



SO,
CAN WE SIGN THIS WITH DOCUSIGN?

In May 2020, the federal government passed the *Corporations (Coronavirus Economic Response) Determination (No.1) 2020* (Cth) in response to the COVID 19 pandemic. Among other things, this determination made it clear for the first time that companies could validly execute deeds and agreements using signing platforms such as DocuSign and Adobe Sign (**Signing Platforms**) under Australian corporations law.

Even with the above determination in place (as recently extended by the *Corporations (Coronavirus Economic Response) Determination (No.3) 2020* (Cth)) (collectively, the **CV19 Determination**) for the period between 5 May 2020 and 21 March 2021 (**Determination Period**) there are still differences of opinion in the legal market as to when Signing Platforms can validly be used to execute deeds and agreements. The most common questions that arise in relation to the “electronic execution” of deeds and agreements are as follows:

1. Can company officers sign a deed or agreement on behalf of a company (under s127(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**) or otherwise) using a Signing Platform?
2. Are split executions permitted under s127 of the Corporations Act? I.e. can 2 company officers of a company sign separate copies of the same deed or agreement?
3. Can a natural person sign a deed or agreement using a Signing Platform? How is this different to when company officers are signing on behalf of a company?

Our thoughts on these questions are set out in the tables below based on the current state of the law in South Australia and what we consider to be common, day-to-day practice in relation to high value, or material contracts. At the present time, we have not addressed electronic conveyancing legislation in the attached (which enables conveyancing instruments to be signed electronically in certain instances), as we intend to publish further information on this in the near future.

HAVE A QUESTION? CONTACT THE TEAM

Please feel free to get in contact with any of our commercial lawyers if you require any further information, whose contact details can be found on our [website](#).

This document is intended as general information only. It does not purport to be legal advice. Readers must seek professional advice before acting in relation to these matters.

COMPANIES

DOCUMENT	CAN IT BE SIGNED USING A SIGNING PLATFORM?	COMMENTS
Deeds		
Deeds signed under s127 of the Corporations Act during Determination Period	Yes	<p>The CV19 Determination modifies the Corporations Act and makes it clear that:</p> <ul style="list-style-type: none"> / deeds can be executed by companies under s127 of the Corporations Act during the Determination Period using a Signing Platform; and / split executions under s127 of the Corporations Act will be permitted during the Determination Period. <p>Where deeds are executed by companies under s127 of the Corporations Act during the Determination Period using a Signing Platform, the following formalities need to be met:</p> <ul style="list-style-type: none"> / the deed should contain an appropriate counterparts clause and an appropriate clause which permits the use of Signing Platforms and split executions; / the deed should contain a clause confirming how the parties have agreed the identification and reliability requirements in the CV19 Determination have been satisfied (Identification and Reliability Requirements). The Identification and Reliability Requirements require a method to be used to identify the signatory and indicate their intention in respect of the information communicated, which is “as reliable as appropriate for the purpose for which the company is executing the document, in light of all the circumstances, including any relevant agreement...”; and / the whole document which is to be signed by each company officer (i.e. not just the signature pages) needs to be uploaded onto the Signing Platform and circulated to the other party/parties by inserting their email addresses into the Signing Platform. <p>In most cases, parties to a deed will be able to satisfy the Identification and Reliability Requirements by using a Signing Platform to circulate the deed for execution to the email address of each other party and separately emailing to their email address(es) an access code generated by the Signing Platform to enable the signatory to access and sign the document using the Signing Platform.</p> <p>This is a secure, authenticated process which is arguably more secure than the signatory signing a counterpart using a wet signature and emailing a PDF of the signed counterpart to the other party. When this method is used, the Signing Platform will generate a time stamped certificate of completion (or similar) which should be retained for future evidentiary purposes.</p>
Deeds signed otherwise than in accordance with s127 of the Corporations Act during Determination Period	No	The CV19 Determination does not enable deeds to be signed 'electronically' during the Determination Period by any means other than in accordance with s127 of the Corporations Act.

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Deeds signed outside Determination Period	No	<p>Although there are views to the contrary in the legal market, based on the current state of the law (including recent case law), there is no certainty that the requirements of:</p> <ul style="list-style-type: none"> / s127 of the Corporations Act; or / s41 of the <i>Law of Property Act 1936 (SA)</i> (Law of Property Act), <p>relating to the execution of deeds by companies can be satisfied when a Signing Platform is used or when split executions are used outside of the Determination Period.</p> <p>Our view is that the CV19 Determination should be made permanent in order to put an end to the ongoing uncertainty in this area and improve the efficacy of modern commerce. However, until this occurs, or the law in this area is otherwise clarified, as general rule:</p> <ul style="list-style-type: none"> / deeds should not be executed by companies (under s127 of the Corporations Act or otherwise) using Signing Platforms; and / split executions for deeds should not be used or accepted. <p>Despite the above, if an appropriate counterparts clause is contained in a deed, it is common practice for a deed to be printed and duly executed under s127 of the Corporations Act (or s41 of the Law of Property Act) using wet signatures, scanned and then circulated to the other party in PDF format. If such a deed counterpart is circulated in this manner (i.e. in PDF counterparts):</p> <ul style="list-style-type: none"> / the whole document (i.e. not just the signature pages) must be scanned and circulated to the other party; and / split executions should not be used or accepted. <p>Although it will be necessary for a company or body corporate to execute a deed under s41 of the Law of Property Act from time to time, where possible, it is always best practice for a company to duly execute a deed (or agreement) in accordance s127 of the Corporations Act (rather than under s41 of the Law of Property Act), because this entitles the parties to rely on the statutory assumptions in s129 of the Corporations Act including:</p> <ul style="list-style-type: none"> / that the company's constitution has been complied with; / that the officers who have signed have been duly appointed (provided they are listed as officers in current ASIC records) and have proper authority to sign; and / that there is no requirement for the company's common seal to be attached, <p>(Statutory Assumptions).</p>
Agreements		
Agreements signed under s127 of the Corporations Act during Determination Period	Yes	<p>Agreements may be executed by companies under s127 of the Corporations Act during the Determination Period using a Signing Platform. In this regard, see our comments above in relation to deeds. These comments (including the formalities that need to be complied with) apply equally to agreements.</p>

