

ELECTRONIC SIGNATURES AND REMOTE WITNESSING

ANDREW SUTHERLAND AND LACHLAN SADLER

JULY 2020

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INTELLECTUAL PROPERTY
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INTRODUCTION

Key topics

- Common law relating to signing agreements and deeds and witnessing requirements
- *Electronic Transactions Acts*
- Temporary COVID-19 measures

COMMON LAW - AGREEMENTS

Agreements - signatures

- There is no universal requirement that agreements must be signed
 - Oral agreements can be binding and enforceable
 - Written agreements can be binding and enforceable even if they are unsigned (acceptance can be implied from the offeree's conduct).
- Any requirement that an agreement needs to be "signed" arises from legislation.
- The courts have recognised electronic signatures in relation to agreements for many years and have generally broadly interpreted what amounts to a "signature" in that context.

COMMON LAW - AGREEMENTS

What constitutes a “signature”?

- *Bassano v Toft* [2014] EWHC 377 (QB) (Popplewell J [40]): “Generally speaking a signature is the writing or otherwise affixing of a person’s name, or a mark to represent his [or her] name, with the intention of authenticating the document as being that of, or binding on, the person whose name is so written or affixed. The signature may be affixed by the name being typed in an electronic communication such as an email.”
- *Stuart v Hishon* [2013] NSWSC 766 (Harrison J [34]): “Mr Stuart typed his name on the foot of the email. He signed it by doing so. It would be an almost lethal assault on common sense to take any other view.”

COMMON LAW - DEEDS

Deeds

- At common law, deeds are subject to a number of formal requirements:
 - a deed must be “signed, sealed and delivered” and made of “paper, parchment or vellum”
 - the parties must have intended to create a deed
- Legislation has modified these requirements in different contexts to varying degrees. There are differences between the States and Territories.
- At the Federal level, s 127(3) *Corporations Act 2001* provides that an Australian company can execute a document as a deed if it is expressed to be executed as a deed and it is executed in accordance with s 127(1) (directors / director and company secretary) or s 127(2) (common seal).
- This section does not override the common law requirements for deeds. There is also some debate about whether all types of acts that have been held to constitute “signatures” of agreements are enough to effectively “sign” a deed.
- As a result, at common law, all deeds should be printed on paper and signed in “wet ink”.

WITNESSING

- **Witnessing not required**

- Agreements executed by individuals (including attorneys on behalf of Australian companies)
- Deeds executed in Victoria by individuals (including attorneys)
- Agreements and deeds executed by Australian companies in accordance with s 127(1) *Corporations Act* or by a company's authorised representative

- **Witnessing required**

- Deeds executed by individuals (including attorneys) outside Victoria
 - Agreements and deeds executed by a company's common seal in accordance with s 127(2) *Corporations Act*
- Even if witnessing is not legally required, it is still **best practice** for governance reasons and because doing so helps to prove a party's execution (if there is ever a dispute about that).
 - Certain documents may have special witnessing requirements arising from legislation. For example, under the *Powers of Attorney Act 2014* (Vic), an enduring power of attorney must be witnessed by two witnesses.

THE ETAS

ELECTRONIC TRANSACTIONS ACTS (the ETAs)

- The *Electronic Transactions Act 1999* (Cth) (and the corresponding State and Territory legislation) are intended to, amongst other things, facilitate the use of electronic transactions in Australia.
- Section 8: a transaction is not invalid because it took place by electronic communications. In other words, the ETAs validate such transactions if they would otherwise be invalid for that reason.
- Section 10: a requirement under Commonwealth law for a “signature” is met in relation to an “electronic communication” if:
 - 1. Identity:** a method is used to identify the person signing and indicate their consent to the document.
 - 2. Reliability:** the method was as reliable as appropriate for purpose for which the communication was generated/communicated in all the circumstances, including any agreement.
 - 3. Consent:** where the “receiving entity” is a Commonwealth body, its requirements must have been met; otherwise, the “receiving entity” must have consented to the method used.

THE ETAS

Exceptions to the ETAs

- Many laws are exempt from the ETAs. The laws exempt from the Commonwealth ETA are listed in Schedule 1 to the *Electronic Transactions Regulations 2000* (Cth).
- General exemptions include:
 - 1. Companies:** s 127 *Corporations Act* is exempted from the Commonwealth ETA. As a result, the common law applies where a company purports to execute an agreement electronically in accordance with s 127(1). There is some debate about whether the presumptions in s 129 are available if a company executes an agreement electronically in accordance with s 127(1).
 - 2. Documents that need to be witnessed:** the ETAs in NSW, Qld, SA and WA do not apply to witnessing requirements. As a result, the common law would apply in those circumstances if a witness purported to sign electronically.
 - 3. Powers of attorney and wills**

THE ETAS

Exceptions to the ETAS

- **Deeds:** given the purpose of the ETAs, an electronically-signed deed should not be invalid simply because it was executed electronically. However, it has not been settled whether or not the ETAs override the common law requirement of “paper, parchment or vellum”. As a result, electronic deeds may not take effect as deeds under the ETAs and will be invalid and unenforceable unless the Court is satisfied they can be enforced as agreements.
 - The risks of an electronically-signed deed not taking effect as a deed and being invalid and unenforceable can be reduced by printing out a copy as an “original” document (if this is possible given the electronic method which the parties intend to use to sign the document) and also by including a counterparts clause in the deed providing that the parties agree the deed can be executed in electronic counterparts.
 - However, to remove the risk that the deed being invalid and unenforceable as a deed, the safest approach is to print out the deed on paper and formally sign it in “wet ink”.

