

**THE REGULATORY REFORM (EXECUTION OF DEEDS AND DOCUMENTS)
ORDER 2004**

STATEMENT BY THE DEPARTMENT FOR CONSTITUTIONAL AFFAIRS

INTRODUCTION

1. This statement is laid before Parliament in accordance with section 6 of the Regulatory Reform Act 2001 (“the Act”) together with the draft of the Regulatory Reform (Execution of Deeds and Documents) Order 2004 (“the draft Order”) which we propose to make under section 1 of the Act. The purpose of the Order is to amend the Law of Property Act 1925, the Powers of Attorney Act 1971, the Companies Act 1985 and the Law of Property (Miscellaneous Provisions) Act 1989 so as to reduce burdens on corporations and companies and to remove inconsistencies between the Acts that govern the execution of deeds and documents.

DESCRIPTION OF THE PROPOSALS

2. The Government proposes to implement the recommendations of the Law Commission’s report on the Execution of Deeds and Documents by and on behalf of Bodies Corporate. The overlapping provisions of section 74 of the Law of Property Act 1925, section 36A of the Companies Act 1985 and section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 will be amended to remove restrictions on corporations and companies and to promote consistency between the Acts, reducing uncertainty in the law. The proposals will also trigger a range of minor and consequential amendments which will affect, among others, the above-mentioned Acts and the Powers of Attorney Act 1971.

EXTENT

3. Section 74 of the Law of Property Act 1925 applies to corporations aggregate¹ and extends to England and Wales only. Section 36A of the Companies Act 1985 applies to corporations registered under that Act and sets out the law of England and Wales only. The Powers of Attorney Act 1971 and the Law of Property (Miscellaneous Provisions) Act 1989 also extends to England and Wales only. Recommendations affecting the United Kingdom were omitted from the Order on this basis². The proposed Order will therefore only extend to England and Wales. Separate arrangements apply in Scotland and Northern Ireland via the 1985 Act and dedicated territorial legislation e.g. Requirements of Writing (Scotland) Act 1995.

DETAILS OF THE CONSULTATION (Section 5(1) of the Act)

4. On 6 September 2002 the Government published a consultation document regarding the implementation of the Law Commission’s report on the Execution of Deeds and Documents by and on behalf of Bodies Corporate³.

¹ Bodies with legal personality separate and distinct from its members and incorporated under English law e.g. Friendly Societies Act 1974, Companies Act 1985.

² The Law Commission recommended an amendment to liquidators’ powers under the UK wide Insolvency Act 1986. This reform has been omitted to preserve the territorial extent of the draft Order.

³ Report number 253, published in August 1998

5. The consultation document was produced in accordance with the code of practice on written consultations. The consultation document was published on the DCA and ukonline websites (www.dca.gov.uk/consult/rro/deeds.htm and www.direct.gov.uk) and publicised by a DCA press notice issued on 6 September 2002. The consultation document was circulated to organisations and individuals listed at Annex A to this document. These included representative bodies and the FTSE 100 companies. The closing date for the consultation was 29 November 2002 (a period of 12 weeks) but account was taken of all representations received up to and including 6 December 2002. No further responses were received after this date.
6. The National Assembly for Wales were also consulted as required under section 5(1) of the Act. The Assembly had no comments. The Department also consulted the Scottish Executive and Scottish Office who had no comments.

BACKGROUND

7. The origin of the proposed reforms lies in the changes made by the Companies Act 1989 and the Law of Property (Miscellaneous Provisions) Act 1989, although difficulties with the law in this area are of much longer standing.
8. The Companies Act 1989 introduced a new section 36A into the Companies Act 1985 which abolished the requirement that every company must keep a common seal and, for the first time, allowed companies to execute deeds by the signature of their officers alone. Generally, it sought to reflect the changes about the formal requirements for deeds which had been introduced by the Law of Property (Miscellaneous Provisions) Act 1989.
9. While section 36A provided companies with a modicum of administrative freedom, it was criticised for its complexity and detail. It was also found to conflict with overlapping statutory provisions, particularly section 74 of the Law of Property Act 1925 and section 1 of the Law of Property (Miscellaneous Provisions) Act 1989. Furthermore, in a number of areas, the regime for companies differed from that for other corporations.
10. Following a joint reference by the Lord Chancellor and the President of the Board of Trade, the Law Commission published a consultation document⁴ based on the following terms of reference: 'to review the law on the execution of documents and documents by and on behalf of all bodies corporate and to make recommendations'.
11. There was very clear support for legislative reform from consultees to the Law Commission's provisional proposals. These proposals formed the basis of the Law Commission's recommendations in their report, which has been accepted by the Government. They cover a number of issues.

⁴ Consultation Paper number 143, published in September 1996

BURDENS OF THE EXISTING LEGISLATIVE PROVISIONS (Section 6(2)(a) of the Act)

