CLAYTON UTZ

Email 30 October 2020

Manager
Market Conduct Division
The Treasury

businesscomms@treasury.gov.au

Confidential

Dear Manager

Corporations Amendment (Virtual Meetings and Electronic Communications) Bill 2020 (Bill)

Thank you for the opportunity to make a submission on the proposed amendments to the Corporations Act 2001.

Clayton Utz is a leading Australian law firm with a team of partners and lawyers who have been working to support businesses and other stakeholders to enter into and exchange contracts in an easy, efficient and reliable manner during the COVID-19 pandemic. We are making this submission because we want to ensure that the legislative framework that enables corporations to operate in Australia and globally continues to work effectively and within industry norms and expectations.

This submission is limited to the impact of the proposed changes to the execution of documents.

1. **Deeds and the common law 'paper rule'**

1.1 At common law, a deed had to be a writing on paper, parchment or vellum (often called the "paper rule").[1] In Australia, this rule effectively precludes the making of deeds in an electronic form unless altered by statute. In November 2018, New South Wales became the first Australian jurisdiction expressly to allow deeds to be created in electronic form and Victoria and Queensland have recently passed temporary laws with a similar effect. New South Wales and Queensland in particular have abrogated the paper rule with clear and direct language which leaves no room for uncertainty as to its effect.

1.2 The combined effect of the current statutory position in these jurisdictions and the Bill is that a deed is able validly to be executed and formed electronically where the governing law of the deed is one of these jurisdictions.

1.3 The position is less clear where the governing law of a deed is a jurisdiction which has not abolished the paper rule by statute in the following circumstances:

(a) all parties to a deed execute electronically pursuant to section 127 as amended. This circumstance would not be an issue if the effect of section 127 as amended was to abolish the paper rule for companies where execution was in compliance with section 127; and

(b) one or more parties to the deed execute counterparts electronically pursuant to section 127 as amended and one or more parties to the deed execute a paper counterpart. Even if the effect of section 127 as amended was to abolish the paper rule for companies where execution was in compliance with section 127, this

[1] For a recent example, see Bendigo and Adelaide Bank Limited v Russo [2019] NSWSC 661 at 91

circumstance is still likely to give rise to uncertainties. This is because it would still be unclear as to whether the ambit of section 127, as amended, was, where one party to a deed executes it pursuant to section 127 to:

(i) abolish the paper rule for all other parties executing the deed (and thereby overrule the common law positon under the governing law due to inconsistency);

(ii) abolish the paper rule only for the parties executing the deed pursuant to section 127 (and thereby overrule the common law positon in relation to the counterparts executed under section 127 under the governing law due to inconsistency); or

(iii) not have the effect of abolishing the paper rule in relation to the deed at all because the deed (which comprises all counterparts) would not be in written form.

1.4 It seems to us that the effect of these uncertainties will be to drive parties in significant commercial transactions to choose jurisdictions that have abolished the paper rule as the governing law for deeds where it is possible to do so. They may also result in some deeds ultimately being found to be invalid based upon a misplaced reliance on section 127 of the Corporations Act as amended.

1.5 In our view it is unclear whether the amendments have, and are intended to have, the effect of abolishing the paper rule. They could be construed as being limited to the execution of deeds because they do not expressly refer to the form of deeds. The draft explanatory materials suggest that the Bill may be intended to abrogate the paper rule - although the expression used is "created" which may be different conceptually from the form in which a deed must exist. In our submission given the that the abrogation of the paper rule would resolve the issue set out in circumstance 1.3(a) above, it would be of significant practical benefit for the legislation to do so in express terms. An issue as important as this should not be left to arguments based upon implications (i.e. where it is permitted to execute a counterpart of a deed electronically, it must follow that the deed can be in an electronic form) or based upon comments in the Explanatory Memorandum. Conversely, if the Government has not expressly abolished the paper rule in the drafting because the view has been taken that the Commonwealth lacks the power to do so, this should be stated in the Explanatory Memorandum (for example by stating that the abolition of the paper rule is a matter for the laws of the individual states and territories).

