

# COVID-19: PRESSURE POINTS: E-SIGNING REFORM IN QUEENSLAND (AUSTRALIA)

03 June 2020 | Australia

Legal Briefings - By **Melissa Swain Tonkin, Phillip Smith and John Slater**

---

Queensland has temporarily eased restrictions on the electronic signing of certain documents, allowing:

- deeds to be signed electronically and without a witness;
- mortgages (in certain circumstances), general powers of attorney, affidavits, declarations, wills, enduring powers of attorney and advance health directives to be electronically signed and witnessed via audio-visual link; and
- deeds, general powers of attorney for corporations, affidavits and declarations to be signed using split execution or counterparts.

In this article, we unpack these reforms as well as the key issues to consider when dealing with electronically signed documents and provide practical guidance to ensure the document is legally binding.

## PRACTICAL TIPS

- E-signing the Queensland-law governed documents above will be binding provided the

method is *as reliable as appropriate*. To avoid the reliability of an e-signed document being questioned, parties should:

- agree on the method of e-signing in advance (e.g. using software like DocuSign or inserting a stored signature into a document);
  - verify each signatory's identity; and
  - clearly identify in the document each signatory's name and the capacity in which they are signing.
- Check whether physical signing is required under any special rules, such as specific legislation, a company's constitution or pre-existing contracts.

## OVERVIEW

The labyrinth of rules and restrictions regulating the electronic execution of documents has long been a source of complication in commercial transactions. The COVID-19 pandemic has given fresh urgency to calls for reform. Social distancing and remote working have made formalities, such as witnessing and signing documents in wet ink, increasingly impractical, while the uptake of electronic methods of execution has been hindered by a lack of legal certainty.

Fortunately, reforms passed by the Queensland parliament offer some welcome (albeit temporary) relief. The *Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Regulation 2020* (as amended) (**the Regulations**) have introduced new rules permitting:

- the electronic signing of deeds, general powers of attorney, affidavits, declarations and certain other enduring documents; and
- the witnessing of certain documents by way of audio-visual link.

These measures follow the *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020*, issued by the Federal Treasurer, which notably allowed companies to sign under section 127 of the *Corporations Act* (**the Determination**) using electronic signatures and counterparts. Our earlier update on the Determination can be found [here](#).

## ELECTRONIC DEEDS

The most important feature of the Regulations is the introduction of very clear rules for the electronic execution of deeds.

The Regulations achieve this by:

- expressly providing that a deed may be made and signed in electronic form (Regulations, section 12O); and
- abrogating the following rules at common law:
  - that a corporation execute a deed using its common seal (Regulations, section 12Q) – this relaxation will be most beneficial for foreign companies who may wish to sign deeds electronically;
  - that a deed signed by an individual be witnessed (Regulations, section 12S); and
  - that a deed be made on paper or parchment (Regulations, section 12N(2)).

In order to take effect, a deed must also:

- a. contain a conspicuous statement that the instrument is a deed; and
- b. be 'delivered' in accordance with section 47 of the *Property Law Act* (meaning the parties intend to be bound).

# E-SIGNING OTHER DOCUMENTS

The Regulations provide that a range of other documents can be electronically signed, including:

- mortgages (in certain circumstances);
- general powers of attorney;
- affidavits and statutory declarations; and
- wills, enduring powers of attorney and advance health directives.

The Regulations also provide the option of witnessing such documents via audio-visual link. In principle, witnessing over video-conferencing platforms like Skype or Zoom should be valid, provided that the following requirements are met:

- the witness is a **special witness** (which in most cases is limited to Australian legal practitioners, certain justices or commissioners for declaration and notaries public) (Regulations, section 5);
- the witness observes the signatory direct the substitute signatory to sign the document (if applicable);
- the audio visual link enables the witness to be satisfied, by the sounds and images made by the link, that the signatory or substitute signatory is signing the document;
- the witness observes the signatory or substitute signatory signing the document in real time;
- the signatory or substitute signatory signs each page of the document;
- the witness is satisfied that the signatory is freely and voluntarily signing the document or directing the substitute signatory to sign the document (Regulations, section 17); and
- the witness takes reasonable steps to verify the identity of the signatory and that their name matches the name written on the document (Regulations, section 18).

