

## Article Information

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## Playing It Safe - Are your contracts binding and enforceable on all parties?

**When directors and company secretaries sign documents on behalf of a company, they must hold the proper authority and also the capacity to do so pursuant to section 127(1) of the Corporations Act 2001 (Cth) (Act). In the event that the formal execution provisions in section 127(1) are not strictly followed, there is a risk that the court may find the documents were not binding on the company purporting to sign them and ultimately unenforceable against that company.**

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### Execution of Documents under the *Corporations Act*

Under section 127(1) of the Act, a company may execute a document with or without a common seal. If a company elects to execute a document without a common seal, that document must be signed by either:[\[1\]](#)

- two directors of the company;
- a director and a company secretary; or
- for a proprietary company that has a sole director who is also the sole company secretary, that director.

Consequently, signing pursuant to section 127 will allow reliance on the statutory assumptions under section 129 of the Act.

### Sole Director Issue

While the ASIC register allows the registration of single director proprietary companies (i.e. sole director appointment and no company secretary appointment), the Act does not permit for the signing and execution of documents by that sole director on behalf of such company to bind the company where that sole director has not also been appointed as the sole secretary. This means that single director proprietary companies cannot rely on section 127 of the Act to properly execute a document and consequently, cannot rely on the relevant statutory assumptions under section 129 as to signing and enforceability.

However, the Act does provide clarity surrounding the execution of documents for a sole director who is also appointed as the sole secretary pursuant to section 127(1)(c). Accordingly, it is essential for the sole director of a proprietary company to ensure that they are also properly appointed as the company's sole secretary *prior* to signing any documents to be relied on, in order to properly bind the company to that document. This ensures that the signing provisions under section 127(1)(c) of the Act are strictly adhered to and the company and other parties to that document may rely on the section 129 assumptions.

### Improper Execution of Documents: A case study

In the case of *Knight Frank Australia Pty Ltd v Paley Properties Pty Ltd*,[\[2\]](#) a sale of land contract for \$1.5 million was signed by the first director of De Chellis Homes Pty Ltd, and counter-signed by Paley Properties Pty Ltd. The first director struck out the words 'Sole director/ Sole secretary', indicating that the company had 2 or more directors. The second director did not sign the contract. The overarching issue was whether the contract was binding despite the absence of the second director's signature. The court held that without the second director's signature, the contract was not properly executed under section 127(1) of the Act.[\[3\]](#) Hence, the contract was unenforceable and the purchaser was not bound by

its terms.

The outcome of this case serves as a reminder to directors, company secretaries and sole directors / sole secretaries that in order to validly sign a document on behalf of a company, they must sign in accordance with the formal provisions set out in section 127(1) of the Act to ensure that the company is properly bound and ultimately that the document is binding and enforceable on that company.

### **Importance of Proper Execution**

Properly appointing officers when signing and executing documents under section 127(1) of the Act is essential for three main reasons:

1. **Enforceability:** Appointing the proper officers and signing in accordance with the formal provisions in section 127(1), binds both parties to the document. If the document is not executed properly, it may not be enforceable (as seen in *Knight Frank v Paley Properties*). Following the proper signing provisions ensures that the document is binding and reduces delays in enforcement.
2. **Relying on section 129:** Executing documents under the section 127(1) allows parties to rely on the statutory assumptions in section 129 of the Act. These include the assumptions that the directors and company secretaries have been duly appointed and have authority to exercise their powers,<sup>[4]</sup> and that documents have been duly executed without a seal.<sup>[5]</sup>
3. **Executing as Deed:** If a document is signed accordingly with section 127(1) of the Act, a company may execute a document as a deed, assuming that document is expressed to be executed as a deed under section 127(3).

### **Summary**

- Only 2 directors, a director and a company secretary or a sole director and sole company secretary can validly execute a document on behalf of a company pursuant to section 127(1) of the Act;
- For single director proprietary companies, you must ensure that the sole director is also properly appointed as the company's sole secretary *prior* to signing any documents. This allows parties to rely on section 127(1)(c) and ultimately the assumptions pursuant to section 129 of the Act.
- Proper execution of documents under section 127(1) allows parties to be bound by the document and provides for reliance on the statutory assumptions pursuant to section 129 of the Act.

*For further information relating to the execution of documents on behalf of a company under the Corporations Act, please contact Banking and Finance Partner, Greg Conomos.*

<sup>[1]</sup> *Corporations Act 2001* (Cth) s 127(1).

<sup>[2]</sup> [2014] SASCFC 103.

<sup>[3]</sup> *Ibid* 103 [88] (Blue J).

<sup>[4]</sup> *Corporations Act 2001* (Cth) s 129(2).

<sup>[5]</sup> *Corporations Act 2001* (Cth) s 129(5).