

ELECTRONIC TRANSACTIONS AMENDMENT REGULATIONS 2021

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

in compliance with section 15J of the *Legislation Act 2003*

PURPOSE AND OPERATION OF THE INSTRUMENT

The purpose of the *Electronic Transactions Amendment Regulations 2021* is to amend the *Electronic Transactions Regulations 2020* to provide an updated list of Commonwealth laws that are exempt from the *Electronic Transactions Act 1999* (the Act).

The *Electronic Transactions Regulations 2020* (the Principal Regulations) provides a list of Commonwealth laws that are exempt from the Act.

The Act facilitates the use of electronic transactions, and enables business and the community to use electronic communications in their dealings with the government. The Act ensures that a transaction under a Commonwealth law will not be invalid simply because it was conducted by means of electronic communication. If a Commonwealth law requires an individual to give information in writing, provide a handwritten signature, produce a document in material form or record or retain information, the Act operates to ensure those requirements are fulfilled if provided electronically.

The Act is based upon principles of functional equivalence, which means that paper-based commerce and electronic commerce should be treated equally by the law, and technology neutrality, which means that the law should not discriminate between forms of technology. The Act does not remove any legal obligations that may be imposed upon an individual by other Commonwealth laws.

Section 16 of the Act provides that the Governor-General may make regulations prescribing all matters required or permitted to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Act applies to all laws of the Commonwealth unless, pursuant to section 7A of the Act, they are specifically exempted by the Principal Regulations or are exempted pursuant to section 7B of the Act. Schedule 1 to the Principal Regulations contains the list of Commonwealth laws that are exempt from the application of the Act. These exemptions are necessary to account for circumstances where it is not appropriate to provide information, documents or signatures electronically.

The *Electronic Transactions Amendment Regulations 2021* (the Amendment Regulations) amend the Principal Regulations to provide an updated list of Commonwealth laws that are exempt from the Act. The amendments ensure that the Act operates and reflects current and

emerging digital channels and consumer and business preferences and supports the Australian Government's Digital and Deregulation Agendas.

The Principal Regulations contain 93 exemptions. To ensure that the exemptions to the operation of the Act are fit for purpose, exemptions are regularly reviewed. Business practices, and consumer behaviours and expectations, have evolved since many of the exemptions were introduced. The Amendment Regulations removes 33 exemptions and reduces the scope of one existing exemption.

The removal of and reduction in scope of current exemptions to the Act supports the Government's digital agenda and Digital Economy Strategy, which sets out how Australia will secure its future as a modern and leading digital economy and society by 2030. Removing further exemptions facilitates the application of the Act to the previously exempt legislation. Transactions executed under the laws removed from the Principal Regulations are, under the Amended Regulations, valid if they take place wholly or partly by means of electronic communications. The reduction in the number of exemptions to the Act reduces barriers to electronic communications and e-commerce for businesses and the community.

The Amendment Regulations reduce the scope of one current exemption under Part XV of the *Commonwealth Electoral Act 1918* (the Electoral Act). The commencement of the *Electoral Legislation Amendment (Counting, Scrutiny and Operational Efficiencies) Act 2021* inserted new subparagraphs 194(1A)(a)(ii) and (iii) and 194(1A)(d) into the Electoral Act. These amendments to the Electoral Act facilitate a paper-based and electronic process for postal voters outside Australia to securely self-certify their postal vote certificate by providing official documented evidence of identity where they are unable to find 'an authorised witness'. The Amendment Regulations remove subsections 194(1A)(a)(ii), 194(1A)(a)(iii) and 194(1A)(d) from the current exemption and subject those provisions to the application of the Act.

The Act is a law of general application. Removal of exemptions from the Principal Regulations subjects laws to the application of the Act. Wider application of the Act enables, but does not compel or mandate, the use of electronic communications by business and individuals in their dealings with government.

The Regulations commence on the day after they are registered on the Federal Register of Legislation.

Details of the Regulations are set out in **Attachment A**.

CONSULTATION

Consistent with the requirements of the *Legislation Act 2003*, the Amendment Regulations have been informed by consultation with the government agencies that have policy responsibility for the legislation to be removed from the Principal Regulations. Removal of exemptions facilitates additional avenues of communication with the government but does not prevent people communicating with government agencies through paper-based correspondence.

The following government agencies were consulted by the Deregulation Taskforce within the Department of the Prime Minister and Cabinet:

Department of Finance
Department of Veterans' Affairs
Department of Infrastructure, Transport, Regional Development and Communications
Department of Foreign Affairs and Trade

Further details of the Regulations are set out in **Attachment A**.

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation assessed the Regulations as having a minor regulatory impact on businesses, community organisations and individuals (OBPR Reference: ID25033). As such, a Regulation Impact Statement was not required.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Electronic Transactions Amendment Regulations 2021

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Disallowable Legislative Instrument

The *Electronic Transactions Act 1999* (the Act) legally validates transactions under Commonwealth law taken place wholly or partly by means of electronic communications. This framework allows documents that are required in writing, contain a signature, or are to be produced or retained, to be met in an electronic form. The Act applies to all laws of the Commonwealth unless, pursuant to section 7A of the Act, they are specifically exempted by the *Electronic Transactions Regulations 2020* or are exempted pursuant to section 7B of the Act.

