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16 July 2021

By email: businesscomms@treasury.gov.au

Market Conduct Division
The Treasury
Langton Crescent
Parkes ACT 2600

Dear Manager,

Submission to the Treasury: *Treasury Laws Amendment (Measures for Consultation) Bill 2021: Use of technology for meetings and related amendments*

1 Executive summary

Thank you for the opportunity to provide our views on the draft legislation (*Treasury Laws Amendment (Measures for Consultation) Bill 2021: Use of technology for meetings and related amendments*) (the **Exposure Draft**) that proposes to amend the *Corporations Act 2001* (Cth) (**Corporations Act**) in relation to virtual meetings and electronic document execution.

Gilbert + Tobin welcomes reforms that update the *Corporations Act* to reflect contemporary ways of doing business. Our submission is limited to the proposed changes in respect of:

- the execution of documents – at paragraph 3 below; and
- virtual meetings – at paragraph 4 below.

In summary, we submit that:

- the amendments in relation to both the execution of documents and virtual meetings should be made permanent, rather than as temporary amendments;
- in respect of the electronic execution of documents:
  - section 127 should include a simple statement that electronic execution is permitted and that references to a "document" in sections 127, 128 and 129, include a document in electronic form (see paragraph 3.1 below);
  - the wording used in the *Exposure Draft* to authorise split execution be clarified to refer to the execution of a document, rather than the signing by a signatory (see paragraph 3.2 below); and
  - the process by which a witness may remotely witness the affixing of a company's common seal be clarified (see paragraph 3.3 below);

- in respect of virtual meetings:
  - the requirement for constitutional change to hold purely virtual meetings rightly presupposes members' ability to decide what is in their best interests (see paragraph 4.1 below);
  - sections 249S(3)(c) and 252Q(3)(c) are too broad, the time for holding purely virtual meetings should be clarified to be at a time reasonable in relation to the registered office of a company (see paragraph 4.2 below);
  - further guidance and clarification should be provided in relation to hybrid meetings, to cater for the eventuality where the virtual technology is not functional (see paragraph 4.3 below); and
  - the right of members to participate orally or in writing as provided by sections 249S(8) and 252Q(8), to avoid doubt, should be clarified to include that such participation can be done through virtual technology (see paragraph 4.4 below).

2 About Gilbert + Tobin

Gilbert + Tobin is an independent Australian corporate law firm that is recognised as a leading transactions, regulatory and disputes law firm. We have one of Australia's most highly regarded corporate and commercial practices, and are a legal adviser of choice for industry leaders and strategic, high profile and complex matters.

Our submission is guided by our experience in working with Australian business, government and not-for-profits on matters relating electronic execution and meetings, both before and during the Covid-19 pandemic.

Even before the Covid-19 pandemic, methods of electronic execution and communication and remote working were being increasingly adopted, and in this regard, the law was lagging market practice.

Organisations that had a preference for using electronic execution were structuring their agreements to avoid this uncertainty. This includes, by way of example, structuring written contracts as simple agreements rather than deeds to avoid the "paper rule" and signing by methods other than section 127, in order to avoid the uncertainty of whether section 127 applied to electronic documents and signatures. This kind of restructuring is inherently inefficient and, in the case of section 127, results in counterparties being deprived of some of the protections provided under section 129.

The ability for companies to conduct their meetings virtually has been a long-awaited feature in the *Corporations Act* and the resultant flexibility and cost saving that is anticipated for companies is welcomed. The operation of the amendments caters for innovations, and strike a good balance between the responsibilities of directors and the opportunities for members to participate in purely virtual meetings.

One benefit of the temporary Covid-19 measures at the Commonwealth, State and Territory level is that they, by and large, updated legislative rules to reflect contemporary practice.

3 Electronic execution of documents

This submission should be read alongside our submission to Treasury dated 29 October 2020 (**2020 Submission**) which we made in respect of Treasury's earlier consultation on the *Corporations*

Amendment (Virtual Meetings and Electronic Communications) Bill 2020 (**2020 Exposure Draft**). A copy of our 2020 Submission is annexed to this letter at Annexure A.

