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Law Council
OF AUSTRALIA

Business Law Section

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Permanent reforms – virtual meetings and electronic document execution

This submission is made by the Corporations Committee (**Committee**) of the Business Law Section of the Law Council of Australia in response to the *Treasury Exposure Draft Bill* (**Draft Bill**) and Exposure Draft Explanatory Materials (**Draft EM**) in relation to *Making permanent reforms in respect of virtual meetings and electronic document execution* (**Consultation**).

1. PRESSING NEED FOR REFORM

The Committee is strongly supportive of reforms:

(a) to enable Australian corporations to hold virtual and hybrid meetings and to communicate with stakeholders electronically and to execute documents; and

(b) to permit Australian corporations, their officers and employees to execute corporate documents and deeds electronically under the *Corporations Act 2001* (Cth) (**Corporations Act**), without reliance on common law or State laws.

These reforms are needed to bring the conduct of business, and engagement with stakeholders by Australian corporations, into a modern context, to improve flexibility to meet the needs of the corporation and to reduce the cost and complexity of doing business in Australia.

2. GENERAL OBSERVATIONS – VIRTUAL / HYBRID MEETINGS

2.1. *Important for Boards to retain flexibility to judge what format best suits the corporation*

The Committee believes that it is critically important that the Board of a corporation retains flexibility to determine what best suits the needs of the particular corporation that they govern – both for communications and conduct of meetings.

Some Boards may not wish to adopt a virtual or hybrid meeting format if a physical gathering is permitted. Some Boards may see electronic meetings and communications as an opportunity for broader stakeholder participation for 'ordinary course' meetings, but may prefer a physical meeting if there is special business to be addressed.

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For some corporations – particularly smaller companies, not-for-profit entities and registered clubs – the costs of virtual or hybrid meeting formats may not justify the advantages that those formats could offer.

The choice of format should be a judgement call for the Board, having regard to the corporation's particular circumstances, their directors' duties and the well-established law of meetings.

Recommendation:
That the Draft EM should confirm that the Board retains a discretion to choose the format of any general meeting – there is no obligation to offer a virtual or hybrid meeting.

2.2. *The law of conduct of meetings (other than format) should not need significant change*

The Committee also believes that greater flexibility as to format of a meeting should not require Parliament to rewrite or prescribe basic principles of the law of meetings, in particular the duties and discretions of the Chair of the meeting, and principles as to the content of minutes.

The Committee considers that those duties, discretions and principles are well established and readily adapt to different meeting formats. In addition, codes of best practice will develop that will guide Boards in how best to conduct meetings to ensure appropriate governance and supervision standards are applied. As with most things corporate there are a vast array of different corporations and circumstances and the rules for conducting meetings can vary to meet those different corporations and circumstances.

In particular:

- *That shareholders should be offered a reasonable opportunity to participate*. However, this does not mean that every shareholder may ask as many questions as they please, or speak for as long as they please or on any matter they please, nor may they insist that Chair or the Board respond to a question. The Chair may set limits on the number of questions, time allowances, and may move the meeting on if a particular item of business has been sufficiently dealt with. The Chair or the Board may decline to respond to a question.
- *The Chair is responsible for the orderly conduct of the meeting.* For instance, the Chair may move a motion that a shareholder cease to be heard if they are raising matters that are not properly the business of the meeting, or if they persist in asking questions that have been sufficiently addressed. The Chair may rule that a shareholder be removed from the meeting if they are disruptive, if their conduct is unacceptable or if they refuse to comply with the Chair's proper rulings.
- *Minutes are not a transcript of the meeting*. It has never been a requirement that every question asked by a shareholder at a meeting be recorded in the minutes, and it is not established market practice to do so at Annual General Meetings or other general meetings of a corporation.

To require a record of all questions submitted (including repetitive questions) as part of the minutes of the meeting has the potential to change the law as to the content of minutes, which would have broader ramifications than the issue that this addition to the Draft Bill is directed towards.

The proposal has a troubling interaction with section 249P (member's statements) which requires a threshold of a 5% shareholding or request from 100 members, and

a notice period, for a statement to be required to be distributed to members. This has not been explored in the Consultation material.

The Chair is subject to directors' duties in chairing the meeting and providing members with a reasonable opportunity to participate, as with all other actions of a director. A concerned member is equally capable of keeping a record if they want to take issue with the conduct of the meeting (for example, if they consider that there has been inappropriate "cherrypicking" of questions) – as they have always been able to do at a physical meeting.

