

# Legal briefing

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## Execution of commercial documents

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This Legal briefing sets out some important issues to consider when executing commercial documents, including contracts and deeds.

If a document is not executed correctly, it may mean that the document or deed is not binding.

Some commonly used execution clauses are in Appendix 1 (for use in contracts) and Appendix 2 (for use in deeds). Appendix 3 gives a table of execution requirements for deeds in the states and territories.

## Execution of documents by government

### Non-corporate Commonwealth entities

Under the *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act), a non-corporate Commonwealth entity is a part of the legal entity of the Commonwealth. Therefore, it executes documents in the name of the Commonwealth.

The accountable authority of a non-corporate Commonwealth entity, or their delegate, may sign documents on behalf of the Commonwealth. This power is usually also delegated to other officials in the agency. If a delegate is signing, the delegate should ensure that it is within the scope of their delegation to execute any document. It is common for delegations to be limited by reference to things like dollar value, types of documents, and subject matter.

There may also be additional approvals that will need to be addressed (for example, where the document includes an indemnity or the arrangement deals with the acquisition or disposal of interests in land).

For more information on delegations and authorisations, see AGS Legal briefing No 74, [Delegations, authorisations and the Carltona principle](#).

## Corporate Commonwealth entities

A corporate Commonwealth entity is legally separate from the Commonwealth. This means that it will usually be executing documents in its own name.

The governing legislation of a corporate Commonwealth entity will often include provisions dealing with the execution of documents, including delegation.

If the governing legislation does not prescribe a method of execution, you should ensure that the document is executed by an appropriately authorised official or officials in accordance with the usual legal requirements for the type of document.

Some corporate Commonwealth entities have particular legislation governing their establishment and operations. The entity's legislation may give it the legal right to enter into a particular arrangement, including by executing a document or deed in its own name. However, other entities' legislation may not give them this legal right. If not, a document or deed may need to be entered into in the name of the Commonwealth. In this situation, you should seek legal advice.

If the corporate Commonwealth entity is a Commonwealth company under the PGPA Act, see 'Australian companies (including Commonwealth companies)' below.

For more information on delegations and authorisations for corporate Commonwealth entities, see AGS Fact Sheet No 11, [Corporate Commonwealth entities – authorisations and delegations](#).

'Some corporate Commonwealth entities have particular legislation governing their establishment and operations.'

## States and territories

Similar considerations apply to execution by a state or territory, or by a state or territory statutory authority. If you are unsure about what execution requirements apply, you should seek legal advice.

## Australian companies (including Commonwealth companies)

### Corporations Act companies

The *Corporations Act 2001* (Cth) governs execution of documents by Australian Corporations Act companies (including Commonwealth companies under the PGPA Act).

#### Section 110A

Under s 110A of the Corporations Act (in Div 1, Pt 1), documents (including deeds) may be signed in a flexible and technology neutral manner. This means companies do not have to use any specific type of technology or platform for signing documents. Section 110 provides that the Division applies to documents including deeds to be signed by a person under s 126 or s 127.

Under s 110A(2) the method of signing must:

- identify the person
- indicate the person's intention in respect of the information recorded in the document
- indicate that the method was either as reliable as appropriate for the purposes or proven in fact to have fulfilled the person's intention.

The Explanatory Memorandum notes that these requirements mirror those in s 10(1)(a) and (b) of the *Electronic Transactions Act 1999* (Cth).

Section 110A(3) sets out certain things in relation to which a person is not required to indicate their intention for the purposes of s 110A(2)(a). These include the signature of another person, and the common seal. The note to this section provides that it is to accommodate minor differences which arise from the way a document is signed.

Section 110A(4) provides, among other things, that it is not a requirement that each party sign the document in the same manner. For example, one director may sign by hand and another may sign by electronic means. Split execution is permitted. Further, it is no longer a requirement that a person sign the entire contents of the document.

Section 110A(5) allows a person to sign a document in more than one capacity, by signing only once, if the document requires or permits this and states the capacities in which the person is signing the document.

### Execution methods

An Australian Corporations Act company (including a Commonwealth company under the PGPA Act) may execute a document in one of 5 ways:

- by affixing the common seal
- by the company officers without a common seal
- by an agent
- by an attorney
- by an alternative method in the company's constitution.

