

8 October 2021

Deregulation Task Force – MDE Consultations
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Dear Sirs,

Modernising Document Execution – Consultation on a common pathway for digital execution of statutory declarations and deeds

Who we are

Governance Institute of Australia is a national membership association, advocating for our network of 40,000 governance and risk management professionals from the listed, unlisted 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 not-for-profit organisations and the public sector. 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.

Executive Summary

- Governance Institute's members strongly support the modernisation and deregulation agenda and consider the outdated and inconsistent document execution laws across the Commonwealth and various states unnecessarily add impediments to Australian businesses' ability to conduct business in the already difficult environment caused by the COVID-19 pandemic. We have advocated for some time about the need to bring Commonwealth and state laws into the 21st century so that they keep pace with the way Australians engage with digital communications and technologies.¹
- In our members' experience executing documents in hardcopy while people are working remotely has been a major challenge, as has been the uncertainty about the legality of companies executing documents and signing company minutes electronically under the Corporations Act. They spent considerable time in 2020 considering these issues and Governance Institute obtained advice from counsel on a number of these questions.²
- The Treasurer's Determinations in 2020 enabling electronic execution of documents and communication with shareholders and electronic meetings on a temporary basis provided

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

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

much needed assistance. Governance Institute has been actively involved in the consultations about making these temporary changes permanent.³

- Our members' first preference is for a uniform set of rules for execution of documents which are clear and widely understood and accepted. As a starting point, they consider there should be mutual recognition of statutory declarations and deeds executed in one jurisdiction in all other jurisdictions with harmonisation as the desired final position and alignment between the rules for individual persons and corporate entities.
- Our members note that there are categories of documents such as wills, enduring powers of attorney or enduring appointments of guardianship where witnesses still perform an important function. However, our members consider that witnessing should not generally be required, unless it is required in a particular jurisdiction.
- Our members consider that the current provisions of the Electronic Transactions Act (ETAs) provide a useful starting point for minimum reliability requirements, noting that the various ETAs are likely to require review considering this consultation.
- To preserve choice and ensure equitable access, and recognising that there are digital access issues, our members consider it is important to preserve the ability for wet ink signatures and physical execution.

Preliminary comments

- As the last eighteen months have demonstrated, technological progress and the uptake of new technology by businesses and consumers is advancing rapidly. There are likely to be technological solutions and ways of doing things not yet in existence, but which will exist within a relatively short time which may again change the way businesses and consumers operate and behave as radically as the changes experienced during 2020 and 2021. It is therefore critical that legislation be technology and mode neutral to enable businesses and consumers to respond to rapid technological change.
- Increased efficiency should be one of the aims of any initiative to encourage digital execution – any proposed changes should not involve applying technological solutions to entrench inefficient, manual processes.
- It would be useful to understand how this consultation interacts with the Government's broader Digital Economy Strategy and other initiatives such as the Modernising Business Registers Project (MBR). It will be important for the Deregulation Task Force and other parts of Government involved in delivery of the various projects and initiatives forming part of the Strategy to interact closely to ensure these projects and initiatives are aligned and that the Task Force's work aligns with Treasury's regulatory reform program.
- Some of the current barriers identified in the Consultation Paper and the challenges our members experience are the result of the fact that their organisations for the most part operate under the Corporations Act, but carry on activities which attract state legislation and/or require interaction with financial institutions, state-based bodies such as land registries and the requirements of various Commonwealth and State courts and tribunals, – securing cooperation from the various states and other bodies will be key to finding a common pathway.
- Wider adoption of digital execution of deeds and statutory declarations presupposes the increased use of technology by businesses and consumers. This will bring with it an increased potential for digital fraud. We encourage consideration of the potential for digital fraud as part of the reform design process and building in protective mechanisms.
- Governance Institute's 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. Digital-only should not be imposed on key stakeholders who need non-digital options or who do not have access to digital technology.

³ See Submission [Treasury Laws Amendment \(Measures for Consultation\) Bill 2021: Use of technology for meetings and related amendments](#), Governance Institute of Australia, 10 September 2021.

Our submission does not address all the consultation questions but concentrates on those areas of interest and relevance to our members. Our detailed responses to the Consultation Questions are set out in the **Attachment**.

If you wish to discuss any of the issues raised in this letter, please contact me or Catherine Maxwell.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'M. Motto', with a stylized flourish at the end.

Megan Motto
CEO

Attachment

Responses to Consultation questions

- **As a business or as an individual, when and why do you use statutory declarations or deeds? Please provide any examples of the costs involved in the process. Why might you use a statutory declaration over a standard declaration, or a deed over a contract?**

Our members report that their organisations make limited use of statutory declarations, but they are aware these documents are used extensively for the range of purposes set out in the Consultation Paper.

