



# 38 fact sheet

26 May 2020

## Execution solutions for remote working arrangements

This fact sheet focuses on practical solutions for Commonwealth entities which need to sign and accept documents (including contracts and deeds) during an isolation, semi-isolation or remote working scenario. These circumstances pose a number of challenges including diminished printing and scanning capability and the availability of witnesses for execution. It should be read in conjunction with Fact Sheet 37 (Execution clauses).

Note that this fact sheet is based on the law as at the date of publication. Circumstances are rapidly changing and the Commonwealth, States and Territories are each passing legislation and making regulations and declarations to respond to the evolving situations. These responses may be temporary and might include modifications to certain statutory requirements which are relevant to the valid execution of documents. The Appendix to this fact sheet summarise changes to relevant laws and requirements.

### Summary of solutions

The below table identifies issues and solutions to facilitate the execution of a range of documents in these circumstances (including under any temporary changes). Additional details are discussed later in this fact sheet.

<i>Document type</i>	<i>Is electronic execution permitted?</i>	<i>Considerations</i>	<i>Solutions</i>
Correspondence	Yes	Consider value and risk associated with document	Electronic or digital signature
Memorandum of Understandings (MoUs), work orders, and similar	Yes	Consider value and risk associated with document	Electronic or digital signature
Contracts	Yes	Usual formalities of contract must be satisfied	Electronic or digital signature
Land documents requiring registration	Only where permitted through an Electronic Lodgement Network (ELN)	Ensure that a client authorisation form has been signed, which will also require a verification of identity to be completed  Consider particular requirements of the registry in the jurisdiction	Use ELN  If ELN not available, electronically execute an agreement committing to sign registrable form of document in future

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<i>Document type</i>	<i>Is electronic execution permitted?</i>	<i>Considerations</i>	<i>Solutions</i>
Deeds	By individuals – in New South Wales, Victoria and Queensland  By Corporations Act companies – yes	Particular considerations for companies including in connection with requirements around electronic execution in accordance with the modified operation of section 127 of the Corporations Act  Proximity of witness (in time and space) is necessary, except in NSW and Victoria. No witness required in Queensland. (See below in connection with witnessing)  Consider benefits of deed vs contract	Where the deed is made in NSW, Victoria or Queensland, make the law of that jurisdiction the governing law and sign electronically  Convert to contract (if contract formalities met) and sign electronically  Electronically sign an agreement committing to sign the deed  Where a deed is required and is not made in NSW, Victoria or Queensland, if possible, print (in counterpart), physically sign in the presence of witness, scan and send (note that this qualifies as physical or ‘wet ink’ signing with electronic delivery)  See below solutions for companies to execute deeds
Documents which require a witness	Yes, but exercise caution	In NSW, Victoria and Queensland, witnessing of documents may occur via audio visual link and the witness may sign a copy of the document  Outside NSW, Victoria and Queensland, proximity of witness (in time and space) is necessary and same document (not copy) must be signed by the witness	In NSW, Victoria and Queensland use audio visual link to witness signature in accordance with relevant regulations and witness may sign copy of document signed by signatory  Outside NSW, Victoria and Queensland witness may be physically proximate ‘at a distance’ and may attest that they have witnessed by signing the same document on the same device, or by using a suitable digital execution platform
Documents signed by or on behalf of Corporations Act companies	Yes, where method of execution is pursuant to the modified operation of s 127 of the Corporations Act  Otherwise, exercise caution depending on the method of execution	The <i>Corporations Act</i> is exempt from the <i>Electronic Transactions Act</i>  Different execution methods are available  The <i>Corporations (Coronavirus Economic Response) Determination (No. 1) 2020</i> (Cth) modified s 127(1) of the <i>Corporations Act</i> to permit electronic execution of documents (including deeds) and to allow persons dealing with companies to assume that documents signed electronically have been duly executed	Execution in compliance with s127 may occur where each officer either: <ul style="list-style-type: none"><li>• signs a physical counterpart of the same document; or</li><li>• executes using a suitable form of electronic communication.</li></ul> A person who has the authority of the company may execute (eg a person holding a power of attorney or who is authorised via a board decision), subject to the nature and terms of that authority (including electronic execution of deeds, where the jurisdiction permits)

