Asia Pacific Guide to Lending and Taking Security - Australia

Working digitally

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# 1. Is it possible for documents to be executed electronically (whether by the manual insertion of a digital signature or the use of an e-signing platform) under the laws of this jurisdiction? If so, is this limited to only particular types of finance documents?

The electronic execution of documents may be permitted in Australia, depending on the following:

The type of document, that is, whether the document is an agreement or a deed.

If the document is to be signed by a natural person or a corporation.

**Execution by natural persons**

Generally speaking, agreements can be signed electronically by natural persons. However, certain types of agreements must be signed in wet ink (such as mortgage documents to be lodged with the relevant land registry) unless electronic execution is expressly permitted in the relevant legislation or by the relevant authority. See the answer to question 3 of this section for further details.

In respect of deeds, the electronic execution of deeds has historically been problematic due to the long-standing common law requirement for deeds to be written on parchment or paper and, therefore, requiring wet ink signatures. However, the electronic execution of deeds by natural persons is now allowed in the following jurisdictions:

New South Wales (NSW) under the Conveyancing Act 1919 (NSW).

Queensland under the Property Law Act 1974 (Qld) pursuant to amendments passed by the Justice and Other Legislation Amendment Act 2021 (Qld) — except for powers of attorney by individuals in deeds and general powers of attorney, which must be a physical document and witnessed (subject to limited exceptions).

Victoria under the Electronic Transactions (Victoria) Act 2000 (Vic) pursuant to amendments passed by the Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021 (Vic).

No other Australian states have enacted measures concerning the electronic execution of deeds by natural persons.

**Execution by corporations**

Corporations registered under the Corporations Act can sign documents electronically by its authorized agent under Section 126 of the Corporations Act or by its directors and company secretaries under Section 127 of the Corporations Act.

However, if a corporation signs by an authorized agent, the other parties to the contract may not rely on the assumption in Section 129(5) of the Corporations Act, which provides that a person may assume that a document has been duly executed by a company if it is executed in accordance with Section 127(1) of the Corporations Act.

Under Section 127(1) of the Corporations Act, a corporation may execute a document without a common seal if the document is signed by any of the following:

Two directors of the company;

A director and a company secretary of the company; or

For a proprietary company that has a sole director who is also the sole company secretary — that director

Electronic execution and split execution under Section 127(1) of the Corporations Act is allowed pursuant to amendments to the Corporations Act passed in the Corporations Amendment (Meetings and Documents) Act 2022 (Cth), which came into force on 22 February 2022.

The latest amendments to the Corporations Act under the *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Act 2023* (Cth) closed several existing gaps, confirming that any document required or permitted to be signed under the Corporations Act can now be signed physically or electronically. In addition, electronic signing is expressly allowed for other documents that require a signature such as directors' annual reports and declarations and creditors' statutory demands.

**Split execution by directors**: Section 110A of the Corporations Act permits directors to sign a copy or counterpart of a document (including a deed) by wet ink or electronically without the need for that copy or counterpart to include the signature of the other company officer signing the document. Each director must sign a complete copy of the document.

**Electronic signature by directors**: For electronic execution of a document (including a deed) to be effective, the following conditions must be met:

A method of signing is used to identify the person in the electronic signature and to indicate the person's intention to sign a copy or counterpart of the document. Platforms such as DocuSign would appear to satisfy this requirement.

The copy or counterpart includes the entire contents of the document.

The method used to sign electronically is "as reliable as appropriate for the purpose for which the information was recorded, in light of all the circumstances, including any relevant agreement" or is proven, in fact, to have identified the signatory and the signatory's intention in respect of the contents of the document, by itself or together with further evidence.

In practice, when a company is executing a document under Section 127 of the Corporations Act, directors can sign electronically, provided that the method used identifies the signatory and indicates their intention. This can be done in one of two ways:

By applying an electronic or digital signature through an application such as Adobe Sign or DocuSign, which would appear to be valid under the act without further evidence, as these applications use authentication technology to verify the signer's identity.

By applying an "e-signature," for example by "copy and pasting" an image of the signature into a document. This method would require further evidence of the signatory's identity and intention (for example, through a confirmatory email) given the risk that the e-signature could be applied without the signatory's consent.

# 2. Where the witnessing of a signing is contemplated, is it possible for the witness to verify the signature over a live video call?

Regarding corporations, witnessing the affixation of a common seal can be done remotely under Section 127(2A) of the Corporations Act. Witnessing a signing is not otherwise required under the Corporations Act and depends on the laws of the relevant State.

Remote witnessing is now available in NSW, Queensland and Victoria:

In NSW, the Electronic Transactions Act 2000 (NSW) allows for remote witnessing by live audio-visual link, subject to procedural requirements.

In Queensland, the Property Law Act 1974 (Qld) and the Powers of Attorney Act 1998 (Qld) permit deeds and general powers of attorney for corporations to be executed electronically without a witness. Witnessing of the signing of affidavits and statutory declarations may also be done by audio-visual link, subject to procedural requirements.

In Victoria, the Electronic Transactions (Victoria) Act 2000 (Vic) permits witnessing to occur via audio-visual link for most documents (including deeds), subject to procedural requirements. With the exception of testamentary instruments and power of attorney documents, the witness does not need to be physically located in Victoria. All of the witnessing requirements must be satisfied on the same day.

In other Australian jurisdictions, specific legislation allowing for the remote witnessing of documents typically used in financing transactions does not currently exist or has expired (in the case of temporary COVID-19 measures).

# 3. Is it possible to register/perfect security electronically without wet ink signatures?

**Real property**

With the exception of NSW, Victoria and South Australia, wet ink signatures are ordinarily required for a real property mortgage to be validly executed and thereafter registered in the relevant land register.

In particular, in Queensland, wet ink signatures are still ordinarily required for the execution of mortgage documents that are intended to then be delivered to the land register for registration. However, mortgages lodged electronically in accordance with the Electronic Conveyancing National Law (Queensland) are permitted to be electronically signed.

**Personal property**

Security over personal property governed under the PPSA may be perfected by "possession", "control" or registration on the PPSR (see the answers to questions 10 and 11 of the "If taking security" section for more details). The process of registering a security interest on the PPSR is completed online and no further signatures from the grantor or secured party will be required to complete the process. However, it will be necessary to examine if the underlying security agreement has been executed validly in accordance with the formalities described in the answer to question 1 of this section.

# 4. Are there any other legal restrictions that may prevent the parties from executing a finance transaction electronically?

There are no other restrictions apart from those above. As discussed, only some of the COVID-19 emergency measures put in place during the pandemic have been permanently adopted under statute and the specific formalities will depend on the jurisdiction under which the documents are signed.

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