

[Emergency legislation, signing under s 127 and remote witnessing during COVID-19 pandemic](#)

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Authored by the LexisNexis Legal Writer team.

Coronavirus (COVID-19): This guidance note contains material that may be affected by temporary legislative and/or regulatory measures introduced in response to the COVID-19 pandemic. We are reviewing our content as these changes are implemented and will continue to provide regular updates. In the meantime, for updates on key developments and related practical guidance on implications for lawyers, see our [latest legal updates](#). For more information about COVID-19, see the [LexisNexis Information Hub COVID-19](#).

Emergency legislation in response to COVID-19 regarding signing and witnessing documents

As summarised in the below table, emergency legislation in response to COVID-19 has been enacted by the federal government and various states which provides ministers with temporary powers to amend requirements regarding the signing and witnessing of documents.

Jurisdiction	Emergency legislation	Expiry date
Commonwealth	<p>Coronavirus Economic Response Package Omnibus Act 2020 (Cth)</p> <p>Treasurer has temporary powers by legislative instrument to amend provisions of the Corporations Act 2001 (Cth) (Act). The Treasurer's power to do so expires on 24 September 2020. Any such legislative instrument may be effective for a maximum of 6 months.</p> <p>On 5 May 2020 the Treasurer released a determination, Corporations (Coronavirus Economic Response) Determination (No. 1) 2020 to allow companies to electronically sign a document under s 127 of the Corporations Act (see Can companies sign electronically under s 127 of the Corporations Act? below).</p> <p>Note: The Corporations (Coronavirus Economic Response) Determination (No. 1) 2020 was due to expire on 5 November 2020. On 21 September 2020 the Treasurer released Corporations (Coronavirus Economic Response) Determination (No. 3) 2020, made pursuant to the power granted to the Treasurer under s 1362A of the Corporations Act, effectively repealing the earlier determination and remaking it on the same terms. The new determination is automatically repealed on 22 March 2021.</p>	24 Sep 2020
	<p>Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020 (Cth)</p> <p>Ministers have temporary powers to amend or disapply provisions of any Commonwealth Act or legislative instrument that relates to the signing, witnessing and attesting of documents, certification of matters by witnesses and verification of identity.</p> <p>Any such amendment or disapplication will expire on 31 December 2020.</p>	22 March 2021
NSW	<p>COVID-19 Legislation Amendment (Emergency Measures) Act 2020 (NSW)</p> <ul style="list-style-type: none">Allows for regulations to be made under certain NSW Acts (including the Conveyancing Act 1919 (NSW)) to enable amendment of requirements for signing, witnessing and attesting of documents under the Act. Any such	31 Dec 2020
		22 Oct 2020

