Implications of the electronic witnessing provisions

Part 2B of the Electronic Transactions Act 2000 (NSW) and its impact on the practice of property, wills and estates practitioners

28 September 2020

SUMMARY

The *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW) commenced operation on 22 April 2020, providing for the signing of certain documents to be witnessed by audio visual link.

On 28 September 2020, the S*tronger Communities Legislation Amendment (Courts and Civil) Act 2020* incorporated the electronic witnessing provisions into Part 2B of the *Electronic Transactions Act 2000* (***Electronic Transactions Act***) and extended their operation to 31 December 2021.

Part 2B of the *Electronic Transactions Act*, which is titled "Remote witnessing pilot scheme", provides an alternative mechanism to allow witnessing of documents by audio visual link when those documents would otherwise need to be witnessed in the physical presence of a signatory.

While it is in operation, Part 2B may be relied on in a range of circumstances, including where a client has been diagnosed with COVID-19 or has been in contact with someone diagnosed with COVID-19 or where the pandemic has made it difficult or unsafe for a solicitor and/or client to meet in person. Extending the provisions to 31 December 2021 also provides an opportunity to review their effect and assess the merits of a further extension beyond the pandemic.

This paper summarises some of the limitations and risks associated with relying on the provisions in the context of property transactions and dealings with wills and estates. Solicitors should carefully consider these risks before deciding to rely on the provisions.

Documents can still be witnessed and attested in the traditional way, in the physical presence of the signatory. However, Part 2B of the *Electronic Transactions Act* offers an alternative option. There are also other options discussed in this paper which may be utilised, such as where the client is unable to meet with a solicitor but does not have access to audio visual link facilities.

This document reflects the regulatory environment in New South Wales as at 7 October 2020. Practitioners should take into consideration any later developments.

CONTENTS

INTRODUCTION

The COVID-19 pandemic has caused many industries to rethink their service models and come up with new and more innovative ways to service their consumers.

Although the legal industry remains an essential service, due to social distancing requirements and the fact that many people (including clients and legal practitioners themselves) are engaging in self-isolation, the witnessing of documents such as wills, enduring powers of attorney (**EPoAs**), appointments of enduring guardian (**AEGs**), advance care directives (**ACDs**), affidavits, statutory declarations and deeds has become more challenging.

In response to these challenges, and in consultation with the NSW Law Society and other stakeholders, the provisions contained in Part 2B of the *Electronic Transactions Act* provide an alternative mechanism to allow legal practitioners to witness documents by audio visual link (**AVL**) that would otherwise need to be witnessed in the physical presence of a signatory.[1] These provisions operate to facilitate alternative means of witnessing documents until Part 2B is repealed, which is set to occur on 1 January 2022.[2] The provisions do not have retrospective operation.[3]

While they are in operation, the provisions may be relied on in a range of circumstances including where a client has been diagnosed with COVID-19 or has been in contact with someone diagnosed with COVID-19, or where the pandemic has made it difficult or unsafe to meet with the client in person. The provisions can also be relied upon by practitioners where convenient to do so. Extending the operation of the provisions to 31 December 2021 allows the NSW Government further time to reflect on their utility and effectiveness, and to assess the merits of extending their operation beyond the pandemic.

Jurisdictions around Australia and globally have responded differently to the need to witness documents during COVID-19. This paper summarises the position in NSW only.

Legal practitioners should be aware of a number of challenges posed by the provisions, including:

- the possibility of elder abuse (undue influence, coercion etc.);
- the need to confirm mental capacity;
- the fact that some members of the community may not have adequate access to AVL technology (for example, the elderly or those in regional or remote communities);
- the need to undertake adequate verification of identity (**VOI**); and
- the need to properly document interactions with the client in greater detail than usual.

Although Part 2B provides alternative ways to witness and attest documents (amongst other things) during this pandemic, solicitors can continue to witness documents in the traditional way, in the physical presence of the signatory.

In summary, the provisions contained in Part 2B introduce a “brave new world” for the legal profession. Although it will assist legal practitioners and their clients to engage in legal services which require witnessing of documents despite possible quarantine, self-isolation or social distancing rules, legal practitioners need to be aware of the many risks and unresolved issues

---

[1] The provisions were originally located in the *Electronic Transactions Regulation 2017* (NSW) which commenced on 22 April 2020. The *Electronic Transactions Act 2000* (NSW) originally provided that the Regulation would expire on 26 September 2020 and this date was subsequently extended to 26 March 2021 (reg 8B of the *Electronic Transactions Regulation 2017* (NSW)). On 28 September 2020, the *Stronger Communities Legislation Amendment (Courts and Civil) Act 2020* incorporated the provisions into a new Part 2B of the *Electronic Transactions Act* titled “Remote witnessing pilot scheme” and extended their operation to 31 December 2021.

