

**10 September 2021**

Market Conduct Division  
Treasury  
Langton Cres  
Parkes ACT 2600

**By email:** [businesscomms@treasury.gov.au](mailto:businesscomms@treasury.gov.au)

Dear Mesdames and Sirs.

**Exposure Draft - Treasury Laws Amendment (Measures for Consultation) Bill 2021:  
Use of technology for meetings and related amendments**

This submission is made by the Law Council of Australia in response to the consultation by the Commonwealth Treasury on the above Exposure Draft, being a follow up consultation to the previous Exposure Draft released for consultation in June 2021 (**Previous Exposure Draft**).

This submission has been prepared with the assistance of the Business Law Section and the Law Council's Modernising Document Execution Working Group.

In general terms, the Law Council supports and welcomes the proposed measures in the Exposure Draft in particular to the extent the current Exposure Draft reflects the Previous Exposure Draft.

Specifically, the Law Council supports the following amendments to the Corporations Act:

- the facilitation of sending documents to members by electronic means;
- the facilitation of hybrid meetings (that is, partly physical and partly virtual);
- the facilitation of virtual only meetings where they are required or permitted by the company's constitution;
- ensuring that members have the right to ask questions and make statements at the virtual component of meetings orally as well as in writing;
- conferring a new right on shareholders with at least 5% to require external oversight of, or a report on, a poll;
- extension of document execution reforms to sole director companies, where there is no company secretary appointed; and
- the mandating of a review of the legislation after a two year period.

In addition, the Law Council supports the additional reform proposal contained in the current Exposure Draft to amended section 126 to facilitate document execution, including deeds, by companies.

The Law Council considers that the package of measures in the Exposure Draft, when read in light of the *Treasury Law Amendment (2021 Measures No. 1) Act 2021* (Cth), generally represent a sound and proportionate balancing of the various interests.

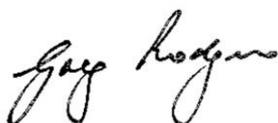
However, the Law Council has comments, concerns or reservations in the current Exposure Draft about the following key issues:

- we submit that proposed section 110(4) be amended to put beyond any doubt and avoid legal debate that section 110A is not an *exclusive code* for electronic execution of documents;
- we would strongly support the extension of electronic document delivery reforms to takeover documents under Chapter 6 of the *Corporations Act 2001* (Cth) (**Corporations Act**);
- we consider that the requirement to provide notice of election rights with each and every notice sent to shareholders is unwarranted, and suggest that a notice posted on a company or registry website or an annual notification would be suitable;
- we suggest that section 126 to be amended to clarify whether all State and Territory rules and requirements for deed execution are or are not preserved by section 126(2), given the potential for inconsistency between section 126(2) and section 126(4);
- while we support the reforms to section 126, we do not support the related insertion of a new section 129(3A) as drafted because we consider the new proposed paragraph (b) to go too far in, on a literal reading, allowing any agent held out by the company to be assumed to have authority to execute any document under section 126;
- while we do not have a fundamental objection in principle, we are concerned that the new requirement for all listed entity substantive resolutions to be voted on by poll (proposed sections 250JA and 253J(1A)) is not based on evidence of abuse under the current law that warrants a new prescriptive requirement; and
- we have a reservation that the inclusion of a reference to “validity” of a poll in the context of the new right to have a report on a poll (proposed sections 253V(4) and 253X(4)) will mean that only a qualified lawyer will be able to provide such reports (“validity” being an inherently legal conclusion and hence a matter for legal advice) and suggest that consideration be given to a different form of words to describe the content of the report since the language of proposed section 253V(7) and 253X(7) make it clear that an auditor or share registrar is a suitable person or entity to provide such a report.

Annexed to this letter is a table setting out more detailed comments and submissions in relation to certain provisions in the Exposure Draft.

For further information or if you would like to discuss any aspect of this submission, please contact John Keeves, Chair of the Law Council’s Modernising Document Execution Working Group and Member of the Executive of the Business Law Section [john.keeves@jws.com.au](mailto:john.keeves@jws.com.au) 0419 039 019.

