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COVID-19 Guidance on witnessing documents electronically and verification of identity

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This document has been prepared as guidance for LIV members to respond to issues arising from COVID-19 and may be amended from time to time to respond to changes in government policy or address new issues.

LIV acknowledges the FAQ prepared by the Law Society of New South Wales on electronic witness of signatures (2018) which were further developed.

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LIV Guidance on witnessing documents electronically and verification of identity

1. Introduction

The LIV expects, and will continue to advocate for, the protection of legal practitioners' designation as both an 'essential' and 'necessary' service throughout the requirements of social distancing and working from home in the wake of the COVID-19 pandemic.¹ Such designation will provide practitioners with more freedom of movement to perform their duties, which may include the traditional in-person signing of legal documents. However, even with this designation, there are considerable limitations on the movement of clients and there are ongoing concerns for the health and safety of clients and practitioners. Therefore, it is essential that practitioners understand their alternative options when working remotely to use electronic systems for witnessing documents and verifying identity.

2. Potential Emergency Legislation

The *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW) was passed on 25 March 2020 and enables 'altered arrangements for witnessing signatures, including requirements for certification of certain matters by witnesses and verification of identity, provided for by an Act or another law.'²

The LIV has strongly advocated for similar legislation to be passed in Victoria. If approved, this will enable the making of regulations to override the provisions of existing legislation to prescribe altered arrangements for the signing and witnessing of documents.³

3. Guidance for Conveyancing

The Australian Registers National Electronic Conveyancing Council have issued [Guidance on Client Authorisations](#) which is available on the LIV's [COVID-19 Hub](#).

4. Guidance on Oaths and Affirmations

The [Federal Court](#), [Family Court](#), [Federal Circuit Court](#) and [County Court of Victoria](#) have all published statements regarding accepting unwitnessed affidavits. Practitioners should check the details for each court, as they are all slightly different, and explain the arrangements to their clients.

¹ The LIV has written to the [Victorian](#) and [Federal](#) Attorneys-General calling for emergency legislative amendments to remove any ambiguity regarding witnessing documents electronically. The LIV will continue to monitor and consult with government and amend the guidance in accordance with any future reform. The LIV has also written a separate letter to the Victorian Attorney General specifically on witnessing wills and POAs.)

This guidance note has been updated to reflect the Stage 3 restrictions of the State of Emergency declared in Victoria on Monday 30 March 2020. The LIV will continue to work with stakeholders, the LIV Succession Law Section and the LIV Technology and Innovation Section to provide practical up-to-date guidance on the options available to members.

² *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* s17(1)(b).

³ The NSW legislation limits the introduction of new regulations for when Parliament is not sitting and is unlikely to sit within two weeks after the regulations are made, and where, in the Minister's opinion, the regulations are in accordance with health advice and reasonable to protect the health, safety and welfare of persons.

We encourage practitioners to monitor and check the [LIV COVID-19 Hub](#) for updates from the various courts and jurisdictions.

The Federal Court' Practice Note on [Special Measures in Response to COVID-19](#) updated on 31 March 2020. The LIV have called on the State Courts to take a similar stance:

Signatures on Documents and Affidavits in the Federal Court of Australia

- To facilitate the electronic filing of all documents, if access to scanning technology is limited, the Court will temporarily allow documents to be signed electronically, including by having the person signing the document type their name in the relevant space in the signature block in lieu of physically signing the relevant document.
- The Court also acknowledges that remote working arrangements may pose significant challenges to having affidavits sworn or affirmed. The Court will accept the filing of unsworn affidavits on the understanding that, if required, these will later be sworn or affirmed when circumstances allow.

Oaths and Affirmations Regulations

From 1 March 2019 the [Oaths and Affirmations Act 2018](#) repealed Divisions 1 to 11 of Part IV, Part V and other provisions of the *Evidence (Miscellaneous Provisions) Act 1958* and the [Oaths and Affirmations \(Affidavits and Statutory Declarations and Certifications\) Regulations 2018](#) replace the 2008 Regulations.

For more information on the changes please consult LIV February 2020 articles on the changes '[FAQs, Oaths, affirmations, statutory declarations](#)'.

