

# [Signing documents remotely or electronically in a pandemic or crisis](#)

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## **Introduction to signing documents remotely or electronically — brief overview of Australia’s electronic transaction regime**

Generally, there are few impediments to the use of electronic signatures, or e-signatures, for “remote” execution of most legal documents. This is largely because, subject to some exceptions, the [Electronic Transactions Act 1999](#) (Cth) (ET Act) operates to provide that a transaction under a Commonwealth law will not be invalid simply because it was conducted through “electronic communication” (see [Legal framework of the Electronic Transactions Act and ET Act basics](#)). [Section 5](#) of the ET Act provides that “electronic communication” means:

**References:** [s 5, Electronic Transactions Act 1999 \(Cth\)](#)

- a communication of information in the form of data, text or images by means of guided and/or unguided electromagnetic energy; or
- a communication of information in the form of speech by means of guided and/or unguided electromagnetic energy, where the speech is processed at its destination by an automated voice recognition system.

Each Australian state and territory has its own Electronic Transactions Act, which generally mirrors the ET Act, but (further to legislative exemptions in the ET Act as set out in the [Electronic Transactions Regulations 2000](#) (Cth) (ET Regulations)) provides jurisdiction-specific legislative exemptions of circumstances where an electronic signature cannot be used.

## **Signing documents remotely or electronically in a pandemic or crisis**

During a pandemic or crisis, when governments mandate physical distancing and corporates implement remote working arrangements, legal practitioners and clients, as well as counterparties, are faced with many challenges, including signing documents without easy access to printers to produce paper copies, the unavailability of an independent adult witness when one is required, and interruption of services such as delivery by post or courier.

Against this background, it is useful that legal practitioners are aware of 2 practical matters:

- Australia’s electronic transaction regime allow for a document to be signed electronically provided that:
  - identity: a method is used to identify the person and to indicate that person’s intention regarding the information communicated;
  - reliability: the method used was reliable or factually proven to have identified the person and indicated their intentions regarding the information communicated; and
  - consent: the person to whom the signature is being given consents to use the agreed method of identifying the person and indicating their intention.
- Australian legislation does not prescribe the use of a particular type of technology. This is a key principle (known as “technology neutrality”) in the ET Act, as explained in the [Revised Explanatory Memorandum of the Electronic Transactions Bill 1999](#)  (Cth).

In practice, this means (unless an exception applies) an electronic signature is capable in law of being

utilised by a signatory to execute a document during a pandemic or crisis if the method used can satisfy these 3 requirements.

A document may also be signed by a “digital signature”. Digital signatures are a type of electronic signature. Digital signatures typically use Public Key Infrastructure (or “PKI”) technology which (in short) encrypts a hash with a user’s private key. This creates a unique identifier that can be checked for authenticity and provide as evidence for non-repudiation (that is, to avoid denial of execution).

The law and industry practice relating to electronic transactions can be complex and is certainly evolving. Tasks such as providing advice on electronic execution of a set of finance documents require clear instructions from clients on what they wish to achieve, detailed analysis of the facts, and careful application of the law. In a pandemic or crisis, hastily implementing procedures to enable electronic execution of documents that are usually signed by hand in wet ink on physical paper can pose risks. It would be prudent for legal practitioners to first understand the risks of electronic signatures when compared to using “wet ink” signatures”, then take steps to mitigate the risks.

## Keys risks relating to the use of electronic signatures

- “Unchartered waters” risk

The use of electronic signatures has not been considered in much detail by Australian courts. While there is a clear legislative intention to generally promote electronic transactions under the ET Act and e-commerce is high on the Government’s agenda, there is a risk that a court may choose to treat electronic signatures as not equivalent to “wet ink” signatures.

- Invalidity and unenforceability

Signing a document electronically carries the risk of it being non-binding due to failure to comply with its formalities. The best example here is the signing of a document that is a deed. The formalities include that a deed be “signed, sealed and delivered”, the signing of the deed by the signatory be attested in the presence of a witness, and compliance with each jurisdiction’s prescribed requirements for the execution of a deed in the jurisdiction in which the deed is formed.

- Identity fraud

A “standard” e-signature can be created very easily. Anyone can type a name to “sign” an email or paste an image of a signature into a softcopy document. As such, there is a risk that a document will not be enforceable against the person who allegedly signed it, if the electronic signature was applied without authority.

- General security risks

A general issue with documents signed by electronic signatures is that they could be accessed and amended without the consent of the parties. This challenges the value of the documents as evidence of the arrangements the parties sought to put in place. A party that can demonstrate an electronically signed document was, or could be, amended without a signatory’s consent after the document was electronically signed, a court could discount the evidentiary value of the document.

