MODERNISING DOCUMENT EXECUTION

Consultation on a common pathway for digital execution of statutory declarations and deeds

KPMG Australia

October 2021

KPMG.com.au

Contents

Executive Summary

As a leading professional services firm, KPMG Australia (KPMG) strives to contribute to the debate that is shaping the Australian economy. We are committed to meeting the requirements of all our stakeholders – not only the organisations we audit and advise, but also employees, governments, regulators and the wider community. KPMG welcomes the opportunity to provide a response to the consultation paper on a common pathway forward for digital execution of statutory declarations and deeds (the consultation paper) released by the Deregulation Taskforce of the Department of the Prime Minister and Cabinet (PM&C).

KPMG supports the Australian Government's commitment to implement smart, modern systems, settings and regulation through its Digital Economy Strategy. Electronic execution of documents offers increased flexibility and a reduction in time and costs for businesses.

It is critical that we do not lose the gains that have been made in this area through the introduction of temporary measures that have enabled greater use of electronic signatures and audio-visual witnessing of documents in response to the COVID-19 pandemic. KPMG strongly supports the Australian Government's intention to make permanent changes to the Corporations Act in this regard.

KPMG regularly uses statutory declarations and deeds when working with clients. These documents are required by legislation and regulators across various Australian jurisdictions. The cost of execution can increase dramatically where physical witnesses and wet signatures are required. Recent advances in technology can ease the requirement of physical execution in favour of electronic execution, resulting in significant time and cost savings. The disruption from COVID-19 has demonstrated that technologies to create secure, accessible and consistent pathways for executing these important documents can be embraced, whilst maintaining the paper-based option.

Providing effective means of digitally executing documents across international borders is essential in assisting Australian businesses to thrive in the global economy. KPMG notes that reform must be achieved in a system where measures that enhance convenience and accessibility sit alongside measures that maintain the integrity of current document execution processes. KPMG supports the principles for reform set out in the consultation paper, and recommends that several additional principles could be considered, specifically reliability, security, consistency, accessibility and certainty.

Furthermore, KPMG welcomes the proposal in the consultation paper to improve national consistency, since all jurisdictions in Australia have their own laws and regulations governing statutory declarations and deeds, and there are inconsistent document requirements across jurisdictions. This can add unnecessary complexity when executing documents and undermine confidence in the electronic system.

KPMG's submission directly addresses the consultation questions at section two and makes 16 findings in section one.

In summary, we need to modernise document execution and move away from required clauses as "signed, sealed and delivered". To achieve this, clarity will be needed around how a deed can be electronically signed, virtually witnessed and delivered over the internet while still being enforceable.

KPMG looks forward to continued engagement with PM&C and the Deregulation Taskforce as they develop their final policy approach to digital execution of statutory declarations and deeds in the coming months.

Yours sincerely,

Kate Marshall
Head of KPMG Law
KPMG Australia

Background

About KPMG

KPMG is a global organisation of independent professional firms, providing a full range of services to organisations across a wide range of industries, governments and not-for-profit sectors. We operate in 146 countries and territories and have more than 227,000 people working in member firms around the world. In Australia, KPMG has a long tradition of professionalism and integrity combined with our dynamic approach to advising clients in a digital-driven world.

KPMG Law

KPMG Law is also a global organisation providing legal advice to organisations across a wide range of industries, governments and not-for-profit sectors. We operate in 81 jurisdictions with close to 3,000 lawyers in member firms across the world. In Australia, KPMG Law supports clients to navigate the current and emerging legal and regulatory issues by delivering legal and business solutions underpinned by commerciality, quality and technology.

Section 1: KPMG findings

FINDING 1

Deeds and statutory declarations are required by particular regulators in Australian jurisdictions. KPMG supports digital options which can reduce the costs involved, as the cost of execution can increase dramatically where physical witnesses and wet signatures are required. Costs increase further in circumstances where a Justice of the Peace is required to witness documents.

FINDING 2:

Providing effective and flexible means of digitally executing deeds and statutory declarations not only benefits businesses trading across domestic borders, but is essential to assisting Australian businesses doing business across international borders, allowing them to thrive in the global economy.

FINDING 3:

Secure online execution of documents would give both parties certainty that the document is executed and that digital 'checks and balances' can be made. This further removes the potential for errors in execution requiring a re-do, which adds to an already burdensome process and lengthy wait times.

FINDING 4:

KPMG recommends that the consultation process considers the principles of reliability, security, consistency, accessibility and certainty as set out in the answer to consultation question 3. In considering these principles the Deregulation Taskforce should consider the following:

- reforms should not remove or relax safeguards but consider to what extent similar levels of assurance can be secured in the digital environment;
- security must be a primary consideration and leverage the increasing prevalence of secure options for verifying an individual's identity online, such as the Government's Digital Identity system;
- clarity of requirements for document execution and witnessing are essential to ensure that digital requirements do not become a hindrance to doing business or increase costs; and
- enhanced accessibility in relation to document execution will benefit those in regional areas; however, reform should not be mandated, since this would exclude the non-technology enabled.

FINDING 5:

The Deregulation Taskforce should engage closely with the Digital Transformation Agency (DTA) to ensure alignment and consistency with relevant design principles of digital identity, including accessibility, safety and security.

FINDING 6:

Wide-ranging benefits from electronic document execution include time and cost savings due to a reduced burden of collecting multiple physical signatures, travel to regional and remote locations, and costs associated with printing and postage. In addition, electronic execution can provide a comprehensive audit and verification trail that is not possible with physical document execution.

