

Further reforms to facilitate the creation and signing of documents electronically

A recent legislative reform to the *Corporations Act 2001* (Cth) enables companies to sign documents electronically, while the *Electronic Transactions Act 2000* (NSW) ("ET Act") has been amended to more comprehensively facilitate alternative arrangements for making, executing, filing and serving documents and information under State legislation. Familiarity with these developments will enable agencies to manage their dealings at a distance during the COVID -19 pandemic.

KEY POINTS

- ▶ The *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* (Cth) ("the Determination") enables the electronic signing of documents by companies under the *Corporations Act 2001*.
- ▶ The *COVID-19 Legislation Amendment (Emergency Measures – Attorney General) Act 2020* ("the Amendment Act") amends (amongst other things) the ET Act to permit regulations to be made to further facilitate temporary alternative arrangements to existing legislative requirements. The intention is to enable a broader range of documents and information to be made and communicated by electronic means.

Company Signatories - Ordinarily, a company executing a document without a common seal would sign the document under s. 127(1) of the *Corporations Act*. However, and as noted in our alert of 25 March 2020, it was unclear whether s. 127 applies to the electronic execution of documents. The Determination temporarily modifies the operation of s. 127(1) to facilitate electronic execution of documents by companies where signing by two directors, a director and a secretary or by a sole director who is sole secretary.

Under the Determination, for a six month period up until 6 November 2020, a document executed by a company without using a common seal under s. 127(1):

- a) may be in electronic form; and
- b) may be executed under s. 127(1):
 - i. by the relevant company officer/s each signing a separate copy or counterpart of the full physical document – in other words, modified s. 127(1) supports split execution of multiple paper copies or counterparts; or
 - ii. by the relevant company officer/s electronically signing the full electronic version of the document. The method used must (1) identify the signatory and his or her intention in respect of the document's contents and (2) be as reliable as is appropriate for the purpose for which the company is executing the document.

The Explanatory Note to the Determination states "that there are a wide variety of means by which officers of a company might sign a document electronically. These include:

- pasting a copy of a signature into a document;
- signing a PDF on a tablet, smartphone or laptop using a stylus or finger;
- cloud-based signature platforms like DocuSign."

The Determination also modifies s. 129(5) so that execution of a document by a company in accordance with the modified s. 127(1) will attract the assumption that the document has been duly executed.

The Determination does not expressly deal with deeds and does not expressly modify the operation of s. 127(3), which 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 s. 127(1) or (2). Notwithstanding this, NSW government agencies may enter into deeds with companies in an electronic format where companies sign electronically in accordance with the modified s. 127(1). Consider seeking advice in relation to the methods of electronic execution accommodated by modified s. 127(1) if they are not clear in a particular case.

Widening of Regulation-making Power under ET Act -
The primary regulatory regime supporting the validity of electronic transactions in New South Wales is the ET Act. On 25 March 2020, the ET Act was amended to permit regulations to be made that alter the signing, witnessing and attesting of documents under certain specified Acts. We have now seen an example of its use to enable the witnessing of documents by audio visual link ("AVL") by the *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020*, as discussed in our alert of 23 April 2020.

"Altered arrangements" includes the modification and suspension of arrangements, permissions or requirements (see s. 17(5)).

Modified s. 17 will enable regulations to be made to facilitate a wider range of documents and information to be made or communicated electronically.

Until the regulations are made, agencies should ensure compliance with existing laws and requirements in relation to the making and communication of documents and information.

The Amendment Act expands the regulation-making power under s. 17(1) in two ways.

- *First*, the power can now be used to make regulations that provide "altered arrangements" for the making, giving and retaining of documents or information (see s. 17(1)(d) to (n)).
- *Second*, the power to make regulations under s. 17(1) has been extended to any Act, and not just those Act(s) specified under the previous s. 17(5).

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