

## Article Information

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## Electronic signatures, remote witnessing and COVID-19

**Restrictions on movement and gatherings in response to the COVID-19 pandemic have made arranging for wet signature execution, and the witnessing of such signatures where necessary, impractical, if not effectively impossible, in many cases.**

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Despite advances in electronic authentication methods, wet signatures on paper documents still retain primacy as the means of indicating agreement to the contents of a document. However, restrictions on movement and gatherings in response to the COVID-19 pandemic have made arranging for wet signature execution, and the witnessing of such signatures where necessary, impractical, if not effectively impossible, in many cases. They have brought into focus the limitations of system that gives primacy to wet signature execution of documents. Law reforms in the various Australian jurisdictions have sought to overcome this problem, albeit temporarily. This article provides an overview of those reforms.

### Commonwealth

Under the Commonwealth *Electronic Transactions Act*, a requirement for a signature under a Commonwealth law is taken to have been met in relation to an electronic communication if, in general terms, a method is used to identify the person and their intention in respect of the information communicated, that method is reliable and appropriate in the circumstances or is proven in fact to have identified the person and indicate their intention in relation to the information communicated, and the method complies with the requirements stipulated by the recipient or is otherwise consented to by the recipient.<sup>[1]</sup> However, many Commonwealth laws are excluded from the operation of the *Electronic Transactions Act*, including the *Corporations Act 2001*.<sup>[2]</sup> This is problematic for the execution of documents by companies.

To overcome this problem, the Commonwealth Treasurer enacted the *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* (the **Determination**), modifying the operation of s 127(1) of the *Corporations Act* to permit remote and electronic execution of documents by companies. It provides that, in addition to methods currently permitted under s 127(1), a company may execute a document without a common seal if two directors, a director and a secretary or the sole director and secretary either:<sup>[3]</sup>

- each sign a physical copy or counterpart; or
- each use an electronic method to identify themselves and indicate their intention in respect of the contents of the document, and that method is either reliable or appropriate in the circumstances or is proven in fact to have fulfilled the functions of identifying the person and indicating their intention (essentially mirroring s 10(1)(b) of the *Electronic Transactions Act*).

The Determination also extends the entitlement to assume that a document apparently executed in accordance with s 127 has been duly executed by the company to documents executed in accordance with the modified requirements in the Determination.<sup>[4]</sup>

### New South Wales

Australia's premier state also has an *Electronic Transactions Act* permitting signature by electronic means in substantially the same terms as its Commonwealth counterpart.<sup>[5]</sup> Unlike the Commonwealth however, the list of exclusions is not as extensive, being largely limited to the lodgement, filing or production of documents in connection with court processes, documents under certain public administration statutes, personal or postal service of documents and documents to be verified or attested to under signature by someone other than their author. NSW legislation also specifically permit deeds to be made in electronic form, though witnessing and attestation of a signature is problematic if done remotely.

Shortly after the announcement of COVID-19 restrictions, on 25 March 2020 the NSW Parliament enacted omnibus legislation amending the *Electronic Transactions Act* to include a temporary regulation-making power specific to the COVID-19 pandemic.[\[6\]](#) Pursuant to that power, regulations[\[7\]](#) were made permitting:

- a signature to be witnessed by audio-visual link; and
- arrangements (e.g. verifying the identity of the signatory or swearing/affirming an affidavit) in relation to witnessing signatures and the attestation of documents to be performed by audio-visual link.

The witnessing of a signature must be performed in real time and the witness must endorse the document, or a copy of the document, with a statement specifying the method of witnessing and that it was witnessed in accordance with the COVID-19 regulation. The witness can confirm the signature was witnessed by either signing a separate counterpart of the document or a scanned copy of the signed document sent electronically by the signatory.

These provisions apply to deeds, wills, powers of attorney and affidavits, among other documents. They overcome the problems that physical distancing poses for witnessing and attestation. However, they do still retain the primacy of wet signatures, eschewing the opportunity to implement reforms permitting secure electronic authentication methods to replace the authentication function that witnessing currently serves. These provisions lapse after 6 months, though they can be extended by regulation for up to 12 months in total.