FINDING 7:

KPMG considers that witnessing is a necessary requirement when it comes to the execution of statutory declarations and deeds. However, the integration of digital identity could replace the need for some of the elements of the existing witnessing requirements. KPMG believes that, at a minimum, the ability to verify the objectivity and significance of a document is a key part of the executions process.

FINDING 8:

Witnesses have various responsibilities based on the jurisdiction in which they are operating. Further legislation regarding document execution should aim to ensure witnesses have uniform responsibilities across the Commonwealth, states and territories. In making witnessing responsibilities uniform, KPMG considers it vital that there are clear and consistent guidelines around what constitute appropriate mechanisms for digitised document execution before witnessing requirements are reduced or are made completely redundant.

FINDING 9:

Any proposal allowing for witnessing to be permissible via Audio-Visual Link (AVL) will require split execution of documentation. Therefore, KPMG suggests that permanent amendments will need to be made to s 127 of the Corporations Act in order to ensure split execution of documents can be accepted into law.

FINDING 10:

As a minimum requirement, any reforms to document execution should not remove or relax safeguards and requirements which recognise the solemnity and special status of deeds and statutory declarations. Instead, verification and authentication techniques that are already available should be explored to achieve similar or enhanced levels of security in a digital environment.

FINDING 11:

KPMG considers that any reform to document execution be technology agnostic but could include a government certification process.

FINDING 12:

KPMG strongly welcomes the proposal in the consultation paper to improve national consistency across jurisdictions and recommends that consideration also be given to international models in order to reduce the cost of doing business across international borders.

FINDING 13:

While there are risks associated with reforms to document execution, including security, certainty, inconsistency and increased regulatory burden, many of these are likely to be mitigated by measures outlined in the consultation paper. Existing legislative protections should, at a minimum, be preserved in any future document execution regulatory framework and could be used as an exemplar to consider when embedding protections in the new law.

FINDING 14:

In relation to the principles included in the consultation paper, there are a number of additional areas that must be considered in the context of any reforms in this area. Retaining the current physical approach in addition to a new digital option is essential; in particular for vulnerable, elderly and remote communities where accessibility requirements for technology can be constrained.

FINDING 15:

KPMG considers that consistency across Australian jurisdiction as well as with international counterparts such as Europe, the United Kingdom, and Canada would be beneficial.

FINDING 16:

While physical document execution has thorough processes to ensure its integrity, paper documents are not immune from error. KPMG considers that digital document execution has the potential to offer enhanced integrity in comparison to the current system if implemented with the right safeguards and controls.

Section 2: KPMG Insights

Response to consultation questions

Question 1: As a business or as an individual, when and why do you use statutory declarations or deeds? Please provide any examples of the costs involved in the process. Why might you use a statutory declaration over a standard declaration, or a deed over a contract?

KPMG regularly uses statutory declarations and deeds when working with clients. As per the consultation paper, each year more than 4.5 million deeds and 3.8 million statutory declarations are completed in Australia.[1]

In simple terms, it is KPMG's view that deeds are a formal version of contracts. Deeds are particularly common in KPMG for agreements between two parties when legal enforceability is required. However, there is no consideration or payment of money between the parties. Deeds also provide additional protection to a paying party by increasing the period during which a performing party can be sued for a breach of its terms from six years under a simple contract to 12 years under a deed. Examples of when KPMG requires the execution of deeds are deeds of guarantee, sale and purchase deeds, confidentiality deeds and trust deeds. Deeds can also be required by some regulators such as ASIC and the Australian Securities Exchange (ASX).

Statutory declarations are used by KPMG when they are required by the government or regulators. An example of when KPMG has required the execution of statutory declarations is directors/officers of a company declaring they have not been subject to criminal or civil penalty proceedings or other disciplinary action and where they reside (e.g. Australian residents) as part of an initial public offering and associated listing of a company on the ASX. Statutory declarations can also be required in connection with the lodgement of corporate documents to ASIC, where an employee may have misplaced a verification document (e.g. expense receipts), passport applications and security clearance documentation. Some use of statutory declarations can also be driven by the requirements of the employer or organisation arising from internal company policy. Statutory declarations have been historically required to be written on paper and signed with wet ink to strengthen legal certainty, by validating the parties' identities and confirming their intention to be bound by the legal rules that govern the transaction.

Direct and indirect costs associated with executing deeds and statutory declarations in comparison to documents with electronic signatures include additional time required to coordinate the signing of paper documents by a number of parties, printing costs, and courier costs. These costs can increase further when it is required that a document be witnessed by a Justice of the Peace (JP). Generally, these additional time costs are billed to clients on a time cost basis which can increase the cost of the legal process. Further information in relation to the costs involved are detailed at Question 2.

[1] Modernising document execution across the Federation | Attorney-General for Australia and Minister for Industrial Relations (attorneygeneral.gov.au)

FINDING 1: Deeds and statutory declarations are required by particular regulators in Australian jurisdictions. KPMG supports digital options which can reduce the costs involved, as the cost of execution can increase dramatically where physical witnesses and wet signatures are required. Costs increase further in circumstances where a Justice of the Peace is required to witness documents.

Question 2: What barriers, challenges or difficulties have you experienced with physical document execution? Do you have examples relating to paper requirements, witnessing requirements or jurisdictional inconsistencies? Are there other barriers that aren't captured here? What can we learn from international approaches?

