

## **COVID-19: Companies can sign documents electronically under s127(1) Corporations Act from 6 May 2020**

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### **Abstract:**

S1362A of the *Corporations Act 2001* (Cth)(**Act**)(inserted by Sch 8 of the [Coronavirus Economic Response Package Omnibus Act 2020](#) (Cth)) authorises the Treasurer to modify the operation of specified provisions of the Act by legislative instrument and, on 5 May 2020, the Treasurer made a determination under this instrument making power, the [Corporations \(Coronavirus Economic Response\) Determination \(No.1\) 2020](#) (Cth) (**Determination**) allowing companies to electronically sign documents under s127 of the Act.

### **Background to companies signing documents under s127 of the Act**

S129(5) of the Act provides that a person may assume that a document has been duly executed by a company if the document has been executed by prescribed company officers in accordance with s127(1) of the Act.

S129(6) of the Act provides that a person may assume that a document has been duly executed by a company if the document has been sealed and witnessed by prescribed company officers in accordance with section 127(2) of the Act.

Until the Determination, it was not clear if a company could electronically execute a document under s127 because the Act is exempted from the *Electronic Transactions Act 2000* (Cth) (see Reg 4 of the *Electronic Transactions Regulations 2000* (Cth)).

### **Can companies now sign documents electronically under s127 of the Act?**

Yes, companies can now electronically sign documents under section 127(1) of the Act.

The Determination modifies the operation of s127(1) and s129(5) Corporations Act 2001 (Cth) to provide as follows:

- A “document” is expressly stated to include a document in electronic form.
- A company may execute a document without using a common seal, i.e. in accordance with s127(1), if each of the prescribed company officers (2 directors, a director and a company secretary or a sole director and company secretary, whichever is applicable) either:
  - (if the document is in a physical form) sign a copy or counterpart of the document, i.e. each sign a copy or counterpart of the document; or
  - (if the document is in electronic form (i.e. an electronic communication within the meaning of the *Electronic Transactions Act 1999* (Cth))), use a method which identifies the signatory and indicates the signatory’s intention in respect of the contents of the document and that method is as reliable as appropriate for the purpose for which the company is executing the document or is proven to have fulfilled the functions of identifying the signatory and indicating the signatory’s intention, by itself or together with further evidence.
- The signed:

- copy or counterpart of the physical document; or
- electronic document,

must include the entire contents of the document, but does not need to include:

- the signature of another signatory (i.e. each signatory can sign a separate document); or
  - any material included in an electronic document to evidence the reliability of the method used to identify the signatory and to indicate the signatory's intention.
- For the purposes of the assumption in s129(5) of the Act, a reference to a document being executed in accordance with s127(1) includes a reference to a document being executed in accordance with s127(1) as modified by the Determination. This effectively means that a person can assume that document which is executed by a company in accordance with the modified version of s127(1) has been duly executed by the company.

### **How are documents electronically signed?**

A document can be electronically signed by:

- pasting an image of a physical signature into the document;
- using a stylus or finger to sign a soft copy of the document on a touchscreen tablet, laptop or smartphone; or
- using a cloud-based digital signature platform such as DocuSign.

The recipient of the electronic signature must:

- be able to identify the person signing and confirm that he/she intends to be bound;
- be satisfied that the method used is reliable; and
- consent to the document being signed electronically.

### **For how long can companies sign documents electronically under s127?**

The Determination is temporary in nature and only modifies the operation of s127(1) and s129(5) of the Act for a period of 6 months. Accordingly, companies can only execute documents electronically under s127(1) from 6 May 2020 until 5 November 2020 (inclusive of both dates).

### **What about documents signed electronically under s127 before 6 May 2020?**

The Determination does not operate retrospectively. It will therefore not validate any document which was executed electronically by a company under s127 before 6 May 2020.

### **Does it apply to deeds?**

Certain dealings with land must be in the form of a deed; however, the Determination does not expressly state that companies may electronically sign deeds under section 127(1) (a "deed" is not included in the "document" definition) and, under common law, a deed must be written on paper.

In Victoria, the *COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020* (VIC), which commenced on 12 May 2020, temporarily removes the "paper" requirement by allowing deeds to be signed electronically (see [VIC temporary regulations allow for electronic](#)

[signing of deeds and remote witnessing of documents](#)) and there is no statutory witnessing requirement for deeds in Victoria.

In New South Wales, s38A *Conveyancing Act 1919* (NSW) allows deeds to be electronically created, signed and witnessed but s38, which deals with the signing and witnessing of deeds, states that it does not affect the execution of deeds by corporations. It is therefore not clear if s38A only applies to the execution of deeds by individuals (and not by corporations). Further, a witness normally needs to be physically present at the time that the document is being signed by the signatory and the witness must sign the same document (not a separate copy of it) at the same time as the signatory signs it (see the NSW Law Society's [FAQ on electronic witnessing of signatures](#)). While the execution of deeds can be witnessed remotely in NSW (see [COVID-19 — NSW allows certain documents \(including paper land registry dealings and plans\) to be witnessed remotely](#)), an individual attorney appointed by a company under deed could consider electronically executing a deed under the *Conveyancing Act 1919* (NSW) on behalf of the company provided the attorney's electronic execution is witnessed.

But in light of the above continuing uncertainty about the validity of deeds executed electronically by companies and until the matter is clarified by further legislation or properly tested by the courts, the most prudent approach in all jurisdictions would be for companies to continue signing deeds in wet ink.

### **What about a foreign company?**

The Determination only applies to companies registered under the Act – see the definition of “company” in s9 of the Act. It therefore does not apply to a foreign company or other entity that is not a “company” as defined in the Act.

### **What about land registry documents?**

It will depend on the land registry as each land registry in each jurisdiction has its own specific execution requirements. In New South Wales, the [Conveyancing Rules](#) were amended to temporarily allow the electronically signing and witnessing of plans and dealings (see [COVID-19 — NSW allows certain documents \(including paper land registry dealings and plans\)](#)). If a document can be lodged electronically via an Electronic Lodgment Network Operator (**ELNO**), eg PEXA, then that document can be digitally signed and lodged at a land registry by an ELNO subscriber, e.g. legal practitioner, on behalf of a party to the document.

### **Key takeaway**

The previous uncertainty as to whether or not a company can electronically sign a document under s127 of the Act has been removed. For a period of 6 months (from 6 May 2020 until 5 November 2020), a company can electronically sign a document under s127(1) of the Act and a counterparty can rely on the assumption in s129(5) of the Act that the document has been duly executed by the company. If there is more than one company officer signing the document, each can sign a separate document. For deeds however, it would be prudent for companies to continue signing them in wet ink.