CHANGES TO THE CORPORATIONS ACT NOW PERMIT COMPANIES TO ELECTRONICALLY SIGN DOCUMENTS – AGAIN!

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Electronic execution and split execution of documents by Australian companies under section 127 of the *Corporations Act 2001* (Cth) (Corporations Act) are again expressly permitted with the passing of the *Treasury Laws Amendment (2021 Measures No.1) Act 2021* (Amending Act) on 10 August 2021. The relevant provisions of the Amending Act came into effect on 14 August 2021.

A RECAP

Historically, there has been uncertainty over whether an agreement or deed that is in electronic form and signed electronically by company officers, or is signed by a split execution method where the two officers signing execute different counterparts of the document, has been validly executed under section 127 of the Corporations Act.

That uncertainty was resolved when, in response to the COVID-19 pandemic, the Federal Government introduced temporary measures on 6 May 2020 permitting the electronic and split execution of documents under section 127 – the Corporations (Coronavirus Economic Response) Determination (No.1) 2020 (Cth) and its successor, Corporations (Coronavirus Economic Response) Determination (No.3) 2020 (Cth) (Determinations).

Unfortunately, the (No.3) Determination expired on 21 March 2021 without the changes proposed at that time by the Treasury Laws Amendment (2021 Measures No.1) Bill 2021 (now the Amending Act) being enacted. So, from 22 March 2021 until 14 August 2021 when the Amending Act took effect, uncertainty around the validity of electronic and split execution under section 127 returned. The amendments now in force under the Amending Act bring a welcome clarity on this issue to companies and their advisors.

There are, however, no transitional provisions in the Amending Act dealing with documents executed electronically or by split execution after 21 March 2021 but before 14 August when the Amending Act took effect. Any questions around whether documents signed under section 127 during that period have been validly executed will be determined by the law as it stood before the Determinations.

The table below summarises this sequence of events:

Relevant period	**Electronic and split execution under s127 Corporations Act valid?**
Prior to 6 May 2020	No, judicial and market uncertainty over validity.
6 May 2020 to 21 March 2021	Yes, under the Corporations (Coronavirus Economic Response) Determi Corporations (coronavirus Economic Response) Determination (No 3) 202

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22 March 2021 to 13 August 2021	No, with the expiry of the No 3 Determination, interpretation of s127 return and market uncertainty over validity.
14 August 2021 to 31 March 2022 (subject to further legislation or determinations)	Yes, under s127 of the Corporations Act as amended by *Treasury Laws A 2021.*

WHAT'S CHANGED?

From 14 August 2021, a company may execute a document **without a common seal under section 127(1)** of the Corporations Act if two directors, a director and company secretary or the sole director/company secretary of a proprietary company either:

- sign a copy or counterpart of the document in physical form (i.e., by wet signature on a paper document); or
- use an electronic method of execution which reliably identifies the person and indicates the person's intention to sign the document.

The copy, counterpart or electronic communication must include the entire contents of the document (so sending just the execution page(s) for signing will not satisfy this requirement) but does not need to include the signature of any other person signing the document. The requirement for a copy or counterpart to include the entire contents of the document does not mean that the signatory needs to physically print or sign every page – rather it is to give certainty as to the terms agreed to by all the signatories.

Where a company executes a document **with a common seal under section 127(2)**, remote witnessing of the fixing of the seal is now also permitted under a new section 127(2A), which is a new development – the previous Determinations did not modify section 127(2). To be effective:

- the witness must observe the fixing of the common seal by electronic means;
- the witness must sign the document (which may be a copy of the document without the common seal affixed);
- if there is more than one witness, each witness can sign different counterparts of the document; and
- the document must include a statement that the witness observed the fixing of the seal by electronic means.

The new provisions do not prescribe the process by which a person may witness the signing electronically. However, the parties should ensure that the witnessing is done in 'real time' via audio-visual link or a similar method, and a statement with the above wording should be included in the execution block.

WHAT IF THE DOCUMENT TO BE SIGNED IS A DEED?

There are additional considerations where the document to be executed is a deed. All Australian jurisdictions have laws prescribing requirements for a valid deed. Only the laws of New South Wales, Victoria and Queensland

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permit deeds to be in electronic form and electronically signed and so it is critically important to consider the governing law of the deed in question.

If the governing law of the deed is New South Wales, Victoria or Queensland, an Australian company can now sign the deed electronically under sections 127(1) and (3) of the Corporations Act, given the changes outlined above. However, the laws of all other States or Territories do not permit deeds to be in electronic form.

Therefore, if the governing law of the deed is **not** New South Wales, Victoria or Queensland, the deed must be signed in wet ink on a paper document. The amendments to section 127(1) do however apply to permit split execution by officers of an Australian company in wet ink on different hard copy counterparts of the deed. This is not the case where a company executes a deed with a common seal under section 127(2). For that execution method, the relevant officers cannot witness the fixing of the common seal by split execution. They must both sign the same printed copy of the deed, as sections 127(3A) and (3C) which permit counterparts do not expressly deal with witnessing the fixing of the common seal to a physical document.

Any other requirements for a valid deed in the relevant jurisdiction must also be satisfied.

THE CHANGES ARE STILL TEMPORARY

Unfortunately, rather than making these changes regarding electronic and split execution permanent, the amendments to section 127 only apply temporarily. They are due to automatically expire on 31 March 2022 under the transitional provisions in the Amending Act.

On or after 1 April 2022, the Treasurer again has the power to make a determination similar to the previous Determinations allowing companies (persons) to electronically sign documents. This power was reintroduced by the *Treasury Laws Amendment (COVID-19 Economic Response No. 2) Act 2021*, which also came into effect recently. Any such determination expires on 31 December 2022.

WHAT DOES THIS MEAN IN PRACTICE?

Australian companies may now confidently execute an agreement under section 127 of the Corporations Act by electronic means or by a split execution method – at least until 31 March 2022. It is hoped that permanent changes will be in place after this date.

If the document is a deed, the governing law of the deed should be checked before the company proceeds to sign electronically under section 127.

The new provisions do not prescribe the method to be used for the electronic signing, so long as the method sufficiently identifies the person signing the document, indicates their intention to sign the copy or counterpart, and is as reliable as appropriate for the purpose for which the document was generated (or be proven in fact to have identified the person and indicated their intention to sign). These requirements should be met by most common methods of electronic signing, including by using a platform like DocuSign, generally without any other step being needed. We recommend that the name of each signatory be inserted below their electronic signature to ensure that they can be identified.

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The company signatories must also ensure that the document signed is the entire document or counterpart, although that does not mean that they need to sign every page. There is no requirement for the counterparties to consent to the use of electronic signatures.

Section 127 only applies to the execution of documents by a company registered under the Corporations Act. Foreign companies that do not have an Australian Registered Body Number (ARBN), statutory corporations, and other entities therefore cannot execute under this section.

A company should retain a copy of all executed documents for its records (the entire signed document, not just the signature pages), regardless of how the document was signed. If it was signed by a 'split execution', a copy of each executed counterpart should be retained. It is good practice for the parties to agree to the creation of a composite document, incorporating all the signed counterparts.

This alert only deals with execution by a company under section 127 of the Corporations Act. There are other ways in which a company can validly execute documents, including deeds, and some of these can be done electronically!

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