The LIV recommends practitioners consider the Regulations for the prescribed wording and form requirements for affidavits, statutory declarations and certification.

5. Electronic contracting

Despite two decades of electronic transactions being supported by legislation, there is still ambiguity as to the validity of electronically signing legal documents for the purposes of contracting.⁴ This puts limitations on businesses working remotely as there remains ambiguity that electronic signatures under the *Electronic Transactions Regulations 2000* (Cth) ('ETA') fulfil the requirements of s127 and s129 of the *Corporations Act 2001* (Cth) ('Corporations Act').⁵

⁴ Mark Burrows, 'Digital signatures: Redesigning signing', Law Institute Journal, (Web Page, 1 April 2020), <<https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/April-2020/Digital-signatures--Redesigning-signing>>.

⁵ Ibid

It is widely held in the legal sector that the ETA does not apply to the Corporations Act. This has been expressly upheld by two Supreme Court decisions⁶. As such, it has been suggested that businesses, banks and financiers, upon seeking legal advice as to how to contract credit arrangements, would likely be advised not to proceed unless they can obtain a wet-ink signature. However, being excluded from the ETA does not amount to an express prohibition on electronic contracting by companies and two Supreme Court decisions also suggest that companies can still execute pursuant to section 127 in an electronic form⁷.

Additionally, there is uncertainty as to whether deeds can be executed electronically. This stems from the common law requirement for a deed to be prepared on paper, parchment or vellum. The NSW Supreme Court has ruled, in obiter, that the common law position is correct and a deed must be signed in a paper form⁸. However, the decisions in both *Laszczuk* and *Pickard* suggest that the paper requirement can be dispensed with where the deed is executed pursuant to section 127 of the Corporations Act⁹. In *Pickard*, it was stated that:¹⁰

The plaintiffs submit that s 127 overrides all other requirements for a deed, including the paper requirement. They submit that the common law paper requirement has been extinguished or at least modified by statute. I accept that Bendigo and Adelaide Bank v Laszczuk is authority for this proposition.

The decision in *Pickard* has also created some uncertainty through the later statement that¹¹:

Given that s 127(1) contemplates a document being executed by two officers signing it, there is good reason to consider there must be a single, static document rather than a situation where two electronic signatures are sequentially applied to an electronic document.

Some commentators have interpreted Justice Stanley to mean that electronic signing is impermissible but that would be inconsistent with his earlier statements. More likely, given the subsequent reference to *Seddon*, is that his honour was referring to a split execution process where two directors execute separate pdfs of the same contract by applying their signature electronically.

Given this uncertainty regarding electronic execution by companies, particularly in light of the growing need for it during the COVID-19 crisis, the LIV has called for the following urgent reforms:

1. Amend the *Electronic Transactions Regulations 2000* (Cth) to carve out ss127 and 129 of the *Corporations Act* in the list of legislation excluded from operation of the *Electronic Transactions Act 1999*; and/or
2. Amend the *Corporations Act* to clarify that for the purposes of s127 and s129 a 'document' may be electronic, and that a document will be taken to have been signed by individuals, if individuals have signed identical counterparts of it; and/or

⁶ *Bendigo and Adelaide Bank Ltd v DY Logistics Pty Ltd* [2018] VSC 558; *Bendigo and Adelaide Bank Ltd (ACN 068 049 178) v Pickard* [2019] SASC 123.

⁷ *Bendigo And Adelaide Bank Ltd v Laszczuk* [2018] VSC 388; *Bendigo and Adelaide Bank Ltd (ACN 068 049 178) v Pickard* [2019] SASC 123;

⁸ *Bendigo and Adelaide Bank Ltd v Russo* [2019] NSWSC 661.

⁹ *Ibid*; *Bendigo and Adelaide Bank Ltd (ACN 068 049 178) v Pickard* [2019] SASC 123.

¹⁰ *Ibid* at [64].

¹¹ *Ibid* at [70].

3. Add a subsection 127(5) to the Corporations Act which provides: “a document (including a deed) may be in electronic form”; and/or
4. An alternative approach to recommendation 3 is to include in the section 9 ‘Dictionary’ of the Corporations Act, “Document (including a deed) includes a document in electronic form”.