[2] Section 14K of the *Electronic Transactions Act.*

[3] Section 14J of the *Electronic Transactions Act* provides that an endorsement that would have been satisfactory for the purposes of the *Electronic Transactions Regulation 2017* is taken to be satisfactory for the purposes of s 14G(2)(d)(ii) of the *Electronic Transactions Act*.

that may arise. Legal practitioners must take care at all times to ensure the risk of any adverse consequence is mitigated. Detailed file notes and extrinsic evidence in relation to interactions with clients via AVL, particularly when it comes to witnessing documents under the new provisions, will be crucial.

PART 1 – TRADITIONAL METHODS

The current legislative framework relating to the witnessing of documents in NSW is dispersed across a number of different statutory instruments (both State and Commonwealth) depending on the type of document to be witnessed.

In relation to **wills**, section 6(1) of the *Succession Act 2006* (NSW) (***Succession Act***) provides:

> (1) A will is not valid unless:
>
> (a) it is in writing and signed by the testator or by some other person in the presence of and at the direction of the testator, and
> (b) the signature is made or acknowledged by the testator in the presence of 2 or more witnesses present at the same time, and
> (c) at least 2 of those witnesses attest and sign the will in the presence and at the direction of the testator (but not necessarily in the presence of each other).

A "witness" can be anyone of 18 years or more who can see and attest that the testator has signed the will.[4] A beneficiary under a will should not be a witness to the execution of the will. A gift made by a will to a person who is a witness to the will may be void.

Despite the formal requirements set out in section 6, section 8 of the *Succession Act* provides the Court with the discretion to dispense with the formal requirements for the execution of a will if the Court is satisfied that the document was intended by the testator to form his or her will.

In relation to **EPoAs**, section 19(1) of the *Powers of Attorney Act 2003* (NSW) (***Powers of Attorney Act***) provides:

> (1) An instrument that creates a power of attorney creates an enduring power of attorney for the purposes of this Act if:
>
> (a) the instrument is expressed to be given with the intention that it will continue to be effective even if the principal lacks capacity through loss of mental capacity after execution of the instrument, and
> (b) execution of the instrument by the principal is witnessed by a person who is a prescribed witness (not being an attorney under the power), and
> (c) there is endorsed on, or annexed to, the instrument a certificate by that person stating that:
> (i) the person explained the effect of the instrument to the principal before it was signed, and
> (ii) the principal appeared to understand the effect of the power of attorney, and
> (iii) the person is a prescribed witness, and
> (iv) the person is not an attorney under the power of attorney, and
> (v) the person witnessed the signing of the power of attorney by the principal.

Subsection (2) defines who may act as a prescribed witness under the *Powers of Attorney Act* for the purposes of an EPoA.[5]

---

[4] *Succession Act* 2006 (NSW) s 9.

[5] Section 19(2) of the *Powers of Attorney Act 2003* (NSW) states that "prescribed witness" means:

> (a) a registrar of the Local Court, or
> (b) an Australian legal practitioner, or
> (c) a licensee under the *Conveyancers Licensing Act 2003*, or an employee of the NSW Trustee and Guardian or a trustee company within the meaning of the *Trustee Companies Act 1964*, who has successfully completed a course of study approved by the Minister, by order published in the Gazette, for the purposes of this paragraph, or
> (d) a legal practitioner duly qualified in a country other than Australia, instructed and employed independently of any legal practitioner appointed as an attorney under the instrument, or
> (e) any other person (or person belonging to a class of persons) prescribed by the Regulation for the purposes of this paragraph.

In relation to **AEGs**, section 6C(1) of the *Guardianship Act 1987* (NSW) (***Guardianship Act***) provides:

(1) An instrument does not operate to appoint a person as an enduring guardian unless:

(a) it is in or to the effect of the form prescribed by the regulations, and
(b) it is signed:
(i) by the appointor, or
(ii) if the appointor instructs – by an eligible signer who signs for the appointor in the appointor's presence, and
(c) it is endorsed with the appointee's acceptance of the appointment, and
(d) the execution of the instrument by the appointor and appointee is witnessed by one or more eligible witnesses, and
(e) each witness certifies that the person or persons whose execution of the instrument is witnessed executed the instrument voluntarily in the presence of the witness and appeared to understand the effect of the instrument; and
(f) if the instrument is signed for the appointor by an eligible signer – the person who witnesses the signature certifies that the appointor, in the witness's presence, instructed the signer to sign the instrument for the appointor.

