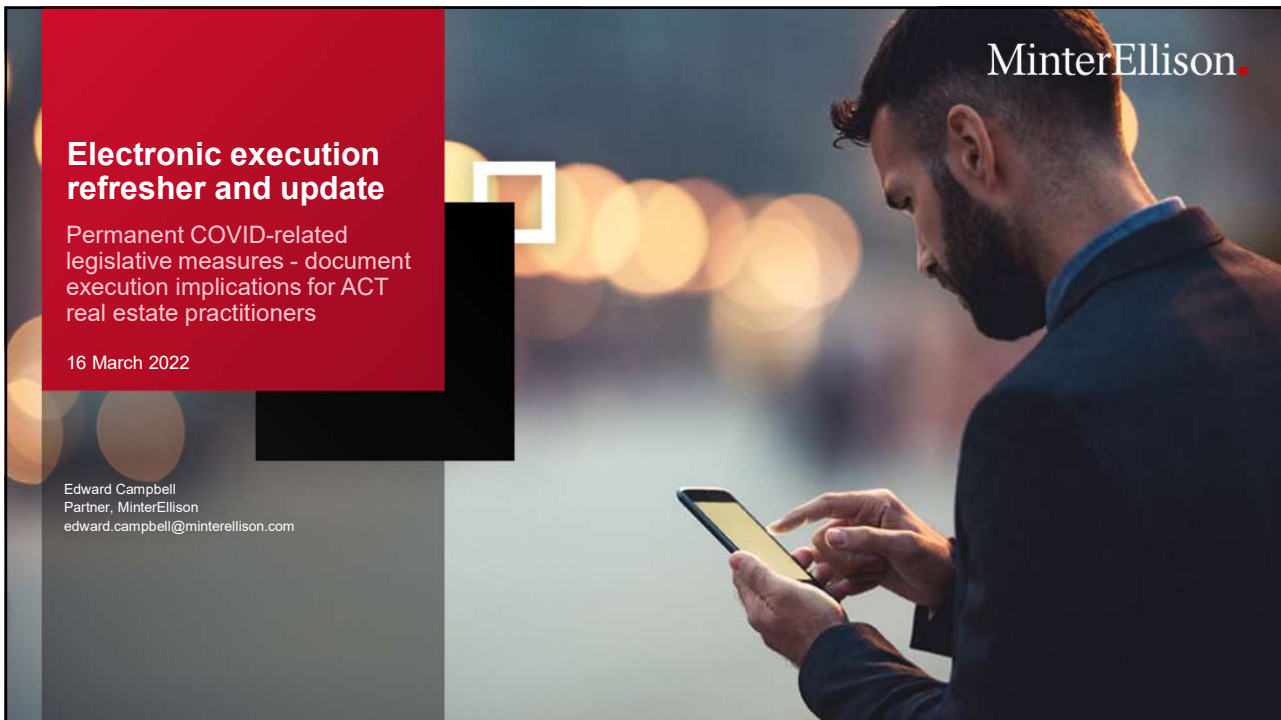


2022 Property Law Afternoon

Technology in property law:
Electronic signing, contracting
and conveyancing

Edward Cambell, MinterEllison

Wednesday 16 March 2022



Electronic execution refresher and update

Permanent COVID-related legislative measures - document execution implications for ACT real estate practitioners

16 March 2022

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Today's presentation

1 KEY ISSUES	Even as electronic execution has become commonplace, issues remained eg: - deeds, split execution, witnessing - differences in jurisdiction and type of document
2 REFRESHER	The 'what' and 'how' of electronic execution - methods - reliability, identification and consent
3 LEGISLATION	COVID-related acceleration of legislative interventions in the space - Commonwealth - Australian Capital Territory

LEGISLATIVE SNAPSHOT

The following table is a high level summary of the legislative position for electronic execution in each jurisdiction as at the date of this document. You will need to review the legislation in effect as at the date of your transaction, as the law is currently continually being updated in this area, there are a number of sunset dates that apply and there are nuances that this type of high level summary does not capture.

