

Submission on Treasury Laws Amendment (Measures for Consultation) Bill 2021

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About the authors

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Declaration of interests

As a research fellow at the ADM+S Centre, Dr Fraser is funded by ARC grant number CE200100005.

Dr Fraser is also a co-founder of, and minority stakeholder in, Treescribe.com and therefore has an indirect interest in promoting legal technology in general.

Executive summary

This submission addresses the proposed amendments to sections 127 and 129 of the Corporations Act 2001, which would make permanent the COVID-19 emergency measures to allow electronic execution and witnessing of documents by corporations. This submission:

1. welcomes these changes on the basis that they will encourage the uptake of legal technology, which has the potential to improve:
 - a. access to law;
 - b. trust in the business environment;
 - c. economic efficiency (by reducing transaction costs); and
 - d. innovation and entrepreneurship in Australia;
2. identifies key trade-offs resulting from the implementation of the provisions, namely the trade-offs between:
 - a. the efficiency of digital signing and the risk of abuse by parties who use the ‘noise’ provided by electronic signing invites to change or add agreements at the point of execution;
 - b. flexibility and certainty connected with the technological neutrality of the provisions;
 - c. convenience and security when it comes to choice of electronic signing method;
3. welcomes the provision for a 2 year review, and recommends Treasury monitor these trade-offs and consider the appropriate response (if any) at the time of review.

1. Arguments in favour of the amendments

We agree with Treasury’s appraisal of the provision for electronic signing by companies to reduce compliance costs for Australian companies.

Removing obstacles to electronic signing by companies will encourage the uptake of efficient digital contracting technologies, including AI technologies, more generally.

This goal is consistent with the goals of Australia's Digital Economy Strategy and recently released AI Action Plan.

There now exists a host of digital contract technologies, whose functions extend far beyond digital signing. These include platforms and applications for:

- automated or semi-automated contract drafting and generation;
- smart management of contract templates and precedents;
- digital communication and negotiation between parties;
- digital execution; and
- post-signing management of contract performance.

Such technologies have the capacity to:

- reduce transaction costs of businesses, by making the processes of contract creation, negotiation, execution and management faster, easier and more efficient;
- improve access to law, by making it easier for Australian companies to use and understand their own contracts, with less reliance on costly legal advice;
- increase trust and reduce disputes in the business environment, by encouraging companies to enter enforceable, comprehensible contracts; and
- create incentives for Australian entrepreneurs to develop better digital tools for contracts.

Of course, clarifying that electronic execution is legally effective will not by itself create a digital transformation in law. It will, however, remove one point of friction for that transformation.

2. Key trade offs

a. Efficiency vs Risk of Abuse

While we are in favour of the new amendments, we wish to sound a note of caution, based on our experience in legal practice. We have used electronic execution of contracts for several years.

Complex transactions often involve several contracts dealing with different aspects of a deal. Typically, these contracts are all signed in a short period of time when the deal is fully negotiated.

During electronic signing, the flurry of electronic 'signing invites' and other notifications arriving in a clients' email inbox can provide cover for the addition of a provision or even a whole document that is not agreed, which presents a high risk of mistaken document execution. There is a principle of common law that a party misrepresenting the nature of contract terms cannot rely on the misrepresented terms (*Curtis v Chemical Cleaning and Dyeing Co* [1951] 1 KB 805). This might go some way to mitigating the risks just described. But it is difficult, risky and costly for companies to rely on this principle.

Adding to this concern is the multiplicity of contract signing solutions with different interfaces, which can be confusing for clients. It is easy to do something unintended with a new software interface and electronic execution interfaces of varying quality share only one characteristic: there is no "undo" functionality. For all the inconvenience, paper documents present less variation in the "interface" for signing.