TEMPORARY COVID-19 MEASURES

- States, Territories, and the Commonwealth have passed temporary laws to allow for electronic execution of documents during the COVID-19 response measures

COMPANIES

- The *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* (Cth) gives “certainty” that a document signed pursuant to s 127 electronically (including an electronic document) has been validity executed. The entire process can be conducted electronically while these measures apply. Other parties can rely on the s 129 assumptions
- Must satisfy essentially the same requirements as the ETA
- Determination came into effect on 5 May 2020 and will be automatically repealed after 6 months

FEDERAL COURT

- The *Special Measures in Response to COVID-19 (SMIN-1)* provides that the Court will temporarily accept documents (including affidavits) signed electronically (including by typing a name). The Court will also accept unsworn affidavits which will later be sworn or affirmed, if required

TEMPORARY MEASURES

VICTORIA

- Temporary measures (currently set to) expire on 24 October 2020.

TYPE OF DOCUMENT	ELECTRONIC SIGNATURE?	REMOTE WITNESSING?
Deeds	✓	Witness not required
Mortgages		✓
Wills		
Powers of Attorney		
Statutory Declarations		
Affidavits		

TEMPORARY MEASURES

NEW SOUTH WALES

- Temporary measures (currently set to) expire on 22 October 2020

TYPE OF DOCUMENT	ELECTRONIC SIGNATURE?	REMOTE WITNESSING?
Deeds	✓	
Wills		
Powers of Attorney		✓
Enduring Guardianship		
Statutory Declarations		
Affidavits		

TEMPORARY MEASURES

QUEENSLAND

- Temporary measures (currently set to) expire on 31 December 2020

TYPE OF DOCUMENT	ELECTRONIC SIGNATURE?	REMOTE WITNESSING?
Deeds	✓	Do not need to be witnessed if requirements are met
Mortgages		
Wills	✓	✓
Powers of Attorney		
Statutory Declarations		
Affidavits	✓	

TEMPORARY MEASURES

OTHER

- ACT has also made similar regulations
- Other States have not introduced any temporary regulations and therefore the default position applies
- Some States have passed laws allowing them to make regulations but have not done so yet

EXAMPLES

AN INDIVIDUAL EXECUTING A DEED IN NEW SOUTH WALES

1. The **default position** is that the deed must be physically signed and witnessed. However, under the NSW **temporary measures**, the deed may be signed and witnessed electronically.
2. Set up an **audiovisual link** (for example, Skype or Zoom) between the signatory and witness.
3. The witness should **confirm the identity** of the signatory, for example via a Driver's Licence.
4. While sharing their screen, the signatory should **insert their electronic signature**, name and date on the deed using either the built-in signing feature of most PDF readers or more sophisticated specialty software such as DocuSign.
5. The signatory should then send a copy of the executed deed to the witness, who should use the same method to **insert their own electronic signature**, name and date as witness.
6. The witness signature block should **include a statement** that the document was "signed and witnessed over audiovisual link in accordance with clause 2 of Schedule 1 to the *Electronic Transactions Regulation 2017*"

EXAMPLES

TWO COMPANIES EXECUTING AN AGREEMENT IN VICTORIA

1. The **default position** is that the companies cannot execute electronically pursuant to s 127 and rely on the Commonwealth ETA (as noted, a company can execute a document electronically without relying on the Commonwealth ETA).
2. However, under the **temporary measures**, companies can rely on the ETA.
3. As one of the requirements of the ETA is consent, the agreement should **include a clause** stating that the parties agree that the document can be executed with electronic signatures using electronic counterparts and it should identify the method which will be used for that purpose.
4. The directors or director/secretary of one company should **execute the document using their electronic signatures** (using a simple PDF reader or software such as DocuSign) in accordance with s 127 and then send the document to the other party.
5. The other company should **execute a copy of the signed agreement** (or their own counterpart) using the same software.

SUMMARY – DEEDS AND AGREEMENTS

TYPE OF DOCUMENT	ELECTRONIC SIGNATURE?		REMOTE WITNESSING?	
	Normal/default	COVID	Normal/default	COVID
Agreements				
Australian companies	Yes (but note s127 / ETA issue)	Yes	Witness not legally required	
Individuals (inc attorneys)	Yes			
Deeds				
Australian companies	No	Yes	Witness not legally required	
Individuals (inc attorneys)		Yes (Vic, NSW, Qld) otherwise no	No (witness not required in Vic)	<ul style="list-style-type: none"> • NSW – yes • Vic/Qld – not required • otherwise no

KEY TAKE AWAYS

When determining whether a document can be electronically signed / remote witnessed, consider:

- 1. Relevant jurisdiction.** The Commonwealth ETA applies to “laws of the Commonwealth” (ie, where the document is made for the purposes of a Commonwealth statute). Otherwise, the ETA in the state where the document is signed will apply. If there is any doubt, abide by the most restrictive ETA.
- 2. Type of document.** For example, if the document is a deed, special requirements may apply.
- 3. Temporary measures.** Check whether the temporary measures apply.
- 4. Signatories.** Where a company is signing, the requirements of the *Corporations Act* (as modified by temporary measures) apply.
- 5. Witnessing.** If the document must be witnessed, check that it is permissible to do this remotely under the relevant temporary measures. Ensure you comply with any remote witnessing requirements.
- 6. Receiving entity.** If there is a Commonwealth “receiving entity”, any technical requirements they have set out must be satisfied.