	<p>regulation may be effective for a maximum of 6 months.</p> <ul style="list-style-type: none"> Introduces a regulation-making power under s 17 of the Electronic Transactions Act 2000 (NSW) to allow altered arrangements regarding signing, witnessing and attesting of certain NSW-law governed documents, certification of matters by witnesses and verification of identity. Any such regulation may be effective for a maximum of 6 months. Pursuant to this regulation-making power, on 22 April 2020 the Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020  (NSW) was made which addresses remote witnessing (see NSW emergency regulation regarding remote witnessing below). 	
VIC	<p>COVID 19 Omnibus (Emergency Measures) Act 2020  (VIC) (VIC Emergency Legislation)</p> <p>Ministers have temporary regulation-making powers to amend or disapply legislation relating to various matters, including:</p> <ul style="list-style-type: none"> the witnessing, execution or signing of legal documents such as affidavits, statutory declarations, deeds, powers of attorney, contracts or agreements, undertakings and wills; the process by which a document is given or issued; and the certification of documents. <p>This regulation-making power expires on 24 October 2020.</p> <p>The VIC Emergency Legislation also introduces a temporary amendment to the Oaths and Affirmations Act 2018 (Vic) which allows for affidavits to be witnessed by audio visual link and signed and initialled electronically.</p> <p>Pursuant to this regulation-making power, on 12 May 2020 the COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020 (VIC) was made which addresses electronic signing and remote witnessing (see VIC emergency regulation regarding electronic signing and remote witnessing below).</p>	<p>24 Oct 2020</p> <p>24 Oct 2020</p>
QLD	<p>COVID-19 Emergency Response Act 2020  (QLD)</p> <p>Ministers have broad regulation-making powers to amend or suspend any legislation or common law relating to documents, including in relation to the signing, witnessing and attesting of documents, certification of matters, verification of identity and the filing, lodgment, giving or service of a notice or other document.</p> <p>This regulation-making power expires on 31 December 2020.</p> <p>Pursuant to this regulation-making power, on 22 May 2020 the Justice Legislation (COVID-19 Emergency Response — Documents and Oaths) Regulation 2020  (Qld) as made which addresses electronic signing and remote witnessing (see QLD emergency regulation regarding electronic signing and remote witnessing below).</p>	<p>31 Dec 2020</p> <p>31 Dec 2020</p>
SA	<p>COVID-19 Emergency Response Act 2020 (SA) (SA Emergency Legislation)</p> <p>Ministers have regulation-making powers to amend or suspend any requirements under an act or law relating to the preparation, signing, witnessing, attestation, certification, stamping or other treatment of any document.</p> <p>This regulation-making power expires on 9 October 2020.</p> <p>Pursuant to this regulation-making power, the COVID-19 Emergency Response (Section 16) Regulations 2020  (SA) made on 20 April 2020 broadens the categories of persons who may take statutory declarations. For further guidance on witnessing statutory declarations, practitioners may refer to the Law Society of South</p>	<p>9 Oct 2020</p>

	<p>Australia's "Further advice on witnessing statutory declarations during COVID-19".</p> <p>The SA Emergency Legislation permits certain meetings to be held remotely by audiovisual link, however this does not apply to the witnessing of a document being signed (remote witnessing is specifically excluded under the COVID-19 Emergency Response (Section 17) Regulations 2020 (SA) made on 20 April 2020).</p>	
TAS	<p>COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020 (TAS) (TAS Emergency Act)</p> <p>Minister has the power to issue a notice to enable any action required under a legislative instrument to be:</p> <ul style="list-style-type: none"> • taken by means of a physical action such as a signature or personal service; or • evidenced in a non-electronic document, <p>to be taken or evidenced by the electronic means as specified in the notice.</p> <p>On 3 April 2020 the Premier issued a notice under the TAS Emergency Act to allow for signatures to be taken and documents to be evidenced by electronic means under certain provisions of the Local Government Act 1993 (TAS) and related regulations.</p>	<p>"Emergency cessation day" as declared under s 27 of the TAS Emergency Act</p>
ACT	<p>COVID-19 Emergency Response Act 2020 (ACT) (ACT Emergency Legislation)</p> <p>The ACT Emergency Legislation permits an individual to witness the signing of a document remotely via audiovisual link provided that the following conditions are satisfied — the witness must:</p> <ul style="list-style-type: none"> • observe the signatory signing the document in real time; • confirm the signature was witnessed by signing the document or a copy of the document; and • endorse the document (or copy of the document) with a statement as to the method used to witness the signature and that the document was witnessed in accordance with s 4 of the ACT Emergency Legislation. <p>This provision is effective on and from 14 May 2020 until the last day of a 3-month period during which no "COVID-19 emergency" has been in force. The ACT Emergency Legislation defines a COVID-19 emergency as a state of emergency declared under the Emergencies Act 2004 (ACT) or the Public Health Act 1997 (ACT) due to the coronavirus disease 2019.</p>	<p>3 months after end of "COVID-19 emergency"</p>

Can companies sign electronically under s 127 of the Corporations Act?

