

**CORONAVIRUS ECONOMIC RESPONSE PACKAGE (MODIFICATIONS –  
STATUTORY DECLARATIONS AND NOTICES OF INTENTION TO MARRY)  
DETERMINATION 2020**

**EXPLANATORY STATEMENT**

Issued by the authority of the Attorney-General

under the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020*.

**PURPOSE AND OPERATION OF THE INSTRUMENT**

The *Coronavirus Economic Response Package (Modifications – Statutory Declarations and Notices of Intention to Marry) Determination 2021* (the Determination) temporarily modifies signing, witnessing, and documentary arrangements for Commonwealth statutory declarations and witnessing arrangements for notices of intended marriage (notices).

By providing alternative arrangements for meeting documentary requirements for Commonwealth statutory declarations and notices, the Determination will assist individuals who, as a result of the COVID-19 pandemic, are concerned about meeting in person to have a document witnessed or cannot meet in person because of restrictions imposed by government. The Determination will facilitate the execution of statutory declarations and notices in these circumstances, thereby allowing for the continuity of business operations, government service delivery and marriage processes.

The Determination is made under Schedule 5 of the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* (the Omnibus Act). Under Schedule 5 of the Omnibus Act, responsible Ministers can make a determination temporarily adjusting arrangements under Commonwealth legislation for a range of different matters including signing, witnessing a signature and other documentary requirements. In this case, the Determination temporarily modifies the requirements in relation to signing, witnessing and documentary arrangements for Commonwealth statutory declarations under the *Statutory Declarations Act 1959* (SD Act) and the *Statutory Declarations Regulations 2018* (SD Regulations). It also modifies witnessing requirements for notices under the *Marriage Act 1961* (Marriage Act). These temporary modifications will end on 31 December 2022.

*Providing alternative arrangements for the witnessing and signing of Commonwealth statutory declarations*

Schedule 1 of the Determination varies section 8 of the SD Act and Schedule 1 to the SD Regulations. Currently section 8 of the SD Act provides that a statutory declaration made under the SD Act must

be in the prescribed form and be made before a prescribed person (that is, a witness). Schedule 1 to the SD Regulations contains the prescribed form, which requires a signature from both the declarant and the prescribed person who witnesses the declarant sign the statutory declaration.

The requirement in section 8 of the SD Act that a statutory declaration be ‘made before’ a prescribed person means that the declarant sign the statutory declaration in the physical presence of the prescribed person.

Currently the SD Act is exempt from the application of section 10 of the *Electronic Transactions Act 1999* (which relates to the use of electronic signatures), because of the exemption listed in item 88 of the table in Schedule 1 of the *Electronic Transactions Regulations 2020*. As such, statutory declarations currently need to be signed by the declarant and the prescribed person using a traditional wet ink signature.

Neither the SD Act nor SD Regulations currently contain a provision that allows for separate versions of the same statutory declaration to be signed. As a result, both the declarant and the prescribed person need to sign the one document.

The Determination amends section 8 of the SD Act and Schedule 1 to the SD Regulations to make provision for the signing of statutory declarations using electronic means, as well as witnessing by a prescribed person via a facility that enables audio and visual communication between persons in different places. The amendments to section 8 of the SD Act also allows the prescribed person to sign a copy of the statutory declaration that was signed by the declarant, provided that the prescribed person is satisfied that it is a true copy of the statutory declaration signed by the declarant. All of the changes to the SD Act and the SD Regulations in the Determination will enable a declarant and prescribed person to be in different locations when the declarant signs the statutory declaration before the prescribed person.

Commonwealth agencies and individuals rely on statutory declarations for a number of purposes including in relation to applications under administrative schemes and in a variety of human resources settings, including as a form of evidence to support claims. As a result of lockdowns and travel restrictions that have been put in place due to the COVID-19 pandemic and concerns that individuals have about the transmissibility of coronavirus, people have not always been able to make Commonwealth statutory declarations that meet the current legislative requirements. This has affected the continuation of some business transactions and government service delivery. This Determination is designed to address the problem by removing barriers that prevent individuals making valid Commonwealth statutory declarations. In particular, these changes will enable a declarant and prescribed person to be in different locations when the declarant signs the statutory declaration before the prescribed person.

