



28 May 2021

Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By email only to: economics.sen@aph.gov.au

Dear Committee Secretariat,

Treasury Laws Amendment (2021 Measures No. 1) Bill 2021

The Law Institute of Victoria ('LIV') welcomes the opportunity to provide feedback to and participate in the Senate Economic References Committee's ('SERC') Inquiry into the *Treasury Laws Amendment (2021 Measures No.1) Bill 2021* (Cth) ('the Bill'). This submission has been informed by the LIV's Technology and Innovation Section. The LIV recommends:

1. That the amendments be introduced on a permanent, rather than temporary basis;
2. The statements in para 1.2 and the table following para 1.7 of the explanatory memorandum be corrected;
3. Inclusion of an explanatory note in Schedule 1, clause 6 of the Bill that non-compliance with the new provisions does not equal legal invalidity;
4. Strict application of the provisions affording members at a virtual or hybrid meeting reasonable opportunity to participate, particularly where the ability to be heard or ask questions is stifled by the format of the meeting; and
5. Harmonisation of the presently divergent approaches by States/Territories to electronic signature and remote witnessing requirements.

Permanent Reform to Temporary Measures

The temporary measures under the *Corporations (Coronavirus Economic Response) Determination (No. 3) 2020* (Cth) ('**Determination No. 3**') have proven largely successful in providing short-term regulatory relief to facilitate the continuation of business and mitigate the economic impact of the pandemic. Given the confusion amongst the legal profession regarding the validity of electronic



signatures and document execution, Determination No. 3 provided significant clarity for practitioners, with no substantive concerns expressed during its operation. As the temporary measures have expired, the state of the law has again become unclear.

The proposed amendments under Schedule 1 of the Bill are currently set to expire on 16 September 2021.¹ Based on the current timeline, the SERC's report is due on 30 June 2021. Given the time required to pass the Bill, the LIV is concerned that it is unlikely to be in effect for a meaningful period. While the Explanatory Memorandum ('EM') contemplates the proposal of permanent reform once the temporary extension sunsets,² the LIV recommends permanent reform be introduced *immediately* to avoid the potential for widespread uncertainty, as arose when Determination No. 3 self-repealed on the 21 March 2021, reverting to 'pre-COVID-19' perceptions and processes. The consultation process preceding the introduction of the temporary measures and this Bill should be sufficient to warrant the introduction of the amendments contemplated under this Bill on a permanent basis.

Background to the Amendments

The *Electronic Transactions Act 1999* (Cth) ('ETA') is based on the United Nations Commission on International Trade Law's ('UNCITRAL') Model Law on Electronic Commerce 1996, to enable and facilitate commerce conducted using electronic means and increasing legal predictability for electronic commerce.³ Each State and Territory government has enacted legislation which substantially mirrors the provisions of the ETA. Where the ETA applies, in situations where documents are required to be in writing, signed, produced or retained – it provides certainty that these requirements can be met via electronic means.

However, because Division 2 of Part 2 of the ETA does not apply to and the *Corporations Act 2001* (Cth) ('CA'),⁴ there still exists significant uncertainty amongst legal practitioners as to whether corporations can electronically sign documents under section 127 of the CA 2001. Section 127(1) of the CA requires two company directors or one company director and a company secretary to sign a document in order for the document to be validly executed. The uncertainty amongst the

¹ *Treasury Law Amendment (2021 Measures No.1) Bill 2021* (Cth), s 1679F.

² Explanatory Memorandum, *Treasury Laws Amendment (2021 Measures No.1) Bill 2021* [1.6].

³ Statement of Purpose – UNCITRAL Model Law on Electronic Commerce (1996).

⁴ *Electronic Transactions Regulations 2020*, Schedule 1, Item 23.



profession reignited as a result of the *obiter* comments in *Bendigo and Adelaide Bank Ltd v Pickard* which purported to require that two officers must sign a 'single, static document'. Many interpreted this comment to mean that two officers could not sequentially apply separate electronic signatures to an electronic document.⁵

However, an electronic document can exist as a 'single' document, unlike two separate physical documents or counterparts of a document in separate locations. Provided that the signers demonstrate the requisite intention, it is submitted that a director or company secretary should be able to validly execute a document electronically under section 127(1).