18 August 2021

ITEM	COMMONWEALTH	QUEENSLAND	NEW SOUTH WALES	ACT	VICTORIA	SOUTH AUSTRALIA	WESTERN AUSTRALIA
COVID-19 LEGISLATION	Treasury Laws Amendment (2021 Measures No. 1) Act 2021 (Cth) (amending the Corporations Act)	Justice Legislation (COVID-19 Emergency Response – Documents and Oaths) Regulation (Qlt) 2020	Electronic Transactions Act 2000 (NSW)	COVID-19 Emergency Response Act 2020 (ACT)	Electronic Transactions (Victoria) Act 2000 (Vic)	COVID-19 Emergency Response (Section 17) Regulations 2020 (SA)	COVID-19 Response and Economic Recovery Omnibus Act 2020 (WA)
EXECUTION OF DEEDS	Permitted by s 127 of the Corporations Act, provided a complete copy of the document is being signed and a reliable method is used to identify the person signing.	Permitted by s 120 provided the document contains a conspicuous statement the document is a deed (s 12N). The deed may be signed without the need of a witness (s 12S).	Permitted by s 38A of the Conveyancing Act 1919 (NSW) but the execution of the deed must be witnessed.	Not addressed	Permitted by s 12A of the Electronic Transactions (Victoria) Act 2000	Not addressed	Not addressed
SPLIT EXECUTION	Permitted by s 127 of the Corporations Act, provided a complete copy of the document is being signed and a reliable method is used to identify the person signing.	Permitted by s 12R for documents that are deeds (Note, this regulation does not authorise split execution of agreements)	Not addressed	Not addressed	Not addressed	Not addressed	Not addressed
WITNESSING DOCUMENTS	Not addressed	Permitted by Part 4, provided the witness complies with the specified statutory procedure	Permitted by s 14C, provided the witness complies with the specified statutory procedure	Section 4 permits witnessing of affidavits, wills and certain health directions and powers of attorney, provided the witness complies with the specified statutory procedure	Permitted by s 12 provided the witness complies with the specified statutory procedure	Section 4 expressly excludes witnessing of execution by audio visual link	Witnessing under certain enactments is permitted by Division 4, but this does not include agreements, deeds, powers of attorney or mortgages
SUNSET DATES	31 March 2022	30 September 2021	1 January 2022 (with respect to witnessing)	12-month period after no COVID-19 declaration in force	None	17 September 2021	31 December 2021

Tasmania and the Northern Territory have enacted limited relevant legislation.

THE ELECTRONIC TRANSACTIONS ACTS

There are near uniform Electronic Transactions Acts in each jurisdiction that facilitate electronic execution. In general terms these Acts deem electronic execution effective (subject to the comments over the page), if the following conditions are satisfied:

- The signatory uses a method that identifies themselves and indicates an intention to be bound.
- The method of identification is as reliable as appropriate, considering the purpose of the transaction.
- The signatory consents to the use of electronic communication to fulfil the requirement for a signature and the method of identification.

These Acts facilitate electronic execution and do not override other legal requirements.

Where agreements are being executed, you should include a statement in the document that confirms consent to electronic execution.

Reliability of identification is a key concern. For simple consents or authorisations, it should be sufficient to 'cut and paste' a signature. However, for substantive agreements, reliability will require using a process that confirms identity of the signatory (such as DocuSign) and it is important to ensure that safeguards that provide evidence of the signatories' identity are kept in place (eg failure to control passwords that authenticate identity, may result in the execution being ineffective).

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Requirement to 'sign' – *Electronic Transactions Act 2001 (ACT)*

Section 9 Signatures

(1) If, under a Territory law, a person's signature is required, that requirement is taken to have been met for an electronic communication if—

- a method is used to identify the person and to show the person's intention in relation to the information communicated; and
- the method used was either—
 - as reliable as was appropriate for the purposes for which the electronic communication was generated or communicated, in the circumstances, including any relevant agreement; or
 - proven in fact to have fulfilled the functions mentioned in paragraph (a), 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 using the method mentioned in paragraph (a).

(3) The reference in subsection (1) to a law that requires a signature includes a reference to a law that provides consequences for the absence of a signature.

ELECTRONIC TRANSACTIONS ACT:

- A transaction is not invalid under a Territory law merely because it took place by 1 or more electronic communications. "Territory law" excludes the *Corporations Act 2001 (Cth)*. **Does not override other specific laws.**
- Requirements imposed under a Territory law to give information in writing, provide a signature, produce or keep a document, record information can be met in electronic form.

Refreshing on 'signing' electronically

- Evolving with technology
- Different methods
 - Scan, type, paste, stylus,
 - Platforms emerging
 - Distinguished from digital signatures
- Rising acceptance over time, but not new – Commonwealth electronic transactions legislation is from 1999

Qantas links up with Brisbane-based e-signature start-up



Lucas Beard
Reporter

Nov 9, 2021 - 5:00am

Save Share

Qantas has partnered with Brisbane-based e-signature start-up Annature to grant loyalty customers frequent flyer points for every document completed through the fledgling company's systems.