An "eligible witness" is defined in section 5 of the *Guardianship Act*.[6]

In NSW, there is no specific form or legislation regarding ACDs. According to the NSW Ministry of Health, an ACD can be spoken or written and does not need to be witnessed to be legally enforceable (although witnessing an ACD is recommended).[7]

In relation to **affidavits** and **statutory declarations**, section 34(1) of the *Oaths Act 1900* (NSW) (***Oaths Act***) provides:

(1) A person who takes and receives a statutory declaration or affidavit in this State (an authorised witness) –

(a) must see the face of the person making the declaration or affidavit, and
(b) must know the person who makes the declaration or affidavit or confirm the person's identity in accordance with the regulations, and
(c) must certify on the declaration or affidavit in accordance with the regulations that this section has been complied with.

Clause 7(1) of the *Oaths Regulation 2017* (NSW) further provides as follows:

(1) For the purposes of section 34(1)(c) of the Act, an authorised witness certifies that section 34 of the Act has been complied with by certifying the following matters in a certificate on the declaration or affidavit:

(a) that the authorised witness either:
(i) saw the face of the person making the declaration or affidavit, or
(ii) did not see the face of the person because of a face covering, but is satisfied that the person had a special jurisdiction for not removing the covering,
(b) that the authorised witness either:
(i) knows the person, or
(ii) has confirmed the person's identity based on an identification document presented to the authorised witness, and

---

[6] Section 5 of the *Guardianship Act 1987* (NSW) states that an "eligible witness" means a person who:
(a) is any of the following:
(i) an Australian legal practitioner,
(iii) a registrar of the Local Court,
(iv) a person (or a person belonging to a class of persons) prescribed by the regulations for the purposes of this subparagraph, and
(b) in the case of an instrument appointing an enduring guardian or revoking an appointment--is not an appointee or substitute enduring guardian.

[7] NSW Ministry of Health, *Making an Advanced Care Directive*, August 2019, NSW.

(c) if the authorised witness has relied on an identification document to confirm the identity of the person – that the document that the authorised witness relied on is the document that is specified by the authorised witness in the certificate.

Part 5 of the *Oaths Act* provides who is authorised to take and receive oaths, affidavits and declarations.

Federal courts pick up the law of the jurisdiction relating to the action.[8] However, different arrangements may exist in federal courts.[9]

In relation to **deeds**, subsections 38(1), (1A) and (1B) of the *Conveyancing Act 1919* (NSW) (***Conveyancing Act***) provide as follows:

(1) Every deed, whether or not affecting property, shall be signed as well as sealed, and shall be attested by at least one witness not being a party to the deed; but no particular form of words shall be requisite for the attestation.

(1A) For the purposes of subsection (1), but without prejudice to any other method of signing, a deed is sufficiently signed by a person if –

(a) by the direction and in the presence of that person the deed is signed in the name of that person by another person,
(b) the signature is attested by a person who is not a party or signatory (except by way of attestation) to the deed, and
(c) the person attesting the signature certifies in his or her attestation that he or she is a prescribed witness and that the signature was affixed by the direction and in the presence of the person whose signature it purports to be.

(1B) For the purposes of subsection (1) but without prejudice to any other method of signing, a deed is sufficiently signed by a person if –

(a) that person affixes his or her mark on the deed,
(b) the affixing of the mark is attested by a person who is not a party or signatory (except by way of attestation) to the deed, and
(c) the person attesting the affixing of the mark certifies in his or her attestation –
  (i) that, before the mark was affixed, he or she explained the nature and effect of the deed to the person making the mark, and
  (ii) that he or she believed, at the time the mark was affixed, that the person making the mark understood the explanation.

Generally, section 38(1) of the *Conveyancing Act* only requires that a deed "be attested by at least one witness not being a party to the deed". Ideally the witness should also be an adult who is not a relative, employer or employee of the signatory to the deed. The same applies to the signing of a deed by a marksman pursuant to section 38(1B).

However, where the deed is to be signed by direction under section 38(1A), the witness, in addition to not being a party or signatory to the deed, must also be a prescribed witness. Prescribed witnesses for the purposes of section 38(1A)(c) are set out in Schedule 4 to the *Conveyancing (General) Regulation 2018* (NSW).

Section 38A of the *Conveyancing Act* further provides that "A deed may be created in electronic form and electronically signed and attested in accordance with this Part". This is further confirmed in section 6C.

In relation to **contracts** dealing with interests in land, under the *Electronic Transactions Act 2000* (NSW), a transaction (which is defined to include a contract or agreement) will not be

[8] *Judiciary Act* 1903 (Cth) s 79; *Rizeq v Western Australia* [2017] HCA 23; (2017) 262 CLR 1.
[9] The Federal Circuit Court practice guidance issued 31 March 2020 appears at http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/rules-and-legislation/practice-directions/2020/jpd022020 . The Federal Court's equivalent appears at: https://www.fedcourt.gov.au/__data/assets/pdf_file/0004/62374/SMIN-1-31-March-2020.pdf (website - https://www.fedcourt.gov.au/covid19/covid-19#31_3).

invalid because it took place by means of one or more electronic communications. The three fundamental requirements for validity are set out in section 9(1):

(a) a method is used to identify the person and to indicate the person's intention in respect of the information communicated, and
(b) the method used was either –
    (i) as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement, or
    (ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence, and
    (iii) the person to whom the signature is required to be given consents to that requirement being met by way of the use of the method mentioned in paragraph (a).

