



NATIONAL AUSTRALIA BANK SUBMISSION

Modernising Business Communications

Improving the Technology Neutrality of Treasury
Portfolio Laws

February 2021

Introduction

NAB welcomes the Government's Deregulation Agenda and concurs with the objectives of the Deregulation Taskforce, namely, to create fit for purpose and lightest touch regulation, which is easily understood, cost effective and timely, and ultimately make it easier to do business. As part of the Deregulation Agenda, NAB appreciates the consultation into modernising business communications and looks forward to working with the Government in facilitating the adoption of technology neutrality across the five categories listed in the Modernising Business Communications Discussion Paper 2020 (the Discussion Paper).

As a member of the Australian Banking Association (ABA), NAB has also contributed to the ABA submission.

Executive Summary

COVID-19 has accelerated the adoption of digital technologies by Australian consumers and businesses and has identified examples of where the current legislative environment has not kept pace with digital adoption, particularly in scenarios where technology neutrality is not permitted. NAB is supportive of the policy goals and principles laid out in the Discussion Paper which relate to adoption of technology neutrality in business communication to customers, shareholders and other stakeholders. In circumstances where customers or stakeholders are not able to receive electronic communication or prefer hard copy documents, resorting to written communication may be appropriate and should be facilitated, particularly in the case of elderly or vulnerable customers.

NAB is acutely aware of the benefits of technology neutrality in respect to current written communication requirements. These include the requirement to publish certain announcements in print newspapers, written communication to shareholders, as well as inconsistencies in regulation between credit products and deposit and other financial products. These are all areas where NAB would welcome a deregulated approach to written communication and an acceptance of electronic communication.

Regarding communication with regulators, NAB is of the view that there has already been a significant move toward electronic correspondence but welcomes a further shift toward less prescriptive means of communicating. This also applies to hearings, which COVID-19 has shown are able to be held virtually whilst still upholding the integrity of the process.

Signatures are another aspect of business communication in need of modernising. COVID-19 has highlighted the inconsistencies between states and territories when it comes to executing deeds and signing mortgages electronically. Although the Government has introduced temporary legislation to allow for e-signatures and is moving to make these changes permanent, there are still some states and territories which do not allow for e-signatures in their legislation. There is a need for national consistency across this topic and guidance as to the interplay of federal and state legislation, particularly businesses such as NAB which operate nationally.

Record-keeping is a critical business practice that, if managed in hard copy, can become complex for a company when managing storage and retrieval. NAB is supportive of record-keeping

requirements being satisfied through electronic storage, providing the same levels of integrity and accessibility as hard copy physical storage are met.

Whilst payments have not been directly addressed in NAB's submission, the ABA submission covers the payment neutrality reforms which are supported by NAB in facilitating e-transactions and discouraging non-digital payment methods such as cheques.

1. Written Communication with Stakeholders

With the increased use of digital technologies, more people are likely to view electronic communications as the preferred method of communication. For the purpose of illustrating the importance of electronic communication NAB has brought forward examples where a shift to technology neutrality would be beneficial, including for pricing announcements, written publications and advertisements, and shareholder communications.

Pricing announcements

In the example provided in the Discussion Paper on publishing notices in newspapers, NAB believes that notifying customers of pricing changes to our banking products through print newspaper is no longer the best way to notify customers of these changes. Instead, the most effective and timely way of communicating information about interest rates and fees for current and future customers is through our website. For customers without access to our website, pricing is also available in branches or over the phone. This ensures the information is accurate, timely and verifiable as having been communicated from NAB. The use of a digital channel, such as a company website, is preferred over email or SMS notifications as these present a range of operational and customer experience issues. These include but are not limited to:

- Many customers have not provided their correct or current information. This is partly due to customers having created accounts with NAB prior to e-mail addresses being the norm. In some instances, it would be difficult for NAB to seek a current email address or mobile number from some elderly customers who may not access these communication methods.
- The management of consent to send pricing communications through these channels can be very challenging, particularly in the instances of primary and secondary account holders, complex business entities and managing hundreds of products. If NAB was to proceed with sending pricing communications through these channels there would be a need for guidance on consent management.

Written publications and advertisements

The requirement to publish certain notices in print newspapers is also no longer the most effective way of providing transparency to the general public. An example is when a business is wound up and liquidators are required to place an advertisement in a daily newspaper circulating generally in each State or Territory where the body has carried on business at any time during the six years, before any distribution of that body's property can be made. When reconciling the purpose of this requirement, which is to invite all creditors of the body to make their claims within a reasonable time frame, publishing the notice via newspaper may not be the most effective method of communication to creditors. By applying the proposed principles in the Discussion Paper,

subsection 601CC(14) of the Corporations Act 2001 could be amended to allow for advertisements to be placed online.