## Key risk mitigants relating to the use of electronic signatures

- Check for legislative exemptions at Commonwealth level relating to electronic transactions (see [Legal framework of the Electronic Transactions Act and ET Act basics](#))

Check if an ET Act exemption applies with respect to the documents a client wishes to sign electronically. This is because some provisions of the ET Act do not apply to certain Commonwealth laws, as set out in [Sch 1](#) of the ET Regulations. Those that may be of particular relevance to banking and finance law and practice include (not an exhaustive list):

- [Banking Act 1959](#)(Cth) — [s 8\(1\)](#) of the ET Act does not apply to [s 13\(1\)](#), (ADI to supply information to APRA) and [62\(1\)](#) (Supply of information) of this legislation (see Overview — [Banking Act — the essentials](#));
- [Bills of Exchange Act 1909](#)(Cth) — [s 8\(1\)](#) of the ET Act does not apply to the whole of this legislation;
- [Corporations Act 2001](#)(Cth) (Corporations Act) — [ss 8\(1\), 14, 14A, 14B](#) and [15](#) of the ET Act do not apply to the whole of this legislation. [Schedule 1](#) of the ET Regulations, item 28, refers to the “Corporations Act 1989” as being exempted, but this is taken to be a reference to the Corporations Act by operation of [s 1407](#) of the Corporations Act;

**References:** [Sch1, Electronic Transactions Act 1999 \(Cth\)](#)

[s 14, Corporations Act 2001 \(Cth\)](#)

[s 14A, Corporations Act 2001 \(Cth\)](#)

[s 14B, Corporations Act 2001 \(Cth\)](#)

[s 15, Corporations Act 2001 \(Cth\)](#)

[s 1407, Corporations Act 2001 \(Cth\)](#)

- [Cheques Act 1986](#)(Cth) — [s 8\(1\)](#) of the ET Act does not apply to the whole of this legislation;
  - [Financial Transaction Reports Act 1988](#)(Cth) — [s 9](#) of the ET Act does not apply to [s 15](#) (Reports in relation to transfer of currency into or out of Australia) of this legislation; and
  - [Superannuation Industry \(Supervision\) Act 1993](#)(Cth) — [s 8\(1\)](#) of the ET Act generally does not apply to this legislation but there are limited exceptions.
- In addition, certain documents, notices and consents used in the provision of credit related services under the [National Consumer Credit Protection Act 2009](#) (Cth) (see Overview — [What is consumer credit?](#)) are not compatible with the use electronic signatures.

**References:** [s 8, Electronic Transactions Act 1999 \(Cth\)](#)

[s 9, Electronic Transactions Act 1999 \(Cth\)](#)

[s 13, Electronic Transactions Act 1999 \(Cth\)](#)

[s 15, Electronic Transactions Act 1999 \(Cth\)](#)

[s 62, Electronic Transactions Act 1999 \(Cth\)](#)

- Check for legislative exemptions at state or territory level relating to electronic transactions

Check the relevant state or territory Electronic Transactions Act for legislative exemptions that may apply with respect to the documents a client wishes to sign electronically (see [Lending — Checklist for the use of electronic signatures under the Electronic Transactions Act 1999 \(Cth\) \(ETA\)](#)) for legislative exemptions that may apply with respect to the documents a client wishes to sign electronically. Common exceptions include signing testamentary instruments such as wills, signing enduring powers of attorney, signing documents that require a witness, signing of some court documents, and signing certain documents that are required to be personally served.

- Check for any emergency legislation that enables modification of electronic execution requirements in response to the pandemic (see [Emergency legislation, signing under s 127 and remote witnessing during COVID-19 pandemic](#)).
- Design and implement a method to reliably identify the signatory and to indicate the signatory's intention

Generally, in addition to naming the signatory in the execution block, it would be prudent for a party (typically a lender) to require proof of identity documentation to confirm the identity of the person actually carrying out the electronic signing (such as a borrower). In any case, reliability should be considered objectively in light of all the circumstances, including the type of document being signed, the importance of the document, and the likelihood of legal challenges to the signature.

- Ensure there is “positive” consent

On the basis that the ET Act is designed to facilitate e-commerce, there are arguments to support the view that a signatory could provide consent electronically for the use of electronic signatures to execute documents. That said, it would be prudent for legal practitioners to ensure that a document intended for electronic execution includes a term that provides it can be signed by electronic means. For example, if acting for a lender, a legal practitioner can draft wording into forms and agreements that specify the borrower positively consents to the lender's electronic signature process and electronic communications generally.