As regards the third requirement, it would be prudent to confirm the consent of the other party prior to entering into the transaction.

Amendments to the *Conveyancing Act* in late 2018 confirmed that contracts dealing with interests in land can be signed electronically.

Not all contracts dealing with interests in land need to be witnessed. The Law Society/Real Estate Institute standard form contract does not require a party's signature to be witnessed. On the other hand, a deed (or a document expressed to be a deed such as a Law Society lease) must be witnessed. As mentioned above, section 38A of the *Conveyancing Act* provides that deeds can be signed and witnessed electronically.

From 27 April 2020, changes to the Conveyancing Rules temporarily allow **paper land dealings, plans and s 88B instruments** to be *signed* electronically. These documents may also be *witnessed* electronically using an AVL during the COVID-19 restrictions. These temporary changes do not alter any existing requirements for execution and certification, verification of identity or establishing the right to deal.[10]

In the remainder of this paper we concentrate on the common estate planning documents, being wills, EPoAs and Enduring Guardian appointments.

[10] https://www.registrargeneral.nsw.gov.au/__data/assets/pdf_file/0009/822546/Conveyancing_RulesCOVID-19_Pandemic_Amendment.pdf; https://www.registrargeneral.nsw.gov.au/__data/assets/pdf_file/0010/822592/Guidance-note_executing-paper-land-dealings-during-COVID-19.pdf.

PART 2 – ESTABLISHING ESSENTIAL VALIDITY

Although each of the documents covered by Part 2B of the *Electronic Transactions Act* is governed by legislation that imposes specific requirements in relation to witnessing, the overall theme of the traditional methods is that the document must be witnessed by a specific person (or persons) who is/are physically "present" when the signatory executes the document for the document to be valid.

Pursuant to the NSW legislative requirements that existed before the electronic witnessing provisions – which still exist and will exist after the provisions are repealed – in order for the following documents to be valid, witnesses (including legal practitioners, particularly where the document requires a legal practitioner to be a witness) must be physically present and in close proximity to the signatory at the same time that the signatory signs the document in order to witness the execution of documents: wills, EPoAs, AEGs, affidavits, statutory declarations and deeds.

The proper witnessing of a document is one aspect of the formal validity of these documents. However, a document isn't valid unless there is also essential validity. This means that the person must possess mental (or testamentary) capacity and free will. With the enduring documents the practitioner needs to positively certify the appearance of understanding and, with enduring guardian appointments, the existence of voluntariness – thus making these aspects of essential validity an incident of formal validity.

For guidance which may assist with establishing essential validity, see the Best Practice Guide for practitioners in relation to elder abuse (2018), which is published on the Law Society of NSW website.[11]

[11] https://www.lawsociety.com.au/resources/practice-resources/my-practice-area/elder-law

PART 3 – NEW EMERGENCY MEASURES

As social distancing and self-isolation measures have been introduced, the notion of being "physically present" has become more challenging for legal practitioners and their clients. In response to these conditions, the provisions in Part 2B of the *Electronic Transactions Act* permit the signing of a 'document' by audio visual link (**AVL**).

Section 14F of the *Electronic Transactions Act* defines 'document' as including:

(a) a will,
(b) a power of attorney or an enduring power of attorney,
(c) a deed or agreement,
(d) an enduring guardianship appointment,
(e) an affidavit, including an annexure or exhibit to the affidavit,
(f) a statutory declaration.

The phrase 'audio visual link' is defined as "technology that enables continuous and contemporaneous audio and visual communication between persons at different places, including video conferencing" (section 14F).[12]

Section 14G(2) of the *Electronic Transactions Act* provides that a person witnessing the signing of a document by AVL (the 'witness') must:

1. Observe the person signing the document (the 'signatory') sign the document in real time.

The camera angle may need to be adjusted to allow the witness to see simultaneously the face of the signatory, the signing hand of the signatory and the document as the signing occurs.

2. Sign the document or a copy of the document as witness.

The witness must "attest or otherwise confirm the signature was witnessed by signing the document or a copy of the document".[13]

Section 14G(3) of the *Electronic Transactions Act* specifies that at least two possible ways of doing this are:

(i) that the witness may sign a counterpart of the document as soon as practicable after witnessing the signing of the document by the signatory, or

(ii) if the signatory scans and sends a copy of the signed document to the witness electronically, the witness may countersign the scanned document as soon as practicable after witnessing the signing of the document.

The above options are not exhaustive.

