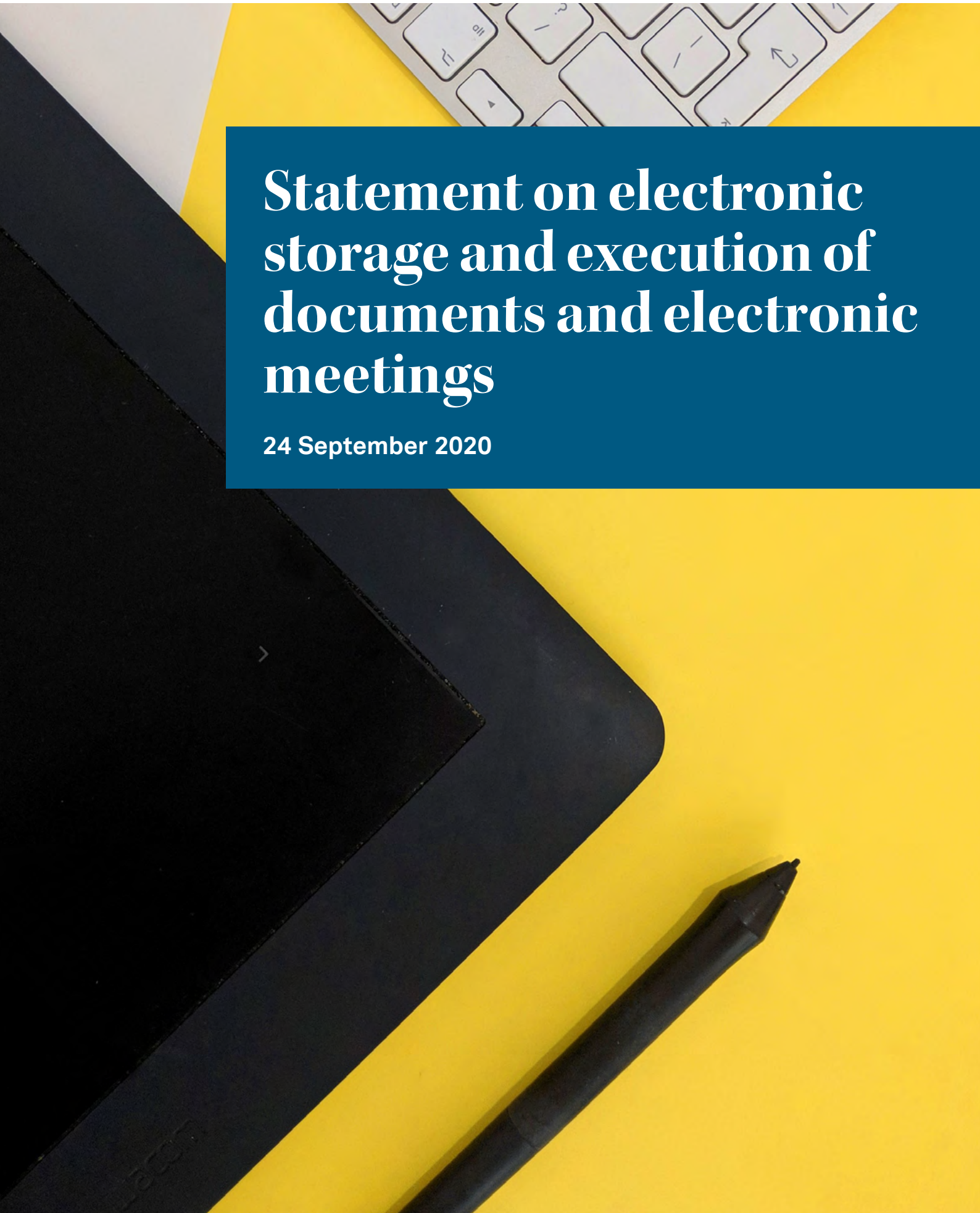
Governance Institute of Australia



Statement on electronic storage and execution of documents and electronic meetings

24 September 2020

The COVID-19 pandemic has impacted companies' ability to conduct business and highlighted the many shortcomings of the *Corporations Act 2001 (Cth)* (the Act) in an increasingly digital age.

In many locations, restrictions have made it impossible to hold a meeting where shareholders or directors are physically present in the same venue.

Executing documents when people are working remotely is another challenge thrown up by COVID-19. People working remotely are not available to apply a 'wet ink' signature. There are also issues with people not being able to print, execute, scan and return documents from home.

There has also been uncertainty about the legality of companies executing documents electronically under the Corporations Act.

Companies, and their officers and employees, have had to carry on business operations using electronic books and records, applying electronic signatures to documents, holding meetings by telephone or video conference, and communicating electronically with each other and with shareholders.

Governance Institute has sought counsel's opinion on issues related to electronic storage and execution of documents and electronic meetings under the Corporations Act to assist our members with answers to many of the questions they have asked us during the pandemic.

The legal opinion from Douglas Gration is attached as an appendix to this statement and covers the following matters:

- Electronic storage of documents
- Electronic signature of documents
- Execution of deeds
- Electronic meetings of directors and shareholders
- Notices of meeting
- Minutes of electronic meetings
- The location of a meeting held electronically
- COVID-19 relief.

Governance Institute continues to advocate for Government to update the Corporations Act to make it technology-neutral and shift it from its basis in a 'hard copy' 19th century world to a 21st century one. Governments have introduced some relief to enable electronic execution of documents and facilitate virtual AGMs as a result of the COVID-19 pandemic. We hope that Government takes this valuable opportunity to reform Australia's corporate regulatory infrastructure to make it certain, coherent and fit-for-purpose in the digital age.

Electronic storage

Books and records required to be kept under the Act can be stored electronically as can a company's registers (s 1306).