## **Victoria**

The signature provisions in Victoria's electronic transactions statute[\[8\]](#) mirror those of NSW and the Commonwealth.

COVID-19 omnibus legislation enacted by the Victorian Parliament permits regulations to be made for the witnessing, execution or signing of legal documents, including deeds, powers of attorney, contracts and wills. Regulations[\[9\]](#) were so made, permitting deeds and mortgages (among other things) to be signed electronically and for the signature (or any other thing that needs to be observed, such as identity documents as part of a verification of identity procedure) to be witnessed remotely by audio-visual link. An extended meaning of "transaction" is prescribed for the *Electronic Transactions (Victoria) Act*, for which a requirement for a signature can be satisfied in accordance with s 9 of that Act.[\[10\]](#)

Similarly to the NSW provisions, a person who witnesses something remotely in accordance with the COVID-19 must include with their signature a statement that the witnessing was done by audio-visual link in accordance with the COVID-19 regulation.[\[11\]](#)

The Victorian regulation also expressly contemplates the signing of a document electronically in counterparts, imposing an additional requirement that each person whose signature is required on the document or whose consent to electronic signing is required receives a copy of each signed counterpart.[\[12\]](#) As with its NSW counterpart, this latter requirement seems designed for wet signatures as opposed to fully electronic authentication methods.

The omnibus legislation also amended the *Oaths and Affirmations Act 2018 (Vic)*, dealing with oaths, affirmations, affidavits and statutory declarations, to permit:

- a deponent or authorised affidavit taker to meet a requirement for signature or initialling by electronic means;[\[13\]](#)
- something required to be done by the deponent or authorised affidavit taker in each other's presence to be done by means of audio link or audio-visual link;[\[14\]](#) and
- a scanned hard copy or electronic copy to be signed or initialled instead of the original affidavit or other document.[\[15\]](#)

## **Queensland**

The signature provisions in Queensland's electronic transactions statute[\[16\]](#) mirror those of the jurisdictions discussed above.

Following a similar model to Victoria (although Queensland made its statute over a month before Victoria did), the Queensland Parliament enacted omnibus legislation[\[17\]](#) conferring a broad regulation-making power in relation to, among other things, the signing of documents, witnessing of signatures, verification of identity and attestation of a document. At the time of writing almost a month later, specific regulations have been made in relation to wills, enduring powers of attorney and advance health directives permitting presence and witnessing by audio-visual link. However, general regulations facilitating electronic signature and attestation of broad effect similar to NSW and Victoria have not yet been made.

## **South Australia**

The signature provisions in South Australia's electronic transactions statute<sup>[18]</sup> mirror those of the jurisdictions discussed above.

Like Victoria and Queensland, South Australia enacted omnibus legislation<sup>[19]</sup> that contains a general regulation-making power in relation to the "signing, witnessing, attestation, certification, stamping or other treatment of any document".<sup>[20]</sup> However, at the time of writing the only use of this regulation-making power has been to allow a greater range of persons to take a statutory declaration under SA law.<sup>[21]</sup> Broader permission for electronic signatures and remote witnessing or attestation as in other jurisdictions has not been enacted.

In relation to remote witnessing, the Act specifically provides that a requirement for two or more persons to be physically present will be satisfied if the persons meet or the transaction takes place remotely using audio link, audio-visual link or any other means of communication prescribed by the regulations. However, regulations specifically exclude any "requirement that a person be physically present to witness the signing, execution, certification or stamping of a document or to take any oath, affirmation or declaration in relation to a document"<sup>[22]</sup> from the remote meeting permission, thereby preventing the kind of remote witnessing and attestation of signatures or verification of identity permitted in NSW and Victoria.

### **Tasmania**

The signature provisions in Tasmania's electronic transactions statute<sup>[23]</sup> mirror those of the jurisdictions discussed above.

