

Advisers cautioned on electronic execution of deeds

By Miranda Brownlee



While the government introduced a legislative instrument in May enabling companies to execute documents electronically, there is still uncertainty around whether this supports the valid execution of a deed, according to a law firm.

Shaun Backhaus from DBA Lawyers said while some jurisdictions have been passing their own unique legislation to allow for more documents to be signed and witnessed electronically, including deeds, it is still best to avoid the electronic execution of deeds wherever possible, given the complexity and temporary nature of the legislation.

The NSW, Victorian and Queensland governments, he said, have all introduced regulations authorising signatures on deeds and certain other documents to be witnessed via audio-visual link.

However, SMSF professionals should not attempt to make a deed electronically after 22 October 2020 under NSW law, 24 October 2020 under Victorian law and 31 December under Queensland law, he warned.

There are slight differences in the electronic signing or witnessing of documents between NSW, Victoria and Queensland, he cautioned, so it's important the criteria in each jurisdiction is closely followed to ensure a valid and legally effective document is made if electronic execution/witnessing is required.

For example, in order for electronic witnessing by audio-visual link to be effective and done in accordance with the NSW Regulations, he said, witnesses must observe the person signing the document in real time, confirm that the signature was witnessed by signing the document or a copy of the document, and be reasonably satisfied the document the witness signs is the same document, or a copy of the document signed by the signatory.

The witness must also endorse the document, or a copy of the document, with a statement specifying the method used to witness the signature of the signatory and that the document was witnessed in accordance with the NSW Regulations.

For witnessing to be done in accordance with the Victorian Regulations, the witnesses should endorse the document with a statement that they observed the signatory signing by audio-visual link in accordance with the Victorian Regulations and must be satisfied that the document was electronically signed in accordance with the Victorian Regulations and correctly endorsed, he explained.

"The Victorian Regulations also authorise deeds to be signed and witnessed in counterparts with the requirements being met even if signatures appear in only some of the copies of the documents, provided those copies include the entire contents of the document. The requirements are taken to be met so long as every signatory or party whose consent is required under the Victorian Regulations receives every copy of the document on which a signature appears," he noted.

While Mr Backhaus acknowledged that witnessing is not a strict legal requirement for deeds under Victorian law, it is best practice to have a witness attest to the execution of a deed as most people expect this to occur.

"However, a deed remains valid under Victorian law despite there being no witnesses. Witnesses are required, however, for a deed to be legally effective in most other jurisdictions including NSW," he said.

The Queensland Regulations expressly deal with the common law position, he said, by removing the need for a deed to be written on paper or parchment. Further, the Queensland Regulations also remove the witnessing requirements; however, they also provide for documents to be witnessed by audio-visual link.

“The Queensland Regulations authorise deeds to be signed and witnessed in counterparts or true copy and provides that the counterpart of true copy does not need to include the signature of any other signatory or party to the deed. Further, it provides that there is no need to include material in the deed about the method used for electronically signing the deed,” he explained.

“The Queensland Regulations also provide that a deed can be executed electronically without the consent of any other person who is to sign or be a party to the deed. While witnessing is not a strict legal requirement for deeds under Queensland Regulations, it is best practice to have a witness attest to the execution of a deed as most people expect this to occur.”

Electronic execution by companies

In addition to the laws passed in these three states, Mr Backhaus said the federal government has also temporarily modified the *Corporations Act 2001* (Cth) by way of a legislative instrument that permits companies to execute documents, hold meetings and provide notices via technology for the period commencing on 6 May 2020 and ending on 5 November 2020.

Under the determination, director and shareholder meetings may be held using one or more forms of technology to enable all persons entitled to attend to participate without being physically present in the same place. The determination provides that:

- Electronic notices of meetings must include information about how those entitled to attend can participate in the meeting.
- Every person participating in the meeting is taken for all purposes to be present at the meeting (i.e. the quorum requirement will be met).
- Votes taken at meetings must be taken using an electronic poll and not on a show of hands to give each person entitled to vote the opportunity to participate in real time or to record their vote prior to the meeting.
- All persons attending the meeting must be given an opportunity to “speak”, and this can be achieved via audio connection. Chat systems or written functions may not be sufficient under the determination as the word “speak” appears to require oral communication.
- A proxy may be appointed using one or more technologies specified in the notice of the meeting.

Companies can validly execute a document where the persons able to sign documents on behalf of a company:

- Sign a copy or counterpart of the document that is in a physical form and includes the entire contents of that document (e.g. not simply the execution page).

- Sign a document using an electronic communication method, where that method reliably identifies the person and indicates their intention in respect of the contents of the document.

However, Mr Backhaus warned that a number of law firms including DBA Lawyers feel there is still some uncertainty on the extent the determination supports the valid execution of a deed.

Mr Backhaus advised that, wherever possible, SMSF professionals should avoid electronic execution, and if clients do seek to rely on electronic execution of a deed, this should only be done where the parties are comfortable that either the NSW, Victorian or Queensland Regulations apply.

He also warned SMSF professionals that the deed cannot be made electronically if it is subject to the law of the Australian Capital Territory, the Northern Territory, Tasmania, South Australia or Western Australia as these jurisdictions have not yet enacted legislation for the electronic execution of deeds.

“If you do proceed with electronic execution, make sure that you carefully follow the criteria of each jurisdiction and ensure execution occurs prior to the deadlines. In particular, advisers forwarding documents to client for execution should follow up before the relevant deadline to confirm proper execution has been effected,” he advised.

“There may be various other obligations on a person witnessing that must be taken into account, such as ensuring no undue influence, duress or unconscionable conduct is apparent and that the person signed freely and voluntarily.”

Mr Backhaus said there may be further changes in the law in this area, especially in jurisdictions other than NSW, Victoria and Queensland.