## Practical tips

For a specific document or transaction, certain precautions and steps should be taken. Suitably detailed records should also be kept of the steps taken and factors considered in connection with electronic execution of each document in order to manage operational and legal risk, and also to prove the validity of execution by its delegates. The steps may be built into a process or procedure document and to the extent relevant taking into account whether documents can be electronically created and signed and whether remote witnessing is permitted in the jurisdiction, should include that:

- the signatory assesses:
  - the relevant document and the complexity of the document, the value of the agreement and/or the identity of the counterparties to determine whether these increase the likelihood of dispute
  - the risks that electronic signatures potentially pose (including that the document may not be enforceable if improperly executed and that an electronic signature may be affixed without proper authorisation), in order to determine whether it is appropriate to sign the document electronically (or whether a physical ‘wet ink’ signature is preferable).
- the signatory should electronically affix their signature in the execution block of any document being signed to both identify them and indicate their intention to be bound by the document
- documents that have been signed electronically are appropriately stored and archived with protections and caveats so that the risk of signatures on the documents being copied and pasted from a ‘signed’ document which is stored in the document management system is reduced
- where the physical proximity of the witness is required and the same document must be signed and witnessed, any witness should electronically affix their signature in the execution block immediately after the signatory to both identify them as witness and indicate that they were physically present at the time of execution and witnessed the act of signing
- an appropriate method of electronic signature is used (eg an exchange of pdf versions, affixing facsimile copies of electronic signatures or use of a digital signing program)
- any signatory uses a strong password on their email account
- when production of hard copies is feasible, retaining a hard copy of the contract or deed which has been executed by the signatories
- where possible, consider ‘locking’ the signed documents to prevent further amendments being made to that document – noting that with current technology, very few methods of ‘locking’ a document are foolproof
- caution should be exercised when accepting a document that has been electronically signed by another party. Steps should be taken to require that party to establish to the agency’s reasonable satisfaction the elements of identity and reliability and to minimise the risk of fraud. For example, sending a letter to the signatory at a known mail address thanking them for providing their electronically signed document (and asking them to contact you immediately if they did not so provide it)
- clauses are added to relevant documents in which the parties state that they intend to sign electronically and will be bound by their electronic signatures
- the signatory confirms that there are no limitations under its current financial delegation instrument and in any other internal delegations that require execution of the documents by physical signature.

## Signing

### Signatures generally

The common law accepts that documents can be signed by a party in ways other than a traditional pen and ink signature (eg marks, pseudonyms, printed names and stamps).

The key characteristics of a signature as distinct from ordinary writing are that a signature and the act of signing should:

- evidence the signatory's **identity** (that is who signed the document)
- evidence the signatory's **intention to be legally bound** by the signed document.

Ideally, a signature will also assist in the **authentication** of a document (for example showing that a document is not merely a draft) and will **make it difficult for a signatory to deny** that they are bound by a document (absent evidence to the contrary such as fraud or forgery).

### Physical signatures, electronic signatures and digital signatures explained

It is helpful to distinguish between physical, electronic and digital signatures.

<i>Type of Signature</i>	<i>Description</i>	<i>Examples</i>
<b>Physical or 'wet ink'</b>	The method of marking a physical document to indicate assent to its terms	Handwritten signature made with ink on a physical document A person's mark on a physical document
<b>Electronic</b>	Distinct from physical signatures in that they leave no physical impression on the document that they relate to. Essentially, any electronic communication which satisfies the characteristics of a signature (ie evidencing identity and intention) has the potential to be a legally effective electronic signature	Typing a name in electronic format Scanning and inserting (pasting) a physical signature into an electronic document A name appearing in the 'From' field in an email Clicking an 'I accept' button
<b>Digital</b>	A type of electronic signature that incorporates a verification element, most often cryptographic authentication technology. Digital signatures under a Public Key Infrastructure (PKI) system provide high standards of assurance of signatory identity, document confidentiality and integrity and non-repudiation	To use digital signatures, a specialised platform or software is required Exercise caution in choosing the platform or software to ensure that it is based on PKI

## Documents which may be signed electronically

Under the *Electronic Transaction Act 1999* (Cth) (**ETA**) and similar State and Territory legislation,<sup>1</sup> many documents may be validly created and signed electronically. The ETA does not displace the common law.

Under the ETA if a law requires a person's signature, there are broadly 3 requirements for a valid electronic signature – being identification, reliability and consent.

