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Submission on the document execution provisions of the June 2021 Exposure Draft 'Using technology to hold meetings and sign and send documents'

We are a committee of senior lawyers in five large law firms with significant corporate and financing practices,[1] known as the Walrus Committee. We are grateful for the opportunity to make this submission.

This submission relates only to the document execution provisions (that is, the proposed amendments to sections 127 and 129 of the *Corporations Act 2001* (Cth)) in the Exposure Draft, and, of necessity, the *Treasury Laws Amendment (2021 Measures No.1) Bill 2021* (***TLAB 1***). They deal with issues that our firms and others in commercial and corporate practice encounter on an almost daily basis.

The value of electronic commerce

We very much welcome the overall thrust of the provisions in facilitating electronic commerce. The advantages of doing so are readily apparent.

Electronic communication and information storage are rapidly becoming the norm in general life and commerce. There are significant savings in cost and environmental impact. Processes are speedier, easier, more convenient and more efficient. Generally they are more accessible. Regional Australia is not as burdened by the tyranny of distance, or the paucity of resources. Records are often more accessible, secure and reliable — it is easier to store and locate documents executed electronically. In practice often it is easier to establish that documents and communications have been properly signed, or received and opened — there is a clear trail. Paper communication through the post is not becoming any easier. Increasingly, individuals who may be required to sign documents are working from home, or they may be located at a distance from where the documents are prepared.

The reforms' value demonstrated by the Determinations

The reforms are particularly welcome after the 'roller-coaster ride' in this area since the onset of the COVID-19 pandemic. Their utility was well demonstrated in the implementation of last year's Treasurer's Determinations. When the last Determination expired on the 21st of March 2021 without the anticipated replacement, there was significant consternation and dislocation in the marketplace. The resulting return of uncertainty which bedevilled this area has made participants reluctant to embrace electronic documents or electronic execution. Some have insisted on a return to the old-fashioned 'wet ink' signing of physical paper documents.

The experiment of the Treasurer's Determinations was a great success. There were no downsides. A few uncertainties in the drafting of the Determinations were exposed, but on the whole those are addressed by the drafting of TLAB 1. We suggest some further improvements below.

The value and importance of sections 127,128 and 129

[1] Allens, Ashurst, Herbert Smith Freehills, King&Wood Mallesons and Norton Rose Fulbright

Allens is an independent partnership operating in alliance with Linklaters LLP.

As outlined in the Schedule below, sections 127, 128 and 129 have an important role in commerce. They are designed to facilitate the ability of companies to engage in the economy with minimal transactional friction, and for other parties to be able to deal with them with confidence. In doing so, they assist companies large and small. In the modern era, particularly after the lessons of the COVID-19 restrictions, they should apply equally to physical and electronic documents. In particular they play an important role in companies' access to credit — lenders are very concerned to ensure that loan and security documents are binding on companies, and these sections give a ready pathway for them to be satisfied that that is the case.

It is sensible and appropriate for the sections to be updated to clearly accommodate modern technology and document management.

Reforms urgent

Given the above, and the experience with the current Sydney lockdown, this is a pressing issue of real and immediate concern in the market. We suggest that everything be done to expedite the reforms.

Proposed amendments in Exposure Draft

We generally support the further changes in the Exposure Draft to the drafting of sections 127 and 129.

1. *Single director companies*

The changes proposed to paragraphs 127(1)(c) and 127(2)(c) are particularly welcome, and will remove an anomaly that often bedevils transactions in practice. We often come across companies which only have one director and no secretary. Under current law either the parties need to forgo the advantages of sections 127, 128 and 129, or delay matters while the director appoints himself or herself as secretary. Requiring a sole director to also be a sole secretary is an unnecessary administrative burden. There is clearly one person who is the controlling mind of the company, and no other officer who can sign. Whether that person has one title or two is irrelevant.

2. *Removal of language relating to sole director, sole secretary companies in subsections 129(5) and (6*)

We support the removal of the language.

It has always been curious that the final sentence of the subsections should focus on just one of the paragraphs of section 127(1) and 127(2), and not the others, and only deal with the situation where there is a sole director and secretary and not the situation where two directors or a director and a secretary are signing.

It has become apparent in case law that the deleted final sentence is unnecessary. The courts have held that under the earlier language in the subsections, in the absence of notice or suspicion to the contrary, a party dealing with a company is entitled to make assumptions as to due execution by a company by a director or secretary, if a signature appears above the title 'director' or 'secretary' in the document, whether or not the party can rely on holding out by the company or documents lodged with ASIC as contemplated by sub sections of section 129(2) or (3).[2]

The purpose of the deleted language is already achieved by the earlier words in each subsection, and so it can be removed, and should be removed, as it can cause confusion by only relating to one of a number of scenarios. We do, however, think it would be helpful in the Explanatory Memorandum to make it clear that that that is the reason for the deletion.