We note that the *Exposure Draft* amends some of the changes that are to be made by the *Treasury Laws Amendment (2021 Measures No.1) Bill 2021* (the **Bill**). Given this, our submission includes changes that should be included in the *Exposure Draft* to amend the changes that are to be made by the *Bill*.

3.1 Documents in electronic form

Section 6 of the *Determination*[1] made it clear that references to a "document", included a document in electronic form.[2] This drafting addresses the fact that the *Corporations Act* does not expressly state that a document can exist in electronic form.[3]

Unlike the *Determination*, the *Exposure Draft* does not contain any similar statement.

While we are of the view that the amendments to section 127 in the *Exposure Draft* contemplate documents existing in electronic form and being executed by electronic means, we submit that the inclusion of a similar statement in the *Corporations Act* would be beneficial for practical reasons. We say this because:

- such a statement had been included in the *Determination*, and by including it in the *Corporations Act* the implication that Parliament intends a different result in the *Exposure Draft* is avoided*;* and

- some law firms and lawyers had expressed doubt as to whether the *Determination* itself permitted electronic documents and electronic execution. While, in general terms, we disagree with this view, it leads to practical difficulties when advising on transactions where a counterparty refuses to accept documents in electronic form or electronic execution.

We note that this recommendation is consistent with submissions that have been made by other law firms on the *2020 Exposure Draft*.

3.2 Split execution

The amendments to provide for split execution under the *Bill* (which are not amended under the *Exposure Draft*) are contained in sections 127(3A) and (3C).

We note that the *Bill* provides that a "***document** will be taken to have been **signed by a person***" if the procedures in those sections are followed. Section 127(3C) further provides that a document signed by a person, need not include the signature of another signatory.

However, nowhere does the *Bill* state that a document will be taken to have been ***executed*** in these circumstances. The real issue has never been whether a signatory's signature is effective if it is applied to a document absent any other signatory's signature (and we note, in practice, this is what happens when signatories sign the same document one after the other). The real issue is whether these signatures, when taken together, have the legal effect of the company executing the document.

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[1] Corporations (Coronavirus Economic Response) Determination (No. 3) 2020 (**Determination**).

[2] Determination, section 6(2).

[3] The existing definition for "document" in section 9 of the Corporations Act does not refer to documents in electronic form.

For this reason, we submit the wording of section 127 dealing with split execution should be clarified to refer to the *execution* of a document, rather than the signing by a signatory.

For further details we refer to paragraph 5 of our 2020 Submission.

3.3 Witnessing remotely

The amendments to provide for remote witnessing of the affixation of a company's common seal under the *Bill* (which are not amended under the *Exposure Draft*) are contained in section 127(2A).

We submit that, from a practical perspective, further clarity should be added to make clear the procedure that must be followed by a company to take advantage of these provisions. We note that equivalent legislation permitting the remote witnessing of signatures in some States and Territories provides greater detail as to the requirements that remote witnessing must meet.

We outlined our observations in this regard in paragraph 6 of our 2020 Submission and repeat them in this submission.

4 Virtual meetings

4.1 Constitutional changes

From a member's viewpoint, shareholder meetings are their opportunity and right to bring directors and management to communicate and discuss the past and future affairs of their company.

The requirement for purely virtual meetings to be held **only if** required or if the company's constitution allows it, is a balance between the ability of members to decide on this characteristic, and the general lack of visibility around questions and comments by other shareholders. Members as a group are best placed to decide how meetings should be conducted. The position rightly presupposes that members can decide what is in their own best interests.

Nonetheless, the timing of the amendments will be avidly watched by companies going into the upcoming AGM season. Should the amendments come in time for companies to prepare their notice of meeting, it will provide the opportunity for members to vote for a change in the constitution where required. If the opportunity is missed for the 2021 AGM, the amendments remain flexible enough to cover the eventuality of an emergency that may require a purely virtual meeting.