- **Identification** – the recipient must be able to identify from the method of execution the person signing and confirm that the person signing intends to be bound by the information communicated (typically an electronic signature accompanied by the signatory's name and position).

<sup>1</sup> The relevant state and territory Acts are the *Electronic Transactions Act 2001* (ACT), the *Electronic Transactions Act 2000* (NSW), the *Electronic Transactions (Northern Territory) Act 2000* (NT), the *Electronic Transactions (Queensland) Act 2001* (Qld), the *Electronic Communications Act 2000* (SA), the *Electronic Transactions Act 2000* (Tas), the *Electronic Transactions (Victoria) Act 2000* (Vic) and the *Electronic Transactions Act 2011* (WA).

- **Reliability** – the method used to sign must be reliable, which is objectively determined by considering all relevant circumstances and the purpose for which the signature is required (it may be sufficiently reliable that a password protected email account is used to send the communication, or that software is used which requires a password or authentication before a digital signature is inserted).
- **Consent** – the counterparty to the document being electronically signed must agree to the document being signed electronically. If the Commonwealth is the receiving entity, it may impose technical requirements in connection with the signature.

While each document must be considered in context, examples of documents which may be signed electronically include:

- correspondence (including letters, memoranda of understanding and emails)
- contracts (preferably where there is no witnessing requirement – as to which see our comments below)
- work orders, extensions and variations
- deeds, including deeds poll, but only where these are governed by NSW, Victorian or Queensland law which permits deeds to be created in electronic form and signed and attested electronically
- land registry documents which may be signed and lodged through an Electronic Lodgement Network (ELN).

## **Solutions for documents which may not be signed electronically**

Certain documents may not be able to be signed electronically and for some documents electronic execution may be considered inappropriate (for instance high value or high risk arrangements). Options for signing such documents are discussed below.

Temporary modifications to statute made in response to the COVID-19 pandemic are summarised in the table in the Appendix to this fact sheet. The below discussion should be read subject to the specific temporary modified requirements in each jurisdiction.

### **Property documents requiring registration**

#### *Electronic Lodgement Network available*

These must be signed in accordance with the requirements of the titles office in each jurisdiction and where these cannot be registered through an ELN they will normally require original documents with wet ink signatures.

#### *Agreement to sign document via ‘wet ink’ at a later date*

Where wet ink signatures cannot be obtained and electronic signing and lodgement through an ELN is unavailable, consider securing a commitment from the counterparty in the form of an electronically signed agreement to execute the relevant instrument or dealing in registrable form with wet ink signatures at the earliest reasonable opportunity whereupon the electronically signed agreement would cease to have effect. Among the things to be considered here will be any relevant State based regulatory time limits concerning lodgement of instruments or dealings.

Specific issues in connection with land registry requirements will be covered in a separate publication.

## Deeds

### General

Fact Sheet 37 sets out the formalities for execution of deeds. At common law, a deed must be written on paper.

Based on the reasoning in recent cases in South Australia<sup>2</sup> and Victoria<sup>3</sup> there may be a shift generally towards greater acceptance that electronic execution of documents, including deeds, by a company under s 127 of the Corporations Act is possible, subject to satisfaction of certain requirements. However, in the absence of binding authority on the issue it is unsafe to assume that a deed signed electronically purportedly in accordance with s 127 is valid.

Note also the below discussion concerning the temporary modification to the operation of section 127 of the Corporations Act.

### *Approach in jurisdictions which permit the electronic creation and signing of deeds*

#### New South Wales

Since 22 November 2018, legislation in New South Wales has overridden the common law requirement that a deed must be on paper, and permits the electronic creation and signing of deeds.<sup>4</sup> There is some uncertainty surrounding whether the New South Wales legislation is confined to execution by individuals, or extends to corporations.<sup>5</sup>

#### Victoria

In Victoria, the *COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020* was made on 12 May 2020 under section 4 of the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic). The Regulations modified section 9 of the *Electronic Transactions (Victoria) Act 2000* (Vic) for the requirement for a signature to extend to a deed or a mortgage (cl 6). Section 9 provides that a requirement for the signature of a person is taken to have been met in relation to an electronic communication if:

- a method is used to identify the person and to indicate the person's intention in respect of the information communicated; and
- the method used was either:
  - as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
  - proven in fact to have fulfilled the functions described in the first dot-point, by itself or together with further evidence; and
- the person to whom the signature is required to be given consents to that requirement being met by way of the use of the method mentioned in the first dot-point.