On the other hand, our members report that their organisations use and encounter deeds regularly in a range of situations including:

- deeds of access and indemnity – these deeds set out the terms and conditions on which a company will grant a director access to company documents and the circumstances in which a company will indemnify a director. These deeds are routinely provided by companies of all types to directors on appointment. Any amendments to these deeds are also executed as deeds. Some companies use a deed poll for this purpose which is expressed as a deed
- deeds of guarantee, for example for leases
- deeds of cross guarantee between members of corporate groups
- deeds of settlement in litigation
- deeds of amendment when an existing deed needs to be amended
- deed polls
- to document an agreement between two parties without consideration
- confidentiality deeds with government agencies and regulators
- trust deeds for debenture holders under Part 2L.1 of the Corporations Act, and
- other trust deeds.

Company Secretary Top 20 listed company

I have a 'no deeds' policy unless it is absolutely necessary – despite this, we still execute lots of deeds.

Phillippa Ryan and Veronica Taylor clearly identify why deeds are used in so many business contexts:

The practical benefit of deeds is the certainty that they promise for commercial and individual legal planning... Once a deed has been properly executed and delivered, the party making the deed becomes conclusively bound by the provisions of the deed and cannot thereafter 'resile from or recall it'. A deed functions as strong prima facie evidence of a clear agreement, or creation or transfer of a legal right.⁴

Deeds have several advantages that are important to business, they are enforceable regardless of whether consideration has been provided, there is a longer limitation period for a deed than for a contract and they provide an important signal that the parties intend to create binding obligations.

- **What barriers, challenges or difficulties have you experienced with physical document execution? Do you have examples relating to paper requirements, witnessing requirements or jurisdictional inconsistencies? Are there other barriers that aren't captured here? What can we learn from international approaches?**

⁴ [Executing documents in a digital economy: rethinking deeds and statutory declarations in Australia](#), Phillippa Ryan and Veronica L Taylor, September 2021 at page 43.

In our submission in February 2021 our members identified ‘wet ink’ signatures for deeds as one of the most difficult issues they encounter in the context of deeds.⁵ These difficulties have only increased since the onset of COVID-19 and our members report that they spend significant amounts of time on the logistics of document execution.

One of the major sources of difficulty has been the interaction of companies being able to execute documents electronically under the Treasurer’s Determinations in 2020 and the temporary amendments to the Corporations Act in the *Treasury Laws Amendment (2021 Measures No 1) Act 2021* and various state laws including the requirements of state Land Titles Offices. Some case studies and examples of difficulties encountered with execution and confirmation of identity are provided below. Where transactions involve executing documents for use overseas our members report that these difficulties are magnified.

Case studies – challenges of executing documents and dealing with inconsistent advice and state requirements

Company Secretary Top 20 listed company

We have spent literally thousands of dollars on urgent return couriers to arrange for one of our directors who lives two hours away from the CBD to execute documents, return them to me and then courier them to different states.

There is a two-speed system operating, we execute documents and then have issues because the different states have different systems and then we find law firms have different views about what amounts to correct execution in a particular state. Another issue I have encountered is that some law firms require execution using DocuSign and others requiring Adobe Sign and they don’t agree about which is better.

I have also spent hours of my time going to Australia Post to have my identity checked.

Company Secretary Top 20 listed company

I have been involved in arranging for execution of urgent documents relating to asset finance transactions and have literally spent one hour talking about the transaction and then about three hours talking through the execution arrangements.

I recently arranged to meet a partner from one of the major law firms in a park so I could collect documents which had to be re-executed because of a problem with the first execution.

Company Secretary Top 50 listed company

We have had to continue with wet ink signatures on leases and couriering documents around the country because state Land Title offices will not accept electronic signatures. I now keep a stock of Express Post envelopes at home for sending documents, as well as stamped return envelopes. We have one full time member of staff who just deals with document execution. There really is a two-speed system.

Differing law firm advice about execution also causes problems. In one case we had agreed at the beginning of the transaction that execution would be electronic and at the last minute we went back to wet ink.

⁵ See Submission [Modernising Business Communications – Improving the Technology Neutrality of Treasury Portfolio Laws](#), Governance Institute of Australia, 28 February 2021 at page 9.

I have had to print leases at home because there have been no staff in the law firm office which prepared the lease and then send them for execution.

I have also been asked to provide certificates to law firms to the effect that I have signed a document, that the company is bound by the document, that the law firm is authorised to insert the signature page into the document and that it is authorised to circulate the signed pages for stamping.

Case Study – Governance Institute Fellow describing challenges of verification of identity in the preliminary stages of a property transaction

Extract of email from law firm about verifying documents

Following last week's meeting, my colleagues have reached out to the NSW Law Society on the Verification of Identity (VOI) process.