# PRACTICAL GUIDANCE

## HOW DO I ENSURE AN ELECTRONIC SIGNATURE IS BINDING?

The Regulations are not prescriptive about the type of technology used to electronically sign, but rather focus on whether the signatory's consent has been reliably obtained. Specifically, the method of electronic execution must:

- a. identify the signatory for the document and the signatory's intention in relation to the contents of the document; and
- b. either be:
  - as reliable as appropriate for the purpose for which the document is signed, having regard to all the circumstances, including any relevant agreement; or
  - proven in fact to have fulfilled the functions described above, by itself or together with further evidence.

## WHEN WILL A METHOD OF E-SIGNING BE 'AS RELIABLE AS APPROPRIATE'?

As with companies [electronically signing under s.127 of the Corporations Act](#), any of the commonly used methods of electronic execution should, in principle, be valid, including:

- digitally signing using DocuSign or another secure, cloud-based platform; or
- inserting a stored signature into a document; or generating a new signature using a stylus and touchscreen.

The key issue is whether the method is *reliable*, which will depend on all of the circumstances at hand. That said, some basic steps that can help avoid the reliability of an electronically signed document being called into question include:

- agreeing with the other parties in advance on the method of electronic execution and maintaining a record of such agreement;
- verifying the signatory's identity, for example, by ensuring that each electronically signed counterpart has been sent from each signatory's usual email address and maintaining records of communications showing that the parties intended to execute the document;
- clearly identifying each signatory by name in the document and, if they are signing on behalf of a party to the document, the capacity in which they are signing; and
- ensuring that the type of document is clearly stated and that all relevant form requirements are met.

## **ELECTRONIC COUNTERPARTS ALLOWED**

The Regulations also provide that deeds, general powers of attorney for corporations, affidavits and declarations can be made using separately signed counterparts (Regulations, sections 12R and 12ZA). This means that parties may:

- retain separate electronic files signed by each signatory as opposed to each signatory electronically signing the same file; and
- use different methods of signing their individual counterpart (for example one party may sign electronically while the other signs a paper counterpart).

Notably, the Regulations appear to restrict parties from declining to accept a document that has been electronically signed, stating that a deed, general power of attorney, affidavit and declaration may be made in electronic form without the consent of another signatory or party (Regulations, sections 12C, 12H, 12O and 12Y).

## **A WORD OF CAUTION**

Although the Regulations mark a significant departure from the pre-COVID status quo, parties should carefully consider whether any special rules apply to documents that are proposed to be signed electronically (e.g. under the terms of specific legislation, under a company's constitution or under pre-existing contracts). The approach to reform of electronic signing regulation also varies across the other Australian States and Territories.

## **WHAT'S NEXT?**

The Regulations will expire on 31 December 2020. However, this is an area of reform which has been gaining momentum for some time and this may well be a precursor of a permanent change in the near future.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



**MELISSA SWAIN-TONKIN**  
PARTNER, BRISBANE

+61 7 3258 6461  
melissa.swain@hsf.com



**MATTHEW FITZGERALD**  
PARTNER, BRISBANE

+61 7 3258 6439  
Matthew.FitzGerald@hsf.com



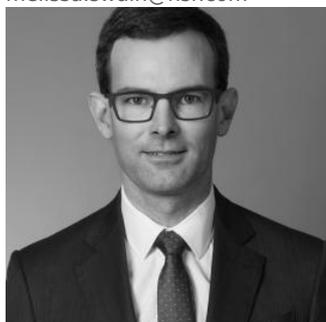
**NATALIE BRYCE**  
PARTNER, BRISBANE

+61 7 3258 6574  
Natalie.Bryce@hsf.com



**SIAN NEWNHAM**  
PARTNER, BRISBANE

+61 7 3258 6591  
Sian.Newnham@hsf.com



**JAY LEARY**  
PARTNER, AUSTRALIA

+61 8 9211 7877 / + 61 7 3258  
6619  
Jay.Leary@hsf.com



**IAN WILLIAMS**  
SENIOR ADVISER,  
SYDNEY

+61 2 9225 5980  
Ian.M.Williams@hsf.com

---

## LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

**SUBSCRIBE TO STAY UP-TO-DATE WITH LATEST THINKING, BLOGS, EVENTS, AND MORE**

Close