Allens Ashurst HERBERT SMITH FREEHILLS KING&WOOD MALLESONS NORTON ROSE FULBRIGHT

Statutory Review of the Meetings and Documents Amendments

Submission of the Walrus Committee concerning the execution of documents

24 July 2024

WHO WE ARE

We are a committee including senior lawyers drawn from five large law firms — Allens, Ashurst, Herbert Smith Freehills, King & Wood Mallesons and Norton Rose Fulbright, which have significant corporate and financing practices.

We write in response to the *Statutory Review of the Meetings and Documents Amendments* consultation paper published in June 2024 (**Paper**). We also refer to the previous submissions of the Walrus Committee in respect of 2 of the consultations cited in the background to the Paper:

- November 2020 submission on "Making permanent reforms in respect of virtual meetings and electronic document execution";[1] and
- July 2021 submission on "Using technology to hold meetings and sign and send documents".[2]

The Walrus committee, or several of the firms comprising our committee, have also cooperated on submissions to other consultations considering electronic execution of agreements and deeds by corporations:

- Walrus submission of 8 November 2021 to the Senate Economics Legislation Committee regarding the Corporations Amendment (Meetings and Documents) Bill 2021;[3]
- Allens, Ashurst, KWM & NRF submission to the 2021 "Modernising Document Execution consultation paper";[4] and
- Walrus submission on the WA Landgate 2023 Consultation Paper "Electronic Creation and Execution of Documents".[5]

Our submission relates only to consultation question 13 of the Paper: what, if any, issues have been experienced with the electronic signing of documents? If yes, how could these be improved?

We welcome the Paper and thank you for the opportunity to make this submission.

INTRODUCTION

It is our collective experience that the execution of documents amendments to the *Corporations Act 2001* (Cth) (**Corporations Act** or the **Act**), made permanent in February 2022, have been widely embraced and welcomed. These amendments have vastly simplified and modernised document execution for Australian companies registered under the Corporations Act (**Corporations Act companies**), making transactions easier, cheaper and quicker. So far as we know, they continue to have no ill effect, and are not generating calls to turn back the clock.[6] Nor is there any increased incidence or risk of fraud.

The simplification of the formalities of deeds on a national basis (including allowing electronic execution) is particularly welcome.

There are some further tweaks which we would suggest to consolidate and extend the considerable advantages which have flowed from the amendments. And we suggest the benefit of the reforms as to deeds should be extended to statutory and foreign corporations.

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1 https://treasury.gov.au/consultation/c2020-119106

2 https://treasury.gov.au/consultation/c2021-177098

3 https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/CAMeetingsandDocuments/Submissions

4 https://www.regulatoryreform.gov.au/sites/default/files/modernising-document-execution-consult_0.pdf .

5 https://www.landgate.wa.gov.au/siteassets/documents/news/docs-linked-in-cibs/consultation-paper-on-the-electronic-creation-and-execution-of-documents.pdf?domain=customerinformationbulletin.cmail20.com

6 We made this observation in our submission of 8 November 2021 to the Senate Economics Legislation Committee regarding the Corporations Amendment (Meetings and Documents) Bill 2021 (above n 3) and this continues to be the case.

SUGGESTED MODIFICATIONS

We suggest the following clarifications or extensions for the reasons set out below.

1. Sections 126 and 127 should be amended to confirm that they override any requirements for the execution of deeds under state or territory laws. It may also be worth clarifying that s 5G of the Corporations Act does not limit the application of ss 126 and 127.
2. Section 126 should be amended to provide expressly that for a document executed under the section to take effect as a deed, it is not necessary that it be sealed or be expressed to be sealed.
3. The benefit of the reforms as to deeds should extend to other corporations not currently dealt with, including foreign corporations and statutory corporations.
4. Section 126 should be expanded to operate where a corporate entity (not just an individual) acts as agent or attorney for a company.