Electronic signatures

Documents required to be signed under the Act can be signed electronically if the signatory has authorised the affixing of their electronic signature. As a matter of practice, it will be necessary to prove that the signatory authorised or authenticated the affixing of their signature. This might be done through an email from the signatory or a separate written document. It might be in the form of a file note of a telephone conversation in which the affixing of the signature was authorised. It might also be appropriate to record the approval and authorisation for the use of electronic signatures in board minutes relating to the relevant transaction.

Directors' consents to act and minutes are documents that are required to be kept and signed under the Act and may be kept and signed electronically in the same way as other documents under the Act. They are not required to be signed with a 'wet signature'. If a director's consent is signed electronically, the necessary documents to show that the signatory authorised or authenticated the affixation of their signature should also be retained.

To demonstrate compliance with section 251A (2), which requires minutes of meetings to be signed, the company should retain proof of the authorisation of the individual who signs the minutes to the affixing of their signature. While the authorisation could be oral, it is preferable that there is a written record of this, for example through an email from the chair authorising the affixing of their electronic signature.

It may, as a matter of good governance, also be appropriate to ask the directors to pass a resolution noting and agreeing that the minutes will be (or have been) signed electronically.

Deeds

At common law, a deed is an instrument written on paper, parchment or vellum and must be physically signed.

Section 38A of the *Conveyancing Act 1919* (NSW) provides that a deed may be created in electronic form and electronically signed.

Queensland and Victoria have enacted temporary relief in response to the COVID-19 pandemic allowing deeds to be created and executed electronically.

The legislation in other Australian jurisdictions does not expressly address deeds that are created or executed electronically. It is therefore likely that in jurisdictions other than New South Wales, and temporarily Queensland and Victoria, deeds cannot be created or signed electronically. A paper document, executed with a 'wet signature', is the safest approach.

Electronic meetings of directors and shareholders

The Act allows meetings of both directors and members of a company to be held electronically.

Under section 248D a directors' meeting may be held using any technology consented to by all the directors. The consent may be a standing one and a director may only withdraw their consent within a reasonable period before the meeting.

In some cases, directors may have adopted the practice of meeting by telephone or videoconference without each director having formally consented to the use of that technology. It would be appropriate for directors to consider recording formally, for example in a board charter or in letters of appointment for directors, the technologies by which they have agreed their meetings can be held.

Section 249S of the Act provides that a company may hold a meeting of its members at two or more venues using any technology that gives the members a reasonable opportunity to participate.

The factors which will be relevant in deciding whether members have a reasonable opportunity to participate in a meeting, include:

- the ability of the chair to conduct and control the proceedings
- the number of persons attending the meeting
- the nature of the business of the meeting (for example, it may include a visual presentation)
- the voting processes available (for example, it will be necessary to have procedures in place to count members' votes from all venues)
- whether persons at the meeting can communicate with the chair and follow the proceedings.

While ASIC has expressed doubt as to the validity of virtual meetings, recent cases have held that virtual meetings can satisfy the requirements of section 249S.

Notices of meeting

Notice of a directors' meeting can be given in writing or by telephone or email. There are no statutory requirements as to the content of a notice of meeting of directors although at common law, and as a matter of common sense, the notice must specify the time and place of the meeting. If the meeting is to be held using technology, the notice of meeting should specify how to access the meeting through that technology (for example the telephone number to dial or the URL to access a videoconference).

Written notice of a members' meeting must be given to each member. A company is permitted to send the notice to an electronic address nominated by the member or through a means of access, for example the internet, nominated by the member. The notice of meeting must set out the place, date and time for the meeting (and, if the meeting is to be held in two or more places, the technology that will be used to facilitate this).

It is not necessary to include a physical location in the notice of meeting for a virtual meeting.

Minutes of electronic meetings

There are no specific statutory requirements as to the contents of the minutes of a meeting held electronically.

As a matter of good practice, the minutes of directors' meeting should record the technology by which the meeting was held, and which directors attended electronically and which directors (if any) met face-to-face.

In the case of a meeting of members it would usually be sufficient to record the technology by which the meeting was held and that some (or all) members attended electronically. As with a face-to-face meeting, if many members attend, it is not necessary to name them individually in the minutes.

The location of a meeting held electronically

A meeting may be held in two or more places or venues. The meeting will be held in each place in which an attendee is located.

As a matter of good practice, the minutes of a meeting held in a small number of places would ordinarily record the places at which the meeting was held. For example, if a meeting of directors were held by videoconference between a boardroom in Sydney and a boardroom in Melbourne, the minutes should say so. On the other hand, the minutes of a directors' meeting held entirely by telephone or videoconference would ordinarily record the technology by which the meeting was held but would not record where each individual participant in the meeting was located.

In cases where it is important to know and record in the minutes the place or places where a meeting is held (for example for tax purposes), the minutes should record where the individual participants in a meeting held by telephone or videoconference are physically located.

COVID-19 relief

Commonwealth

On 5 May 2020, the Treasurer made the *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* that modified the Act and various other rules and regulations to facilitate the continuation of business in circumstances relating to COVID-19. On 21 September 2020 this Determination was repealed and replaced in substantially the same form by the (*Coronavirus Economic Response) Determination (No. 3) 2020* (Determination). The Determination will be automatically repealed on 22 March 2021.

While the Act already permits and facilitates the conduct of companies' businesses remotely and electronically, the Determination gives companies further confidence.

The Determination modifies the operation of the Act so that:

- a meeting may be held using one or more technologies that give all persons entitled to attend a reasonable opportunity to participate without being physically present in the same place,
- all persons so participating in the meeting are taken for all purposes (for example, a quorum requirement) to be present at the meeting while so participating,
- a vote taken at the meeting must be taken on a poll, and not on a show of hands, by using one or more technologies to give each person entitled to vote the opportunity to participate in the vote in real time and, where practicable, by recording their vote in advance of the meeting,
- a requirement to allow an opportunity for persons attending the meeting to speak (for example, by asking questions) may be complied with by using one or more technologies that allow that opportunity,
- a proxy may be appointed using one or more technologies specified in the notice of the meeting,
- notice of a meeting may be given, and any other information to be provided with notice of a meeting, or at or in relation to a meeting, may be provided, using one or more technologies to communicate to those entitled to receive notice of the meeting:
    i. the contents of the notice and the other information; or
    ii. details of an online location where this information can be viewed or from where it can be downloaded.