Yes (for now). On 5 May 2020 the Treasurer released a determination, [Corporations \(Coronavirus Economic Response\) Determination \(No. 1\) 2020](#) (Determination) under this instrument-making power inserted into the Corporations Act to allow for companies to electronically sign documents under [s 127](#) of the Corporations Act. This addresses the previous uncertainty as to whether a company can electronically sign due to the Corporations Act being exempted from the [Electronic Transactions Act 1999](#) (Cth).

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

The Determination amends the Corporations Act such that:

- a “document” expressly includes a document in electronic form;
- [s 127\(1\)](#) is amended to permit:

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

- companies to electronically sign documents without using a common seal under [s 127\(1\)](#), ie signing by 2 directors, a director and a secretary or a sole director and secretary; and
- split execution of a physical or electronic document, ie a company’s officers may sign separate copies or counterparts of a physical or electronic document.

The copy or counterpart of the (physical or electronic) document must include the entire contents of the document. For electronic signing, a method must be used to reliably identify the signatory and to indicate the signatory’s intention in respect of the contents of the document.

- [s 129\(5\)](#) is amended to allow a person dealing with a company to assume a document signed in accordance with the amended [s 127\(1\)](#) has been duly executed.

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

[s 129, Corporations Act 2001 \(Cth\)](#)

The ways in which a document can be electronically signed include pasting a copy of a signature into a document, using a stylus or finger to sign a document on a tablet, laptop or smartphone or using cloud-based signature platforms like DocuSign.

Practice Tip: For a signature which is copy pasted into a document, it would be prudent for a counterparty to require evidence that the signatory personally applied his or her signature to the document or provided his or her authority for the signature to be applied to the document.

The Determination is temporary. It applies to documents executed on and from 6 May 2020 and expires on 22 March 2021 (see note regarding extension above).

What about deeds?

The Determination does not expressly address whether companies may electronically sign deeds under [s 127](#), although some law firms adopt the view that it does implicitly. There are valid reasons to support this view, including that:

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

- [s 127\(3\)](#) of the Corporations Act provides that a company may execute a document as a deed if the document is expressed to be executed as a deed and is executed in accordance with [ss 127\(1\)](#) and [\(2\)](#). Therefore as the Determination amends [s 127\(1\)](#), a deed in electronic form that is expressed to be executed as a deed and is executed in accordance with the Determination should take effect as a deed;
- the Determination amends [s 129\(5\)](#) to extend the due execution assumption to a document in electronic form; and
- the clear intention as evidenced in the explanatory note to the Determination is to facilitate documents in electronic form being signed electronically.

References: [s 129, Corporations Act 2001 \(Cth\)](#)

Victorian and Queensland law governed deeds may be signed electronically for the duration of the VIC Emergency Regulation (see VIC emergency regulation regarding electronic signing and remote witnessing) and the QLD Emergency Regulation (see QLD emergency regulation regarding electronic signing and remote witnessing) respectively.

For all other Australian jurisdictions, the most prudent approach is for a company to sign deeds in wet-ink to avoid the risk of the deed being deemed invalid or unenforceable (see “Avoid signing deeds electronically” in [Signing documents remotely or electronically in a pandemic or crisis](#)). However, if that is not possible as a result of the pandemic, the Determination should cover electronic execution of deeds for the reasons set out above.

Other limitations of the Determination

In addition to not expressly addressing electronic signing of deeds under [s 127](#), the Determination has the following limitations:

- The modification of [s 127](#) only applies to “companies” (ie companies that are registered under the Corporations Act, see definition of “company” in [s 9](#) of the Corporations Act), but not to foreign companies or other entities that are not “companies” as defined in the Corporations Act (eg statutory corporations). Therefore, only counterparties entering into documents with “companies” can rely on the Determination.

References: [s 9, Corporations Act 2001 \(Cth\)](#)

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

- The changes do not operate retrospectively and will not validate any purported electronic signing of documents under [s 127](#) before 6 May 2020. However, an option is for parties to ratify electronic execution in accordance with the Determination.