4.2 Only virtual meetings

In keeping with the spirit of the amendments, we support providing flexibility to companies on how they conduct their meetings as long as the conditions to participate in the meeting are reasonable. We submit that sections 249S(3)(c) and 252Q(3)(c) are too broad; the time for holding purely virtual meetings should be clarified to be at a time reasonable in relation to the registered office of the company since:

- it is consistent with the time that meetings are taken to be held in section 249RA(1)(c), and will provide clearer guidance to directors; and
- with the recognition that the member base can be diverse from various perspectives, it will be known and appreciated by members (whether it be at the point of purchase of shares or when planning attendance at meetings), when forming an expectation around meeting times.

4.3 Hybrid meetings

In the *Explanatory Memorandum*, an opt-in pilot is proposed to further observe the conduct of hybrid meetings and allow for improvements to be made in line with recommendations post the pilot.

We respectfully submit that a pilot is not required as hybrid meetings have been held for over a year and the advantages of giving the option of holding a hybrid meeting far outweigh only physical meetings. The pandemic has demonstrated the requirement for pure virtual meetings in some circumstances must be allowed.

We believe that further guidance and clarification should be provided in relation to hybrid meetings, in the event that the virtual technology is not functional, and a quorum is present at the main physical venue, around what next steps should be and considerations in continuing or reconvening the meeting.

4.4 Right to participate orally and in writing

The legislation should provide further guidance on shareholders' participation at meetings, especially in hybrid and purely virtual meetings; we submit that questions and comments should be published (unless the number is overwhelming) for better visibility by all shareholders. This will provide a similar experience to physical meetings, where all shareholders present are able to hear questions and comments, even if companies decide not to or cannot respond.

We submit that the right of members to participate orally or in writing as provided by sections 249S(8) and 252Q(8), to avoid doubt should be clarified to include that such participation can be done through virtual technology.

5 Measures should be made permanent

Last month, the Senate Economics References Committee published its report on the *Treasury Laws Amendment (2021 Measures No.1) Bill 2021 [Provisions]* (**Senate Committee Report**). The Senate Committee Report recommended that the Schedule 1 measures proposed by the *Bill* be made temporary and sunset at least six months from the *Bill*'s date of Royal Assent. We submit that the approach currently taken in the *Exposure Draft* should be preferred and that the measures introduced to facilitate electronic execution of documents and virtual meetings under the *Corporations Act* should be made permanent.

The Senate Committee Report notes that introducing temporary measures will provide time for extensive consultation before the measures are implemented permanently and refers to issues that were raised throughout the Committee's consultation process, including, with respect to electronic execution, concerns that permitting electronic execution may increase the risk of documents being executed fraudulently. It was noted that this risk was increased by the growing incidence of cybercrime.[4]

Respectfully, we do not believe that these concerns, which we do not cavil with in this submission, outweigh the benefit of the *Bill* and *Exposure Draft* being made permanent.

[4] Senate Economics References Committee, *Treasury Laws Amendment (2021 Measures No.1) Bill 2021 [Provisions]* (June 2021), paragraph 2.82.

We note that the *Determination* applied temporarily, and when it lapsed without the *Bill* having passed, this created material inconvenience, uncertainty and disruption to businesses who had to revert to pre-*Determination* ways of doing business. Parliament will always have the power to revise and amend the *Corporations Act*, and, in our submission, it would be far preferable for the ordinary legislative process to apply than for these provisions to be allowed to lapse after six months.

* * * * *

Thank you for the opportunity to provide our views on the *Exposure Draft*.

Please let us know if there is any further information or details that we can provide in respect of any of the above.

Yours sincerely
Gilbert + Tobin

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Annexure A –
Gilbert + Tobin 2020 Submission

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29 October 2020
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Manager
Market Conduct Division
The Treasury
Langton Crescent
Parkes ACT 2600

Dear Manager,

Submission to the Treasury: draft legislation making permanent reforms in respect of virtual meetings and electronic document execution

1 Executive summary

Thank you for the opportunity to provide our views on the draft legislation that proposes to amend the *Corporations Act 2001* in relation to virtual meetings and electronic document execution (the **Exposure Draft**).