Schedule 1 of the Regulations contains a list of Commonwealth laws that are exempted from the operation of the Act, or particular provisions of the Act. These exemptions are necessary to account for circumstances where it is not appropriate to provide information, documents or signatures electronically.

The purpose of the *Electronic Transactions Amendment Regulations 2021* (the Amendment Regulations) is to ensure that the exemptions to the operation of the Act remain relevant in light of current and emerging digital channels and consumer preferences. The exemptions provided in Schedule 1 of the Regulations are regularly reviewed to reflect evolving business practices and consumer behaviours. 33 current exemptions have now been identified as conducive to electronic communications, and are to be removed from Schedule 1 of the *Electronic Transactions Regulations 2020*. Part XV of the *Commonwealth Electoral Act 1918* has been amended to reflect newly inserted provisions and the existing exemption will be reduced in scope.

Human rights implications

Item 1 of the Amendment Regulations amends the *Electronic Transactions Regulations 2020* by inserting subparagraphs 194(1A)(a)(ii) and (iii) and paragraph 194(1A)(d) of the *Commonwealth Electoral Act 1918* in Schedule 1, with the effect of removing those provisions from the exemption to the *Electronic Transactions Act 1999*. The newly inserted provisions will facilitate both paper-based and electronic processes for postal voters outside Australia to securely self-certify their postal vote certificate by providing official documented evidence of identity where they are unable to find an authorised witness.

Enabling electronic process for postal voters engages the right to take part in public affairs and elections by providing access to voting. This right is promoted by expanding the methods in which postal votes can be received.

Item 2 of the Amendment Regulations amends the *Electronic Transactions Regulations 2020* by removing 33 exemptions from Schedule 1. This item does not raise human rights issues as the amendments will reduce regulatory impact as far as practicable and increase the certainty and availability of electronic transactions.

Removing the exemptions from the operation of the Act for particular provisions of Commonwealth law enables, but does not compel or mandate, the use of electronic communications by business and individuals in their dealings with government. Removing exemptions merely allows for a requirement or permission to provide information in writing under a law of the Commonwealth to be fulfilled in electronic form, in addition to written paper form.

Conclusion

Item 1 of this Disallowable Legislative Instrument is compatible with human rights because it promotes the right to take part in public affairs and elections.

Item 2 of this Instrument does not raise human rights issues.

Details of the *Electronic Transactions Amendment Regulations 2021*

Section 1 – Name

This section provides that the title of the proposed instrument is the *Electronic Transactions Amendment Regulations 2021*.

Section 2 – Commencement

This regulation would provide that the Regulations commence on the day after they are registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the proposed Regulations are made under the *Electronic Transactions Act 1999*.

Section 4 – Schedules

This section notes that instruments to be specified in a Schedule to this instrument will be amended or repealed. Any other item in a Schedule to this instrument will have effect according to its terms.

Schedule 1– Laws of the Commonwealth to which certain provisions of the Act do not apply

Section 1 – Clause 1 of Schedule 1 (cell at table item 19, column 1, paragraph (b))

The Amended Regulations reduce the scope of one former exemption under Part XV of the Commonwealth Electoral Act 1918 (the Electoral Act). The commencement of the *Electoral Legislation Amendment (Counting, Scrutiny and Operational Efficiencies) Act 2021* inserted new subparagraphs 194(1A)(a)(ii) and (iii) and 194(1A)(d) into the Electoral Act. These amendments to the Electoral Act facilitate a paper-based and electronic process for postal voters outside Australia to securely self-certify their postal vote certificate by providing official documented evidence of identity where they are unable to find ‘an authorised witness’. The amendments to the Regulations remove subsections 194(1A)(a)(ii), 194(1A)(a)(iii) and 194(1A)(d) from the former exemption and subject those provisions instead to the application of the Act.

Section 2 - Clause 1 of Schedule 1 (table items 31 to 34, 38 to 41, 46 to 48, 50, 51, 54 to 56, 61, 62, 64 to 66, 68, 70 to 76, 79, 80, 92 and 93)

The above items (which are also extracted below) will be repealed from the table in Schedule 1. This will result in the removal of those exemptions from the application of Act. The effect of removing these 33 exemptions will be to subject each of those laws to the application of the *Electronic Transactions Act 1999*. The Act is a law of general application and in the absence of an exemption the Act will apply. Application of the Act will ensure that a transaction will not be invalid simply because it was conducted by means of electronic communications. Transactions that have taken place by electronic communications are recognised as functionally equivalent to paper-based counterparts. Removal of exemptions

facilitates additional avenues of communication with the government but will not prevent people communicating with government agencies through paper-based correspondence.