Barriers, challenges, and difficulties with physical document execution

Many legal firms, including KPMG Law, experience difficulties with physical document execution in all aspects of legal practice. As mentioned in Question 1, physical document execution is time and financially costly, particularly when it requires finding appropriate witnesses, equipment (such as printers, scanners and fax machines), and organising to physically co-locate people to sign. This can cause significant delays to a transaction where 'wet-ink signatures' are required. This is particularly evident in the current COVID-19 environment where it can be difficult to get a document witnessed or where there are postal delays. Sometimes it is neither practical nor convenient to have every person sign one paper document. Consequently, KPMG supports the suggestion in the consultation paper that a secure, electronic pathway for document execution could save large direct costs each year.[2]

Examples relating to paper requirements, witnessing requirements, and jurisdictional inconsistences

As highlighted by the Deregulation Taskforce, SMEs spent around nine million hours a year printing and collecting statutory declarations, travelling to the locations of authorised witnesses, discussing, completing and submitting declarations. Below are examples that KPMG has experienced under the current regulations that could be improved through the modernisation of document execution processes.

Particular legal documentation such as deeds and statutory declarations require a 'wet-ink signature', which ensures that all signatory parties to the document have engaged with the same original copy, ensuring its legitimacy and integrity and leaving little room for dispute about its contents. In instances where the participants are in different locations, this can be logistically difficult as well as time consuming and financially costly. Before COVID-related lockdowns and travel restrictions, it may have required participants to travel to a specific location to sign the document. Some documentation has required mailing which, during restrictions, can have resulted in long delays, missing deadlines. This has been evident at both domestic and international levels during the pandemic.

Additionally, where electronic execution has been permitted under temporary COVID-19 amendments, there is still a lack of certainty in relation to the need to print out the entire document I paper form and store as a physical copy to ensure it is effective. Greater clarity around these requirements would be beneficial.

An option to complete secure online execution of documents would give both parties certainty that the document is executed and that digital 'checks and balances' can be made. This further removes the potential for errors in execution (either by the document declarant or the witness) requiring a re-do, adding to an already burdensome process and lengthy waiting times.

As noted in the consultation paper, the execution of statutory declarations and deeds can be affected by jurisdictional inconsistencies. KPMG has discussed this challenge further at Question 8. Examples of inconsistencies are NSW accepting digital signatures in certain circumstances whilst other jurisdictions do not.[3] These

[2] Modernising document execution across the Federation | Attorney-General for Australia and Minister for Industrial Relations (attorneygeneral.gov.au)
[3] NSW legislation for digital signatures

inconsistencies may cause unnecessary confusion and errors, which could further burden the legal system unnecessarily. KPMG believes a level of jurisdictional uniformity regarding the digital execution of legal documents has the potential to greatly benefit the system.

Changing and temporary legislation

COVID-19 has highlighted the logistical difficulties that exist under the current system when the ability to travel and/or meet in person is restricted. The Government initially recognised this when it introduced the temporary amendments to Section 127 of the Corporations Acts 2001 (Cth) through the Corporations (Coronavirus Economic Response) Determination (No.1) 2020. However, KPMG notes that it was not definitive in the Corporations Act 2001 (Cth) as to whether electronic execution and split execution were permissible or impermissible under the original Section 127.

The initial temporary amendments lapsed in March 2021 but were reinstated in August 2021 through the Treasury Laws Amendment (2021 Measures No.1) Bill 2021. These latest temporary amendments now permit the execution of documents under section 127 to be done electronically providing that:

- the participant is identifiable and able to indicate their intention to sign;
- parties sign on a copy or counterpart document that includes the entire contents; and
- the method of execution is reliable and appropriate for the required purposes.

Fitting into the digital economy

Moving forward, it is vital that the execution of deeds and statutory declarations keeps pace with business and technology modernisation. The Government's 'Digital Economy Strategy' states that "To be a leading digital economy and society in 2030, every business needs to become a digital business", specifying that Australia needs more "businesses adopting and adapting digital technology to add flexibility, mobility and resilience their businesses, and save themselves time and money." By permitting businesses to execute documents electronically on a permanent basis, as the temporary amendments permit, the Government would be enabling businesses to fulfill this goal.

Keeping up with the global economy and client needs

Interacting with the global economy is a major part of the Government's 'Digital Economy Strategy'. Providing effective, yet flexible means of executing deeds and statutory declarations across international borders, without the need for documents to physically cross borders, is essential to assisting Australian businesses to thrive in the global economy.

As it stands, physical document execution is inconsistent with the constantly changing global environment in which KPMG provides its legal services. Not only is it not always possible for KPMG to be in the same physical locations as its clients, but more than ever, clients are requesting to conduct business online, rather than in-person.

CASE STUDY – EXECUTING AN IPO ACROSS INTERNATIONAL BORDERS

A KPMG example of where a modernised document execution system would have been of great benefit was when assisting overseas parties on an initial public offering which also involved a US-based client. The client had directors based both in Melbourne and the United States. ASIC required that certain constituent documentation be provided to it, together with a statutory declaration from a director who was based in the United States. The documents <u>had</u> to be original versions, and the statutory declaration be a 'wet ink signature'. KPMG was already operating under a tight timeframe and having to arrange the original documents to be mailed to and from the US proved challenging and beholden to unexpected postal delays. With a digital means of document execution, Australian businesses could increase productivity by executing documents faster, ensure certainty in delivery by not relying upon postal and mailing services, as well as suit client needs, leading to improved business services.