Gilbert + Tobin welcomes reforms that update the *Corporations Act 2001* to reflect contemporary ways of doing business. Our submission is limited to the proposed changes in respect of the execution of documents only. In summary, we submit that:

- in respect of electronic execution (see paragraph 3 below):
  - section 127 should include a simple statement that the signing of a document referred to in section 127(1) includes a signatory electronically signing an electronic form of that document;
  - the following requirements included in the *Exposure Draft* should not be carried forward in the final legislative amendments:
    - a signatory "receives" a copy of the document (under section 127(3B)(a)); and
    - a signatory provides a separate electronic communication indicating that they have signed the document (under section 127(3B)(c)); and
  - on the question of what constitutes a valid electronic signature, the adoption of the language from the *Electronic Transactions Act 1999* (**ETA**) be considered further for the reasons set out at paragraph 4 below;
- the wording used in the *Exposure Draft* to authorise split execution be clarified (see paragraph 5 below); and
- the process by which a witness may remotely witness the affixing of a company's common seal be clarified (see paragraph 6 below).

2 About Gilbert + Tobin

Gilbert + Tobin is an independent Australian corporate law firm that is recognised as a leading transactions, regulatory and disputes law firm. We have one of Australia's most highly regarded corporate and commercial practices, and are a legal adviser of choice for industry leaders and strategic, high profile and complex matters.

Our submission is guided by our experience in working with Australian business, government and not-for-profits on matters relating to electronic execution, both before and during the Covid-19 pandemic.

Even before the Covid-19 pandemic, methods of electronic execution and remote working were already being increasingly adopted, and in this regard, the law was lagging market practice. Organisations that had a preference for using electronic execution were structuring their agreements to avoid this uncertainty.

This includes, by way of example, structuring written contracts as simple agreements rather than deeds to avoid the "paper rule" and signing by methods other than section 127, in order to avoid the uncertainty of whether section 127 applied to electronic documents and signatures. This kind of restructuring is inherently inefficient and, in the case of section 127, results in counterparties being deprived of some of the protections provided under section 129.

One benefit of the temporary Covid-19 measures at the Commonwealth, State and Territory level is that they, by and large, update legislative rules to reflect contemporary practice.

3 Electronic execution

The original intent behind section 127 was to minimise the regulatory burden on companies and to promote business efficiency by enabling companies to execute documents by the ordinary signature of directors and company secretaries, rather than by the outdated and cumbersome method of affixing a company's common seal.

Given this, we welcome reforms to section 127 that will bring it up to date to contemporary ways of transacting business.

That said, we respectfully submit that the amendments proposed to section 127 are unnecessarily complex, and do not reflect how companies currently execute documents under the *Determination* and in other contexts. In our view, a simpler approach, more in line with the approach provided for in the *Determination*, as well as in other State and Territory legislation, would be more appropriate and more likely to achieve the goals of these reforms.

New section 127(3B) – a three step test

The new section 127(3B) appears to provide for a 3-step process for electronic execution.

- **Step one** (**the signatory receives a copy of the document**). Section 127(3B)(a) imposes a requirement that a signatory "*receives a copy or counterpart of the document*". The use of the word "receives" suggests that another person is required to provide the document in order for it to be "received" by the signatory.

  Keeping this requirement would exclude documents where the signatory prepared or created the execution version of that document. This would disproportionately affect smaller companies, but not be limited to these companies.

Even in the situation where a signatory has received a copy of a document from a third party, questions arise as to when that document will no longer be considered to have been "received". Does the entering of details at the last minute (for example, inserting the date) or saving an email attachment as a local copy mean that the document has no longer been "received"?

We note that no similar requirement exists under section 127(1) or 127(2), under the ETA nor under any equivalent State or Territory legislative instruments relating to electronic signing.

It is unclear to us what mischief this requirement is attempting to address. In our submission, this requirement should be removed.

