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Submission on the document execution provisions of *Treasury Laws Amendment (2021 Measures No.1) Bill 2021*

We are a large law firm with a significant corporate and financing practice. 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 *Treasury Laws Amendment (2021 Measures No.1) Bill 2021* . They deal with issues that our firm and others in commercial and corporate practice encounter on an almost daily basis.

We very much welcome the overall thrust of those provisions, though we would have preferred they were permanent rather than expiring on 16 September.

A number of the issues were dealt with temporarily by the Treasurer's Determinations issued under s1362A of the *Corporations Act 2001* (Cth). The most recent Determination expires on 21 March 2021.

There is an urgent need for the substantive relief provided by the Determination to continue, and the Bill is designed to achieve that relief.

We are therefore concerned that there is some prospect that the Bill may be delayed because the Senate resolved that the Committee does not need to produce its report until 30 June 2021.
This would return us to the old law, rendering electronic signing more difficult until the Bill is passed. We urge the Committee to produce their report in sufficient time so that the legislation can be passed before the Determination expires.

As outlined in the Schedule below (prepared by our firm and others in the Walrus Committee in relation to a previous submission)[1] sections 127, 128 and 129 have an important role. 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.

Suggested changes

[1] There has been insufficient time to prepare a joint submission on this occasion.

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1. Copies or counterparts to include entire contents

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

   It is designed to deal with an issue that often bedevils transactions: 'split execution'. It is very common practice in transactions to arrange that the documents to be signed are 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 close to the norm for international agreements.

   Often, a company's officers who need to sign the documents or the company under s127(1) are located in different places and need to sign different counterparts. This is known as 'split execution'. The difficulty has been that the market would not accept that split execution would satisfy s127(1) as currently drafted.

   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 the signor print out the entire document. Sometimes, the documents are many hundreds of pages, and in construction and infrastructure contracts, are well over 1000 pages.

   The Explanatory Memorandum 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 will not be sufficient to convince the market, or the courts. We have discussed the issue with a number of other law firms, who agree with our concern. Our experience in relation to sections 127 and 129 is that lawyers and their clients are understandably cautious. Unless they are convinced that a method of execution is clearly covered by the drafting, they will not take the risk, and will not accept documents executed in that way.

   We suggest that the requirement be removed.

   There is no need for the statute to second-guess the common law. 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.

   For similar reasons we suggest that the same language also be removed in subsection 127(3B)(b). Electronic documents should be treated the same way as physical ones.

2. .What is the original?

   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 ss129(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 (s13 of the *Acts Interpretation Act 1901* (Cth)). The subsection itself does not refer to electronic documents or signing. It would be helpful if it did.

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.

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.

Other thoughts

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 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[2] and was significantly broadened and strengthened with the introduction of the current language in 1998.[3]

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 sections 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 sections 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.[4] The sections expressly operate even in the instance of fraud or forgery.[5] The only threshold – and a low one[6] – 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.

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[2] *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.'

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

[4] *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

[5] Section 128(3)

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

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.