The notice of meeting must include information about how those entitled to attend the meeting can do so.

The Determination also facilitates the electronic execution of documents under section 127 of the Act.

Queensland

In Queensland, Regulation 120 of the *Justice Legislation (COVID-19 Emergency Response-Documents and Oaths) Regulation 2020* (Qld) provides that an instrument that is to have effect as a deed may be made in the form of an electronic document and may be electronically signed. The Queensland regulation expires on 31 December 2020.

Victoria

In Victoria, regulations have been passed allowing for deeds to be in electronic form and to be electronically signed (*COVID-19 (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020* (Vic)).

The Victorian regulation was originally to expire on 24 October 2020. The COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Bill 2020 (Vic), which is currently before the Victorian Parliament and was passed by the lower house on 18 September 2020, will, if enacted, extend the operation of the Vic COVID-19 Regulations to 26 April 2021.

Opinion

Electronic storage and execution of documents

Electronic meetings

D Gration

Opinion

1. COVID-19 has brought a new focus on companies, and their officers and employees, operating remotely from their usual places of work and facilitating those operations with the assistance of electronic storage of books and records, electronic signing of documents, holding meetings by telephone or video conference, and communicating electronically with each other and with shareholders.

2. I have been briefed by Governance Institute of Australia to give my opinion on the following questions concerning the law relating to these issues. My opinion is necessarily general and recipients should seek advice as to their own particular circumstances as required.

Electronic storage

1. *Is a company permitted to store electronically books and financial records which are required to be kept under the Corporations Act 2001 (Cth) (the **Act**)?*

2. *Is a company permitted to maintain electronically registers which are required to be kept under the Act?*

3. *Are there evidentiary issues with proof of the contents of books and financial records and registers which are required to be kept under the Act and which are kept electronically?*

Electronic signatures

Many documents are required to be signed under the Act, for example, documents executed in accordance with s127, directors' consents to act (s201D), circular resolutions (s248A), minutes of meetings (s251A), directors' declaration with respect to financial statements (s295), chief executive officer's and chief financial officer's declaration in relation to financial statements (s295A), and documents lodged with ASIC (ss351 and 352). In some cases, the signed document is required to be kept, for example a director's consent to act under s201D.

4. *Can documents which are required to be signed under the Act be signed electronically?*

5. *If the signed document is required to be kept, does this mean that the document must be signed with a "wet signature"?*

6. *Are deeds executed by companies required to be signed with a "wet signature"?*

Electronic meetings

7. *Are companies permitted under the Act to hold meetings of directors and shareholders electronically?*

8. *What are the requirements in respect of the notice of meeting and minutes of a meeting to be held electronically?*

9. *Can the minutes of a meeting be signed electronically for the purposes of s251A of the Act? If minutes can be signed electronically how should they be signed to ensure validity?*

10. *Where is a meeting that is held electronically considered to be held and should the location be included in the minutes?*

3. This opinion first deals with the general law in respect of these questions. I then briefly address specific measures that the Commonwealth and State governments have taken in respect of these matters as part of their response to the COVID-19 pandemic.

Electronic storage

*Is a company permitted to store electronically books and financial records which are required to be kept under the Corporations Act 2001 (Cth) (the **Act**)?*

4. The Act permits and facilitates the keeping of electronic books and records.

5. Section 9 of the Act[1] defines "*books*" to include:

> "*(a) a register; and*
>
> *(b) any other record of information; and*
>
> *(c) financial reports or financial records, however compiled, recorded or stored; and*
>
> *(d) a document ...*"

6. "*Financial records*" are also defined in section 9.

7. Section 1306(1)(b) provides that a "*book that is required by this Act to be kept or prepared may be kept or prepared ... by recording or storing the matters concerned by means of a mechanical, electronic or other device*".

8. Section 1306(2) requires that matters recorded or stored in books which are kept or prepared by means of a mechanical, electronic or other device must generally be capable of being reproduced in written form at any time. Section 288 is to similar effect specifically in respect of financial records.

[1] In this advice, references to sections are references to sections of the *Corporations Act 2001* (Cth) unless otherwise stated

9. In some cases, the Act requires books and financial records to be kept in particular places: see, for example, section 172 (registers); section 251A (minutes); and section 289 (financial records).

10. The effect of section 1301 is that if the Act requires a book to be kept in a particular place, and the book is kept on a computer, then the book will be taken to be kept in a place (the place of inspection) where the matters in the book can be reviewed in written form, provided that a notice has been lodged with ASIC saying that this will be done. The book will then be taken to be kept at the place of inspection.

11. Section 1301 requires that the notice lodged with ASIC specifies "*the situation of the place of storage*". The prescribed form[2] requires details of the physical address of the location of the computer on which the records are stored. This may present practical difficulties where the books are stored on, for example, a cloud computing platform.

Is a company permitted to maintain electronically registers which are required to be kept under the Act?

12. A company's registers fall within the definition of books and may be kept electronically in the same way as other books.

13. Section 173 allows for a person who is entitled to inspect a register which is kept on a computer to inspect the register by computer.

Are there evidentiary issues with proof of the contents of books and financial records and registers which are required to be kept under the Act and which are kept electronically?

14. Written reproductions of books which are required to be kept under the Act, and which are kept on a computer, are admissible in evidence and are prima facie evidence of their contents.