Even though the Determination introduces new ways to sign and witness statutory declarations, declarants and prescribed persons are still able to sign and witness a statutory declaration using the traditional means of wet ink signatures with the parties being in the same location when the declarant signs the declaration before the prescribed person.

#### *Providing alternative arrangements for the witnessing of Notices of Intention to Marry*

Schedule 2 of the Determination modifies section 42 of the Marriage Act. Parties seeking to get married in Australia are required under the Marriage Act to provide at least one month's written notice before being able to get married. Schedule 2 of the Determination temporarily changes the requirements for a notice to be given by parties getting married to an authorised celebrant. The current requirements in section 42 of the Marriage Act require that the notice must be signed by the parties getting married in the physical presence of the listed authorised persons, as specified in paragraphs 42(2)(c) and (d).

Due to physical distancing and lockdown measures, ongoing difficulties are being faced by marrying couples who need to have their notice witnessed and signed in person before an authorised person under section 42 of the Marriage Act. The department received correspondence from couples, particularly in the state of Victoria, and overseas, who were unable to meet the physical witnessing requirements during the COVID-19 pandemic due to lockdown or social distancing restrictions in their state or country.

The Determination temporarily modifies the requirement under section 42 of the Marriage Act that a notice of intended marriage must be signed by the party giving the notice in the physical presence of a specified authorised person, to instead allow the notice to be signed under the observation of an authorised witness. That is, the signatures of the parties on the notice can be witnessed remotely by means of an audio-visual link. The effect of the modification made by the Schedule 2 of the Determination is to support marrying couples to progress their plans for marriage and submit their notices of intention to marry during the COVID-19 pandemic, where government public health directives and social distancing restrictions may prevent them from physically accessing an authorised person to witness their signatures on the notice.

#### *Requirement for legislation*

As legislation mandates the specific physical requirements for statutory declarations and notices, legislative amendments will limit any risks associated with adopting an administrative approach.

The Determination is a legislative instrument subject to disallowance. The Determination does not apply retrospectively and, pursuant to subitem 1(7) of Schedule 5 of the Omnibus Act, has no operation after 31 December 2022.

## **CONSULTATION**

Schedule 1 of the Determination was prepared in response to numerous enquiries from other Commonwealth agencies, organisations and members of the public raising concerns in relation to satisfying the physical witnessing, production and signature requirements for Commonwealth statutory declarations following the introduction of lockdowns and travel restrictions due to the COVID-19 pandemic. Consultation was undertaken with the Attorney-General's Department's Commonwealth Fraud Prevention Centre, Information Law Unit and Administrative Law Section. Consultation was also carried out with other agencies across the Commonwealth that were specific to the Determination. Further, in line with the Government's ongoing work regarding possible reforms to execution of statutory declarations, consultation with Commonwealth agencies was also undertaken and used to inform the development of the Determination.

Schedule 2 of the Determination was developed in response to feedback received from marriage celebrants and marrying couples about their difficulties in finding authorised persons to physically witness their notices of intention to marry. The department consulted with Marriage Celebrant Associations in April and May 2020, and May 2021. Celebrant Associations indicated support for this temporary change to allow the remote witnessing of the notice of intended marriage, making it easier for couples to progress their marriage plans during the COVID-19 pandemic.