It is possible for the signatory to send the document to the witness by some other means. Potentially, the document could be sent by post. This could mean that the document is not received by the witness until some days after it is signed by the signatory. Because of issues that can arise where there is a delay in completing the document, this option is not encouraged.

In relation to wills, in order to meet the requirements of section 6(1)(c) of the *Succession Act* the testator should also observe each witness signing the counterpart or copy document in real time. This requires item 2 to be repeated for each witness, each time with the signatory/testator being able to see simultaneously the face of the witness and the signing hand of the witness.

---

[12] Section 14F of the *Electronic Transactions Act*.

[13] Section 14G(2)(b) of the *Electronic Transactions Act*.

3. Be reasonably satisfied that the document being signed is the same as the document or copy of the document to be signed by the witness.

Where documents are signed in counterpart, one way for a witness to satisfy themselves could be by having the document read aloud by the signatory so the witness can check that the counterpart is identical. If the document is relatively brief the practitioner could ask the signatory to hold it close to the camera so that a "page-turn" comparison can be conducted; for lengthier documents this may not be practical.

4. Endorse the document, or the copy of it, with a statement specifying the method used to witness the signing and that the document was witnessed in accordance with section 4G of the *Electronic Transactions Act*.

There is no prescribed wording for this endorsement.

A notation to section 14G(2) of the *Electronic Transactions Act* states that a document may be endorsed with a statement along the following lines:

> This document was signed in counterpart and witnessed over audio visual link in accordance with section 14G of the *Electronic Transactions Act 2000*.

If the document is not signed in counterpart then those words should be deleted from the endorsement.

PART 4 – APPLYING THE EMERGENCY MEASURES

Dealing with a client's matter remotely (whether it is by telephone, email or video conferencing) carries additional risks for both the client and practitioner. Careful consideration needs to be given to those risks if a practitioner decides to proceed having only remote contact with the client. The level of risk will differ depending upon a number of factors including the nature of the transaction being undertaken, the medium used to have contact with the client and whether (and how well) the practitioner knows the client.

If you are not in a position to see the client in person and you take the view that the level of risk is unacceptable, you should immediately notify the client that you are unable to assist and that, if required, the client should look for legal representation elsewhere.

When dealing with a client via audio visual link, as opposed to being in the client's physical presence, the following tasks are likely to be more challenging:

- verifying the client's identity;
- assessing the client's mental capacity to give instructions, to make documents and enter into transactions;
- ensuring the client is not subject to the undue influence of a third party;
- ensuring you can maintain your obligation of confidentiality to the client, and that the client's privacy is protected; and
- storing the documents.

When taking instructions, providing advice and witnessing documents over audio visual link, practitioners need to be extra vigilant in relation to the above matters. The following practical tips are suggested:

1. How do I identify the client?

If you are not meeting the client face to face, it is still important to identify the client to prevent fraud. If the client is not already known and recognisable to you, one option is to have the client forward to you a form of photo identification that you can check against the person's appearance by audio visual link. Another option is to ask the client to produce photo identification (such as a driver's licence, passport or government issued Photo Card) and hold the identification up to the camera. You should ensure the details on the identification match the details provided by the client and that you are satisfied the person on camera is the person as shown in the photograph on the identification.

A further option is to ask the client to sign their name on a blank piece of paper in front of the camera and ensure you can see them doing so.[14] Then ask the client to hold the piece of paper with their signature up to the camera alongside an identification document which contains their signature. Compare the signatures and ensure you are satisfied they match.

It is important to keep a record of how you identified the client. You could take a screen shot of the client holding up their identification – if the client consents (but ensure you can see their face) to retain on your file. Ensure you make a file note of the steps taken to satisfy yourself of the client's identity.

2. From whom do I take instruction?

It continues to be vital that instructions are taken directly from the client, not from third parties. This applies regardless of the mode or medium of taking instructions and the COVID-19 pandemic is no excuse to depart from this practice.

[14] The suggestion made in item 3 of Part 3 should be adopted.

3. What about mental capacity and undue influence?

Whether or not you are seeing the client face to face it is important to consider and test the client's mental capacity to do what they are proposing, whether it is making a will or power of attorney or any other document. Extra care should be taken when the client meeting is via audio visual link, and the usual open questions testing the client's understanding should be asked and the answers recorded.

Ordinarily you would see a client alone to check that they are acting voluntarily and not being unduly influenced by another person. Bear this in mind when seeing a client by audio visual link, and ask whether anyone else is present.

If your client is making an enduring power of attorney, the prescribed witness needs to provide a certificate that they explained the effect of the power of attorney to the principal before it was signed and that the principal appeared to understand the effect of the power of attorney. A record should be kept of the discussion with the principal that satisfied the prescribed witness of the matters certified.