Execution of deeds by corporations

12. Section 74(1) of the Law of Property Act 1925 provides that in favour of a purchaser a deed is presumed to be validly executed by a corporation if the affixing of its seal is attested by a director and the company secretary or similar officer. By contrast, section 36A(4) of the Companies Act 1985, which deals with the signature of company documents, permits the alternative of signature by two directors. The requirement that the secretary must attest is a restriction on corporations in carrying on their business. Section 74(1) is further restricted, and inconsistent with section 36A(4), in that the latter applies to any document, whether or not it is a deed, whereas the presumption in favour of purchasers in section 74(1) is expressly restricted to deeds.
13. The Committee will wish to be aware that the Government is committed to introducing major reform of company law, implementing the work of the Company Law Review. Legislation will be introduced as soon as Parliamentary time allows, and a draft Bill will be published beforehand for consultation. One aspect of those reforms is that they would permit, for the first time, companies to be constituted without a company secretary⁵. This will have the effect of permitting companies with only a single potential signatory and, as part of those reforms, the law will plainly change to address how a single-signatory company can execute deeds and documents. However, there is neither pressure from stakeholders nor recommendations from the Law Commission for single-signatory corporations, so the Government does not propose to introduce that further reform for corporations.
14. Although there is some uncertainty about its effect, section 36A(4) of the 1985 Act appears to envisage personal signature by the secretary or director(s) in question. This would appear to impose a restriction on execution by a company in circumstances where the relevant directors or secretary are themselves other companies or directors. While the Government has consulted on a proposal that all directors be natural persons, there is no similar proposal in relation to company secretaries. A similar restriction (although again its precise effect is uncertain) arises from section 74(1) of the 1925 Act, which requires the affixing of a common seal to be “attested” by a director and the secretary. This apparent requirement for two people to attest conflicts with current practice, which is less burdensome, and under which the seal is attested by a single person authorised to sign on behalf of the corporation.

Irrebuttable presumption of delivery

15. Section 36A(6) of the Companies Act 1985 provides that, in favour of a purchaser, a document which has been duly executed by a company is presumed to have been delivered on its being executed. The presumption cannot be rebutted. This presumption imposes a restriction on companies, preventing them from delaying delivery where this is appropriate. Moreover, it is

⁵ 'Modernising Company Law', Cm 5553, 16 July 2002 (available at www.dti.gov.uk/cld/review.htm); see paragraph 6.6.

inconsistent with the scheme of delayed delivery⁶ introduced by the Law of Property (Miscellaneous Provisions) Act 1989. Nor is there any comparable presumption contained in section 74(1) of the Law of Property Act 1925.

Execution on behalf of another person

16. Section 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989 requires a deed to be validly executed as a deed by the person making it or the parties to it. However, it makes no reference to a deed being executed on behalf of such a person or parties. This appears to impose a restriction on a person who wishes to make a deed, or the parties to the deed, in that it prevents them from delegating the task of execution (although solutions to the problem are found in practice, and the problem does not always arise, for example when the situation falls within section 74(3) of the Law of Property Act 1925 (conveyance by attorney on behalf of corporation)).
17. Section 7(1) of the Powers of Attorney Act 1971 deals with the execution of instruments by someone who has been given a power of attorney to act for a person. However, it refers to the signature of the person giving the power. This is not apt where that person is a corporation, which does not execute instruments through its own signature. Although ignored in practice, this imposes a restriction on corporations granting powers of attorney. Section 7(3) gives rise to a further restriction of this nature in the specific case of conveyances.

Execution under seal not evidence of intention to create a deed

18. Section 1(2)(a) of the Law Reform (Miscellaneous Provisions) Act 1989 imposes a requirement that, in order to be a deed, an instrument must make clear on its face that it is intended to be a deed. It is not clear whether the mere use of a seal in executing a document indicates such an intention. It is undesirable that whenever a corporation executes a document under seal it should have a particular significance and be treated as a deed. It is not thought that the Act was intended to have that result.

Extension of presumption of authority to deliver

19. Section 1(5) of the Law of Property (Miscellaneous Provisions) Act 1989 creates an irrebuttable presumption that where a person such as a solicitor or a licensed conveyancer purports to deliver an instrument deed on behalf of a party relating to a transaction involving land, the person is authorised to deliver it. However, this presumption is restricted to transactions involving the creation or disposal of an interest in land and does not apply to other transactions. Section 1(5) therefore imposes a burden on solicitors etc in restricting the scope of their authority.
20. Respondents to the Government's consultation agree with the Department that the Acts under consideration impose burdens as they set restrictive requirements on corporations and companies when executing deeds and other documents. They also agree that the legislative provisions are inconsistent and unclear and that greater uniformity and certainty are desirable.

⁶ The practice of authorising a third party (such as the maker's solicitor) to deliver the document on behalf of the maker at the appropriate time.

HOW THE PROPOSALS REMOVE OR REDUCE EXISTING BURDENS (Section 6(2)(b) of the Act)

21. The proposed Regulatory Reform Order will amend the three main Acts that regulate the execution of deeds and documents:

- Article 3 of the draft Order removes the requirement in section 74(1) of the Law of Property Act 1925 that the secretary of a corporation must attest the affixing of the corporation's seal to a deed in order for the deed to be presumed to have been validly executed, and also removes the restriction of that presumption to deeds, extending it to all instruments. (See paragraph 12 of this document.)
- Article 5 repeals the irrebuttable presumption of delivery in section 36A(6) of the Companies Act 1985. (See paragraph 15.)
- Article 7(3) removes any possible restriction in section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 on the execution of a deed by a person on behalf of a party to the deed. (See paragraph 16.)
- Article 8 inserts a new subsection in section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 so as to reduce the burden that a deed must clearly be intended to be a deed, by adding a proviso that execution of an instrument under seal does not by itself make the instrument a deed. (See paragraph 18.)
- Article 9 removes the restriction in section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 relating to the presumption of authority to deliver an instrument. (See paragraph 19.)
- Paragraphs 2 and 11 of Schedule 1 to the draft Order remove the requirement in section 74(1) of the Law of Property Act 1925 and section 36A of the Companies Act 1985 relating to the attestation and signature of deeds where a corporation or company is itself a corporate officer of another corporation or company. (See paragraph 14.)
- Paragraphs 6 and 7 of Schedule 1 remove any restriction in the Powers of Attorney Act 1971 on the use by corporations of powers of attorney. Paragraph 8 removes any such restriction in the specific area of the execution of conveyances. (See paragraph 17.)