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

NSW emergency regulation regarding remote witnessing

On 22 April 2020, the NSW government became the first to pass a temporary regulation regarding remote witnessing, the [Electronic Transactions Amendment \(COVID-19 Witnessing of Documents\) Regulation 2020](#)  (NSW) (NSW Emergency Regulation). The NSW Emergency Regulation was made under [s 17](#) of the Electronic Transactions Act 2000 (NSW) to “help reduce face-to-face contact during the COVID-19 pandemic”. The NSW Emergency Regulation expires on 22 October 2020.

References: [s 17, Electronic Transactions Act 2000 \(NSW\)](#)

Traditional methods of signing and witnessing documents remain valid while the new temporary regulation is in force.

What documents are covered by the NSW Emergency Regulation?

Under the NSW Emergency Regulation, an audio visual link can now be used for arrangements requiring witnessing by NSW law, including:

- wills;
- powers of attorney and enduring powers of attorney;
- appointments of enduring guardianship;
- deeds and agreements;
- affidavits, including annexures and exhibits to an affidavit;
- statutory declarations;
- certifications of matters required by a law;
- confirming or verifying the identity of a signatory; and
- seeing the face of a signatory.

What is an audio visual link?

An audio visual link is defined as technology that enables continuous and contemporaneous audio and visual communication between persons at different places, including video technology.

In practice, this means video conferencing via platforms such as Skype, WhatsApp, FaceTime, Microsoft Teams and Zoom can be utilised for the purpose of witnessing the execution of documents.

How can an individual witness a signature by audio visual link?

Under the NSW Emergency Regulation, an individual may witness a signatory signing a document by audio visual link provided the below conditions are satisfied. The witness must:

- observe the signatory signing the document in real time, ie the witness must actually observe the signatory physically signing the document, whether it is done electronically or by wet ink signature;
- attest or otherwise confirm that he/she witnessed the signatory's signature by signing the document or a copy of the document. The witness may, as soon as practicable after witnessing the signing:
 - sign a counterpart of the document; or
 - sign a scanned copy of the document signed by the signatory;
- be reasonably satisfied that the document that the witness signs is the same document or a copy of the document that he/she observed being signed by the signatory; and
- endorse the document (or the copy of the document) with a statement specifying the method used to witness the signature of the signatory and that the document was witnessed in accordance with the NSW Emergency Regulation.

How could it work in practice?

A legal practitioner could email a document to a client. Upon receipt, the client could print the document and arrange a Zoom or Skype meeting with the legal practitioner so that the legal practitioner can witness the client signing the document. The legal practitioner could then immediately endorse the required statement on a counterpart or, alternatively, the client could scan the signed document and email it back to the legal practitioner who can then print it and endorse the required statement on the scanned copy of the signed document.

The witness' statement (above the name and signature of the witness) could read as follows:

I, [name of witness], confirm that this [name of document] was signed by [name of signatory] and witnessed by me over audio visual link using [name of video-conferencing platform, eg Zoom] in accordance with the [Electronic Transactions Amendment \(COVID-19 Witnessing of Documents\) Regulation 2020](#) (NSW).

Do the signatory and the witness have to be in NSW when signing?

No. They do not have to be physically located in NSW during the audio visual link, however the NSW Emergency Regulation only applies to NSW-law governed documents.

Does the Regulation affect what documents may be signed electronically in NSW?

No. The Regulation only applies to witnessing requirements.

For NSW only, under [s 38A](#) the Conveyancing Act 1919 (NSW) a deed can be in electronic form and signed electronically by an individual (including an individual attorney signing for a company). In all other cases, a deed should be signed by an individual in wet ink.