How the question process is managed would be better addressed through guidance to assist corporations to adapt to new meeting formats and as practice evolves. The way in which these principles, duties and discretions apply to meetings does not need to be prescribed by legislation.

The proper means for addressing compliance with these principles, duties and discretions is a matter for the judgment of the Chair and the Board consistent with their directors' duties and in the context of the particular meeting and the particular corporation.

Where a meeting is not properly conducted, participants in a virtual meeting have the same remedies and rights of action at their disposal as they would for a physical meeting.

Recommendations:
That the manner in which the Chair addresses the principle that shareholders should have a reasonable opportunity to participate need not be addressed in the legislation – the common law of meetings adapts to the virtual or hybrid context.

In particular, that there should be no requirement to record each question asked at a virtual or hybrid meeting in the minutes – which would change established principles and practices as to the content of minutes and the law regarding member statements, and would be a more significant change in the law of meetings than we believe this aspect of the Draft Bill intended to effect.

2.3. *Fears that shareholder lobby groups or activists may be stifled*

The Committee is cognisant of concerns expressed by shareholder interest groups, proxy advisers and activists that their ability to be heard or to ask questions may be stifled by features of the technology used to hold a virtual or hybrid meeting.

This is a reasonable concern to raise for consideration – although the Committee believes that it may have been overstated. It does not justify a prescriptive legislative response that would make meetings unworkable and impose administrative and cost burdens on corporations that are simply not necessary in the vast majority of cases. Company meetings are already expensive and cumbersome.

The common law of meetings already provides a sufficient framework, and particular concerns and protocols for meetings that may have contentious matters being raised can be highlighted in guidance rather than legislation.

However, while the Committee believes that the requirement to include all questions in minutes is an inappropriate response, questions of transparency and whether some companies should consider broader forums for shareholder engagement (particularly where hundreds of questions are submitted) does require separate consideration. In our view, this is better addressed by guidance, in the first instance, as new meeting formats (and potential abuses of the format by either companies or shareholders) are explored.

Recommendation:
That these stakeholder concerns be voiced in guidance regarding shareholder engagement, as new meeting formats are explored.

That this issue is not properly addressed by prescriptive legislative requirements framing the way in which shareholder participation must be accommodated, or imposing new administrative and record keeping requirements for shareholder meetings.

3. GENERAL OBSERVATIONS – ELECTRONIC EXECUTION OF DOCUMENTS

3.1. *Electronic execution of general corporate documents*

It is important that the legislation expressly acknowledge that officers and employees of a corporation who are signing a corporate document in that capacity, may electronically sign an electronic copy of that document.

For instance – this may include notices of meeting (whether for shareholders or directors), minutes of meeting, notices given to a stock exchange, prospectuses, consents to act, consents to be named, ASIC forms, ASX forms and applications to corporate regulators.

While we note that the Draft Bill addresses this with respect to meeting documents (and ancillary documents related to meetings) in s253S, we suggest that it could usefully be a broader authorisation.

Recommendation:
That authority to electronically sign electronic copies of corporate documents (beyond those referenced in s253S), in a capacity as an officer or employee of a corporation, be clearly expressed in either the legislation or in the Draft EM.

3.2. *Electronic execution of contracts by persons other than a 'company'*

There is general acceptance in the legal community that section 127 (as amended by *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020 and Corporations (Coronavirus Economic Response) Determination (No. 3) 2020* (the **Determinations**)) is sufficient to enable the electronic execution of electronic counterparts of contracts by a company.

However, where the counterpart to the contract is a natural person, or is a corporation that is not a company, or a foreign entity – the ability to execute the contract electronically becomes a matter of State, Territory or foreign law. Within Australia, there is no common position amongst all States and Territories, which impacts ease of doing business.

Recommendation:
To facilitate ease of doing business – Treasury and the Attorney General's Department should:
(i) consider whether there is constitutional power to expand the categories of signatories to documents capable of being executed under the Corporations Act;
(ii) consider the extent to which the Corporations Act could address execution of contracts by individuals, corporations and other entities, where a company is a counterparty to the contract (expanded jurisdiction); and
(iii) consider the extent to which the Corporations Act could recognise (at least as a matter of Australian law, where Australian law is the law of the contract) documents executed pursuant to that expanded jurisdiction under the Corporations Act.

However, we recognise that this may require broader consideration and assessment than is practicable for the current Draft Bill.