HOW THE PROPOSALS REMOVE INCONSISTENCIES AND ANOMALIES (Section 6(2)(c) of the Act)

22. Some of the proposals will remove inconsistencies and anomalies that were caused by the passage of the 1989 Acts. They will promote greater understanding and certainty in the business and voluntary sectors. The efficiency of business transactions will improve and any doubts that may exist in the law will be removed.

23. The definitions of 'execution' within the Acts are inconsistent. Section 36A(5) of the Companies Act 1985 says that 'a document executed by a company...intended...to be a deed... has effect upon delivery as a deed'. The implication here is that a document may be executed but not delivered until a later date. Section 1(3) of the Law of Property (Miscellaneous Provisions) Act

1989 refers to an instrument that is not only executed but signed, attested and delivered by an individual. Here, the term used is 'executed as a deed', rather than "executed". Section 74(1) of the Law of Property Act 1925 is inconsistent with both these sections in that it does not refer to delivery at all. Although there does not appear to be any inconsistency in the policy of the three sections, the wording is inconsistent and has given rise to uncertainty.

24. Articles 4 and 6 therefore remove any inconsistencies between the Law of Property Act 1925, the Companies Act 1985 and the Law of Property (Miscellaneous Provisions) Act 1989 over the execution and delivery of deeds.
25. Section 1(3) of the 1989 Act requires the third person to execute a deed in the presence of a witness, and requires the witness to attest the signature. Section 74(3) of the Law of Property Act 1925 is inconsistent with this, in that it does not require the witness to attest the signature. Section 74(4), on execution by an authorised officer of a corporation, is similarly inconsistent.
26. Paragraphs 3 and 4 of Schedule 1 to the draft Order therefore remove the inconsistencies between the Law of Property Act 1925 and the Law of Property (Miscellaneous Provisions) Act 1989 over execution of instruments on behalf of a corporation.

MAINTENANCE OF NECESSARY PROTECTION (Section 6(2)(d) of the Act)

27. The proposal concerning attestation by two directors (see paragraph 12) maintains the same level of protection as before. The existing law requires a director and company secretary (or deputy) to attest a deed under section 74(1) of the Law of Property Act 1925. The proposal will repeal section 74(1) and replace it with a new provision to allow one additional director to sign in place of the company secretary. This ensures that two appointed officers will continue to attest deeds. Moreover, it preserves the existing requirement while allowing corporations greater flexibility in the execution of documents.
28. Confirming the rules applicable to corporate officers (see paragraph 14) will increase protection on two grounds; firstly, those dealing with corporate officers will find their powers defined in statute; and secondly, corporate officers themselves will benefit from the added protection offered in the elaboration of their powers. Similarly, the proposal requiring the director of more than one company to sign for each, maintains the necessary protection by ensuring that deeds are correctly attributed to the parties involved. This provides greater protection to those with an interest in the execution of deeds.
29. Extending the irrebuttable presumption of authority to deliver (see paragraph 19) will increase the protection of those who deal with people or corporations who act through their legal advisers. This is achieved by extending the class of transaction on which they can rely on the irrebuttable presumption that the solicitor, licensed conveyancer or notary public with whom they are dealing has the authority to act on the other person's (or corporation's behalf). Furthermore, it maintains the protection for those who execute deeds as they will continue to retain control over the delivery of a deed.
30. Amending the rules concerning powers of attorney (see paragraph 17) will also increase the protection for those who deal with people (or corporations) acting through attorneys. It will become easier for them to rely on the actions of an attorney as binding on the donor of the power of attorney. As regards the

delivery of deeds (see paragraph 24), the fusion of 'delivery' and 'execution' will increase protection for those who deal with people or corporations through a deed. This is achieved by standardising the rule which determines when a deed becomes effective. The proposal outlined for the irrebuttable presumption of delivery also maintains the necessary protection by recasting the rules of presumption between people, companies and corporations.

31. The proposal relating to the face-value requirement (see paragraph 18) will increase the necessary protection for those who deal with people or corporations through a deed. This is achieved via the clarification of the rule that determines when a deed satisfies the face-value requirement.
32. The Government and vast majority of respondents to the consultation do not consider that the proposed reforms would undermine any necessary protections. The level of protection in certain areas of the law will increase because of the proposals.

EXPECTATION AS TO THE EXERCISE OF RIGHTS AND FREEDOMS (Section 6(2)(e) of the Act)

33. The Government does not consider that the proposals prevent any person from continuing to exercise any rights or freedoms. In some instances, they encourage greater freedom, particularly with the proposal to extend the delayed delivery scheme to companies and corporations, who will then be able to use deeds more effectively. The majority of respondents to the consultation exercise welcomed the proposal to extend the delayed delivery scheme. It was felt that compliance with the 1989 Act offered greater flexibility by allowing a seal ahead of delivery.

NEW BURDENS TO BE IMPOSED (Section 6(2)(f) of the Act)

34. Section 36A(4) of the 1985 Act appears to allow the director or secretary of more than one company to sign once for all of the companies which are parties to the deed. This practice has grown even though it is incompatible with the concept that the deed is in fact the act of each company. Errors in drafting have led to disputes as to the enforceability of a deed against particular companies which are intended to be a party to it. Effective management control is disrupted by the lack of certainty in the completeness of a deed.
35. Paragraph 10 of Schedule 1 imposes a new burden by requiring a director or secretary of more than one company to sign separately for each company which is a party to a deed. This affects the activities of directors and secretaries associated with more than one company; in the event they become parties to the execution of a deed, the director must sign for each one separately.