The operation of section 9 of the *Electronic Transactions (Victoria) Act 2000* (Vic) is also modified by reg 11 such that use of an electronic signature is not of itself sufficient reason to refuse consent (whereas concerns about the integrity of the document may still be a valid reason). Further, reg 12 provides that any requirement that more than one signature appears on the same document is met where each signatory or consenting party receives every copy on which a signature appears.

The deed will not be invalid because it took place wholly or partly by means of one or more electronic communications as a result of reg 5 modifying sections 7(1) and (2) of the *Electronic Transactions (Victoria) Act 2000* (Vic) to include them as transactions within the scope of the Act (cl 5).

<sup>2</sup> *Bendigo and Adelaide Bank Limited (ACN 068 049 178) & Ors v Kenneth Ross Pickard & Anor* [2019] SASC 123

<sup>3</sup> *Bendigo and Adelaide Bank v DY Logistics Pty Ltd* [2018] VSC 558.

<sup>4</sup> Section 38A, *Conveyancing Act 1919* (NSW)

<sup>5</sup> Section 38 of the *Conveyancing Act 1919* (NSW) expressly states that that section does not affect execution by corporations, however it is not clear how this interacts with s 38A which does not contain any similar limitation

The modification for remote witnessing is discussed below.

#### **Queensland**

In Queensland, the *Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Amendment Regulation 2020* amended the *Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Regulation 2020*.

Under the regulation (as amended) an instrument that is to have effect as a deed may be made in the form of an electronic document and may be electronically signed (reg 12O(1)). This can be done without the consent to making it in that form by any other person (reg 12O(2) & (3)). The signing of an electronic deed does not require a witness (reg 12S). The instrument must contain a *conspicuous statement* that it is a deed (reg 12N(1)(b)). The instrument takes effect as a deed even if it is not written on paper or parchment, not an indenture or stated to be an indenture, or is not sealed or stated to be sealed (reg 12N(2)). Corporations may sign deeds in a way consistent with the Corporations Act, as amended (see below) (reg 12Q). Deeds may be signed using counterparts or true copies for separate signatures (reg 12R).

#### ***Solutions for jurisdictions which do not permit the electronic creation and signing of deeds***

##### **Using Contract form instead of a Deed**

For agreements which may originally be intended to be created in the form of a deed but are capable of satisfying the formalities of a contract (ie essentially where consideration is passing) and which do not need to be in the form of a deed, these may be reframed as a contract and signed electronically. It should also be noted that a document which purports to be a deed but which fails to satisfy the formalities of a deed may nevertheless be enforceable as a contract if it otherwise satisfies the requirements of a contract.

In deciding whether a deed might be reframed as a contract, the following benefits of deeds should be considered:

- they are valid without the need to establish that consideration has been provided
- the limitation period for enforcing rights under deeds is longer than under contracts
- they may be binding on each party immediately on that party signing and delivering their counterpart even in the absence of the other party signing
- there may be additional remedies available under some forms of deed
- they may contain provisions which appoint one party as the attorney of the other permitting the appointed attorney to sign (other) deeds.

##### **Agreement to execute Deed via wet ink in future**

A further option to consider is for the parties to electronically sign an agreement in electronic form which annexes the form of deed (and any other related document which the parties intend to be signed in hard copy with a 'wet ink' signature in due course) and which commits the parties to execute that or those annexed documents at the earliest opportunity, and in the interim confirms that the parties agree to comply with the terms of the annexed deed/documents as if they were formally executed. There would need to be consideration for this agreement to be enforceable as a contract, so this may be problematic if consideration does not pass under the annexed deed, and solutions within the terms of the agreement may be required. Note that an exchange of promises may be sufficient consideration.

An advantage of this approach is that it will ultimately result in the parties physically signing the annexed deed and other documents. At its simplest, this could be achieved by an exchange of emails annexing the agreed deed/documents and agreeing in the terms of the email both to be bound by them and to execute hard copies at the earliest opportunity.

### Signing pursuant to authority

A deed may be signed on behalf of another person or on behalf of a company if the authority of the person signing also derives from a deed (ie a power of attorney). Accordingly, this option will only be viable for deeds to be signed by that attorney or authorised person if the original authority can be granted via a deed.