## **REGULATION IMPACT STATEMENT**

The Office of Best Practice Regulation (OBPR) has confirmed that an exemption from Regulation Impact Statement requirements was granted as there were urgent and unforeseen circumstances.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **Coronavirus Economic Response Package (Modifications – Statutory Declarations and Notices of Intention to Marry) Determination 2021**

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview**

The *Coronavirus Economic Response Package (Modifications – Statutory Declarations and Notices of Intention to Marry) Determination 2021* (the Determination) amends section 8 of the *Statutory Declarations Act 1959* (SD Act) and Schedule 1 to the *Statutory Declarations Regulations 2018* (SD Regulations) to make provision for signing of statutory declarations using electronic means as well as witnessing by a prescribed person via a facility that enables audio and visual communication between persons in different places. The amendments to section 8 of the SD Act also allows the prescribed person to sign a copy of the statutory declaration that was signed by the declarant, provided that the prescribed person is satisfied that it is a true copy of the statutory declaration signed by the declarant.

Currently section 8 of the SD Act provides that a statutory declaration made under the SD Act must be in the prescribed form and be made before a prescribed person (that is, a witness). Schedule 1 to the SD Regulations contains the prescribed form and requires a signature from both the declarant and the prescribed person who witnesses the declarant signing the statutory declaration.

The requirement in section 8 of the SD Act that a statutory declaration be ‘made before’ a prescribed person requires that the declarant sign the statutory declaration in the physical presence of the prescribed person.

Currently the SD Act is exempt from the application of section 10 of the *Electronic Transactions Act 1999* (which relates to the use of electronic signatures), because of the exemption listed in item 88 of the table in Schedule 1 of the *Electronic Transactions Regulations 2020*. Therefore statutory declarations currently need to be signed by the declarant and the prescribed person using the traditional wet ink signature.

Neither the SD Act nor SD Regulations currently contain a provision that allows for separate versions of the same statutory declaration to be signed. As a result, both the declarant and the prescribed person need to sign the one document.

Commonwealth agencies and individuals rely on statutory declarations for a number of purposes including in relation to applications under administrative schemes and as a form of evidence to support claims. As a result of lockdowns and travel restrictions that have been put in place due to the COVID-19 pandemic and concerns that individuals have about the transmissibility of coronavirus, people have not always been able to make Commonwealth statutory declarations that meet the current legislative requirements. This Determination is designed to address this problem by removing barriers that prevent individuals making valid Commonwealth statutory declarations. In particular, these changes will enable a declarant and prescribed person to be in different locations when the declarant signs the statutory declaration before the prescribed person.

Even though the Determination introduces new ways to sign and witness statutory declarations, declarants and prescribed persons are still able to sign and witness a statutory declaration using the traditional means of wet ink signatures with the parties being in the same location when the declarant signs the declaration before the prescribed person.

Schedule 2 of the Determination temporarily removes the requirement under the *Marriage Act 1961* (the Marriage Act) for a notice of intended marriage (notice) to be witnessed in the physical presence of specified authorised persons, instead allowing the notice to be witnessed remotely, that is, through audio-visual link facilities.

This is to enable marrying couples to progress their plans for marriage and submit their notice to allow them to marry during the COVID-19 pandemic, where government public health directives and social distancing restrictions causing the lack of available witnesses may otherwise prevent them from completing and submitting their notice of intend marriage to an authorised celebrant.

The Determination is made under subitem 1(2) of *Schedule 5 to the Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020*. The Determination is made in response to circumstances relating to the COVID-19 pandemic.

Schedule 1 of the Determination limits the right to privacy, but to the extent that privacy is limited, those limitations are reasonable, necessary and proportionate.

Schedule 2 of the Determination does not introduce any limitations on human rights.

### **Human rights implications**

The legislative instrument engages the following rights or freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*:

- The right to privacy in Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR).

- The right to respect for the family in Article 23 of the ICCPR.

### Right to privacy

Article 17 of the ICCPR recognises that:

- No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, and;
- Everyone has the right to the protection of the law against such interference or attacks.

The right to protection against arbitrary or unlawful interference with privacy is contained in Article 17 of the ICCPR. Article 17 provides that no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour or reputation, and that everyone has the right to the protection of the law against such interference or attacks.