[2] See in particular *Caratti v Mammoth Investments Pty Ltd [2016] WASCA 84* (Also *Soyfer v Earlmaze Pty Ltd* [2000] NSWSC 1068) The result is good for counterparties alleging a document is binding on a company, but it is not carte blanche or a free-for-all. There is a threshold to the application of section 129, which is canvassed in the judgment. That is that a party relying on the assumptions under section 128(1) has to have had 'dealings' with the company. Parties are generally comfortable with that threshold, and it would be perilous to try to change or clarify it.

See also *Australia and New Zealand Banking Group Ltd v Adventure Quest Paintball-Skirmish Pty* Ltd (2016) 113 ACSR, 425; [2016] NSWSC 188

Suggested changes to TLAB 1 amendments

We do have some suggested changes.

1. *Split execution — counterparts should not need to include entire contents*

   Proposed section 127(3A) is extremely welcome, but its utility is reduced by one of its requirements.

   It is designed to deal with an issue that often bedevils transactions: so-called 'split execution'. It is very common practice in transactions to arrange for the documents to be signed to be electronically transmitted to the signer to physically sign the document. Commonly the signer would print out only the signature pages, and sign those. This would be the norm (or close to it) for documents with international elements.

   Often, a company's officers who need to sign the documents for the company under section127(1) are located in different places and need to sign different copies or counterparts. This is known as 'split execution'. The difficulty has been that significant sectors of the market do not accept that split execution would satisfy section127(1) as currently drafted, particularly following the decision in *Bendigo and Adelaide Bank Limited (ACN 068 049 178) v Kenneth Ross Pickard* [2019] SASC 123.[3]

   The proposed subsection would allow split execution, allowing individuals to sign separate copies or counterparts. However, proposed paragraph 127(3A)(b) requires that the copy or counterpart signed include 'the entire contents of the document'. Under paragraph (a) that copy or counterpart needs to be in physical form. The clear meaning of paragraph (b) is that the physical copy of a counterpart to be signed contains the entire document, requiring that the signer print out the entire document. Sometimes, the documents are many hundreds of pages. Construction and infrastructure contracts can be well over 1000 pages. It is simply not practicable for most people to print lengthy documents when working from home.

   The Explanatory Memorandum to TLAB 1 states that

   > "this does not mean that the person needs to physically print or sign every page. Rather it ensures that a document cannot be validly executed by signing a document that does not have the same content as the original document. It simply reflects the common law position that the signatories must agree to the same terms."

   With respect, we do not agree that the language will be interpreted in this way, and this note is unlikely to be sufficient to convince the market, or the courts. Our experience in relation to sections 127 and 129 is that lawyers and their clients are understandably cautious and conservative. Unless they are convinced that a method of execution is clearly covered by the drafting of the legislation, they will not take the risk, and will not accept documents executed in that way.

   We suggest that the requirement that the entire contents be included be removed, and the legislation should expressly reflect the intention stated in the Explanatory Memorandum that the person need not physically print or sign every page.

   Under the law of contract it is necessary that signers are agreeing to identical terms (wherever those terms are located). The position can be left to the common law — either the signature clearly adopts the contents or it does not. There is no need for the statute to second-guess the common law in this circumstance.

   A similar approach should be adopted in subsection 127(3B)(b). Electronic documents should be treated the same way as physical ones.

2. .*What is the original?*

[3] The Court said the following at [70]:

> *Given that s 127(1) contemplates a document being executed by two officers signing it, there is good reason to consider there must be a single, static document rather than a situation where two electronic signatures are sequentially applied to an electronic document. As Seddon has noted, it is insufficient that two signatures appear on different counterparts or copies of the same document because no one counterpart or copy would be properly executed by the company under s127(1).*

While technically this may also be obiter and appears to have been made as a passing remark, this raises doubt that split execution will satisfy the requirements of section 127(1)

The Bill states that a 'copy or counterpart of a document' can be executed, but seems to assume there is still some separate original document. There should no need for a separate original. Each executed copy or counterpart is in effect an original. This should be clarified to remove this confusion. One way would be simply to refer to 'the original or a copy or counterpart'.

3. *Clarifying that provisions are not exclusive or comprehensive*

   As currently drafted subsections 127(2A), (3A) and (3B) appear to limit the manner in which the affixation of a common seal can be witnessed, or documents signed, under subsections 127(1), (2) and (3). That is reinforced by the suggested notes in subsections129(5) and (6).

   The language should all make clear that those provisions are not comprehensive or exclusive and do not limit subsections 127(1), (2) or (3).

4. *Clarifying proposed subsection 127(3B)*.

   While the heading of the subsection refers to electronic documents, it is not part of the Act (section 13 of the *Acts Interpretation Act 1901* (Cth)). The subsection itself does not refer to electronic documents or signing. We suggest that it should.

5. *Deeds*

   Our view is that the amendments (and the new definition of document in section 9 of the *Corporations Act* introduced by the *Corporations Amendment (Corporate Insolvency Reforms) Act 2020*) are sufficient to allow electronic deeds signed by companies in the manner described. However, this has in the past been an area of contention, including in respect of the Treasurer's Determination.