15. Section 1305 provides that:

> *(1) A book kept by a body corporate under a requirement of this Act is admissible in evidence in any proceeding and is prima facie evidence of any matter stated or recorded in the book.*
>
> *(2) A document purporting to be a book kept by a body corporate is, unless the contrary is proved, taken to be a book kept as mentioned in subsection (1).*

[2] See ASIC Form 991/992

16. The presumption in section1305(2) has been interpreted to mean that a document purporting to be a book kept by a company is taken to have been kept under a requirement of the Act unless the contrary is proved.[3]

17. Section 1306(5) provides that:

> *"If:*
>
> *(a) because of this Act, a book that this Act requires to be kept or prepared is prima facie evidence of a matter; and*
>
> *(b) the book, or a part of the book, is kept or prepared by recording or storing matters (including that matter) by means of a mechanical, electronic or other device;*
>
> *a written reproduction of that matter as so recorded or stored is prima facie evidence of that matter."*

18. The admissibility of a reproduction of a document that is kept electronically, and that was not required to be kept by the Act, will be determined by the applicable rules of evidence in the relevant jurisdiction.

Electronic signatures[4]

Can documents which are required to be signed under the Act be signed electronically?

19. At least up until the COVID-19 pandemic, most Australians used and relied on instruments bearing electronic or facsimile signatures every day. Australian bank notes are required to bear the signatures of the Secretary to the Department of Treasury and the Governor of the Reserve Bank.[5] These signatures are not affixed manually but by the machine that prints the notes.

20. Similarly, most correspondence that listed companies send to their shareholders, such as dividend statements and notices of meeting, will be either fully electronic or, if in hard copy, signed electronically or mechanically, rather than manually, by the named signatory.

21. The courts have accepted for many years that a document may be validly signed otherwise than manually with a pen.

22. Loxton cites an 1869 New Hampshire case in relation to the use of a telegraph to sign a contract in which it was said:[6]

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[3] *ASIC v Rich* (2009) 236 FLR 1 at [394] – [400]; *ASIC v PFS Business Development Group Pty Ltd* (2006) 57 ACSR 553 at [66] – [72].
[4] See generally Diccon Loxton '*Not Worth the Paper They're not Written on? Executing Documents (Including Deeds) Under Electronic Documentation Platforms*' (2017) 91 Australian Law Journal 133 (Part A) and 205 (Part B).
[5] Section 37 of the *Reserve Bank of Australia Act 1959* (Cth)
[6] Loxton *op cit* at 206; *Howley v Whipple* 48 NH 487 (1869)

"*It makes no difference whether that operator writes the offer or the acceptance in the presence of his principal and by his express direction, with a steel pen an inch long attached to an ordinary penholder, or whether his pen be a copper wire a thousand miles long. In either case the thought is communicated to the paper by the use of the finger resting upon the pen; nor does it make any difference that in one case common record ink is used, while in the other case a more subtle fluid, known as electricity, performs the same office.*"

23. In Australia in 1884, the Supreme Court of Victoria said that:[7]

"*[a] signature may be impressed upon the document by a stamp engraved with a facsimile of the ordinary signature of the person signing … But proof … must be given that the name printed on the stamp was affixed by the person signing, or that such signature has been recognised and brought home to him as having been done by his authority so as to appropriate it to the particular instrument.*"

24. Modern Australian courts have accepted that a document may be signed electronically. The key requirement is that the signatory must have authenticated or authorised the affixation of their signature.

25. In *Islamic Council of South Australia Inc v Australian Federation of Islamic Councils Inc* [2009] NSWSC 211 at [22], Brereton J held that where a person's name was "*subscribed to [an] email with the intent of authenticating the communications*" it "*constitutes a signature notwithstanding that it appears in typewritten and not handwritten form*".

26. Similarly, in *Kavia Holdings Pty Ltd v Suntrack Holdings Pty Ltd* [2011] NSWSC 716 at [33], Pembroke J said:

"*In my view the inclusion of the sender's name on the email amounted to "signing" ... The requirement for signing is intended to identify the sender and authenticate the communication. That is sufficiently achieved in an email by the setting out of the sender's name together with the email address from which the email is despatched. The name of the sender and his email address are readily and rapidly verifiable. Any other conclusion would produce a capricious and commercially inconvenient result that might have wide-reaching and unintended consequences in modern day trade and commerce.*"

27. Recently, several cases arising out of the collapse of the Great Southern group of companies have considered whether documents can be signed electronically for the purposes of the Act. In particular, the cases have considered whether affixing the electronic signatures of the directors of a company to a document is sufficient for the purposes of section 127(1) which allows a company to execute a document by having it signed by 2 directors or a director and secretary.

[7] *R v Moore; ex parte Myers* (1884) 10 VLR 322 at 324-325

28. The Great Southern group operated various agricultural managed investment schemes. Investors in those schemes usually borrowed to finance their investment. Great Southern Finance purported to execute the relevant loan deeds under section 127 by electronically affixing the signatures of its directors to those documents. The loans were subsequently assigned to Bendigo and Adelaide Bank which sought to recover the loans from investors after the schemes collapsed. Some investors challenged whether their loan deeds had been validly executed.

29. In *Bendigo and Adelaide Bank Limited v DY Logistics Pty Ltd* [2018] VSC 558, Croft J observed (footnotes omitted):

> *[49] The word "signed" is not defined in the Corporations Act. The Corporations Act excludes the operation of s 10 of the Electronic Transactions Act 1999 (Cth) ("ETA"). Accordingly, the Commonwealth legislation dealing with whether a legislative requirement may be met by electronic means expressly excludes s 127 of the Corporations Act from its operation. There is otherwise no indication given by Parliament that "signed" is intended to have any other meaning [than] its ordinary meaning.*
>
> *[50] The ordinary meaning of the word "signed" is elucidated by the common law. At common law a person may sign a document by stamping their name, by typewriting or by printing, but in all cases, the question will be whether what was done fulfilled the function of a signature. What is required for signing to be effective is that there be some kind of "personal authentication of the individual 'signing'".*