In addition, we strongly suggest that the language of s 110A(2) which sets out the requirements for a signature, is clear, accurate, intuitive, consistent with international conventions and other statutes, and has the benefit of a large body of case law. It should not be amended.

SIMPLIFICATION ON A NATIONAL BASIS OF THE REQUIREMENTS FOR THE EXECUTION OF DEEDS BY CORPORATIONS

General

The amendments regarding document execution are clearly designed to simplify the requirements for the execution of deeds by Corporations Act companies on a national basis. While the amended provisions are not stated as being exhaustive or exclusive,[7] as intended they have achieved some much-needed uniformity and simplicity across the states and territories of Australia, and have, up to a point, allowed a standardised approach significantly reducing costs and increasing efficiency.

There are a number of provisions which expressly dispense with many of the arcane common law or statutory requirements for the creation and execution of a deed when it is executed by or for a Corporations Act company under s 126 or s 127. Those requirements had varied from jurisdiction to jurisdiction.

In particular:

1. Delivery is not necessary (ss 126(7) and 127(3B)) (contrary to common law requirements and to the assumptions underlying some state or territory statutory requirements).[8]
2. Deeds executed by an individual as agent need not be witnessed (s126(6)(a)) (contrary to a number of state or territory statutory requirements).[9]
3. An individual signing a deed as agent does not need to have been appointed by a deed (s 126(4)) (contrary to common law requirements).
4. The deed can be electronic, not physical (ss 126(6)(b) and 127(3A)(b)) (contrary to common law requirements).

Issues

The changes above are very welcome, and have had a significant effect, but in our experience the following issues have been raised which are worthy of being addressed.

- **First**, the above provisions mentioned in 1 and 2 are clearly designed to prevail over any inconsistent state or territory law, and in our view, do so because of s 109 of the Constitution. Nevertheless, some have questioned whether this is the case, citing s 126(3) or the convoluted

[7] See Corporations Act ss 126(8) and s 127(4).

[8] Eg. *Property Law Act 1974* (Qld) s 47 and *Property Law Act 2000* (NT) s 49.

[9] *Civil Law (Property) Act 2006* (ACT) s 219(1)(b); *Conveyancing Act 1919* (NSW) s 38(1A)(b) and (1B)(b); *Law of Property Act 2000* (NT) s 47(2); *Law of Property Act 1936* (SA) s 41(2)(a); *Conveyancing and Law of Property Act 1884* (Tas) s 63(2)(a) and *Property Law Act 1969* (WA) s 9(1)(b).

provisions of s 5G of the Corporations Act.[10] While we disagree with this view, we suggest that the position be clarified.

Since ss 126 and 127 are intended to override these state and territory procedural requirements, it would be helpful if this was made clearer to eliminate the potential for arguments to the contrary.

- **Second**, the reform is not complete across Australia. Section 126 as drafted does not remove the arcane statutory requirement for sealing, meaning there can still be inconsistent requirements across Australia.

  This runs counter to the general intention of the amendments to s 126 which was to make execution of documents by agents easier, more flexible and technology neutral.[11] This is discussed further below.

- **Third**, the benefits of the new simplified regime do not apply to foreign corporations and statutory corporations. This is discussed further below.

- **Fourth**, s 126 does not extend to a corporate entity acting as an agent or attorney for Corporations Act companies. This is discussed further below.

Sealing

Sealing by an individual is not dealt with, which means that the position in Victoria is inconsistent with the rest of Australia.

Nicholas Seddon has explained that at common law deeds are required to be "sealed" and this has two meanings: one being the application of a "common" or corporate seal where a corporation is signing; and the other being sealed by an individual.[12]

In most jurisdictions throughout Australia the need for an individual to seal a deed has been replaced by the act of signing. But in Victoria ss 73 and 73A of the *Property Law Act 1958* (Vic), require a document to be expressed to be "sealed".[13] Section 12A of the *Electronic Transactions (Victoria) Act 2000* (Vic) does provide that a deed may be signed, sealed and delivered by electronic communication, but ss 73 and 73A still require the deed to be expressed to be sealed.

