

DIGITAL ECONOMY STRATEGY

RESPONSE TO CONSULTATION PAPER

November 2017

CONTENTS

Introduction	3
Make digital signatures easier	3
Make digital finance easier	5
Privacy regime changes	5

INTRODUCTION

1. ANZ thanks the Department of Industry, Innovation and Science for the opportunity to contribute to the development of Australia's digital economy strategy.
2. ANZ believes that the digital economy is central to driving productivity, competition and innovation in Australia. We already observe this within the finance industry where new technologies are providing payment and banking options that are valued by customers. We have supported key Government initiatives aimed at digital innovation in finance such as open data¹ and making it easier to become a bank.²
3. The points we raise in this submission are three legal reforms that would make it easier for the economy to digitise.

MAKE DIGITAL SIGNATURES EASIER

4. Increasingly, our customers want to be able to engage with us digitally. Loan documents, guarantees and security documents can all be negotiated and provided to customers electronically. However, due to Australian laws, customers must often print those documents, sign them with a pen and return physical copies (or scan and email a PDF of the signed document) rather than executing them electronically. In contrast, jurisdictions like the United States better support contracting parties to use digital signatures.
5. There are three key ways in which legal uncertainty could be removed to increase the use of digital signatures through the Australian economy.

Companies signing contracts

6. Sections 129(5) and (6) of the *Corporations Act 2001* (Cth) (**Corporations Act**) allow parties dealing with companies to assume that a document has been duly signed by the company if it is signed in accordance with section 127. Under section 127, companies can sign documents through two directors of the company or a director and a company secretary, with or without affixing the company seal.
7. This is an important assumption as it means that counterparties do not need to review the company's constitution and minutes of directors' meeting approving entry into the contract to ensure that that the company is duly authorised to enter into the contract being signed.
8. Unfortunately, the *Electronic Transactions Regulations 1999* (Cth) (**ET Regulations**) exclude the entire Corporations Act from the provisions of the *Electronic Transactions Act*

¹ https://static.treasury.gov.au/uploads/sites/1/2017/09/c2017-t224510_ANZ.pdf

² http://www.pc.gov.au/_data/assets/pdf_file/0011/222698/sub049-financial-system.pdf

1999 (Cth) (**ET Act**) that state that use of an electronic signature does not invalidate a transaction.³ Because section 127 does not refer to electronic signatures, the exclusion of the Corporations Act from the operation of the ET Act means that counterparties cannot assume that a digitally signed contract binds the company to the contract. Instead, counterparties must review evidence that the document has been duly executed, such as minutes of directors' meeting and the constitution.

9. To allow companies to electronically execute contracts and other documents (without needing to review evidence of due execution), the exclusion of section 127 of the Corporations Act from the ET Act should, at least, be removed. This would allow the migration of many elements of commerce into the digital realm.
10. More ambitiously, the exclusion of the entire Corporations Act from the ET Act could be reviewed. While beyond the scope of this submission, the rationale for the non-application of the ET Act to the many legal functions of the Corporations Act may benefit from consideration to identify opportunities for enhanced digitisation of commerce and finance.

Requirements for deeds

11. In a similar vein, there are also issues with executing deeds electronically.
12. Deeds are commonly used for granting security over property or giving a guarantee. While State and Territory legislation has modified the common law requirements for execution (including sealing) and delivery of deeds, the common law continues to apply in relation to the requirement that a document must be written on paper, parchment or vellum in order for it to take effect as a deed.⁴
13. It is unclear whether a document that purports to be a deed and is executed digitally will satisfy these requirements. Where a document fails to take effect as a deed, it may be unenforceable. Even if a document were subsequently printed, it is not clear that this is sufficient to satisfy the legal requirements for a deed.
14. The ET Act should be amended to expressly allow electronic execution of deeds. We note for reference that the United Kingdom has addressed this issue by:
 - abolishing any rule that restricts the substances on which a deed can be written or that requires a deed to be sealed and delivered; and

³ Sections 8(1), 9 to 12, 14, 14A, 14B and 15.

⁴ *Scook v Premier Building Solutions Pty Ltd* [2003] WASCA 263

- giving the relevant Minister power to amend any legislation that requires a person's signature or seal or which is required to be delivered as a deed or witnessed so as to facilitate use of electronic communications.

Witnessing documents

15. When some documents are signed, the signature of a party must also be witnessed. Documents that are signed digitally may not be able to be witnessed in a legal sense despite the fact that digital signing technology is able to authenticate the signing party's identity through other means and often more reliably (eg through dual-factor authentication or digital certificates).
16. The ET Act should be amended to provide that where a document is required to be witnessed, this requirement will be satisfied if the identity of the party digitally signing the document can be authenticated with a high degree of confidence.

MAKE DIGITAL FINANCE EASIER

17. The ET Act could also be reviewed to make it easier to provide customers with online statements for credit contracts.
18. Section 9 of the ET Act (in addition to Regulation 10 of the ET Regulations) requires proactive consent in writing for electronic communication of documents required under the credit law. In practice, this is inconvenient for customers and limits take up of electronic communications.
19. To enable the digitisation of credit processes, it may be beneficial to align the credit laws with the position on non-credit accounts. This position has seen a significant increase in customers using online statements. Our research indicates that consumers find electronic statements more convenient. We suggest that customers should be allowed to provide electronic consent, or credit providers should be able to move customers to electronic communications after giving notice and providing an option to retain written communications.

PRIVACY REGIME CHANGES

20. Australia's privacy regime will be increasingly critical as the economy goes digital. For example, privacy will underpin Australia's moves towards open data. In ANZ's submission to the Government on the Open Banking Review, we have set a number of amendments to the *Privacy Act 1988* (Cth) (**Privacy Act**) that could be considered to help facilitate open banking.

Direct application of Privacy Act

21. More broadly, the Government could consider statutorily extending the application of the Privacy Act to all parties to whom personal information is disclosed.
22. At present, the Privacy Act obligations generally apply to the organisation to which the individual discloses their information. If that organisation then, with the individual's permission, discloses the information to a second organisation, the second organisation does not carry those same obligations to the individual. Instead, the first organisation is required to ensure that the second organisation safeguards the information.
23. The Privacy Act could be amended to require all organisations that receive personal information, whether directly from the individual or indirectly through another organisation, to protect the information. We think this could have three benefits for the digital economy:
 - Individuals would be better able to protect their information in a digital economy, particularly as third party data recipients increasingly rely on fourth and fifth party data processors with whom the initial discloser is unlikely to have, or readily be able to achieve, a contractual relationship – this may result in greater consumer faith in digital economy services
 - It would force through statute rather than contract subsequent recipients of personal information to protect that information – this could see greater compliance with the Privacy Act
 - It could free original recipients of the information from their current 'policing' role, reducing the compliance costs

White list of equivalent jurisdictions

24. Another change to the privacy regime could be for the Australian Office of the Information Commissioner to maintain a white list of the jurisdictions with laws or binding schemes that 'overall, [are] at least substantially similar to the way in which the APPs protect the information'. This would give organisations clarity about which jurisdictions information can be sent to in compliance with Australian Privacy Principle 8.2(a)(i).