'The common seal is an implement (typically a stamp) used to place a mark or impression on a document to authorise or agree to the document.'

#### *Execution by affixing the common seal*

An Australian company may sign a document by affixing its common seal. Execution using a common seal is increasingly uncommon in Australian commercial practice.

The common seal is an implement (typically a stamp) used to place a mark or impression on a document to authorise or agree to the document. The common seal includes the name of the company and its Australian Company Number (ACN) or its Australian Business Number (ABN), where the last 9 digits of its ABN are the same as, and in the same order as, the last 9 digits of its ACN.

If a company chooses to execute a document using its common seal then usually the common seal must be affixed in the presence of:

- 2 directors of the company
- a director and a company secretary of the company, or
- the sole director of a proprietary company, if that sole director is also the company secretary or where the company does not have a company secretary.

These witnesses indicate their presence by signing the document next to the common seal. The company's constitution could affect the way a company seals a document and set out how the common seal may be affixed. For example, the constitution may require that the company's board of directors pass a resolution authorising the affixing of the common seal to a document.

The company can use either physical or electronic means to witness the affixing of the common seal.

#### *Execution by the company officers without a common seal*

Under the Corporations Act, Australian companies are not required to have a common seal. If an Australian company does not have a common seal or does not wish to use its common seal, certain company officers can execute a document by signing it in accordance with s 127(1) of the Corporations Act. The document must be signed by:

- 2 directors of the company
- a director and a company secretary of the company, or
- the sole director of a proprietary company, if that sole director is also the company secretary or where the company does not have a company secretary.

Under s 127(3A), a document can be executed as a deed without the execution being witnessed and regardless of whether it is in physical or electronic form. There is no requirement for the entire contents of the document to be signed. As for execution by agents, delivery is not required for a deed which is executed under s 127(1) or (2).

#### *Execution by agent*

Under s 126, an agent can exercise a company's power to execute documents, including deeds. The power to act as the company's agent can be conferred by a resolution of the board of the company. Refer to 'Execution by attorney or agent' below.

Unlike the position at common law, the agent is not required to be appointed by a deed. Also, the agent may exercise the company's powers to execute documents and deeds without them being required to be on paper. Execution does not require a witness and delivery is not required.

There is potentially some risk in relying on the Corporations Act provisions for execution by agents where these differ from state and territory requirements for execution by individuals. This is because the law of the states and territories may prevail over Commonwealth law to the extent of inconsistency, which is a reversal of the usual rule in this regard. So it would be prudent to require agents to be appointed under a deed and the agent's execution to be witnessed.

### *Execution by attorney*

Refer to 'Execution by attorney or agent' below.

### *Execution by alternative method in company's constitution*

A company's constitution may provide an alternative method by which the company may execute a document. However, it is uncommon for a constitution to prescribe an alternative method of execution. The company's constitution should be consulted and you should seek legal advice if you are relying on an alternative method of execution.

## **Corporations Act assumptions**

Under the Corporations Act, a person dealing with an Australian company is entitled to rely on certain assumptions, including that a document will bind the company if it appears to be signed in accordance with s 127(1) (method 2 above) or if it is sealed and witnessed in accordance with s 127(2) (method 1 above).

Where a document (including a deed) has been executed by an agent in accordance with s 126 of the Corporations Act (method 3 above), a person is entitled to assume that a person the company holds out to be its agent was duly appointed and has the authority customarily exercised or performed by an agent of that kind from a similar company.

Note that the law relating to agency and deeds will continue to apply regardless of the right to rely on assumptions as provided for under the Corporations Act.

See 'Execution by attorney or agent' below for more information.

## **Execution by companies not incorporated or under external administration**

Special rules apply to execution of documents by companies that have not been incorporated yet or that are being externally administered (for example, companies in liquidation, administration or receivership). For example, subject to certain approvals, only the administrator acting as an officer of that company, and not the officers of the company, can perform or exercise the powers and functions of a company under administration. If you are dealing with such a company, you should seek legal advice.

## **Aboriginal and Torres Strait Islander corporations**

### **Execution methods**

A *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act) corporation may execute a document in one of 5 ways:

- by affixing the common seal
- by the corporation officers without a common seal
- by an agent
- by an attorney
- by an alternative method in the company's constitution.

Note that the CATSI Act has not been amended to allow for deeds to be in electronic form or to be signed electronically.