Section 126(2) only dispenses with the need for an agent to apply a "common seal" to a deed, a clear historical reference to when companies had a "common seal" and routinely executed documents with it. It does not expressly displace the requirement that the agent has sealed the document. Similarly, s 126(6) does not contain wording that overrides the requirement for sealing. The result is that language which would suffice elsewhere will not work in Victoria, preventing a national approach with the resulting efficiencies. Wording to override the requirement for a deed to be sealed or to be expressed to be sealed should be included.

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[10] See for example the AGS legal briefing 'Execution of commercial documents' 4 September 2023 revised 18 July 2024 at https://www.ags.gov.au/sites/default/files/2023-09/20230904-lb128-full.pdf which states at page 4:

> *There is potentially some risk in relying on the Corporations Act provisions for execution by agents where these differ from state and territory requirements for execution by individuals. This is because the law of the states and territories may prevail over Commonwealth law to the extent of inconsistency, which is a reversal of the usual rule in this regard. So it would be prudent to require agents to be appointed under a deed and the agent's execution to be witnessed.*

[11] Explanatory Memorandum to the *Corporations Amendment (Meetings and Documents) Bill 2021*, paras 1.26 and 1.29.

[12] *Seddon on Deeds* (2nd ed, 2022), [1.6], p 16.

[13] Outside of Victoria generally it is enough if the document is simply expressed to be executed as a deed for it to be considered to be "sealed": *Civil Law (Property) Act 2006* (ACT) s 219(1) and (3); *Conveyancing Act 1919* (NSW) s 38(1) and (3); *Law of Property Act 2000* (NT) s 47(1) and (2); *Law of Property Act 1936* (SA) ss 41(1)(b), 41(2) and 41(5) and *Conveyancing and Law of Property Act 1884* (Tas) s 63(1)(a), 63(2) and 63(5). However, we note for completeness that some consider there is also some ambiguity in the ACT and NSW provisions. The requirement for an individual to seal a deed has been dispensed entirely with under Queensland legislation (*Property Law Act 1974* (Qld) s 46E and *Property Law Act* 2023 (Qld) s 49(2)(a)) and Western Australian legislation (*Property Law Act 1969* (WA) s 9).

Foreign corporations and statutory corporations

The procedural requirements in s 110A of the Corporations Act that apply to the execution of documents by a company under ss 127 and 126, apply only to a Corporations Act company (ss 9 and 110(1)). While *corporation* is defined in Corporations Act s 57A with a wider meaning, including 'any body corporate (whether incorporated in this jurisdiction or elsewhere)', this term is not utilised in these sections.

However, other corporations such as foreign corporations and statutory corporations are very active in Australian commerce and should be able to sign documents (including deeds) in the same way.

Where foreign corporations which do not have seals or are from jurisdictions that have no concept of "deeds" are required to execute Australian law governed deeds, we have had to develop complex protocols for their execution.[14] It is often difficult and/or time-consuming to convince foreign entities and their advisers as to why it is necessary to adopt seemingly bizarre practices and wording, and why they should change their normal signing methods from what is comfortable and familiar to them, incurring legal costs and delays.

Similar reforms should extend to the execution of documents by foreign and statutory corporations. This would be consistent with the Queensland approach.

Corporate agents

Finally s 126 does not contemplate a corporate entity (whether or not a Corporations Act company) acting as agent or attorney for a company; it is limited to "*an individual* acting with the company's express or implied authority…".

As raised in previous submissions, it is very common:

- for a corporation to sign documents as agent or attorney for another corporation, or
- for documents, like security documents, to give corporations the power to do so.

It would be helpful if s 126 also contemplated this.

PROCEDURAL REQUIREMENTS FOR ELECTRONIC SIGNING

No need for more protections against fraud

With respect to the panel considering whether the document execution amendments have resulted in an increase in fraud, this has not been the experience of any of our firms.

