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

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EXPOSURE DRAFT EXPLANATORY MATERIALS



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# ***Glossary***

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

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



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# Chapter 1

## Use of technology for meetings and other meetings-related amendments

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### Outline of chapter

1.1 This Bill creates a permanent statutory mechanism for the electronic execution of company document. 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 The Act does not currently facilitate the use of virtual meeting technology to conduct a meeting. Similarly, to execute a company document, the Act requires certain individuals to physically sign a single document.

1.4 During the COVID-19 pandemic the Government provided temporary relief (in the *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* and *Corporations (Coronavirus Economic Response) Determination (No. 3) 2020*) to allow meetings of companies and registered schemes to be held virtually using video-conferencing technology and extend the statutory mechanism for the execution of company documents to include electronic execution. This relief expired on 21 March 2021.

1.5 The Government has introduced legislation into Parliament to allow companies and registered schemes to hold virtual meetings and electronically sign documents until the end of 15 September 2021 (Schedule 1 to the Treasury Laws Amendment (2021 Measures No. 1) Bill 2021).

1.6 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.

1.7 The Bill makes changes to the Act to give effect to that announcement. It refines the drafting approach taken in Treasury Law Amendments (2021 Measure No. 1) Bill 2021 by restructuring the rules so that they apply to all types of meetings.

### Summary of new law

1.8 The Bill provides a statutory mechanism for companies to execute documents electronically. When a company executes a document:

- persons may sign the document electronically;
- the fixing of the seal can be witnessed electronically;
- separate copies of the document may be used by each person required to execute the document; and
- the document may be executed by the sole director of a proprietary company that does not have a company secretary.

1.9 It also includes provisions which allow all 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 (regardless of whether the constitution was amended before or after the commencement of these reforms).

1.10 All meetings, regardless of how they are held, must give members a reasonable opportunity to participate. This includes holding the meeting at a reasonable time and place, using reasonable technology to conduct a virtual meeting and connect different physical locations together, and giving members the opportunity to exercise their existing rights to speak or ask questions orally or in writing.

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

1.12 The Bill also allows a member or group of members with more than 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.

## Detailed explanation of new law

### Companies signing documents

1.13 Schedule 1 to the Bill provide a permanent statutory mechanism for companies to execute documents electronically. *[Schedule 1, item 14, section 1679F]*

#### *Electronic witnessing of the fixing of a seal*

1.14 If the company executes the document by fixing a common seal, the person witnessing the fixing of the seal may do so electronically. They may do this by:

- using technology such as videoconferencing to observe the fixing of the seal;
- signing the document or a copy or counterpart of the document; and
- annotating the document with a statement stating that they have observed the fixing of the seal electronically.

*[Schedule 1, item 14, section 1679F]*

#### *Secretary, director or witness may sign the document electronically*

1.15 Further, the director, secretary or witness may electronically sign the document (or a copy or counterpart of the document) if three conditions are satisfied:

- the copy must include the entire contents of the document;
- a method must be used to identify the person and indicate their intention to sign the document; and
- the method must be as reliable as appropriate for the purposes for which the document was generated or proven in fact to have indicated the person's identity and intention.

*[Schedule 1, item 14, section 1679F]*

1.16 This mirrors the approach in section 10 of the *Electronic Transactions Act 1999* relating to electronic signatures, with the exception that there is no requirement for the recipient to consent.

1.17 The new law takes a technology neutral approach and does not mandate the use of any particular type of technology. Rather, a range of technologies may be used including digital platforms and new technologies that may emerge in the future.



### ***Separate copies and counterparts may be used***

1.18 The Bill also allows the individuals to sign a copy or counterpart of the document (rather than the original). The document does not need to include the signature of any other person. This means that the directors of the same company may sign different documents, that is, split execution is permitted. *[Schedule 1, item 14, section 1679F]*

### ***Sole director companies***

1.19 Amendments are made to expand the statutory mechanism for executing a company document to a proprietary company with a sole director but no company secretary.

1.20 The Bill provides that, for proprietary companies without a company secretary, a document is validly executed if:

- the sole director signs the document; or
- the sole director witnesses the fixing of the seal.

*[Schedule 2, items 1-2, sections 127(1)(c), 127(2)(c)]*

### ***Extension of assumptions***

1.21 People dealing with companies are entitled to assume that a document is validly executed if the new rules are followed. This replicates the assumptions people dealing with companies are entitled to make in relation to the traditional methods of executing a company document under the Corporations Act. *[Schedule 1, item 14, section 1679F, Schedule 2, items 3-7, section 129]*

1.22 The assumptions that apply to a sole director company no longer include the sentence, ‘For the purposes of making the assumption, a person may also assume that a person who [executes the document] and states next to their signature that they are the sole director occupies this office’. This change was made because the additional sentence is not needed to ensure that a person can assume that the document has been duly executed.

