

The remote witnessing of legal documents is now here to stay

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After an 18 month trial period the NSW Parliament has now made the temporary provisions which allowed for the remote witnessing of important legal documents such as wills, statutory declarations and affidavits, permanent. The decision to make these measures permanent will enable individuals and businesses to be able to execute legal documents in a COVID safe way to ensure business continuity and the effective provision of legal services.

The provisions were made permanent by way of the *Electronic Transactions Amendment (Remoting Witnessing) Act 2021 (NSW) ('the Act')* and will create certainty around the future use and adoption of remote witnessing.

Requirements of remote witnessing

To comply with the remote witnessing provisions the witness must:

- observe the signatory signing in real time;
- sign the document, or an exact copy of the document, signed by the signatory;
- be satisfied that the document they sign is the same document, or a copy of the document, signed by the signatory; and
- state that the method used to witness the signature (i.e. AVL, Zoom etc) and state that it was witnessed in accordance with the *Electronic Transactions Act*.¹

Allowing for the remote witnessing of documents such as affidavits, deeds and statutory declarations by way of audio visual link aims to overcome the immediate issue of having a witness physically present to observe the signature.

Remote witnessing moving forward

The Act not only makes remote witnessing permanent, but it also clarifies a number of aspects involved in undertaking remote witnessing. For instance, the Act:

- clarifies that an original document may include any signed pages by the signatory and witness, followed by the remainder of the document unduplicated, removing the need to include unnecessary duplicates within the original document²;
- provides that remote witnessing is possible even if both parties are outside NSW provided that they are signing a document which is required to be signed under an Act or law of the NSW jurisdiction³; and
- temporarily widens the classes of persons authorised to witness statutory declarations until the end of 2022 to include professionals such as doctors, nurses and migration agents (previously limited to Justice of the Peace, notary public and legal practitioners).

The potential pitfalls of remote witnessing

The use of remote witnessing has largely been viewed as an effective and successful tool in allowing the legal profession to adapt to the constraints brought on by the COVID-19 environment, however it is also important to consider some of its potential pitfalls.

For example, the legislation does not require the recording or storage of remote witnessing sessions which may become relevant to review if an assertion of undue influence is made in the context of a contested will or transfer of property which raises concerns. That is, the technology creates the possibility that during the remote witnessing session a third party may be present in the room, who guides and influences the signatory to sign the legal document, which the witness is unaware of, as the third party's actions may be outside the field of vision of the audio visual link.

¹ *Electronic Transaction Act 2000 (NSW)* s 14G(2)

² *Electronic Transaction Act 2000 (NSW)* s 14H

³ *Electronic Transaction Act 2000 (NSW)* s 14I

Other issues, may arise when multiple documents are required to be witnessed and out of complacency signatures are recycled without disclosing the full detail contained in the documents to the signatory. This may occur by way of a third party speaking on behalf of the signatory, who consents to the use of the signature without disclosing this to the signatory.

It may be sound practice to seek the consent of the signatory to record the remote witnessing session and identify the capacity of the signatory including if any other individuals are present.

Despite the concerns we have discussed above, the permanent adoption of remote witnessing is a positive step. It will assist in improving access to legal services and will allow for a more efficient execution process of legal documents, saving both costs and time.

At ClarkeKann we can assist you with any issues or concerns you may have relating to the remote witnessing of documents.