Yours faithfully



**Greg Rodgers**  
**Chair, Business Law Section**

## Annexure A – Submission Table

| #  | Reference              | Description  | Submission  |
|----|------------------------|--|---|
| 1. | Part 1.2AA, Division 1 | <b>Technology neutral signing</b>  | In principle, we support the policy underlying these provisions, that the Corporations Act should be technologically neutral.   |
| 2. | 110(4)                 | <b>Other ways of signing documents not limited</b>   | <p>We consider this to be a useful provision, but submit that the legislation should make it <i>clearer</i> that the facilitative provisions of section 110A are not an exclusive code for electronic signing of a document.</p> <p>Electronic signing should be permissible if a person has (as a matter of fact) evidenced an intention to be bound, to approve, to authenticate or to attest a document (as the case requires).</p> <p>We suggest that proposed section 110(4) could be amended to read:</p> <p><i>“This Division does not limit the ways in which a person may sign a document (including a deed), <b>whether in electronic or physical form.</b>”</i></p>  |
| 3. | 110A(4)(d)             | <b>Avoidance of doubt (document need not include all information recorded in the document)</b> | <p>We support the apparent intent behind this provision, so that a person can be taken to sign a document even if the intention is indicated in a way that does not contain the full contents of the document (which we might call “signature by reference” by analogy to incorporation by reference.</p> <p>However, we consider that the form of words used is ambiguous and possibly circular, by using the term “document” twice but apparently in two different senses.</p> <p>We suggest that the provision should be amended read “...the thing signed by the person to indicate an intention to sign the document, does not need to contain all the information contained in the document”.</p>   |
| 4. | 110B                   | <b>Lodgement of documents</b>  | We support the facilitation of lodgement electronically signed documents.   |
| 5. | Part 1.2AA, Division 2 | <b>Technology neutral sending documents to members</b>   | <p>As above, in principle, we support the policy underlying these provisions, that the Corporations Act should be technologically neutral. We generally support these provisions.</p> <p>We would strongly support the extension of the provisions to documents sent to members under Chapter 6 of the Corporations Act (takeovers), to enable bidder’s statements and target’s statements to be sent to members, including the sending of bidder’s statements to members using the target’s information about members.</p> <p>While we note that the provisions contemplate extension to other documents (see section 110C(2)(c)), we consider that additional specific provisions would be required to deal properly with the sending of takeover documents</p> |

| #   | Reference               | Description   | Submission   |
|-----|-------------------------|---|--|
|     |                         |   | (given that documents are sent by bidders to the shareholders of the target), and would strongly encourage the Government to pursue additional specific reforms in relation to takeover documents.   |
| 6.  | 110K                    | <b>Sender must give notice of recipient's [election] rights</b>                                     | We consider that a requirement to give notice of election rights is appropriate. However, we query whether notification on each occasion that a notice is given is proportionate. A requirement that a notice is placed on a website or is given at least annually with, say, the notice of AGM would be more suitable.  |
| 7.  | 126                     | <b>Agent exercising a company's power to make contracts and execute documents (including deeds)</b> | <p>We note that these are significant additional reforms compared to the previous consultation.</p> <p>There are far reaching and perhaps fundamental reforms to facilitate execution by companies and will overcome many of the formalities that bedevil corporate execution of documents, including deed.</p> <p>In principle, we support these measures.</p> <p>However, we suggest that section 126(2) be amended to clarify whether execution of a deed must comply with the various state and territory requirements such as attestation, sealing or delivery.</p> <p>We assume that section 126(2) is not intended to preserve all "local law" deed execution rules but it would be useful for this to be put beyond doubt to avoid uncertainty and debate between lawyers about execution formalities given that section 126(4) appears to state that a deed can be executed without regard for local formalities.</p> |
| 8.  | 127(1)(c),<br>127(2)(c) | <b>Sole director execution</b>  | We support these amendments.   |
| 9.  | 127(2A)                 | <b>Execution using seal</b>   | <p>We support this amendment, which gives additional flexibility in satisfying the requirement for witnessing.</p> <p>However, we do query what is intended in section 127(2A)(c) by the "method" used to indicate the person witnessed the affixing of the seal. If this reference to "method" is thought to be obscure or ambiguous, the provision will not be relied on in practice. At a minimum, additional guidance could be included in the explanatory memorandum.</p>   |
| 10. | 129(3A)(b)              | <b>Agent</b>  | <p>We do not support this amendment as it goes far beyond what is necessary for the purpose of the amendments to section 126.</p> <p>This provision (read literally) would allow <u>any</u> agent to bind the company in relation to <u>any</u> contract, even if the agent had neither actual nor apparent authority in relation to the particular contract concerned.</p>  |