## Witnessing of documents

### Generally

The witnessing requirement for deeds derives from statute and is required in all jurisdictions except Victoria.<sup>6</sup> It is not a formal requirement for the validity of a deed at common law.<sup>7</sup> A witnessed document will normally be better evidence of the identity of the signatory and their intention to be bound than a document that has not been witnessed. Even in the absence of a requirement at common law, it has long been the practice for an attesting witness to sign a deed in witness of the fact that the deed has been signed, sealed and delivered by the executing party.

Witnessing electronic or digital signatures for documents generally is legally and technologically complex. Subject to the statutory modifications in some jurisdictions which permit witnessing by audio visual link, the witness needs to be physically proximate when the signatory signs and must see the physical act of electronic execution, before attesting to that fact by themselves signing the same document. These requirements pose a difficulty in certain contexts, such as any requirements for social distancing.

Additionally, there is a risk that the process of electronic execution may be such that a separate but identical copy of the signed document is created which the witness then signs. This might occur where, for example, the document is electronically sent from one device (where the signatory's signature is applied) to another (where the witness's signature is applied). Online or cloud based services are more likely to operate in this way. This may be grounds on which the validity of execution of the deed may be challenged.

### Approach in jurisdictions which permit remote witnessing

#### New South Wales

In NSW, emergency legislation has removed the requirement for physical proximity for witnessing documents. The *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* provides that documents can now be witnessed and attested by audio visual link. For example, by using zoom or skype with video. The documents that can be witnessed by audio visual link include a will, power of attorney, deed, agreement, enduring guardianship appointment, affidavit and statutory declaration.

A person witnessing the signing of a document by audio visual link must (cl2(2)):

- observe the person signing the document (the signatory) sign the document in real time
- attest or otherwise confirm the signature was witnessed by signing the document or a copy of the document
- be reasonably satisfied the document the witness signs is the same document, or a copy of the document signed by the signatory
- endorse the document, or the copy of the document, with a statement:
  - specifying the method used to witness the signature of the signatory, and
  - that the document was witnessed in accordance with Sch 1 of the *Electronic Transactions Regulation 2017* (NSW).

<sup>6</sup> See Fact Sheet 37, Appendix 2

<sup>7</sup> *Goddard's Case* (1584) 2 Co Rep 4b at 5a; 3 Leon 100; 76 ER 396; *Garrett v Lister* (1661) 1 Lev 25; 83 ER 279



A witness may confirm the signature was witnessed by signing a counterpart of the document, or, if the signatory scans and sends a copy of the signed document electronically, by countersigning the document as soon as practicable after witnessing the signature (cl2(3)).

#### Victoria

In Victoria, the *COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020* provides for remote witnessing under the *Electronic Transactions (Victoria) Act 2000* (Vic). In order for the remote witnessing to be valid, the following requirements must be met:

- the witness writes their signature to signify that they have observed something
- the witness has observed that thing by audio visual link; and
- the witness writes a statement accompanying their signature that indicates that the thing was observed by audio visual link in accordance with the *COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020*.

As noted above in connection with deeds, the regulation permits signatures to appear on different copies of the document and this would extend to the signatures of witnesses.

The regulation also provides for electronic signing and remote witnessing with regard to the *Oaths and Affirmations Act 2018* (Vic), *Powers of Attorney Act 2014* (Vic) and *Wills Act 1997* (Vic).

#### Queensland

In Queensland, the *Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Regulation 2020* as amended by the *Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Amendment Regulation 2020* permits remote witnessing by audio visual link of certain types of documents. This includes affidavits, declarations and general powers of attorney. As noted above, deeds are not required to be witnessed.

A document may be witnessed by audio visual link if the witness (or if there is more than one witness for a particular type of document then at least one of them) is a special witness (eg an Australian legal practitioner or a notary public).

#### *Solutions for jurisdictions which do not permit remote witnessing*

Physical proximity for the purposes of witnessing could include being present at a distance, such as outside the room in which the document is signed and observing through a window. In this scenario, signing the same physical document as the witness within a reasonable time after the signatory signs at or near the same location, even if at the time the witness signs they are not physically proximate to the signatory.