- **Step two** (**the signatory signs the document**). Section 127(3B)(c) imposes a requirement that a signatory indicate, by means of an electronic communication, that the person has signed the document.

  In this paragraph, the use of the present tense "indicates" together with the past tense "signed" suggests that the "*indicates, by means of an electronic communication*" takes place at a different, later time from the earlier occurrence of "*the person has signed the document*". The example provided in the explanatory note at [1.13] suggests this is the intent behind the drafting.[1]

  As currently drafted, it is unclear whether this act of signing the document under step two may be met by a person electronically signing the document, or whether this is still referring to wet-ink signature. We note that sections 127(3B)(d) and (e), which replicate the requirements of the ETA appear to qualify the giving of the electronic communication (under step three), and not the act of signing the document (under step two).

  Without clear words to indicate that electronic signing is permitted under section 127, there is a real likelihood that, consistent with pre-*Determination* practice, many law firms will advise that the act of signing under step two must still be carried out by wet-ink signature. That is, although section 127(3B) envisages the receipt of the document may occur electronically, and that the signed document may be communicated electronically, the act of signing must still occur in physical form. This is no different from what already occurs today.

  In our submission, section 127 should contain a clear statement that a document may be signed electronically.

- **Step three** (**the signatory sends an electronic communication indicating that they have signed the document**). After a signatory has signed the document, they are required to send an electronic communication indicating they have done so in order to meet the requirements of section 127(3B). We raise a number of issues with this step three:

  - (**it does not reflect business practice**) First, the idea that signing alone is not sufficient, but must be accompanied by a separate electronic communication in order to be effective, does not reflect common practice and is likely to result in confusion.

    Where signed agreements are exchanged, it is very often a person other than the signatory that does so (for example, external lawyers). In this situation, the signatory is

[1] As an aside, we note that in section 10 of the ETA, the reference to the "electronic communication" is referring to the document that is signed. However, the *Exposure Draft* appears to have adopted a different approach: the "electronic communication" is referring to a different thing from the "document" to be signed.

not providing any separate electronic communication indicating that they have signed the document.

- (**exchange should not be a default requirement for validity**) This requirement is analogous to document exchange or delivery. The concept of contracting parties having to exchange signed copies of documents in order to effect "delivery", has long passed from the common law,[2] and is only a requirement where required as part of the parties' agreement.[3] It would be a retrograde step to reintroduce this requirement under these reforms.

- (**if there is no identifiable counterparty**) It is frequently the case that a document has no identifiable counterparty at the time of execution (for example, a power of attorney executed in the form of a deed poll). In this situation, it is unclear to whom the electronic communication must be sent.

- (**what is the executed document?**) In the situation where a signatory has signed a physical document (as is contemplated under section 127(3B)(a)(i)), then scanned a copy of the document, what is the status of this scanned copy? Or the signed, physical document?

  The reference to a document in physical form in section 127(3B)(a)(i) suggests that section 127(3B) is intended to impose an additional or different requirement than is already provided for in section 127(1) for documents signed by wet-ink – however, what this additional or different requirement is, is unclear.

- (**relevant intention of the signatory**) Separating the act of signing from the act of giving the electronic communication suggests that the signatory is required to form 2 intentions: an intention to sign the document (which they have carried out) and an intention to communicate the fact that they have signed to another person.

  When using some cloud based electronic signing tools, this intent may never arise. With these tools, signed copies of the document are automatically sent to named recipients, without the signatory having to specifically send or trigger the sending of any communication. In this situation, the circulation of the document to recipients is pre-programmed by someone organising the execution process, often a person who is not one of the signatories.

Interaction with amended section 129(5)

A further issue with the proposed section 127(3B) is its interaction with the proposed amendments to section 129(5). Section 129(5) allows for a person to assume that a document has been duly executed by the company if the document appears to have been signed under section 127(3B).

The words "*the document appears to have been signed in accordance with section 127(1), (3A) or (3B)*" in section 129(5) direct the reader to the content of each of sections 127(1), (3A) or (3B).

