



Law Council
OF AUSTRALIA

Office of the President

24 July 2020

Senator Andrew Bragg
Chair
Senate Select Committee on Financial Technology and Regulatory Technology
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: fintech.sen@aph.gov.au

Dear Chair

Supplementary submission: Inquiry into Financial Technology and Regulatory Technology

On 1 July 2020, the Law Council appeared before the Senate Select Committee on Financial Technology and Regulatory Technology (**Committee**) following an invitation to provide evidence to the Committee's inquiry into the current state of Australia's Financial Technology (**FinTech**) and Regulatory Technology (**RegTech**) sectors (**Inquiry**).

This supplementary submission addresses two issues that were raised by the Committee Chair during the Law Council's appearance at the public hearing. The Committee requested the Law Council's further views on:

- steps that could be taken by the Australian Government in relation to technology neutrality in the corporate law context; and
- examples of better and modern ways to the witnessing and execution of documents.

These matters are dealt with separately below.

Technology neutrality in corporate law

The Law Council (through the Corporations Committee of its Business Law Section) has previously propounded the importance of technology neutrality in areas relevant to corporate law in its submission to the Department of Treasury's 'Corporations and Schemes Unit' on 23 June 2016 (**June 2016 Submission**).¹ That submission responded to the Proposal Paper titled *Technology neutrality in distributing company meeting notices and materials* which was released by the Government on 5 May 2016 (**Proposal Paper**).²

¹ See, Law Council of Australia, 'Submission on technology neutrality in distributing company meeting notices and materials' (23 June 2016) <[https://www.lawcouncil.asn.au/docs/a857c5c1-07b5-e611-80d2-005056be66b1/3160-Technology neutrality in distributing company meeting notices and materials.pdf](https://www.lawcouncil.asn.au/docs/a857c5c1-07b5-e611-80d2-005056be66b1/3160-Technology%20neutrality%20in%20distributing%20company%20meeting%20notices%20and%20materials.pdf)> ('**June 2016 Submission**').

² Australian Government 'Technology neutrality in distributing company meeting notices and materials' (May 2016) <https://treasury.gov.au/sites/default/files/2019-03/C2016-022_Technology-neutrality-distributing-meeting-notices.pdf> ('**The Proposal Paper**').

The Proposal Paper suggested that a ‘technology neutral mode of distributing [company] meeting notices and materials’ should replace the pre-existing ‘opt in’ system set out in the *Corporations Act 2001 (Cth)* (**Corporations Act**), whereby shareholders needed to actively choose to receive notices of upcoming meetings (and accompanying materials) electronically or they would be sent by post – assuming a company had not amended its constitution to state the different method of notice.³

Subsequent to the Proposal Paper and consultation process, the Corporations Act was amended so that the possible means for a company to give notice of meeting (of members) to members and directors, including electronically, were listed as equal alternatives. Amongst other methods, the relevant provision now states that notice can be given:

- personally;
- by post;
- by...fax number or electronic address (if any) nominated by the member; and
- by sending it to the member by other electronic means (if any) nominated by the member.⁴

The Law Council considers these amendments a good example of how to legislate technology neutrality in practice. The electronic method of performing a required task is explicitly equalised with the traditional, analogue method (rather than making it a secondary option or requiring an opt-in). In the Law Council’s view, likely consequences of such technology neutrality include increased shareholder engagement, a positive impact on cost savings and improved communications tracking.⁵

For the purposes of the Inquiry, the Law Council submits that the technology neutrality of company meeting notice requirements under the Corporations Act should be matched, in the corporate law context, by neutrality in the document execution process.

Namely, as suggested in the Law Council’s initial submission to this Inquiry dated 25 June 2020, consideration should be given to completely dispensing with witnessing requirements where technology can provide robust evidence of due execution.⁶

A further issue related to technology neutrality in the context of electronic company meetings has come to the Law Council’s attention. As outlined in the Law Council’s submission of 25 June 2020, the *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020 (Emergency Determination)* temporarily allows company meetings required under the Corporations Act to be held virtually, ‘using one or more technologies that give all persons entitled to attend a reasonable opportunity to participate without being physically present in the same place’.⁷ These temporary measures have clear benefits, with the necessary safeguards. The Emergency Determination will expire in early November 2020, prior to the date by which many listed companies must hold their Annual General Meetings.

As the Law Council noted, if virtual meetings are held after the expiry of the Emergency Determination (even if the notice was despatched before expiry), the validity of the meeting

³ *The Proposal Paper* n 2, 1.

⁴ See, Corporations Act s 249J(3)(a) – (ca).

⁵ May 2016 Submission n 1, 2.

⁶ Law Council of Australia, ‘Submission to the Inquiry into Financial Technology and Regulatory Technology’ (25 June 2020) (**‘Submission of 25 June 2020’**) 10.

⁷ *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* s 5; Submission of 25 June 2020 n 6, 11.

is not assured.⁸ There remains uncertainty about whether the modifications will be extended and consequently as to whether venues should be booked. Accordingly, the Law Council emphasises the need for an early announcement of an extension of the temporary authorisation for company meetings required under the Corporations Act to be held virtually under appropriate circumstances,⁹ or of legislation to make the modification permanent.

Platforms for electronic witnessing and execution

As stated in the Law Council's submission of 25 June 2020, the witnessing requirement was originally intended to protect against fraud.¹⁰ It attests:

- that the witness was present when the document was signed;
- to the identity of the signatory who executed the document; and
- to the signatory appearing to be of sound mind and not under duress.