PROPORTIONALITY, FAIR BALANCE AND DESIRABILITY OF THE ORDER (Sections 1(1)(c) and 3(2) of the Act)

36. The practice of one director or secretary signing for all the companies they represent has been allowed to develop through a lack of certainty in the Companies Act 1985. The imposition of this new burden creates the legal requirement and administrative inconvenience of signing a document more than once where a director or secretary is signing for more than one company, but it will encourage certainty in the law and ensure that deeds are complete and self-

contained. A deed or document that is improperly executed through a failure to comply with this requirement will be void, just as is any document that is not executed in the proper way. Additional, limited consultation with selected stakeholders did not manage to elicit any quantitative evidence on the effect of this additional burden, suggesting that it would be unquantifiably small.

37. For the same reasons, the new burden is considered to strike a fair balance between the public interest and the interests of the directors and company secretaries affected by its imposition. In addition, having regard to the extent to which the Order as a whole also removes and reduces burdens in the law (see paragraph 21) and promotes clarity and certainty, the Government considers that it is desirable that the Order be made.

SUBORDINATE PROVISIONS (Section 6(2)(g) of the Act)

38. The proposal does not contain any subordinate provisions.

SAVINGS (Section 6(2)(h)(i) and (ii) of the Act)

39. A final Regulatory Impact Assessment is attached at Annex D. It is difficult to establish cost savings that will be made when the reforms take effect. There is no quantifiable information available on administrative savings, nor was there any feedback from the consultation regarding the regulatory impact of the reforms.

40. Cost savings are likely to be felt more in the long term, with increasingly efficient transactions being completed in less time with a lesser need to procure legal advice.

OTHER BENEFITS (Section 6(2)(i) of the Act)

41. The Government views the primary non-financial benefit to be increased transparency and legibility of the laws that regulate the execution of deeds and documents. It will provide greater certainty and confidence in the business sector and stimulate business transactions.

THE CONSULTATION (Section 6(2)(j) of the Act)

42. Details of the consultation process are given at paragraphs 4 to 6 above.

43. The consultation paper entitled invited comments on proposals to implement the recommendations of the Law Commission's report by way of a Regulatory Reform Order. A full list of recipients and respondents are attached at Annex A and Annex B respectively.

REPRESENTATIONS RECEIVED IN RESPONSE TO THE CONSULTATION (Section 6(2)(k) of the Act)

44. There were 23 responses to the consultation document received by the Department for Constitutional Affairs by 6 December 2002. Although the consultation closed on 29 November 2002, the Department saw no reason not to accept responses after this date. Representations were received from solicitors, legal academics, Government offices, professional bodies and trade associations.

45. The majority of respondents agreed that a Regulatory Reform Order made under the Act was the most appropriate measure and supported the main thrust of proposed reforms. The issues raised by respondents are dealt with in more detail at Annex C to this document.
46. In the consultation document respondents were asked to identify any information they did not wish to be disclosed. 3 respondents requested that their representations should be treated confidentially and accordingly, within the terms set out in section 7 of the Act, these representations are included in a summary of comments, and where appropriate DCA's response to those comments is at Annex C has not been identified.

CHANGES MADE IN LIGHT OF THE CONSULTATION (Section 6(2)(l) of the Act)

47. No changes have been made to the Government's proposals following the response to the consultation.

COMPATIBILITY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

48. The Government considers that the provisions of draft Regulatory Reform (Execution of Deeds and Documents) Order 2003 are compatible with Convention rights.

CHARGES ON PUBLIC REVENUE

49. The draft Order imposes on the public revenues and does not require any payments to be made to a public authority.

RETROSPECTION

50. The draft Order is not retrospective.

EUROPEAN UNION

51. Article 9 of the e-Commerce Directive (2000/31/EC of 8 June 2000) and the Electronic Signatures Directive (1999/93/EC of 13 December 1999) require Member States to ensure that the legal requirements applicable to the contractual process do not create obstacles to electronic contracting. The Government does not believe that the proposed Order creates any such obstacles; it deals with how deeds and documents are executed, but introduces no new concepts or requirements that discriminate against electronic contracting. However, it recognises that the proposed Order deals with the way that companies and other corporate bodies make contracts, and in particular introduces into s.36A of the Companies Act 1985 the requirement that a director of more than one company 'sign' a deed or document separately for each company that is party to the agreement.
52. Because the Law Commission developed its proposals as a coherent whole, and because they remain relevant even in the context of technological advances, the Government proposed in its Consultation Paper to implement the Law Commission's recommendations as they are presented. Then, if further changes appeared necessary, they would be addressed by Orders under section 8 of the

Electronic Communications Act 2000 or other appropriate means. There was widespread agreement with, and no dissent from, this approach.

53. The Government acknowledges that, in the light of the Community obligation in Article 9, it would not be satisfactory to leave the issue outstanding if there were a barrier to electronic contracting. Having considered the matter further, the Government is not persuaded that section 36A cannot be interpreted as applying equally to electronic contracts; and it does not believe that the introduction of a requirement to sign more than once in certain cases would affect the position. If the Committee disagrees, in either respect, the Government would be prepared to make an amendment to the present proposal or to come forward with an order under the Electronic Communications Act 2000 or other appropriate means. If a separate instrument were used, the intention would be to ensure that the commencement dates were harmonised.

