



HOW CAN WE USE E-SIGNATURES IN PLACE OF 'WET' SIGNATURES, AND WHEN DO WE USE A COMMON SEAL?

DISCLAIMER: - IRIS Consultants are not legally qualified and do not seek to provide legal guidance on the use of eSignatures or Common Seals. The aim of this 'Help Sheet' is to summarise and synthesize available legislative information — please seek further help from your organisation's legal advisors. Refer to the References for a list of the sources used to prepare this Help Sheet.

The use of eSignatures is increasing as we apply this method of authorisation to documents that we create in the course of our work. eSignatures are convenient, easy to use, and save both costs and time. An eSignature can be an authenticated mark, usually in the form of the signatory's name, or a digital version of a physical signature written onto software on an electronic device. Our Digital Strategy, Transition, or Transformation must consider carefully the business processes around the use of eSignatures at our organisations.

Digitisation Risk around eSignatures includes ensuring the capacity to use eSignatures for 'born digital' documents, ensuring that documents using eSignatures are compliant with legal requirements, and that the business processes, policies, and procedures which control the use of eSignatures at Government organisations support this compliance.

What is an eSignature?

A digital image representing a written signature and placed in an electronic communication.

What do we need to remember when using eSignatures?

1. The validity of our electronic documents must be assured for the eSignature to be allowable — that is, the person signing must be validly identified
2. Valid methods for using eSignatures include:
 - Cloud-based signature platforms such as DocuSign
 - Signing a PDF on a tablet, Smartphone or laptop using a stylus or finger
 - Copying and pasting a copy of a signature
3. Where eSignatures are copied and pasted into a document, they must be kept securely and only provided to those authorised to use them
4. Electronic execution (formalisation) for documents such as Contracts is further authenticated when signatories personally email the document via an email address not used by another person

Deed or Contract?

Documents which are written agreements may be either a Contract or a Deed.

Differences between Contracts and Deeds include:

- Contracts do not require a witness when they are signed
- Contracts require the agreement of both parties to come into effect
- Deeds are required for documents like transfers of real estate or Power of Attorney documents
- Uncertainty around recent changes to the *Corporations Act 2001* means that Deeds in most cases are still expected to be in physical format in every State and Territory except New South Wales

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Because execution requirements for Deeds differ between the States and Territories – either requiring witnesses to the use of a Common Seal, or the presence of specific persons – organisations should consider carefully whether a document should be made as a Deed, or whether it can be a Contract. Because Deeds are more often than not required to be in physical form, eSignatures should not at this stage be used for Deeds, and as a low-risk strategy Deeds should be exempt from Digitisation.

When should we NOT use eSignatures?

The Commonwealth Government and the *Electronic Transactions Act 2011* in Western Australia have paved the way for the increased use of eSignatures within Government organisations – including for documents such as Contracts which are sent and retrieved electronically – with some considerations for when not to use eSignatures, for example:

1. When all parties have not agreed to the use of eSignatures to formalise the document
2. When a witness to the signing is required
3. For Powers of Attorney, Credit-related Service documents, and other documents in the form of Deeds
4. To retrospectively e-sign documents

Common Seals

Common Seals are identifying marks that are sometimes used in place of signatures. As more and more documents are created electronically and eSignatures are used more widely, the ways in which our organisations use Common Seals may also change. Electronic seals are increasingly being used in place of physical Common Seals and must be governed by similar business process rules to those used for eSignatures. The use of Common Seals is optional and the circumstances for using or not using a seal will be defined by the organisation either within its Constitution or Policies, with many organisations now changing their Constitutions to reduce the instances of the use of a Common Seal, to enable a more widespread application of eSignatures.

References

- Australian Government Solicitor (2019) Fact Sheet No. 37. Retrieved from https://www.ags.gov.au/publications/fact-sheets/Fact_sheet_No_37.pdf
- Buslijeta, H. (2020). Signing contracts electronically just got easier for companies. Retrieved from <https://www.kwm.com/en/au/knowledge/insights/signing-contracts-electronically-just-got-easier-for-companies-20200506>
- Michael, V. (2020). A simple guide to using e-signatures in Australia. Retrieved from <https://michaellawgroup.com.au/a-guide-to-using-electronic-signatures-in-australia/>
- Pembroke-Birrs, J., Mulligan, P., Kelly, M. and Samson, C. (2020). Out of the dark ages (for now). Retrieved from <https://www.nortonrosefulbright.com/en-au/knowledge/publications/0c4f149c/out-of-the-dark-ages-for-now>
- Restas, J. and Ebbott, S. (2020). Electronic execution, virtual meetings and the Corporations Act: Temporary updates. Retrieved from <https://hwlebsworth.com.au/electronic-execution-virtual-meetings-and-the-corporations-act-temporary-updates/>
- TaylorWessing. (2020). The execution of documents – getting it right. Retrieved from https://www.taylorwessing.com/synapse/commercial_execution.html
- Wall, B. (2005). Did you know – What’s the difference between Deeds and Agreements? Retrieved from <https://www.claytonutz.com/knowledge/2005/august/did-you-know-what-s-the-difference-between-deeds-and-agreements>

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