Assuming that the witness is physically proximate to the signatory and saw that person sign the document, either of the following 2 methods would also satisfy the requirement that the same document is signed and witnessed:

- inserting the signatures of the signatory and witness into the same electronic document at the same time on the same device, and in order to do this the signatory and the witness would be in the same room at the time these steps occur
- using a digital platform which replicates the physical process as closely as possible (eg a digital platform could be used which allows for the same electronic document to be signed on the same device, and includes steps through which the signatory verifies that the witness is physically present, and certain data such as time, the device's Internet Protocol (IP) address, etc is recorded for each signature).

Normally contracts do not require witnessing but it would be prudent to check the requirements of any legislation that applies to the arrangement.

## Documents signed by Corporations Act companies

### *Emergency legislation modifications*

The *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* (Cth) modifies the operation of sections 127(1) and 129(5) for a period of 6 months beginning 6 May 2020. This determination has been made under section 1362A of the Corporations Act, which was inserted by Schedule 8 of the *Coronavirus Economic Response Package Omnibus Act 2020* (Cth).

Under the determination, a company may execute a document, including a document in electronic form, without using a common seal if each person specified in paragraph 127(1)(a), (b) or (c) (ie the company officers), as the case requires, of the Corporations Act either:

- signs a copy or counterpart of the document that is in a physical form; or
- complies with the following requirements for an electronic communication:
  - a method is used to identify the person in the electronic communication and to indicate the person's intention in respect of the contents of the document; and
  - the method:
    - is as reliable as appropriate for the purpose for which the company is executing the document, in light of all the circumstances, including any relevant agreement; or
    - is proven in fact to have fulfilled the functions of identification and proof of intention as to the content of the document, by itself or together with further evidence.

The copy, counterpart or electronic communication must include the entire contents of the document, but need not include the signature of another person signing the document nor any material included in the document because of section 6(4) of the determination.

Under the determination, a person may assume in accordance with section 129(5) of the Corporations Act that a document including an electronic document has been duly executed by the company if the document appears to have been signed in accordance with the above requirements.

The Explanatory Statement to the determination provides that the determination 'alters the operation of section 127 of the Act to give certainty that when company officers sign a document electronically (including an electronic document), the document has been validly executed'. The Explanatory Statement also notes that while it is in effect, there is no need for a 'single static document' in order for section 127 to be complied with, and that the entire process of executing a document can be carried out using electronic communications.

Electronic execution is valid in all jurisdictions under the modified operation of section 127 of the Corporations Act, and a counterparty can rely on the presumptions in section 129(5) of the Corporations Act where an electronic document is electronically signed. This extends to deeds signed by a Corporations Act company in this way in all Australian jurisdictions.

### *Generally*

There are a number of execution methods available to companies<sup>8</sup> – including execution by a person holding a power or attorney or a person who is otherwise authorised to execute a document by the Company (for example through a board minute).

Sometimes it is necessary or desirable for a document to be executed by a Company pursuant to s 127(1) of the Corporations Act so that another party can rely on the presumption in s 129(5) of that Act that a document executed in accordance with s 127(1) by a director and company secretary or 2 directors has been duly executed.

Generally (and subject to the below discussion concerning temporary modifications to the operation of the Corporations Act) it is possible, but not settled, that execution under s 127(1) can occur electronically. The ETA does not apply to execution by companies under s 127 of the Corporations Act. However, as mentioned above in the section headed 'Deeds', recent authorities suggest that electronic execution

<sup>8</sup> See Fact Sheet 37, page 2

may occur under s 127(1) on the basis that the requirement of 'signing' in that section may be satisfied if there is personal authentication by the signatories and a single document is signed by both officers.

In relation to deeds, signing in accordance with s 127(1) could displace the common law requirements including the paper requirement. Again, the position is not settled and caution should be exercised.

If you cannot rely on the presumption in s 129(5) of the Corporations Act, you must satisfy yourself that the person executing the document on behalf of the company is duly authorised to do so.

Fundamentally this means that you should seek evidence of their authority. For example:

- **execution by power of attorney:** ensure that the document is signed by an attorney (being an individual) under a power of attorney and evidence of the attorney's appointment by the company is provided<sup>9</sup>
- **execution under board authority:** request a copy of the board authority and confirm that it applies to the document that is being executed
- **execution as permitted under the company's constitution:** if the constitution of the company sets out another method of execution this could be adopted if legally permissible for the type of document (for example the constitution might specifically allow electronic execution)
- **execution under s127(1) of the Corporations Act:** if execution must proceed purportedly in reliance on s 127(1) of the *Corporations Act*, consider:
  - including in the agreement an electronic execution clause and also warranties as to the authority of the persons signing similar to the statutory assumptions in s129(5)
  - requiring evidence of personal authentication of the officer signatories, and that a single electronic document was signed
  - requiring evidence of the identity and actual authority of the signatory or signatories to the relevant documents (eg board minutes or company resolutions).