KPMG notes that digital execution may have to be carefully considered to take into account any perverse legal ramifications. In the United Kingdom, deeds have continued to be held to a higher standard even when digitally executed. This would mean mistakes in the digital execution process may not be overlooked by an Australian Court. In one instance *(R (on the application of Mercury Tax Group and another) v HMRC [2008] EWHC 2721)* the parties recycled a signature page from a deed of guarantee by attaching it to an amended version of the deed. This was held to be insufficient for execution. The Court said the test for execution of deeds was a strict test. This is in part to prevent fraud but also to maintain the historical formality associated with the serious nature of a deed.

FINDING 2: Providing effective and flexible means of digitally executing deeds and statutory declarations not only benefits businesses trading across domestic borders, but is essential to assisting Australian businesses doing business across international borders, allowing them to thrive in the global economy.

FINDING 3: Secure online execution of documents would give both parties certainty that the document is executed and that digital ‘checks and balances’ can be made. This further removes the potential for errors in execution requiring a re-do, which adds to an already burdensome process and lengthy wait times.

Question 3: What would you consider to be a desirable outcome from reforming document execution? Are these the right principles for reform? Are there other outcomes or principles we should consider?

For KPMG and its clients, the desired outcome for document execution reform is a framework which facilitates secure commercial transactions in the modern era, where physical presence becomes unnecessary, and ease of doing business is increased. However, reform must be achieved in a system where measures enhancing the convenience, ease and accessibility of digitally enabled document execution sit alongside measures which maintain the integrity of current document execution processes. Integrating robust data security and privacy, risk, and fraud management standards and requirements into any reforms is critical to establishing a fit-for-purpose regime.

KPMG supports the stated principles for reform set out in the consultation paper and provides several additional points below regarding key considerations across each of the categories.

1) **Reliability:** KPMG considers that these reforms should not remove, or relax, safeguards and requirements which recognise the solemnity and special status of deeds and statutory declarations. Rather, they should consider to what extent similar levels of assurance can be secured in the digital environment. The reforms should include measures that preserve and transition the solemnity of execution and witnessing into the digital environment and maintain the universal legal enforceability of documents. Such measures for consideration include technology-agnostic standards relating to, for example, audit trails for signatures and digital identity verification standards.
2) **Security:** KPMG agrees that security must be a primary consideration in these reforms. Changes to current requirements must include clear and implementable measures to prioritise the security of documents and verification of an individual’s identity. KPMG notes the increasing prevalence of secure options for verifying an individual’s identity online, such as the Government’s Digital Identity system, and recommends that the Taskforce engage closely with the Digital Transformation Agency (DTA) to ensure alignment and consistency with relevant design principles of digital identity, including accessibility, safety and security.
3) **Consistency:** Of all the proposed principles, KPMG considers consistency across jurisdictions to be particularly important to the success of these reforms. Any efficiencies gained through providing technology-based options for document execution can be negated by the ongoing complexity, uncertainty and risk presented by different requirements applying across Australian jurisdictions. These State and

Territory inconsistencies are not only evident in execution and witnessing requirements, but also in other format, content and validity requirements for deeds and statutory declarations. KPMG recommends that, as a precursor to any digital document execution streamlining measures, the Taskforce should consider reforms across State, Territory and Commonwealth laws to harmonise these requirements. The full benefits of document execution modernisation can only be realised if underpinned by a consistent national foundation of laws. The approach taken by the European Union's eIDAS (electronic Identification, Authentication and trust Services), which provides a single digital signing standard across EU member countries, provides a useful exemplar here.

4) **Accessibility:** KPMG notes and agrees with the Taskforce's observations that reforms may enhance accessibility in relation to document execution, particularly for those Australians who live in regional or remote areas and cannot easily fulfil existing requirements including in-person witnessing. The cost of doing business across international borders could also be lowered. The introduction of digital options also, however, risks alienation of members of our community who are less digitally conversant or who may choose, for security or other reasons, not to transact digitally. KPMG agrees with the Taskforce's overriding principle that such reforms would not be mandated, and that non-technology-based options for document execution be retained. Again, KPMG notes that the Digital Identity initiatives being led by the DTA provide useful examples of regulatory safeguards which guard against the mandating of digital options, both directly and indirectly (for example, by ensuring that viable alternative non-technology channels remain available for individuals to use).

5) **Certainty:** KPMG agrees that clarity of requirements for document execution and witnessing are essential, to ensure that digital requirements do not become a hindrance to doing business or increase costs. As discussed under Consistency above, KPMG envisages that this certainty could be best provided through ensuring that reforms to modernise document execution are underpinned by an initiative to harmonise the different laws applying to statutory declarations and deeds across Australian States, Territories and the Commonwealth.

FINDING 4: KPMG recommends that the consultation process considers the principles of reliability, security, consistency, accessibility and certainty as set out in the answer to consultation question 3. In considering these principles the Deregulation Taskforce should consider the following:

- reforms should not remove or relax safeguards but consider to what extent similar levels of assurance can be secured in the digital environment;
- security must be a primary consideration and leverage the increasing prevalence of secure options for verifying an individual's identity online, such as the Government's Digital Identity system;
- clarity of requirements for document execution and witnessing are essential to ensure that digital requirements do not become a hindrance to doing business or increase costs; and
- enhanced accessibility in relation to document execution will benefit those in regional areas; however, reform should not be mandated, since this would exclude the non-technology enabled.

