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Dear Sirs,

Positioning Australia as a leader in digital economy regulation – Consultation on the Electronic Transactions Act (ETA)

Who we are

Governance Institute of Australia (GIA) is a national membership association, advocating for our network of 43,000 governance and risk management professionals from the listed, unlisted, public, and not-for-profit sectors.

As the only Australian provider of chartered governance accreditation, we offer a range of short courses, certificates, and postgraduate study. Our mission is to drive better governance in all organisations, which will in turn create a stronger, better society.

Our members have primary responsibility for developing and implementing governance frameworks in public listed, unlisted and private companies, as well as the public sector and not-for-profit organisations. They have a thorough working knowledge of the operations of the markets and the needs of investors. We regularly contribute to the formation of public policy through our interactions with Treasury, ASIC, APRA, ACCC, ASX, ACNC and the ATO. We are a founding member of the ASX Corporate Governance Council. We are also a member of the ASIC Business Advisory Committee, the Modernising Business Registers Program Business Advisory Group, the ASX Business Committee and the ACNC Sector Users Group.

Background

Our members have daily responsibility for the execution of documents and record keeping. They have first-hand experience of the impact of the patchwork of inconsistent legislation and outdated business practices that act as barriers to the digital economy. They experienced the increased uptake of electronic tools such as email, computer storage, e-signing platforms and electronic meeting technology during the COVID-19 pandemic. The use of electronic tools exposed out of date paper-based business practices to which they do not wish to return.

A significant difficulty during the pandemic was execution of documents required under the Corporations Act, a specific exemption from the ETA. During lock down periods some of our members resorted to sending board minutes by courier or taxi to directors for wet ink execution. Some of these difficulties were resolved by the Corporations Act Amendment (Meetings and Documents) Act 2022 which made it clear that companies can execute deeds and other documents electronically, send electronic notes of company meetings and hold shareholder and other meetings using technology. However, these amendments do not apply to all documents required under the Corporations Act. Our members also report that the effect of these

amendments is not necessarily widely understood as the practice of providing 'wet ink' signatures (particularly with deeds) is still being followed, notwithstanding electronic execution is valid.

Governance Institute has been actively involved in Treasury's Modernising Business Communications initiatives involving the improvement of the technology neutrality of Treasury portfolio laws for some years.¹ Our members support 'digital by default' provided this means governments are encouraged to provide digital options wherever possible while considering implementation issues, potential risks and costs.

We have not addressed each of the questions in the Consultation Paper but have the following general comments:

- **Inconsistent patchwork of Commonwealth and State legislative and administrative requirements** – one of the key barriers to achieving leadership in digital economy regulation is the current inconsistent patchwork of legislative and administrative requirements. Despite changes during COVID-19 not all State courts or Tribunals accept electronic documents or signatures as the 'best evidence'. As noted in the Consultation Paper, the ETA does not apply consistently across the Commonwealth and different Commonwealth Departments and Agencies have differing consent, execution and retention requirements. In addition, the ETA does not apply to key pieces of business legislation such as the Corporations Act. Our members consider there needs to be a clear, consistent approach to the issues of consent, signatures, exemptions and record keeping. Leadership in digital economy regulation will require significant effort on the part of the Commonwealth working closely with the States to achieve a clear consistent approach to these issues.
- **Interaction with other major reform programs and need for cross agency communication and cooperation** – the Attorney General's Department is currently undertaking a major review of the Australian privacy regime, Treasury has been engaged in the Modernising Business Communications Project for some years and the corporate regulator ASIC's registers are moving to the ATO as part of the Australian Business Registry Services. It will be critical for these and other current initiatives to inform each other and for there to be close communication and cooperation between the various agencies and project teams. Absent this, the difficulties outlined in the Consultation Paper will continue.
- **Digital only should not disadvantage key stakeholders** – there will be key stakeholders who prefer to use paper-based processes and wet ink signatures, particularly in the context of shareholder communications. Any legislative change should enable those who still wish to use wet ink signatures and hard copy to do so, but should also facilitate the move to e-transactions. For example, some years ago the Corporations Act was amended to enable companies to send electronic copies of annual reports to shareholders. Our members report that the number of hard copy annual reports required is now a fraction of what it was, with most shareholders preferring to receive an electronic report or a link to the document on a company website. The move to digital annual reports has significantly reduced costs and paper waste. Nonetheless most companies still have some shareholders who prefer to receive hard copy annual reports or paper-based communications. While this number is likely to diminish over time individuals should still be able to use wet ink signatures or paper communications if that is their preference. As the Consultation Paper notes the 'It is important that the form of the transaction (wet-ink or digital) should be based on consumer preference (or legitimate legal barriers) rather than on confusion or concern about the application or legal validity of transactions undertaken in reliance of [sic] the ETA'.
- **Consent requirements should be clear, consistent and practical** – given the importance of being able to rely on consent the requirements should be clear. As the Consultation Paper notes there is confusion about the ETA consent requirements. Where possible, individuals and businesses should be able to

¹ See Governance Institute submission [Modernising Business Communications – Improving the Technology Neutrality of Treasury Portfolio Laws](#), 28 February 2021.

interact across Government agencies consistently and there should be a whole of government approach to consent. Any consent requirements should also be easy for businesses to implement and for consumers and others to understand covering issues such as when and how often should consent be obtained. Our members also consider the development of clear guidance around consent would be beneficial.