If you are witnessing the signature of an appointor or appointee to an instrument making an appointment of enduring guardian, the prescribed witness needs to certify that the signatory appeared to understand the effect of the instrument and voluntarily executed it. Again, a record should be kept of the discussions with the signatories that satisfied the prescribed witness of the matters certified.

Other comments about these vital issues relating to essential validity are:

- Assessing the client's mental capacity and volition can involve not only considering the client's responses to questions, but also taking note of the client's reactions and body language.
- Practitioners may find that they need to spend more time than they normally would when taking instructions.
- Some clients are not "tech savvy" and may need to have someone around at the beginning of the meeting to assist them to set up the technology.
- Give the client permission to terminate the call/connection at any time without giving any explanation. They may wish to do this if, at any time, they are not comfortable continuing. An arrangement can be made for them to make contact again as soon as they are able.

4. What is the best method for maintaining privacy and confidentiality?

Consider raising the following issues with the client:

- they ensure they use a secure internet connection;
- they are in a private location where they cannot be overheard and are unlikely to be interrupted;
- they use a headset, if they have one, as this may assist privacy; and
- if the client is using a shared computer, they clear their browser history after the interview.

As a practitioner consider the following:

- Ensure the client cannot see confidential information of other clients.
- Ensure you do not inadvertently show confidential information to the client through your computer screen. For example, if you are 'sharing your screen' with the client so you can go through a document together, ensure you are not receiving pop up email notifications.
- Ensure your conversation with the client cannot be overheard, particularly if you are working from home or otherwise outside of your usual office. Remember that sound through the speaker on your computer may travel further than you would think.

5. How do I store the documents and copies of documents?

Where the documents are signed in counterparts there will be more than one document making up the executed and witnessed document. Even where a scanned copy is signed by the witness, there will be more than one document as the document with the signatory's wet signature will be a separate document to the scanned signed copy countersigned by the witness(es).

It is recommended that all documents/counterparts/copies be stored together so that it is clear that the signing and witnessing process was completed in accordance with the electronic witnessing provisions.

PART 5 – OTHER ISSUES TO CONSIDER

1. Does the *Electronic Transactions Act* set out the only method for witnessing wills and enduring documents while COVID-19 restrictions are in place?

No. Part 2B of the *Electronic Transactions Act* provides an additional way to arrange witnessing of documents, where a face to face meeting is not possible. In many instances, a face to face meeting observing social distancing rules will still be the most appropriate way to arrange for many documents, such as wills, powers of attorney and appointments of enduring guardian, to be witnessed. For clients who do not have access to the necessary technology a face to face meeting for execution may be the only option.

2. What other options should be considered?

Where a client wishes to make a will, and is unable to arrange two witnesses or to access an audio visual link, an alternative option is signing with only one or even no witnesses using wording such as 'I intend this document to form my will', in anticipation of an application to have the document admitted to probate under the dispensing power.[15]

It may be useful to consider the following:

- Wills can be made by a testator with a physical incapacity by using the procedure in section 6 of the *Succession Act* of directing a person to sign in the presence of the testator.
- A will may be made by a person without legal capacity because of age in the circumstances described in sections 5 or 16 of the *Succession Act*.[16]
- A will may be made by a person without testamentary capacity using the procedures in Part 2.2, Division 2 of the *Succession Act*, i.e. a statutory will.
- An incorrectly executed will may be able to be rectified[17] or treated as an informal will.[18]

In relation to enduring documents:

- An incorrectly executed power of attorney may be able to be rectified.[19]
- An enduring guardian appointment form can be made by an appointor with a physical incapacity by using the procedure in section 6C of the *Guardianship Act* of directing an eligible person to sign in the presence of the appointor.
- An incorrectly executed enduring guardian appointment form may be able to be rectified.[20]

3. If the document is signed in counterparts, should this be stated on the documents?

Yes. This is essential as Part 2B of the *Electronic Transactions Act* requires an endorsement by the witness specifying the method used to witness the signature of the signatory.

4. What does 'real time' mean?

The phrase is used in the *Electronic Transactions Act* but isn't defined. It is likely to mean 'at the same time'. This doesn't mean that the signatory and witness(es) must be in the same time zone. However, a witness seeing a recording of the signatory signing will not be observing the signing in 'real time'.

---

[15] See *Succession Act 2006* (NSW) s 8.
[16] See Powell, *Recent Developments in NSW in the Law Relating to Wills*, (1993) 67 ALJ 25; *Application of M* [2000] NSWSC 1239; *In the matter of J LC* [2014] SASC 20.
[17] *Succession Act 2006* (NSW) s 27; *Re Estate Johnson Deceased* [2014] NSWSC 512.
[18] An example is *Estate of Daly* [2012] NSWSC 555; 8 ASTLR 48.
[19] *Re Gouder* [2005] NSWSC 116.
[20] *Guardianship Act 1987* (NSW) s 6K(4).

