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State Development and Regional Industries Committee
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Submission on the amendments on execution of deeds in Justice Legislation (COVID-19 Emergency Response—Permanency) Amendment Bill 2021 (Qld)

We are large law firms in Brisbane, and elsewhere in Australia and overseas with significant practices involving projects and transactions throughout Queensland and elsewhere.

We appreciate the opportunity to make this submission on the proposed amendments to be made by Part 8 of the *Justice Legislation (COVID-19 Emergency Response—Permanency) Amendment Bill 2021* (Qld) to the *Property Law Act 1974* (Qld) relating to the execution of deeds, which make permanent the valuable and successful changes in the temporary Regulation.

Deeds are very common documents in Queensland. They are subject to archaic and arcane requirements which can be cumbersome, make progress difficult and trip up parties who do not have access to sophisticated legal advice. There is a profound need for the law to be simplified and updated.

In particular under general law, deeds must be on paper, parchment or vellum. Without statutory reform, they cannot be created electronically. It is important that this changes so that the Queensland economy is able to embrace fully the new digital world, and have electronic documents.

The advantages of doing so are readily apparent. Electronic communication and information storage are rapidly becoming the norm in general life and commerce. There are significant savings in cost and environmental impact. Those in regional Queensland have greater access, and can also set up competitive businesses unrestrained by geography. The disabled and elderly and others confined to their homes have greater access. Processes are speedier, easier, more convenient and more efficient. Generally they are more accessible. Records are often more accessible, secure and reliable. In practice often it is easier to establish that documents and communications have been properly signed, or received and opened — there is a clear audit trail. Paper communication is not becoming any easier or more reliable — Australia Post is cutting down its services.

We therefore support the amendments and welcome the introduction of permanent reforms which facilitate the electronic execution of documents and simplify the requirements for deeds.

The reforms originally introduced by the *Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Regulation 2020* (Qld) (“**Regulations**”) were a model of their kind: clear, comprehensive and helpful. Our colleagues have made several submissions to the governments of other jurisdictions urging them to use the Regulations as a model for their own reforms.

We are pleased to see that the Bill retains most of the best features of the Regulations. However, the Bill also makes some changes which we consider are a retrograde step. We set these out below.

Our comments

We have the following comments on the amendments.

1 Execution of deeds by governments

The proposed amendments relate to execution of deeds by corporations, individuals and partnerships. That is very welcome, but one important omission is execution by governments. In one recent transaction, while other parties were able to sign a deed electronically under the

Regulations, the Queensland government did not. There is no reason why governments should not be able to sign documents electronically.

This could be simply corrected —perhaps by a general provision allowing deeds to be electronic for all entities not covered by the other provisions.

2 Execution of deeds by partnerships

The express provisions relating to partnerships (s46G) are also very welcome. However, one of the difficulties relating to partnerships comes from the common law rule that a person authorised to sign a deed on behalf of another needs to be appointed by a deed. This has meant that all partners need to sign deeds, unless all partners have by deed authorised the execution by an individual partner.

It should be made clear that an individual can sign for a partnership even if the individual was not appointed by deed.

3 Consent to electronic execution

The Bill provides that the method of electronic signing must be consented to by each other signatory to the document (see the definition of accepted method in the amended s44). While we are aware that consent is required under Federal and State and Territory electronic transactions legislation, it is not clear to us why this is necessary in relation to deeds. While the Bill states that consent may be inferred, the requirement prompts questions as to what if any additional steps the parties need to take to demonstrate that there is consent in addition to the using the chosen electronic platform or engaging with an electronic signing process.

4 Powers of attorneys given by an individual.

The Bill (Clause 51, proposed s46A of the *Property Law Act*) provides that a power of attorney given by an individual under a deed (including an individual in the individual's capacity as a sole trader) must be a physical document that is signed in the presence of a witness, excepted in limited circumstances.

This has the effect of restricting access for individuals and sole traders (in the regions and elsewhere) and inhibiting the ability of others to deal with them.

It is not clear to us why. We note:

- It is not clear why stopping someone doing something electronically gives any protection when they can do it by paper. It only creates difficulty.
- It retains the peculiar and arcane rule that a person can only authorise another person to sign a deed if the authorisation is itself a deed. This is rightly removed for corporations by the new s46F(1)(d). The effect is that an individual, no matter how sophisticated, can still only authorise another individual to sign a deed if the authorisation is itself a deed, and that authorisation that must be by paper witnessed physically.
- We have not seen any adverse consequences of permitting powers to be given electronically.
- We understand that there may be a concern to retain witnessing for documents where the witness must have certain qualifications and is certifying completion of some step (eg enduring powers of attorney, affidavits, statutory declarations) and for testamentary documents (wills). However, witnesses for deeds merely verify a signature. In this context, witnessing achieves little and can be a trap for other parties seeking to rely on the deed, as a failure to satisfy procedural requirements for witnessing can invalidate the deed, even though the other parties are not in a position to verify satisfaction. Setting procedural and other requirements for a remote witnessing link only compounds the problem.
- Witnessing and paper are not required for agreements, even though they may be of enormous significance to the parties.

- This approach means that individuals signing powers of attorney which are deeds, for which the paper and witnessing requirements apply, lose some of the benefits of electronic signatures (that is, ease of use and flexibility, particularly for those who find it difficult to attend offices to sign document because of geography, ill-health, incapacity, quarantine, lockdown or isolation requirements).
- A power of attorney or agency given by an individual which is not in the form of a deed will not be subject to the paper or physical witnessing requirement. We see no reason to justify a different treatment of powers of attorney in the form of a deed.
- There is an exception under s46A(2) where the document is *part* of a commercial or other arms' length transaction. Often, individuals sign separate powers of attorney authorising execution of deeds. Those are not part of a transaction but relate to the transaction. We suggest that at least the exception should carve out powers of attorney where they *relate to* specific transactions.

We are happy to discuss any of the above.

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