*Execution by affixing the common seal*

A CATSI Act corporation may sign a document by affixing its common seal. The common seal includes the corporation's name and its Indigenous Corporation Number (ICN).

If the corporation chooses to execute a document using its common seal then usually the common seal must be affixed:

- in the presence of 2 directors of the corporation
- in the presence of a director and a corporation secretary of the corporation, or
- for corporations with only one director, by that director.

As for Corporations Act companies, similar considerations apply to CATSI Act corporations concerning witnesses.

*Execution by the corporation officers without a common seal*

A CATSI Act corporation is not required to have a common seal. If the corporation does not have a common seal, or does not wish to use its common seal, a document can be executed by being signed by:

- 2 directors of the corporation
- a director and a corporation secretary of the corporation, or
- for corporations with only one director, that director.

*Execution by agent*

An individual acting with a CATSI Act corporation's express or implied authority and on behalf of the corporation may execute a document (other than a deed). This individual is usually referred to as an authorised signatory or authorised representative. The power to act as the corporation's agent can be conferred by a resolution of the board of the corporation. Refer to 'Execution by attorney or agent' below.

*Execution by attorney*

Refer to 'Execution by attorney or agent' below.

*Execution by alternative method in corporation's constitution*

A CATSI Act corporation's constitution may provide an alternative method by which the corporation may execute a document. However, it is uncommon for a constitution to prescribe an alternative method of execution. The corporation's constitution should be consulted and you should seek legal advice if you are relying on an alternative method of execution.

**CATSI Act assumptions**

Under the CATSI Act, a person dealing with a CATSI Act corporation is entitled to rely on certain assumptions, including that a document will bind the corporation if it appears to be signed in accordance with s 99-5(1) (method 2 above) or if it is sealed and witnessed in accordance with s 99-5(2) (method 1 above).

Where a document (other than a deed) has been executed by an agent in accordance with s 99-1 of the CATSI Act (method 3 above), a person is entitled to assume that a person held out by the corporation to be its agent was duly appointed and has the authority customarily exercised or performed by an agent of that kind of a similar corporation.

As for Corporations Act companies, similar considerations in relation to deeds and the law of agency apply to CATSI Act corporations.

**Execution by corporations not incorporated or under external administration**

As for Corporations Act companies, special rules apply to execution of documents by CATSI Act corporations that have not yet been incorporated or that are being externally administered.

## Individuals

An individual may execute a document by simply signing it. Putting aside situations where witnessing is required by law (such as in the case of a deed or where legislation requires certain other instruments to be witnessed), for evidentiary reasons it is also often prudent to consider whether an individual's signature should be witnessed by a person who is not party to the document.

Most jurisdictions permit the execution of documents electronically. However, certain precautions and steps should be taken, bearing in mind any operational and legal risks that might arise from executing the specific document or transaction electronically.

To manage these risks, and also to prove the validity of execution by the signatory or delegate, it is important to retain suitably detailed records of the steps taken and factors considered in connection with electronic execution of each document. The steps may be built into a process or procedure document and, to the extent relevant, should consider whether documents can be electronically created and signed and whether remote witnessing is permitted in the jurisdiction.

‘Most jurisdictions permit the execution of documents electronically.’

## Signing

### Signing generally

The common law accepts that a party can sign documents in ways other than a traditional pen and ink signature (for example, marks, pseudonyms, printed names and stamps).

The key characteristics of a signature as distinct from ordinary writing are that a signature and the act of signing should:

- evidence the signatory's **identity** (that is, who signed the document)
- evidence the signatory's **intention to be legally bound** by the signed document.

Ideally, a signature will also assist in the **authentication** of a document (for example, showing that a document is not merely a draft) and will **make it difficult for a signatory to deny** that they are bound by a document (absent evidence to the contrary such as fraud or forgery).

### Electronic execution generally

Under the *Electronic Transactions Act 1999* (Cth) (ETA) and similar state and territory legislation,<sup>1</sup> many documents may be validly created and signed electronically.