References: [s 38A, Conveyancing Act 1919 \(NSW\)](#)

NSW Law Society guidelines

To help practitioners better understand the NSW Emergency Regulation, on 22 May 2020, the NSW Law Society released guidelines called "[Implications of the Electronic Witnessing Provisions — Electronic Transactions Amendment \(COVID-19 Witnessing of Documents\) Regulation 2020 \(New South Wales\) and its impact on the practice of property, wills and estate practitioners](#)". These guidelines outline recommendations for people witnessing documents generally and for lawyers who are required to witness documents. The guidelines also address potential areas of ambiguities in the NSW Emergency Regulation, including:

- what "real time" witnessing means where lawyers and clients are in different time zones — the guidelines suggest "real time" means "same time" and does not mean that the lawyer and client must be in the same time zone;
- the NSW Emergency Regulation not specifying where the signatory and witnesses should be located when the document is signed. The guidelines suggest that this can raise questions of where the document was made and note that "it may be appropriate to seek judicial guidance or declaratory relief before taking action to implement the instrument"; and
- the NSW Emergency Regulation's silence on whether the document should be considered to be made when it is signed by the signatory or by the witness. The guidelines state that "the safest approach is to treat the document as not being executed until the witness has signed".

VIC emergency regulation regarding electronic signing and remote witnessing

On 12 May 2020 the Victorian Government introduced a temporary regulation, [COVID-19 Omnibus \(Emergency Measures\) \(Electronic Signing and Witnessing\) Regulations 2020](#) (VIC) (VIC Emergency Regulation), made under [s 4](#) of the COVID-19 Omnibus (Emergency Measures) Act 2020 (VIC), which allows for:

- electronic signing of deeds and mortgages;
- remote witnessing for electronic transactions; and
- electronic signing and remote witnessing of powers of attorney, wills and statutory declarations.

The VIC Emergency Regulation is temporary and expires on 24 October 2020.

Electronic signing of deeds and mortgages under VIC Emergency Regulation

[Sections 5 and 6](#) of the VIC Emergency Regulation modify the [Electronic Transactions \(Victoria\) Act 2000](#) (VIC) (VIC ETA) to permit the electronic signing of deeds and mortgages.

This means that Victorian-law governed deeds and mortgages may be electronically signed by an individual or corporation. Victorian-law governed deeds need not be witnessed.

Electronic split execution of documents under VIC Emergency Regulation

[Section 12](#) of the VIC Emergency Regulation modifies the VIC ETA to make it clear that split execution is permitted provided that:

- the requirements set out in [s 9\(1\)](#) of the VIC ETA for electronic signatures (being requirements as to identity, reliability and consent) have been satisfied; and
- each signatory and party to the document receives every copy on which a signature appears.

Requirements of a witness under VIC Emergency Regulation

[Section 7](#) of the VIC Emergency Regulation modifies the VIC ETA to allow for remote witnessing to be conducted by audio visual link provided that:

- the witness observed the person signing the document by audio visual link;
- the witness writes their signature to signify they have witnessed the person signing; and
- the witness includes a statement accompanying their signature that indicates the witness observed the person signing the document by audio visual link in accordance with the VIC Emergency Regulation.

The VIC Emergency Regulation does not prescribe any particular form of audio visual link, and instead adopts the definition of “audio visual link” in the [Evidence \(Miscellaneous Provisions\) Act 1958](#) (Vic), being any facilities (including closed-circuit television) that enable audio and visual communication between persons at different places. This would include video conferencing platforms such as Skype, WhatsApp, FaceTime, Microsoft Teams and Zoom.

A similar process as outlined above in “How could it work in practice” could be followed. An example of the statement accompanying the witness’ signature is as follows:

This document was witnessed by audio-visual link in accordance with the [COVID-19 Omnibus \(Emergency Measures\) \(Electronic Signing and Witnessing\) Regulations 2020](#) (Vic).

Electronic signing and remote witnessing of powers of attorney, wills and statutory declarations under VIC Emergency Regulation

The VIC Emergency Regulation also provides for the electronic signing and remote witnessing of powers of attorney (Part 4), wills (Part 5) and statutory declarations (see Part 3), including further procedural requirements which a witness to these documents must comply with.

