

# Alert

CORPORATE & COMMERCIAL

## COVID-19: Companies Given the Temporary Right to E-Sign Documents

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There has been a lot of uncertainty as to whether digitally executing a document satisfies the company execution requirements under section 127(1) and section 129(5) & (6) of the *Corporations Act 2001* (Cth) (**Corporations Act**). It was not clear whether a company could electronically execute a document under section 127 because the Corporations Act is exempted from the *Electronic Transactions Act 2000* (Cth).

However, on 5 May 2020, the Treasurer made the *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* (Cth) (**Determination**)<sup>1</sup> to temporarily modify the requirements for validly executing documents. Although not specifically stated, this indicates that, without the modifications, the Corporations Act does not support electronic execution of documents by companies. As

<sup>1</sup> The determination was made pursuant to Schedule 8 of the *Coronavirus Economic Response Package Omnibus Act 2020* (Cth) which inserted a new section 1362A into the *Corporations Act*, authorising the Treasurer to modify the operation of specified provisions of the Corporations Act by legislative instrument.

of 6 May 2020, for a six month period only, companies have the option to choose to electronically execute documents pursuant to the Corporations Act.

The Determination will reduce the burden on companies that are trying to implement new safety protocols to protect their staff during the COVID-19 pandemic. Companies will be able to reduce the number of face-to-face meetings, and they will have greater flexibility when considering remote working arrangements for their staff.

The two options for execution of documents provided by the Determination are:

- persons specified in section 127(1) (a), (b) or (c) of the Corporations Act (two directors or a director and secretary or sole director/secretary of a proprietary company) may sign a separate copy or counterpart of a document in a physical form (so it is not necessary for them to sign the same copy); or

- each of the persons e-signs a copy of the document in the manner required by subsection 6(4) of the Determination.

### Tread carefully when opting to e-sign a document

The Treasurer's Determination is not a catch-all, and companies should still stop to assess the type of document they have in front of them before executing it. There are a range of precautions companies should follow when electing to e-sign. These include that:

- the Determination is temporary and only lasts until 5 November 2020;
- the Determination does not work retrospectively (any document e-signed before 6 May 2020 will not be validated);
- the method used must identify the signatory and indicate the signatory's intention;

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- the method must be proven to be as reliable as is appropriate for the purpose for which the company is executing the document (this may be a somewhat uncertain requirement);
- the signatory will need the consent of the other parties to the document;
- the recipient(s) must also be able to identify the person executing and confirm that he/she intends to be bound by the e-signature;
- the recipient(s) must further be satisfied that the method used to e-sign is reliable; and
- the copy, counterpart or electronic communication that is executed must contain the entire document.

Some documents are excluded from the Determination and must still be physically executed. These include:

- deeds;
- documents that require execution by a foreign company (the definition of 'company' under the *Corporations Act* does not include foreign companies); and
- land registry documents, except if a dealing

document is lodged electronically through an electronic lodgement network operator (such as **PEXA**). In this instance, the document can be digitally executed and lodged at a land registry. However, this is undertaken by a conveyancer or legal practitioner through the electronic lodgement network operator's platform.

### Methods to e-sign documents

If the requirements of the Determination or the precautionary measures above do not warn you off e-signing, then there are a quite a few methods available to companies to electronically execute a document, including:

1. pasting an image of a physical signature into the e-document;
2. using a stylus or finger to sign the e-document on a touchscreen tablet, laptop or smartphone; or
3. using a digital signature platform such as DocuSign, Adobe Sign, HelloSign, or GlobalSign, most of which can allow you to insert your signature from any device (laptop, phone or tablet) as it is cloud-based technology.

If you are unsure what your company can and cannot digitally execute, whether the chosen method of e-signing is valid, or have any other questions, then please contact one of our experts for more advice.



[MORE INFO](#)

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