- Employ a method of authorisation and authentication

A method of authorisation and authentication should be used to mitigate the risk that a duly authorised person has not signed the document. This may occur in situations where a person, X, has access to a mobile device that belongs to another person, Y. The application of X's electronic signature by Y on a document without X's knowledge may be invalid. By way of example, a lender could require a borrower to confirm that they have personally applied their electronic signature to a document, or that they have duly authorised another person to apply their electronic signature to the document on their behalf.

- Avoid signing deeds electronically

In terms of risks of signing a deed electronically vs “wet ink” signing, the main risk is that the deed may be deemed to be invalid or unenforceable. For example, there are differing views on whether a modern deed needs to be “on parchment, vellum or paper” to be effective, and there is some commentary to suggest that this requirement may be overcome by printing out the electronically signed deed, but this remains an untested hypothesis.

In relation to deeds signed by companies, it has been judicially accepted that electronic signature in

accordance with [s 127\(1\)](#) of the Corporations Act can override any such requirement for “parchment, vellum or paper” due to the operation of [s 127\(3\)](#). This would allow companies to sign purely electronic deeds, despite the Corporations Act being exempt from the ET Act. However, two key requirements apply: (a) each company officer must personally sign the document or approve their signature being applied to the document (eg in the form of board minutes); and (b) for companies other than sole director/secretary companies — both officers must sign a single, static document, rather than a situation where two electronic signatures are sequentially applied to an electronic document.

**References:** [s 127, Corporations Act 2001 \(Cth\)](#)

*Bendigo and Adelaide Bank Ltd (ACN 068 049 178) v Pickard* [\[2019\] SASC 123](#); [BC201906280](#)

*Bendigo and Adelaide Bank Ltd (ACN 068 049 178) v Pickard* [\(2018\) 129 ACSR 386](#); [\[2018\] VSC 388](#); [BC201807071](#)

The second requirement above raises practical issues (including for electronic signature technologies such as DocuSign) as each signatory will technically create a new electronic version of the relevant document when applying their signature. As a result, it is currently unclear how this requirement can be satisfied in practice for multi-officer companies.

If an electronically signed deed is non-binding, the underlying agreement may still survive as a simple contract if all the elements of a contract have been satisfied, these being offer and acceptance, the intention to create a legal relationship, and importantly, consideration. A deed that survives as an agreement would not retain some benefits that are afforded to deeds, such as rights given to third parties, in that third parties that are named in the deed may have the benefit of rights under that deed, including the right to enforce the terms of the deed.

For these reasons, while some electronic signature solutions in the market have functionality to enable a deed to be executed and witnessed electronically, it would be prudent to approach them with caution.

A prudent approach here would be to consider:

- arranging for the deed in paper form to be signed with wet ink; or
- converting the deed into an agreement (which should include at least nominal consideration) for signing by electronic means, but only after some legal analysis as to whether the benefits and protection afforded by a deed could be sufficiently addressed in other ways.

## Walrus Committee remote signing protocols

Given that in Australian commercial transactions it is commonplace for execution versions of documents to be emailed to the parties so they may sign them in separate locations, a group of major Australian law firms known as the Walrus Committee has agreed on a set of [remote signing protocols](#)  to assist in establishing market practice on how to conduct remote signings. The protocols outline three different approaches to signing documents remotely and recommend what documents are suited to each approach. The remote signing protocols are intended to ensure the legal effectiveness of documents signed in accordance with the protocols.

## Measures introduced in response to the COVID-19 pandemic

Practitioners should have regard to the relevant emergency legislation in response to the COVID-19 pandemic that

enables modification of signing and witnessing requirements. Importantly, measures have been introduced to expressly permit electronic signing of documents under [s 127](#) of the Corporations Act (Cth) (see [Emergency legislation, signing under s 127 and remote witnessing during COVID-19 pandemic](#)).

**References:** [s 127, Corporations Act 2001 \(Cth\)](#)

## **Checklist**

[Lending — Checklist for the use of electronic signatures under the Electronic Transactions Act 1999 \(Cth\) \(ETA\)](#)  
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*Further Reading - you will need a LexisNexis© subscription*

[Australian Banking & Finance Law Bulletin > 2020 > Volume 36 No 4 — August 2020 > Creating deeds in electronic form: why we should not be deterred by the ghosts of the past — \(2020\) 36\(4\) BLB 68](#) 

[Australian Property Law Bulletin > Volume 35 No 4 — May 2020 > Corporate signing goes digital — \(2020\) 35\(4\) APLB 72](#) 

[Australian Property Law Bulletin > 2019 > Volume 34 No 7 — August 2019 > Court opens door to electronic deeds signed by company directors — \(2019\) 34\(7\) APLB 100](#) 