6. Current Victorian legislative framework

The following guidance covers the current Victorian legislative requirements for:

- Witnessing generally
- Wills
- Enduring Powers of Attorney and Appointments of Medical Treatment Decision Makers
- Affidavits (such as for Probate applications)
- Verification of Identity (excluding conveyancing services)

6.1 *Can I witness the signing of a document via video-conferencing platforms such as Skype, Zoom or other similar platforms?*

It is important to note legislation requires the signing of common documents to be ‘in the presence of’ the witness¹². Presently, it is established prudent practice that ‘physical presence’ is in fact required. It is ambiguous as to whether video/remote presence is permitted and valid under ‘physical presence’ to satisfy legislative requirements. This is a matter which the LIV has raised with the Attorney-General seeking urgent clarification and amendment by legislative instrument. Given that no amendments are presently in place, practitioners are therefore required to turn to case law.

Witnessing a will by video conference runs the risk of the will being found to be invalidly executed although it may then be upheld as a valid informal will.

The LIV¹³ has issued a specific member [Practice Note](#) advising providing guidance on this issue.

The Law Society of New South Wales’ *FAQ on Electronic Witnessing of Signatures*’ states the requirements of an attesting witness are as follows:¹⁴

- a) ‘certifies that they were present at the time the document was signed’ (Seal v Claridge (1991) 7 QBD 519; Freshfield v Reed (1842) 9 MN & W 404; 152 ER 181; Ellison v Vikicevic (1986) 7 NSWLR 104 at 112; Netglory v Caratti [2013] WASC 364 at [144]-[147]);
- b) ‘certifies that the document attested was signed by the witness’ (Freshfield v Reed (1842) 9 MN & W 404; 152 ER 181; Ellison v Vikicevic (1986) 7 NSWLR 104 at 112);

¹² Section 7(1) of the Wills Act 1997 (Vic).

¹³ Practice Note for Victorian practitioners taking Will and Enduring Power of Attorney Instructions during COVID-19 (Web Page) <<https://www.liv.asn.au/CMSPages/GetFile.aspx?nodeguid=fae8945b-61d6-4121-8a42-c71d5c772a96&lang=en-AU>>.

¹⁴ Law Society of New South Wales, FAQ on Electronic Witnessing of Signatures, (Web Page) <https://www.lawsociety.com.au/sites/default/files/2018-09/L_S2976_LegalTech_Witnessing-electronic-signatures_FAQ_v2.pdf>.

- c) *'certifies that the document was signed voluntarily, so that it was the signatory's own act'* (Freshfield v Reed (1842) 9 MN & W 404; 152 ER 181; Burns v Lorac Mining (1985) 4 FCR 301 at 303); and
- d) *'represents that they attested at the time they witnessed the signature by the signatory'* (Netglory v Caratti [2013] WASC 364 at [150]-[170]).'

The recent Victorian Court of Appeal decision in *Pell v R [2019] VSCA 186* stated 'in the presence of' included video-conferencing. Weinberg J, with whom Maxwell P and Ferguson CJ agreed, concluded that video conferencing achieved the necessary requirements as legislation is to be read purposively. His Honour rejected the Applicant's claim that '*in the presence of*' meant '*physical presence*', on the grounds that such an argument:

*'...can be argued that rather than merely construing the word 'presence', it requires an additional word, 'physical', to be read into the statute.'*¹⁵

The LIV notes this ruling was in the context of an accused being held to have been 'in the presence of' a jury panel when arraigned via video-conference. There is considerable debate in the legal community as to whether this decision has universal application as a persuasive case that where 'in the presence of' is a requirement, it can be fulfilled by video-conference.

6.2 Can a power of attorney be witnessed electronically?

The LIV recommends practitioners avoid executing powers of attorney electronically. At present, it is not sufficiently clear in the legislation and the terminology has not been clarified through case law.

