

## Article Information

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## Goodbye Wet-ink - Hello, Electronic Signing: Revisions to the Corporations Act 2001

**The introduction of the Corporations Amendment (Meetings and Documents) Bill 2021 has bridged the gaps in the law surrounding the electronic execution of deeds by corporations. The new Bill recently passed by Parliament on 10 February 2022, has provided much needed clarification for companies who are now able to electronically sign documents (including deeds) and rely on the assumptions under s 129 of the Corporations Act 2001 (Cth) (the Act).**

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Prior to the introduction of *Corporations Amendment (Meetings and Documents) Bill 2021*, there was widespread confusion surrounding whether companies could validly execute deeds and rely on the assumptions under the Act. Often companies would incorrectly rely on s 38A of the *Conveyancing Act 1919* (NSW) or precariously cite the temporary provisions which have yet to be tested before a court. The introduction of this long-awaited Bill has provided a clear pathway in the law when dealing with electronic execution of deeds by corporations.

### **‘Signed, Sealed and Delivered’**

Historically, Common Law embedded three requirements to creating a deed, it:

1. must be written on paper, parchment or vellum – a formality that until now, could not be satisfied in the digital age;
2. must be sealed – by a wax, wafer seal or rubber stamp – although in more recent times, this requirement was satisfied merely by inserting the word ‘sealed’ on the deed; and
3. must be delivered – ‘Delivery means some conduct indicating that the person who has executed the deed intends to be bound by it’.<sup>[1]</sup> This requirement varies from state to state but is generally satisfied by inserting the word ‘delivered’ on the deed.

Section 127 of the Act governs the way deeds are executed by corporations without a common seal, that is, either 2 directors of the company or a director and a company secretary. For a proprietary company that has a sole director who is also the sole company secretary, then this director is the signatory.<sup>[2]</sup>

### **Temporary relief during COVID-19**

Throughout the COVID-19 pandemic, corporations found it difficult to uphold their obligations through traditional means. Whilst temporary relief was provided under various amendments to the Act the position remained unclear as to whether companies could sign and be bound by deeds under the Act when using their electronic signature.

The *Corporations (Coronavirus Economic Response) Determination (No3) 2020* that operated from 23 September 2020 to 21 March 2021, allowed for companies to electronically sign. However, it was prudent for companies to err on the side of caution when exercising their rights under this instrument as it remained unclear as to whether the definition of ‘documents’ included deeds or whether it only pertained to agreements and documents which related to meetings of members.

Subsequently on 13 August 2021, the *Treasury Laws Amendment (2021 Measures No1) Act* was introduced and relief was provided to corporations. Companies were temporarily allowed to meet their obligations through electronic methods, such

as electronically signing documents in counterpart until 31 March 2022. This relief however, is subject to various requirements including:

1. the identity of signatory must be verified;
2. the intention of the signatory must be known; and
3. the signatories must be witnessed.

The difficulty in companies seeking to rely on temporary relief is that these legislations were not tried or tested before a Court. In addition, these amendments only stood as temporary relief throughout the COVID-19 pandemic with no permanent amendments to the Act, until now.

### **Permanent changes to the Corporations Act**

The passing of the *Corporations Amendment (Meetings and Documents) Bill 2021* now clarifies and confirms the position companies may take when it comes to using electronic methods to satisfy execution requirements and director obligations.

The permanent changes to the Act will come into effect on **1 April 2022** and are summarised as follows:

Execution of Documents	<ul style="list-style-type: none"> <li>• Electronic methods are introduced to execute documents including deeds by or on behalf of companies</li> <li>• Documents (including deeds) may be signed in accordance with s 126 and s 127 of the Act by signing either a physical or electronic form of the document.</li> <li>• Companies may rely on the assumptions under s 129 of the Act when electronically executing documents.</li> <li>• Provisions extend to proprietary companies where there is a sole director but no company secretary. This will negate the need for a company secretary to be appointed prior to signing documents.</li> <li>• In order to validly sign documents electronically, the method of execution must identify the person, indicate the person's intention in respect of the information recorded. This method must be reliable for the purpose.</li> </ul>
Hybrid Signing	<ul style="list-style-type: none"> <li>• A company may execute a document by one director signing a physical form of the document by hand, together with another director signing an electronic form of the document by electronic means.</li> </ul>
Delivery of Documents	<ul style="list-style-type: none"> <li>• Documents may now be delivered in physical form or electronically (i.e. email) however it must be accessible to the recipient. For example, the document that has been sent must allow the recipient to open the file and view it at the time it is received.</li> </ul>
Lodgement of Documents	<ul style="list-style-type: none"> <li>• Documents lodged with ASIC or the Registrar can be signed in accordance with this Bill.</li> <li>• If a document is required or permitted to be signed under the Act and has been signed in accordance with this Bill, then the relevant authority cannot refuse to receive or register the document on the mere basis the document has not been signed.</li> </ul>
Agents	<ul style="list-style-type: none"> <li>• Agents on behalf of companies will be able to make, vary ratify or discharge contracts and execute documents (including deeds) under this new Bill.</li> <li>• Agents will not need to be appointed by a deed in order to execute the documents. Where an Agent has executed a deed on behalf of a company, people will be able to rely on the assumption in s 129(3) of the Act.<a href="#">[3]</a></li> </ul>

### **Measures firms will need to take**

The amendments to the Act have taken a 'technology neutral approach and does not mandate the use of any particular type of technology', however it is predicted that digital signing platforms such as DocuSign will be widely used.[\[4\]](#) In implementing these new methods of signing, practitioners must ensure that the necessary steps have been taken prior to exercising this Bill. This includes amending any existing company constitutions to allow for electronic signing, including provision in existing precedent documents which indicate an intention to electronically sign and amending the execution

blocks to provide the necessary confirmations for electronic signing.

### **Key Takeaways**

- Companies can now sign electronically and rely on the assumptions under s 129 of the Act.
- Agents on behalf of companies will be able to make, vary, ratify or discharge contracts and execute documents (including deeds).
- Practitioners must implement certain measures prior to exercising electronic execution of documents for companies.

[\[1\]](#) *Monarch Petroleum v Citco Petroleum* [1986] WAR 310, 355.

[\[2\]](#) *Corporations Act 2001* (Cth) s 127.

[\[3\]](#) Explanatory Memorandum, Corporations Amendment (Meetings and Documents) Bill 2021.

[\[4\]](#) Explanatory Memorandum, Corporations Amendment (Meetings and Documents) Bill 2021.