

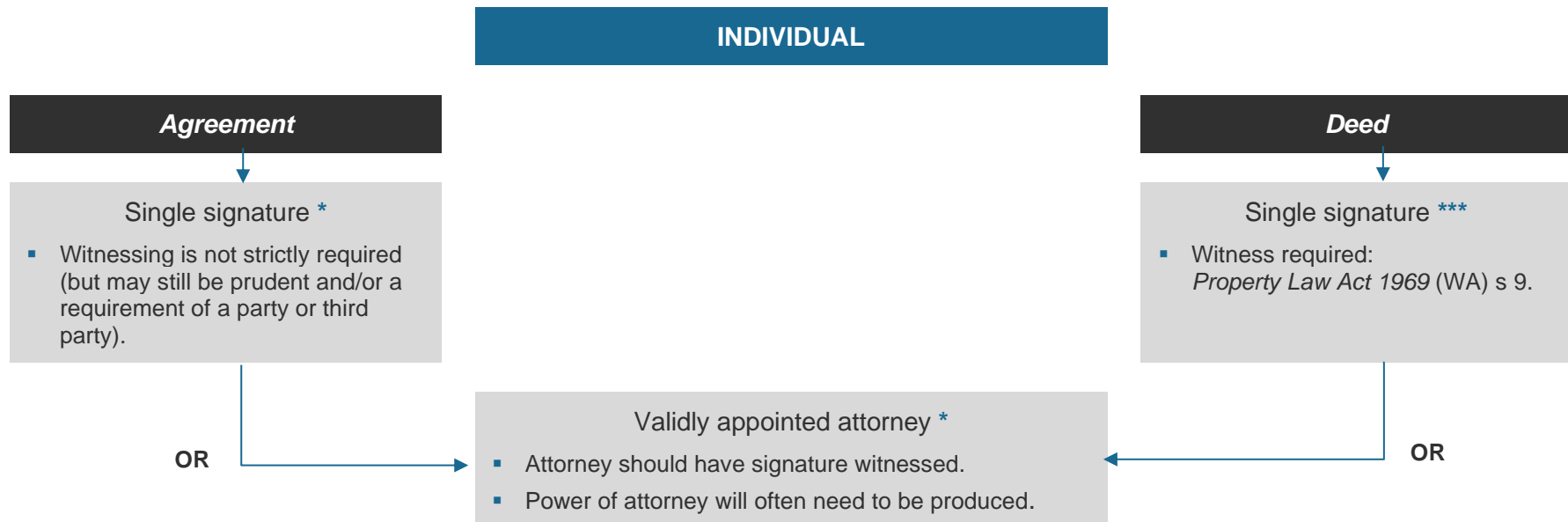
Factsheet | A guide to executing contracts

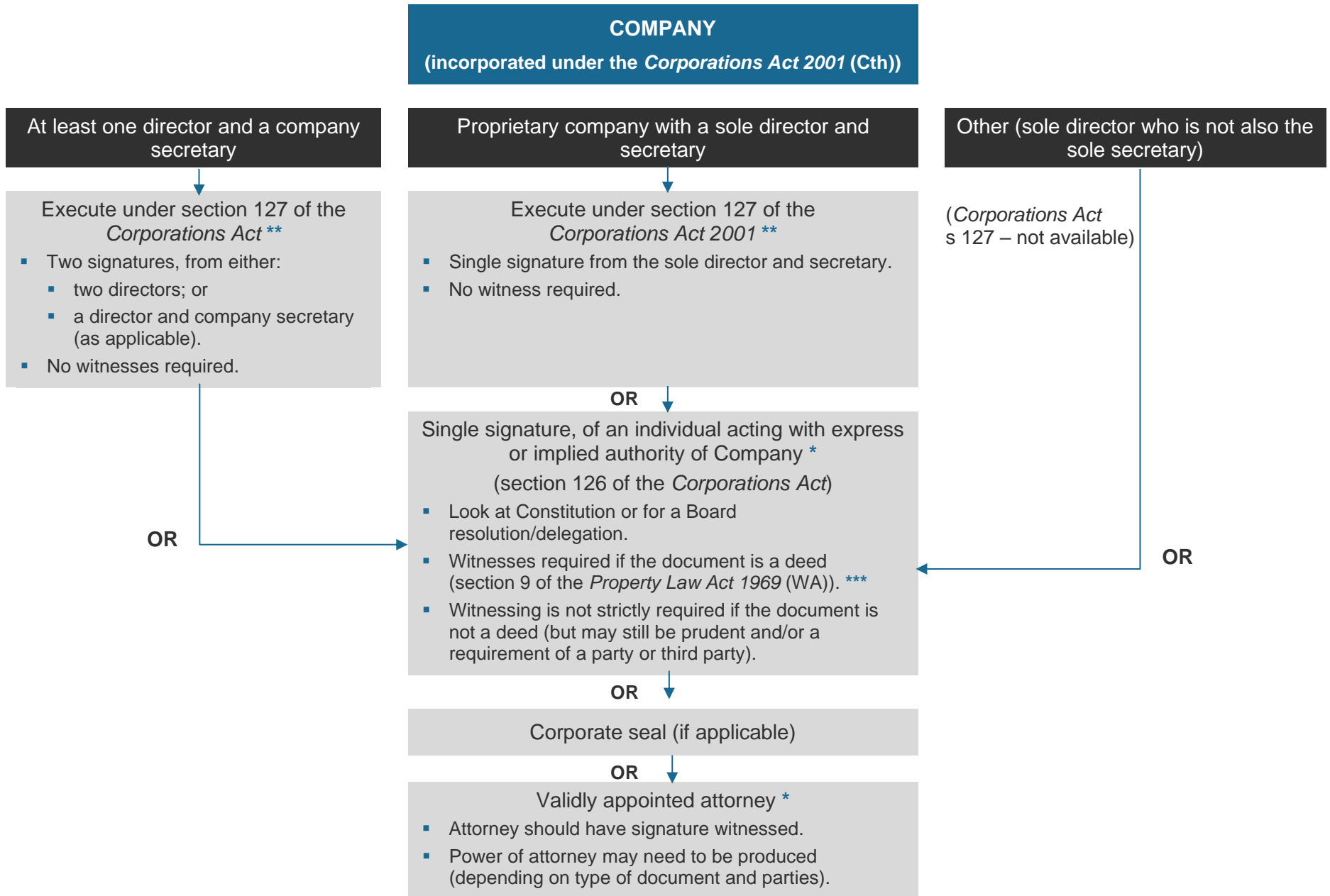
With the advent of technology and applications that allow for electronic signing, it can be hard to keep up with how contracts are to be properly executed.

