

New Temporary Legislation Virtual Witnessing of Documents.

By Andrew Calvin, Associate Director, IT, IP & Real Property ¹

The need for many of us to work from home and self-isolate has prompted the NSW Government to allow for certain documents to be witnessed remotely.

The *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020 (NSW)* came into effect on 22 April 2020 and removes the requirement for witnesses to the signing of documents to be physically present. Documents can instead be witnessed via audio visual link.

This **temporary legislation** will expire 6 months from the effective date unless NSW Parliament decides otherwise.

What documents does this apply to?

The new legislation allows the following documents to be witnessed by audio visual link:

- a will;
- a power of attorney or an enduring power of attorney;
- a deed or agreement;
- an enduring guardianship appointment;
- an affidavit, including an annexure or exhibit to the affidavit; and
- a statutory of declaration.

What is an 'audio visual link'?

Audio visual link means technology that enables **continuous** and **real time** audio and visual communication between persons at different places, and includes video conferencing platforms (e.g. Skype, WhatsApp and Zoom).

How to witness a document electronically

A person witnessing a document by audio visual link must:

1. ensure that they are viewing the signing of the document as it is actually occurring on screen, and not simply being shown the signed document;
2. confirm that they witnessed the signature, either sign a counterpart of the document as soon as practicable after witnessing the signing of the document, or if the signatory scans and sends a copy of the signed document electronically—countersign the document as soon as practicable after witnessing the signing of the document.

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3. endorse the document, or the copy of the document, with a statement describing the method of signing and that the document was signed in accordance with the Regulations; and,
4. be reasonably satisfied that the document the witness signs is the same as the document the witness observed signed by the signatory.

Practical tips

For a seamless experience and to ensure that you are complying with the new temporary legislation, it is important to keep the following in mind:

- **Comply with other laws:** where other regulations require other actions, make sure that these are properly complied with, such as the manner in which a will can be witnessed under the *Successions Act 2006*. It is also important to note that these regulations only apply to the witnessing and signing of documents under the jurisdiction of NSW laws, and do not affect the signing of documents in other jurisdictions, such as corporate signatories under section 127 of the *Corporations Act 2001*.
- **Agree on protocol beforehand:** it is important to agree on how the parties are to sign and witness any documents over audio visual link before the meeting begins. This is to ensure that you're both on the same page and complying with the Regulations. This includes
 - Agreeing how the documents will be signed
 - Agreeing how the documents will be exchanged
 - Providing express consent to the use of electronic signatures and/or recording of the event.
- **Take the usual precautions:** follow the usual processes for preventing fraud by confirming the identification of the signatory and prevent undue influence by checking their capacity to enter into the agreement.
- **Take notes:** even though it is happening via audio visual link, it is still important to properly document the meeting and the reason for holding it, by keeping proper files notes. This may come in handy when having to justify a particular decision or approach.

Important to note:

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Andrew is an accomplished lawyer with over 30 years' experience in IT, IP and Real Property law. He has a very strong legal and commercial background in technology transactions, corporations and commercial property laws and has worked extensively in social media, procurement, systems integration, commercial property, construction, infrastructure, complex property development, intellectual property, dispute resolution and corporate governance related matters.

Andrew's strengths include offering strategic legal and business advice that is pragmatic and commercial.

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Andrew was in-house in Stockland Corporation Limited, the Australian Broadcasting Corporation, and head of property legal for Sydney Water Corporation, Australia's largest water utility with over 4,500 properties.

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