

## Signing documents remotely and reforms to facilitate document execution under specified Acts

Electronic transactions are facilitated by the *Electronic Transactions Act 2000* ("ET Act"), which supports the execution of agreements by way of electronic communications. Familiarity with the Act's application (and limitations) will assist organisations and individuals alike to continue their dealings at a distance during the COVID-19 pandemic.

### KEY POINTS

- ▶ The *ET Act* provides a regulatory regime to support the valid use of electronic signatures (e-signatures), but may not support e-signing of agreements in all cases.
- ▶ Government will be able to e-sign most general commercial contracts, such as procurement contracts, but:
  - (i) agreements regulated by specific legislation
  - (ii) deeds and
  - (iii) agreements to be electronically executed by companies
 will need more careful attention.
- ▶ The *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* amends the *ET Act* to permit regulations to be made to facilitate the execution of documents remotely in view of the COVID-19 pandemic.

There is no general law requirement for agreements to be signed but there may be a legislative requirement for signing in some instances. Signing is also best practice as a risk mitigation measure. In New South Wales, electronic transactions are facilitated by the *ET Act*. Electronic execution of specific types of transaction and other documents may also be provided for in other legislation, such as the *Conveyancing Act 1919*.

Section 7 of the *ET Act* provides generally for the validity of electronic transactions, while ss. 8 and 9 facilitate electronic contracts and their execution. In particular, s. 9 sets out the legal requirements for a valid e-signature. In short, parties to a transaction should agree, in advance of signing and in writing (e.g., by way of email), that the agreement will be executed electronically and the method of e-signing to be adopted, which should be appropriate to the particular contract. Possible methods include applying a scanned paper signature to a pdf document, using a digital pen, or using e-signing software such as DocuSign. Most general commercial contracts are capable of electronic execution under the *ET Act*.

However, some contracts may warrant further attention: (a) contracts regulated by specific legislation, (b) contracts executed in the form of a deed, and (c) where a signatory to a contract is a company incorporated under the *Corporations Act 2001*.

*Contracts Regulated by Specific Legislation* – It may not be possible to rely on the *ET Act* to support electronically executed contracts that are regulated by specific legislation. This is especially the case where the regulating statute:

- (a) is excluded from the operation of the *ET Act* (see cl. 4 and 7 of the *Electronic Transactions Regulation 2017* ("ET Reg"));
- (b) requires the regulated contract's execution to be witnessed (see cl. 5(f) and 6(f) of the *ET Reg*); or
- (c) prohibits, expressly or otherwise, electronic execution.

Nevertheless, electronic execution of the regulated contract may still be permitted under general law and, in some instances, the regulating statute itself.

*Deeds* – Deeds are by nature difficult given the emphasis on formalities of execution, and uncertainties of the law in this area. If electronic execution is unavoidable, the safest course may be to structure the deed so as to be enforceable as a contract, namely by providing for adequate consideration.

*Company Signatories* – Electronic execution by companies presents challenges because it is unclear whether the statutory provisions on regular execution

under s. 127 of the *Corporations Act 2001* apply to electronic execution. If possible, companies should execute by wet ink signatures under s. 127 of the *Corporations Act*. Otherwise, it is suggested that agencies check the identity and position of the proposed signatory and obtain evidence of their authority to sign for the company. This is because the statutory assumptions in s. 129 as to due execution may not be relied on if a company is not considered to have signed in accordance with s. 127.

Two further issues for consideration are witnessing and execution by an agent. The common law does not require the signing of a contract to be witnessed. However, if the regulating statute or a particular contract requires it, then the witness should:

- (a) be physically present at the time of the e-signing and
- (b) immediately e-sign the same document e-signed by the signatory.

In some instances, practical necessity may require a government signatory (holding any necessary financial delegation) to sign an agreement for the agency through an agent. In these circumstances, if there is no legislative impediment to doing so, it is recommended

that the signatory officer should provide express, written authorisation to the officer who is to sign as their agent to apply the signatory's e-signature to the agreement. The signatory should also inform the counter-party in advance about the proposed electronic execution through an agent and obtain the counter-party's written agreement to the proposed method of execution.

Finally, and in view of the health risks posed by COVID-19, reforms are taking place in this area of law. The *COVID-19 Legislation Amendment (Emergency Measures) Act 2020*, which commenced on 25 March 2020, amends the *ET Act* to permit regulations to be made to facilitate the provision of altered arrangements for the signing, witnessing and attesting of documents under certain specified Acts. In particular, regulations may be made under each of the following Acts to provide for remote execution of documents:

- ET Act
- Oaths Act 1900
- Guardianship Act 1987
- Succession Act 2006
- Powers of Attorney Act 2003
- Conveyancing Act 1919 and
- any other Act administered by the Attorney-General.

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