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Walrus Committee submission on the document execution provisions in the exposure draft Corporations Amendment (Virtual Meetings and Electronic Communications) Bill

We are a committee of senior lawyers from five large Australian law firms which have significant corporate and financing practices. 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 Corporations Amendment (Virtual Meetings and Electronic Communications) Bill 2020 circulated on 19 October 2020.

Those amendments deal with issues that our firms and others in commercial and corporate practice encounter on an almost daily basis. We welcome the overall thrust of those provisions and we are very grateful for the opportunity to make this submission to suggest ways in which we believe those provisions may be improved to better implement the clear policy intention behind them.

Introduction

The Bill represents an extremely welcome development to clarify the law permanently so that companies may execute documents electronically under section 127, and parties dealing with them may rely on that execution under section 129.

As outlined in the Schedule below, 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.

However, where a person signs electronically, as currently drafted the proposed amendments in the Bill in effect require two additional steps under section 127 which are not required with physical documents, nor with documents signed electronically by individuals, and which were not required under the Treasurer's Determination[1] — separate electronic communications to and from the signer.

These extra requirements may increase transaction costs and will reduce the benefit of the reform to the economy, in three ways. They will impose limitations on methodology and may impose costs on companies who wish to sign electronically. More importantly they will significantly affect the ability of counterparties dealing with companies to rely on execution in this form, and that in turn will adversely affect the ability of companies to transact. Finally, they will lead to errors or omissions and thus, through inadvertence, deny parties the benefit of the reforms.

Those additional requirements appear to have little or no policy benefit and should be removed.

Further the amendments make difficult the common practice of signing documents by printing out only the execution pages and signing them.

In addition, we make some other suggestions below.

Suggested amendments

(a) The proposed subsections 127(2A), (3A) and (3B) should all make clear that they are not comprehensive or exclusive and do not limit subsections 127(1), (2) or (3).

As currently drafted they 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). In doing so those

[1] *Corporations (Coronavirus Economic Response) Determination (No. 3) 2020* (Cth) and its predecessors

subsections will limit the flexibility and coverage of section 127, and therefore of section 129(5) and (6).

(b) The requirement in subsection 127(3B)(a) – that a signer receive a document by electronic communication – should be removed. The subsection should also expressly allow the electronic signing of the document itself, and not just a copy or counterpart.

We are not aware of any practical or policy reason as to why a signer needs to have received the document in particular ways, or receive it at all, rather than create it. We deal with this and the next issue in greater detail below.

(c) Similarly, the requirement in subsection 127(3B)(c) for a signer to indicate that they signed the document is significantly restrictive, and makes reliance by outside parties under section 129(5) difficult. Signing of the document itself should be sufficient.

(d) Subsections 127(3A) and (3C), expressly allowing 'split execution', are very welcome. However, subsection 127(3A)(b) requires that the document signed includes the entire contents of the document. This significantly reduces its utility. Where the document being signed is an agreement (as opposed to a deed), it is extremely common practice, both internationally and in Australia, for the signers to print out and sign just the signature pages, and not to print out the entire document. It would be close to the norm for international agreements.

Printing documents is environmentally unattractive, and it is burdensome (particularly if a person is working from home without administrative assistance). Documents can run to hundreds of pages, and in some cases, in relation to large commercial, construction and infrastructure transactions, they can be over a thousand pages long.
Subsection 127(3B)(b) also unnecessarily refers to the need to sign a complete copy.
We deal with this issue further below.

(e) We suggest that if the Treasury receives submissions indicating that some parties have some doubt as to whether the amendments will clearly allow electronic deeds, then for the legislation to achieve its goals, it would be better to have further clarification. For the legislation to have the desired effect, it is important that it be beyond doubt that it allows electronic deeds and other documents.

Our view is that the amendments 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. This clarification can be achieved in a number of ways but one way might be to include a clear statement in the new provisions that the common law rule that deeds must be on paper or other physical medium is abolished.

(f) The reform should extend the ability to execute documents electronically to foreign corporations and statutory corporations. Major corporate players in the Australian economy include foreign corporations and statutory corporations that are not companies.

(g) It would be very useful to take the opportunity to fix up one common practical problem that occurs in relation to section 127(1). Many small companies have a sole director who is not also secretary. The subsection and subsection (2) should extend to the sole director.

. We would be happy to look at any proposed drafting to address the above points.

Other thoughts

Some parties have expressed concern as to the requirement of proposed subsection 127(3B)(e) (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 the 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.

Discussion of the requirements of electronic communications to and from signers who are signing electronically

The requirement that the signer receive the document by electronic communication in subsection 127(3B)(a)(ii)

It is not clear as a policy matter why this requirement exists. If a person is signing a document, why does it matter how the signer has 'received' it?

