company sends hard copies to 0.02 per cent of its shareholders that elect to receive hard copies, after they receive notification that materials are available online.
- Two documents per meeting must be signed.
- It takes one director one hour to travel to sign hard copy documents.

The overall regulatory saving for this option is around **\$20 million per year** (over 10 years).

Overall, Option 3 results in an average saving of **\$450 million per year**. This is a result of combining the savings associated with electronically sending meeting-related materials (\$20 million) and electronic document execution (\$430 million).³

³ Numbers may not add due to rounding.

Regulatory burden estimate (RBE) table

Average annual regulatory costs (relative to the status quo)				
Change in costs (\$ million)	Business	Community organisations	Individual	Total change in cost
Total, by sector	-450	0	0	-450

Who did you consult and how did you incorporate their feedback?

Prior to the Coronavirus crisis, the Government committed to improving the technological neutrality of regulation. In July 2019, the Prime Minister tasked the Assistant Minister to the Prime Minister and Cabinet with establishing the Deregulation Taskforce and invigorating the Government’s New Deregulation Agenda. On 15 June 2020 the Government announced the next priority areas for the Deregulation Taskforce which included modernising business communications. This served as an impetus for stakeholders to provide feedback on priority reforms to make legislation technology neutral – including making permanent changes to regulatory requirements in respect of meeting-related materials and document execution.

As a result of the Treasurer using his temporary power to introduce temporary reforms during the Coronavirus outbreak, stakeholders have had an unprecedented opportunity to test the operation of legislative amendments since its introduction on 5 May 2020. Companies and shareholders alike have been taking advantage of these reforms, sending meeting materials and executing documents electronically.

Considering the unprecedented opportunity to test the operation of legislative amendments prior to making a decision about permanent law reform, the Government has considered submissions received through a range of avenues, including public consultation on the exposure draft legislation.

The first avenue involves Treasury obtaining data and information on the substantive effect of the temporary reforms from stakeholders and analysing confidential and public communications from industry and investor stakeholders. As a part of this process, Treasury analysed 17 submissions and reports from different stakeholders, and spoke with a range of stakeholders.

The second avenue involved Treasury drawing on submissions and testimony from industry and investor stakeholders from the Senate Select Committee on

Financial Technology and Regulatory Technology.⁴ There were six relevant submissions, and eight witnesses at hearings, which provided relevant testimony. The Committee released its first interim report in September 2020 which included three relevant recommendations: (1) that companies communicate with shareholders electronically by default with shareholders to receive paper-based communication on an opt-in basis; (2) electronic execution and (3) witnessing of documents be allowed.

The third avenue was through public consultation on exposure draft legislation from 19 October to 6 November 2020. Treasury received over 65 submissions, as well as a large number of correspondence from retail investors. Treasury also met with a range of industry and investor representative bodies. Subsequent public consultation on the exposure draft legislation was held from 25 June to 16 July 2021, during which Treasury received 34 submissions and undertook targeted consultation with industry stakeholders.

The fourth avenue was through public consultation on the Improving the Technology Neutrality of Treasury Portfolio Laws as part of the Deregulation Taskforce's modernising business communications agenda. As part of this consultation process, Treasury also held targeted meetings to seek stakeholder views on areas of business communication requiring reforms and to raise awareness of the Government's technology neutral reform agenda and public consultation process. On 18 December 2020, the Government released a public consultation paper, which was open for 10 weeks and closed on 28 February 2021. On 21 April 2021, the Government also announced other reforms following this consultation, that will be progressed through a separate legislative progress.

This experience simultaneously allowed the Government to obtain feedback on the reforms both by having an unprecedented opportunity to observe the actual operation of reforms, as well as through stakeholder feedback. This feedback, from industry and investor representative groups, has helped the Government

⁴ The terms of reference of this that the Committee requires them to consider opportunities for the RegTech industry to strengthen compliance but also reduce costs. In the Issues Paper that they released on 23 October 2019, they sought feedback on removing regulatory barriers arising from a lack of technology neutrality. Following the Coronavirus outbreak, the Committee re-opened its call for submissions to the inquiry to enable submitters to provide further input to the Committee. They also conducted a number of public hearings between 30 June 2020 and 10 August 2020. Submitters to the inquiry, as well as those attending these hearings used these opportunities to comment on the effectiveness of the temporary measures and the possibility of them been made permanent. The Committee released a second interim report in April 2021 which examined further issues in the RegTech industry. However, no additional recommendations in relation electronic communication and meetings were made.

determine the permanent reforms that should be made with respect to document execution and meeting-related materials.

Summary of feedback

There was an overwhelming support from industry representatives, including listed companies, share registries, business associations and legal professionals to make the temporary reforms permanent. Relevant stakeholders included the Australian Institute of Company Directors (AICD), Australian Banking Association (ABA), Law Council, the GIA, Business Council of Australia (BCA) and Australasian Investor Relations Association (AIRA).