Founded in 2020 by Amreeta Abbott, Annature was created as an answer to the stranglehold DocuSign had on the e-signature space and frustration with its pricing model, after selling her previous business to ASX-listed [Class Limited](#).

"I couldn't understand why people were paying so much for a technology that was only getting easier and easier to build." Ms Abbott told *The Australian Financial Review*. "I could see the friction points in business that were being held up because of the price point from an overseas company."



Amreeta Abbott believes Qantas chose to collaborate with Annature because it is Australian-owned and signed with data secured onshore. Paul Harris

Whereas DocuSign locks customers in for a monthly or annual subscription fee, Annature provides a pay-as-you-go model that charges users for each document signed.

Annature's business boomed quickly during COVID-19 as the nation moved to work from home and its client list ballooned to more than 3000 names across Australia and New Zealand.

RELATED QUOTES



Requirement to 'sign' cases - Electronic transactions uniform legislation

Some examples of cases on signatures under electronic transactions Acts:

- Certification of a Council by-law by a lawyer, lawyer's name typed in the form but signature not inserted, lawyer emailed the form to the Council, email and attachment sufficient to show identification, endorsement of the certificate – *Adelaide City Corporation v Corneloup* (2011) 110 SASR 334.
- Agreement for lease evidenced by email exchange taken to be in writing and signed, satisfied the identification, reliability and consent requirements - *Claremont 24-7 Pty Ltd v Invox Pty Ltd [No 2]* [2015] WASC 220.
- Slightly pixelated signature image submitted via an online platform was not taken to show the method was unreliable - *Getup v Electoral Commissioner* [2010] FCA 869
- Electronic submissions process for a development application included entry of identification details. Error in drivers' licence number did not prevent effective signing, it was just one aspect of the process without significant effect - *Harding v Brisbane City Council* [2008] QPEC 75
- Separation agreement taken to be signed by email signoff - *Faulks v Cameron* [2004] NTSC 61
- Parties exchanged emails containing an offer to sell business, accepting entity not identified in the email, but ascertainable from surrounding facts, consent inferred from email negotiations - *Stellard Pty Ltd v North Queensland Fuel Pty Ltd* [2015] QSC 119



Issues to be aware of

Witnessing



■ Common law

- what does a witness attest to?
- presence, same document, voluntariness, confirmation they witnessed the signing



■ Electronic witnessing

- common law requirements difficult to fulfil
- *COVID-19 Emergency Response Act 2020 (ACT)* – Section 4

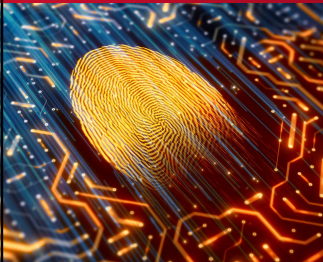


■ Platforms



Corporations Amendment (Meetings and Documents) Act 2022

Certain temporary Commonwealth reforms for corporation meetings and documents are now permanent, and will affect document execution for real estate matters



- The *Corporations Amendment (Meetings and Documents) Bill 2021* received Assent on 22 February 2022.
- The permanent changes are not identical to the previous temporary measures.
- Meetings
 - hybrid virtual/IRL meetings to be allowed, with wholly virtual meetings allowed only if the constitution expressly permits;
 - provisions about virtual attendance, electronic receipt of meeting documents, votes
- Documents changes :
 - enable companies and their officers (including company agents) to create and sign deeds, as well as other documents, electronically;
 - allow the use of technology to execute documents with a common seal electronically, including by allowing witnesses to validly witness the fixing of a company seal electronically;
 - enable proprietary companies with a sole director and no company secretary to use the statutory document execution mechanisms;
 - provide for future extension to other documents

Status update

Electronic signing for companies under s127 *Corporations Act 2001*

Temporary relief is now in place

Schedule 1 to the **Treasury Laws Amendment (2021 Measures No.1) Act (TLA 1 Act)** commenced on 14 August 2021. Broadly, the changes in Schedule 1 temporarily enable companies to use technology to meet regulatory requirements under the Corporations Act around convening meetings, distributing meeting related materials and signing/executing documents until 31 March 2022.

