

01 March 2021

Data Economy Unit
Market Conduct Division
The Treasury
Langton Crescent
PARKES ACT 2600

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Dear Sir/Madam

‘Modernising Business Communications – Improving the Technology Neutrality of Treasury Portfolio Laws’ issued in December 2020

The Small and Medium Enterprise Committee of the Business Law Section of the Law Council of Australia (**SME Committee**) makes these comments on the ‘Modernising Business Communications – Improving the Technology Neutrality of Treasury Portfolio Laws’ consultation paper issued in December 2020 (**Consultation Paper**).

The SME Committee has as its primary focus the consideration of legal and commercial issues affecting small businesses and medium enterprises (**SMEs**) in the development of national legal policy in that domain. Its membership is comprised of legal practitioners who are extensively involved in legal issues affecting SMEs.

Please note that the SME Committee’s submission may differ from those made by other Committees of the Law Council because of our Committee members’ perspectives and experiences as advisers to SMEs.

Response and feedback

The SME Committee recognises that the Consultation Paper focuses on how best to improve the technology neutrality of Treasury portfolio laws to ensure they do not restrict the use of current and future technologies, particularly in light of the COVID-19 pandemic..

The SME Committee notes from the Consultation Paper that many of the Treasury portfolio laws that would require amendment for technology neutrality are currently contained in legislation that is exempt from the application of the *Electronic Transactions Act 1999* (Cth) (**ETA**). Accordingly, the SME Committee is of the view that the simplest and most efficient way to allow those Treasury portfolio laws to become technology neutral would be to reduce or remove the exemptions to the ETA that those laws are currently provided with.

The SME Committee considers that the requirement under the ETA for a recipient to consent to receive electronic communications may need to be reconsidered in light of the policy goals

the Government is seeking to achieve, with the principles for effective communication, particularly with potential consumers of financial products and services, to allow for consent to be implied by default, except where no electronic address or access is available for the recipient.

Consultation Questions

1. *Do the business communication requirements in Treasury laws create a burden on business?*

From the experience of SME Committee, the requirements for consent from recipients, and identification of recipients as well as the requirements for hard copy documents impose burdens on business that can delay or prevent a timely service being provided to a recipient.

- a. *If so, what categories of communication (as outlined in this paper) or legislative provisions are creating a burden and should be prioritised for reform?*

The categories of documents imposing burdens would be written communications and the need for written signatures, although with on-line communications the requirements for identification provide considerable time delays and burdens, which can be particularly troublesome for older recipients.

- b. *Are there non-regulatory requirements that inhibit businesses, consumers or regulators from using their preferred method of communication? If so, please provide examples.*

The SME Committee has observed a range of non-regulatory requirements that inhibit small businesses and consumers from using their preferred methods of communication including:

- for some recipients who are not as comfortable with using modern communication methods, , who may be characterised as having a lack of on-line access, lack of on-line experience, inability to learn to interact on-line and general lack of confidence, mean they are not accessing or using businesses and government services that are increasingly using on-line communication as their primary engagement points;
- there are still locations both suburban and regional where internet access is unreliable which also means access to on-line businesses and government services is inhibited;
- hard copy AustPost mail delivery services have also recently been reduced in many locations which has inhibited timely communication;
- the costs for express hard copy mail delivery and courier services have also increased. This has contributed to businesses' to transitioning to email and other on-line communications to reduce their expenses. Although for customers and other businesses with which they communicate there has been an improvement in timing of delivery, it has been at the expense of those without reliable access to on-line communications.

2. *What is the cost of complying with the current regulations? Please provide a breakdown of costs and an indication of the frequency at which these communications occur.*

The SME Committee is unable to provide current regulatory cost details for SME businesses.

- a. *Would these costs be reduced if the law was technology neutral? Please provide a breakdown of any anticipated savings and any non-monetary benefits.*

The SME Committee is also unable to provide a breakdown of any anticipated savings and any non-monetary benefits for SME businesses.

However, from the experience of the SME Committee, the provision of communications electronically is considerably cheaper than the provision of communications through hard copy and regular mail post.

The provision of communications through hard copy and regular post requires costs to be incurred for type setting and printing of the communication, as well as the costs of mail post and often for the services of a mail house where large numbers are involved, and for returned mail another exercise to locate an alternative address to which the hard copy communication can be re-sent. These activities also add time to the delivery of the communication.

The provision of communications electronically, including email or text contact with the recipient and recipient access to the communication, whether general or individually addressed, through a website portal, can be actioned quickly if need be, can be updated quickly if need be, and only requires (generally) one soft copy to be loaded onto the electronic platform the recipient accesses to receive the communication. This process is considerably cheaper than a hard copy of regular mail post.

3. *Do you agree with the categories of communication outlined in the consultation paper?*

The SME Committee does agree with the categories outlined.