30. Croft J explained in footnote 102 of his decision why the *Electronic Transactions Act 1999* (Cth) is excluded:

> "*Section 7A of the ETA permits Commonwealth legislation to be specifically exempted from its operation. The Electronic Transactions Regulations 2000 (Cth), Schedule 1, items 28 and 30 specify that Division 2 of Part of the ETA (which contains s 10) does not apply to the Corporations Act 1989 (Cth) or the Corporations Law. No reference is made to the Corporations Act 2001 (Cth). However, s 1407 of the Act (contained in the original transitional provisions) provides that a reference in an instrument to an Act that is part of the "old corporations legislation" is taken to include a reference to the corresponding part, provision or provisions of the "new corporations legislation". The legislative note to s 1407 makes express reference to the Corporations Law.*"

31. Croft J had earlier observed in *Bendigo and Adelaide Bank Ltd v Laszczuk* (2018) 129 ACSR 386[8] at [45] that (footnotes omitted):

> "*As to the form of the signatures, it should be borne in mind that a signature is only a mark. A signature may be impressed upon a document by a stamp with the*

[8] Affirmed on appeal in *Laszczuk v Bendigo and Adelaide Bank Ltd* [2020] VSCA 17

authority of the person signing. ... Moreover, there is no reason why the assumptions a person is entitled to make under s 129(5) of the Corporations Act should be confined to signatures made with a pen in the usual way."

32. Section 129(5) allows a person to assume that a document has been duly executed if it appears to have been signed in accordance with section 127(1).

33. In *Laszczuk*, Croft J accepted that the loan deed had been validly executed electronically. In *DY Logistics*, his Honour accepted that the loan deed could have been executed electronically, but found that the bank had not proved that the directors of Great Southern Finance had authorised the affixation of their signatures to the loan deed. Accordingly, he found that the loan deeds in that case had not been validly executed.

34. In summary, documents required to be signed under the Act can be signed electronically if the signatory has authorised the affixation of their electronic signature. As a matter of practice, it will be necessary to prove that the signatory authorised or authenticated the affixation of their signature. This might be done through an email from the signatory or a separate written document. It might be in the form of a file note of a telephone conversation in which the affixation of the signature was authorised. It might also be appropriate to record the approval and authorisation for the use of electronic signatures in board minutes relating to the relevant transaction.[9]

35. Finally, as a matter of prudence having regard to the importance of the relevant document and any possible difficulties that might later be encountered in proving the authorisation or authentication of the signatories' signatures, it will be worth considering whether it is more straight-forward to obtain a "wet signature" on particular documents.

If the signed document is required to be kept, does this mean that the document must be signed with a "wet signature"?

36. Examples of documents which are required to be kept and also to be signed include director's consents to act (section 201D) and minutes (section 251A).

37. A document that is required to be kept may be kept electronically (section 1306(1)) and the document may be signed electronically (see above). The document does not need to be signed with a "wet signature".

38. If the document is signed electronically, the necessary documents to show that the signatory authorised or authenticated the affixation of their signature should also be kept.

[9] In *DY Logistics* a director of Great Southern Finance's evidence was that the board had approved the affixation of the electronic signatures but board minutes supporting this were not produced. The Court found that authorisation had not been proved and that the deed not been validly executed.

Are deeds executed by companies required to be signed with a "wet signature"?

39. In *Manton v Parabolic Pty Ltd* (1985) 2 NSWLR 361, Young J said at 367-368 that:

> "*... a deed is the most solemn act that a person can perform with respect to a particular property or contract involved, and the form of that deed is as laid down by the law from time to time.*"

40. At common law, a deed is an instrument written on paper, parchment or vellum.[10]

41. In two other Great Southern cases, the borrowers argued that, regardless of whether a document could be signed electronically generally under the Act, a deed could not be executed in this way.

42. Section 127(3) provides that a company may execute a document as a deed if the document is expressed to be executed as a deed and, among other ways, it is executed by being signed by two directors or a director and secretary.

43. In *Bendigo and Adelaide Bank Limited v Russo* [2019] NSWSC 661, the relevant loan deed was expressed to be executed as a deed in accordance with section 127 by the affixation of the electronic signatures of the directors. McCallum J said at [90] – [95] that if it had been necessary to decide the question, she would have held that it remains a common law requirement of a deed that it be written on paper and that it therefore cannot be signed electronically.[11]

44. Similarly, in *Bendigo and Adelaide Bank Limited v Pickard* [2019] SASC 123, Stanley J referred at [17] and [56] to the common law requirement that deeds be written on paper, parchment or vellum. His Honour accepted at [57] that *Laszczuk* was authority for the proposition that section 127 had extinguished or modified the common law requirement that deeds be written on paper. However, he went on at [70] to distinguish *Laszczuk* because that case "*was concerned with a stamp rather than facsimile signatures applied by electronic means*"[12] and said:

> "*The purpose of s 127 is to enable a natural person i.e. a director to act as and for a company by a particular form of execution. Its purpose is not to permit a company to execute a document which, if executed by a natural person, would not amount to a deed.*"

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[10] See the definition in R Norton, R Morrison and H Goolden, *A Treatise on Deeds* (2nd ed, Sweet & Maxwell, London, 1928). See also, for example, *Scook v Premier Building Solutions Pty Ltd* (2003) 28 WAR 124 at [132].

[11] This requirement has now been modified in New South Wales by section 38A of the *Conveyancing Act 1919* (NSW). See also the temporary COVID-19 relief in Queensland and Victoria discussed below.

[12] In fact Great Southern Finance purported to execute the loan deed documents in each of *Laszczuk*, *DY Logistics*, *Russo*, and *Pickard* in exactly the same way by affixing the electronic signatures of its directors to the relevant document.

45. Stanley J went on to find at [71] that the bank could not rely on section 127 to prove that the loan deed was validly executed.

46. The common law position has been altered in New South Wales by section 38A of the *Conveyancing Act 1919* (NSW) which provides that a deed may be created in electronic form and electronically signed. Queensland and Victoria have enacted temporary relief in response to the COVID-19 pandemic which allows deeds to be created and executed electronically (see below). The legislation in other Australian jurisdictions does not expressly address deeds that are created or executed electronically. It should be assumed that the common law position that a deed must be written on paper, vellum or parchment continues in those jurisdictions. It is therefore likely that in jurisdictions other than New South Wales, and temporarily Queensland and Victoria, deeds cannot be created or signed electronically. A paper document, executed with a "wet signature", is the safest approach.