1.6 In our view resolving circumstance 1.3(b) above involves difficult issues in relation to the scope of the Corporations Act. We doubt that any drafting changes would assist in resolving these issues.

1.7 We add that the circumstances we have set out above would, of course, not give rise to issues if all states and territories enacted their own legislation abolishing the paper rule.

Submission 1:

Section 127(3) should make it clear that any rule of law which restricts the substances on which a deed may be written is abolished

2. **Clarifying that a sole director of a company (which has no company secretary) can validly execute a document under section 127(1)(c) or 127(2)(c) of the Corporations Act**

2.1 Where a proprietary company only has one director who is also the sole secretary, sections 127(1)(c) and 127(2)(c) provide a method in which the company can validly execute documents. These provisions are supported by the assumptions in sections 129(5) and 129(6). However, in order to get the benefit of those assumptions, the person signing must state next to their signature that they are the sole director and sole company secretary of the company.

2.2 Where a proprietary company has a sole director, but no company secretary (this is permitted by section 204A(1) of the Corporations Act) counterparties may not be able to rely on the above assumptions for valid execution under section 127(1)(c) or 127(2)(c) of the Corporations Act. To get the benefit of the assumptions, counterparties often require the sole director to appoint themselves as the sole secretary. In other words, merely being the sole director of a proprietary company (even though this is permitted under section 204A(1)) may not entitle parties to rely on the assumptions in sections 129(5) and 129(6).

2.3 **Submission**

Submission 2: Sections 127(1)(c) and 127(2)(c) should allow a sole director proprietary company that has no company secretary to validly execute documents for the purposes of those subsections. Consequential amendments should also be made to sections 129(5) and 129(6).

3. **Drafting Issues**

Set in the table below are some drafting issues we have identified in the Bill:

Section	Issue
Heading to subsection 127(3B)	**Issue** Subsection 127(3B) is preceded by the heading "*Signing an electronic copy or counterpart*". This heading slightly misstates the effect of the subsection. If a signatory receives a copy or counterpart that includes the entire contents of the document (subsections (a) and (b)), they can sign the document by means of an electronic communication which, in effect, indicates their assent to the contents (subsections (c), (d) and (e)). They do not need to sign the copy or counterpart they received, or even a copy or counterpart at all. Signing in accordance with subsection 127(3B) means the "document" is taken to have been signed by the person, not a copy or counterpart. **Possible solution** Change the heading to read "*Electronic signing*"

Section	Issue
Subsections 129(5) and 129(6)	**Issue** We are concerned that the references added to subsections 129(5) and 129(6) do not accurately reflect the operation of section 127 and are potentially inconsistent as follows: (a) In subsection 129(5), subsections 127(1), 127(3A) and 127(3B) are expressed as alternatives. In fact, subsection 127(1) can operate on its own without either of subsections 127(3A) or 127(3B), but subsections 127(3A) and 127(3B) only relevantly operate in conjunction with subsection 127(1). Accordingly these subsections cannot be characterised individually as alternatives to one another; and (b) The amendments to subsection 129(6) give rise to the same issue. Subsection 127(2) can operate on its own, but subsection (2A) can only operate in conjunction with subsection 127(2). Additionally, if subsection 129(5) is drafted to contain a reference to the facilitative provisions, subsections 127(3A) and 127(3B), it is anomalous that subsection 129(6) does not. In particular, subsections 127(3A) and 127(3B) would need to be relied upon to enable the witness' signature to be electronic or to be placed on a physical copy or counterpart. This anomaly could be interpreted by a court as giving rise to subsections 129(5) and 129(6) having different effects.

Please contact us if you would like to discuss any aspect of this submission.

Yours sincerely

Steven Klimt, Partner
+61 2 9353 4133
sklimt@claytonutz.com

David Landy, General Counsel
+61 2 9353 4175
dlandy@claytonutz.com

Our ref 80199416