Notably, the effect of [s 35\(2\)](#) of the VIC Emergency Regulation is that an attorney may electronically sign documents where the attorney makes a statement on the document indicating that they signed electronically in accordance with the VIC Emergency Regulation. This creates some uncertainty as to whether electronic signing by an attorney would be invalid without such a statement. Accordingly, it is prudent to include such a statement in any Victorian-law governed document to be signed by an attorney while the VIC Emergency Regulation is in effect.

QLD emergency regulation regarding electronic signing and remote witnessing

On 22 May 2020 the Queensland Government introduced a temporary regulation known as the [Justice Legislation \(COVID-19 Emergency Response — Documents and Oaths\) Regulation 2020](#) (QLD) (QLD Emergency Regulation), which allows for the electronic signing of deeds, mortgages, general and enduring powers of attorney, statutory declarations, affidavits and wills. It also removes the requirement for deeds to be witnessed and provides for remote witnessing by audio visual link of certain other documents.

The changes effected by the QLD Emergency Regulation are temporary and will expire on 31 December 2020.

Requirements for deeds under QLD Emergency Regulation

The QLD Emergency Regulation expressly allows for deeds to be made in electronic form and to be signed electronically by corporations and individuals (including an individual attorney signing for a corporation). It clarifies the previous uncertainty around deeds by specifically removing the requirement for a deed to be made on paper or parchment.

In addition, the QLD Emergency Regulation allows for:

- deeds to be signed without a witness;
- deeds to be signed via split execution and in counterparts;
- corporations (including statutory corporations and foreign corporations) to sign a deed without a seal. In the case of:
 - an Australian corporation, this is consistent with [s 127](#) of the Corporations Act 2001 (Cth);

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

- a foreign corporation, it may sign a deed without applying its common seal provided that it does so in accordance with the law of the place of its incorporation; and
- a statutory corporation, it may sign a deed without applying its common seal provided that it does so in accordance with its statute; and
- a deed to be made electronically without the consent of a counterparty.

The following requirements for deeds must be satisfied:

- be in writing and contain a statement that it is executed as a deed;
- be delivered in accordance with existing law; and

- the requirements in the electronic transactions legislation as to identity and reliability are satisfied (but as noted above, the QLD Emergency Regulation expressly removes the requirement for a counterparty's consent).

Requirements for general powers of attorney under QLD Emergency Regulation

The above requirements for deeds also apply for general powers of attorney. A general power of attorney for a corporation may be signed without a witness. However for a general power of attorney for an individual, any requirement under the [Powers of Attorney Act 1998](#) (QLD) or another law for a general power of attorney to be witnessed will still apply. In such a case only certain persons (eg a lawyer or Justice of the Peace) may witness and the witnessing may be done by audio visual link.

Requirements for mortgages under QLD Emergency Regulation

The QLD Emergency Regulation allows for certain real property mortgages to be signed and lodged electronically. A mortgage that is held by a mortgagee on the same terms and conditions as the mortgage lodged electronically (eg via PEXA) can be electronically signed and need not be witnessed, provided it complies with [s 11](#) of the Property Law Act 1974 (Qld) (which requires such instruments to be in writing).

Remote witnessing by audio visual link under QLD Emergency Regulation

The QLD Emergency Regulation also allows for the following documents to be electronically signed and remotely witnessed by audio visual link:

- statutory declarations;
- enduring powers of attorney;
- affidavits; and
- wills.

Only certain persons (eg a lawyer or Justice of the Peace) may witness the signing of these documents and certain procedural requirements for audio visual witnessing must be satisfied.

Please note:

- This guidance note provides for the status of the law as at 22 September 2020. As the law and market practice on these issues is evolving, you should always consider the full text of all relevant emergency legislation and accompanying guidance material.
- This guidance note does not specifically consider any measures introduced in relation to the signing of court documents or documents affecting real property. For any real property dealings, you should carefully consider the requirements of the relevant jurisdiction including any relevant land titles office guidelines.

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](#) 

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