Electronic meetings

Are companies permitted under the Act to hold meetings of directors and shareholders electronically?

47. The Act allows meetings of both directors and members of a company to be held electronically.

Meetings of directors

48. Section 248D provides that:

> "*A directors' meeting may be called or held using any technology consented to by all the directors. The consent may be a standing one. A director may only withdraw their consent within a reasonable period before the meeting.*"

49. In *Gillfillan v ASIC* (2012) 92 ACSR 460, one of many reported decisions arising out of ASIC's proceedings against the directors of James Hardie, Barrett JA observed with respect to section 248D:

> *"[15] The statutory permission for a meeting of directors to be "held" by means of agreed technology entails, as a bare minimum, a requirement that each participating director can, for the duration of the meeting, hear and be heard by every other participating director — or, as it was put by Branson J in Re GIGA Investments Pty Ltd (1995) 58 FCR 106 ; 17 ACSR 472 , is "able to be aware of the contributions to the meeting made by each other director and to contribute himself or herself to the meeting without significant impediment". But more may be required in a given case. For example, where the directors discuss the content of a particular document in the course of the meeting and that document is not already in the possession of every director entitled to participate, the agreed technology by means of which the meeting is "held" must enable each participating director to see the document's content at the*

relevant point during the meeting. In the same way, if a document is to be "tabled" at a meeting of directors (see, for example, s 192(3) of the Corporations Act), the agreed technology must be such as to allow the full content of the document to be placed before every participating director. Other aspects of a particular meeting's agenda may, in the same way, dictate attributes of permissible technology.

[16] Under s 248D, particular technology may be employed for the holding of a meeting only if that technology is "consented to by all the directors". It must therefore be seen that every one of the directors in office when the meeting is held has separately and individually consented to the holding of the meeting by means of the technology in fact to be used. The section states that the consent "may be a standing one", but this does not mean that technology consented to on a "standing" basis by each of A, B and C (being all the directors in office at the time of the consent) is available after the board comes to consist of A, B and D.

[17] The decision whether or not to consent to a particular mode of technology for the purposes of s 248D is a personal decision for each director. Any director giving conscientious consideration to that question is bound to assess whether the proposed technology will satisfy the requirements outlined at [15] above."

50. In some cases, directors may have adopted the practice of meeting by telephone or videoconference without each director having formally consented to the use of that technology. It would be appropriate for directors to consider recording formally, for example in a board charter or in letters of appointment for directors, the technologies by which they have agreed their meetings can be held.

Meetings of members

51. Section 249S provides that:

"*A company may hold a meeting of its members at 2 or more venues using any technology that gives the members as a whole a reasonable opportunity to participate.*"

52. Section 249S was first introduced by the *Company Law Review Act 1998* (Cth). Paragraph 10.44 of the Explanatory Memorandum for that Act indicates the factors which will be relevant in deciding whether members as a whole will have a reasonable opportunity to participate in a meeting, including:

"*(a) the ability of the chairman to conduct and control the proceedings*

(b) the number of persons attending the meeting

(c) the nature of the business of the meeting (for example, it may include a visual presentation)

(d) the voting processes available (for example, it will be necessary to have procedures in place to count members' votes from all venues)

(e) whether persons at the meeting can communicate with the chairman and follow the proceedings."

53. In the early days of the COVID-19 pandemic, ASIC[13] and others[14] expressed doubt as to whether section 249S allowed "virtual meetings", that is meetings which were not conducted in a specified place and which all participants attended through technology. These doubts arose, at least in part, because of the requirements of section 249L that the notice of a members' meeting "*set out the place ... for the meeting*", as discussed below, and section 249R that a meeting "*be held at a reasonable time and place*". It was thought that these provisions might require a meeting to be held in at least one specific place.

54. However, in June 2020, three cases held that "virtual meetings"[15] can satisfy the requirements of section 249S.

What are the requirements in respect of the notice of meeting and minutes of a meeting to be held electronically?

Meetings of directors

55. Section 248C, a replaceable rule, provides that:

> "*A directors' meeting may be called by a director giving reasonable notice individually to every other director.*"

56. Most companies' constitutions contain a provision to similar effect. Often the company secretary is also empowered to call a meeting of directors.

57. Notice of a directors' meetings can be given in writing or by telephone or email. There are no statutory requirements as to the content of a notice of meeting of directors although at

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[13] On 20 March 2020, ASIC issued a media release "*20-068MR Guidelines for meeting upcoming AGM and financial reporting requirements*". ASIC said that "*There is some doubt as to whether the Corporations Act permits virtual AGMs and there may also be doubt as to the validity of resolutions passed at a virtual AGM*". Nevertheless, the media release said "*ASIC intends to take a no action position on non-compliance with provisions of the Corporations Act that may restrict the holding of virtual AGMs where an entity elects to hold a virtual AGM in order to comply with the statutory 31 May 2020 deadline or during the extension period*". On 6 May 2020, ASIC issued "*Guidelines for investor meetings using virtual technology*", by which time the Commonwealth's modifications to the Act in response to the COVID-19 pandemic had been put in place, so it was not necessary to resolve ASIC's doubts as to the validity of virtual meetings.

[14] In their submissions to the Senate Select Committee on Financial Technology and Regulatory Technology, Governance Institute of Australia and the Australian Institute of Company Directors considered it desirable that companies be able to hold virtual meetings and that any doubts as to their validity be resolved through legislative amendments – see the Interim Report of the Committee released in September 2020 at [2.29] – [2.31].