Shareholder communications

NAB supports the default position that mass communication be sent electronically to shareholders. NAB believes that electronic communication provides a number of benefits for all shareholders, including:

- Engaging with shareholders on a timelier and more frequent basis (for example, enabling shareholders to receive email alerts in relation to result briefings and a summary of financial results announcements on the day they are made).
- Expanding their access to a wide range of important company information.
- Avoiding postal delays which can result in shareholders having insufficient time to take any action which might be required by such documents (for example, new security issues which will be open for a limited timeframe).
- Standing by our commitment to reduce our environmental impact by reducing printing.

However, NAB recognises and is cognizant of the difficulties this presents for some retail shareholders who may not have access to electronic communications. Some shareholders may also have not yet consented to electronic communications or nominated a preference for this type of communication so printed documents can continue to be sent to shareholders who request them.

NAB believes that behavioural change toward electronic communication would be supported by no longer having paper or hard copy as the default communication method as there is a tendency for people to accept the default as it is often easier than making an active change.

Regulatory differences between credit and deposit and other financial products

There are currently different laws and regulations which apply to personal credit and financial products which result in different levels of complexity when switching paper-based customers over to electronic correspondence.

Personal credit products are primarily governed under the National Consumer Credit Protection Act 2009 and deposit and other financial products under the Corporations Act 2001. Whilst there were some changes to the Electronic Transactions Regulations in July 2020 which made the position with personal credit products more flexible, there are still inconsistencies and complexities involved with switching customers to electronic correspondence between each product type.

The key difference in switching consumers to electronic correspondence is that for personal credit products, the bank must have express or inferred consent from the customer to send them most regulated correspondence electronically. For deposit and other financial products, NAB would not need to undertake an analysis of whether it has express or inferred consent before it can switch consumers to electronic correspondence. Instead, it can rely on regulatory relief provided by ASIC in relation to the Corporations Act 2001 (i.e. ASIC Corporations (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647 9) which facilitates providers communicating with consumers electronically by giving consumers notice and an opportunity to opt-out.

Greater uniformity across provisions relating to electronic communications for credit and deposit products (and other financial products) would be beneficial in offering a single way in which providers can communicate electronically including switching customers to electronic correspondence. This would also ensure a more consistent experience for customers regardless of the banking product that they hold.

Risks

There is a risk that electronic communications may cause an increase in fraudulent communications and therefore the proposed principles should ensure that electronic communications are provided in a way or form that is at least as reliable as a hard copy. Some examples include through the use of company owned websites and customer communication portals.

2. Communicating with Regulators

NAB agrees with the Government's proposed principles for modernising communications with regulators, as set out on Page 10 of the Discussion Paper.

Types of regulatory communications which would benefit

The Discussion Paper correctly identifies the types of regulatory communications which would benefit from technology neutrality as those which require the provision of notice or information in writing, either to or by a regulator. A number of relevant provisions in Treasury legislation are currently captured by exemptions to the Electronic Transactions Act 1999 (ETA). In practice however, NAB's engagement with the Australian Securities and Investments Commission (ASIC), Australian Prudential Regulation Authority (APRA) and Australian Competition and Consumer Commission (ACCC) are already predominantly undertaken through electronic means, such as through email or an online portal.

Risks

With regards to the policy goals outlined in the Discussion Paper, NAB agrees that regulatory consistency and efficiency are critical, however NAB favours a move away from detailed prescription to minimise the potential for inadvertent increases in the costs of complying with regulatory requests and requirements.

NAB has reviewed the proposed options for implementing the principles, being to remove relevant exemptions to the ETA and amend relevant Treasury legislation. NAB identifies neither of these options as particularly high risk, although the proposal to amend relevant Treasury legislation would benefit from greater clarity to understand its potential impact.

If the amendments to Treasury legislation are intended to clarify the accepted use of electronic communications, then such proposals are likely to carry a relatively low risk. However, if amendments were proposed to provide new, additional powers for regulators to prescribe the method and format in which they receive information, such amendments should adopt technology neutral principles and allow for consideration of what is reasonable in the circumstances.

Hearings

NAB advocates for hearings, pending feasibility, to no longer require in person attendance and agrees with the proposed principles for maintaining high standards of procedural fairness. NAB favours the option which allows entities the most flexibility possible, for example by allowing

regulators to offer multiple options for how a hearing can be conducted, rather than the option requiring a physical meeting by default.

3. Signatures

COVID-19 has exposed many of the limitations of the current legislative environment, particularly when it comes to the need for wet signatures. NAB strongly advocated for the temporary relief provided by the Government in response to COVID-19 to provide businesses with certainty that when company officers sign a document electronically, the document has been validly executed in accordance with the Corporations Act 2001. Permanently allowing electronic execution methods as a valid method of executing documents under legislation would allow businesses to more easily operate in an environment where officers/employees may work more flexibly. The technology neutral changes to signing requirements will also make the execution of corporate documents more convenient and reduce the regulatory costs of complying with legislation (for example, cost incurred with individuals travelling to sign and witness physical documents in the same location).

All types of business communications would benefit from these technology neutral changes so long as businesses ensure that their electronic signing methods are at least as reliable an indication of the signatory's identity as wet ink signatures.

