



Exposure Draft: *Corporations Amendment (Virtual Meetings and Electronic Communications) Bill 2020*

FSC Submission

November 2020



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1. About the Financial Services Council

The FSC is a leading peak body which sets mandatory Standards and develops policy for more than 100 member organisations in one of Australia's largest industry sectors, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advice licensees and licensed trustee companies. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing \$3 trillion on behalf of more than 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the fourth largest pool of managed funds in the world.

2. Executive Summary

Thank you for the opportunity of providing a submission on the Exposure Draft (ED). In summary, our views are as follows:

1. We agree in principle with the policy intent and support the ED;
2. We are concerned, however, that there has been a short consultation. We would like to see, for example, the practicalities of electronic execution as proposed in the ED being tested before legislation is introduced into the Parliament. Similarly, we would prefer to see what the learnings, if any, are from the current round of Annual General Meetings (AGMs) to inform the drafting of final legislation;
3. Final legislation should interrelate appropriately with other measures designed to accommodate technology and reduce any "red tape" under existing legislation, such as electronic transactions legislation of the Commonwealth, States and Territories;
4. Electronic document execution could be used for a broader range of documents;
5. Insofar as is reasonable, concerns that the virtual meeting provisions might disenfranchise groups of shareholders or members should be considered carefully and if found to have merit, appropriately addressed.

We have set out some more detailed comments in part 4 below.

3. FSC Recommendations

1. Our primary suggestion is that the legislation is not hurried through the Parliament. The drafting then can be refined and informed by reference to practical experience during the current AGM “season” and for the duration of the current temporary modification period (which ends on 21 March 2021).
2. We agree in principle with the proposals concerning remote execution and witnessing and the clarity provided in relation to execution of deeds. However, we do recommend that further clarity be provided in some aspects of the drafting and, again, the final drafting be informed by practical experiences during the modification periods.
3. Under the proposed new legislation, company documents executed by both with and without a seal may be executed using electronic means. To provide consistency, we recommend extending this relief to also cover ASIC forms. Some of the ASIC forms, e.g. Form 520 Declaration of solvency and Form 491 Changes to scheme details, require wet-ink signature and have to be lodged by post. By extending the proposed relief, it would allow companies to more effectively engage with ASIC.
4. Although the legitimacy of virtual meetings is to be commended, in our view, attendance and participation in physical company meetings is an important shareholder right. Moreover there needs to be safeguards introduced to ensure all participants have appropriate rights to be heard. There also needs to be some clarity concerning issues around the use of technology for virtual meetings and fairness to all participants. Again, we believe that some of these issues will be identified during the current period of AGMs.

4. Detailed Comments

4.1. Electronic Execution etc.

1. We agree with the drafting in the ED that permits the affixation of common seals to be witnessed remotely. For clarity, it would be useful if the final form legislation could expressly provide that this method does not prevent another permitted method from being adopted.
2. We note that the ED also addresses the ambiguity which has arisen in relation to the purported execution of Deeds by electronic means. Again, as a matter of prudence and for clarity we suggest that provisions of this kind have paramount force and effect notwithstanding any rule of general law or statute to the contrary.
3. We do note that proposed section 127 (3B) contains a number of requirements and processes which must be satisfied before a document can be taken to have been executed electronically by a company. We also note that there have been suggestions that these conditions are too restrictive and extend beyond the requirements for “normal” execution. That is correct, however, in our view a balance needs to be drawn between protection of counterparties relying on documents which appear to have been executed electronically and business efficacy. We suggest that further consideration be given to these conditions and whether the same will be found to be too restrictive and impractical for businesses to achieve. Further and appropriate consultation with business needs to occur.
4. There is a requirement in proposed section 127(3B)(a) that the signer receive the document electronically. Receipt of electronic communication is further limited by proposed section 105A(b)(4) so that the signer has to receive the document electronically at their nominated electronic address. The difficulty here is that the signer of the document indeed may well have generated the relevant document in the first instance. The provisions thus do not seem to work properly. We suggest that consideration be given to the practicalities of execution and the relevant conditions. It would be useful in this regard if it were made clear that the permitted forms of execution are not limited or excluded by electronic execution.
5. We suspect also that some of the conditions such as that in proposed section 127(3B)(c) that the signer indicates they have signed the document comment may not be consistent with some electronic signature platforms, which send a confirmation email to the signer of the document and not from the signer. These practical issues will need to be considered further by Treasury and we strongly suggest that further consultation be undertaken on such points.

4.2. Virtual Meetings.

1. The FSC supports virtual meetings provided that these are accessible to all relevant stakeholders, do not disenfranchise any stakeholders and are “technologically neutral”. There are some aspects however in the ED which appear to fall short of achieving these aims.
2. For example, we note that under the ED, any questions or comments submitted by a member or a shareholder at a meeting conducted using technology must be recorded

in the minutes of the meeting. Shareholders and members of registered schemes may then access these minutes under existing sections 251B and 253N.

The regulatory impact statement that accompanies the draft Bill specifically notes that this was included to address any concerns around 'cherry picking of questions'. We accept this is a laudable approach; however, we do express some reservations as to whether the provisions would achieve the anticipated outcome. Certainly, as a matter of record in the minutes, questions and comments would appear if any such requirements are imposed and satisfied. However, minutes are available only after the event and, accordingly, say do not create an equivalent real time visibility of face-to-face meetings and proceedings of the meetings. Thus, there still remains an issue that there may well be a risk of some questions and comments being omitted at the meeting itself.

3. This means that more prescriptive detail on what the minimum requirements for ensuring transparency and inclusion of questions and comments in meetings is required.
4. In our view and in similar vein, there also should be clear requirements on suitable and adequate technology being in place as a pre-requisite to ensure investors are not 'locked out' of meetings or that meetings will be reconvened if that occurs where they do not also offer a face to face to meeting option.