At the public hearing on 1 July 2020 Ms Shannon Finch, Chair of the Corporations Committee of the Law Council's Business Law Section, stated that the Law Council is in favour of removing the requirement for valid execution of a deed by an individual that execution be witnessed, provided that what is required instead is an equally effective method of validating an individual's identity using an electronic platform.¹¹ In many cases, electronic verification is less liable to fraud given the digital record that is necessarily created by any form of electronic execution.¹²

Electronic verification may be performed through platforms which use cryptographic software enabling digital signatures to be created via a private key which the signatory keeps secret. It can be proved through the software that a certain key was used to create a particular signature, permitting an inference that the holder of the key used it to do so. That inference could be rebutted if the key were hacked, stolen or copied and used by another person. However, a statutory or contractual rule could be established to make its use otherwise non-repudiable by the person to whom the key is assigned, in line with the legal status currently enjoyed by a signature which has been properly witnessed

Ms Finch informed the Committee that she was aware of a number of platforms which could be used to verify a person's identity for the purpose of electronic execution.¹³ Ms Finch also advised that the Law Council considers it preferable to allow flexibility in relation to which platforms and methods may be used.¹⁴ This is important to ensure that business is not unnecessarily hampered.

Ms Finch noted the success that the Law Council has observed in the use of document execution platforms which require a person to establish their identity before they can execute, and which embed the identifier on execution of the document.¹⁵ One example she gave was the platform DocuSign.¹⁶

⁸ Submission of 25 June 2020 n 6, 12. There are exceptions to this – for instance, if a meeting is convened by court order, the court would be able to authorise a virtual meeting.

⁹ See, *ibid* 12.

¹⁰ *Ibid*.

¹¹ Evidence to the Senate Select Committee on Financial Technology and Regulatory Technology, Parliament of Australia, Canberra, 1 July 2020, 27 (Shannon Finch).

¹² *Submission of 25 June 2020* n 5.

¹³ *Ibid*.

¹⁴ *Ibid*.

¹⁵ *Ibid* 28.

¹⁶ *Ibid* 27.

In answer to the Committee's request for further examples of better or more modern ways to witness documents through technology platforms, the Law Council repeats its clarification that these platforms do not facilitate witnessing *per se*. Rather, they perform the task of verifying a signatory's identity. The Law Council is not aware of any software currently available which replicates the functions of witnessing by providing a facility for the attestation by one person that he or she saw another person sign the relevant document, or by providing evidence of the signing having occurred beyond an assertion.

The Law Council has received further feedback from members of its Business Law Section that as well as using the DocuSign platform, they have found simply inserting an electronic signature into an Adobe Portable Document Format file to be effective. They have also provided positive feedback about using the platform Nitro Pro (including for choreographed series signing).

As an alternative to removing the requirement that the execution of a deed by an individual be witnessed in order for execution to be valid, the Law Council suggests one option could be to replicate in the Corporations Act the temporary regulations currently in place in Victoria,¹⁷ Queensland¹⁸ and New South Wales¹⁹ which authorise a process for witnessing documents by which one person sees, through an audio-visual connection, a second person sign a document digitally. The first person then receives a copy of the signed digital document and signs a digital attestation of the documents that they saw the second person sign. This process could be authorised to fulfil witnessing requirements under federal law generally, including in relation to statutory declarations and affidavits.

The Law Council suggests that it would be possible to design a single software product to cater for this 'online witnessing' process. However, software developers would need to be given the requisite incentive to do so – namely, the knowledge that the process which the software would be designed to support would be authorised beyond the COVID-19 pandemic.

Finally, the Law Council acknowledges that electronic verification of a signatory's identity cannot be considered directly equivalent to fulfilling all three elements of witnessing as currently required and set out above. Some consumer advocates have argued against extending the current measures temporarily permitting electronic signing and witnessing because of the potential for misuse against consumers and elders, for example in witnessing powers of attorney and online loan documents. The Law Council considers this a valid concern. The risk of misuse could, however, be mitigated by inserting robust requirements in the relevant regulations or legislation for safeguards to be built into electronic signing and/or witnessing products. Electronic signing and witnessing may also be limited to particular persons (eg companies but not individuals) or to particular types of transactions (eg not powers of attorney).

¹⁷ See, the *COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020* (Vic) made under the *Electronic Transactions (Victoria) Act 2000* (Vic).

¹⁸ See, *Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Regulation 2020* (Qld) Part 4 'Signing or witnessing documents by audio visual link'.

¹⁹ See, *Conveyancing Act 1919* (NSW) s 38A, which states that: "A deed may be created in electronic form and electronically signed and attested in accordance with this Part." However a witness must be physically present and must sign the same document as the signatory. The *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW) (**NSW Regulation**) was introduced as an emergency measure, under the *Electronic Transactions Act 2000* (NSW). Significantly, however, the NSW Regulation at sections 2(2)(b) and 2(3) does not specify whether the witness can electronically sign the document/a copy of the document. According to the BLS, there is market feedback to suggest some reluctance to accept documents executed under the NSW Regulation.

We thank you once again for the opportunity to provide this supplementary submission to the Committee. If you have any further inquiries, please contact Dr Natasha Molt, Director of Policy, at natasha.molt@lawcouncil.asn.au or on (02) 6246 3754.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Pauline Wright', written in a cursive style.

Pauline Wright
President