They confirmed that at present the legislation does not take into account JP's or lawyers being able to properly certify a document as a true copy of the original using audio visual links (AVL) and a lot of enquiries have been raised with them around this. In the context of the issue raised by one lot owner around the distance to a Post Office, note that Pharmacists are also JP's so there could be a pharmacy close to them.

Their suggestion for the time being is that where it is impracticable to go through the usual process of actually having the original document provided, taking a photocopy of and then certifying in the normal way, you may:

- *have a copy sent to you via email*
- *conduct a meeting in AVL where you are able to clearly see the original documents (front and back); and*
- *use different wording along the lines of:*

I _____ solicitor/JP confirm that I observed the original of this document, front and back, through audio visual link on [date] at [time] and that it appeared to me to be a correct representation of the original document.

They appreciate it is not the best solution and it will likely result in some risk of potential fraud occurring but they are focusing on safety and ensuring compliance as best they can with the laws in place.

It also emphasises the importance to ensure we are all doing 100-point VOI checks on our clients to minimise any risk on our end at least.

... I set out the above as a "last resort" mainly for lot owners living overseas because as you know, our proposal contemplates that Australia Post will attend to VOI's.

Case study – jurisdictional inconsistencies – Governance Institute of Australia, Fellow

Bendigo and Adelaide Bank Pty Ltd v DY Logistics Pty Ltd [2018] VSC 558 was a case where the validity of a guarantee turned on whether the power of attorney under which the guarantee was executed had itself been validly executed as a deed. The answer to this question depended upon whether it was to be determined in accordance with Western Australian law, the governing law of the guarantee, or the law of Victoria, the place where the power of attorney was executed. The Court decided that the relevant law was the place of execution of the power of attorney and that the power of attorney had not been executed as a deed because it was not "expressed to be sealed" as

required by section 73A of the *Property Law Act 1958* (Vic), notwithstanding that the power of attorney stated on its face that it was “*executed as a deed*”. It is entirely unreasonable to expect ordinary citizens and businesses to be able to determine whether an instrument has been executed as a deed in accordance with the technicalities of the law of the jurisdiction in which it was executed, even more so when there might be no way of knowing on the face of an instrument in which Australian jurisdiction it was executed or whether it was executed in Australia at all.

One issue that has proved particularly challenging during COVID-19 is that some ASIC forms cannot be lodged electronically and must still be lodged in hard copy with a wet ink signature. Lodgement is often time critical and at a time when postal deliveries are delayed this has caused significant issues. A case study illustrating these difficulties is set out below.

Case study – ASIC forms – Company Secretary listed company

... it appears that no funds or time is dedicated to paper forms and given the situation with COVID-19 this has substantial impacts on the integrity of the ASIC registry system. In my experience ASIC has not been processing electronic changes to Form 492s and also any paper forms sent from Perth have taken time to get to Victoria and then back again (returned as electronic changes have processed but paper forms haven't). This relates to a situation of attempting to update records by both paper and electronic means, which results in ASIC simply attempting to process a form (Form 208) and returning the form back saying the share capital is not up to date (which is out of date due to the paper/electronic conundrum).

From a user perspective, credit agencies, lenders, investors), the reliability of share capital and other data has suffered and requires urgent attention.

Our members also report that there can be a reluctance to move away from hard copy documents because of nervousness about whether electronic documents will be the ‘best evidence’ available in the event of subsequent litigation. Many law firms still take the view that original hard copy documents are required in the event of litigation and are therefore to be preferred.

- **What would you consider to be a desirable outcome from reforming document execution? Are these the right principles for reform? Are there other outcomes or principles we should consider?**

Our members consider that the outcome should be that execution of documents should be straightforward and reliable. Everyone should know when they have executed a document, hence the need for ‘solemnity’ sometimes. After the event, often many years later, it should be possible to prove the document was executed and the person bound. Electronic means are now potentially a more reliable way to do this than wet ink signatures.

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. Digital-only should not be imposed on key stakeholders who need non-digital options or who do not have access to digital technology. While many consumers were able to move to digital during the COVID-19 pandemic, it was clear, that for many consumers the digital divide was a reality – ‘The ability to get online is not the same for all Australians and the online shift has left vulnerable cohorts exposed.’⁶ When modernising document execution it will be vital to ensure that vulnerable cohorts are not left behind.

Our members’ first preference is for a uniform set of rules for execution of documents which are clear and widely understood and accepted. As a starting point, they consider there should be mutual recognition of statutory declarations and deeds executed in one jurisdiction in all other jurisdictions

⁶ See [Riding The Digital Wave Report on COVID-19 Trends and Forward Work Program](#), Australian Broadband Advisory Council, November 2020.

with harmonisation as the desired final position and alignment between the rules for individual persons and corporate entities.

- **Should electronic execution of statutory declarations and deeds be permitted? What would be the benefits and costs for you of digital options?**

Our members support electronic execution of statutory declarations and deeds, noting our comments above that this will not be an option for all and that the ability to execute these documents in hard copy should remain.