In the case of execution under section 127(1), the (pre-*Determination*) application of section 129(5) was typically straightforward: one looks to the execution block of the document to confirm whether it

[2] *Segboer v AJ Richardson Properties Pty Ltd* [2012] NSWCA 253 at [53], and the older authority cited, including *Xenos v Wickham* (1867) LR 2 HL 296 at 323.

[3] *Federal Commissioner of Taxation v Taylor* (1929) 42 CLR 80 at 87.

appears that 2 directors or a director and company secretary have signed. No further investigation or diligence is required (noting the section 128(4) exception).

In the case of section 127(3B), this is a more complex exercise, and it is unclear what parts of section 127(3B) must be "apparent" on the face of the document in order for the section 129(5) to apply. Indeed, as stated above, no part of section 127(3B) speaks to any particular form of signature or other words having to be attached to the document.

The risk is that, in its current form, the application of section 129(5) to execution under section 127(3B) is seen as a dead letter.

Operation of section 127(3B)(b) is unclear

Lastly, we note that the operation of section 127(3B)(b) is unclear in the context of section 127(3B). It is unclear whether the "entire content" requirement attaches to each reference to the "document" in clause 127(3B) or only some of those references. If it is to attached to each reference, then we submit that this may be impractical in some situations, particularly where a person is required to print and scan the entire document using a printer or scanner at home.

A possible solution: a simplified approach to section 127(3B)

In our submission, the language of section 127(3B) should be simplified to include a clear statement that a company may execute a document, under section 127(1), by its signatories electronically signing an electronic form of that document.

That is, the reference to a document being signed by a person under section 127(1) includes a reference to that document being electronically signed. We have set out at paragraph 4 below some thoughts on how "electronically signed" may be defined.

We note that such an approach is more closely aligned with the approach adopted in the *Determination*, as well as in other State and Territory legislative instruments.

4 Some views on using ETA language

In our view, the practice of replicating the words of sections 10(1)(a) and (b) from the ETA in the *Corporations Act 2001* (and other legislation) is apt to confuse readers who are unfamiliar with the ETA.

The ETA language is highly technical, and assumes the reader understands the origins of those words and how those words have been applied under ETA case law (the **pre-requisite knowledge issue**). In particular, the words "method" and "intention" may have a relatively clear meaning when read in the context of section 10 of the ETA, but is far less obvious when used in other places without a similar context.

Our experience with other entities and their interpretation of the ETA words in the Determination

In the context of the *Determination*, which also adopted the ETA form of words, we have seen some sophisticated, legally advised entities:

- refuse to accept a document electronically signed under section 127 on the basis that they do not know when and how section 6(4) of the *Determination* may be satisfied; and

- after being explained how a document is intended to be electronically signed using a cloud e-signing platform, require proof that:

  - each signatory has effectively authorised each step of the process (for example, document is uploaded into the cloud platform, company provides email addresses of its signatories, law firm enters those email addresses in the cloud platform, etc); and

  - each signatory has formed sufficient intent (for the purposes of section 6(4)(a)) in respect of each step of the process and records this intent in writing.

Such an approach effectively makes electronic execution under section 127 a more complicated exercise than wet-ink signing and one that is practically impossible. While we strongly disagree with such flawed and unworkable interpretations of the *Determination*, it is an issue that the *Exposure Draft* should deal with; otherwise, the benefits sought to be achieved by the *Exposure Draft* will not be fully realised.[4]

In the context of section 127(3B), the risk is that each of the words "method" and "intention" can be read as a reference to one or more of the limbs of section 127(3B). Based on our experience with the *Determination*, the word "method" may be read by some as referring to the steps immediately preceding the act of signing, including the preparation and circulation of the document amongst signatories, and the word "intent" as referring to the intentions of the signatories relevant to each such step.

Again, while we consider this interpretation to be inconsistent with the approach of the ETA, we fear that it is one that will be adopted by a sufficient number of lawyers so as to render electronic execution under section 127 unworkable.