CA 2001 Interaction with ETA provisions

As discussed earlier, with the validity of electronic signing being unclear this must be sufficiently clarified in the proposed legislation. The LIV recommends that paragraph 1.2 of the EM (and the first sentence under the heading 'current law' in the table below paragraph 1.7) be amended to highlight this significant uncertainty regarding whether company documents **must** be executed by all parties *physically* signing the same static document (rather than simply stating, perhaps incorrectly, that this is the case currently).⁶ Whilst the relevant provisions of the ETA do not apply to the CA or instruments made under that Act, the ETA is not the source of validity of electronic signatures, rather it provides a 'safe harbour', via the deeming provisions, where the prescribed criteria are satisfied. Additionally, non-compliance with the deeming provisions within the ETA does not invalidate an otherwise valid form of signature – section 127 of the CA is already technologically neutral. Under section 127(3), a company may execute a document if the document is expressed to be executed as a deed and is executed in accordance with subsection s127(1) or s127(2) CA. Section 127 does not limit the ways in which a company may execute a document, including a deed.

Recent cases have given significant weight to the proposition that section 127 overrides all other common law requirements for a deed and has either extinguished, or at least modified, the paper rule.⁷ A plain reading of section 127(1) does not purport to require a physical signature and there is no basis to read in any such requirement. Recent cases have proceeded on the assumption that an electronic signature, or other forms of signature not made with a pen, are capable of meeting

⁵ [2019] SASC 123 [57].

⁶ Explanatory Memorandum, *Treasury Laws Amendment (2021 Measures No.1) Bill 2021* (Cth) [1.2], [1.7].

⁷ *Bendigo and Adelaide Bank Ltd v Laszczuk* [2018] VSC 388; *Bendigo and Adelaide Bank Ltd v Pickard* [2019] SASC 123 at [57].



the requirements of section 127(1) of the CA, provided that all signatories sign the same, static document.⁸ The LIV recommends the explanatory memorandum be clarified to highlight that, while there is significant uncertainty, there is no legal basis to suggest that the correct starting point, without reform, is that 'company documents must be executed by all parties physically signing the same static document'.⁹

Deeds

At common law, a deed must be written on paper, parchment, or vellum, sealed by the parties executing the document and delivered.¹⁰ The parties must also objectively intend for the instrument to take effect as a deed. Given the uncertainty discussed earlier, many firms refuse to execute deeds electronically or even offer the option.

The LIV supports the proposed amendments to CA under clause 6 of Schedule 1 of the Bill. While the new subsections provide some certainty, the LIV recommends the inclusion of an explanatory note stating that non-compliance with section 127(3B) *does not necessarily* lead to the conclusion that execution is invalid, and/or that the statutory assumptions in section 129(5) CA 2001 cannot be relied upon.¹¹ The conclusion that a document has not been validly signed does not necessarily result from a situation where a person does not use a 'method' to electronically sign the document, or that a person hasn't expressly indicated their intention to sign a copy or counterpart of the document using that method. A person may in fact have electronically signed a document and intended to be bound, even where a 'method' was not used. Whether or not this is the case will necessarily be a question of fact.

Consent Requirements

The LIV welcomes the exclusion of the consent requirements in section 10 of the ETA. The LIV agrees with the proposition that those provisions which require the recipient to consent to the use of electronic communication would impose significant regulatory burdens on companies in order to

⁸ *Bendigo and Adelaide Bank Ltd v Pickard* [2019] SASC 123.

⁹ Explanatory Memorandum, *Treasury Laws Amendment (2021 Measures No.1) Bill 2021* (Cth) [1.2].

¹⁰ *Bendigo and Adelaide Bank Pty Ltd & Ors v Kenneth Ross Pickard & Anor* [2019] SASC 123.

¹¹ Section 129(5) provides that a person may assume a document has been duly executed by the company if the document *appears* to have been signed in accordance with section 127(1) *Corporations Act 2001* (Cth).



prove that consent was obtained at the time the document was executed.¹² Further, the relief provided by Determination No. 3 only required that the signatory be identified by an appropriate method and indicate their intention to execute the document and significantly, did not include the requirement that a person consent to electronic communication.¹³ This approach should continue.