   It is important this be generally accepted. If submissions by other parties suggest that it is still unclear, then we suggest it be further clarified. Deeds are still commonly used in commerce.

6. *Foreign and statutory corporations*

   Finally, the provisions only deal with companies. They do not extend to foreign and statutory corporations. Such corporations are very active in Australian commerce, and should be able to sign documents (including deeds) in the same way, and ideally, also as set out in subsections 12Q(2), (3) and (4) of the relevant Queensland Covid regulation.[4]

Other thoughts on the TLAB 1 electronic document provisions

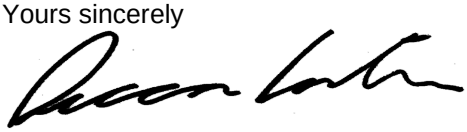
Some parties have expressed concern as to the requirement of proposed subsection 127(3B)(c) (or at least have done so in relation to the similar provision in the Treasurer's Determination). There have been concerns about what, if any, additional steps should be taken by the signer to satisfy these requirements and the extent to which the counterparty should enquire into these steps. In these circumstances it may be difficult (and dangerous) to

[4] *Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Amendment Regulation 2020* (Qld):

> *(2) Also, for a statutory corporation, the instrument may be signed by a person, or in a way, authorised by the Act under which the corporation is established, incorporated or registered.*
>
> *(3) Further, for a corporation that is not incorporated under an Australian law, the instrument may be signed by a person, or in a way, authorised by the law of the place in which the corporation is incorporated.*
>
> *(4) An instrument that is to have effect as a deed for a corporation may be signed in accordance with this section whether or not the seal of the corporation is used.*

have more specific language — the legislation should not be overly prescriptive. The language is familiar from its use in the *Electronic Transactions Act 1999* (Cth), where courts have given it a very wide meaning. It seems to us to be acceptable.

Yours sincerely



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Attach

SCHEDULE

The policy of sections 127, 128 and 129 of the Corporations Act

Sections 127, 128 and 129 are designed to facilitate the ability of companies to engage in the economy, and for other parties to be able to deal with them with confidence. The general policy direction dates back to the introduction of the fore-runners to sections 128 and 129 in 1983[5] and was significantly broadened and strengthened with the introduction of the current language in 1998.[6]

Section 127 sets out some ways in which a company may sign a document. A company can still sign in other ways, but there is a considerable advantage of execution under section 127 for the company and for parties dealing with it. Under subsections 129(5) and (6) those parties are entitled to rely on the validity of that execution, where the document appears to have been executed under section 127.

The courts have applied that policy by rightly giving a liberal interpretation to subsections 129(5) and (6). The result is that in the absence of actual notice or suspicion to the contrary, parties dealing with a company may rely on execution of a document where a signature appears above the word 'director' or 'secretary' (as the case may be). They can do that without needing to make any enquiry, and without checking the appointment or name of the director or the veracity of the signature.[7] The sections expressly operate even in the instance of fraud or forgery.[8] The only threshold – and a low one[9] – is that the other party to the document is 'dealing' with the company.

In general, the conscious policy decision for decades has been that where an outside party is dealing with a company in good faith, it is the company that bears the risk of invalid, forged or unauthorised signature, not the outside party.

This is important for the economy so that:

- parties dealing with companies in good faith are not put on enquiry to make sure that their dealings are validly executed by the company — they can deal confidently with companies;
- companies do not face burdens or barriers in signing documents or satisfying other parties (like lenders) that they are bound; and
- other parties subsequently can rely on the documents which appear to have been signed by companies (for example where they are relying on or acquiring rights, like assignees or sub-lessees). This is increasingly relevant in a tertiary economy where contractual rights and other rights assume greater importance.

This is particularly valuable for small-to-medium enterprises that choose to organise as companies rather than sole traders or partnerships. Without the provisions the fact that the company has a separate legal personality would otherwise create significant barriers when its directors transact, when compared to sole traders. Parties who might deal with them may want assurance the company is bound. This flows both ways — small companies will also need to be able to rely on dealings with other small companies.

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[5] *Companies and Securities Legislation (Miscellaneous Amendments) Act 1983 (Cth)* (Cth) as section 68A of the Companies Code. The Explanatory Memorandum of this Act stated that the purpose of section 68A was to ensure that: 'a person who deals in good faith with persons who can be reasonably supposed to have the authority of the company should be protected against later denials by the company that the persons purporting to act for it lacked authority.'

[6] *Company Law Review Act 1998* (Cth)

[7] *Caratti v Mammoth Investments Pty Ltd; Mammoth Investments Pty Ltd v Granite Hill Pty Ltd; Granite Hill Pty Ltd v Esperance Cattle Co Pty Ltd* [2016] WASCA 84; *Zhang v BM Sydney Building Materials Pty Ltd* [2016] NSWCA 166

[8] Section 128(3)

[9] See for example *Australia and New Zealand Banking Group Ltd v Frenmast Pty Ltd* (2013) 282 FLR 35