## **Hybrid meetings of shareholders of a company or registered scheme**

1.23 The Bill also makes permanent changes to give companies and registered schemes greater flexibility to use technology to hold meetings.

### ***How meetings may be held***

1.24 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 2 and 5, sections 249R and 252P]*

1.25 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.

1.26 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 2 and 5, sections 249RA(3) and 249PA(3)]*

1.27 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 physical venue (or the main physical venue, if there is more than one physical venue)
Wholly virtual meetings	Registered office of the company or responsible entity	Time at the registered office

*[Schedule 1, items 2 and 5, sections 249RA(1)-(2) and 249PA(1)-(2)]*

***Reasonable opportunity to participate***

1.28 Regardless of how a meeting is conducted, the members as a whole must be given a reasonable opportunity to participate. *[Schedule 1, items 2 and 5, sections 249S(1) and 252Q(1)]*

1.29 This requirement has several components.

1.30 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 2 and 5, sections 249S(4)-(5) and 252Q(4)-(5)]*

1.31 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.

1.32 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. 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 reasonable to hold the meeting. *[Schedule 1, items 2 and 5, sections 249S(3) and 252Q(3)]*

1.33 Third, reasonable technology must be used to connect more than one physical venue or facilitate virtual attendance. *[Schedule 1, items 2 and 5, sections 249S(6)-(7) and 252Q(6)-(7)]*

1.34 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.

1.35 Fourth, where members have a right to speak, comment or ask questions, the member must be given the right to do so either orally or in writing. Examples of where members have such a right include under sections 250S and 250T which give members as a whole the right to ask questions of management and auditors, or make comments, at Annual General Meetings. *[Schedule 1, items 2 and 5, sections 249S(8) and 252Q(8)]*

1.36 Finally, if a document is tabled at a meeting, a copy of the document must be made reasonably accessible to the members as a whole, either before or during the meeting. At a virtual meeting, this could be done by screencasting the document. *[Schedule 1, items 2 and 5, sections 249S(9) and 252Q(9)]*

1.37 These five requirements are not an exhaustive list of what is involved in giving the members as a whole a reasonable opportunity to participate. For instance, directors should consider in what circumstances the right to participate also includes a right to be seen. *[Schedule 1, items 2 and 5, sections 249S(2) and 252Q(2)]*

1.38 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 12, section 1322(3A)]

1.39 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]
- allow members to continue to vote by show of hands unless a poll is demanded; and [Schedule 1, items 3, 4 and 7, sections 250BB(1)(b), 250J(1) and 253J(2)]
- correct an error in a note in Treasury Laws Amendment (2021 Measures No. 1) Bill 2021. [Schedule 1, item 6, note to section 252Z(4)]

### **Giving and signing meeting documents electronically**

1.40 The Bill permanently allows any document that relates to a meeting to be given electronically and signed electronically. It makes permanent the changes in Treasury Laws Amendment (2021 Measures No. 1) Bill 2021. [Schedule 1, item 14, section 1679F]

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

- documents in which a person makes a request in relation to a meeting (for example a member's statement or members resolution);
- notices of meetings;
- notices of a resolution or a record of a resolution (including where the resolution is made without a meeting);
- notices of a statement in relation to a meeting or a matter to be considered at a meeting;
- documents relating to a proxy, such as a document to appoint a proxy;
- questions for auditors and responses to those questions; and
- minute books.

1.42 A document may be provided electronically either by:

- 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).

#### ***When a document may be given electronically***

1.43 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; and
- the individual receiving the document has not opted to receive the documents in hard copy.

1.44 The Bill also updates references to ASIC to include a reference to the Registrar. This change is necessary as some documents may be lodged with the Registrar in the future due to the passage of *Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020*. [Schedule 1, items 10-11, sections 253RA and 253RD]

#### ***Minute books***

1.45 Minutes may also be recorded and kept electronically if it is reasonable to expect that the information would be readily accessible so as to be usable for subsequent reference. [Schedule 1, item 14, section 1679F]

1.46 If the company or registered scheme elects to keep minute books electronically, it must also ensure that the method provides a reliable means of maintaining the integrity of the information and that the minutes are open for inspection at the same place where a hard copy would have been retained. *[Schedule 1, item 14, section 1679F]*

## **Review**

1.47 The provisions relating to meetings and electronic communication must be reviewed no later than the earliest practicable day after the end of two years. The review of different provisions can be conducted at different times. *[Schedule 1, item 15, sections 1687B(1)-(2) and (4)]*

1.48 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 15, sections 1687B(3) and (5)]*

## **Requests for independent reports on polls**

1.49 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 of the polls at the meeting of the members. *[Schedule 2, item 6, section 253T]*

