



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 created a legal Determination applied to the *Corporations Act 2001*, that allowed for temporary changes to the Act. The *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020*, made into law on May 6, 2020, was a Directive that allowed 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. From February 2022, the passing of the *Corporations Amendment (Meetings and Documents) Act 2022* has made permanent some of the earlier temporary changes.

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

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

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 were required to be in physical form to be legal, a Contract could 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.

From 23 February 2022, we can “rely on a document (including deeds) which has been electronically executed on behalf of a company. The permanent amendments to the Act allow a company to execute a document by electronic signature or the fixing of the company seal witnessed electronically.”(Htin and Stewart, 2022)

What does the 2022 Amendment change?

1. Certain company documents, including Agreements, Deeds, and Resolutions can now be signed electronically
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— has now been made permanent within the *Corporations Act*
3. Certain company documents can be ‘sent’ in physical or digital form, including made available on a Website, from April 1, 2022
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.

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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 that may be specified under State Legislation
4. To retrospectively e-sign documents

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