

FAQs – electronic witnessing under Part 2B of the Electronic Transactions Act 2000 (NSW)

On 22 April 2020, the *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* amended the *Electronic Transactions Regulation 2017 (Regulation)* to allow the signing of certain documents to be witnessed by audio visual link. On 28 September 2020 the [Stronger Communities Legislation Amendment \(Courts and Civil\) Act 2020](#) incorporated these 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 applies to a range of documents governed by NSW legislation, including wills, powers of attorney and enduring guardianship appointments, as well as deeds, agreements, affidavits and statutory declarations. Note that Part 2B provides a non-exhaustive list of documents to which it applies.

What are the requirements for executing and witnessing under the Electronic Transactions Act?

To witness the signing of a document by audio visual link, the witness must:

1. Observe the person signing the document in real time.
The camera angle may need to be adjusted to allow the witness simultaneously to see not just the face of the signatory but also the signing hand of the signatory and the document as the signing occurs.
2. Be reasonably satisfied that the document the witness signs is the same document, or a copy of the document signed by the signatory.
“Reasonably satisfied” is not defined in the Electronic Transactions Act. For documents being signed in counterpart, one way for a witness to satisfy themselves might be to have the document read aloud by the signatory so the witness can check that the counterpart is identical. Another way might be to ask the signatory to hold it close to the camera and conduct a “page-turn” comparison.
3. Sign the document or a copy of the document as witness.
The Electronic Transactions Act specifies that two possible ways of doing this are:
 - 1) *that the witness may sign a counterpart of the document as soon as practicable after witnessing the signing of the document, or,*
 - 2) *if the signatory scans and sends a copy of the signed document electronically, the witness may countersign the document as soon as practicable after witnessing the signing of the document.*

Note in relation to wills: to meet the requirements of s 6(1)(c) of the *Succession Act 2006* the testator should also observe each witness signing the counterpart or copy document in real time.

4. Endorse the document and each copy of the document with a statement that specifies the method used to witness the signing and that the document was witnessed in accordance with the Electronic Transactions Act.
There is no prescribed wording for this endorsement. An endorsement along the following lines may be appropriate:

“This document was signed [in counterpart] and witnessed over audio visual link in accordance with section 14G of the Electronic Transactions Act 2000.” (delete words where appropriate)

As a general comment, practitioners should take care to document the procedures followed in each case and to retain all copies necessary to evidence the signing and witnessing process. Practitioners should also be mindful to ensure confidentiality at all times.

Is an endorsement that complied with the Regulation still valid for the purpose of the Electronic Transactions Act?

Yes. Section 14J of the Electronic Transactions Act provides that an endorsement that would have been satisfactory for the purposes of clause 2(2)(d)(ii) of Schedule 1 to the Regulation is taken to be satisfactory for the purposes of section 14G(2)(d)(ii) of the Electronic Transactions Act.

Wills, enduring powers of attorney and appointments of enduring guardian

Is this the only way wills, powers of attorney and appointments of enduring guardian should be signed and witnessed while COVID-19 restrictions are in place?

No – the Electronic Transactions Act provides an additional way to arrange signing and 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.

In those instances where a client wishes to make a will and is unable to arrange two witnesses or to access an audio visual link the client should be advised of the option of 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 (see s 8 of the *Succession Act 2006*). If circumstances permit, as soon as the client is able to arrange two witnesses (whether in person or via audio visual link) the will should be executed in a manner that meets the formal requirements.

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, have the client forward to you a form of photo identification that you can check against the person’s appearance by audio visual link. Keep a record of how you identified the client.

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 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.

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 evidence, not only of compliance with the Electronic Transactions Act, but also of the identity, capacity and volition of the signatory.

You should not record the audio visual meeting unless you have the consent of the client and all other parties to do so.

Storage of 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 witnesses, 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 Transactions Act.

Contracts dealing with interests in land

Can contracts dealing with interests in land be electronically signed?

The Electronic Transactions Act does not provide altered arrangements for the electronic signature of documents, only witnessing.

In relation to contracts dealing with interests in land, under the *Electronic Transactions Act 2000* (NSW) ("the Act"), a transaction (defined to include a contract or agreement) will not be invalid because it took place by means of one or more electronic communications.

The three fundamental requirements are set out in s 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
- (c) 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 to 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 1919* in late 2018 confirmed that contracts dealing with interests in land can be signed electronically.

Can contracts dealing with interests in land be electronically witnessed?

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 the Law Society leases) must be witnessed. Section 38A of the *Conveyancing Act 1919* provides that deeds can be signed and witnessed electronically.

As noted above, the Electronic Transactions Act does not define the phrase "reasonably satisfied". Where a practitioner is witnessing a document whether he or she is reasonably satisfied will ultimately be a matter for the practitioner's professional judgment.

Is there any impact on the Conveyancing Rules?

It is still the case that signing and witnessing of Torrens title dealings must comply with the provisions of the Conveyancing Rules. However, practitioners are also alerted to temporary changes under [the Conveyancing Rules – \(COVID-19 Pandemic\) Amendment – April 2020](#).

Both the [Office of the Registrar General](#) and [NSW Land Registry Services](#) have measures in place to minimise the impact of COVID-19. Those measures are under constant review. Further details are available from the respective websites and include: [COVID-19: New options for executing NSW paper land dealings and instruments during the pandemic](#) and [Assisting customers during COVID-19 novel coronavirus disruptions](#).

Previous guidance re remote witnessing

The Law Society had previously prepared [guidance](#) to the profession regarding the remote witnessing of documents. While this guidance, at least temporarily, has been superseded by the amendments to the Electronic Transactions Act, the considerations in the document in relation to the risks associated with witnessing documents remotely are still relevant.

Guidance as at 7 October 2020