The temporary measures are similar in substance to the measures contained in the Corporations (Coronavirus Economic Response) Determination (No. 3) 2020 (Determination No. 3) which expired on 21 March 2021.

Timing

The changes introduced by the Bill apply to documents sent and meetings held on or after 1 April 2022.

The Bill applies to documents executed on or after 23 February 2022 (the day after the Bill received Assent).

'Technology neutral' execution

The changes introduced by the Bill give companies the option of executing certain documents electronically and remove ambiguity around this process.

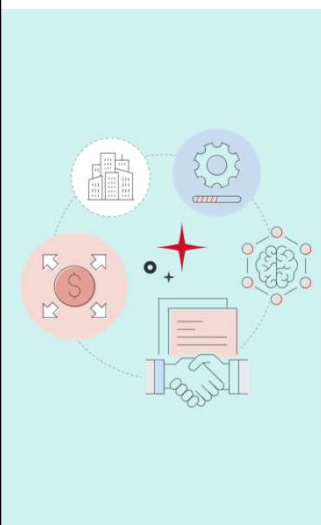
The changes in Schedule 1 (Division 1 of Part 1.2AA) set out the requirements for how company documents (including deeds), and meeting related documents can be validly executed in a 'technology neutral manner'.

The Bill also amends existing requirements in ss 126 and 127 of the Corporations Act to make clear that documents will be able to be validly executed in accordance with the changes introduced by Division 1 of Part 1.2AA.

Other key changes to note include the following.

- Amendments to s127 of the Corporations Act which will mean that proprietary companies with a sole director and no company secretary will be able to use the statutory document execution mechanisms (which is currently not the case).
- Amendments to s126 of the Corporations Act which will permanently enable agents to make, vary, ratify or discharge contracts and execute documents (including deeds) on behalf of companies. There is no requirement for the agent to be appointed by deed.

What is happening in the ACT?



- *COVID-19 Emergency Response Act 2020 (ACT)* – Section 4
- *Civil Law (Property) Act 2006 (ACT)* – Part 2.3 General rules about deeds and documents or corporations
 - Signed and sealed
 - Attested by at least 1 witness

Some more detail on witnessing under *COVID-19 Emergency Response Act 2020 (ACT)*

In order for the remote witnessing to be valid, the following requirements must be met:

- observe the person signing the document (the signatory) sign the document in real time
- 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; and
- endorse the document, or the copy of the document, with a statement:
 - > of the method used to witness the signature of the signatory; and
 - > that the document was witnessed in accordance with section 4

Legislative changes Summary table – ACT and Cth

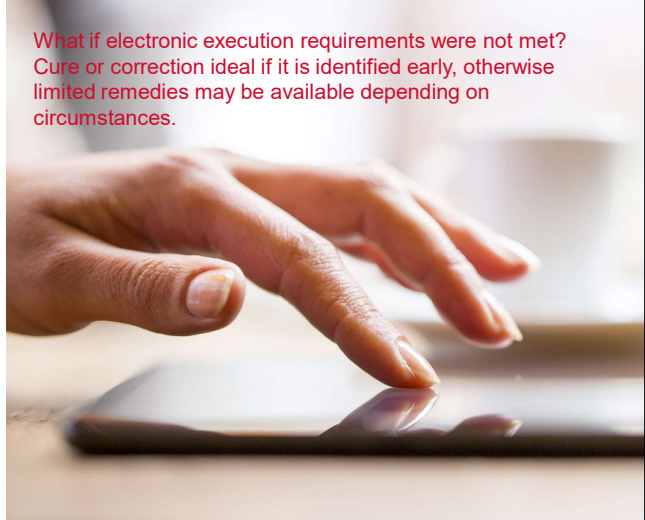
ITEM	COMMONWEALTH – TEMPORARY (Sunset 31 March 2022)	COMMONWEALTH – PERMANENT (consultation continuing)	ACT POSITION
COVID-19 LEGISLATION	Treasury Laws Amendment (2021 Measures No. 1) Act 2021 (Cth)	Corporations Amendment (Meetings and Documents) Act 2022	COVID-19 Emergency Response Act 2020 (ACT)
EXECUTION OF DEEDS	Permitted by s 127 of the Corporations Act, provided a complete copy of the document is being signed and a reliable method is used to identify the person signing.	New s110A permits an electronic method of signing if (a) the method identifies the person signing and their intention; and (b) the method is as reliable as appropriate or proven in fact to achieve (a). New s126 provides for individuals to execute documents – in relation to deeds: the document must be expressed to be a deed (s126(5)); witness not required (s126(6)); delivery is not necessary if executed as a deed in accordance with s126(1).	Not addressed
SPLIT EXECUTION	Permitted by s 127 of the Corporations Act, provided a complete copy of the document is being signed and a reliable method is used to identify the person signing.	Split execution addressed differently to the TLA – current s127(3C) repealed. New s110A(1)-(2) provides for physical or electronic signing, by reliable method which identifies signatory's intention regarding the information recorded in the document. Sec 110A(3) provides a person is not required to indicate an intention in respect of another signatory or their intention, common seal or immaterial information generated for the purpose of signing in the normal course of communication, storage or display. Sec 110(4) confirms that s110A does not require a person to sign the same form of the document/same page/use the same method/ all the information recorded in the document to be included in the form that is signed. Persons signing more than once in different capacities – see s110A(5).	Not addressed
WITNESSING DOCUMENTS	Not addressed	Individual's execution of a document as a deed is not required to be witnessed whether executed electronically or by hand (s126(6)(a)). Witnessing of the fixing of company seal may be electronic (s127(2A)).	Sec 4 permits witnessing of affidavits, wills and certain health directions and powers of attorney, provided the witness complies with the specified statutory procedure.