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Agreements signed otherwise than in accordance with s127 of the Corporations Act during Determination Period	No (best practice) Yes (common practice)	Please see the comments in the 2 following rows, which generally apply to agreements which are executed by a company during the Determination Period by means other than s127 of the Corporations Act.
Agreements signed outside Determination Period	No (best practice)	<p>As mentioned above, it is always best practice that an agreement is executed by a company under s127 of the Corporations Act to enable the Statutory Assumptions to be relied upon.</p> <p>Based on the current state of the law, there is no certainty that agreements can be validly executed by a company under s127 of the Corporations Act using a Signing Platform (and therefore there is no certainty that the Statutory Assumptions can be relied upon where this occurs) outside of the Determination Period.</p> <p>For this reason, in our view, best practice is currently that agreements should not be executed by companies outside of the Determination Period using Signing Platforms.</p> <p>Despite the above, if an appropriate counterparts clause is contained in an agreement, it is common practice and acceptable for the agreement to be printed and duly executed under s127 of the Corporations Act using wet signatures, scanned and then circulated to the other party in PDF format.</p> <p>If an agreement counterpart is circulated in this manner (i.e. in PDF counterparts):</p> <ul style="list-style-type: none"> / the whole document (i.e. not just the signature pages) should be scanned and circulated to the other party (as a matter of best practice); and / split executions of agreements should not be used or accepted.
Agreements signed outside Determination Period	Yes (common practice)	<p>Despite the best practice of requiring execution under s127 of the Corporations Act, agreements can be, and often are, executed by companies using other means, including Signing Platforms, inside and outside of the Determination Period. Although this can be effective, the risk involved with this is that the parties will not be entitled to rely on the Statutory Assumptions.</p> <p>In order to control this risk (which must be assessed on a case by case basis), appropriate enquiries need to be made in order to obtain comfort that the relevant signatory or signatories have been duly appointed and authorised to sign the agreement on behalf of the company such as reviewing the company constitution and board resolutions (which, absent of the Statutory Assumptions, is never completely certain).</p> <p>Where a Signing Platform is used by a company to execute an agreement, similar formalities as we have listed above in relation to the execution of deeds using a Signing Platform (including the practice of inserting suitable counterparts clauses and other acknowledgements into the agreement in relation to the use of Signing Platforms) should be satisfied in order to ensure compliance with the consent, identification and reliability requirements of the <i>Electronic Communications Act 2000</i> (SA) (ECA).</p>

NATURAL PERSONS

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Individuals		
Deeds	No	<p>Until the law in this area is clarified, our view is that deeds should not be executed by natural persons using Signing Platforms. The key difference that applies where a natural person executes a deed (as opposed a company) is that s41 of the Law of Property Act requires the execution of a deed by a natural person to be witnessed by at least one witness who is not a party to the deed (who must be physically present at the time the deed is executed).</p> <p>Regulation 5 of the <i>Electronic Transactions Regulations 2017 (SA)</i> (made under the ECA) makes it clear that the ECA (and therefore the added legal certainty provided by the ECA) does not apply where witnessing occurs through a Signing Platform and at the present time, the regulations made under s16 of the <i>COVID 19 Emergency Response Act 2020 (SA)</i> have not suspended the general witnessing requirement under s41 of the Law of Property Act.</p> <p>As such, where an individual executes a deed, the validity of that execution is largely dependent on the common law relating to attestation and witnessing for the purposes of s41 to the Law of Property Act (and similar acts in other States). This case law, despite persuasive views to the contrary in the legal market, does not provide certainty as to whether the witnessing requirement can be satisfied by:</p> <ul style="list-style-type: none">/ using a Signing Platform; or/ a person who has witnessed the signatory "press the button" on the Signing Platform signing a separate document (or sending a separate email) confirming they have witnessed the signature. <p>Despite the above, if an appropriate counterparts clause is contained in a deed, it is common commercial practice and acceptable for the deed to be printed and duly executed using wet signatures, in the presence of a witness in compliance with s41 of the Law of Property Act, scanned and then circulated to the other party in PDF format.</p> <p>If such a deed counterpart is circulated in PDF format, the whole document (i.e. not just the signature pages) must be scanned and circulated to the other party.</p>
Agreements	Yes	<p>Unlike deeds, there is no legal requirement for the signature of a natural person party to an agreement to be witnessed under s41 of the Law of Property Act. Agreements may therefore be executed by natural persons using a Signing Platform.</p> <p>Where a Signing Platform is used by a natural person to sign an agreement, similar formalities as we have listed above in relation to the execution of deeds by companies using a Signing Platform (including the practice of inserting suitable counterparts clauses and other acknowledgements into the agreement in relation to the use of Signing Platforms) should be satisfied in order to ensure compliance with the consent, identification and reliability requirements of the ECA.</p>