5. Should I record the audio visual meeting?

If you have the ability to record the audio visual meeting, it may be a good idea, as this will provide evidence not only of compliance with the electronic witnessing provisions but of the identity, capacity and volition of the signatory. However, you should not record the audio visual meeting unless you have the consent of all persons participating in the recording, such as the client, witnesses, and medical staff, to do so.[21]

6. Does the signatory (i.e. client) need to be in NSW whilst on audio visual?

The *Electronic Transactions Act* doesn't stipulate where the signatory or witness must be located. Because the signatory is in a different physical location to the witness, and the witnessing is by AVL, it may not be possible to determine the location of the signatory or witness. Potentially this could cause issues about where the document was made (see further below). However, the *Electronic Transactions Act* is also silent on this point.

7. Can digital signatures or electronic signatures be used for documents to which Part 2B of the *Electronic Transactions Act* applies?

The position with electronic signing hasn't changed. If it was possible before the electronic witnessing provisions were introduced, it is still possible. If it wasn't possible before the provisions were introduced, it still isn't possible. This means that electronic signatures are not possible for wills, enduring powers of attorney, enduring guardian appointments, affidavits and statutory declarations (even though AVL witnessing is now possible for those documents).

8. In relation to wills, should an attestation clause be amended to state that the will was signed pursuant to the s 14G of the *Electronic Transactions Act*?

This is advisable. However the *Electronic Transactions Act* only requires an endorsement by the witness specifying:

- the method used to witness the signature of the signatory, and
- that the document was witnessed in accordance with section 14G of the *Electronic Transactions Act.*

So, strictly, this does not need to form part of the attestation clause.[22]

9. Should a contemporaneous record be made of compliance with the provisions?

A will may be made many years before a person's death. The witnesses may then be dead, or incapable or unwilling to give evidence of the circumstances surrounding the making of the will. It has been suggested that, where a will is executed in the manner allowed by Part 2B of the *Electronic Transactions Act*, an affidavit should be made by a participant explaining the execution of the will in the event that evidence of formal validity is later needed. Similar issues may arise with the other documents also.

10. Which is the original and which is/are the copy/ies?

The *Electronic Transactions Act* is silent on this point. Where there are different documents signed by the signatory and witness(es), the original document could be the document signed by the signatory, the document signed by the witness(es), or all the documents assembled together. In the case of a will, there may be as many as three documents which bear the original signature of the signatory or a witness.

With a will, is the original will the document that has been scanned through and witnessed by the witnesses so that it has the testator's non-original signature on it (and possibly one witness'

[21] A practitioner who knowingly contravenes the *Surveillance Devices Act* 2007 (NSW), may be guilty of professional misconduct and be subject to professional discipline: *Legal Profession Complaints Committee v Rayney* [2020] WASC 131. It is also a criminal offence.

[22] It should also be recalled that it is not essential for a will to have an attestation clause: *Succession Act 2006* (NSW) s 6(3).

non-original signature on it) and one original witness signature on it, or is it both that document plus the document with the testator's original signature on it (and possibly plus the other document with the first witness' original signature on it) – so two or three counterparts in total?

This is an important issue as identifying the original document arises in various circumstances. For instance, the original will must be produced to obtain a grant of representation. The original power of attorney needs to be produced to be registered by the Registrar-General in the General Register of Deeds. The original document must be produced to enable a certified copy to be made.

Until there is a definitive decision of which of the potential options is the original document, the safest approach is to produce or certify all documents signed by the signatory and the witness(es).

11. When is the document said to be made?

Traditionally, a document is not 'made' until all the formal requirements are completed. However, because the provisions are intended to be 'remedial' they are likely to be construed broadly. It is therefore possible that the document could be made when the signatory signs the document rather than when the execution is completed by the witness (or, with a will, witnesses) signing.

This issue will be important if the signatory dies or becomes mentally incapacitated before the witness is able to sign (or, with a will, if there is an intervening marriage or divorce). The issue that will arise is whether the document is validly executed if there are these intervening events before the witness signs.

The *Electronic Transactions Act* is silent on this point. Until there is a definitive decision of this issue, the safest approach is to treat the document as not being executed until the witness has signed. This is an extra reason for having the signatory sign and the witness sign contemporaneously (rather than the witness sign some time – like hours or days – after the signatory).

12. Where is the document made?

In *Bendigo and Adelaide Bank Ltd v Pickard* [2019] SASC 123 the court explained that:

> The law applicable to the creation of a power of attorney is the law of the jurisdiction in which it was made. However, the law applicable to its construction and operation is that of the jurisdiction where the power operates or is intended to operate.[23]

Where is a power of attorney (or other document to which Part 2B of the *Electronic Transactions Act* applies) made when it is witnessed electronically, and the signatory and witness(es) are in different jurisdictions? The *Electronic Transactions Act* is silent on this point. A number of other choice of law issues may arise.[24] Until there is a definitive decision on the

---

[23] [2019] SASC 123, [24] citing *Bendigo and Adelaide Bank Ltd & Anor v DY Logistics Pty Ltd* [2018] VSC 558, [27].

