

# Legal Alert

Corporate

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## Can Company Officers Sign Deeds Electronically?

A recent South Australian Supreme Court decision established that the purported electronic execution of a deed by a company is not effective execution under section 127 of the Corporations Act.

The case is also a reminder that, when signing a deed in accordance with section 127 of the Corporations Act, for the execution to be effective, company officeholders should sign the same static version of the document (rather than separate counterparts).

The bank's inability in that case to recover the amount owing to it underscores the importance of ensuring that relevant laws in relation to the execution of documents are understood and complied with by company officers and their advisors.

### Summary of Facts

In [\*Bendigo and Adelaide Bank Ltd & Ors v Kenneth Ross Pickard & Anor \[2019\] SASC 123 \(Pickard\)\*](#), a subsidiary of Bendigo and Adelaide Bank, ABL Nominees Pty Ltd (**Bendigo Bank**), advanced a \$505,250 loan to Kenrop Pty Ltd.

Kenrop defaulted on the loan.

Bendigo Bank sought to recover the amount owing from Kenrop's directors, Kenneth and Ann Pickard (**Pickards**), as personal guarantors pursuant to a loan deed.

Significantly, the Pickards had not themselves signed a personal guarantee in favour of Bendigo Bank. Instead, they had authorised a third-party, Great Southern Finance Pty Ltd (**GSF**), to do so on their behalf under a power of attorney deed.

The Pickards submitted that the loan deed was not enforceable against them as a guarantee on the basis that the loan deed had been signed by GSF as the Pickards' attorney by the affixation of the Pickards' electronic signatures to an electronic version of the document.

### Key Issue

Among other issues, the Court had to ascertain whether the affixing of the Pickards' electronic signatures to the loan deed by GSF's office staff was such that an enforceable deed of guarantee came into existence between the Pickards and Bendigo Bank.

### The Decision and Outcome

The Court held that the loan deed was not properly executed as a deed and could not be enforced.

This was on the basis that:

- the Kenrop board resolutions which gave authority to GSF did not go so far as authorising the placement of signatures on loan deeds (they were limited to formally accepting various loan and finance applications);
- the purpose of section 127 of the Corporations Act is enable a natural person to act as and for a company by a particular form of signing and contemplates a document being executed by two officers signing it (meaning that, in the Court's view, there must be a single, static document rather than a situation where two electronic signatures are sequentially applied to an electronic document); and
- section 127(1) will not have been complied with where two signatures (of officers of the same company) appear on different counterparts or copies of the same document because no one counterpart or copy would be properly executed by that company.

Accordingly, Bendigo Bank could not rely upon the provisions of section 127 of the Corporations Act to establish that the loan deed was validly executed. The Pickards' guarantees contained in the loan deed were invalid.

Further:

- the Court found that the loan deed could not bind the parties as a contract due to the lack of consideration; and

- because the loan deed was void at its inception, the doctrine of ratification could not be applied to validate the ineffective execution of the loan deed as there was no act to be ratified.

As a result, Bendigo Bank was unable to recover the unpaid loan amount of from Kenrop or the Pickards.

## What are the Implications?

The decision in *Pickard* has implications for the use of:

- electronic signatures; and
- signing in counterparts,

especially given their increasing desirability in today's modern era of electronic / "paper-lite" communication.

The Court's decision in *Pickard* is likely to be viewed by some as antiquated, inconvenient and frustrating, however, Bendigo Bank's inability to recover the amount owing to it underscores the importance of ensuring that relevant laws in relation to the execution of documents are understood and complied with.

Where electronic execution is desirable in the circumstances of a particular transaction, parties should proceed with caution and ensure that their processes (including board approvals, powers of attorney, and authentication and signing procedures), and the processes of counterparties, are consistent with the Court's conclusions in *Pickard*.

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