Australian Banking Association

30 October 2020

Jodi Keall
Manager
Market Conduct Division
The Treasury
Langton Crescent
Parkes ACT 2600

Email: businesscomms@treasury.gov.au

Dear Jodi,

The Australian Banking Association (ABA) welcomes the opportunity to provide comments on the exposure draft Corporations Amendment (Virtual Meetings and Electronic Communications) Bill 2020.

The ABA has worked in partnership with a coalition of stakeholders including the Business Council of Australia, the Australian Institute of Company Directors, the Customer Owned Banking Association, the Australian Finance Industry Association, the Australian Property Institute and the Council of Small Business Organisations Australia to modernise the country's approach to conducting essential business electronically. Those organisations support the content of this submission.

The Federal Government's actions to provide regulatory relief from the *Corporations Act 2001* (Corporations Act) to ensure essential banking business could occur during the COVID-19 pandemic was extremely welcome by the banking industry to minimise interruptions for our customers.

We strongly welcome the Government's proposal to make the electronic execution of company documents and virtual meetings reforms permanent for the benefit and convenience of customers and to improve efficiencies in the processing of critical documents. The ABA encourages the Government to make these changes before the temporary measures are due to expire on 21 March 2021.

The ABA considers:

- Deeds should be able to be created and signed electronically by companies and individuals.
- Electronic signatures rather than wet signatures should be able to be used for a broader range of legal and business documents.
- Remote witnessing should be legally valid.

The ABA also considers legislative reforms should be drafted in a technology neutral way so that legislation does not hinder the development of new technologies, including technologies for electronic execution.

The Government has also recognised that promoting digital business will be crucial for enhancing productivity, creating jobs and growing the economy at a critical time and the ABA strongly supports this position. The ABA encourages the Government to consider making additional digital economy reforms to improve productivity and streamline processes for small business.

This further consideration should include reviewing the need to obtain physical copies of documents, and the need for the execution of documents to be witnessed, as these two

requirements also significantly impede the adoption of technology in business communications. It should also promote national consistency in the regulation of key business documents including deeds and mortgages.

The attachment to this letter provides further detailed comments about the exposure draft bill.

If you have any questions about this submission, please contact me at rhonda.luo@ausbanking.org.au or 0430 724 852.

Yours sincerely,

Rhonda Luo
Policy Director

Australian Banking Association

Detailed comments: Schedule 1, Part 1 of exposure draft bill

Electronic execution

Item 3

The ABA welcomes the additional provision allowing the fixing of company seals to be remotely witnessed. However, we urge the Treasury to clarify that this does not limit the ways in which company seals can be affixed under section 127(2).

Item 4

The ABA welcomes the addition of a heading that clarifies section 127(3) deals with the execution of company deeds.

However, the ABA understands the effect of the temporary reforms has been uncertain in relation to deeds. We think it would be important to put this matter entirely beyond doubt. Most or all security agreements and guarantees are intended to have effect as deeds, the issue affects a large percentage of customers, especially small businesses.

As such, the ABA urges Treasury to include an express statement in legislation that overrules the common law requirement for deeds to be written on paper or parchment.

Item 5

The ABA is concerned that the prescribed method of electronic execution will unintentionally limit technology development, and introduce uncertainty about whether outside parties can rely on a company's use of electronic signatures.

The proposed section 127(3B) introduces a number of process requirements before a document can be taken to be electronically signed by a company, and these process requirements do not exist for 'wet' signatures. These requirements also do not exist under the general *Electronic Transactions Act 1999.* As a result, the proposed section 127(3B) would require outsiders seeking to rely on electronic signatures to seek assurance or verify that these procedural requirements have been satisfied.

Additionally, this outcome would go against a settled area of law and policy that, where an outside party deals with a company in good faith, it is the company that bears the risk of invalid, forged or unauthorised signature, not the outside party. This policy is important to the economy by ensuring:

- Parties can deal confidently with companies without having to make additional inquiries.
- Companies do not face burdens or barriers in signing documents or satisfying other parties (like lenders) that they are bound.
- Other parties subsequently can rely on the documents which appear to have been signed by a company (for example where they are relying on or acquiring rights, like assignees, sub-lessees).
- Parties have the confidence to deal with small-to-medium enterprises. Likewise, small-medium enterprises have the confidence to deal with other small enterprises without having to expend additional resources to make inquiries.

This outcome would, as a result, significantly reduce the efficiency and reliability of electronic execution by companies, and thus undermine the intended benefit of the reforms.

The ABA proposes that Treasury consider removing these provisions. At the very least, the ABA urges Treasury to clarify that proposed sections 127(2A), (3A) and (3B) are not comprehensive or

exclusive and do not limit how documents can be executed or company seals witnessed under subsections (2) or (3).

Our comments on specific provisions are as follows.