Department for Constitutional Affairs

July 2004

Annex A – List of Consultees

Annex B – Representations Received

Annex C – Government's response to representations received

Annex D – Final Regulatory Impact Assessment

Annex A – List of Consultees

A Cleal
Abbey National plc
Addleshaw Booth & Co
Ashurst Morris Crisp
Association of Business Recovery Professionals
Association of Chartered Certified Accountants
Association of Corporate Trustees
Association of Friendly Societies
Association of Larger Local Councils
Association of Lawyers and Legal Advisors
Association of London Government
Barclays Bank plc
Berwin Leighton Paisner
Bevan Ashford
Birmingham Law Society
Blake Lapthorne
Bond Pearce
Booth & Co
Brain & Brain
Bristol Law Society
British Bankers Association
British Chamber of Commerce
British Property Federation
Building Societies Association
Burgess Salmon
CA Brodie QC
Cameron Markby Hewitt
Centre for Commercial Law Studies
Centre for Company and Commercial Law
Charity Commission
Charles Aldous QC
Chartered Institute of Bankers
Christopher Brougham QC
Christopher Clarke QC
Christopher Lockhart-Mummery QC
Church Commissioners
City of London Law Society
City of Westminster Law Society
Clifford Chance
CMS Cameron McKenna
Committee of Vice Chancellors & Principals of Universities
Companies House
Confederation of British Industry
Consumers Association
Co-operative Law Association
Co-operative Union Ltd
Council for Licensed Conveyancers
Council of Mortgage Lenders
County Land and Business Association
Consumer Credit Association of the UK
Consumer Credit Trade Association
Credit Protection Association
Crown Estate
Debbie Clelland
Denton Wilde Sapte
Department of Trade and Industry
Devon & Exeter Incorporated Law Society
Devonshires
Dibb Lupton Alsop
Downing College Cambridge
Duchy of Lancaster Office
Eben Hamilton QC
Ecclesiastical Law Society
Edge & Ellison
EG Nugee TD QC
Eversheds
EWH Christie QC
Farrer & Co
Federation of Small Businesses
Field Fisher Waterhouse
Financial Law Panel
Financing & Leasing Association
Forum for Private Business
Frere Cholmeley Bischoff
Freshfields Bruckhaus Deringer
Friendly Societies Commission
Gamon Arden and Co
General Council of the Bar
Government Property Lawyers
Halifax Building Society
Hammond Suddards
Hampshire Incorporated Law Society
Herbert Smith
Hewitson Becke and Shaw
His Honour Judge Moseley QC
HM Land Registry
Holborn Law Society
Hon Mr Justice Blackburne
Hon Mr Justice Carnwath CVO
Hon Mr Justice Evans-Lombe
Hon Mr Justice Laddie
Hon Mr Justice Lightman
Hon Mr Justice Lindsay
Hon Mr Justice Neuberger
Hon Mr Justice Robert Owen
House of Commons Library
Insolvency Practitioner's Association
Insolvency Service

Institute of Chartered Accountants in England and Wales	Professor Geoffrey Morse
Institute of Chartered Secretaries and Administrators	Professor Ian Fletcher
Institute of Directors	Professor John Baker QC
Institute of Legal Conveyancers	Professor Len S Sealy
Jonathan Gaunt QC	Professor Mark Thomson
K Lewison QC	Professor Robert Pennington
Law Society	Professor Roger Gregory
Leeds Law Society	Professor Sir Roy Goode QC
Linklaters	Professor Graham Battersby
Law Society of Jersey	Professor MG Bridge
Law Society for Wales	Professor David Hayton
Liverpool Law Society	Professor Philip Kenny
Lloyds Bank	Professor Dan Prentice
Local Government Association	R Neville Thomas QC
London Stock Exchange	Registry of Shipping and Seamen/Department of Transport
Lord Grabiner QC	Royal Institute of British Architects
Lord Alexander of Weedon QC	Rt Hon Lord Justice Chadwick
Lord Goodhart QC	Rt Hon Lord Lloyd of Beswick
Lovells	Scottish Executive
Manchester Law Society	Scottish Office
Michael Croker	Sheffield District Incorporated Law Society
Midland Bank plc	Shell International Ltd
Mills & Reeve	Shoemiths
Morgan Bruce	Simmons and Simmons
Nabarro Nathanson	Sir Robert Fellowes KCB GCVO
National Assembly for Wales	Sir John Vinelott
National Association of Local Councils	SJ Berwin & Co
National Association of Citizens Advice Bureaux	Slaughter & May
National Consumer Council	Society of Country Secretaries
National Westminster Bank plc	Society of Licensed Conveyancers
Newcastle Upon Tyne Law Society	Society of Local Council Clerks
Non-Administrative Receiver's Association	Society of Public Teachers of Law
Northern Chancery Bar Association	Society of Scrivener Notaries
Norton Rose	Stephenson Harwood
Nottingham Law Society	Tarmac plc
Osborne Clarke	Taylor Joynson Garrett
Payne Hicks Beach	Titmuss Sainer Dechert
Peter Curry QC	Trades Union Congress
Peter Scott QC	Treasury Solicitor's Department
Pinsent Curtis	Warwickshire Law Society
Plymouth Law Society	Watson Farley & Williams
Professor AJ Boyle	Welsh Office
Professor David Milman	Wragge & Co
	Yorkshire Law Society

Annex B - Respondents to the Consultation

Andrew Allen
Association of Business Recovery Professionals
British American Tobacco
Clifford Chance
GKN
Hammond Suddards Edge
Institute of Chartered Secretaries and Administrators
Institute of Directors
Professor John Baker QC
Joint Working Party of the City of London's Law Society's Company and Banking Law
Sub-Committee and Standing Committee on Company Law
Notaries Society
Richard Ashmore (FCIS ACIB)
School of Law, University of Northumbria
Society of Scrivener Notaries
The Association Of Friendly Societies
The Crown Estate Commissioners
Birmingham Diocesan Registry
The Insolvency Service
The Institute of Chartered Accountants
The Wellcome Trust

Note:- Three respondents requested confidentiality

A Regulatory Reform Order as the method of implementation

Comment: Formalities regarding the execution of deeds and documents should appear in primary not secondary legislation if they are to be relied upon in jurisdictions outside England and Wales...If the new law is to be split by statute and order, it would be less accessible for ordinary people.

