

ELECTRONIC ISSUES – THE RISKS ASSOCIATED WITH ELECTRONICALLY SIGNING YOUR TRUST DEEDS

Senior Lawyer at Topdocs Legal, Lav Chhabra, outlines the key legislative reasons that preclude individual trustees from using electronic signatures to execute their SMSF and other trust deeds in NSW, QLD, SA and WA, and the complications associated with companies using electronic signatures generally.

The financial services industry is continually looking to automate the way in which advisers and their clients both connect with each other, and operate their entities.

Electronic signatures are one example where advisers are looking to gain some efficiencies in the operation of their business, not only for themselves but for their clients as well. Although electronic signatures have been around for a number of years, they are a technology that has been fairly slow to adopt by industry professionals due to the uncertainty relating to their validity for executing the various types of legal documents.

As the associated legal practice of Topdocs, a leading provider of legal documentation in Australia, we took it upon ourselves to thoroughly

research the legislative provisions governing electronic signatures to come to a conclusion as to whether advisers can utilise them to enable trustees to execute their deeds electronically.

In this context, we are looking specifically at the execution of deeds.

The conclusion we came to is this - the witnessing requirements relating to the execution of deeds by individuals in many of the Australian states preclude the electronic execution of trust deeds in their jurisdiction by individual trustees. Further, across the board, there are many complications in corporate trustees using electronic signatures under the Corporations Act 2001 (Cth).

The consequence of this conclusion? You as a financial adviser may be inadvertently putting yourself and your clients at risk of creating ineffective structures if you are utilising electronic signatures for your trust deeds.

What is the basis of our conclusion?

The general requirements for an individual to validly execute a deed are outlined in the relevant state based statutes. Almost all jurisdictions require that, amongst other things, the signature of an individual signing a deed be witnessed by an independent person.

The relevant state based Acts, and their requirements in relation to witnessing, are outlined below:

State/Territory	Act	Signatures required to be witnessed?
VIC	Property Law Act 1958 (Vic)	No
NSW	Conveyancing Act 1919 (NSW)	Yes
QLD	Property Law Act 1974 (Qld)	Yes
ACT	Civil Law (Property) Act 2006 (ACT)	Yes
TAS	(Conveyancing and Law of Property Act 1884 (Tas)	Yes
SA	Law of Property Act 1936 (SA)	Yes
WA	Property Law Act 1969 (WA)	Yes
NT	Law of Property Act 2000 (NT)	Yes

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As you can see, all states except for Victoria specifically require individuals' signatures to be witnessed when they execute a deed. Although, the Property Law Act 1958 in Victoria does not specify a requirement that the signature of an individual signing a deed be witnessed by an independent person, in practice, signatures of individuals are witnessed in Victoria as well.

Why is this important to note?

The Electronic Transactions Act 1999 (Cth) (ETA Cth) specifies the requirements for electronic signatures in relation to matters that fall under the laws of the Commonwealth. Each State and Territory has also enacted similar legislation which specifies the requirements for electronic signatures in relation to matters that fall under their jurisdiction. The various Acts not only outline the specific procedures and elements that must be present for a document to be signed electronically, but also

outline a number of exemptions (that is, documents that cannot be signed electronically). A key exemption outlined in many of the Acts is a document that is required to be signed by a witness.

The table below lists the jurisdictions which have specifically excluded documents with a witnessing requirement from the application of electronic signatures provisions of their Electronic Transactions Act.

State/Territory	Act	Sections Authorising Electronic Transactions and Signatures	Are documents that require witnessing exempted?
NSW	Electronic Transactions Act 2000	S7 & S9	Yes
QLD	Electronic Transactions Act 2001	S8 & S14	Yes
SA	Electronic Transactions Act 2000	S7 & S9	Yes
WA	Electronic Transactions Act 2011	S8 & S10	Yes

It should be noted that in all jurisdictions, other exclusions also apply in addition to documents that are required to be witnessed. However, these documents are outside the scope of our enquiry.

The conclusion? As the statutes in NSW, QLD, SA and WA, which specify the execution requirements for a deed in their jurisdiction, specifically require individual signatures to a deed to be witnessed, and the Electronic Transactions Acts of these States specifically exclude documents that require witnessing from being able to be executed electronically, individual trustees in these jurisdictions are unable to rely on

the Electronic Transactions Act of their jurisdiction for the purposes of using electronic signatures to execute their deeds. Therefore, they cannot effectively execute deeds electronically.

What about Companies?

Companies are governed by the Corporations Act 2001 (Cth) (Corporations Act). As the Corporations Act is an act of the Commonwealth, electronic transactions (including electronic signatures) under it will need to be assessed under the ETA Cth.

Section 127 of the Corporations Act outlines how a company may execute a document (including a deed). In short, it states that

companies may execute documents in the following manner:

A company may execute a document without using a common seal if the document is signed by:

- (a) 2 directors of the company; or
- (b) a director and a company secretary of the company; or
- (c) for a proprietary company that has a sole director who is also the sole company secretary-- that director.

A company with a common seal may execute a document if the seal is fixed to the document and the fixing of the seal is witnessed by... (refer to (a), (b) and (c) above).

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If a company executes a document in a manner outlined above, third parties are able to rely on the assumption provided in Sections 129(5) or (6) (as the case may be) of the Corporations Act that the document has been duly executed by the Company.

Section 127 further states that the section does not limit the ways in which a company may execute a document, including a deed. This means that, for example, a company could execute a document under the terms of its constitution using a method that may differ from the methods outlined in Section 127. However, should a company sign a document in a manner not specifically outlined in Section 127, the assumptions that the document has been duly executed by the company do not apply.

The ETA Cth, much like its state based counterparts, outlines the procedures and elements required to sign a document electronically. Further, the regulations made under the ETA Cth, the Electronic Transactions Regulations 2000 (ETR Cth) provide a list of Commonwealth laws that the ETA Cth does not apply to. Corporations Law is specifically excluded in relation to the provisions of the ETA Cth which specify the requirements for electronic signatures.

Corporations Law is not defined in the ETA. However, assuming that the reference to 'Corporations Law' in the ETR Cth includes the Corporations Act, we can conclude that companies may not rely on the provisions of the ETA Cth to sign documents electronically under Section 127 of the Corporations Act.

Therefore, should a company sign a deed electronically, a third party may not rely on the assumptions that the document has been duly executed by the company. Consequently, there is a risk that third parties, such as banks, may not accept the deed as being executed correctly or may require further information to confirm effective execution of the deed by the company.

What are the risks if a deed is signed electronically, despite the legislation not allowing it?

There are many risks associated with defective execution of deeds, the primary risk being that the document may be deemed invalid or unenforceable.

If this was the case, this opens up the trust or SMSF to a wide range of potential risks, including challenges from beneficiaries and taxation consequences. This puts both yourself as the adviser, and your clients, at significant risk.

The increased litigation in the SMSF industry of late, particularly in the context of death benefits, should serve as a reminder of the very real consequences that can occur should a document be deemed to be invalid or unenforceable.

So where to now?

Like many practitioners, we believe the legislation will catch up over time to enable the execution of deeds electronically in all Australian jurisdictions.

However, as the legislation currently stands, at least half of the Australian states preclude individuals from signing deeds electronically. This, in addition to the issues associated with the electronic execution of documents by companies, means that advisers and their clients are currently at risk if advisers provide an offering that incorporates the ability to execute deeds electronically as a standard course of action.

More information

Should you have any queries or require more information, please contact the team at Topdocs on 1300 659 242.

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