- **Customer initiated signing**: The requirement in proposed section 127(3B)(a) that the signer *receive* the document electronically should be removed. Receipt of electronic communication is further limited by proposed section 105A(b)(4) so that the signer has to receive the document electronically at their nominated electronic address. This requirement would be less technology neutral than the temporary reforms, and would not be satisfied in a number of common situations where:
  - The signer generated the document.
  - The signer is presented with a device by another person.
  - The signer has accessed the document via electronic channels other than email, such as a website.
- A common situation is where a customer will initiate sending to the bank a signed document. This can be done for a drawdown request or compliance certificate. In other situations, customers may download and sign forms. It would be a poor outcome if a document was not considered to have been properly executed because it was not 'received' by the customer at their 'nominated electronic address'.
- In summary, customers can obtain documents for signing through a variety of channels, and it should not be the case that the recipient must conduct due diligence on how the document was obtained by the customer before accepting a signed document. Similarly, it would also be onerous for a customer to conduct due diligence on how a document was received by a bank before accepting a signed document.
- **Entire document:** The requirement in proposed sections 127(3A)(b) and 127(3B)(b) that the copy or counterpart includes the entire contents of the document should be removed. This provision appears to require the signer to receive, print out and sign the entire agreement. This is not consistent with common practices for the signing of documents in Australia and internationally, and would be contrary to the norm for the signing of international agreements.
  - It does not accommodate the common practice of each person signing the relevant execution page and returning it with the execution version of the document. This method still provides the requisite degree of certainty regarding the contents of the document to which the person signing intends to be bound.
  - Financing documents are frequently hundreds of pages long (and at times thousands) with multiple obligors and dozens of lenders. In the scenario of a 100-page loan agreement signed by 10 obligor companies in split execution, the executed version would be 100 x 10 x 2 = 2000 pages. This makes it confusing for customers, unwieldy and challenging to receive the document by email and/or by post and to store it either electronically or physically.
- If Treasury considers legislation needs to deal with this issue, sections 127(3A)(b) and (3B)(b) of the Bill should be amended to include a wider set of circumstances where the entire set of terms is clear, without a signature needing to be applied to a copy that itself includes the entire contents.
- **Double handling and technology neutrality**: The requirement in proposed section 127(3B)(c) that the signer indicates they have signed the document should be removed. This requirement appears to require a separate electronic communication, in addition to the use of electronic signatures, by the signer. This requirement

would be less technology neutral than the temporary reforms, and would not be satisfied in a number of common situations, for example:

- Some electronic signature platforms or products send a confirmation email to the signer not from the signer.
- If the signer accesses and signs the document on a device or via a website, the signer may need to send a separate communication confirming their execution.
- If the document itself is an email, the signer may need to provide a separate email confirming execution.

- This outcome would not be technology neutral. Instead, the proposed section127(3B)(c) could indirectly deter use of signing platforms, and potential future electronic signature technologies or products, because of the requirement for an email or other communication from the signatory. Such an outcome is counter-intuitive, especially when there are potential security and efficiency benefits of using a signing platform or product.
- In addition, if parties interpret this provision as requiring the communication to have been *sent* by the signer, this would cause further difficulties complying with this requirement.
- **Electronic signature being 'as reliable as appropriate in the circumstances'**: we understand the rationale for this requirement in the *Electronic Transactions Act,* however query if this requirement is equally necessary in context of execution of documents by companies, particularly given it results in a different treatment for electronic documents when compared with 'wet signed' documents and limits the benefit of section129(5) (see below).
- **Impact on section 129(5)**: The proposed section 127(3B) can also have the unintended consequence of undermining the utility of section 129(5).
  - Section 129(5) allows outside parties dealing with the company to rely on signatures (such as a signature over the word 'director' or 'secretary') without confirming whether or not the signer holds the office and without checking the signature. The document itself is sufficient.
  - If the proposed section 127(3B) is interpreted as requiring outsiders to make inquiries before accepting and relying on electronic signatures, it would significantly reduce the effectiveness of the proposed reforms , result in unequal treatment for documents depending on the execution method and introduce legal uncertainty.

Using a mix of 'wet' and electronic signatures

The Bill is silent on whether a mix of wet and electronic signatures are acceptable. This may occur, for example, where one director signs a document in 'wet ink' signature in the branch, and another signs a counterpart of the document electronically. To facilitate technology neutral business communication, the ABA considers it would be beneficial for the legislation to clarify this point.

Application to small companies, foreign companies and statutory companies

The ABA also proposes the Government extend these reforms.

- Many small companies have a sole director who is not also secretary. The ABA suggests sections 127(1) and (2) should extend to the sole director.

- Foreign companies are significant participants in the Australian economy. The ABA suggests the electronic execution reforms should be extended to foreign companies.
- Statutory companies are active in many parts of the Australian economy. The ABA suggests the electronic execution reforms should be extended to statutory companies.

Virtual meetings

The ABA supports legislation being technology neutral and facilitating innovation in how companies and businesses engage with shareholders and other stakeholders. These innovations can facilitate engagement and participation by shareholders and other stakeholders who are not able to attend a physical meeting (including those living interstate, overseas, or otherwise in remote and regional areas, and those living with a disability). The ABA also considers technology can be used in a way that promotes and facilitates engagement, rather than to reduce engagement. As such the ABA supports the *Corporations Act* permitting companies to hold meetings other than in a specified place.

The ABA also considers implementing electronic processes without adapting related process can have the unintended consequence of disenfranchising some stakeholders who may not be familiar with technology and who may not have easy access to electronic voting platforms. As such the ABA would support the bill seeking to ensure communications and documents are accessible, stakeholders can reasonably be made aware of the meeting process and requirements, and how they can participate in each meeting.