- a. *Are there other types of business communication that should be considered?*

The SME Committee considers that unsolicited telephone communication from a range of utility and insurance providers should be more regulated to avoid the unnecessary time that small businesses and consumers may spend in answering these calls.

Although not another type of business communication, the SME Committee notes that the requirement for a recipient to provide identification by producing a range of personal documents can pose difficulties for recipients as well as result in delays in accessing or using business or government services, even those that do not require communication to be primarily on-line.

- b. *Do you agree with the proposed principles outlined in the consultation paper or are there additional or alternative principles that should be considered?*

The SME Committee supports the principles outlined in the Consultation Paper except that it considers the ETA limitation that requires a recipient of an electronic communication to provide consent should be changed by either removing the requirement from the ETA, or by providing in the ETA that consent is deemed to have been given once a recipient accesses or opens the electronic communication.

The Committee supports the technological neutrality approach to legislative requirements for business communications including that default communication method should be unspecified to allow the senders to determine which form of communication best suits their customers, other businesses and stakeholders with which they communicate, and the requirements of their business models, with the proposed provisos that the recipient is able to access the communication, and that the communication can be stored so as to be readily accessible by both sender and recipient, and available for re-use if need be.

c. What, if any, barriers would restrict implementation of the proposed principles?

The major barrier to implementation of the proposed principles would be if the parliament did not pass the proposed amendments to both the ETA and those required to other Treasury portfolio laws to enable the changed ETA to apply.

4. How could stakeholders (such as consumers and investors) benefit or be disadvantaged from greater technology neutrality in Treasury laws? Please provide any relevant data, if available.

From the experience of the SME Committee, the vast majority of stakeholders, being SME businesses, consumers of the products and services provided by SME businesses and investors in SME businesses would benefit from the flexibility as to the form business communications could take to meet their legislative obligations should relevant Treasury portfolio laws become technology neutral.

With regard to their customers and investors, so long as the Treasury portfolio laws when technology neutral enable a range of communication forms, an SME business can choose the most appropriate form by which they communicate to their customers, investors and other businesses, and that form may vary within those groups. The forms of communications will then become a commercial decision for an SME business, which can avail itself of opportunities for cost reductions and improved timing delivery efficiencies.

Similarly, large organisations with communication obligations under legislation would also benefit through the potential cost savings and efficiencies a range of communication formats would allow.

In both cases, where a customer cannot receive electronic communications or does not have the facility to access on-line information, the SME business or large organisation with the legislative obligation to provide information to that customer would need to maintain hard copy regular post communication to meet those obligations.

5. Which of the options identified on page 3 do you consider would provide the biggest benefits while appropriately managing risk?

The SME Committee considers the simplest and most efficient option to provide the biggest benefits while appropriately managing risk is to reduce or remove exemptions to the ETA for Treasury portfolio laws that currently lack of technology neutrality.

The SME Committee does not support the first option being considered by Government, being to maintain the status quo. The SME Committee recognises that the COVID-19 pandemic situation has illustrated the practical benefits and acceptance of adopting digital technologies in business so that the opportunity should be taken by Government as soon as possible to change legislative requirements to further facilitate use of those technologies now and into the future through recognising technology neutrality.

The second option being considered by Government, being to agree principles for legislative change, then to identify and prioritise the implementation of those required changes to Treasury portfolio laws, should, in the SME Committee's view, only be chosen where technology neutrality cannot be achieved by having the ETA apply by removing any exemption currently provided thereunder.

6. *If technology neutral reforms are introduced, what should businesses do to manage the impact of these changes, to ensure that benefits are realised and disadvantages overcome?*

The SME Committee anticipates that small businesses would need to review the methods by which they communicate to take advantage of the proposed changes, and if need be and appropriate for their customers, implement default electronic communications which would be much easier if, as earlier suggested, the current requirement for the recipient's consent is removed as an impediment under the ETA.

7. *What transitional issues do you foresee for businesses, consumers and regulators in moving to technology neutral communication methods?*

Compared to the experiences the SME Committee has been aware of with the implementation of other change regimes, the transition to increased default use of electronic business communications facilitated through technology neutral legislation as proposed in the Consultation paper should not prove onerous.

- a. *What are the key implementation risks and their likelihood of occurring? How can we mitigate these risks? Please provide examples.*

The only implementation risk that the SME Committee can foresee would be that for regulatory communications involving obligations for lodgements, payments or registration there could be concerns of businesses and consumers that without a reminder communication they may not be aware of their regulatory obligation. This issue arose in New South Wales when annual car registration went on-line, and without a notice on the car or an email of reminder, many residents found themselves fined for driving unregistered cars. The risk can easily be mitigated by email/text reminders.

Further discussion

The SME Committee would be happy to discuss any aspect of this feedback. Please contact Coralie Kenny, Chair of the SME Committee, on 0409 919 082 if you would like to do so.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Greg Rodgers', written in a cursive style.

Greg Rodgers
Chair, Business Law Section