Participation Requirements in Virtual Meetings

The participation requirements under the Emergency Determination No. 3 ensured members generally have a reasonable opportunity to participate in virtual meetings, clarifying the scope to hold meetings using technology under the CA.¹⁴ The LIV welcomes the Bill's expansion of the participation requirement beyond that referenced in Determination No. 3, by explicitly stating that reasonable participation includes the right to speak, both orally and in writing.¹⁵ However, the LIV is in agreement with the LCA that the Bill is a reversion of the requirement under the CA, which affords 'the persons entitled to attend the meeting, as a whole' with reasonable opportunity to participate, rather than the more comprehensive measures under Determination No. 3 which referred to 'all persons entitled to attend'.¹⁶

The onset of COVID-19 has demonstrated that feasible alternatives to virtual meetings may not be available during a period of emergency lockdowns or other emergency events. Virtual meetings have significant benefits, in terms of general convenience and a lack of geographical constraints. However, these benefits must be balanced against potential limitations which arise in relation to opportunities for members to participate meaningfully and to hold company officers accountable.

The LIV is concerned that the shift to, and emphasis on, digital meeting technologies may result in significant disadvantage to certain portions of shareholders or members who have limited access to, or familiarity with, technology. Thus, the LIV submits that the 'reasonable opportunity' requirement should be applied strictly,¹⁷ with the relevant benchmark being what would otherwise

¹² Explanatory Memorandum, *Treasury Laws Amendment (2021 Measures No.1) Bill 2021* (Cth) [1.61].

¹³ *Corporations (Coronavirus Economic Response) Determination (No. 3) 2020* (Cth), s 6.

¹⁴ Explanatory Memorandum, *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021* (Cth) [1.35].

¹⁵ *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021* (Cth) sch 1, cl 31 (see proposed s 253Q (2)).

¹⁶ Law Council of Australia, Senate Economic Reference Committee, Inquiry into *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021* (Cth) (Submission, 3 March 2021) [25].

¹⁷ *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021* (Cth) sch 1, cl 31 (see proposed s 253Q (1)).



be available to members at a physical meeting. This may be remedied to some extent by a default option to have meeting paperwork posted to members in a hard-copy format unless members opt-in to digital distribution.

The EM explicitly refers to sections 250SA and 250T of the CA, which ensure members have a reasonable opportunity to ask questions or comment on a listed company's remuneration report,¹⁸ and have a reasonable opportunity to ask questions of the company's auditor or representative.¹⁹ The LIV submits that the EM should also include a reference to section 250S of the CA, which requires the chair of an AGM to allow a reasonable opportunity for the members, as a whole, to ask questions about or make comments about the management of the company. The LIV agrees with the LCA's submission that virtual meetings which only allow members to submit written questions through a private channel lacks transparency and may result in member questions being curated by company officers, consequently raising accountability issues.²⁰ The LIV submits that a provision requiring company officers to provide an opportunity to ask oral questions live in the virtual presence of others in the meeting,²¹ may assist in mitigating these accountability concerns.

Harmonisation

Commercial and personal transactions occur at a high frequency across Australian borders, at times raising a multitude of cross-jurisdictional issues. The LIV and our legal peak body counterparts across Australia's states and territories are constituent bodies of the LCA and have been involved in the implementation at the state level, the recommendation of the LCA for e-signature (and e-witnessing) processes to be harmonised across states and territories, given that commercial and personal transactions regularly cross jurisdictional boundaries.²² The LIV itself has recently been closely involved in consultations to make permanent the COVID-19 emergency measures enacted

¹⁸ *Corporations Act 2001* (Cth), s 250SA.

¹⁹ *Corporations Act 2001* (Cth), s 250T.

²⁰ Law Council of Australia, Submission to the Senate Economics Legislation Committee's Inquiry into the *Treasury Laws Amendment (2021 Measures No.1) Bill 2021* (Cth) [29].

²¹ Explanatory Memorandum, *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021* (Cth) [1.37], [1.39].

²² Law Council of Australia, Submission to the Senate Economics Legislation Committee's Inquiry into the *Treasury Laws Amendment (2021 Measures No.1) Bill 2021* (Cth) [58].



in Victoria,²³ including electronic document execution and remote witnessing, which passed under the *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021 (Vic)*. The LIV also published a practice note on the permanent modifications made under the Act prior to its introduction.²⁴ The LIV and the coalition of legal bodies have formed a consensus view regarding the need for further harmonisation of the presently divergent approaches by each State.

Yours sincerely,

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President
Law Institute of Victoria

²³ *Justice Legislation Amendment (System Enhancements and Other Matters) Bill 2021 (Vic)*, part 10.

²⁴ Law Institute of Victoria, *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* ([Practice Note](#), Version 3, 27 April 2021)