Often, signing invitations are only issued to signatories of the contract, meaning that parties' lawyers are not copied in, and therefore do not have a chance to conduct a final document review. Lawyers may not even know their client has signed a document electronically. As a result, clients may miss out on final advice about entering into the agreement as negotiated, or about managing the contractual obligations it creates, which may be time sensitive.

In short, electronic signing creates new opportunities for dishonest practices; for problems with contractual understanding and performance; and ultimately, for disputes.

b. Flexibility vs Certainty

A second key trade-off associated with the new provisions for electronic signing is between flexibility and certainty. The provisions are expressed in technology neutral language. The advantage of this approach is that it avoids mandating and locking in existing electronic signing technologies. Lock-in of that kind could prevent the development of better, more efficient or more secure methods.

The disadvantage of technology neutral language is that it leaves room for uncertainty as to what electronic signing methods will be considered adequate proof of identity of the signatory (and under what circumstances). This concern holds true for the Electronic Transactions Act 1999 as well as the proposed amendments under consideration.

Law lags behind in the adoption of technology, and one reason for this is that lawyers are generally risk averse. It is right and proper that lawyers should be committed to avoiding unnecessary risks for their clients. But risk aversion may be at the expense of efficient use of technology. In the face of uncertainty about what kinds of digital execution pass muster, some lawyers may still prefer the certainty of physical signing. It would be unfortunate if uncertainty led to a lack of uptake of electronic signing methods and legal technology more broadly.

Uncertainty about the adequacy of any given electronic signing method may also lead lawyers and companies to favour digital signing methods that mirror physical signing – for example, applying an image of a person's signature to a PDF document. Such methods may not actually be as secure, efficient or reliable as, for example, execution with a cryptographic key enabled by password protected authentication.

c. Convenience vs Security

This brings us to the third trade-off: between convenience and security. Applying an image of a person's signature to a PDF document is probably the easiest, most convenient way to electronically sign a document. It doesn't require printing. And a person can save their signature for multiple applications. Indeed, multiple signatures can be saved on one computer. But this creates the potential for anyone with access to a computer where a digital signature is stored to sign using whatever signatures are stored. In fact, access to a signatory's computer isn't strictly necessary. Anyone with an image of a person's signature can apply that image to a pdf with relative ease.

On the other hand, most secure methods of electronic signing involve cryptographically protected, time-stamped signatures, protected by two-factor authentication. But such methods may be cumbersome – especially if a signatory needs to sign a very large number of documents.

Most reputable electronic signing software applications use reasonable security measures and encryption, but there is a possibility that a significant number of companies will settle on the more convenient option of applying an image of a signature to a pdf. That may result in higher rates of fraud.

3. Two year review

Given the problems described above, we approve the provision for sunseting and reviewing the new amendments within a two year period. This review would provide an opportunity to pick up on problems with electronic signing, including whether, for example, the dishonest uses of signing invites described above become commonplace.

One possible solution to the problem of dishonest or mistaken electronic execution invitations would be to make it mandatory, when contractual parties are represented by lawyers, to copy the lawyers in as non-signatories. This would not by itself solve the problem described above. Indeed, it might increase legal costs. Even so, there may be merit in creating a mechanism to prevent the circumvention of legal review. Merely increasing the likelihood that lawyers will check an electronic signing version of a contract would discourage parties from surreptitiously adding new contracts or provisions, without necessarily requiring actual legal review in every instance.

Another possible measure might be to require electronic signing invites to include an express warranty that the document to be signed has not departed from the latest version reviewed by both parties. Breach of warranty is an easier cause of action than the common law doctrine of misrepresentation.

For now, we raise these points merely as issues to consider at the time of review, rather than firm recommendations.

As for the trade-offs between flexibility and certainty, and convenience and security, we also do not currently recommend any particular action. It may be that markets will resolve the problem of how best to balance certainty, convenience and security. Courts may also help shed light on what signing methods will provide proof of identity appropriate for various circumstances. Once again, we raise these points as issues to monitor and to consider in assessing the amendments at the time of review in two years.