Wet-ink execution has always been vulnerable to fraud and forgery. Many electronic signing platforms and methodologies contain precautions, which actually reduce the risk.

The law has long since evolved to allow a wide variety of mechanisms to satisfy "wet-ink" signature requirements.[15] Many of these methods of signing, such as allowing for marks or stamped signatures, are no greater proof against forgery or fraud than electronic means. "Wet-ink" signatures can easily be forged, and the case-law abounds with examples.

As noted in our previous submission parties have their own risk appetite and tolerance and are free to make their own assessment of risk. In relation to deeds and agreements, it is the counterparty that mainly bears the risk of fraud etc and can make their own assessment as to whether to accept a document. (There is an exception in the case of indefeasible registered Torrens Title dealings, where the signing party is protected by verification of identity procedures).

This is consistent with changes to ss 128 and 129 and their predecessors over time, and with case law interpreting those provisions. Indeed the whole basis of ss 128 and 129 is that counterparties bear the

[14] See "Execution of deeds by foreign corporations" by Allens, Ashurst, Herbert Smith Freehills, King & Wood Mallesons and Norton Rose Fulbright at APLMA - Documentation (accessible only to APLMA members – we can supply a copy to the panel on request).

[15] See Diccon Loxton, "Not Worth the Paper They're not Written on? Executing Documents (Including Deeds) Under Electronic Documentation Platforms: Part A" (2017) 91 *ALJ* 133, section 4.3 (p 139-140).

risk. For example an indecipherable scrawl of a signature above the word "director" has been held to be sufficient to found reliance under s 129(5).[16]

Parties are free to set their own requirements. Setting out additional legislative requirements would be unnecessarily restrictive, raise more uncertainties, and limit technological change and flexibility.

S110A(2) should not be changed

There may be some submissions which express concerns about requirements for a signature set out in s 110A(2) of the Corporations Act and request that they be redrafted or "clarified". We would strongly disagree. The requirements in s 110A(2) should remain as is.

The current concepts and language are quite adequate.

- They are intuitive and are consistent with the general concept of the role of a signature. That is, that it identifies the signer and the signer's intention.
- They are consistent with long standing provisions in the *Electronic Transactions Act 1999* (Cth) and its state and territory equivalents.
- Those in turn are based on Article 7 of the *United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce of 1996*.[17]
- Numerous cases in Australia and elsewhere have considered the requirements, looking at a wide variety of signing methods in a variety of contexts.[18] They give a clear basis for interpretation. The cases indicate that these requirements are relatively easy to satisfy and are well understood.
- The language applies as much to 'wet-ink' signatures as to electronic ones. The courts are unlikely to start new adopt a restrictive interpretation which would invalidate methods traditionally accepted.
- Any attempt to further prescribe rules around electronic signing methods or change the language risks creating further uncertainty and being too prescriptive and inflexible, restricting innovation.

CONCLUSION

Overall the document execution amendments to the Corporations Act have brought much needed clarity, uniformity and convenience to the execution of deeds and agreements by Corporations Act companies. There is very little we would change. However, we submit that it would support the overall goal of achieving a nationally consistent regime for the execution of deeds and other documents if the changes suggested above were implemented.

Thank you again for the opportunity to make this submission. We would be delighted to discuss this further. Should you have any queries, at first instance please contact:

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16 See, for example, *MDN Mortgages Pty Ltd v Caradonna* (2010) 15 BPR 29,145 and *Caratti v Mammoth Investments Pty Ltd* (2016) 50 WAR 84.

17 See *Electronic Transactions Bill 1999 Revised Explanatory Memorandum,* p31.

18 See Diccon Loxton, 'Not Worth the Paper They're not Written on? Executing Documents (Including Deeds) Under Electronic Documentation Platforms: Part A' (2017) 91 *Australian Law Journal* 133 and 'Part B' (2017) 91 *Australian Law Journal* 205.

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