

16 July 2021

Market Conduct Division
Treasury
Langton Cres
Parkes ACT 2600

By email: businesscomms@treasury.gov.au

Dear Treasurer

Exposure draft – Treasury Laws Amendment (2021) Measures No. 1 (Bill 2021)

I am a partner of Sparke Helmore Lawyers with my primary practice being in the field of property development, a key employment and business driver in Australia particularly in these difficult times we face. I also have a background and passion of information technology and as such, I have sought to drive innovation and improvement in the space of both the legal framework and proper implementation of electronic signatures and electronic conveyancing over the recent years.

There have been significant advancements over the years driving efficiency and better cost outcomes for clients in the space of conveyancing generally and in particular, in states such as New South Wales and Victoria who have now implemented specific legislation to assist in this digital process.

Conveyancing though is but a small part of my practice with a large part incorporating other necessary aspects such as company and business meetings; documentation needed between developers and third parties such as loan facilities with financial institutions, joint venture type arrangements between various parties, option deeds between developers and landowners, building contracts, consultancy agreements as well as a raft of other ancillary contracts and deeds necessary to cover off the legal aspects needed to facilitate a property development.

As you have quite appropriately set out in your briefing papers, the ability to facilitate the electronic execution of documents on behalf of companies has been frustrated over the years and much discussion and conjecture has been set out through various publications around a company's ability to sign documentation electronically. Some of these aspects have also been considered in some states through the Courts also and so the implementation of legislation to resolve .

Concerns under the current Bill

Execution of documents under the Corporations Act

Whilst the proposed bill under Schedule 1 proposes changes to s127, in particular the inclusion of ss127(3B) which aims to resolve the issue of allowing company directors to sign documents electronically, it does not provide the same comfort for parties that may sign pursuant to s 126. There has been much debate around whether or not a person signing under s.126 electronically is permitted because of the relevant applications of agency but also considering the exclusion of the Corporations Act specifically under the *Electronic Transactions Regulations 2020 (ETR)*.

In addition, whilst an explanatory note has been included at S.129(5) seeking to attempt to link ss127(3B) into the allowed assumptions provided, the section itself may not be considered to have extended the parameters far enough and a variation to s.129(5) may be necessary so as to reference

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s127 in its entirety in order to avoid debate as to whether the proper legal application of the proposed changes will indeed have the desired effect.

Therefore, dealing solely with the issue of execution of company documents for example, the Bill would need to be amended to take into account electronic signing under s 126 as well as changes to s129(5). It may also be necessary on a broader context to consider similar implications as they apply to execution of company documents by parties who are not a director or secretary such as chairman and other parties granted delegated authority.

Ability to sign contracts and deeds

Secondary to the facilitation to electronically sign a document is the common law and legislative provisions surrounding the requirements for the signing of a contract vs a deed. In most cases the States have legislation surrounding the requirements of signing a deed, for example I refer to s38 of the *Conveyancing Act 1919* (NSW).

Whilst NSW and VIC have introduced relevant legislative changes recently to put this issue to bed, other States have not.

As most formal business arrangements are entered into in the form of a deed, either through design or because of other legislative requirements (anything to do with real property for example must be by way of deed), the fact that the proposed Bill remains silent on this issue means this difficulty still remains when dealing with cross border arrangements or arrangements in States other than NSW or VIC.

It would be an ideal opportunity to incorporate within the Bill a provision allowing for terms similar in line to that introduced by NSW and VIC so as to ensure there is no doubt that a company can e-sign either a contract or a formal deed and that it will be valid and binding.

Service of Documents electronically

In addition to this, leaving aside the changes applied in consideration of virtual meetings, there appears to be no change to s109X dealing with the ability to electronically receive and serve documentation. As a result, parties will still be compelled to serve various documentation through paper means still. An aspect that may have been overlooked given the other pressing primary issues.

Suggested alternative

Under the ETR, Schedule 1 sets out the various Commonwealth Acts to which the *Electronic Transactions Act 1999 (ETA)* does not apply. The Corporations Act is identified at Schedule 1, Items 23 and 24.

The proposed Bill attempts to incorporate the provisions around e-signing under the ETA into s.127 however in doing so it takes too narrow a focus and it would appear that perhaps a more sensible approach may be to simply amend the ETR by removing reference to the Corporations Act entirely.

In doing so, this would:

1. alleviate various proposed changes within the Bill simplifying it;
2. avoid the problems of cherry picking or being too narrow in its application;
3. deal with the issues of e-signing so no need to change s126, 127 or 129.
4. avoid the problem that will arise having to consider the interplay and practical circumstances surrounding matters which will need to be considered ultimately by the Courts between the application of the ETA and the Bill;

5. allow for parties to deal with documents in line with legislation that has already been tested and broadly acknowledged and known to the legal and business community; and
6. because of the fact these laws are already well known to the legal and business community, provide much more confidence in its application and validity.

If the above solution is not implemented to allow a broader rectification of the laws then more changes must be implemented into the proposed Bill to properly and fully consider all of the relevant aspects where technology can provide as good or a better outcome to the issues business face every day.

It does not however deal with the issue of contracts vs deed which would still need to be dealt with as above nor the issue of e-service which still require attention and inclusion in the Bill to rectify and deal with these ancillary issues.

I hope the above may provide you with some assistance in considering the issues raised and advancing the legal framework needed to better support and drive better business in Australia through the help of the many benefits that technology can provide.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Emanuel Oros', with a long horizontal flourish extending to the right.

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