The question of who can sign and how they can validly sign depends on the document, and the identity of the parties. In the modern age (particularly in light of COVID-19), electronic signing has a growing role to play. A temporary legislative response enabling companies to execute documents electronically was introduced earlier this year, and has in more recent months been extended (by way of the *Corporations (Coronavirus Economic Response) Determination (No. 3) 2020*) for a further period of 6 months ending 21 March 2021.

The following factsheet aims to shed some light on how an individual, a company and an incorporated association can validly execute a contract under the current laws.

Who can sign?





INCORPORATED ASSOCIATIONS

(incorporated under the
Associations Incorporation Act 2015 (WA))

Single signature, of an individual acting with express or implied authority of Association *

(Associations Incorporation Act s 15(1)(b))

- Look at Constitution or for a Board resolution / delegation.
- Witnesses required if the document is a deed (*Property Law Act 1969 (WA)* section 9). ***
- Witnessing is not strictly required if the document is not a deed (but may still be prudent and/or a requirement of a party or third party).

OR



Corporate seal (if applicable)

OR



Validly appointed attorney *

- Attorney should have signature witnessed.
- Power of attorney will often need to be produced (depending on type of document and parties).

Notes

* Electronic signing may be available *if the document being executed is an agreement*, but not if it is a deed.

- An electronic signature might be a scan or image of a signature; signature using a stylus; typing a name; agreement by email; image; formal digital signature. A signature requires some form of personal authentication of the individual. So, if, for example, a signature was applied to an electronic document without approval, there would be no personal authentication and it would be ineffectual: *Bendigo and Adelaide Bank Ltd v Pickard* [2019] SASC 123.
- The general rule under the *Electronic Transactions Act 2011* (WA) (**ETA WA**) and *Electronic Transactions Act 1999* (Cth) (**ETA CTH**), is that a transaction is not invalid because it took place wholly or partly by means of electronic communication: s 8(1) ETA WA; s 8(1) ETA Cth.
- If, under a law of the Commonwealth or of WA, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication if —
 - (a) a method is used to identify the person and to indicate the person’s intention in respect of the information communicated; and
 - (b) the method used was either —
 - (i) as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
 - (ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence; and
 - (c) the person to whom the signature is required to be given consents to that requirement being met by the use of the method mentioned in paragraph (a).

(ETA WA s 10; ETA Cth s 10).

Exceptions

- Section 8(1) of the ETA WA does not apply to “any ... transaction that requires a document to be verified, authenticated, attested or witnessed under the signature of a person other than the author of the document”: ET Regs 2012 WA r 3(1)(b).
- Part 2 Division 2 of the ETA WA (incl s 10) does not apply to “any ... requirement that a document is to be verified, authenticated, attested or witnessed under the signature of a person other than the author of the document”: ETA WA s 4(1)(c).
- Sections 8 and 10 of the ETA CTH do not apply to various Cth laws specified in the *Electronic Transactions Regulations 2020* (Cth).

****** *Corporations (Coronavirus Economic Response) Determination (No. 3) 2020* applies until 21 March 2021. Whilst views differ, common consensus is that companies cannot ordinarily execute electronically under s 127. However, under the Determination:

- The definition of 'document' has been amended to include one that is in electronic form: s 6(2).
- Execution under the Corporations Act can occur electronically, provided the method of execution is reliable and appropriate for the purposes to identify and indicate the intention to be bound: s 6(3)(b) and s 6(4).
- If more than one signature is required for a Company to execute, split execution is permissible. That is, the Company's signatories need not sign the same copy of a document; counterparts are permissible.

******* Deeds must be recorded on 'paper, parchment or vellum' (a common law requirement).

Do you have any questions?

If you seek assistance or guidance on executing contracts, please contact David McMullen on **(08) 9321 0522**. David would be pleased to hear from you.



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