

In recent years, we have seen a significant trend away from “wet ink” signing of documents as technological advances and counterparties being spread across various geographical locations, has normalised the use of electronic signatures (**eSignatures**).

Despite it now being relatively common for companies and persons to sign documents using eSignature, there is no universal and clear legal regime that recognises eSignatures for all documents.

A general summary of the law governing eSignatures is as follows:

- **Common Law** – A legally binding agreement (distinct to a deed) does not need to be in writing. As such, a contract can be formed using an eSignature so long as the general law requirements for a contract are met, including that there is an intention to be bound.
- **Statute Law** – The Commonwealth and every State and Territory have passed similar, although different, laws regarding the use of eSignatures. Whilst the general approach has been to facilitate the use of eSignatures, there are numerous carve-outs and exclusions from documents that can be electronically signed (noting in particular powers of attorney and wills).

- **Section 127 Corporations Act 2001** – Pre-COVID-19 the law was not settled on the validity of executing a document using eSignatures for the purpose of section 127 of the Corporations Act (being the most common way for Australian companies to execute agreements). However, the Federal Treasurer on 5 May 2020 implemented temporary measures to provide certainty that company officers can use eSignatures for the purposes of section 127 of the Corporations Act. This interim measure has effect for six months from its commencement.
- **Deeds** – Electronically formed deeds are unlikely to satisfy the “paper parchment and vellum” requirements, together with the requirements for the execution of deeds to be witnessed. As such, it is generally prudent to execute Deeds using wet ink. However, if a Deed is signed using eSignatures or otherwise fails to meet general law requirements, the rights and obligations it sets out can still be enforced, provided it can satisfy the formalities for an agreement at law – a useful saving position.

We note that the law in this area is still evolving and, accordingly, recommended practices in this area are also likely to evolve.

The reference table on the next page details whether eSignatures are permitted for various documents across all States and Territories. Where an eSignature is used, it is important that the eSignature satisfies the requirements set out in the applicable *Electronic Transactions Act*, including that the parties consent to electronic execution, whether within the agreement or by way of independent confirmation.

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Reference table regarding valid execution using E-signatures* (Yes, No, Legally Uncertain ¹)									
	CTH	WA	ACT	NSW	NT	QLD	SA	TAS	VIC
General Agreements by Individuals	Yes								
General Agreements under Section 127 Corporations Act	Yes ²								
Deeds by Individuals	Not relevant	No	No	Yes ³	No	Yes	No	No	Yes ⁴
Deeds under Section 127 Corporations Act	Legally Uncertain ⁵					Yes ⁶			
Documents required to be witnessed	Not relevant	No	Legally Uncertain	No	Legally Uncertain	No	No	Legally Uncertain	Legally Uncertain
Documents required to be personally served	Not relevant	No	No	No	No	No	No	No	No
Court Documents	No ⁷	Legally Uncertain	Legally Uncertain	Yes ⁸	Legally Uncertain	Yes ⁹	Legally Uncertain	Legally Uncertain	Legally Uncertain
Power of Attorney	Not relevant	No	Legally Uncertain	No ⁸	No	Yes ⁹	No	No	Yes ¹⁰
Wills	Not relevant	No	Legally Uncertain	No ⁸	No	No	No	No	Yes ¹⁰

* Note: regulators (including land registry offices) may have different approaches and requirements regarding the use of eSignatures which should be checked and confirmed in advance of any executions relating to documents that will likely need to be filed with a regulator.



- ¹ 'Legally Uncertain' in this table refers to the fact that, whilst eSignatures are not expressly prohibited for the relevant document, it is not expressly permitted and there are legal reasons to suggest an eSignature would not be accepted as valid. Therefore, best practice for these documents is to use a wet ink signature.
- ² Federal Treasurer has implemented temporary changes to alter the operation of section 127 to give certainty that when a company officer signs a document electronically (including an electronic document), the document has been validly executed.
- ³ Under s 38A of the Conveyancing Act 1919 (NSW) (**NSW Act**), a deed may be created in electronic form and electronically signed and attested for the purposes of Part 3 of the NSW Act.
- ⁴ On 12 May 2020, the VIC Government made the COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020 (**VIC Regulations**) to modify the Electronic Transactions (Victoria) Act 2000 and legislation regulating statutory declarations, powers of attorney and wills to provide for electronic signatures. Essentially, the VIC Regulations have modified the 'no invalidity' provision so that s 9 of the Vic ETA applies (i.e., a transaction is not invalid because it took place wholly or partly by means of one or more electronic communications). The VIC Regulations have a maximum 6 month duration.
- ⁵ Whilst the Federal Treasurer has implemented temporary changes to validate the use of eSignatures for the purpose of section 127 of the Corporations Act in relation to General Agreements, given the established common law requirements that deeds be in writing, absent express confirmation from the Treasurer, we continue to express hesitation as using eSignature for deeds being signed in accordance with section 127 and recommend continuing to sign these documents using wet ink.
- ⁶ The Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Amendment Regulation 2020 (**QLD Regulations**) allows documents, including deeds by companies, to be signed electronically. The temporary QLD Regulations have unequivocally abrogated the common law requirement that a deed had to be written on paper or parchment and removes the requirement for a deed signed by an individual to be witnessed. The QLD Regulations will expire on 31 December 2020.⁷ As outlined in the table, court documents are unlikely to be validly electronically signed. However, on 23 March 2020, the Federal Court released the Special Measures in Response to COVID-19 (SMIN-1) practice note. The notice provides that the Court will temporarily allow all documents which need to be filed with the Court (including affidavits) to be signed electronically, including by having the signatory type their name in the relevant space in the signature block. The Court will also accept unsworn affidavits on the understanding that these affidavits will later be sworn or affirmed when circumstances allow. This notice remains in effect until suspended or revoked.
- ⁸ Under the Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020 (**NSW Regulations**), affidavits and statutory declarations may be signed electronically and sworn over audio visual link. The NSW Regulations provide that witnessing, and arrangements in relation to witnessing and attestation of, a document can now be undertaken through an audio visual link where the document is required to be witnessed under NSW law.
- ⁹ Under QLD Regulations, a corporation can make a general power of attorney without the need for it to be witnessed. However, the witnessing requirement remains for individuals making general powers of attorney who can now facilitate witnessing via audio-visual link. All general powers of attorney can now also be made as electronic documents and signed electronically. QLD Regulations further allows affidavits and statutory declarations to be made in the form of an electronic document and witnessed via AV link.
- ¹⁰ The VIC Regulations also purports to modify the Oaths and Affirmations Act 2018, Powers of Attorney Act 2014 and Wills Act 1997 to provide for the electronic execution and remote witnessing of statutory declarations, powers of attorney and wills.

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations, nor should they be considered a substitute for taking legal advice.