Response: The Government appreciates the importance of legislation being prominent and accessible particularly when overseas jurisdictions have an interest in the execution of a deed. However, the purpose of the draft Order is to initiate amendments to primary legislation via a secondary. The relevant provisions will therefore remain within the appropriate Acts of Parliament. The draft Order is not framed as a stand alone provision. It is designed purely to amend primary legislation.

Attestation by two Directors

Comments: The proposal to dispense with a company secretary's involvement in the execution of a deed denies a company of the protection of a (usually, but not always) professionally qualified company secretary.

A company secretary will be optional for private companies under changes proposed by the Company Law Review, and may leave companies with a single director outside the remit of the reforms...Smaller businesses often have difficulty in finding a second director to attest a sealing...the secretary or clerk of the corporation is an important and impartial officer in the execution of deeds and should not be removed from the execution process.

Response: The Government is aware of the potential impact on smaller companies, and the pivotal role the secretary has in the day-to-day operation of a corporation. This proposal means that a secretary or clerk need not be present a document is executed. This will allow them the freedom to concentrate on other areas of work. However, the proposal does not prevent a secretary attesting if they wish. It merely gives corporations the option to execute with one additional director in place of the secretary or clerk.

Corporate Officers

Comment: How is the authority of the person signing or attesting on behalf of the corporate officer to be proved? Officers will usually have express authority conferred to them via the company's articles or a board resolution. However, authority conferred by the corporate officer could be express or implied.

Response: The proposal defines the extent of corporate officers' powers. The authority of a person to act on behalf of a corporate officer is an issue to be addressed and agreed by the parties during the process of execution.

Separate Signature

Comment: It should still be permissible for a person to sign only once provided that the signature was intended to bind the parties. There is no advantage for a signatory

to sign separately. The proposal would impose further complications and cause greater administrative inconvenience.

Response: The Government is sympathetic to companies who make multiple executions in several capacities. However, the overall beneficial effect of this proposal justifies its imposition. It will guarantee certainty in the execution process and promote good practice.

Irrebuttable Presumption of Validity

Comment: This proposal should be supplemented by expanding and retaining 'valid and in good faith' provisions in the 1925 and 1985 Acts. Do not favour this proposal as the definition of 'purchaser' is unfamiliar in other jurisdictions.

Response: This proposal has been contained within certain limits to ensure that the changes are manageable and achieve the overall objective of the reform. Read in context, there is no reason why the definition of 'purchaser' should not be understood in other jurisdictions.

Irrebuttable presumption of authority to deliver

Comment: These proposals do not go far enough. The concept of delivery should be abolished. A deed should become effective and bind a party executing it at the time intended by that party. The burden of execution is insubstantial and, as a concept was out of date and unnecessary .

Response: The Government does not believe such a fundamental concept should be abandoned altogether. Moreover, there is a need maintain a familiarity with key features of the system of execution that is already in place.

Powers of Attorney

Comment: The signature of an individual attorney for a trust corporation should not be witnessed and attested. If there was such an intention for the execution of a document by the company to be witnessed, then Section 1(3) of the 1989 Act would have referred to "person" and not "individual". It is therefore improper to equate a company with an individual acting through an attorney.

Response: The Government does not believe the law should exclude documents executed by trust corporations. Policy relating to the execution of deeds by trust corporations will be reviewed if necessary.

Purpose and Intended Effect of Measure

(i) The Objective

The Government is seeking to implement the recommendations of the Law Commission's report on the Execution of Deeds and Documents. The review was prompted by a number of long standing difficulties with the current law. For example, practitioners found the law to be complicated and overlapping statutory provisions difficult to reconcile. The Law of Property Act 1925, the Companies Act 1985 and the Law of Property (Miscellaneous Provisions) Act 1989 govern the execution of deeds and documents by corporations. However, they are inconsistent, sometimes unclear and in places, unnecessarily restrictive. The Law Commission's recommendations seek to remove unnecessary restrictions on who can sign documents and attest companies' seals, and to remove inconsistencies between the law applicable to companies and other corporations.

The proposals will affect:

- companies and their directors;
- other corporations (which would include many charities) and their officers;
- those entering into transactions with them; and
- legal advisers of all the above.

(ii) Background

The origin of the proposed reforms lies in the changes made by the Companies Act 1989 and the Law of Property (Miscellaneous Provisions) Act 1989, although difficulties with the law in this area are of much longer standing.

The Companies Act 1989 introduced a new section 36A into the Companies Act 1985, which abolished the requirement that every company must keep a common seal, and, for the first time, allowed companies to execute deeds by the signature of their officers alone. Generally, it sought to reflect the changes about the formal requirements for deeds which had been introduced by the Law of Property (Miscellaneous Provisions) Act 1989.

While section 36A provided companies with a modicum of administrative freedom, it was criticised for its complexity and detail. It was also found to conflict with overlapping statutory provisions, particularly section 74 of the Law of Property Act 1925 and section 1 of the Law of Property (Miscellaneous Provisions) Act 1989. Furthermore, in a number of areas, the regime for companies differed from that for other corporations.

There was very clear support for legislative reform from consultees to the Law Commission's provisional proposals. These proposals formed the basis of the Law Commission's recommendations in their report, which has been accepted by the Government. They cover a number of issues.