- **Signatures** – our members agree that the form of transaction – electronic or wet ink – should be based on individual preference not on confusion about the requirements or concern about the legality of transactions carried out in reliance on the ETA. They report that the widespread use of electronic signatures and execution applications during and since COVID-19 has led to significant efficiencies. They endorse the statements in the Consultation Paper that there is still confusion and concerns about whether electronic signatures ensure the legal validity of high risk or high stakes transactions. Many of them report continuing to encounter difficulties in situations where financial institutions will not accept documents validly executed electronically. They also report that some regulatory forms still require wet ink signatures on hard copy documents which must be mailed to the registry and that courts and land registries in some states do not accept electronic execution.

Case Study

A member reports recent examples 'where a major bank (advised by a top tier law firm) refused a banking document we signed via DocuSign, however would accept a document where my CEO and I cut/pasted our signatures on the document electronically. We found it very odd, given DocuSign has all the internal integrity and verification measures in place, and in theory anyone could cut/paste signatures into a document.'

- **Verification** - our members also consider verification of the identity of a person executing a document is extremely important and many of them use electronic applications such as Docu-sign. They consider some form of minimum standard of execution and verification which entitles a party to accept a document as validly executed would be helpful. These standards could be principles-based, supported by guidance. Resolving these difficulties will require communication and cooperation between the Commonwealth and the States and their agencies and courts. The Case Study below illustrates some of the current difficulties.

Case Study

We recently amended our compliance plans, which are approximately 40 pages long. In order to lodge the amended plans with ASIC we are required to attach original signed authorisations by each director that authorise the signing of the plans (by wet signature) by the director's authorised agent. This involved us sending documents to directors in different states as well as overseas with arrangements for express post or courier returns. It was a lengthy process, with mail delays, whilst in lockdown. The original plans and authorisations need to be mailed to ASIC as electronic lodgement is not permitted. To lodge the plans with ASIC they are required to be mailed to ASIC at a centralised mailing house in Victoria within 14 days of the amended plans coming into effect. There is no way to verify when ASIC receives the plans and until such time as the plans appear on ASIC's public register there is no way of telling if they have in fact been received by ASIC. The process is completely out of step with modern business practices.

Company Secretary – Listed REIT

- **A consistent e-commerce approach is long-overdue** – given some of the difficulties noted above our members strongly support a consistent e-commerce approach across the Commonwealth and the States. For example, the ETA should apply to Corporations Act companies. While some aspects of this Act enable

electronic interaction, many other parts are still a jumble of inconsistent notice and communication requirements spread across the Act and the related Regulations.

- **Record keeping requirements remain a major barrier to e-commerce** – while it has been possible for some time to keep *some* documents required under the Corporations Act in electronic form, provided they are capable of reproduction in a hard copy format, it is not clear that this applies universally or that this is universally accepted. As recently as 2020 we obtained advice on behalf of our members about electronic record keeping.² Our members report that during and since the COVID-19 pandemic the move to electronic record keeping has increased significantly because traditional methods of centralised storage of paper-based documents were not possible. Having moved to electronic storage of documents during COVID-19 they report that work practices have changed permanently. Most companies of all sizes now store and retain documents electronically. Although many members report there remains the vexed question of what to do with the vast quantity of documents, such as minute books, which relate to the pre-digital age.

Our members also report that given the massive increase in cybercrime over the last few years many organisations are currently actively considering what information they retain, for how long and for what purpose. One confusing issue in the context of record keeping is that there are varying retention requirements under various pieces of Commonwealth and State legislation. For example, tax records must generally be retained for five years, although other tax-related documents may need to be kept for longer and ASIC requires companies to keep documents for seven years. Where there is a possibility of litigation documents may need to be kept for longer periods.³ Our members consider it would be helpful for it to be settled authoritatively by clear legislation what sorts of records can be maintained electronically and for how long. They acknowledge one potential hurdle is that the differing rules in the various state Evidence Acts as well as the various statutes of limitation.

Governance Institute agrees to this Submission being made public. Please contact me or Catherine Maxwell, GM Policy and Research if you have any questions in connection with this submission.

Yours faithfully,



Megan Motto

CEO

² See the Opinion of Douglas Gratton attached to the [Statement on electronic storage and execution of documents and electronic meetings](#), 24 September 2020, Governance Institute of Australia.

³ See [Litigation 101: Document retention for business](#), Clayton Utz, 4 August 2022.