

## Signing and witnessing documents in the time of COVID-19

The table below summarises the current legal position in NSW on the electronic execution of documents.

Item	Document	Can a digital signature be used?	Practical Tips
1	<p><b>Agreements signed by an individual</b></p> <p><i>(includes execution by an individual attorney on behalf of another individual or company)</i></p>	Yes	<p>An electronic signature will have the same effect as a wet-ink signature. The following practical steps are recommended:</p> <ol style="list-style-type: none"> <li>Obtain email confirmation from a person electronically signing a document that they either personally applied their signature or they authorised another person to apply it.</li> <li>To minimise the risk that a person denies their digital signature was applied by them at a later date, ensure that the person's signature is witnessed by another person. See page 3 for instructions on audio-visual witnessing if in-person witnessing not possible.</li> <li>Ensure the document that is being signed contains a clause which authorises the parties to sign and exchange electronically.</li> </ol>
2	<p><b>Agreements signed by a company</b></p>	<p>Yes</p> <p><i>(but only during this crisis)</i></p>	<p>The <i>Corporations (Coronavirus Economic Response) Determination (No. 1) 2020 (the Determination)</i> came into effect on 6 May 2020. The Determination allows for companies to execute documents electronically pursuant section 127 of the <i>Corporations Act 2001</i> (Cth). These changes will be in operation until 5 November 2020. Companies may now execute documents in any of the following ways under s 127:</p> <ol style="list-style-type: none"> <li><u>Split execution</u>: where the officers of a company sign different copies of the document in wet-ink.</li> <li><u>Modified execution</u>: where the first signatory wet-ink signs and scans the document, which is then printed and signed in wet-ink by the second signatory (next to the signature of the first signatory).</li> <li><u>Electronic execution</u>: separate electronic signatures could be applied to fully electronic versions of the document. The Determination requires that steps are taken to reliably identify the person electronically signing the document and their intention. If the signatory does not email through the executed document directly (eg one officer sends on behalf of the other, or a personal assistant sends on behalf of signatories), it is recommended that each signatory sends an email to the parties confirming that they have electronically signed the document or have authorised a person to do so on their behalf.</li> </ol>
3	<p><b>Deeds signed by individual</b></p>	Yes	<p>See guidance set out in Item 1.</p> <p>This includes deeds signed by an attorney on behalf of an individual or company. The execution of a deed by an individual must be witnessed. See page 3 for instructions on audio-visual witnessing.</p>
4	<p><b>Deeds signed by a company</b></p>	<p>Yes</p> <p><i>(but only during this crisis)</i></p>	<p>See guidance set out in Item 2.</p> <p>While the Determination does not expressly state that deeds may be signed electronically, it is clear that the intention of the Determination is to facilitate the entire process of executing a document using electronic communications.</p>

5	<b>Statutory Declarations</b>	No	<p>Statutory declarations cannot be signed electronically as they have been excluded from the provisions of the <i>Electronic Transaction Act 2000</i> (NSW) that permit electronic execution.</p> <p>This document can be witnessed by audio-visual means. See page 3 for instructions on audio-visual witnessing.</p>
6	<b>General Power of Attorney (NSW)</b>	In some instances only	<p>A Power of Attorney <u>cannot</u> be signed electronically if:</p> <p>a) the attorney is required to sell, mortgage, lease or otherwise deal with the principal's real estate pursuant to the power of attorney, then the power of attorney must be signed in wet-ink and registered with the NSW Land Registry Services; or</p> <p>b) a power of attorney is registered by the Registrar-General in the General Register of Deeds kept under the <i>Conveyancing Act 1919</i>, it must be signed in wet ink.</p> <p>See guidance set out in Item 1. See page 3 for instructions on audio-visual witnessing.</p>
7	<b>Enduring Power of Attorney (NSW)</b>	No	<p>An enduring power of attorney cannot be signed electronically as it has been excluded from the provisions of the Electronic Transaction Act that allow for electronic execution. An enduring power of attorney must be witnessed by a prescribed witness, such as, an Australian legal practitioner and be accompanied by the relevant certificate from the prescribed witness.</p> <p>This document can be witnessed by audio-visual means. See page 3 for instructions on audio-visual witnessing.</p>
8	<b>Enduring Guardianship (NSW)</b>	No	<p>An enduring guardianship cannot be signed electronically as it has been excluded from provisions of the Electronic Transaction Act that allow for electronic execution. An appointment of enduring guardian must be witnessed by a prescribed witness, such as, an Australian legal practitioner and be accompanied by the relevant certification from the prescribed witness.</p> <p>This document can be witnessed by audio-visual means. See page 3 for instructions on audio-visual witnessing.</p>
9	<b>Wills (NSW)</b>	No	<p>Documents that have to be signed and lodged or filed with a judicial body are excluded from the Electronic Transaction Act that allow for electronic execution. Since an original executed version of the will must be submitted to the NSW Supreme Court when applying for a grant of probate, it is not recommended that a will be signed electronically.</p> <p>This document can be witnessed by audio-visual means. See page 3 for instructions on audio-visual witnessing. If witnessing a will by audio-visual means, don't forget that the testator must also see both witnesses sign the will. All counterparts of the will should be collated and stored together so that there is no question that the signatures were not properly witnessed. A copy of the <a href="#">regulations</a> permitting audio-visual witnessing should also be kept with the will for good measure.</p>

## Audio-Visual Witnessing

The *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW) (**Regulation**) was introduced on 22 April 2020. This Regulation permits the signing of documents to be witnessed by audio visual link such as Zoom, FaceTime and Skype. The Regulation applies to documents that are required to be witnessed pursuant to NSW state legislation.

In accordance with the Regulations, a person witnessing the signing of a document via audio visual link must:

- (a) Take steps to be reasonably satisfied that the document the witness signs, is the same as the document or a copy of the document signed by the signatory.

- (b) Observe the person signing the document in real time. This means that the camera angle will need to allow the witness to see both the face and the signing hand of the person signing the document.
- (c) Attest or confirm that the signature was witnessed by signing the document or a copy of the document. This can be done by:
  - (i) the witness signing a blank counterpart of the document as soon as possible after witnessing the execution of the document by the signatory; or
  - (ii) the witness asking the signatory to scan and send a copy of the signed document to the witness for signing as soon as possible after they have witnessed execution by the signatory.
- (d) Endorse a document with a statement specifying the method used to witness the signature, and that the document was witnessed in accordance with the regulation, such as:

*“This document was signed in counterpart and witnessed over audio visual link in accordance with clause 2 of Schedule 1 to the Electronic Transactions Regulation 2017”.*

For further information, please contact [John Nash](#), [Tom Morgan](#) or [Jessica Tanna](#) from our Commercial & Corporate Team.

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