Current exemptions to be repealed

Item	Exemption	Parts of the <i>Electronic Transactions Act 1999</i> which do not apply to the listed exemption
31	<i>Evidence Act 1995</i> , sections 161 and 162	Sections 14, 14A and 14B
32	<i>Extradition Act 1988</i> , subsections 26(1) and 38(1)	Sections 9 and 10
33	<i>Extradition Act 1988</i> , subsection 43(2)	Subsection 8(1), Division 2 of Part 2 and sections 14, 14A, 14B and 15
34	<i>Extradition Regulations 1988</i> , subregulation 4(1)	Subsection 8(1), Division 2 of Part 2 and sections 14, 14A, 14B and 15
38	<i>International Criminal Court Act 2002</i> , subsection 65(3) and section 66	Subsection 8(1), Division 2 of Part 2 and sections 14, 14A, 14B and 15
39	<i>International War Crimes Tribunals Act 1995</i> , subsection 18(2)	Sections 9 and 10
40	<i>International War Crimes Tribunals Act 1995</i> , subsections 27(2), 28(2) and 28(3)	Subsection 8(1), Division 2 of Part 2 and sections 14, 14A, 14B and 15
41	<i>International War Crimes Tribunals Regulations 1995</i> , sub regulation 6(1)	Subsection 8(1), Division 2 of Part 2 and sections 14, 14A, 14B and 15
46	<i>Military Rehabilitation and Compensation Act 2004</i> , sections 319, 323, 330, 405 and 406	Sections 9, 10 and 11
47	<i>Motor Vehicle Standards Act 1989</i>	Subsection 8(1), Division 2 of Part 2 and sections 14, 14A, 14B and 15
48	<i>Motor Vehicle Standards Regulations 1989</i>	Subsection 8(1), Division 2 of Part 2 and sections 14, 14A, 14B and 15

50	<i>Mutual Assistance in Criminal Matters Act 1987</i> , subsection 13(2)	Subsection 8(1), Division 2 of Part 2 and sections 14, 14A, 14B and 15
51	<i>Mutual Assistance in Criminal Matters Regulations</i> , subregulation 3(1)	Subsection 8(1), Division 2 of Part 2 and sections 14, 14A, 14B and 15
54	<i>Navigation Act 2012</i> , subsection 39(1) and sections 40 and 317	Section 11
55	<i>Navigation Act 2012</i> , section 309 and subparagraph 312(1)(b)(i)	Sections 9, 10 and 11
61	<i>Papua New Guinea (Members of the Forces Benefits) Act 1957</i>	Subsection 8(1), Division 2 of Part 2 and sections 14, 14A, 14B and 15
62	<i>Papua New Guinea (Members of the Forces Benefits) Regulations 2016</i>	Subsection 8(1), Division 2 of Part 2 and sections 14, 14A, 14B and 15
64	<i>Protection of the Sea (1992 Fund) Regulations 1994</i> , subregulation 24(1)	Section 11
65	<i>Protection of the Sea (Civil Liability) Act 1981</i> , subsections 15(4), 17(5) and 19C(2)	Section 11
66	<i>Protection of the Sea (Civil Liability) Act 1981</i> , subsections 15(1), 15(2), 15(3) and 19C(1)	Section 12
68	<i>Protection of the Sea (Harmful Anti-fouling Systems) Act 2006</i> , subsections 13(1), 13(2), 15(1) and 15(2)	Section 12
70	<i>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</i> subsections 12(2) and 14(3) and paragraph 21A(1)(b); subsections 23(2) and 25(3)	Section 12
71	<i>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</i> , subsections 12(3), 12(7) and 23(8)	Section 10
72	<i>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</i> , subsection 12(6)	Sections 9 and 10

73	<i>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</i> , subsections 14(1) and 25(1)	Sections 11 and 12
74	<i>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</i> , subsections 14(6) and 25(6) and paragraph 27(1)(k)	Section 11
75	<i>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</i> , section 26G	Sections 9 and 11
79	<i>Registration of Deaths Abroad Act 1984</i>	Subsection 8(1), Division 2 of Part 2 and sections 14, 14A, 14B and 15
80	<i>Registration of Deaths Abroad Regulations 1985</i>	Subsection 8(1), Division 2 of Part 2 and sections 14, 14A, 14B and 15
92	<i>Veterans' Entitlements Act 1986</i> , sections 5T, 30M and 79X	Sections 9, 10 and 11
93	Subordinate legislation made under the <i>Veterans' Entitlements Act 1986</i>	Sections 9, 10 and 11

Exemptions to be amended

Item	Commonwealth Act's original exemption	Commonwealth Act's new exemption	Parts of the <i>Electronic Transactions Act 1999</i> which do not apply to the listed exemption
19	The following provisions of the <i>Commonwealth Electoral Act 1918</i> : (a) section 115; (b) Part XV (other than sections 184 and 184A); (c) Part XVA; (d) Part XVI (other than subsections 202A(1), (2), (4) and (5))	The <i>Commonwealth Electoral Act 1918</i> : a) section 115 b) Part XV (other than sections 184, 184A, 194(1A)(a)(ii), 194(1A)(a)(iii) and 194(1A)(d) c) Part XVA d) Part XVI (other than subsections 202A(1), (2), (4) and (5))	Subsection 8(1), Division 2 of Part 2 and sections 14, 14A, 14B and 15