[15] *Re TPG Telecom Limited* [2020] NSWSC 772 at [19] – [20]; *Re Ellerston Global Investments Limited* [2020] NSWSC 879 at [28]; *Re Sienna Cancer Diagnostics Limited* [2020] FCA 899 at [102] – [116]. A 2016 case held that a telephone meeting could satisfy the requirements of section 249S, although that case concerned a meeting of a single member company: *Re Alstom Signalling Solutions Pty Ltd* [2016] FCA 838 at [51.

common law,[16] and as a matter of common sense, the notice must specify the time and place of the meeting. If the meeting is to be held using technology, the notice of meeting should specify how to access the meeting through that technology (for example the telephone number to dial or the URL to access a videoconference).

Meetings of members

58. Section 249J requires written notice of a meeting to be given to each member, but permits a company to send the notice to an electronic address nominated by the member or through a "*nominated access means*", for example the internet, nominated by the member.

59. In the case of a meeting of members, section 249L(1)(a) requires that the notice of meeting must:

> "*set out the place, date and time for the meeting (and, if the meeting is to be held in 2 or more places, the technology that will be used to facilitate this)*".

60. Section 249R, which was introduced on 1 July 1998, requires that a meeting of members "*be held at a reasonable time and place*". This reflected earlier case law.

61. In *Coombs v Dynasty Pty Ltd* (1994) 14 ACSR 60 at 93, von Doussa J said:

> "*An annual general meeting is not a mere formality, particularly for members who have no opportunity to ask questions about the affairs of the company. To hold a meeting at a time and place where members are unlikely to be able to attend is tantamount to not holding a meeting at all.*"

62. To similar effect, Young J said in *Smith v Sadler* (1997) 25 ACSR 672 at 673:

> "*... in general, directors have a fiduciary duty to convene meetings, particularly annual general meetings at a time and a place where all members of the company present in the state will be able to attend.*
>
> *... Thus it is not competent for the board of directors to frustrate that right by either not holding a meeting or holding it at a time or place where it is almost impossible for some shareholders to attend ...*"

63. Having regard to the current COVID-19 pandemic restrictions, it could be argued that it will be almost impossible for some shareholders to attend a meeting held at any one physical location. It might not be possible to comply with the requirements of section 249R otherwise than through a meeting in more than place, facilitated by technology.

64. Section 249L(1)(a) expressly recognises that meetings may be held in more than place, facilitated by technology. In the case of a meeting facilitated by technology, the meeting will take place in each place in which a participant is physically located. It would appear

[16] *Browne v La Trinidad* (1887) 37 Ch D 1

to frustrate the intent of the Act to allow meetings to be facilitated by technology to interpret section 249L as requiring the notice of meeting to specify at least one physical place, or possibly each physical place, at which the meeting is to be held. None of the cases referred to in footnote 17 considered the form of notice of meeting a barrier to allowing meetings of members to be held by telephone or virtually.

65. In my opinion the better view is that the notice requirements in section 249R do not preclude a company from holding a virtual meeting of members without setting out in the notice of meeting the physical place, or a physical place, at which the meeting will be held.[17]

Minutes of electronic meetings

66. There are no specific statutory requirements as to the contents of the minutes of a meeting held electronically.

67. As a matter of good practice, the minutes of directors' meeting should record the technology by which the meeting was held, and which directors attended electronically and which directors (if any) met face-to-face.

68. In the case of a meeting of members it would usually be sufficient to record the technology by which the meeting was held and that some (or all) members attended electronically. As with a face-to-face meeting, if many members attend, it is not necessary to name them individually in the minutes.

Can the minutes of a meeting be signed electronically for the purposes of s251A of the Act? If minutes can be signed electronically how should they be signed to ensure validity?

69. Minutes of a meeting can be signed electronically in the same way as other documents required to be signed under the Act (see above).

70. For the electronic signature to be valid, the person whose electronic signature is affixed must have authorised the affixation of their signature to the minutes. In order to demonstrate compliance with section 251A(2), which requires minutes of meetings to be signed, the company should retain proof of the authorisation of the individual who signs the minutes to the affixation of their signature. While the authorisation could be oral, it is preferable that there be a written record of this, for example through an email from the chair authorising the affixation of their electronic signature.

[17] The *Corporations (Coronavirus Economic Response) Determination (No. 3) 2020* (and previously the *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020*) does not expressly address the requirements of section 249L with respect to setting out the place of the meeting in the notice of meeting, but the Explanatory Statement to the First Determination says that "*is intended to allow entities who are required or permitted to hold meetings to hold those meetings remotely as virtual meetings, instead of in person, while public health restrictions are in place*". See further below.

71. Whilst the key question is whether the individual whose electronic signature is affixed to a document authorised the affixation of their own signature, it may, as a matter of good governance, also be appropriate to ask the directors to pass a resolution noting and agreeing that the minutes will be (or have been) signed electronically.

Where is a meeting that is held electronically considered to be held and should the location be included in the minutes?

72. As sections 249L and 249S make clear, a meeting may be held in 2 or more places or venues. The meeting will be held in each place in which an attendee is located.

73. As a matter of good practice, the minutes of a meeting held in a small number of places would ordinarily record the places at which the meeting was held. For example, if a meeting of directors were held by videoconference between a boardroom in Sydney and a boardroom in Melbourne, the minutes should say so. On the other hand, the minutes of a directors' meeting held entirely by telephone or videoconference would ordinarily record the technology by which the meeting was held but would not record where each individual participant in the meeting was located.

74. However, in some cases, it is important to know and record in the minutes the place or places where a meeting was held.

75. For example, for tax purposes, a company which is not incorporated in Australia, but which has "*its central management and control in Australia*", will be a "*resident of Australia*".[18]

76. The Australian Taxation Office says that:[19]

> "*Board minutes are the starting point for identifying who exercises and where a company's central management and control is exercised. [Where] the board minutes do not disclose where directors are making a company's high-level decision or the board minutes are false …[it will] be necessary to look at other evidence of who makes and where they make the company's high-level decisions.*"

77. If the location of the central management and control of a company is important, the minutes should record where the individual participants in a meeting held by telephone or videoconference are physically located.