(iii) Risk Assessment

The Law of Property Act 1925, the Companies Act 1985 and the Law of Property (Miscellaneous Provisions) Act 1989 governs the execution of deeds and documents by corporations, but they are inconsistent, sometimes unclear and in places, unnecessarily restrictive. The Law Commission's recommendations seek to remove unnecessary restrictions on who can sign documents and attest companies' seals,

and to remove inconsistencies between the law applicable to companies and other corporations.

(iv) Devolution

The proposed Order will therefore only extend to England and Wales. Separate arrangements apply in Scotland and Northern Ireland via the 1985 Act and dedicated territorial legislation e.g. Requirements of Writing (Scotland) Act 1995.

(v) Scaling the Issue

The first legislation of the modern era to regulate the execution of deeds and documents was the Law of Property Act 1925. Since then, a number of laws (particularly the 1985 and 1989 Acts) have been added to the statute books regulating particular aspects of execution. While these laws were meant to work in conjunction with each other, experience has proven a number of flaws in the interpretation of Acts. For example, the 1925 Act applies to the execution of documents by corporations in the wider sense; the 1985 Act regulates the execution of documents by companies, and the 1989 Act applies generally to the execution of deeds whether by corporations or individuals. This has led to inconsistencies and unnecessary restrictions on how corporations carry on their business.

Options

There are two options available in this area:

Option 1 –do nothing

By doing nothing and maintaining the present regime, which is applicable to the execution of deeds and documents, the Government will not impose any burden on business. Neither will it reduce any of the burdens identified with the present system or address any of the inconsistencies and difficulties that Corporations can face.

Option 2: –adopt the Law Commission’s recommendations.

By adopting the recommendations the Government will provide Corporations with a clearer and more cohesive legal framework for the execution of deeds and documents. Stakeholders considered that the existing law was complicated, inconsistent and confusing. Adoption of the recommendations will therefore increase transparency and legibility of laws regulating the execution of deeds and documents. In the long term, this will also provide greater certainty and confidence in the business sector and stimulate business transactions.

Benefits

Option 1 – do nothing

By leaving the present framework as it is, the Government will not create any new burdens on business or additional costs.

Option 2 – adopt the Law Commission recommendations

By introducing the amendments through the RRO, there are three main categories of benefit arising from the proposals:

- The rules about who needs to sign deeds and other formal instruments (or attest a company’s seal) will be simpler, clearer and more flexible, potentially leading to some administrative savings for corporations. For example, any two directors of a company will be able to attest a seal, whereas now the company secretary or his deputy must be present to do so. Attorneys will be able to execute deeds on

behalf of corporations. Also, companies will no longer face the irrebuttable presumption of delivery on execution. In practice, this means it will be possible to sign (or attest) an instrument before the date when it is intended to take effect.

- The other parties to transactions with corporations will benefit from the broadening of two presumptions that allow them to rely on the validity of documents in the correct form without the need for further consideration or even investigation.
 - Purchasers can currently rely on a presumption that a deed that appears to have been duly executed is valid. This will be extended to other instruments executed by corporations.
 - Purchasers of land currently benefit from a presumption that a solicitor delivering a deed to behalf of a party has valid authority to do so. This will be extended to other categories of transaction.
- Overall, main benefit to corporations is that the law in this area will be made simpler, clearer and more consistent. In particular inconsistencies in the rules applicable to companies and other corporations will be removed. This could in principle lead to savings in the cost of legal advice. It might also reduce the chance of transactions being rendered invalid or having unintended effect due to misunderstanding the legal requirements.

Costs

There is only one proposal in this package that would in principle impose additional costs, although in practice the effect would be negligible. It arises when two or more parties to a single document or transaction are companies having directors in common. In those circumstances, it is proposed that the directors signing for those companies will have to sign separately for each company.

When consulting on this RRO respondents were not able to provide quantitative information on the cost or benefits resulting from the proposals. Others believed the financial impact of the draft Order to be marginal.

(i) Business sectors affected

A cursory glance at the statistics provide a further indication of the benefits that will accrue from the reforms. For example, there are currently 1,639,700 active companies registered at Companies House⁷. Approximately one third of those companies registered are small and medium sized enterprises who claimed audit exemption (and may be less likely to be engaged in the frequent execution of deeds and other formal documents). Therefore, up to 963,000 registered companies are likely to benefit from simplified administrative procedures.

In addition, 1,583,000 property transactions took place in England and Wales last year (valued at £217million)⁸. Of these transactions, 133,000 (11% of the overall total) were non-residential property based (i.e. all land, commercial and industrial property) and were valued in excess of £32 million. Although small, the business portion of the property market represents a significant mode of business for corporations and is likely to expand with greater coherence and understanding of the law.

⁷ Companies House Annual Report and Accounts 2002/2003

⁸ Inland Revenue: Survey of Property Transactions in England and Wales 2002

(ii) Issues of equity & fairness

These proposals are primarily concerned with increased clarity and consistency between statutes governing the execution of deeds and documents. This in turn, will increase the efficiency of business transactions throughout the business and voluntary sector. In terms of equity and fairness, the proposals are wholly positive and beneficiary. It makes the law transparent and accessible to wider sections of the business community (particularly small business). The drawbacks caused by the proposal are negligible (see first paragraph under costs).

Option 1 – do nothing

By leaving matters as they are, inconsistencies and overlap between the Acts described in the RRO will not be addressed. The issues of equity and fairness raised by those inconsistencies will continue unsettled.

Option 2 – adopt the Law Commission recommendations

The Law Commission's recommendations seek to remove unnecessary restrictions on who can sign documents and attest companies' seals, and to remove inconsistencies between the law applicable to companies and other corporations. This in itself will present a fair and more equitable situation between the organisations that commonly execute deeds and documents.