FINDING 5: The Deregulation Taskforce should engage closely with the Digital Transformation Agency (DTA) to ensure alignment and consistency with relevant design principles of digital identity, including accessibility, safety and security.

Question 4: Should electronic execution of statutory declarations and deeds be permitted? What would be the benefits and costs for you of digital options?

Statutory declarations and deeds are used across Australia in a wide range of personal and business transactions. They are often required by legislation and government regulators and play an important role in carrying out legal and economic functions. While many of the formalities surrounding the execution of statutory declarations and deeds have been relaxed in response to commercial considerations in recent years, the requirement of physical execution has largely remained.

Recent advances in technology can ease the requirement of physical execution in favour of electronic execution, resulting in significant time and cost benefits and efficiencies. For example, electronic execution would permit transactions involving the execution of deeds or statutory declarations to occur in a more commercial, seamless and timely manner without risk of transaction milestones being affected due to delays obtaining physical signatures.

Other benefits, or reasons in favour of, electronic execution of statutory declarations and deeds include:

– It reduces individuals being unnecessarily stressed and burdened by the requirement to collect multiple physical signatures on transaction documents;

– It permits the execution of documents from remote locations or locations where a printer may not be immediately available (particularly in the post-COVID environment where there is an upward trend in employees working from home and not returning to the office full time);

– It can provide a comprehensive audit and verification trail that is not typically achievable by physical execution; and

– It can limit negative environmental impacts by limiting the need for car travel, physical printing and courier / postal mail services.

As noted previously, physical execution does not need to be replaced entirely by electronic execution. Rather, electronic execution could be permitted as an alternative to physical execution.

The rules around the electronic execution of statutory declarations and deeds should be uniform across Australian jurisdictions to provide uniformity and confidence in electronic execution. Moreover, there should be minimum reliability requirements (which are discussed in some detail below) that should apply to the electronic execution of statutory declarations and deeds to limit fraudulent activity and unauthorised signatures.

Another consideration, or potential cost, of electronic execution is the cost of the technology required to effect electronic execution (for example, subscription services to digital signature platforms). However, it is likely that this cost is outweighed by the benefits of electronic execution. Notwithstanding, by retaining the ability to physical execute documents, in any circumstances where the cost of electronic execution is not outweighed by its benefits, then physical execution can be performed.

FINDING 6: Wide-ranging benefits from electronic document execution include time and cost savings due to a reduced burden of collecting multiple physical signatures, travel to regional and remote locations, and costs associated with printing and postage. In addition, electronic execution can provide a comprehensive audit and verification trail that is not possible with physical document execution.

Question 5: Is witnessing a necessary requirement for statutory declarations and deeds? Are there documents that should still require the presence of either a physical witness or a witness over AVL? Do advances in digital identity verification make witnessing requirements redundant?

Is witnessing a necessary requirement for statutory declarations and deeds?

KPMG considers that when it comes to the execution of statutory declarations and deeds, witnessing is a necessary requirement regardless of the integration of digital identity or not. However, the integration of digital identity could replace the need for some of the elements of the existing witnessing requirements.

In the instance of a statutory declaration, KPMG views the role of a witness to comprise four main parts:

– Ensuring the declarant's identity;

- Proofing the document to ensure that it fulfils legislative requirements, noting blank spaces, and ensuring all annexures/reference documentation are present;
- Ensuring the declarant understands the effect and ramifications of executing the document, as well as the penalties for any false declarations; and
- Witnessing the declarant signing the statutory declaration.

As noted in the consultation paper, witnesses have various responsibilities based on their jurisdiction. Therefore, not all are legally bound to execute the four parts outlined above. This is another area where any further legislation regarding document execution should aim to be as uniform as possible across the Commonwealth, states and territories.

KPMG considers digital identity makes redundant the confirmation of the declarant's identity as well as ensuring that it is the declarant signing the document and explores this further below. However, this is only one part of the role and function of the witness. It is crucial that the execution of any document that carries significant legal weight, such as statutory declarations, should be witnessed by a second, qualified party. The legislation across jurisdictions supports the importance of a proper execution of this document, as penalties for false declarations range from three to 15 years in prison.

As an example, the NSW Justice of the Peace Handbook outlines several crucial steps that KPMG considers can only be achieved through a witness, or a reassessment of the statutory declaration process. The witness must:

- ensure that the declarant understands the 'purpose, effect and contents of the statutory declaration';
- ensure that the declarant is familiar with the contents of the document;
- warn the declarant that 'it is a serious criminal offence to make a false declaration, and the penalties include imprisonment'; and
- conduct proofing procedures, such as marking blank pages (to ensure no comments are further added), and ensuring all annexures are attached to the document where applicable.

Therefore, it is important that a witness continues to be a part of the execution of any significant document, such as statutory declarations and deeds, to ensure the declarant understands the impact of the document and that its integrity is without question. This applies both to physical and Audio-Visual Link (AVL) executions.

Do advances in digital identity verification make witnessing requirements redundant?

Advances in digital identity verification do not make all witnessing requirements redundant. As mentioned above, witnessing of any kind ensures the integrity of the legal system by confirming that a document is accurate and truthful. However, KPMG believes that digital identity can remove some of the current requirements of a witness.