There is further difficulty because the concept of 'receipt' of an electronic communication is limited under the proposed section 105A(b)(4). For example, why is it necessary that the signer receive it at its 'nominated electronic address'. Why does it need to have been received at an electronic address at all? This may be easily satisfied for some current cloud-based execution platforms, like DocuSign, but not, for example, where a document has been received on a USB device or other hard disc.

This requirement may also create difficulties in a number of other common situations.

For example:

- where the signer generated the document himself or herself (eg, sending an email), it would require the signer to send a communication to another party asking it to send the email to the signer, for the signer to sign and send back;
- where the signer is presented with a tablet containing the document and asked to sign;
- where the signer accessed the document through a website. Banks and other service providers are moving towards connecting with their customers through websites. It is a useful way of providing security, and facilitates the relationship.

If the requirement is retained, a party seeking to rely on the signature, in the absence of statutory assumptions, would need to establish not only that the document was signed, but also that the signer 'received' it at the relevant address by electronic communication. The statutory assumption in section 129(5) might not help. It is not clear under what circumstances it would 'appear' that a document has been signed under subsection 127(3B). For example, would a counterparty need to have seen some evidence of the communication and the nomination of the address?

The need for the signer to indicate that the signer has signed the document by separate electronic communication (subsection 127(3B)(c))

This appears to require a communication which is separate from the act of signing. For example, the signer must send an email saying, 'I signed it'. This is very different from the temporary requirements under the Treasurer's Determination. While that Determination uses the term 'electronic communication', that electronic communication can be the document itself, consistent with case law in relation to the Electronic Transactions Act. That Act and those cases do not require the signer to indicate they have signed the document by separate electronic communication.

It is not clear from the accompanying explanatory materials as to why this additional requirement has been inserted. It may be a by-product of the drafting approach.

It would require an additional step in many currently used methods of electronic signature.

- With DocuSign and similar platforms, emails confirming signature and requiring signature are sent to the signer, not by the signer.

- If the signer signs a document on a website, or signs the document on a proffered tablet, the signer would have to separately send an email, confirming execution.
- The signer would have to do the same if the document was itself an email.

Dealing with the requirement could be cumbersome, but a major difficulty is that those wanting to rely on execution by a company in this way would need to satisfy themselves as to the occurrence of this step. This would be a particular concern if a number of people in the market interpreted the requirement as indicating that the communication needs to be 'sent' by the signer as contemplated by the proposed section 105A(2).

In any event, this would have a significant adverse effect on the utility of section 129(5). With physical documents, consistent with the policy outlined in the Schedule below, the statutory assumptions in sections 128 and 129(5) give considerable protection to outsiders dealing with the company, consistent with the policy objectives of those provisions. The case law has made clear that outsiders can accept what appear to be signatures over the words 'director' or 'secretary' without confirming whether or not the signer does hold that office, even by using one of the other assumptions in section 129, and without checking the signature. The document on its own is sufficient.

Imposing this as a requirement may mean that someone trying to rely on the assumptions in section 129(5) needs to at least confirm that the document 'appears' to have been confirmed by electronic execution in this way, and may require evidence of the email.

A practical example

Under the Treasurer's Determination a sole director and secretary of a small business company could make a binding offer simply by signing and sending an email. The other party could rely on it.

Under the proposed provisions, the director would need to do the following:

1. Request (presumably by email) someone to send to the director an email with the text of the proposed email
2. Receive that email.
3. Forward or reply to the email described in 2, so the signer is signing the relevant text, and sign and send it to the other party
4. Send a second email to the other party confirming the signer had signed the email referred to in 3.

Discussion of the need for a signed counterpart to be the whole document

We understand that the requirement that a document signed must include the entire contents of the document may reflect a concern that directors may sign documents which are incomplete, or subsequently altered or added to. On reflection, we do not think this should be a concern.

- Contract law and other related areas of law give sufficient protection to parties in those circumstances. Either there will be no contract, or the contract will be able to be rectified.
- Additional comfort can be gained from the "reliability" requirements in the proposed subsection 127(3C).
- Finally, this is a very common and successful method of signing documents. In Australia documents have often been signed in this way without any difficulty (to our knowledge). The only issue which we are aware of is split execution where directors signed separate counterparts. But that did not relate to the contents of the document. Where that was not an issue, for example where the document is signed by individuals, or under power of attorney, or by two directors together, documents were often signed in this way.

  If the language was introduced it would insert a requirement in relation to companies executing under section 127 which does not arise with other parties.

SCHEDULE

The policy of sections127, 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, 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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[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