The right to privacy under Article 17 can be subject to permissible limitations in order to achieve a legitimate objective. Permissible limitations on privacy must be authorised by law and must not be arbitrary, meaning the limitation on privacy must be in accordance with the provisions, aims and objectives of the ICCPR and reasonable in the particular circumstances.

The Determination limits the right to privacy, in that it requires additional disclosure of personal information than what is required by the ordinary requirements for completing a Commonwealth statutory declaration. Specifically, the Determination requires that where the temporary arrangements to complete a statutory declaration are used, the prescribed person must disclose either their telephone number or email address (or both) on the declaration.

The additional disclosure of personal information under the temporary arrangements is a reasonable limitation on the right to privacy. It is necessary to achieve a legitimate objective, which is to minimise the risk of fraud in making a statutory declaration under the temporary arrangements. It will enable organisations, and state, territory and Commonwealth government agencies which receive a Commonwealth statutory declaration that has been signed and/or witnessed electronically, to verify that the declaration has been validly witnessed by contacting the witness. It is also proportionate, requiring the witness to disclose one type of personal information, in addition to the existing requirements for the witness and the declarant to disclose their full name, qualification and address. It is not envisioned that the need to contact witnesses will be frequent, as it should only be in circumstances where there is some doubt as to the validity of the witnessing of the statutory declaration.

Further, organisations and agencies subject to the *Privacy Act 1988* must comply with their obligations set out in the Australian Privacy Principles in the collection and use of personal information in a Commonwealth statutory declaration.

Finally, in circumstances where a witness does not provide their phone number or email address this does not invalidate the statutory declaration. It is recognised that temporary changes may result in some witnesses being unaware that they need to provide their phone number email address when witnessing a declaration in accordance with the temporary provisions. Further, it is also recognised that there may be very sound reasons as to why a witness would be uncomfortable in providing this information. A failure to comply with this aspect of the temporary measure will not invalidate the statutory declaration. However, compliance should be encouraged as a fraud prevention measure, which is why this provision has been included.

#### Right to respect for the family

Schedule 2 of the Determination promotes the right to respect for the family set out in Article 23 of the *International Covenant on Civil and Political Rights*. The right to respect for the family includes the right of men and women of marriageable age to marry.

The temporary modification in Schedule 2 removing the requirement for a notice of intended marriage to be witnessed in the physical presence of an authorised person means that marrying couples are able to access an authorised witness more easily in order to be able to validly complete and submit their notice to get married, thereby supporting respect for the family.

#### **Conclusion**

The Determination is compatible with human rights. Schedule 1 of the Determination is compatible with human rights because, to the extent that it limits the right to privacy, those limitations are reasonable, necessary and proportionate. Schedule 2 of the Determination is compatible with human rights because it promotes the protection of human rights.



## NOTES ON SECTIONS

### **PART 1 – Preliminary**

#### **Section 1 – Name**

Section 1 provides that the title of the instrument is the *Coronavirus Economic Response Package (Modifications–Statutory Declarations and Notices of Intention to Marry) Determination 2021*.

#### **Section 2 – Commencement**

Section 2 sets out the commencement of the Determination as the day after the instrument is registered on the Federal Register of Legislation.

#### **Section 3 – Authority**

Section 3 sets out that this instrument has been made under subitem 1(2) of Schedule 5 to the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* (the Omnibus Act).

#### **Section 4 – Modifications**

Section 4 provides that each modification of a provision of an Act as set out in a Schedule to the Determination is determined for the purposes of subitem 1(2) of Schedule 5 to the Omnibus Act.

### **SCHEDULE 1 – Modifications of the *Statutory Declarations Act 1959* and related regulations**

#### **Item 1 – Definitions**

**Item 1** contains definitions relevant to Schedule 1 of the Determination. Item 1 provides that ‘relevant period’ means the period:

- a) starting when this Schedule commences; and
- b) ending on the day on which item 1 of Schedule 5 to the Omnibus Act is repealed.

