

 HOW CAN WE USE E-SIGNATURES IN PLACE OF 'WET' SIGNATURES UNDER RECENT CHANGES TO AUSTRALIAN LAW, 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.

Recent changes to Commonwealth Law in response to increasing needs to work from home have created a legal Determination applied to the *Corporations Act 2001*, that allows for temporary changes to the Act which may continue after November 6, 2020. The *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020*, made into law on May 6, 2020, is a Directive that allows Australian body corporates – that is, companies – to execute a document in electronic form, as well as allow it to be signed electronically by company officers.

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 our organisations support this compliance.

In practice, this means that we can apply eSignatures in new ways at our organisations. This Help Sheet will provide you with an easily accessible resource to understand these changes

## 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.

## 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

## Signatures, Common Seals, Deeds, and Contracts

Under the *Corporations Act 2001*, companies in Australia may “sign” (affix an identifying mark to) a document in a number of ways, including by using a Common Seal or a signature. If using a Common Seal, a document must be “executed” — that is, formalised — in the presence of a witness or witnesses. In all States and Territories except Western Australia and the ACT, a Deed can be “signed” by Common Seal.

Deeds are binding legal documents given by one party to another, and differ from Contracts, which are an agreement between two parties. Where Deeds traditionally must be in physical form to be legal, a Contract can exist in electronic form. 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.

## What does the 2020 Determination change?

1. The definition of “document” in the Determination now includes the term “document in electronic form”
2. Modified Split Execution — enabling an officer of a company to sign a document and fax or email a digital copy to another officer at a different location, who then prints and “wet” signs or electronically signs that copy
3. Electronic execution — where separate electronic signatures are applied to electronic versions of a document using a valid eSignature method
4. The additional statutory assumption of reliance on the company’s due execution for electronic as well as physical documents

## What is an eSignature?

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

...../page 2

©IRIS Consulting Group Pty Ltd 201405

**FOCUSING ON YOUR INFORMATION NEEDS**

## 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

## 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 WA 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

## References

- Australian Government Solicitor (2019) Fact Sheet No. 37. Retrieved from [https://www.ag.gov.au/publications/fact-sheets/Fact\\_sheet\\_No\\_37.pdf](https://www.ag.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-Birss, 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](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>