



Law Council
OF AUSTRALIA

Business Law Section

24 March 2020

Ms Jodi Keall
Manager
Corporations and Managed Schemes Unit
The Treasury
Level 29, 201 Kent Street
SYDNEY NSW 2000

By email: Jodi.Keall@treasury.gov.au

Dear Ms Keall,

Emergency changes to Australia's electronic signature laws

1. I refer to our ongoing communications in relation to law reform issues, particularly in relation to measures that will assist in the conduct of business dealing with the current situation regarding COVID-19.
2. This submission is made in relation to Australia's electronic signature laws, in particular section 127 of the Corporations Act 2001 (Cth) (**Corporations Act**) and the Electronic Transactions Act 1999 (Cth) (**ETA**). The submission is made by the Corporations Committee, the Digital Commerce Committee and the Technology in Mergers and Acquisitions Working Group of the Business Law Section (**BLS**) of the Law Council of Australia.
3. The ETA contains general rules facilitating electronic transactions and signatures under Commonwealth law, although it omits certain matters such as witnessing and deeds. The ETA parallels almost identical Acts in each State and Territory which facilitate electronic transactions and signatures under the statutes of those jurisdictions. The general rules are subject to exceptions in regulations. For example, the Corporations Act is excepted from the operation of the ETA.
4. Section 127 of the Corporations Act facilitates execution of documents by companies. If a document is executed by two directors, or by one director and one secretary, it can be assumed to be validly executed and authorised by the company concerned. This provision underpins much of Australia's trade, commerce and financial transactions.
5. However, the BLS notes that there is real doubt as to whether section 127 can be complied with remotely. That is, there is a concern that section 127 cannot be complied with if the two signatories do not sign the same physical document, for example, if a document is signed and scanned by the first signatory and then printed and signed by the second signatory, or if separate electronic signatures are affixed to a fully electronic 'document'.
6. In July 2019 the case *Bendigo and Adelaide Bank v Pickard* [2019] SASC 123 was decided. Justice Stanley found that section 127 contemplates a 'single, static document' and therefore that companies cannot rely on section 127 to execute documents electronically by two company officers. If this precedent is followed, this means that section 127 cannot be used to execute an electronic document remotely.

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7. Further, the decision in this case makes it fairly clear that the special category of formal documents known as deeds cannot be executed electronically under section 127.
8. The BLS does not believe that this decision reflects the intent of the legislation. However, it does represent the law in Australia until it is overturned by legislation/regulation (or until it is not followed by other judges).
9. On 24 March 2020, the *Coronavirus Economic Response Package Omnibus Act 2020* received royal assent, providing for the Treasurer to be given a temporary emergency power to amend the Corporations Act by legislative instrument as necessary to deal with the unfolding COVID-19 crisis.
10. In the current circumstances, where much business will be conducted remotely, enabling remote execution of documents by clarifying the law around the use of electronic signatures under the Corporations Act is, in the BLS's view, necessary to facilitate continued trade, commerce and financial transactions.
11. The BLS submits that the emergency powers be used to modify section 127 to apply to electronic documents and allow separate remote signatures under section 127 and specifically to deeds executed by companies.
12. Should this modification occur, the BLS notes that the issues arising will then be:
 - what reliability of signature method is required;
 - is the consent of the recipient required; and
 - what is the 'same' digital document for this purpose?
13. Subsection 10(1) of the *Electronic Transactions Act 1999* (Cth) specifies a standard for electronic signature methods as follows:
 - (1) *If, under a law of the Commonwealth, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication if:*
 - (a) *in all cases—a method is used to identify the person and to indicate the person's intention in respect of the information communicated; and*
 - (b) *in all cases—the method used was either:*
 - (i) *as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or*
 - (ii) *proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence; and*
 - (c) *if the signature is required to be given to a Commonwealth entity, or to a person acting on behalf of a Commonwealth entity, and the entity requires that the method used as mentioned in paragraph (a) be in accordance with particular information technology requirements—the entity's requirement has been met; and*
 - (d) *if the signature is required to be given to a person who is neither a Commonwealth entity nor a person acting on behalf of a Commonwealth entity—the person to whom the signature is required to be given consents to that requirement being met by way of the use of the method mentioned in paragraph (a).*

14. This general reliability standard is largely appropriate. However, the BLS submits that the requirement in section 10 (d) for consent of the recipient to the signature should not be replicated in any emergency amendment to the Corporations Act by Ministerial instrument.
15. Although the section 10 reliability standard is generally supported, the inclusion of a safe harbour which makes it clear that the use of certain named or described technologies or processes satisfies the reliability standard may be beneficial in providing added clarity and certainty.
16. The amendments to the Corporations Act will need to specify that content of the digital document which is signed by the second or subsequent signatories is the same apart from the other signatures. Again, there could be a safe harbour added to the Corporations Act amendments so that it could make clear that the use of certain technologies or processes satisfies the 'same document' standard.
17. The BLS submits that the emergency powers could also be used to clarify that deeds executed by individuals to which a Corporations Act company is a party can be executed electronically, in order to overcome uncertainties about online execution of deeds in some Australian jurisdictions. The BLS also submits that the Corporations Act should be amended to permit persons to electronically witness documents for the purposes of the Act. Such amendments could provide a general standards requirement for electronic witnessing:
 - that the witness sees the principal signer electronically sign a digital document (could be physically co-located or could be remote and observing through e.g. Skype) and
 - the witness then electronically signs a copy of the *same* digital document which includes the principal signatory's electronic signature and signs as attestation that the witness saw the principal signatory sign the same document,
 - proof of satisfying these requirements will turn on the technology used and the instrument might specify safe harbour technology processes.
18. Although it is not within the Treasurer's emergency powers to amend the Corporations Act, for the same reasons of facilitating commercial and other transactions remotely, the BLS requests that similar amendments be proposed by government for the ETA to facilitate multiple electronic signatures on the same 'document' and electronic witnessing for documents which not covered by the Corporations Act, for example for property transactions, deeds and powers of attorney made by individuals.
19. The BLS would be pleased to assist in developing the appropriate measures to address the concerns raised in this letter.
20. If you would like to discuss this issue or would like further information, please contact Mr John Keeves, Executive Member of the BLS at john.keeves@jws.com.au or on 0419 039 019.

Yours faithfully,



Greg Rodgers
Chair, Business Law Section