



Wet ink is still a crucial part of the legal process

Electronic execution's a sign of the times legally

JONATHAN WENIG



When Australians are in lockdown, when the world is in the grip of both a pandemic and the greatest economic shock since the 1930s, there's a fundamental issue our politicians have so far overlooked — document execution.

It may not be as important as regulations to help flatten the COVID-19 curve or support businesses and individuals suffering economic hardship, but it's nonetheless imperative that we turn our attention to this issue if we are to keep the wheels of commerce turning.

It's no secret the law is a slow mover, particularly when it comes to taking advantage of developments in technology.

The law surrounding the execution of documents is, in many ways, stuck in the Middle Ages. In Australia, a deed can be written on parchment or vellum, yet the legal status of an electronically signed deed is still very hazy.

For maybe a decade, lawyers and legal commentators have dabbled with the idea of bringing the law on the execution of documents in line with modern commercial needs and practice. After all, if you can find love online, why shouldn't you be able to sign an affidavit?

Unfortunately, any discussion of reform has been more of an intellectual exercise than a practical one.

And up until now, as there has been no real urgency for reform, most lawyers have been content to play it safe and continue to recommend wet-ink signatures and the in-person witnessing of documents.

But COVID-19 has changed everything, which is why advanced economies around the world are looking urgently at this very wonky issue. Canada has just enacted emergency legislation to authorise the electronic execution and virtual witnessing of wills and other documents.

In Australia, far more than ever, the economy will rely on technology to survive.

New restrictions on social interactions has meant that it is no longer merely less convenient (and more costly) but potentially impossible for many individuals and entities to transact in "wet ink".

It may also no longer be possible for individuals to meet in person to witness documents without risking their own health

and/or that of others. In this context, partners from Arnold Bloch Leibler have written to ASIC and attorneys-general in each Australian jurisdiction requesting urgent guidance and legislative change to further help the nation through this extraordinary time.

In particular, we have recommended the following:

- The federal legislature should clarify that electronic signatures are not only an authorised mode of transacting but also align with, and qualify for, the various statutory assumptions and processes by which companies can transact. And — forgive the lawyerly addition — if two company directors are on the record as directors, are authorised to sign, and do so in different physical locations, or on their own computers or devices, that should be recognised as a legitimate way of transacting.

- There is a curious legal concept of a "deed", which is a particular type of agreement or contract. Some states and territories have enacted legislation to confirm that not only garden variety contracts, but also deeds, can be signed

More than ever, the economy will rely on technology to survive

electronically. The fact that it's only some jurisdictions at this stage introduces inefficiency and useless complexity into the most basic elements of transactions.

- The first two recommendations are warranted simply to bring the law into the 21st century, and the measures will be even more important as we look to facilitate the "snap-back" of our economy on the other side of this crisis. However, while the crisis continues, we also need urgent guidance and confirmation of the processes that will allow valid electronic execution and witnessing of documents — not just mergers and acquisitions contracts, but wills and medical powers of attorney.

- While these clarifications will need action in all of the states and territories, the ideal outcome would be a clear and uniform system across the country.

While Australia remains in lockdown, it is imperative that our governments make it as easy as possible for commercial transactions to be undertaken.

Even more critically, we need to lay the groundwork to help the Australian economy bounce back once restrictions are lifted.

Jonathan Wenig is lead commercial partner at Arnold Bloch Leibler.