

# 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

December 2021

### SUMMARY

Part 2B of the *Electronic Transactions Act 2000* (NSW), which is titled “Remote witnessing scheme”, provides a 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.

The provisions were first introduced on a temporary basis<sup>1</sup> on 22 April 2020 in response to COVID-19 conditions including public health measures that restricted travel and face to face meetings. On 28 September 2020, the *Stronger Communities Legislation Amendment (Courts and Civil) Act 2020* incorporated the provisions into Part 2B of the *Electronic Transactions Act 2000* (***Electronic Transactions Act***) and extended their operation as a pilot scheme.

The operation of Part 2B of the *Electronic Transactions Act* was extended indefinitely on 29 November 2021, upon commencement of the *Electronic Transactions Amendment (Remote Witnessing) Act 2021* (NSW).

In addition to making Part 2B permanent, the *Electronic Transactions Amendment (Remote Witnessing) Act 2021* clarifies the meaning of ‘original document’, the document’s place of execution, and the law applicable to documents executed outside of NSW.

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.

**This document reflects the regulatory environment in New South Wales as at 1 December 2021. Practitioners should take into consideration any later developments.**

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<sup>1</sup> *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW).

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## INTRODUCTION

During the COVID-19 pandemic, although the legal industry remained an essential service, social distancing requirements, travel restrictions and the fact that some clients and legal practitioners may have been required to self-isolate meant that the witnessing of documents such as wills, enduring powers of attorney (**EPoAs**), appointments of enduring guardian (**AEGs**), affidavits, statutory declarations and deeds was more challenging.

In response to these challenges, and in consultation with the Law Society of NSW and other stakeholders, provisions were introduced to provide an alternative mechanism to allow legal practitioners to witness certain documents by audio visual link (**AVL**) that would otherwise need to be witnessed in the physical presence of a signatory. Under these provisions, which are contained in Part 2B of the *Electronic Transactions Act*, any signature of certain documents required by law to be witnessed may be witnessed by AVL.<sup>2</sup> Arrangements for the witnessing of signatures or attestation of documents may also be performed by AVL.<sup>3</sup>

Initially the provisions were introduced as a pilot scheme.<sup>4</sup> Government consultation with the legal profession over the pilot period indicated that electronic witnessing has the potential to bring many benefits including time and cost savings. There are also particular advantages for clients with limited access to legal services due to location, old age, or poor health.

On 29 November 2021, the operation of Part 2B of the *Electronic Transactions Act* was extended indefinitely by the *Electronic Transactions Amendment (Remote Witnessing) Act 2021 (NSW)*.<sup>5</sup> In addition to making the temporary measures permanent, the *Electronic Transactions Amendment (Remote Witnessing) Act 2021* clarifies which document will be the original, the document's place of execution, and the law applicable to documents executed outside of NSW.<sup>6</sup> The provisions are not expressed to have retrospective operation.<sup>7</sup>

Although developed as a response to COVID-19 related conditions, the electronic witnessing provisions can be relied upon by practitioners whenever it is convenient to do so. Solicitors can also continue to witness documents in the traditional way, in the physical presence of the signatory.

While electronic witnessing can have many advantages, legal practitioners should be aware that it poses several challenges, 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.

This paper summarises the position in NSW only.

<sup>2</sup> *Electronic Transactions Act 2000 (NSW)* s 14G(1)(a).

<sup>3</sup> *Ibid* s 14G(1)(b).

<sup>4</sup> 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. The expiry date was then 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 (NSW)* 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.

<sup>5</sup> Schedule 1 of the *Electronic Transactions Amendment (Remote Witnessing) Act 2021 (NSW)*.

<sup>6</sup> It also amends the *Oaths Act 1900 (NSW)*: see Schedule 2 of the *Electronic Transactions Amendment (Remote Witnessing) Act 2021 (NSW)*.

<sup>7</sup> Section 14L of the amended *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*.

## PART 1 – TRADITIONAL METHODS

The legislative framework relating to traditional methods of 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 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.<sup>8</sup> 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.<sup>9</sup>

<sup>8</sup> *Succession Act 2006* (NSW) s 9.

<sup>9</sup> 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*.<sup>10</sup>

In NSW, there is no specific form or legislation regarding Advance Care Directives (**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).<sup>11</sup>

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,

<sup>10</sup> 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.

<sup>11</sup> NSW Ministry of Health, *Making an Advanced Care Directive*, August 2019, NSW.

- (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
- (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.<sup>12</sup> However, different arrangements may exist in federal courts.<sup>13</sup>

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).

<sup>12</sup> *Judiciary Act 1903* (Cth) s 79; *Rizeq v Western Australia* [2017] HCA 23; (2017) 262 CLR 1.

<sup>13</sup> 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](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](https://www.fedcourt.gov.au/covid19/covid-19#31_3)).

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 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 allowed **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.<sup>14</sup>

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

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<sup>14</sup> See the guidance note at [https://www.registrargeneral.nsw.gov.au/\\_data/assets/pdf\\_file/0010/822592/Guidance-note\\_executing-paper-land-dealings-during-COVID-19-V2.pdf](https://www.registrargeneral.nsw.gov.au/_data/assets/pdf_file/0010/822592/Guidance-note_executing-paper-land-dealings-during-COVID-19-V2.pdf). Current and historical versions of the Conveyancing Rules are available at <https://www.registrargeneral.nsw.gov.au/publications/conveyancing-rules>.