### *Commonwealth companies*

Commonwealth companies could put in place powers of attorney or board resolutions to provide appropriate authority for the business of the company to be conducted efficiently.

## Related issues

### Legal advice

For high-value or high-risk arrangements where there are obstacles to execution occurring in the traditional way or where the law as it relates to electronic execution is unsettled, legal advice should be obtained.

### Physical signing with electronic delivery

This fact sheet focuses on electronic execution and does not extend to detailed consideration of effective binding agreements or deeds which may be created through a process of printing a physical document, having that document physically signed (and witnessed where necessary) and then scanning and sending that document to the counterparty. Where mail or courier services are accessible, the physical document could be sent or counterparts exchanged. This approach avoids some of the potential uncertainties connected with electronic execution and may be suitable for some documents, but not all.

### Counterparts using different execution methods

There is no compelling legal reason that a deed or a contract could not be executed in counterpart using different valid methods of execution for each counterpart. As noted in Fact Sheet 37, the legal effectiveness of exchange of counterpart deeds is somewhat unclear but it is a commercial reality.

This solution might be considered to accommodate the most reliable method of execution which can practically be achieved by each party in their own circumstances, and the level of risk each are prepared to absorb.

<sup>9</sup> See Fact Sheet 37, page 9

As noted earlier, deeds executed in counterpart can be binding on a party as soon as they are executed notwithstanding that execution by another party or exchange has not occurred.

### Early engagement

Consider early engagement with the other parties to any arrangement to raise the prospect of electronic signing as a method of execution and to reach agreement as to how the parties will approach this, including practical matters and any specific legal drafting which the resulting agreement will contain.

### Making legislative instruments

Under the *Legislation Act 2003* (Cth), a legislative instrument is 'made' by the signing, sealing or other endorsement of the instrument by the person or body empowered to make it. A Minister or other rule-maker could probably 'make' such an instrument by personally applying an electronic signature, on the basis that this would constitute their endorsement (approval) of the instrument.

Where this is done, it would be advisable that a person witness the application by the Minister of their electronic signature and make a contemporaneous file note to that effect, to ensure that evidence can be provided should there be a question raised in future as to whether it was the Minister who endorsed the document. Alternatively, it may be that the electronic signature could be locked to the Minister personally and evidence provided, if required, that only the Minister could access and apply it.

### Current legislative developments in response to COVID-19

At the date of preparing this fact sheet, emergency legislation has been enacted by the Commonwealth and by some states and territories to create regulation-making and declaration-making powers which could be used to provide for electronic signing and the modification of requirements such as witnessing.

The Appendix to this fact sheet summarise relevant emergency legislation and affected laws, and the related regulations and declarations.

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## APPENDIX TO FACT SHEET 38

