

4 August 2020

Our ref: LP-MC

Nathan MacDonald
Principal Policy Lawyer
Law Council of Australia
GPO Box 1989
Canberra ACT 2601

By email: [REDACTED]

Dear Mr MacDonald

Consistency in electronic execution of documents

Thank you for the opportunity to provide comments regarding potential areas of reform to achieve consistency across jurisdictions for the electronic execution of documents.

QLS is currently reviewing measures taken in response to the COVID-19 emergency with a view to identifying those that have had a positive impact on the profession and the progression of legal matters. We will revert to you again once this process is finalised and will forward a copy of any submissions prepared as a result of this review.

In the interim, we have provided some general, preliminary comments below, including an outline of some of the measures that have been adopted in Queensland with respect to document execution.

Measures adopted Queensland

On 23 April 2020, the [COVID-19 Emergency Response Act 2020](#) (QLD) was passed by the Queensland Parliament providing the framework for regulatory amendment to common law, legislative and regulatory requirements for deeds, affidavits, powers of attorney, wills and other documents.

The *Justice Legislation (COVID-19 Emergency Response — Wills and Enduring Documents) Regulation 2020* (QLD) was published on 15 May 2020. It provided modified arrangements in relation to the making, signing and witnessing of wills, enduring powers of attorney and advance health directives

The regulation was later amended on 22 May 2020 by the *Justice Legislation (COVID-19 Emergency Response — Wills and Enduring Documents) Amendment Regulation 2020* (QLD), to include modified arrangements in relation to a range of other documents including affidavits, statutory declarations and deeds.

The amended regulation, now called the [Justice Legislation \(COVID-19 Emergency Response — Documents and Oaths\) Regulation 2020](#) (QLD) is now in force.

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This legislation prescribes the modified arrangements in relation to:

- wills and enduring documents;
- affidavits;
- statutory declarations;
- oaths;
- deeds;
- general powers of attorney; and
- particular mortgages (lodged under the Electronic Conveyancing National Law).

The modified requirements apply in addition to existing requirements for the making, signing and witnessing of wills under the *Succession Act 1981* (QLD) and enduring documents under the *Powers of Attorney Act 1998* (QLD), in reliance on the *COVID-19 Response Act 2020* (QLD).

The regulation also sets out a number of general requirements that must be met when using audio visual links for signing and witnessing documents. It sets out the requirements of a special witness to sign and keep a certificate that states particular matters including that the document was signed and witnessed in accordance with the regulation.

The regulation is due to expire 31 December 2020.

Future amendments

As noted in our submission to you of 26 May 2020, in response to the Senate Inquiry into the Australian Government Response to COVID-19, the ability to sign and witness documents during the physical distancing restrictions of the pandemic has been a particularly difficult challenge for members of the legal profession and their clients. The difficulties experienced in the COVID-19 pandemic will re-surface during future emergencies, such as natural disasters and will be ongoing in rural and remote areas.

QLS commended the temporary measures introduced to facilitate corporations signing documents.

The ability to sign and execute documents electronically must, however, remain a priority law reform area. Queensland and Australia must keep pace with modern global business practices.

Reform process

The need for the measures provided for by the various State and Federal legislation was urgent and, in the case of Queensland, the measures were put in place largely by way of regulation, permitted by the power given to the State in the Emergency Response Act.

QLS does not generally support substantive changes such as these being made in a regulation and without the proper parliamentary process taking place, which allows for consultation. In Queensland, due to the urgency of these issues, there was limited opportunity for comprehensive consideration of the measures at the time they were put in place. This is one of the reasons why QLS is undertaking a full review now.

Therefore, while QLS generally is in favour of a harmonised national legal framework enabling electronic signatures for appropriate documents on an ongoing basis, any reform in this area

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will need to include a review of the current/emergency legislation and practices in each State and Territory, as well as comprehensive consultation with stakeholders.

Types of documents to be executed electronically

Harmonisation of process is likely to be easier and more effective for commercial transactions, particularly those that regularly take place across jurisdictional boundaries. Adopting a permanent harmonised process for other documents, such as wills and enduring documents may not be as straightforward and may largely depend on the existing jurisdictional requirements.

Based on initial consultation with our members, QLS has reservations about permitting ongoing electronic witnessing of wills and enduring documents. In contrast, preliminary feedback from practitioners in commercial transactional areas of practice does support achieving national consistency of electronic execution for commercial documents such as deeds and contracts.

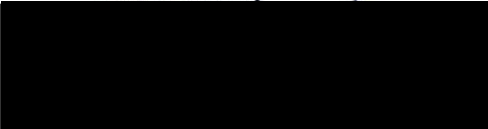
The current inconsistency of approach between the states and between law firms has been a barrier to the COVID 19 changes realising their full potential. We understand that most national firms have internal policies on the execution of documents which are generally developed on a national basis. Some practitioners have found it challenging to determine whether peer law firms acting for counterparties will accept electronic execution of documents, despite the Queensland legislation being quite clear as to its requirements.

The speed with which the emergency measures were put in place seems to have also resulted in some uncertainty among a number of national firms about the efficacy of the laws. Some firms have continued to be very reluctant to accept electronically (or soft) executed documents, without a number of other confirmations, or authentications. In those circumstances, practitioners have found that reverting to "wet ink" has been the easiest way to solve these issues.

We will advise further once our review is finalised.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Luke Murphy
President