Unlike affidavits and statutory declarations, the various different types of powers of attorney do not solely rely on '*in the presence of*'. Instead the different types of powers of attorney require '*2 other persons must be present and witness the person signing*',¹⁶ and '*a witness who witnesses a principal signing and instrument*', which is unclear if this is distinct from being '*in the presence of*'.¹⁷

Additionally, the witnessing requirements for an enduring power of attorney are unique in that there is then an explicit obligation on the witness to do more than witness but also confirm that '*the principal appeared to freely and voluntarily sign the instrument*' and that the principal appeared '*to have decision making capacity in relation to the making of the enduring power of attorney*.' Attempting to perform this remotely carries much more risk for the authorised witness in missing all the various other cues that can come with meeting with someone in person.

A final consideration for the inappropriateness of witnessing a power of attorney electronically is the issue of protecting the original. Unlike a will, Powers of Attorney are not registered in Victoria and if the document appears valid on its face to a bank or a hospital, then the document can be mis-used. It is also highly unlikely that such institutions would

¹⁵ *Pell v R [2019] VSCA 186 at 1163.*

¹⁶ Powers of Attorney Act 2014 (Vic) s11 and s33.

¹⁷ *Ibid* s36.

accept the electronic Power of Attorney as valid and making a certified copy of the original is problematic. Until there are more robust systems around securing, preventing the tampering of, authenticating and circulating essential documents such as the power of attorney, the original should ideally not be in electronic form.

6.3 Can I witness the signing of a document using online or cloud-based document signing services?

Signing a document electronically has many meanings. Electronic signatures can take a variety of forms such as a person typing their name into a contract or email with contractual terms, a person pasting a scanned signature into a soft copy contract in the execution block, a person using an electronic signature platform to insert a typed or handwriting font into the execution block or the use of an e-pen or finder to sign a name on a tablet.

Online or cloud-based document signing services such as DocuSign allow for signers to identify up to two witnesses to sign an agreement in a legal and confidential manner. DocuSign eWitness captures the witness information in a Certificate of Completion to support any legal disputes.

However there are certain documents that are not typically appropriate for electronic signatures or digital transaction management, even though it may be tempting for practitioners to consider using digital signing technologies (such as DocuSign) in view of the COVID-19 circumstances.

The limitations on the use of DocuSign according to their own website include:¹⁸

'Use cases that are specifically barred from digital or electronic processes or that include explicit requirements, such as handwritten (e.g. wet ink) signatures or formal notarial process that are not usually compatible with electronic signatures or digital transaction management.

- *statutory declarations requiring a witness (excluded from Electronic Transactions Act 1999 (Cth) (ETA)*
- *powers of attorney in certain States/Territories (Powers of Attorney Act 2014 (Vic) s 33)*
- *wills, codicils and other testamentary instruments (excluded from ETA and notarization required by Succession Act 2006 (NSW)*
- *bills of exchange*
- *the signature, lodgement, service and filing of documents in connection with legal proceedings in certain States/Territories*
- *certain documents under legislation relating to health insurance, life insurance and general insurance*
- *certain documents, notices, and consents used in connection with the provision of credit related services under the National Consumer Credit Protection Act 2009 (Cth)*
- *transfers of intangible property, such as intellectual property*
- *official Commonwealth documents such as passports'*

¹⁸ DocuSign, eSignature Legality in Australia, (Web Page) <<https://www.docusign.com/how-it-works/legality/global/australia>>.

6.4 Can wills be witnessed electronically

The requirement for witnessing the execution of wills comes from section 7(1) of the Wills Act 1997 (Vic) ('Wills Act') which states three times that the testator must sign the will "in the presence of" at least two witnesses. The witnesses must also then sign "**in the presence**" of the testator. Section 10 then also provides that: "a person who is unable to see and attest that a testator has signed a document, may not act as a witness to a will".

Section s7(1) of the Electronic Transactions (Victoria) Act 2000 ('ETA') states:

- (1) *'For the purposes of a law of this jurisdiction, a transaction is not invalid because it took place wholly or partly by means of one or more electronic communications.'*

However, practitioners should note that regulation 6 of the *Electronic Transactions (Victoria) Regulations 2010* expressly **excludes wills, codicils or any other testamentary instrument** that are created, executed or revoked from operation of the s7(1) and division 2, part 2 of the ETA (Vic). While this does not necessarily amount to an express prohibition, it is a fairly clear legislative direction that wills **should not be electronic**. Pell provides an authority that the requirements of section 7 can be satisfied using a video conferencing process, however it did not consider the specific question of wills and sections 7 and 10. Absent legislative reform, the matter will be for a court to determine. Until that occurs, practitioners must advise their clients that **there is uncertainty as to whether an electronically signed and witnessed will is valid**.