3.3. *Electronic execution of deeds by a company*

There have been differences of opinion in the legal community as to whether the Determinations were effective to override requirements of common law and State legislation for valid execution of a deed – in particular, requirements for a paper copy of a deed (the paper, parchment or vellum requirement) to be signed by hand in 'wet ink', and for witnesses to a deed to attest to witnessing signatures on a paper copy, in 'wet ink'. This has led to some firms declining to issue 'due execution' opinions on electronically executed documents, and requiring deeds to be physically signed and witnessed on paper.

There is also some confusion as to what constitutes 'delivery' of a deed executed by a company under the Corporations Act, which is necessary for a deed to become binding.

While the Committee had regarded the Determinations as sufficient – it is essential that the matter be put beyond doubt.

Recommendations:
The Draft Bill or Draft EM should contain clear words to indicate that it is specifically intended that these revisions to the Corporations Act are intended to override common law and State law requirements for deeds to be executed on paper and in wet ink.

The Draft EM should make it clear that the Corporations Act is sufficient authority for valid execution of a deed by a company, without any requirement for it also to be in accordance with State or Territory laws.

The Draft Bill should indicate that (as an inclusive interpretation) 'delivery' of an electronic copy of a deed should occur when it is released to the other party (whether by electronic means or otherwise) with the clear intent that it be delivered.

3.4. *Electronic execution of deeds by persons other than a company – as above*

The recommendation noted in item 3.2 above applies equally in the context of execution of deeds by persons other than a company.

It is further complicated because State and Territory laws for execution of deeds differ significantly. During the COVID-19 crisis, deeds could (in the Committee's view) be validly executed electronically by persons under NSW, Victorian law and Queensland law. Deeds could not be validly executed electronically under other State and Territory laws (leaving aside execution under s127 of the Corporations Act).

These differences led to an unwillingness to use electronic execution – particularly for banking documents (or other deeds where a 'due execution' opinion may be required) – during the COVID-19 crisis, even in States where it ostensibly was permitted.

Recommendation:
To facilitate ease of doing business – Treasury and the Attorney General's Department should:
(i) consider the extent to which the Corporations Act could address execution of deeds by individuals, corporations and other entities, where a company is a counterparty to a deed (expanded jurisdiction); and
(ii) work with States and Territories to promote harmonised frameworks for execution of deeds within Australia.

As noted above, we recognise that this may require broader consideration and assessment than is practicable for the current Draft Bill.

3.5. *Acceptance of electronically executed documents by Commonwealth regulatory and administrative agencies or authorities*

A key obstacle to use of electronic execution of documents during the COVID-19 crisis was that it was uncertain whether government agencies would accept lodgment of electronically signed documents.

For some – this depended on having facilities to accept electronic documents (for instance, the new ASIC Regulatory Portal was being rolled out during the COVID-19 crisis – some electronically signed documents could be lodged, others could not). For others – this was affected by the standard wording on forms which required 'wet ink' signature, or simply an unwillingness to adapt existing processes.

We recognise that the Draft Bill addresses this with respect to ASIC in s253S(8).

Recommendations:
To facilitate ease of doing business – Commonwealth legislation should stipulate that where an electronic copy of a document may be signed electronically under the Corporations Act, all Commonwealth Government agencies, authorities and bodies must accept lodgment or filing of that electronically executed document as an "original" document (notwithstanding instructions on administrative forms or guidance).

To facilitate ease of doing business – Treasury and the Attorney General's Department should work with the States and Territories to encourage a similar approach by State and Territory government agencies and authorities.

As noted above, we recognise that this may require broader consideration and assessment than is practicable for the current Draft Bill.

4. DRAFTING COMMENTS

More detailed comments, including drafting comments on the Draft Bill, are set out in the Schedule to this submission.

Committee representatives would be happy to discuss any of the matters raised, or provide further detail. If you have any questions – please contact Chair of the Committee, Shannon Finch (shannonfinch@jonesday.com or 0428 894 002) or Committee member and BLS Executive member, Rebecca Maslen-Stannage (rebecca.maslen-stannage@hsf.com or (02) 9225 5500).

Yours faithfully,

Greg Rodgers

Chair, Business Law Section

SCHEDULE – MORE DETAILED COMMENTS

5. PARTICULAR COMMENTS ON THE DRAFT BILL – ELECTRONIC EXECUTION

5.1. *"Signs the document" – various sections*

It must be clear that where the Draft Bill requires a person to "sign the document" (e.g. s127(2A) – where a witness has observed the fixing of a seal by electronic means; or in s127(3B)), that the witness or signatory may also electronically sign an electronic copy of the document. This should also be emphasised in the Draft EM.