[24] 1. If a participant was physically within the territorial jurisdiction of another jurisdiction - whether in Australia or overseas - when the document was electronically executed, does that affect where the document was made? For instance, with a will, is the will made in another jurisdiction if:

1.1 the testator was physically within the territorial jurisdiction of another jurisdiction when the document was electronically executed?

1.2 the first witness was physically within the territorial jurisdiction of another jurisdiction when the document was electronically executed?, or

1.3 the second witness - whose signature enables the will to satisfy the requirements of formal validity - was physically within the territorial jurisdiction of another jurisdiction when the document was electronically executed?

2. If the document is made in another jurisdiction, do the provisions apply to the making of the document? For instance, with a will, will the electronic witnessing provisions apply where:

2.1 the testator or some other participant is resident in NSW?

2.2 the testator or some other participant is domiciled in NSW?

2.3 the testator has immovable property in NSW?

relevant issue, it may be appropriate to seek judicial guidance or declaratory relief before taking action to implement the instrument.

13. In relation to wills, do the usual presumptions apply?

A will which is rational on its face and duly executed gives rise to three presumptions:

1. the presumption of testamentary intention,
2. the presumption of testamentary capacity, and
3. the presumption of knowledge and approval by the testator of the contents of the will.[25]

There is no reason why these presumptions would not apply when a will is executed using the procedure contained in the electronic witnessing provisions. However, if the prescribed procedure is not strictly followed there will not be 'due execution'. Similarly, if the procedure was followed before the provisions first commenced on 22 April 2020 or after they are repealed; the presumptions wouldn't apply in those circumstances.

14. Will there be difficulties obtaining a reseal of a will witnessed by AVL?

Possibly. Extra evidence may be needed to explain the circumstances where the will was electronically witnessed.

15. Are there issues with relying on a recording as proof of signing?

The court in *Re Besanko* [2020] VSC 170 was concerned with a video being produced as an informal will. On close scrutiny, a number of gaps existed in the recording. The court described the pauses as problematic, observing that "There is no way for the Court to know exactly what transpired between [the applicant] and the deceased when the recording was switched off".[26]

16. Are the electronic witnessing provisions intended to cover acceptance of EPoAs and AEGs by the substitute attorneys / alternate guardians or only the principals / donors?

Part 2B of the *Electronic Transactions Act* allows the acceptance by the person appointed as enduring guardian, and alternate enduring guardian, to be witnessed by an eligible witness by audio visual link. The acceptance by the attorney does not need to be witnessed, so the provisions do not apply to the attorney's acceptance of that appointment.

17. What document does the attorney or enduring guardian sign?

Part 2B of the *Electronic Transactions Act* does not apply to signing the document. The attorney and enduring guardian's signature must occur in the traditional manner, namely by a wet signature on the document made by the principal (for a power of attorney) or appointor (for the enduring guardian appointment). The *Electronic Transactions Act* is silent on which is the document made by the signatory (see the discussion under *Which is the original and which is/are the copy(ies)?* above). Until there is a definitive decision of this issue, the safest approach is for the attorney (whether primary or substitute) or enduring guardian (including the alternate enduring guardian) to sign all versions of the document.

It has been pointed out that the alternative option may mean that that there will be many different versions of an enduring guardian appointment form:

- one which bears the wet signature of the appointor;

2.4 the testator or some other person is physically within the territorial jurisdiction of NSW when the will was electronically executed?

[25] *Brown v Barber* [2020] WASC 84, [389] citing *Re Hodges; Shorter v Hodges* (1988) 14 NSWLR 698, 706; *In the Estate of Hassan* [2008] SASC 14, [9]; *Fisher v Kay* [2010] WASCA 160, [85]; *Hornsby v Hornsby [No 2]* [2014] WASC 434, [118]; *Wheatley v Edgar* [2003] WASC 118; (2003) 4 ASTLR 1, [24].

[26] [2020] VSC 170, [62], [51].

- one which is wet signed by the eligible witness (which will often be a solicitor) completing the certificate of witness for the appointor;
- one which is wet signed by the enduring guardian accepting the appointment;
- one which is wet signed by the eligible witness completing the certificate of witness for the enduring guardian;
- one which is wet signed by the alternate enduring guardian; and
- one which is wet signed by the eligible witness completing the certificate of witness for the alternate guardian.

Whilst this may be possible it is not desirable. Clients should not be encouraged to adopt this approach.

18. Do the electronic witnessing provisions allow one to certify a document as being a copy of the original via video?

No. They relate to witnessing documents via AVL.