The LIV has written to the Attorney General by way of letters dated 26 March 2020 and 7 April 2020 requesting clarification of the [Stay at Home Directions](#),¹⁹ particularly in relation to clauses 6 and 10 which remain in force until midnight on 13 April 2020. The LIV has also requested an amendment to the legislation regarding the term '*in the presence of*'. Further information regarding the LIV's lobbying efforts will become available over the coming days.

Whilst there is uncertainty as to it being upheld as a valid will, an electronically witnessed will is more likely to be upheld as an informal under section 9 of the Wills Act than a will that has only been signed by the testator. An electronic process with two witnesses may therefore be preferable to the circumstance of a testator signing a hard copy will without any witnesses at all. The Probate Court has upheld that electronic documents, amongst a variety of things, can constitute an informal will. Ultimately, the electronic will could be signed in the traditional way as and when the period of social isolation ends.

Further guidance has been issued on wills and powers of attorneys in the [LIV's Practice Note](#) to members²⁰.

6.5 Are there other non-traditional ways of witnessing?

There may be circumstances where neither the traditional method nor an electronic method is viable, such as where the client is in social isolation but does not have access to or the capacity to use technology. As a matter of precaution, some practitioners may need to advise their

¹⁹ Stay at Home Directions - Public Health and Wellbeing Act 2008 (Vic)

<<https://www.dhhs.vic.gov.au/sites/default/files/documents/202003/Stay%20at%20Home%20Directions%20.pdf>>

²⁰ Practice Note for Victorian practitioners taking Will and Enduring Power of Attorney Instructions during COVID-19

<<https://www.liv.asn.au/CMSPages/GetFile.aspx?nodeguid=fae8945b-61d6-4121-8a42-c71d5c772a96&lang=en-AU>>

clients to sign copies of their draft wills without witnesses in order to constitute an informal will under section 9 of the *Wills Act*. Should the client not be able to properly execute the will before passing away, the Probate Court can then determine whether the informal will is valid in the circumstances. However, clients should be advised to re-sign a new version of the will in the traditional way as and when the period of social isolation ends.

6.6 Is there guidance on alternative methods of e-signing?

Guidance on alternative methods of e-signing documents are available through:

- [Electronic signatures in Australia: Legal considerations and recommended best practices](#)²¹;
- [Electronic signatures: A guide for lawyers](#);²²
- Thomson Reuters Webinar – [E-Signed – and Sealed? Executing Deeds in the Digital Age](#).²³

6.7 Can I use video conferencing to take initial instructions for wills or powers of attorney?

These challenging times have led many practitioners to consider other means of meeting with clients – such as virtually - by video conferencing, email or telephone.

Practitioners should consider whether a face-to-face meeting is required for the purposes of identifying your client, verifying your client's identity, assessing capacity and ensuring instructions are not subject to (undue) influence of a third party.

There are a number of factors that should be considered such as the client's age, state of health, urgency, whether instructions can be verified (ie. subsequent telephone conversations, emails) and if the instructions are consistent with the client's prior will-making history – the decision to take instructions other than directly with the client carries risk and will require a high degree of discernment by the practitioner.

Practitioners should note any urgency either when arranging the appointment with the client and/or upon taking the instructions for the will.

The LPLC have issued a bulletin²⁴ to assist practitioners in mitigating risks associated with video-conferencing.

6.8 Is there any guidance on verification of identity (VOI)

Given the risk of a cyber-breach, practitioners should avoid the use of a video-conference system or email as the means by which identifying information is provided by a client (such as passports or driver's licences). Particularly during Covid-19 social isolation, there may be circumstances where the parties have no choice but to use a video-conference type system as part of the identifying

²¹ Adobe and North Rose Fulbright, *Electronic signatures in Australia: Legal considerations and recommended best practices*, (Web Page) <<https://acrobat.adobe.com/content/dam/doc-cloud/en/pdfs/esignatures-best-practices-au.pdf>>.