| #   | Reference           | Description                                   | Submission   |
|-----|---------------------|---|--|
|     |                     |   | <p>Moreover, since all employees are to some extent agents or held out as agents of the company that employs them (since a company can generally only act through natural person as agents), are all employees to be taken to have authority to execute all documents including deeds?</p> <p>We submit that section 129(3A) should read as follows, to limit the assumption that can be made about agents' authority:</p> <p><i>(3A) A person may assume that anyone who is held out by the company to be an agent of the company:</i></p> <ul style="list-style-type: none"> <li><i>(a) has been duly appointed; and</i></li> <li><i>(b) has authority to exercise the powers and perform the duties customarily exercised or performed by that kind of agent of a similar company; and</i></li> <li><i>(c) has authority to exercise the company's powers described in subsection 126(1) to the extent set out in paragraph (b) and as otherwise expressly held out by the company.</i></li> </ul> <p>Alternatively, proposed new section 129(3A) could be omitted entirely, section 197(3) could be left unaltered and the powers under section 126 could be sufficiently dealt with by the existing reference to "powers" in paragraph 129(3)(b).</p> |
| 11. | 129(5) and 129(6)   | <b>Assumptions</b>                            | We support this additional amendment (in comparison to the exposure draft legislation for the previous consultation), as the logical extension of the amendments to sections 127(1)(c) and 127(2)(c) to facilitate sole director execution.  |
| 12. | 249R and following  | <b>Hybrid meetings</b>                        | As per our submission to the previous consultation, we support this reform facilitating hybrid meetings (and virtual only meetings if permitted or required by the constitution), as a balanced response to the competing stakeholder interests.   |
| 13. | 249S(7) and 252Q(7) | <b>Orally and in writing</b>                  | <p>As per our submission to the previous consultation, we support this reform requiring shareholders rights to be able to be exercised orally, as a balanced response to the competing stakeholder interests. We note that online meeting platforms now have the necessary functionality.</p> <p>We note that the drafting has been clarified in comparison to the previous consultation so that it is clear that "oral and written rights" apply only to the virtual component of a meeting, such that written exercise of rights is not required for the physical component of the meeting.</p>  |
| 14. | 250JA, 253J(1A)     | <b>Certain resolutions must be decided on</b> | While we have no fundamental objection to this amendment generally requiring all listed company  |

| #   | Reference                                   | Description                                 | Submission  |
|-----|---|---|---|
|     |   | <b>a poll—listed companies and schemes</b>  | <p>substantive resolutions to be put to a poll, we do consider that evidence of a sufficient mischief requiring remedy has not been made out.</p> <p>Under the current general law, the chair of a company has an obligation to put a resolution to a poll if a different result would be obtained on a show of hands. In our view, there is no evidence that meeting procedures have been abused to the extent that this prescriptive rule needs to be introduced.</p>   |
| 15. | 252P(c)(ii)                                 | <b>Virtual meeting of scheme members</b>    | This provision does not contemplate that a virtual meeting provision could be contained in a scheme constitution from the establishment of the scheme. The presumed intent is that the scheme constitution cannot be amended under section 601GC(1)(b) by the responsible entity alone and accordingly we suggest the proposed amendment to section 252P(c)(ii) be drafted in the negative "...such use were <b>not</b> included in the scheme's constitution <b>pursuant to paragraph 601GC(1)(b).</b> "   |
| 16. | 253U(5),<br>253V(6),<br>253W(5),<br>253X(6) | <b>Observer's or reporter's fees</b>        | As per our submission in response to our previous consultation, it is not clear how this provision will operate in that quantum of fees that the company or responsible entity is responsible to pay is not ascertained.  |
| 17. | 253V(4),<br>253X(4)                         | <b>Poll reports - reference to validity</b> | <p>In comparison to the exposure draft for the previous consultation, these provisions refer to the report being on the "validity" of the poll. Validity of the poll is a matter of law.</p> <p>It is not obvious what the legislation is trying to achieve by referring to "validity" in this context. Must the reporter form a view on the qualification of voters and validity of all proxies and other votes? Must the reporter form a view on the accuracy of any determinations as to what members might be excluded from voting? Presumably a report on "validity" of a poll implies more than a mere mathematical review of the voting for accuracy.</p> <p>However, if the provisions are to refer to "validity" only a qualified legal practitioner will be able to provide such a report, or the reporter would need to retain such a legal practitioner to provide advice sufficient to enable a "report" on validity to be given.</p> <p>We assume that this would not be intended given the references in proposed sections 253V(7) and 253X(7) to auditors and registry providers.</p> |