State-based inconsistencies

The proposed amendments to the Corporations Act 2001 set out in the Exposure Draft of the Corporations Amendment Virtual Meetings and Electronic Communications Bill 2020 are welcome. However, NAB encourages Treasury to undertake further work with states and territories to seek to provide greater national consistency in relation to the execution of deeds. For example:

- NSW has permanent electronic deed legislation. However, deeds signed by individuals (including individual attorneys) must be witnessed;
- Victoria has COVID-19 legislation in place allowing for electronic execution of deeds. The law in Victoria does not require deeds signed by individuals (either electronically or wet) to be witnessed, but they may be;
- Queensland has COVID-19 legislation in place allowing for electronic execution of deeds. The COVID-19 legislation does not require deeds signed by individuals (either electronically or wet) to be witnessed, but they may be;
- All other states and territories require physical deeds (and consequently wet signing).

Current proposed changes to legislation include:

- The Federal Government's proposed legislation amending the Corporations Act 2001 which would allow companies to sign electronically on a permanent basis (**Corporations Act Amendment Virtual Meetings and Electronic Communications Bill 2020**).¹ However, it is unclear how the proposed legislation interacts with the state-based deed requirement; and
- NSW is looking to make the remote witnessing legislation a permanent part of their Electronic Transactions Act. It is currently in a trial phase until the end of 2021.

¹ See Consultation Paper page 7, "On 19 October 2020, the Government released further exposure draft legislation to improve the technology neutrality of the Corporations Act 2001".

Given these differences, NAB recommends introducing the following:

- Allowing remote witnessing across all states and territories and the Federal Government leading by example to encourage one consistent approach across Australia;
- Clear guidance that the Corporations Act Amendment will allow companies to sign deeds electronically even if the relevant state does not allow electronic deeds;
- Electronic deeds being allowed in all states and territories;
- Electronic mortgages being allowed in all states and territories (this may be beyond the scope of the Federal Government; and
- A section 127 Corporations Act 2001 equivalent for foreign registered companies (i.e. clear legislative guidance on how a foreign registered company may sign).

Risks

The risk of documents being executed fraudulently or without proper authority needs to be mitigated. Businesses will need to ensure they have protocols/processes in place to guarantee electronic signatures are as reliable as wet ink signatures, including:

- ensuring the signatory electronically signs a full copy of the document and not just an extracted execution page; and
- ensuring the signatory indicates (for example, by means of email attaching the signed document) that the person has signed the document).

4. Record-keeping requirements

NAB agrees with the proposed principles in relation to the storage of electronic registers/company records. Under the Corporations Act 2001 s1306, it is provided that a book that is required by the Act to be kept or prepared may be kept or prepared 'by recording or storing the matters concerned by means of a mechanical, electronic or other device, provided that such mechanical, electronic or other device must generally be capable of being reproduced in written form at any time'.

However, there remains some records that need to be retained in written form under the Corporations Act 2001. As proposed in the Discussion Paper, technology neutrality in respect of record-keeping could be achieved by removing the current exemptions to the ETA which apply to the Corporations Act 2001 and allow records that need to be kept under the Act to be retained in electronic form in accordance with section 12 of the ETA.

In some cases, such as minute books for directors' meetings, NAB's practice currently is to maintain hard copy minute books containing physically signed copies of minutes, as well as digital copies of all signed minutes (i.e. scanned versions). The business impact of retaining hard copies include storage costs (particularly those that need to be held at NAB's registered office in CBD locations) to keep them at a secured location, as well as personnel time of searching for hard copies as opposed to digital versions. NAB therefore support steps that allow and more clearly enable all record-keeping requirements in the Corporations Act 2001 to be met electronically, in line with the proposed principles of integrity and accessibility. NAB also acknowledges, through the introduction of Treasury Laws Amendment (2021 Measures No. 1) Bill 2021, that the Government is already taking steps to make permanent changes to the law.

Risks

NAB considers that the risk of implementing the proposed principles is low, as long as the information continues to be readily accessible, either in electronic form (for example, inspection of the company's register by computer) or in a form that can be printed if required. Section 12 of the ETA provides some protection in relation to the integrity of information as it requires records to be maintained in a substantively complete and unaltered form.

Conclusion

Deregulation and modernising business communications is necessary to ensure that business can be done efficiently and effectively. The COVID-19 pandemic has shown the resilience of the business community in meeting their obligations to their customers, shareholders and other stakeholders. However, this has not been without challenges and significant reforms by the Government to allow for company dealings to take place digitally. NAB is supportive of the move to electronic communication over written communication, both for customers and shareholders, and with its regulators. NAB is also supportive of the e-signature reforms and is particularly keen to see national consistency in signature requirements. Additionally, record-keeping requirements could benefit from a clearer and more consistent approach toward electronic storage. NAB acknowledges the risks involved in a shift toward electronic and digital communication and storage, but is strongly of the view that with adequate guidance, companies are equipped to work through those challenges and will want to adopt ambitious changes in order to reap the significant benefits in compliance, productivity, cost and service to customers.