## **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– 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.<sup>15</sup>

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<sup>15</sup> <https://www.lawsociety.com.au/resources/practice-resources/my-practice-area/elder-law>



### PART 3 – ELECTRONIC WITNESSING PROVISIONS

When social distancing and self-isolation measures were introduced in 2020, the notion of being “physically present” became more challenging for legal practitioners and their clients. In response to these conditions, and in order to continue the benefits that witnessing documents remotely can bring for clients and legal practitioners, the provisions in Part 2B of the *Electronic Transactions Act* now 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 *Electronic Transactions Act* provides that the regulations may exclude particular documents.<sup>16</sup> Presently, the *Electronic Transactions Regulation 2017* does not exclude any documents from the operation of the Act.

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).<sup>17</sup>

In relation to oaths, affidavits and statutory declarations, the *Electronic Transactions Amendment (Remote Witnessing) Act 2021* amends s 26(1)(a) of the *Oaths Act 1900* to allow these documents to be made before Australian legal practitioners.<sup>18</sup> Furthermore, declarations may be made before persons authorised to receive statutory declarations under the *Statutory Declarations Act 1959* (Cth). This latter amendment is due to expire on 1 January 2023.<sup>19</sup>

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”.<sup>20</sup>

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.

<sup>16</sup> *Electronic Transactions Act 2000* (NSW) s 14F.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Electronic Transactions Amendment (Remote Witnessing) Act 2021* (NSW) sch 2 cl 1.

<sup>19</sup> *Ibid* sch 2 cl 2.

<sup>20</sup> *Electronic Transactions Act 2000* (NSW) s 14G(2)(b).

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, the signing hand of the witness and the document as the witness signs.

**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 ELECTRONIC WITNESSING PROVISIONS

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.<sup>21</sup> 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.

### 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*

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<sup>21</sup> The suggestion made in item 3 of Part 3 should be adopted.

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?

If a document is signed in two or more counterparts, it is recommended that all original signed counterparts be retained and stored securely. If applying for a grant of probate of a will signed in counterparts, you will need to file all original signed counterparts with the Court. If an affidavit is signed in counterparts, you may be required by the Court to file all original signed counterparts.

See also Question 9 below regarding which document is considered the original.

## PART 5 – OTHER ISSUES TO CONSIDER

### 1. Does the *Electronic Transactions Act* set out the only method for witnessing wills and enduring documents?

No. Part 2B of the *Electronic Transactions Act* provides an additional way to arrange witnessing of documents. In many instances, a face to face meeting 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.<sup>22</sup>

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*.<sup>23</sup>
- 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<sup>24</sup> or treated as an informal will.<sup>25</sup>

In relation to enduring documents:

- An incorrectly executed power of attorney may be able to be rectified.<sup>26</sup>
- 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.<sup>27</sup>

### 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'.

<sup>22</sup> See *Succession Act 2006* (NSW) s 8.

<sup>23</sup> 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.

<sup>24</sup> *Succession Act 2006* (NSW) s 27; *Re Estate Johnson Deceased* [2014] NSWSC 512.

<sup>25</sup> An example is *Estate of Daly* [2012] NSWSC 555; 8 ASTLR 48.

<sup>26</sup> *Re Gouder* [2005] NSWSC 116.

<sup>27</sup> *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.<sup>28</sup>

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

Section 14I of the amended *Electronic Transactions Act* clarifies that a document may be witnessed via AVL even if the signatory, witness or both are outside the jurisdiction of NSW, if:

- (a) the document is made, or required to be signed, under an Act or law in NSW, or
- (b) the governing laws for the document are the laws in NSW.<sup>29</sup>

## 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.<sup>30</sup>

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

The *Electronic Transactions Amendment (Remote Witnessing) Act 2021* (NSW) clarifies this point. It inserts a new section 14H into the *Electronic Transactions Act*, which provides that:

- (1) For the purposes of another Act or law, the original document for a document witnessed under this Part is a document that—
  - a. contains every page or part of the document, and
  - b. contains each signature or mark of the signatory and witnesses wherever required in the document, and
  - c. contains the endorsement required by section 14G(2)(d), and
  - d. if a signature, mark or endorsement was applied to the same page or part by persons in different locations—contains duplicates of the page or part so that every signature, mark or endorsement is included, and

<sup>28</sup> 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.

<sup>29</sup> Schedule 1, clause 6 of the *Electronic Transactions Amendment (Remote Witnessing) Bill 2021* inserts s 14I in the *Electronic Transactions Act*.

<sup>30</sup> 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).

- e. for a signature, mark or endorsement written physically on a page or part—contains the actual signature, mark or endorsement.

Example— A signature written by hand.

- (2) Except as provided by subsection (1)(d), a page or part is required to be included in the original document only once.

### 10. 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* remains 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).

### 11. Where is the document made?

The Electronic Transactions Amendment (Remote Witnessing) Act 2021 (NSW) clarifies this point. A new section 14J(1) provides that the document is made at the place where the signatory signed the document. The laws of NSW apply to the witnessing and execution of the document if the signatory signs the document outside of the jurisdiction.<sup>31</sup>

### 12. 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.<sup>32</sup>

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’. The provisions are not expressed to be retrospective.

### 13. 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.

### 14. 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

<sup>31</sup> *Electronic Transactions Act 2000* (NSW) s 14J(2); *Electronic Transactions Amendment (Remote Witnessing) Act 2021*, Schedule 1, Clause 6.

<sup>32</sup> *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].



“There is no way for the Court to know exactly what transpired between [the applicant] and the deceased when the recording was switched off”.<sup>33</sup>

**15. 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.

**16. What document does the attorney or enduring guardian sign?**

If an EPA and AEG is signed in counterparts, then it is unclear whether the attorney and enduring guardian need to sign both counterparts, or only one, or could sign a separate counterpart.

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

No. In order to certify a document as a true and correct copy of the original, you must carefully inspect the original document in person in the usual way.

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<sup>33</sup> *Re Besanko* [2020] VSC 170 [62], [51].