A possible solution

Our suggestion is that the wording used in section 127(3B) be amended to:

- address the issue we have raised above about the "pre-requisite knowledge" issue. We suggest two possible approaches:

  - replace section 127(3B)(d) and (e) with a direct reference to the ETA, rather than a verbatim copy of the words being used in section 127. Under this approach, it would be clearer that the rules regarding electronic signing are based on ETA case law; or

  - use a form of words in section 127 to describe what constitutes a valid electronic signature that is different from those used in the ETA. Section 10 of the ETA accommodates a wide range of electronic documents in a wide range of situations. The flexible "as reliable as appropriate" test is an example of this. Similarly, an "electronic communication" under the ETA contemplates forms of communication other than human-readable writing.

    However, in the case of section 127, we would argue the same degree of flexibility is not required – section 127 already assumes a high degree of seriousness and importance is involved, given that only directors and company secretaries are able to sign. It is also

[4] We also note that although the consent of a counterparty to electronic execution (from section 10(1)(d) of the ETA) has not been carried over to section 127(3B), it effectively applies where a contract amongst 2 or more people is concerned. In practice, a contracting party will not sign electronically where the counterparty has indicated that they require wet-ink signature or raise significant hurdles to the acceptance of electronic signing.

implicit from section 129(5) that the act of signing will result in some human-readable mark being applied to the document. As a matter of practice, documents signed under section 127 invariably use an execution block, so there is very rarely (if ever) confusion as to what the intent of the signatory is when a signature appears in the execution block.

As such, we submit that it would be open for section 127 to eschew the generalities of the ETA and to stipulate, with a higher degree of specificity, the requirements for a valid electronic signature;

- if the ETA language is to be retained in section 127, make obvious what the concept of "method" and "intent" is referring to. That is, in each case, it is referring to the act of signing the document only; and

- regardless of which approach is adopted (or even if none of our above suggestions are adopted), we submit that it would be useful for regulations or other guidance to be published which provide a list of methods of electronic signing that meet the requirements of section 127. Such regulations or guidance should not seek to limit the generality of the test included in section 127, but rather provide a non-exhaustive list of acceptable forms of electronic signing. For example (and assuming that the section 10(1)(a) and (b) of the ETA language is retained) the inclusion of the signatory's name in human-readable text next to where their signature is affixed is sufficient to meet the requirement that a method is used to identify the person.

  We acknowledge that this list of methods may not necessarily be technology neutral or future proof, and it may require to be updated from time to time. However, in our view, the certainty that this would provide far outweighs this limitation.

5 Split execution

One of the benefits of the *Determination* was that it enabled "split execution" both in physical form and electronic form. This was achieved by section 6(3) of the *Determination* which provided that "***A company** may also **execute a document** without using a common seal*" (emphasis added) if each signatory signs their own copy of the document, which copy must contain the entire contents, but does not need to include the signature of any other person.

Although the *Explanatory Note* notes that sections 127(3A) and (3C) are intended to provide for split execution, we submit that the *Exposure Draft* could be clearer on this point.

Contrasting the words used in section 6(3) of the *Determination,* sections 127(3A) and (3B) each refer to "***a document** is taken to have been **signed by a person***". Section 127(3C) in turn qualifies the requirement that the document signed by the person need not include the signature of another person. However, none of sections 127(3A), (3B) or (3C) clearly state whether a document is ***executed by a company*** if its signatories sign separate, but identical copies. It is one thing for a document to have been validly signed by a signatory. It is another thing as to whether these signatures together comprise valid execution by the company.

The risk is that the single, static document requirement stated in *Bendigo and Adelaide Bank Limited v Pickard*[5] is not displaced by the new legislative wording. In our submission, the wording used in section 6(3) of the *Determination* should be adapted to make clear that split execution is valid under section 127.

[5] *Bendigo and Adelaide Bank Limited (ACN 068 049 178) & ors v Kenneth Ross Pickard & Anor* [2019] SASC 123 at [70].