1.50 A member or group of members who hold 5 per cent or more 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 2, item 6, sections 253V(1)-(2), 253VA(1)-(2), 253W(1)-(2) and 253WA(1)-(2)]*

1.51 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 2, item 6, sections 253V(3), 253VA(4), 253W(3) and 253WA(4)]*

1.52 The independent person may be the auditor of the company or registered scheme, unless the auditor would have a conflict of interest, such as a vote to remove the auditor. *[Schedule 2, item 6, sections 253V(6), 253VA(7), 253W(6) and 253WA(7)]*

1.53 The company or responsible entity of the registered scheme is responsible for paying any fees associated with appointing the independent person. *[Schedule 2, item 6, sections 253V(5), 253VA(6), 253W(5) and 253WA(6)]*

1.54 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.

1.55 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 2, item 6, section 253X]*

1.56 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 2, item 6, sections, 253VA(4), 253WA(4) and 253Y]*

1.57 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 2, items 6, 7 and 8, sections 253V(4), 253VA(5) 253W(4), 243WA(5), 253X(3), 253Y(3) and 1686, Schedule 3]*

1.58 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.

1.59 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.

## **Application and transitional provisions**

1.60 Schedule 1 implements the changes assuming Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 commences before the Bill.

1.61 It makes permanent the changes in that Bill by repealing the sunset provision. It then makes the necessary consequential amendments to facilitate hybrid meetings.

1.62 These changes apply to meetings if notice of the meeting is given on or after commencement and the meeting is held before 16 September 2021. This ensures that if Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 commences, companies and registered schemes can continue to hold wholly virtual meetings until the date when those temporary changes were due to sunset. *[Schedule 1, item 15, sections 1687A]*

1.63 Work is also being undertaken to ensure that these amendments can be progressed in the Spring sitting period even if Treasury Laws Amendment (2021 Measures No. 1 Bill 2021) does not receive passage.

### ***Changes to the statutory mechanism for execution of company documents for single director companies***

1.64 The changes to extend the statutory mechanism for the execution of company documents to all single director companies apply to documents that are executed on or after the commencement of the Bill. *[Schedule 2, item 7, section 1688]*



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# **Attachment A**

## **Regulation Impact Statement – Electronic document execution and meeting materials**

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### **BACKGROUND**

On 5 May 2020, the Treasurer made 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 outbreak. The temporary reforms allow companies and their officers to:

- validly execute documents electronically; and
- hold entirely virtual meetings and circulate and access meeting-related materials electronically.

The Treasurer subsequently remade the determination to extend the changes to 21 March 2021, given the ongoing challenges posed by the Coronavirus outbreak. On 17 February 2021, the Government also introduced legislation which upon passage and Royal Assent, will re-instate the temporary reforms until 15 September 2021.

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 a hybrid meetings to enable a proper assessment of the shareholder benefits of virtual meetings.

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 copy versions. 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.

### **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 directors will be able to create and sign deeds 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.

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.

In relation to the requirements in respect of meeting-related materials, the measures differ from the temporary reforms, in that they:

- require companies to provide hard copies of meeting materials to shareholders upon request by providing 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.

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 elected 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 outbreak. 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 outbreak 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 900,000 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 **\$384 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 **\$404 million per year**. This is a result of combining the savings associated with electronically sending meeting-related materials (\$20 million) and electronic document execution (\$384 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	-404	0	0	-404

**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 **\$422 million per year**<sup>1</sup> (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:

- 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.

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<sup>1</sup> Numbers may not add due to rounding.

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 **\$442 million per year**. This is a result of combining the savings associated with electronically sending meeting-related materials (\$20 million) and electronic document execution (\$422 million).<sup>2</sup>

*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	-442	0	0	-442

<sup>2</sup> Numbers may not add due to rounding.

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

Prior to the Coronavirus outbreak, 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.<sup>3</sup> There were six relevant

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<sup>3</sup> 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

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.

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 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.

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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.

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 five core modifications to the temporary determination (two in respect of document execution, and three in respect of meeting-related materials).

In respect of document execution, Option 3 took on board suggestions from industry that the final legislation:

- clarify that company officers will be able to create and sign deeds electronically;
- allow companies to electronically execute documents using the common seal of the company, by allowing witnessing to occur electronically; and
- allow companies to electronically execute documents through sole directors who are not also appointed as company secretaries.

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 no later than, as soon as practicable after 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 to apply an electronic signature to an electronic document, it also clarifies that companies can execute deeds electronically, and 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 getting 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 \$442 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 no later than, 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	-404	0	0	-404

### **Average annual regulatory costs (Option 3)**

Change in costs (\$ million)	Business	Community organisations	Individual	Total change in cost
Total, by sector	-442	0	0	-442