Deeds and agreements

Key takeaways

- Dates of commencement of new legislation and transitional provisions, potential gaps could emerge
- Consider proper law of the deed/agreement, location of signing, performance and enforcement
- Identification and verification of signatories
- Counterparts clause/Electronic signing consent clause
- Witnessing – check the requirements in statute and constituent documents (eg POA, partnership agreement), agree the process in advance
- Execution block –consider if any acknowledgements should be stated or legislative requirements apply eg information about the signatory, their office, their intention needs to be stated
- Does the deed contain a power of attorney – consider statutory requirements.

What if electronic execution requirements were not met? Cure or correction ideal if it is identified early, otherwise limited remedies may be available depending on circumstances.



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Deeds and agreements

Counterparts clause

1. Counterparts

This document may be executed in any number of counterparts. Each counterpart constitutes an original of this document, all of which together constitute one instrument. A party who has executed a counterpart of this document may exchange it with another party by faxing, or by emailing a pdf (portable document format) copy of, the executed counterpart to that other party, and if requested by that other party, will promptly deliver the original by hand or post. Failure to make that delivery will not affect the validity of this document.

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Deeds or agreements

Sample clause re consent to electronic execution (if required)

Electronic Signature means a digital signature or a visual representation of a person's handwritten signature or mark which is placed on a physical or electronic copy of this document by electronic or mechanical means and indicates the person's intention to sign this document. **Electronically Signed** has a corresponding meaning.

41.13 Electronic Signatures

- (a) The parties consent to this document being signed by or on behalf of a party by an Electronic Signature.
- (b) The parties intend that any:
 - (i) copy of this document that has been Electronically Signed by or on behalf of a party will constitute an original counterpart executed by that party; and
 - (ii) print-out of this document with the relevant Electronic Signatures appearing will also constitute an original counterpart executed by that party.
- (c) Each signatory that signs this document using an Electronic Signature confirms that their signature appearing in the document, including any such print-out (irrespective of which party printed it), is their personal signature authenticating it.



Corporations Act 2001 execution clause

Statements below execution block

Executed by [Name of company] in accordance with Section 127 of the Corporations Act 2001	
Signature of director	Signature of director/company secretary (Please delete as applicable)
Name of director (print)	Name of director/company secretary (print)

By signing above, each director or secretary (as applicable) consents to electronic execution of this document (in whole or in part), represents that they hold the position or are the person named with respect to their execution and authorises any other director or secretary (as applicable) to produce a copy of this document bearing his or her signature for the purpose of signing the copy to complete its execution under section 127 of the Corporations Act. The copy of the signature appearing on the copy so executed is to be treated as his or her original signature.

Key takeaways

- Remain alert for the legislation commencing at Cth and ACT level – **beware transitional provisions** (eg if one person signs before commencement of the new provisions)
- Plan ahead at the beginning of the transaction regarding identification of signatories and execution
- Involve the client in the risk assessment considering:
 - the proposed method of signing
 - the document being signed
- Attorney-General working with Commonwealth, State and Territory Treasurers towards a common approach to e-signing – watch this space.



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