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Treasury
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Dear Jodi

Using technology to hold meetings and sign and send documents

The Australian Banking Association (**ABA**) welcomes the opportunity to provide a submission to Treasury's consultation, *Using technology to hold meetings and sign and send documents*.

The exposure draft bill would introduce permanent reforms to allow companies to execute documents electronically, and to have the execution of the document witnessed remotely where required. The proposed bill would also allow meetings to be held using audio-visual technology. This exposure draft bill needs to be read in conjunction with the Treasury Laws Amendment (2021 Measures No. 1) Bill (**TLAB 1**). ABA's submission is made on both bills.

ABA has also had the benefit of reading, and supports, the submission made by the Walrus group of law firms.

Urgency of reform

TLAB 1 contains amendments that would have extended the temporary reforms to sections 127 and 129 *Corporations Act 2001* (**Corporations Act**) to enable companies to execute documents electronically. TLAB 1 did not pass parliament before the temporary reforms lapsed on 25 March 2021. It will be crucial for TLAB 1 to pass before this Bill or for the amendments from the two Bills to be consolidated.

As a number of stakeholders have made known to the Commonwealth government, the lapsing of the temporary reforms without an extension or permanent solution being put in place created material disruption in the legal and financial sectors. Significant commercial contracts were disrupted or needed to be executed using 'wet' ink signature. One case involved multiple interstate and overseas parties. These disruptions and associated costs are now evident again in NSW and VIC with the announcement of restrictions to reduce community transmission of COVID-19 and subsequent border closures from other states. These cases highlight the ongoing need for reforms to enable a pivot to electronic execution during the course of the pandemic.

In addition, companies and the financial services sector saw first hand the substantial benefits, practicality and convenience of electronic execution of documents under temporary reforms enacted by the Commonwealth and in some states. There is strong support in the business community for these reforms to continue on a permanent basis, to lock in the digital pivot that was made during the pandemic and support the government's digital economy policy.

The business community including the financial services sector welcomed the Victorian parliament passing legislation to make the state-based electronic execution reforms permanent. We ask the Commonwealth government to also take actions urgently to make the proposed reforms in the Corporations Act permanent.

Comments on exposure draft bill and TLAB 1

ABA makes a number of comments on the exposure draft bill and the drafting in TLAB 1. We understand TLAB 1 is in parliament. However we highlight a small number of matters that should be amended, if the opportunity arises.

Signing and sending documents

Exposure draft bill – company with one director

ABA supports the additional amendment to extend sections 127(1) and (2) to the sole director. Many small companies have a sole director and no company secretary and should also get the benefit of execution under section 127 as well as the electronic signing reforms.

TLAB 1 - electronic deeds made by companies

The ABA welcomes the addition of a heading that clarifies section 127(3) deals with the execution of company deeds. However, the ABA understands that the effect of the temporary reforms has been uncertain in relation to deeds. As such, 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 to avoid any legal uncertainty in applying electronic execution to deeds. Ongoing uncertainty will limit the benefit of electronic execution reforms if counterparties cannot be confident that execution will be effective (and law firms are unwilling to give an opinion to this effect).

This could be done by amending s.127(2), to also refer to executing a document as a deed in accordance with subsection (2A), (3A)-(3C).

TLAB 1 - requirement for complete 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 may imply the signer must 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 $100 \times 10 \times 2 = 2000$ 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 allow signing when the entire set of terms is clear, without a signature needing to be applied to a copy that itself includes the entire contents.

TLAB 1 - clarifying s.127(3B)

While the heading of the subsection refers to electronic documents, it is not part of the Act. The subsection itself does not refer to electronic documents or signing. ABA suggests adding a reference to 'electronic' copy or counterpart in subparagraphs 127(3B)(a) and (b).

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 foreign companies and statutory companies

ABA asks the government to consider extending these reforms to foreign companies (which are significant participants in the Australian economy) and statutory companies (which are active in many parts of the Australian economy).

Holding meetings using technology

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.

ABA makes two further comments in light of the ongoing COVID-19 pandemic.

Virtual only meetings

The exposure draft bill would insert repeal the existing section 249R and insert a new section 249R that, among other things, permits a company to hold a virtual meeting if this is expressly permitted or required by its constitution (section 249R(c)).

In light of the ongoing need for restrictions during the COVID-19 pandemic, this will have an impact on many major companies where their constitutions do not currently permit virtual meetings. Those constitutions can only be changed by resolution at the AGM, and as such these AGMs cannot be held virtually this year. This can create uncertainty or unnecessary risk for companies in the current environment where a number of states continue to have lockdowns, which can be imposed at very short notice and extend for an uncertain period.

ABA asks the government to consider providing a legislative mechanism that would allow companies to hold their next AGM virtually in circumstances where COVID-19 health orders are in place or the current public health situation creates significant uncertainties for a physical or hybrid AGM. ABA would also support the legislation giving ASIC the ability to grant individual or class relief to allow companies to hold virtual AGMs in the circumstances described.

Electronic signing and distribution of notice of meetings (NOMs)

The exposure draft bill would make permanent a temporary reform in TLAB 1 that allows documents that relate to a meeting to be given electronically. A document such as a NOM can only be provided electronically if the individual receiving the document has not elected to receive the documents in hard copy.

For those shareholders who are currently opted in for hard copy, a company would need to first communicate with the shareholder and ask them to re-confirm or change their preferences; and continue to provide hard copy documents if they do not change their preference.

In the current environment where lockdowns can be imposed at very short notice, the requirement to provide hard copy documents can create unnecessary public health risk. Companies’ staff and partners (e.g. printers, mail distributors) would need to physically attend their place of work to manage hard copy printing and distribution.



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To help to manage this current health risk, ABA asks the government to consider allowing documents to be provided electronically where COVID-19 health orders are in place at the time the distribution of communication is taking place.

In addition, TLAB 1 would require companies to notify their shareholders in writing about their right to make an election within 2 months after TLAB 1 is passed by parliament or within 2 months after the day on which the person becomes a shareholder. ABA would be supportive of legislation providing additional flexibility for companies as to when and how they provide this notification to shareholders, while ensuring shareholders are informed and have the opportunity to make an election. This approach would enhance the policy intention of the Bill to enable the use of technology, while maintaining shareholders' ability to receive documents according to their preference.

Thank you for considering the ABA's submission. If you require further information please contact me on 0430 724 852 or rhonda.luo@ausbanking.org.au.

Yours sincerely

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Policy Director