In their submissions to the consultation on the exposure draft legislation, industry continued to express their support for permanent reforms. They noted that there were substantial savings and greater engagement with shareholders. Their primary comments suggested where reforms could further reduce regulatory burden in respect of both document execution and meeting-related materials.

While the document execution reforms were not relevant to shareholders, shareholders were also generally supportive of the reforms with respect to meeting-related materials. However, consistent with the recommendations of the first interim report of the Senate Select Committee on Financial Technology and Regulatory Technology, they also sought amendments which would require companies to provide hard copies, rather than electronic communications, where shareholders have elected to receive hard copies.

Incorporation of feedback into Option 3

Option 3 takes on board stakeholder feedback to make modifications to the temporary determination. In respect of document execution, Option 3 took on board suggestions from industry that the final legislation:

- clarify that companies and their officers (including company agents) will be able to create and sign deeds, as well as other documents, electronically;
- allows companies to electronically execute documents using the common seal of the company, by allowing witnessing to occur electronically.

Following feedback through consultation, various technical drafting changes were also made to ensure that the legislation operated as intended.

With respect to meeting-related materials, Option 3 incorporated feedback to require companies to provide hard copies of meeting materials to shareholders upon request. This will ensure people without internet access can still obtain meeting materials. In making this change, the Government notes that some

companies did provide hard copies of meeting materials upon request, but that this practice was inconsistent.

Option 3 also gives companies flexibility to use technology to sign meeting-related materials, and keep, retain and provide documents such as meeting minutes.

Option 3 also includes a provision requiring a review to be undertaken that examines the effectiveness of the legislative reforms, as soon as practicable, two years after its commencement. This was reduced from five years, following consultation on the exposure draft legislation.

What is the best option from those you have considered?

Option 3 is the best option as it goes furthest of the three options, to achieve the Government's objectives of ensuring that where substantive statutory requirements can be met using digital technologies, the law allows companies and their officers to satisfy the statutory requirements for legal purposes.

Document execution

Option 3 goes the furthest in terms of ensuring that substantive statutory requirements that companies must meet for counterparties to rely on the statutory presumption, can be met electronically.

All three options provide certainty for counterparties to transact with companies, certainty of their legal rights and obligations, and sets expectations as to the internal corporate governance mechanisms that companies should have to ensure that document execution only occurs when companies intend to be bound by legal rights and obligations.

The key difference in Option 3 is that in addition to allowing company officers (including company agents) to apply an electronic signature to an electronic document, it also clarifies that companies can execute deeds electronically, allows for documents to be validly executed via remote witnessing and electronic signatures.

Meeting-related materials

Option 3 also goes the furthest in terms of ensuring that the same substantive statutory requirements are met, while providing as much flexibility to use technology as possible.

All three options require companies to:

- provide notice of meetings that must contain certain information, and certain resolutions and statements; and

- keep meeting minutes whose veracity a meeting chair has attested to.

However, relative to Option 2, Option 3 better ensures that substantive statutory requirements are met, by allowing members to opt-in to receive or request hard copies. This means that companies cannot avoid distributing meeting-related materials simply because a member does not have internet access.

Option 3 also extends the circumstances in which it allows the use of technology. It clarifies that technology may be used to sign materials related to a meeting and allows documents such as meeting minutes to be kept, retained, and provided electronically.

In respect of document execution, it allows technology to be used to witness the application of the common seal of a company as an additional method of document execution and provides clarity that companies can use technology to execute deeds.

Overall regulatory savings

Overall, Option 3 also has the highest regulatory saving of \$450 million on average per year over 10 years. The regulatory costs of requiring companies to provide hard copies of meeting-related materials to shareholders who ask for this information are relatively small, with the regulatory saving attributable to being able to keep, retain, provide and sign meeting-related materials under Options 2 and 3 both being \$20 million. The small additional costs from providing access to hard copies on request should be considered against the benefits of improving access to meeting materials for people with limited access to technology.

Option 3 also includes a legislative review that will provide the opportunity to assess the effectiveness of these reforms and to determine whether they are operating as intended.

How will you implement and evaluate your chosen option?

This legislation makes permanent changes to the *Corporations Act 2001* to implement these reforms.

The legislation also includes a review clause, which requires the Government to evaluate the operation of the legislation as soon as practicable, two years after it commences, to determine whether the reforms are operating as intended.

Regulatory burden estimate (RBE) table

Average annual regulatory costs (Option 2)				
Change in costs (\$ million)	Business	Community organisations	Individual	Total change in cost
Total, by sector	-412	0	0	-412
Average annual regulatory costs (Option 3)				
Change in costs (\$ million)	Business	Community organisations	Individual	Total change in cost
Total, by sector	-450	0	0	-450