This issue has been raised as a concern (preventing use of electronic execution) during the COVID-19 crisis.

It is now clear from the Draft EM that the two signatories for a company (two directors or a director and secretary), signing under s127(1) may sign different *physical or electronic* counterparts of a document. It would be preferable if this could be expressed in the Draft Bill to have retrospective effect (or alternatively for the Draft EM to indicate that this was the intent of s127).

Recommendation: To clarify the position for witnesses in the Draft Bill and Draft EM.

5.2. *Witnessing fixing of a common seal – s127(2A)*

We have received feedback that there is practical confusion as to how the affixing of a seal may be 'observed… by electronic means" – for instance whether it needs to be a camera that can capture both the face of the person as well as the seal being applied at the same time.

"By electronic means" should qualify "observes", not the "fixing of the seal".

Recommendation:

Pragmatic guidance should be included in the Draft EM that is not overly prescriptive, and accommodates what may be seen using a phone camera (i.e. no special technology required).

The grammar in paragraph (a) should be clarified.

5.3. *Unduly prescriptive requirements – s127(3B)*

Some concerns have been raised that the phrasing of the paragraphs of s127(3B) requires separate electronic communications in a prescribed pattern for signature to be effective, which seems overly prescriptive. For instance:

(a) an electronic communication of the counterpart to the signatory; and

(b) an electronic communication from the signatory confirming signature.

There are also concerns that this requires email communications, and that (unintentionally) it might not accommodate document execution platforms. These matters may be able to be addressed by emphasis in the Draft EM that electronic communications are intended to include communications within a document execution platform.

There are also practices in the Australian and offshore markets that involve the circulation of an execution page for signature separately to the full copy of execution draft of a document – with the page then authorised to be applied to the execution copy and released. The Committee does not necessarily endorse that practice, but does observe that this practice is widely adopted for contracts in a context where the identity and authorisation of execution is already clearly established and accepted

between the parties (and uncontroversial) and in those circumstances may be effective to create a contract at common law.

The practice overcomes practical issues such as document sizes and downloading issues for documents in PDF format, where the document may have to be signed on a mobile device, and assists with managing timing issues for execution. There are concerns that s127(3B)(b) would interrupt that practice (for instance, to the extent that it still represents valid execution of a contract under the common law).

Recommendation: To clarify in the Draft Bill or Draft EM that these paragraphs may be addressed by a variety of means that are technologically neutral. Consider whether the requirement that the communications be by 'electronic communication' is too prescriptive and that any form of communication is acceptable, and instead emphasis that the counterparts may be in electronic form.

5.4. *Is intention required to be indicated on the document? – s127(3B)(d)*

It is not clear from the wording of the legislation whether the requirement that "a method is used to identify the person and to indicate the person's intention in respect of the information communicated in the document" will require:

(i) the indication of intention to be contained in or apparent on the face of the document being executed, or whether it is sufficient that it be indicated from other materials; and

(ii) whether it must be indicated to the counterparty, or simply that records be kept that can indicate the intention.

We note that s127(3C)(b) seems to contemplate that the document could contain this indication of intention. However, it would be preferable that it not be essential for this indication to be contained in the document that has been executed.

It is also not clear what this 'indication of intention' needs to be. For instance, are the words "Executed as a deed by" – sufficient to indicate intention? Or does it require a recitation that the electronic signature has been applied with the authority of the named person, and with the intention of executing the document.

The Draft EM refers to the Electronic Transactions Act as the precedent for the clause (which is understandable), but there will not be precedents under that Act to assist with technicalities for execution of deeds. It would be helpful for the Draft EM to provide some examples, with flexibility to indicate intention either in the document itself, or by a separate communication (including via a document execution platform or email).

Recommendation: To clarify in the Draft EM that the 'intention' can be expressed in the document or separately, and by a variety of means (that are technologically neutral).

5.5. *Inclusive requirements – ss127(3A,(3B),(3C))*

Some concerns have been raised with the Committee that it is not sufficiently clear that the various methods for signing documents in ss127(3A),(3B), and (3C) are inclusive, and do not exclude other methods of valid execution at law. While this has previously been accepted with respect to s127(3), it would be helpful to clarify the matter in the Draft Bill or Draft EM to address those concerns.

Recommendation: To clarify in the Draft EM that section 127 is not exhaustive and does not prevent valid execution of a document at common law, by means not specified in the legislation.