(iii) Compliance Costs

Business sectors affected by these proposals are not labour intensive; neither do they produce tangible units. Therefore, there will be no need to buy new equipment or change work processes. There will be a marginal change in work practices (for example, the requirement for a director to sign individually on behalf of every company he represents) but little need for familiarisation or training. The Law Commission's original terms of reference were partly driven by complaints of inconsistency from practitioners in the field⁹. This indicates that principal stakeholders were content to press for a change in the law safe in the knowledge that costs (both financial and practical) would be negligible.

(iv) Other Costs

The impact on stakeholders in rural communities is marginal and subsequently difficult to quantify. Access to lawyers in sparsely populated areas may present problems for some individuals. Clearer legislation may lead to less reliance on legal advice and savings in the long term. However, it is likely that the impact of the proposals on rural communities would be much the same as their counterparts in city areas. The proposals have also been considered in relation to sustainable development. Specifically, the proposals were screened against the future economic, social and environmental effects. There were found to be no such effects resulting from the proposals.

(v) Costs for a typical business

The consultation exercise did not produce any feedback with regard to compliance costs, other costs or costs for a typical business. Representative bodies confirmed that figures relating to the cost of execution were not routinely kept. In any event, the calculation of such figures are unlikely to produce meaningful results. Similarly, the cost of legal advice was considered, but again was difficult to gauge with any degree of accuracy or level of significance.

⁹ Paragraph 1.4 Introduction – Law Commission Report No.253 August 1998

Sensitivity analysis

Sensitivity is not an issue relevant to these particular reforms. Neither is the expected outcome vulnerable to alternative assumptions. The reforms concern a purely functional aspect of the law - and an overriding aim to remove uncertainty and provide clarity in the laws of execution. Moreover, the uncontroversial nature of the reforms set down two basic choices; change the law and promote certainty; or, allow the existing law to stand with its underlying inconsistency. Choosing the former carries no risk of contradiction. It is neither overly optimistic or pessimistic in its purpose. To favour the latter, would preserve the confusion which has become apparent from practice and experience.

Small Business Impact Test

We have had initial consultation with the Small Business Service (SBS) who do not anticipate that these proposals will have a significant impact on business.

The consultation document specifically asked if all the costs and benefits for businesses, arising from the proposals had been accurately determined. Key stakeholders in the consultation, as identified by the Small Business Council, included the Federation of Small Businesses and the CBI. They did not indicate during the consultation process that there would be an adverse impact of these proposals on small business.

The vast majority of deeds and documents are executed by persons or legal advisers representing incorporated bodies. It therefore follows that small businesses (defined by the Small Business Council as one employing less than 50 employees) are unlikely to be significantly affected by the proposals. Those that do execute deeds and documents would do so through their own officers (directors) or their appointed legal representatives.

Competition assessment

The Competition Filter has been completed and indicates that the overall effect of the proposals are neutral. The execution of deeds and documents is a service provided by firms (e.g. solicitors, notaries) on an ad hoc basis. Invariably, the service is provided internally by directors or other corporation officials. Tangible 'markets' do not exist in this context; it would certainly be narrow and highly specialised. The market (if it could be referred to as such) only extends to property transactions involving corporations and individuals.

No one company specialising in this type of work dominates the 'market' or would be adversely affected by the proposals. The reforms focus mainly on business to business transactions, and do not generally overlap with consumer elements of competition. The proposals may however, encourage competition by promoting easier access to legal rules via increased transparency. Overall, there is no market in which real competition can develop. Therefore, the perceived impact on competition is not a relevant question in connection with these proposals.

Enforcement and sanctions

The proposed reforms do not require covert enforcement via a public body. These reforms are designed for the benefit of companies and officials when executing of deeds and documents. Therefore, avoidance/non-compliance with the new rules is unlikely. The reforms represent an uncontroversial area of civil law and will not attract criminal sanctions for non-compliance.

Monitoring and review

DCA intend to monitor the changes following implementation. To allow the measures to take effect, we are currently planning to review the new procedures 6 months after the RRO comes into force.

Results of consultation

The consultation invited views on whether the partial RIA accurately identified the costs and benefits arising from the proposals, and whether recipients agreed that the extent of their impact makes detailed quantification impractical and unnecessary. The consultation also asked recipients for any quantitative information they could provide.

There was a limited response to the question of regulatory impact. However, respondents were content with the approach proposed in the consultation. Respondents were not able to provide quantitative information on the cost or benefits resulting from the proposals. Others believed the financial impact of the draft Order to be marginal. One respondent engaged in the printing and supply of standard forms was primarily concerned with the timing of the draft Order, but offered no further elaboration on compliance costs.

There is certainly a distinction to be made between the fiscal and practical impact of the draft Order. In financial terms the benefits are difficult to quantify. The introduction of transparent rules will undoubtedly lead to administrative savings, but these are likely to materialise only after the draft Order has taken effect. However, the practical effects of the draft Order are more visible and will have an immediate impact on business transactions. The draft Order will remove inconsistencies and anomalies in the law, and provide streamlined procedures benefiting all those with an interest in formal contracts. Thus, there is a clear and tangible benefit to the business and voluntary sectors in the way they conduct business.

Summary and recommendation

The Law Commission's proposals are to all intents wholly beneficial to those affected by this area of law. Although in principle they are relevant to millions of transactions, the number of cases where the effect of the changes will lead to identifiable savings is likely to be much smaller and the extent of any savings marginal. Given the nature of these proposals, it is not considered practicable or necessary to attempt to quantify the benefits

Declaration

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed _____

Date _____

DAVID LAMMY

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