Schedule 1 commences that day after the Determination is registered. Schedule 5 to the Omnibus Act will be repealed at the end of 31 December 2022.

#### **Item 2 – Variation of section 8 of the *Statutory Declarations Act 1959* and Schedule 1 to the *Statutory Declarations Regulations 2018***

**Item 2** of the Determination is to be read in conjunction with the existing provisions contained in section 8 of the SD Act and Schedule 1 of the SD Regulations.

Subitem 2(1) provides that section 8 of *Statutory Declarations Act 1959* (SD Act) and Schedule 1 to the *Statutory Declarations Regulations 2018* (SD Regulations) are varied by item 2 of the Declaration to the extent that they relate to the requirement that a statutory declaration be signed and made before a prescribed person. The variation applies during the relevant period (which is defined in item 1).

Subitem 2(2) varies paragraph 8(b) of the SD Act to omit ‘made before a prescribed person’, and substitute ‘made by signing the declaration (whether by electronic means or otherwise) either before a prescribed person or under the observation of a prescribed person in accordance with this section’.

The variations to paragraph 8(b) of the SD Act provide two changes to the way that statutory declarations can be executed. Firstly, the statutory declaration can be signed by the declarant and the prescribed person (that is, the witness) using electronic means. There are a range of different technologies available to use for electronic signing of documents. Some of these technologies include: a stylus on a touch screen device, a track pad on a laptop to draw with a finger or using a computer mouse to sign in an application which enables it (such as Adobe, or Microsoft Word ‘Ink function’).

Secondly, the prescribed person can observe the declarant sign the statutory declaration through a facility that enables audio and visual communication between persons in different places. Some of these audio visual technologies include: Skype, Microsoft Teams, FaceTime and Zoom.

Subitem 2(3) varies section 8 of the SD Act by adding subsections 8(2) to 8(4) to the Act. New subsection 8(2) sets out the requirements to be followed for a declaration to be made under the observation of a prescribed person.

New paragraph 8(2)(a) of the SD Act provides that if a declaration is made under the observation of a ‘prescribed person’, the observation must occur by means of a facility that enables audio and visual communication between persons in different places and the observation must occur when the declarant signs the statutory declaration.

New paragraph 8(2)(b) of the SD Act provides that the prescribed person must sign the statutory declaration either by electronic means or otherwise (that is, using wet ink), and that the prescribed person must sign either the declaration signed by the declarant or a copy of the declaration that the prescribed person is satisfied is a true copy of the declaration signed by the declarant (whether or not the copy includes the declarant’s signature). As a result of this amendment, the prescribed person does not need to sign the same document that the declarant signed for there to be a valid statutory declaration. Provided that the prescribed person is satisfied that they are signing a true copy of the statutory declaration, a valid statutory declaration will be made.

The prescribed person could be satisfied that the statutory declaration is a true copy by, for example, asking the declarant to read out the declaration or excerpt of the declaration.

New subsection 8(3) of the SD Act provides that in certain circumstances, the prescribed person must include on the declaration their email address or telephone number (or both) and a statement that the declaration was ‘made in accordance with the *Coronavirus Economic Response Package (Modifications—Statutory Declarations and Notices of Intention to Marry) Determination 2021*’.

Subject to new subsection 8(4), the prescribed person’s contact details and the statement must be included on a declaration when a declaration has been made under the observation of a prescribed person and/or where an electronic signature has been used by either the declarant, the prescribed person, or both parties to sign the declaration (new paragraphs 8(3)(b) and (c)).

The inclusion of the statement on the declaration is a record keeping measure. Use of the statement will mean that an entity that receives a completed a statutory declaration can keep track of statutory declarations that were executed in accordance with the new execution arrangements provided for in the Determination. This may be helpful if in the future the entity revisits a statutory declaration that was made while the Determination was in force and is unclear on why the statutory declaration has been signed and/or witnessed using electronic means.