6. PARTICULAR COMMENTS ON THE DRAFT BILL – VIRTUAL MEETINGS

6.1. *Proxies signed under power of attorney – s250B(1)(b)*

We query whether it is necessary to indicate that an electronically 'certified' copy of a power of attorney would be acceptable. During the COVID-19 crisis, requirements of regulators for production of only 'original' (paper copy) certified or notarized copies of powers of attorney causes significant practical issues.

Recommendation: Consider whether electronically executed powers of attorney (and electronically certified copies) may be used.

6.2. *"Electronic address" –s105A(4)*

We query whether this section should not refer only to a "nominated electronic address" at which the company retrieves documents, as this presumes an email address, or possibly a company website (less clear) – but might not accommodate a third party facility (e.g. hosted by the registry or the meeting platform provider).

This then affects how proxies and powers of attorney may be submitted under s250B and s253S.

For instance – the section could also contemplate that the company may retrieve documents submitted via an electronic facility or platform nominated by the company.

Recommendation: Consider broader language such as "electronic facility or platform" via which the company or its agent may obtain a document – cf. "nominated electronic address" at which the company directly retrieves documents.

6.3. *Conduct of polls – s250J*

Consider specifying (either in the Draft Bill or the Draft EM) that where virtual meeting technology is used, the poll may use one or more methods for gathering votes under the poll.

This is particularly important where there is a hybrid meeting, or where there may be various ways of submitting a vote via a meeting platform.

6.4. *Effect of attendance on proxies*

Consider specifying that the Board of a company may determine whether or not presence at a meeting via virtual meeting technology should automatically suspend a proxy that has been submitted (given the practical difficulty of reconciling, in real time, virtual attendees with proxies submitted earlier).

6.5. *Recording details of all questions and member comments in minutes – s251A(1)(a) and s253M(1)*

The Committee considers that this change is unduly onerous, and impractical.

While we note the concerns of shareholder interest groups – the administrative burden that this adds to every member meeting is not justified or proportionate.

Recommendation: Delete this amendment.

6.6. *Flexibility in timing of voting – s253Q*

The Committee is supportive of the flexibility offered to vote either in real time, or where practicable, record a vote in advance.

Recommendation: Consider whether the provisions should specify the ability to submit a vote in advance does not require direct voting authority in the company's constitution.

6.7. *Documents tabled at a meeting – s253Q(5)*

Consider whether this section should also permit or contemplating the 'screencasting' of documents tabled at a meeting – where a presentation is projected onto screens (similar to it being put up on a screen for those attending in person). While the Committee does not have a strong view in this regard, it is one of the features used increasingly with new meeting technologies.

Recommendation: Consider screencasting.

6.8. *'Place' of virtual meetings for timing purposes – s253R*

Consider whether s253R should permit the company to nominate the principal place of business of the company as the 'location' for a virtual meeting (rather than the registered office, given that may be the address of an agent).

6.9. *Expanded jurisdiction – corporations other than companies*

Consider whether to specify that for any meeting of a corporation (other than a company) held for Corporations Act purposes, the virtual meeting provisions apply as if the corporation was a company. However, we acknowledge that this may not be a matter able to be addressed for the current Draft Bill.

6.10. *Electronic communication and signing of meeting documents – s253S*

Consider whether "consent to short notice" should be specifically included.

Note equivalent issues regarding 'indication of intention" in s253S(5)(d) – see above.

6.11. *Other documents under the Corporations Act*

Consider whether a broader range of documents required to be signed by company officers should be included in section s253S (or an equivalent general provision).

6.12. *Documents given to ASIC - s253S(7)*

We query why electronic transmission of documents should not also apply to meeting documents that are required or permitted to be provided to ASIC? We acknowledge that ASIC lodgement systems are in transition, but suggest that it would be more flexible to have the ability to exempt an agency or authority by regulation (rather than principle legislation) so that it is capable of being readily adapted as capability improves.

6.13. *Definitions of 'document'– s9*

We note that the definition of "document' has adopted the updated Acts Interpretation Act definition, and that this is intended to capture electronic documents. We recommend that this be given emphasis in the Draft EM as referring to 'electronic documents' not just 'information.

Consider whether an inclusive definition of 'sign' should be added, to create technology neutrality between different forms of electronic signature (given case law is mixed as to the effectiveness of different forms of electronic signature). Alternatively - some emphasis in the Draft EM to indicate that it is intended that the legislation does not restrict the manner of electronic signature, and include examples.