Digital identity acts as a 100-point ID verification check. KPMG assumes it would most effectively be used during an AVL execution, rather than during a physical execution. Therefore, during an AVL witnessing, a witness would only need ensure that the document is properly proofed, and that the declarant understands the document. A witness would no longer need to cite and confirm the declarant's identity documents as digital identity would already do so. KPMG also understands that digital identity could be used to sign documents and ensure the identity of declarant in doing so, thereby removing the need for a witness to observe the signing of a document.

However, KPMG does recognise that moving away from any form of physical execution could raise concerns regarding identity fraud. This is a significant concern as the documents in question carry significant legal and penal implications, should they be falsified. This could result in the integrity of the process being brought into question, lengthy delays, and a reduction in commercial confidence from businesses.

An added complication is the inconsistency in requirements across jurisdictions and types of execution. For example, witnesses of deeds are generally required to take 'reasonable steps' to verify the identity of the person whose signature they are witnessing ('attesting'). For a modernised system to make physical witnessing redundant, checks such as these would need to be digitally supported to ensure it withstands legislative requirements beyond identity verification of the individual signing.

Whilst witnesses are required to perform 'reasonable' pre-signing checks to verify the identity of the declarant (that they understand the document, and in certain cases, warn them of the penalties in breaching the document), not all declarants may be aware that witnesses are required to do so. What constitutes 'reasonable steps' is not always clear, and the degree of identity verification undertaken will vary. As a result, KPMG considers that a digitised system could create a more streamlined system and improve the ability to meet these requirements remotely, though careful consideration would be needed on how this would be digitised and whether this is still possible without physical or AVL witnessing. Furthermore, consideration is needed around whether this legislation is meeting its intent and is necessary beyond proving identity.

Despite these concerns, KPMG believes that digital identity is great path forward to providing greater security in AVL execution should it be adopted. However, this may require changes in legislation. For example, requiring strong Identity proofing levels would mean that at least two acceptable identity documents must be provided, one of which must show the declarant's face (e.g. licence or passport), the other ensuring that the declarant is the same person (e.g. birth certificate)[4]. This will save time in having to collect these documents every time, digitally record them via picture or scanner, or travel to a witness and present them physically. Not only does this save time and money for the declarant when executing documents, it also addresses concerns around the ambiguity of taking 'reasonable steps' to identify a person when witnessing documents, and provides more certainty around identity claims.[5] Therefore, digital identity can be seen as a more standardised and consistent approach to identity verification that limits human error and brings consistency in the witnessing process.

However, KPMG notes that a broad-sweeping allowance of virtual signing can create risk. As outlined below, the courts caution against digital signatures on statutory declarations and deeds under the original s 127 of the Corporations Act, as they do not demonstrate evidence that the declarant or witness has considered the document. This is because e-signatures could be copied and pasted by anyone who has access to an individual's e-signature. Therefore, any digital signature must ensure that a witness and declarant have come into contact with the document and considered its contents in order for it to be considered valid. It is essential that, regardless of the mechanism, Australia has a consistent and standardised solution for digital verification. Noting this, KPMG sees it as vital that there are clear guidelines around what constitutes appropriate mechanisms for digitised document execution before witnessing requirements are reduced or is made completely redundant.

Are there documents that should still require the presence of either a physical witness or a witness over AVL?

While digital identity may provide a means of verifying the identity of the person making the declaration, it does not address all requirements under all the existing witnessing legislations. KPMG believes that, at a minimum, the ability to verify the objectivity and significance of a document is seen as a key part of the executions process (i.e. verifying that a document is a true and correct copy and that a person understands the impact of the document).

However, in common law, KPMG understands that the courts are undecided on whether e-signatures alone can satisfy the requirement set out in the original s 127 of the *Corporation Act 2001* (Cth). Furthermore, the common law standing on split execution, as observed in *Bendigo and Adelaide Bank Limited (CAN 068 049 178) & Ors v Kenneth Ross Pickard & Anor [2019] SASC 123*, Stanley J determined that two signatures on different counterparts or copies of a document will not satisfy s 127 of the *Corporations Act*.

Though the circumstances outlined in Bendigo Bank may have been unique, it does provide an insight into the court's interpretation of split execution. This is important to note, as any

[4] What are identity proofing levels? | Digital Identity
[5] Modernising Document Execution | Deregulation (pmc.gov.au) section 3.2

proposal allowing for witnessing to be permissible via AVL will require split execution of documentation. Therefore, KPMG would suggest that permanent amendments will be needed to s 127 of the Corporations Act in order to ensure split execution of documents can be accepted into law.

FINDING 7: KPMG considers that witnessing is a necessary requirement when it comes to the execution of statutory declarations and deeds. However, the integration of digital identity could replace the need for some of the elements of the existing witnessing requirements. KPMG believes that, at a minimum, the ability to verify the objectivity and significance of a document is a key part of the executions process.

FINDING 8: Witnesses have various responsibilities based on the jurisdiction in which they are operating. Further legislation regarding document execution should aim to ensure witnesses have uniform responsibilities across the Commonwealth, states and territories. In making witnessing responsibilities uniform, KPMG considers it vital that there are clear and consistent guidelines around what constitute appropriate mechanisms for digitised document execution before witnessing requirements are reduced or are made completely redundant.

