

To: Senate Economics Legislation Committee

Walrus Committee submission on the document execution provisions in the Corporations Amendment (Meetings and Documents) Bill 2021

8 November 2021

We are a committee of senior lawyers from five large Australian law firms which have significant corporate and financing practices.

This submission relates only to the document execution provisions set out in schedule 1 of the Corporations Amendment (Meetings and Documents) Bill 2021; that is, the proposed permanent amendment of the *Corporations Act 2001* (Cth) by inserting sections 110, 110A and 110B, and amending sections 126, 127 and 129.

We strongly support those amendments. They deal with issues that our firms and others in commercial and corporate practice encounter on an almost daily basis, and that have bedevilled transactions and retarded Australia's embrace of a digital economy (and not just during the COVID pandemic, although that certainly exposed the issues). Indeed, we and others have been calling for changes such as these for many years now.

The amendments build on the experience with the temporary measures to address electronic execution by companies, first introduced in May 2020.¹ Those measures have been widely applauded, and so far as we know, they have not had any ill effect, or generated calls to turn back the clock.

That said, there were some shortcomings in those measures and the amendments successfully address them.

The amendments further simplify and modernise document execution for companies, in a way which will make life easier for businesses large and small, and the economy at large.

Among the advantages of the amendments are the following.

Advantages of electronic documents

The Bill represents an extremely welcome development to clarify the law permanently so that companies may clearly execute documents (including deeds) electronically through their officers signing under section 127 and through individuals signing as their agent under section 126.

In doing so, it will bring company documents in line with the modern world. Electronic communication and information storage are rapidly becoming the norm in general life and commerce. We are in a digital age, where an increasing number of documents, transactions and other interactions are fully electronic, and there are now well-accepted and understood technologies for dealing remotely. The issues are generally well tested and familiar.

The advantages of electronic documents are readily apparent:

- There are significant savings in cost and environmental impact. Electronic (and thus paperless) processes are speedier, easier, more convenient and more efficient.
- Generally services are more accessible to consumers and businesses, including small business.
- In particular, parties in regional Australia have greater access to services, and a greater opportunity to conduct business and compete, unburdened by geography.

¹ *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020*, and subsequent Determinations; *Treasury Laws Amendment (2021 Measures No.1) Act 2021* (Cth)

- Individuals working from home (a trend that appears set to become permanent beyond the end of the pandemic) can more easily sign or process documents.
- It promotes competition by increasing availability and also making it easier for new market entrants.
- Electronic records and communications are often more accessible, secure and reliable — it is easier to store and locate documents executed electronically. They are more easily searchable, saving time and money in large transactions and litigation.
- In practice it is often easier to establish that documents and communications have been properly signed, or received and opened — there is a clear electronic evidence trail.
- Paper communication is not becoming any easier or more reliable — Australia Post is cutting down its services.

Uncertainties relating to electronic documents of companies removed

Two areas of particular uncertainty have inhibited the adoption of electronic documents:

- Whether companies can sign electronically under section 127. That section provides a mechanism by which companies can execute documents through their officers signing, so counterparties can rely on those signatures under section 129.
- Whether companies and others can sign deeds electronically (under section 127 or otherwise). Deeds are an ancient form of document but are still common in Australian commerce. For historical reasons they are subject to arcane and archaic requirements. Those requirements include an old common law rule that they must be on paper, parchment or vellum.

The Bill removes those difficulties in relation to companies registered under the Corporations Act.

Deeds simplified in relation to companies

The proposed amended section 126 in particular is very welcome in removing many of the arcane and archaic (and, arguably, redundant) formal requirements for deeds when a company signs a deed through an individual who is acting as an agent for the company.

Those requirements currently vary in the various jurisdictions around Australia. They unnecessarily impede commerce and add to difficulties and costs. For parties without access to sophisticated legal advice, they can be a trap for the unwary, as failure to satisfy those requirements can invalidate transactions or render them harder to enforce.

One of those requirements in some states is that the signature of the agent to a deed be witnessed. We welcome its removal. In our experience witnessing is of very little practical value, and can be a trap and a burden. In particular, having witnesses gives little or no benefit in proving execution. Forgers or fraudsters may forge the witness's signature, or get a crony or innocent dupe to witness their purported signature. The witness may be unknown or untraceable. The perceived benefits are largely illusory.

Another requirement is that an agent or attorney who signs a deed for another must themselves be appointed by a deed, thus multiplying the formalities and risks of error. This too has been done away with in the new section 126 and is a very welcome development.

Other operational difficulties cured

The amendments cure other operational difficulties that often arise in practice.

These include:

Single director companies with no secretary

Currently where a company only has one director, section 127(1) allows the sole director to sign alone for the company only where the director is also the sole secretary, and does not give any method of execution when there is no secretary at all. The amendments correct this.

Split execution

The amendments clarify that if two officers need to sign a document under section 127, they can sign separate counterparts of the document in different ways, and they do not need to print out a full copy of the document to do so. This addresses a significant problem encountered during lockdown but also more generally in the common situation where the officers signing the document are in different locations.

Suggested further reforms.

We suggest that at the earliest opportunity Parliament should extend the reforms to include the following:

Foreign and statutory corporations

The reforms should extend the ability to execute documents electronically (including deeds) to foreign corporations and statutory corporations. Major corporate players in the Australian economy include foreign corporations and statutory corporations that are not Corporations Act companies. Deeds are particularly problematic for some foreign corporations that are resident in jurisdictions that do not recognise the concepts of deeds or seals.

Extend s126 to corporate agents as well as individual agents

Section 126 applies where an individual is appointed as an agent for a company. It does not deal with the common situation where another corporation is signing as agent for the company. Section 126 should allow for the appointment of a corporation as an agent.

Contacts

We would be pleased to discuss the above. Please contact any of the below.

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