²² Timothy Perry, *Electronic signatures: A guide for lawyers*, *Lawyers Weekly* (Web Page, 17 January 2018) <<https://www.lawyersweekly.com.au/biglaw/22559-electronic-signatures-a-guide-for-lawyers>>.

²³ Thomson Reuters, *E-Signed - and Sealed? Executing Deeds in the Digital Age* (Web Page) <<http://response.thomsonreuters.com.au/webinar-esignatures-ondemand>>

²⁴ LPLC Bulletin, *Video Conferencing in the COVID-19 era* (Web Page, 9 April 2020) <<https://lplc.com.au/bulletins/video-conferencing-in-the-covid-19-era/>>

process. However, where a practitioner deems it necessary to do so, they should preference the use of a purpose built VOI system provided by a reputable vendor rather than a general purpose video-conference system. The VOI vendor must make the requisite contractual commitments and warranties to practitioners regarding the security of the system and, ideally, ensure that the information is circulated between the parties via an end-to-end encryption process. The vendor must also warrant that the data is stored in an Australian location and will not leave the country, as otherwise the practitioner will need to consider their compliance with the privacy regime in the relevant country that the data is stored in.

Transactions involving interests in land:

- Using video conferencing to verify identity is **not** part of ARNECC's safe harbour steps (see VOI Standard, Rule 2, schedule 8 of [Model Participation Rules](#) (MPR)).
- Until 1 July 2020 verifying identity via video conferencing may be considered part of the reasonable steps test ([ARNECC Guidance Note 2, question 13](#)).
- From 1 July 2020 ARNECC's model rules will require all VOI to be done face-to-face (version 6 MPR), although this commencement date may be changed in light of the current COVID-19 environment. See [ARNECC's recent notice](#) which states:

Use of the [ARNECC] Standard is not compulsory and may not be practical in some circumstances. Accordingly, it is also possible for a Subscriber to verify the identity of a Person in some other way that constitutes the taking of reasonable steps. What constitutes reasonable steps is dependent on the circumstances of each individual case. Where the Standard is not used and there is a dispute, the Subscriber will be required to establish that the method used to verify the identity of a Person constituted "taking reasonable steps" in the particular circumstances.

Accordingly, where the Standard is not being used a Subscriber may consider that use of video technology, such as Skype or FaceTime, is useful in the particular circumstances. However, its use should be considered by the Subscriber who will have to justify that, in the circumstances of that particular verification of identity, use of video technology and any other measures used, constitute the taking of reasonable steps. ARNECC notes that video technology may be manipulated or forged, therefore caution is recommended. The use of this technology is at the discretion and risk of the Subscriber.

Whether or not the Standard is used to verify a Person's identity, further enquiries should be made where doubt arises, or should reasonably have arisen, in relation to a transaction and a Person's identity.

Other transactions – common law duty to take reasonable steps

Practitioners acting in matters outside of the ARNECC VOI obligations still have a common law duty to take reasonable steps to be satisfied that their client is who they claim to be. Using video conferencing can certainly assist as part of the reasonable steps required to be taken.

Some things to consider doing if using video conferencing for identification purposes are:

- record the meeting and keep the record on your file or keep a good written record of what you did on the assumption that it might end up being tested in court;
- do not ask the client to show identifying documentation to the camera but instead send copies in the mail or via an SMS system (and not email unless the email is encrypted); and
- be alert during the conference for any behaviours that might raise suspicions about the client's identity.

6.9 Can LIV provide additional guidance?

Practitioners should contact the LIV Ethics and Practice Support lines on (03) 9607 9336 or (03) 9607 9378 or email practicesupport@liv.asn.au with any questions. The LIV will continue to update this guidance as amendments are introduced.

The Judicial College of Victoria have created a [webpage](#),²⁵ to help courts and court users understand the different practices that have been put in place across the jurisdictions in response to COVID-19.

Practitioners are encouraged to continue to monitor the [LIV COVID-19 Hub](#) for regular updates.

²⁵ Judicial College Victoria, Coronavirus and the Courts, (Web Page) <<https://www.judicialcollege.vic.edu.au/news/coronavirus-and-courts>>



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