

COVID-19 – NSW allows certain documents (including paper land registry dealings) to be witnessed remotely

Source: [NSW legislation](#) and [Office the Registrar General](#)

Date: 30 April 2020

Abstract:

With the country in lockdown as a consequence of the COVID-19 pandemic, the NSW Government has introduced a new regulation, the *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW)(**Regulation**), which allows for the remote witnessing of certain documents by audio visual link in NSW.

The Regulation amends *the Electronic Transactions Regulation 2017* (NSW)(see schedule 1) and was made pursuant to section 17 of the *Electronic Transactions Act 2000* (NSW) (which was introduced by the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW)).

When does the Regulation take effect?

The Regulation is in effect from 22 April 2020.

How long will the Regulation be in effect?

The Regulation is temporary in nature and will expire 6 months after 22 April 2020, i.e on 22 October 2020 (unless the NSW parliament decides to end it earlier).

What documents are covered by the Regulation?

The Regulation applies to documents which must be witnessed under NSW law, including:

- wills;
- powers of attorney;
- enduring powers of attorney;
- deeds;
- agreements;
- enduring guardianship appointments;
- affidavits, including an annexure or exhibit to the affidavit; and
- statutory declarations.

What is an audio visual link?

An audio visual link is technology that enables continuous and contemporaneous audio and visual communication between persons in different locations, e.g. video-conferencing platforms such as Skype, Zoom, Microsoft Teams or FaceTime.

How does it work?

Provided certain conditions are satisfied (see below), a witness may witness a signatory signing a document by audio visual link.

What conditions must be satisfied?

A witness must:

- observe the signatory signing the document in real time, i.e. 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 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 this Regulation.

How could it work in practical terms?

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, e.g. Microsoft Teams] in accordance with clause 2 of Schedule 1 to the Electronic Transactions Regulation 2017 (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 Regulation only applies to documents being witnessed under NSW legislation.

Does the Regulation apply to companies executing documents pursuant to s127 Corporations Act 2001 (Cth)?

No. The Regulation only applies to documents being witnessed under NSW legislation. It does not affect Commonwealth legislation.

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

No. The Regulation only applies to witnessing requirements. There is also still uncertainty about whether or not a company can validly execute an agreement or a deed electronically under s127.

New authorised witnesses for oaths, declarations and affidavits

The Regulation also extends the list of authorised witnesses for oaths, declarations and affidavits:

- An oath, declaration or affidavit required for a purpose specified in section 26 of the *Oaths Act 1900* (NSW) (i.e. an oath, declaration or affidavit required for the purpose of any court or tribunal, for the registration of any instrument or for purpose of any arbitration) may be taken or made before an Australian legal practitioner. Previously, it could only be made before a NSW justice of the peace, a notary public, a British Consular Officer or an Australian Consular Officer.
- A statutory declaration may be made before a person before whom a statutory declaration under the *Statutory Declarations Act 1959* (Cth) may be made. For a list of authorised witnesses, see the [Attorney General's Department website](#).

What about paper land dealings?

As we reported in our update on 6 March 2020 ([NSW — most residual documents to be made available for electronic lodgment by the end of 2020](#)), there are approximately 100 dealings which cannot currently be lodged electronically at NSW LRS and which must still be lodged in paper (known as “residual documents”).

The Office of the Registrar General NSW has now issued a [guidance note](#) advising the following with regard to paper land dealings:

Verification of identity (VOI)

Legal practitioners and licensed conveyancers might consider using **audio visual technology** to verify the identity of a client who has instructed them to prepare or lodge a land registry document. Under the [Conveyancing Rules](#), they can apply the VOI standard (which requires a face to face in person interview) or verify the identity of the person “*in some other way which constitutes the taking of reasonable steps*”. Alternatively, as before, they can use an Identity Agent (e.g. Australia Post) to carry out the VOI check on their behalf. Some of the [approved information brokers](#) also offer remote VOI checks using online verification and facial recognition technology. For e-conveyancing VOI checks, see our update on 23 March 2020 ([Does the COVID-19 outbreak affect e-conveyancing VOI checks?](#)).

Electronic execution of paper land dealings

An amendment has been made to v5 of the [Conveyancing Rules](#) (the [Conveyancing Rules - \(COVID-19 Pandemic\) Amendment](#)) removing the prohibition on paper land dealings, plans and s88B instruments being signed and witnessed electronically under the *Electronic Transactions Act 2000* (NSW)(all land dealings must be signed and witnessed).

To be valid, electronic signatures must comply with the requirements of Division 2 of Part 2 of the *Electronic Transactions Act 2000* (NSW)(see s9):

- **Identity** – a method is used to identify the person and to indicate the person’s intention in respect of the information communicated.
- **Reliability** – the method used is as reliable as appropriate for the purpose.
- **Consent** - the parties agree to the use of electronic signatures and to the method used.

A person who signs electronically must confirm their **identity** and their **consent** to sign the instrument electronically by including, near or above the electronic signature, words to the following effect:

Electronic signature of me, [insert name], affixed by me, or at my direction, on [insert date]

Alternatively, he/she can use a digital signing platform which indicates that it is an electronic signature and the time and date of that electronic signature.

The above amendment to the Conveyancing Rules (allowing the electronic execution and witnessing of paper land dealings, plans and s88B instruments) is effective from 27 April 2020 and will remain in effect so long as the Regulation is in effect.

Witnessing the execution of paper land dealings via audio video link.

Conveyancing Rule 6.1 requires that a witness must certify that the dealing was “*signed by the signer in the presence of the witness*”; however, the Regulation now also allows a witness, effective from 22 April 2020, to witness the signing remotely subject to the requirements of the Regulation (see above). The requirement that a witness must be an eligible witness (i.e. at least 18 years old, not a party to the dealing and have known the signer for more than 12 months or taken reasonable steps to ensure the identity of the signer) still applies.

The effect of the amendment, together with the Regulation, is that paper land dealings, plans and s88B instruments can now be:

- signed and witnessed electronically; and
- witnessed by audio visual link.

See the [Office the Registrar General NSW](#) website for more information.

Key takeaways

So long as the Regulation remains in effect, i.e. until 22 October 2020 (or earlier if the NSW parliament decides):

- certain documents which must be witnessed under NSW law (such as deeds, agreements, powers or attorney and statutory declarations) may be witnessed remotely by audio visual link (effective from 22 April 2020); and
- paper land dealings, plans and s88B instruments may be signed and witnessed electronically and witnessed remotely by audio visual link (effective from 27 April 2020)