FINDING 9: Any proposal allowing for witnessing to be permissible via Audio-Visual Link (AVL) will require split execution of documentation. Therefore, KPMG suggests that permanent amendments will need to be made to s 127 of the *Corporations Act* in order to ensure split execution of documents can be accepted into law.

Question 6: What minimum reliability requirements should apply to the electronic execution of statutory declarations and deeds? Are the existing provisions in the ETA appropriate and effective? From your perspective, would providing common requirements and definitions, enabling digital verification or improving national usability increase reliability?

As noted above in response to Question 3, KPMG considers that any reforms in relation to document execution should not remove, or relax, safeguards and requirements which recognise the solemnity and special status of deeds and statutory declarations – rather, such reforms should consider to what extent similar levels of assurance can be secured in the digital environment.

KPMG is familiar with verification and authentication techniques that are already available in various digital software products that could be utilised to provide security and reliability in respect of the digital execution of statutory declarations and deeds. These include:

- biometric authentication;
- chain of custody features;
- timestamps; and
- email and IP address tracking.

In addition, KPMG is aware of digital signature products that verify a signatory's identity through a certification authority (CA), which is a secured online database that can be accessed by subscribed users. In such CAs, users confirm their identity by providing specified information to the CA and, in return, are issued a digital signature certificate – or a unique ID – that is stored online. The recipient of a person's digital signature can then find their digital signature certificate online and use it to verify the electronic signature (by comparing the public key on the digital signature certificate to the electronic signature and confirming the signatory's identity). A digital signature certificate system such as this could be explored to verify the identity of signatories in the digital environment.

To ensure the security of transactions, parties should have both the digital signature and digital signature certificate systems in place. Furthermore, it is important that private keys are not readily accessible on company databases and are instead held by the person named on the digital signature. Another issue to be aware of is the software's archiving capabilities - digital signature software should have an effective archiving system which makes retrieving data as easy as possible. This becomes important should any disputes arise; for example, in relation to whether an agreement was signed months or years after the fact. Finally, given the rapid rate of change in the digital world, it may be important to either regularly review any definitions included in legislation or keep definitions sufficiently broad to avoid these definitions becoming redundant when new technologies become available.

Are the existing provisions in the ETA appropriate and effective?

KPMG considers that the existing provisions in the ETA are appropriate and effective, and providing common requirements and definitions would certainly improve reliability, particularly when combined with greater consistency in regulations across jurisdictions. Greater clarity around whether the COVID-19 measures introduced by the Commonwealth and other jurisdictions will become permanent rather than temporary, or when new legislation will be introduced, would also help reduce uncertainty and could improve uptake. Furthermore, introducing nationally accepted methods of digital identity verification or electronic signatures would create increased certainty that documents have been validly executed.

FINDING 10: As a minimum requirement, any reforms to document execution should not remove or relax safeguards and requirements which recognise the solemnity and special status of deeds and statutory declarations. Instead, verification and authentication techniques that are already available should be explored to achieve similar or enhanced levels of security in a digital environment.

Question 7: What processes and/or technologies do you consider appropriate for executing statutory declarations and deeds electronically? Please provide examples.

Some of the current witnessing requirements and provide enhanced security in document execution. Integrating this technology into the document execution process could generate substantial benefits by providing a standardised and more consistent approach to identity verification.

While KPMG notes the need to be technology agnostic in any reforms to digital execution of statutory declarations and deeds, in this response KPMG has provided some commentary on technologies and processes it considers to be appropriate or that could be explored further.

Technology that enables digital signatures and a secure online platform, such as DocuSign, work well for this purpose and technology providers could seek to integrate options for virtual witnessing. Currently, AVL witnessing can be done through external third-party providers that the government has approved, so a similar certification process could be considered into the future for other technologies like platforms that offer fingerprint identification, facial recognition, and blockchain technology.

Arguably the biggest failing with digital signatures, and public-key cryptography generally, is that they are dependent on the private key being kept secret. If the private key is exposed, it is open for someone to dispute that they were indeed the person who 'digitally signed' a document. If a targeted cyber-attack or data breach exposed a private key, then it would have a cascading effect on the enforceability of digitally signed documents which depend upon that key.

To better protect against fraud and other cyber-related risks, organisations could be required to meet specified standards of cyber security and/or have a fraud prevention policy/plan in place before being enabled to utilise digital execution arrangements.

FINDING 11: KPMG considers that any reform to document execution be technology agnostic but could include a government certification process.

Question 8: Have you experienced problems with executing documents across jurisdictions? Please outline what issues you faced. How would greater consistency affect you?

KPMG has experienced a range of challenges when executing documents across jurisdictions. Currently, all jurisdictions in Australia have their own laws and regulations governing statutory declarations and deeds, and there are inconsistent document requirements across jurisdictions. KPMG strongly welcomes the proposal in the consultation paper to improve national consistency, and believes a consistent approach to document execution would be highly beneficial. This lack of consistently can be made particularly challenging when a deed, for example, is governed by the laws of a particular state, but the party or parties executing that deed are subject to different requirements in their jurisdictions.

There are also physical challenges associated with executing documents across jurisdictions. Issues can arise when signatories are located in a different state and cannot access facilities to print a document and scan the physical signed version back. Additionally, when the original version of a document is required this can add significant time due to postage which can also be subject to delays. These challenges have been exacerbated by the COVID-19 pandemic and the working from home environment. The option for digital document execution would significantly streamline this process and lead to greater efficiency.