TABLE OF COVID-19 RESPONSE LEGISLATION RELEVANT TO ELECTRONIC EXECUTION ACROSS THE COMMONWEALTH, STATES AND TERRITORIES

Jurisdiction	COVID-19 Response Legislation	Summary of power/amendment	Legislation to which power extends	Declaration / Regulation description and effective date
Commonwealth	<i>Coronavirus Economic Response Package Omnibus Act 2020</i> (the Omnibus Act) (Assent 24/3/2020)	Various Commonwealth legislation was amended to facilitate different elements of the Commonwealth's response package	Legislation relevant to electronic execution amended by the Omnibus Act includes: <i>Corporations Act 2001</i>	The Omnibus Act inserted section 1362A into the Corporations Act which, among other things, permits the Minister to modify a provision of the Corporations Act by legislative instrument  The <i>Corporations (Coronavirus Economic Response) Determination (No. 1) 2020</i> (Cth) has been made under section 1362A of the Corporations Act  The effect of this determination as it relates to electronic execution is discussed in the body of this fact sheet (Effective date 6/5/2020)
	<i>Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020</i> (Assent 9/4/2020)	Minister responsible for provision can, by legislative instrument, determine that the provision is varied, rendered inapplicable or replaced by another provision (Sch 5, cl 1(2))	Determinations may be made in relation to a provision of any Act or legislative instrument that requires or permits a 'relevant matter' (eg signature, witnessing, attestation) (Sch 5, cl 1(1))	No determinations have been made as at the date of publication of this fact sheet
Australian Capital Territory	Legislation is yet to be enacted as at the date of publication of this fact sheet			
New South Wales	<i>COVID-19 Legislation Amendment (Emergency Measures) Act 2020</i> (Assent 25/03/2020)	Regulations may be made under any relevant Act (listed to the right) to alter arrangements for signing documents, witnessing signatures (including requirements for certification and verification of identity) or attesting documents (s17)	<i>Conveyancing Act 1919, Oaths Act 1900, Guardianship Act 1987, Succession Act 2006, Powers of Attorney Act 2003, Electronic Transactions Act 2000</i> and any other Act administered by the Attorney General	<i>Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020</i>  The regulation provides in a new Schedule 1 to the <i>Electronic Transactions Regulation 2017</i> that witnessing of documents can be by audio visual link if the conditions in cl 2(2) of Sch 1 are complied with  Document is defined to include a will, power of attorney, deed, agreement, affidavit and statutory declaration (Effective date 22/4/2020)
	<i>COVID-19 Legislation Amendment (Emergency Measures—Attorney General) Act 2020</i> (Assent 14/5/2020)	Section 17 of the <i>Electronic Transactions Act 2000</i> is amended to allow that regulations may be made under that section or under another Act to provide for matters including making documents in particular forms, execution and provision of documents (Sch 1, Subsch 1.3)	Legislation relevant to electronic execution amended by the Omnibus Act includes: <i>Electronic Transactions Act 2000</i>	No relevant regulations have been made as at the date of publication of this fact sheet

	<b>COVID-19 Response Legislation</b>	<b>Summary of power / amendment</b>	<b>Legislation to which power extends</b>	<b>Declaration / Regulation description and effective date</b>
<b>Northern Territory</b>	Legislation is yet to be enacted as at the date of publication of this fact sheet			
<b>Queensland</b>	<i>COVID-19 Emergency Response Act 2020</i> (Assent 23/04/2020)	Regulations may be made modifying or suspending certain requirements, including signing, witnessing, verifying or attesting documents (s9)	The regulations may apply to any Act or a common law rule that requires or permits any of the relevant matters in s9(1)	<i>Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Regulation 2020</i> amended by the <i>Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Amendment Regulation 2020</i> (Effective date 22/5/2020)
<b>South Australia</b>	<i>COVID-19 Emergency Response Act 2020</i> (Assent 9/4/2020)	Governor may suspend or modify any requirement under an Act, law or instrument relating to preparation, signature, witnessing, attestation, etc of any document (s16)	The regulations may apply to an Act or law, or an instrument, relating to the preparation, signing, witnessing, attestation, certification, stamping or other treatment of any document	No regulations have been made as at the date of publication of this fact sheet
<b>Tasmania</b>	<i>COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020</i> (Assent 27/3/2020)	The Minister may declare, by notice, that any requirement under any Act for an action to be taken physically (such as a signature), or evidenced in a document, may be taken or evidenced by electronic means (s17)	The declaration may alter the requirements of any Act or instrument of a legislative character	No relevant declarations have been made as at the date of publication of this fact sheet
<b>Victoria</b>	<i>COVID-19 Omnibus (Emergency Measures) Act 2020</i> (Assent 24/04/2020)	Regulations may be made to modify or disapply the application of a 'Justice Act provision' that provides for or regulates the matters listed in s4 (eg witnessing, executing, signing) (s4)	The regulations may apply to a 'Justice Act Provision' as defined in s3, including Acts administered by the Attorney General such as the <i>Electronic Transactions (Victoria) Act 2000</i> and <i>Property Law Act 1958</i>	The <i>COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020</i> The regulation provide for electronic signatures, witnessing the signing of documents by audio visual link, and related matters The relevant Acts are the <i>Electronic Transactions (Victoria) Act 2000</i> , <i>Oaths and Affirmations Act 2018</i> , <i>Powers of Attorney Act 2014</i> , <i>Wills Act 1997</i> (Effective date 12/5/2020)
<b>Western Australia</b>	Legislation is yet to be enacted as at the date of publication of this fact sheet			