The prescribed person is required to include their telephone number or email address on the statutory declaration as a fraud control measure to minimise issues and concerns with the new approach to signing statutory declarations. If the entity receiving the completed statutory declaration wishes to make enquiries about how it was signed under the new arrangements, the entity will be able to contact the prescribed person who witnessed the statutory declaration using their email and/or telephone number that has been included on the statutory declaration.

This requirement for the prescribed person to include their telephone number or email address or both on the statutory declaration is consistent with the Australian Privacy Principles in that it is reasonably necessary for one or more of the entity’s functions or activities (in this case, confirming the correct signing of a statutory declaration that has been provided to the entity).

An entity may also choose to implement supplementary, or entity-specific, fraud controls in addition to the requirement of the prescribed person’s telephone number or email address to be provided. Such controls are not, however, a legal requirement under the SD Act.

New subsection 8(4) of the SD Act provides that failure by the prescribed person to include the statement on the declaration and provide their email address, telephone number (or both), will not affect the validity of the declaration. The provision of this information will assist entities that are receiving statutory declarations that have been signed and witnessed using new technology. However, new subsection 8(4) is included to provide greater flexibility to individuals making statutory declarations to ensure that non-compliance with these information requirements does not invalidate

the statutory declaration. This is consistent with the approach of making statutory declarations more flexible and accessible during the COVID-19 pandemic.

It is recognised that some witnesses may not be aware of the need to provide the statement or their phone number or email address when witnessing a declaration in accordance with the temporary provisions. Further, it is also recognised that there may be very sound reasons as to why a witness would be uncomfortable in providing this information. A failure to comply with this aspect of the temporary measure will not invalidate the statutory declaration. However, as noted above, compliance should be encouraged as a fraud prevention measure which is why this provision has been included

Subitem 2(4) contains amendments to the SD Regulations that are consequential to the changes made to the SD Act. Subitem 2(4) provides that Schedule 1 to the SD Regulations (that is, the statutory declaration form) has effect as if:

- reference to ‘signature’ includes reference to an electronic signature (paragraph 2(4)(a));
- reference to ‘before me’ or other references to the declaration being made before a person includes references to the declarant’s signature of the declaration being observed by the person in accordance with subitem 2(2) of the Declaration (paragraph 2(4)(b));
- if a person is required to include a statement on a statutory declaration under subitem 2(3) – the Schedule indicated that the prescribed person’s email address or telephone number (or both) is required (and not optional) (paragraph 2(4)(c)).

## **SCHEDULE 2 – Modifications of the *Marriage Act 1961***

### **Item 1 – Definitions**

Item 1 outlines the interpretive provision that is relevant to Schedule 2.

- ‘relevant period’ means the period:
  - (a) starting when this Schedule commences; and
  - (b) ending on the day on which item 1 of Schedule 5 to the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* is repealed.

### **Item 2 – Variation of paragraphs 42(2)(c) and (d)**

Item 2 provides that paragraphs 42(2)(c) and (d) of the Marriage Act are varied in relation to notices signed in the relevant period by omitting ‘in the presence of’ and substituting ‘under the observation (whether or not by means of a facility that enables audio and visual communication between persons in different places) of’.

Paragraph 42(1)(a) of the Marriage Act provides that a marriage shall not be solemnised unless notice in writing of the intended marriage has been given in accordance with the section and has been received by the authorised celebrant solemnising the marriage not earlier than 18 months before the date of the marriage and not later than one month before the date of the marriage.

Paragraphs 42(2)(c) and (d) of the Marriage Act provide that a notice under subsection (1) must be signed by each of the parties in the presence of specified persons as listed under paragraph (c) (for notices signed in Australia) and paragraph (d) (for notices signed outside Australia).

The modification provided for in item 2 of Schedule 2 of the Determination allows the parties to sign their notice of intended marriage under the observation of an authorised witness through audio-visual link facilities, instead of being required to sign the notice in the physical presence of an authorised witness.

This item does not remove or modify the other requirements for the giving of a notice of intended marriage under the Marriage Act.