- **Is witnessing a necessary requirement for statutory declarations and deeds? Are there documents that should still require the presence of either a physical witness or a witness over AVL? Do advances in digital identity verification make witnessing requirements redundant?**

Historically the purpose of witnessing documents was to verify that the person who signed the document did in fact sign it. Witnessing also adds to the 'solemnity'. Our members note that there are categories of documents such as wills, enduring powers of attorney or enduring appointments of guardianship where witnesses still perform an important function. However, our members consider that witnessing should not generally be required, unless it is required in a particular jurisdiction.

- **What minimum reliability requirements should apply to the electronic execution of statutory declarations and deeds? Are the existing provisions in the ETA appropriate and effective? From your perspective, would providing common requirements and definitions, enabling digital verification or improving national usability increase reliability?**

Our members consider that the current provisions of the Electronic Transactions Act (ETAs) provide a useful starting point for minimum reliability requirements, noting that the various ETAs are likely to require review considering this consultation.

- **What processes and/or technologies do you consider appropriate for executing statutory declarations and deeds electronically? Please provide examples.**

Our members have no view on what technologies would be appropriate. It would also be helpful to make use where possible of existing systems such as MyGov ID or the soon to be introduced Director ID.

- **Have you experienced problems with executing documents across jurisdictions? Please outline what issues you faced. How would greater consistency affect you?**

As noted in our answer to the first consultation question above the difficulties with executing documents across various Australian jurisdictions are significant. These difficulties are magnified where documents are executed overseas or for use overseas. The case studies below illustrate some of the difficulties our members have encountered.

Case study – execution of documents for filing with a foreign regulator - Company Secretary listed financial services company

The Australian shareholder of a Peoples' Republic of China (PRC) company needed to pass a written resolution to appoint its officeholders, four directors and two secretaries, as authorised shareholder representatives of the PRC company. As the resolution would need to be lodged with the PRC regulator, it was necessary to include specimen signatures for each of the six officeholders and these were required in black fountain pen. The resolution was couriered along with a fountain pen to six different addresses before being provided to a notary to arrange the apostille and then courier the documents to the PRC.

Company secretary – unlisted public company

*... we need to have shipping documents for our international customers, for example, bills of lading signed. Shipping involves a lot of archaic processes, sometimes we need a **notary** to witness/certify these documents and these are as scarce as hens' teeth.*

Same issues have arisen for us in terms of trademarks registered in Australia and also overseas. As we trade overseas, we have trademarks registered in a number of other countries and again, we need to get a notary to witness/certify these, before they can be recognised by the registering authority in the relevant country.

A Notary Public (also known as a Notary or Public Notary) is an individual who is authorised to witness/certify document within an overseas jurisdiction. Some transactions or contracts require documentation to be notarised by a Notary Public when the document will be used in another country. A notary is different to a Justice of the Peace (JP) in the respect that a JP is only recognised within Australia. Notary Public is an international Justice of the Peace.

Execution for use overseas – Company Secretary Top 100 listed company

... some jurisdictions would still insist on wet ink, notarising and then apostille by the Department of Foreign Affairs and Trade. A costly and lengthy exercise especially during COVID, but one that this will not fix as it relies on other jurisdictions.

I recently had a deed couriered to me from Germany by the counterparty for signing, which I only received 10 days later (due to courier delays) - past the completion deadline. I then had to courier it to my director in regional NSW who countersigned on the same piece of paper then returned it to our commercial Division in Queensland. The whole process took two weeks plus.

Deputy Company Secretary – Listed financial services company

... document execution and sending overseas was very common. One challenge that we faced when executing documents electronically using the COVID legislation was that notwithstanding the document was validly executed under Australian law, some overseas jurisdictions would disregard the law of the land in which the document was executed and insist on wet ink signatures.

- **Are there risks with document execution that might lead to an adverse outcome for you, your clients or other third parties as a result of reforms to document execution?**

Wider adoption of digital execution of deeds and statutory declarations presupposes the increased use of technology by businesses and consumers. This will bring with it an increased potential for digital fraud. We encourage consideration of the potential for digital fraud as part of the reform design process and building in protective mechanisms.

- **Do you have suggestions as to other potential reforms relating to document execution?**

Other areas our members consider are in need of reform are ASIC forms and other communications with and from regulators.

- **Are there other issues with document execution not canvassed in this paper that you wish to share?**

Our members report continuing difficulties with the requirements to lodge many ASIC forms in hard copy with wet ink signatures. A case study illustrating some of the difficulties is set out below. As noted above notarisation and apostilles also cause difficulties particularly the reluctance of some overseas jurisdictions to accept electronic signatures.

Case study - Company Secretary listed REIT

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.