Finally, KPMG Law also works across international borders. Documents requiring wet ink signatures can be difficult to obtain from overseas jurisdictions in a timely manner. Executing documents across international borders can be costly where a party is required to obtain independent legal advice to confirm the validity of a signature executed by an overseas corporation. While KPMG notes the focus of this consultation is on Australian legislation, it would be beneficial to consider how these regulations align in an international environment. Implementing a standardised way in which digital verification is made within Australia, that also aligns with overseas jurisdictions (Kalifa Report UK 2021 recommendations) would increase usability and reliability.

FINDING 12: KPMG strongly welcomes the proposal in the consultation paper to improve national consistency across jurisdictions, and recommends that consideration also be given to international models in order to reduce the cost of doing business across international borders.

Question 9: Are there risks with document execution that might lead to an adverse outcome for you, your clients or other third parties as a result of reforms to document execution?

Risks for KPMG and its clients regarding reforms to document execution sit within four key themes:

1) **Security:** Digital document execution presents a heightened risk of fraud, data breaches and vulnerability of confidential or commercially sensitive information. These security risks are the most significant for KPMG and its clients due to the potential for commercial harm to occur should data security and privacy not be prioritised in the future regime.
2) **Certainty:** Businesses must be able to rely on the validity of information and documents. Reforms that may jeopardise the legal enforceability of documents present a large risk to KPMG and its clients, with innumerable consequences should this validity be in question.
3) **Inconsistency:** KPMG and its clients engage in a number of cross-border transactions. Should a future legislative framework be unable to achieve consistency across the Australian jurisdictions, and more broadly, foreign jurisdictions, there is a risk of increased costs and loss of commercial opportunities for businesses, as well as minimal uptake of digital execution due to the difficulties of compliance.
4) **Increased regulatory burden**: Imposition of onerous requirements for digital executions runs the risk of increasing an organisation’s compliance costs, as well as heightened costs and delay should consistency or acceptance of digital execution not be widely realised.

It should be noted that many of these risks are likely to be mitigated by measures outlined within the consultation paper. Additional mitigation measures regarding the above risks may also already exist within existing legislation such as the Corporations Act and the ETA. These protections should, at a minimum, be preserved in any future document execution regulatory framework, and may offer reform exemplars for the Taskforce to consider in embedding sufficient protections in the new law.

FINDING 13: While there are risks associated with reforms to document execution, including security, certainty, inconsistency and increased regulatory burden, many of these are likely to be mitigated by measures outlined in the consultation paper. Existing legislative protections should, at a minimum, be preserved in any future document execution regulatory framework and could be used as an exemplar to consider when embedding protections in the new law.

Question 10: Do you have suggestions as to other potential reforms relating to document execution?

KPMG believes a number of key principles should be considered in the context of any reforms in this area. KPMG notes that the consultation paper suggest that technology can provide a different path for document execution in addition to the current physical approach. KPMG believes retaining the current physical approach in addition to a digital option is critically important, in particular for vulnerable, elderly or remote communities where accessibility requirements for technology must be considered.

Furthermore, as highlighted throughout this submission, KMPG welcomes the proposal to address inconsistency across states and territories and believe this will be beneficial in reducing compliance costs and regulatory burden. In addition, KPMG is seeing increasing instances of cross-border transactions or merger and acquisition matters. Accordingly, seeking to make Australia's approach consistent with that of international counterparts such as Europe, the United Kingdom and Canada would be welcomed.

FINDING 14: In relation to the principles included in the consultation paper, there are a number of additional areas that must be considered in the context of any reforms in this area.

Retaining the current physical approach in addition to a new digital option is essential; in particular for vulnerable, elderly and remote communities where accessibility requirements for technology can be constrained.

FINDING 15: KPMG considers that consistency across Australian jurisdiction as well as with international counterparts such as Europe, the United Kingdom, and Canada would be beneficial.

Question 11: Are there other issues with document execution not canvassed in this paper that you wish to share?

Whilst this submission has predominately focused on measures that would replicate the integrity of physical document execution in a digital approach, it is important to note that the current system is not without fault. The processes currently in place to ensure the solemnity and special status of statutory declarations and deeds through physical execution are thorough and stringent, but paper documents can still be prone to errors.

As noted in earlier questions, correcting errors in paper documents such as pages missed, signatures in the wrong place and illegible writing can be time consuming and can create delays. Paper documents can also make it harder for recipients to verify who actually signed the document and as such may be vulnerable to fraud or forgery.

Therefore, in addition to the wide-ranging benefits of digital document execution outlined in this submission, modernising this area also has the potential to offer enhanced integrity if implemented appropriately.

FINDING 16: While physical document execution has thorough processes to ensure its integrity, paper documents are not immune from error. KPMG considers that digital document execution has the potential to offer enhanced integrity in comparison to the current system if implemented with the right safeguards and controls.

Key authors and contacts

Kate Marshall
Head of KPMG Law

Paul Mayson
Director,
KPMG Law

Felicity Cooper
Director,
KPMG Law

Emma Layton
Manager,
Management Consulting

Bree Taylor
Manager,
KPMG Law

Andrew Antoun
Senior Consultant,
KPMG Law

Amy Jones
Senior Consultant,
KPMG Law

Sophie Finemore
Associate Director,
Regulatory Affairs

Sam Lynch
Senior Manager,
Government & Regulatory Affairs

Olivia Spurio
Senior Consultant,
Government & Regulatory Affairs

KPMG.com.au

777031084DTL