78. The ATO has published guidance as to how it will apply these provisions during the COVID-19 pandemic.[20]

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[18] Definition of "*resident*" and "*resident of Australia*" in section 6 of the *Income Tax Assessment Act 1936* (Cth)
[19] Practical Compliance Guide PCG 2018/9 "*Central management and control test of residency: identifying where a company's central management and control is located*" at [10]. The ATO addresses at [73] – [80] the way in which it will deal with decisions made in more than one place, including where directors meet by telephone or videoconference.
[20] See www.ato.gov.au/General/COVID-19/COVID-19-frequently-asked-questions

COVID-19 relief

79. The Commonwealth and State and Territory governments have put in place various temporary measures to address the COVID-19 pandemic, including with respect to the matters addressed in this opinion. This is a new and frequently changing area of regulation and recipients should check what changes, if any, have occurred since the date of this opinion before relying on the advice below.

Commonwealth

80. On 5 May 2020, the Treasurer made the *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* (**First Determination**). On 21 September 2020 the First Determination was repealed and replaced in substantially the same form by the *Corporations (Coronavirus Economic Response) Determination (No. 3) 2020* (**Second Determination**).[21] The First and Second Determinations modified the Act and various other rules and regulations "*because of the impact of the coronavirus known as COVID-19*" so as to "*facilitate continuation of business in circumstances relating to [COVID-19]*".

81. As can be seen above, the Act already permits and facilitates the conduct of companies' businesses remotely and electronically. Nevertheless, the Determinations have given companies further confidence in this regard.

82. Section 5(1) of the First and now Second Determination facilitates holding meetings in more than one place using one or more technologies. It is consistent with, but more expansive than, section 249S and modifies the operation of the Act so that:

> "*(a) a meeting may be held using one or more technologies that give all persons entitled to attend a reasonable opportunity to participate without being physically present in the same place, and paragraphs (b) to (e) of this subsection apply if the meeting is held in that way;*
>
> *(b) all persons so participating in the meeting are taken for all purposes (for example, a quorum requirement) to be present at the meeting while so participating;*
>
> *(c) a vote taken at the meeting must be taken on a poll, and not on a show of hands, by using one or more technologies to give each person entitled to vote the opportunity to participate in the vote in real time and, where practicable, by recording their vote in advance of the meeting;*

[21] The *Corporations (Coronavirus Economic Response) Determination (No. 4) 2020* (and previously the *Corporations (Coronavirus Economic Response) Determination (No. 2) 2020*) modified the continuous disclosure provisions in the Act and is outside the scope of this opinion.

(d) *a requirement to allow an opportunity for persons attending the meeting to speak (for example, by asking questions) may be complied with by using one or more technologies that allow that opportunity;*

(e) *a proxy may be appointed using one or more technologies specified in the notice of the meeting;*

(f) *notice of a meeting may be given, and any other information to be provided with notice of a meeting, or at or in relation to a meeting, may be provided, using one or more technologies to communicate to those entitled to receive notice of the meeting:*

(i) *the contents of the notice and the other information; or*

(ii) *details of an online location where the items covered by subparagraph (i) can be viewed or from where they can be downloaded*"

83. The modification is subject to a requirement that the notice of meeting must include information about how those entitled to attend the meeting can do so.

84. Section 6 of the First and now Second Determination facilitates the electronic execution of documents under section 127. It relevantly provides that:

"(2) *In this section:*

document includes a document in electronic form.

(3) *A company may also execute a document without using a common seal if each person specified in paragraph 127(1)(a), (b) or (c), as the case requires, of the Act either:*

(a) *signs a copy or counterpart of the document that is in a physical form; or*

(b) *complies with subsection (4) of this section in relation to an electronic communication (within the meaning of the Electronic Transactions Act 1999).*

The copy, counterpart or electronic communication must include the entire contents of the document, but need not include the signature of another person signing the document nor any material included in the document because of subsection (4) of this section.

(4) *A person complies with this subsection if:*

(a) a method is used to identify the person in the electronic communication and to indicate the person's intention in respect of the contents of the document; and

(b) the method:

(i) 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; or

(ii) is proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence."

85. Section 6 does not address or resolve the question raised in *Russo* and *Pickard* (see above) as to whether, absent a statutory modification of the common law, a document created or signed electronically can be a deed as a matter of law.

86. Section 7 of the Determinations provides that the operation of section 129(5) of the Act is modified to extend to execution of documents under section 127 as modified by the Determinations.

87. Section 9 provides that the Second Determination is automatically repealed 6 months after the day after the date on which it was made, that is on 22 March 2021.

Queensland

88. In Queensland, Regulation 12O of the *Justice Legislation (COVID-19 Emergency Response-Documents and Oaths) Regulation 2020* (Qld) (**Qld COVID-19 Regulation)** provides that "*An instrument that is to have effect as a deed may be made in the form of an electronic document and may be electronically signed*".

89. Regulation 27 provides that the Qld COVID-19 Regulation expires on 31 December 2020.

Victoria

90. In Victoria, regulation 5 of the *COVID-19 (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020* (Vic) (**Vic COVID-19 Regulations**) provides that, for the purposes of sections 7(1) and (2) and 13B(2)(c) of the *Electronic Transactions (Victoria) Act 2000* (**ETA**), "*transaction*" includes a deed. Section 7 of the ETA allows a "*transaction*" to take place by means of an "*electronic communication*". Section 9 of the ETA allows for "*electronic communications*" to be electronically signed.

91. The Vic COVID-19 Regulations are repealed on the day that is six months after the commencement of Part 2.1 of the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic), that is on 24 October 2020. *The COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Bill 2020*, which is currently before the Victorian Parliament and was passed by the lower house on 18 September 2020, will, if enacted, extend the operation of the Vic COVID-19 Regulations to 26 April 2021.

Dated: 24 September 2020

D Gration
Castan Chambers, Melbourne