Omnibus legislation enacted by the Tasmanian Parliament permits the Minister to, by notice, declare that notwithstanding what is provided by any legislative instrument, any action that is required to be taken by means of a physical action such as signature or personal service or evidenced in a physical document may be taken or evidenced by the electronic means specified in the notice.<sup>[24]</sup> At the time of writing, only one notice was made under this power, applying only to local councils in the exercise of their functions. There is therefore no special accommodation for electronic contracting in response to COVID-19.

### **Western Australia**

The signature provisions in Western Australia's electronic transactions statute<sup>[25]</sup> mirror those of the jurisdictions discussed above.

At the time of writing, Western Australia has not enacted any legislation providing for electronic signatures or remote witnessing and attestation in connection with the COVID-19 pandemic.

### **Australian Capital Territory**

The signature provisions in the ACT's electronic transactions statute<sup>[26]</sup> mirror those of the jurisdictions discussed above.

The ACT's COVID-19 legislation<sup>[27]</sup> contains a provision permitting the signing of a document to be witnessed by audio-visual link, a document to be attested or certified by audio-visual link and for anything required to be done in the presence of another person to be done if that other person is present by audio-visual link.<sup>[28]</sup> It also contains a requirement for a person witnessing the signing of a document by audio-visual link to observe the signing in real-time and to endorse the document, or a copy of the document, with a statement specifying the method of witnessing and that it was witnessed in accordance with the COVID-19 section.<sup>[29]</sup> These provisions cease to have effect three months after there ceases to be a COVID-19 state of emergency in force (under ACT legislation).

### **Northern Territory**

The signature provisions in the NT's electronic transactions statute<sup>[30]</sup> mirror those of the jurisdictions discussed above.

At the time of writing, the NT has not enacted any legislation providing for electronic signatures or remote witnessing and attestation in connection with the COVID-19 pandemic.

<sup>[1]</sup> *Electronic Transactions Act 2000* (Cth) s 10(1).

<sup>[2]</sup> *Electronic Transactions Regulations 2000* (Cth) sch 1.

<sup>[3]</sup> *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* s 6(3).

- [4] *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* s 7.
- [5] *Electronic Transactions Act 2000* (NSW) s 9.
- [6] *Electronic Transactions Act 2000* (NSW) s 17.
- [7] *Electronic Transactions Regulations 2017* (NSW) sch 1.
- [8] *Electronic Transactions (Victoria) Act 2000* (Vic) s 9.
- [9] *COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020* (Vic).
- [10] *COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020* (Vic) Pt 2 reg 7.
- [11] *COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020* (Vic) Pt 2 reg 10.
- [12] *COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020* (Vic) Pt 2 reg 12.
- [13] *Oaths and Affirmations Act 2018* (Vic) s 49B.
- [14] *Oaths and Affirmations Act 2018* (Vic) s 49C.
- [15] *Oaths and Affirmations Act 2018* (Vic) s 49D.
- [16] *Electronic Transactions (Queensland) Act 2000* (Qld) s 14.
- [17] *COVID-19 Emergency Response Act 2020* (Qld).
- [18] *Electronic Communications Act 2000* (SA) s 9.
- [19] *COVID-19 Emergency Response Act 2020* (SA).
- [20] *COVID-19 Emergency Response Act 2020* (SA) s 16.
- [21] *COVID-19 Emergency Response (Section 16) Regulations 2020* (SA).
- [22] *COVID-19 Emergency Response (Section 17) Regulations 2020* (SA).
- [23] *Electronic Transactions Act 2000* (Tas) s 7.
- [24] *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Tas) s 17.
- [25] *Electronic Transactions Act 2011* (WA) s 10.
- [26] *Electronic Transactions Act 2001* (ACT) s 9.
- [27] *COVID-19 Emergency Response Act 2020* (ACT).
- [28] *COVID-19 Emergency Response Act 2020* (ACT) s 4(2).
- [29] *COVID-19 Emergency Response Act 2020* (ACT) s 4(3).
- [30] *Electronic Transactions (Northern Territory) Act 2000* (NT) s 9.