6 Witnessing remotely

The practice of affixing a company's common seal to a document is a less common way to execute a document. That said, we nevertheless welcome reforms that will take advantage of technology to make this process of execution less cumbersome.

We make the following observations:

- (**timing of the observing of the affixing of the common seal**) unlike temporary measures adopted in some of the States and Territories, [6] section 127(2A) does not specify when the affixing of the common seal is to be witnessed. Further, it is unclear whether the concept of "electronic means" would include observing a video recording of the fixing of the common seal. In our view, observing a video recording is inconsistent with the purpose of witnessing. We submit that the concept of observing in real time ought to be made express in section 127(2A).

- (**timing of the witness' signature**) it is unclear at what time the witness is required to sign the sealed document, in order for their signature to be effective. Current case law indicates that a witness is required to sign the document at the same time that the thing they witness occurs.[7]

  Where a witness has witnessed the affixing of a common seal remotely, then there may be some time lag between the act of sealing and the witness' signing. Given this, the legislation ought to make clear that the witness' signing may take place after the sealing, but within a reasonable time (having regard to the prevailing circumstances). This kind of wording would seek to prevent the situation where a witness signs the document many weeks or months after sealing occurs, due to a lack of effort.[8]

- (**witness signing the same document**) given that the witness will be in a different location from the document when it is sealed, there is a risk that the witness signs a document that is different from the document that was sealed. This risk may arise innocently, for example, because of an error in how the sealed document is scanned or sent (whether electronically or by physical means) to the witness for signing. The legislation ought to make clear that such "innocent" errors such as these do not render the witness' signing ineffective. We note that the NSW temporary Covid-19 measures indirectly deal with this issue,[9] although they do not make clear what the effect is if a witness attests a different document from that which was signed.

- (**can the witness sign an electronic copy of the sealed document**) if it is intended that a sealed document may be scanned, then electronically sent to the witness to sign, then the legislation ought to make clear that this scanned copy will have the same status as the physically sealed copy, for the purposes of section 127. This would appear to be the intention as expressed in [1.16] of the *Explanatory Note;* however, this should be made clear in the legislative drafting.[10]

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[6] For example, see *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation* 2020 (NSW), Schedule 1, Part 1, cl. 3(a) and 3(b) which requires witnessing to occur in real time.

[7] *Netglory Pty Ltd v Caratti* [2013] WASC 364 at [148]-[169].

[8] For example, see *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation* 2020 (NSW), Schedule 1, Part 1, cl. 2(2)(a).

[9] *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation* 2020 (NSW), Schedule 1, Part 1, cl. 2(c).

[10] See, for example, the approach adopted in the *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation* 2020 (NSW), Schedule 1, Part 1, cl. 3(a) and 3(b).

- (**can the witness sign a copy of the document (whether physical or electronic) that does not include the common seal**) if it is intended that a witness may sign an identical copy of the document that does not include the common seal, then the wording used in section 127(3C) should be adapted for this purpose. Given that split execution is permitted, we see no reason in principle why this shouldn't be extended to documents that are executed by sealing.

  Without express wording on this issue, there is a risk that this provision will be interpreted as requiring a single, static document that contains both the common seal and the witness' signature.[11]

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Thank you for the opportunity to provide our views on the *Exposure Draft*.

Please let us know if there is any further information or details that we can provide in respect of any of the above.

Yours sincerely
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[11] See note 5, which by analogy would likely apply to section 127(2). A similar requirement for there to be a single, static document in the context of common seals was expressed in *Edwards v Skilled Engineering Pty Ltd* (Unreported, NSWCA, 14 March 1989) per Priestley JA: "*formalities necessary for the execution of the deed are, on the face of the deed, complied with"* and *Mostyn v Mostyn* (1989) 16 NSWLR 635 at 639 "*[a] witness will attest overseeing the execution by that party of the deed by signing his or her own name in the appropriate place*", both cases cited in *Netglory Pty Ltd v Caratti* (at note 7).