Under the ETA and the similar state and territory legislation, if a law requires a person's signature, there are broadly 3 requirements for a valid electronic signature:

- **Identification** – the recipient must be able to determine from the method of execution (a) the identity of the person signing; and (b) that the person signing intends to be bound by the information communicated (typically an electronic signature accompanied by the signatory's name and position).
- **Reliability** – the method used to sign must be reliable. This is objectively determined by considering all relevant circumstances and the purpose for which the signature is required (it may be sufficiently reliable that a password protected email account is used to send the communication or that software is used which requires a password or authentication before a digital signature is inserted).
- **Consent** – the counterparty to the document being electronically signed must agree to the document being signed electronically. If the Commonwealth is the receiving entity, it may impose technical requirements in connection with the signature.

While each document must be considered in context, examples of documents which may be signed electronically include:

- correspondence (including letters, memoranda of understanding and emails)

<sup>1</sup> The relevant state and territory Acts are the *Electronic Transactions Act 2001* (ACT), the *Electronic Transactions Act 2000* (NSW), the *Electronic Transactions (Northern Territory) Act 2000* (NT), the *Electronic Transactions (Queensland) Act 2001* (Qld), the *Electronic Communications Act 2000* (SA), the *Electronic Transactions Act 2000* (Tas), the *Electronic Transactions (Victoria) Act 2000* (Vic) and the *Electronic Transactions Act 2011* (WA).

- contracts (preferably where there is no witnessing requirement – as to which, see our comments below)
- work orders, extensions and variations
- deeds, including deeds poll, but only where execution of these deeds is governed by New South Wales, Victorian or Queensland law
- land registry documents which may be signed and lodged through an Electronic Lodgement Network (ELN).

## Execution of deeds by individuals

As with execution of documents generally, the requirements for execution of deeds will vary depending on the governing law and the types of entities that are party to the deed. The requirements outlined above will continue to apply. There are also specific formalities that apply to the execution of deeds.

Note that execution of documents, including deeds by Corporations Act companies, is discussed earlier in this Legal briefing. This section concerns execution by company agents or attorneys (being individuals).

A deed cannot be executed in part only. If an attempt is made, by use of any form of words, to limit the effect of execution, the result will be that either the purported execution will be altogether ineffectual or the deed will be altogether binding.

### Specific formalities applicable to the execution of deeds

Subject to statutory modification, the execution of a deed consists of 3 acts:

- signing
- sealing
- delivery.

At common law, deeds must be on paper, parchment or vellum.

Below is a brief description of the requirements of each act necessary for the execution of a deed as well as how these acts and the ‘paper rule’ have been modified by legislation.

#### *Signing*

Statutes in all jurisdictions require that a deed be signed. In all states and territories, except Western Australia and the Australian Capital Territory, statutes provide that an individual may also meet this requirement by affixing their mark to the deed.

‘At common law, sealing is essential to the validity of a deed.’

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#### *Sealing*

At common law, sealing is essential to the validity of a deed. A seal was originally an impression of a person’s crest or coat of arms. As the use of personal seals by individuals became rarer, the sealing process became artificial.

Legislation in all jurisdictions has simplified compliance with the requirement of sealing. Generally speaking, the effect of this legislation is that a deed is deemed to have been sealed where the following 2 conditions are met:

- it is described as a deed or is expressed to have been sealed
- it is attested (witnessed) in accordance with the relevant legislation.

#### *The deed is described as a deed or is expressed to have been sealed*

In all states and territories, except Victoria, the words ‘Executed as a deed’ are sufficient to meet this requirement. In the Australian Capital Territory, a deed that is executed and attested in accordance with the signing and attestation requirements will be taken to be sealed. In Victoria, the words ‘Signed, Sealed and Delivered’ should be used.

#### *The deed is attested (witnessed) in accordance with the relevant legislation*

The purpose of attestation is to provide a witness who can be called to prove execution. Persons present when the instrument is executed are not attesting witnesses unless they sign as witnesses attesting the execution.

In all states and territories, except Victoria and Queensland, a deed must be attested by at least one witness who is not a party to it. As a matter of best practice, attestation should be required in all cases.

There are special requirements for attestation of wills, and ordinary and enduring powers of attorney. These are prescribed by state and territory legislation.

Certain additional requirements also apply in New South Wales and South Australia where:

- the deed is executed by a person acting at the direction and in the presence of the party to the deed, or
- in New South Wales only, where the deed is executed by a person affixing his or her mark. In these cases, legal advice should be sought to ensure that the correct procedure is used.

There is some legal uncertainty on whether a body politic can rely on modern legislation which replaces the requirement to affix a seal. In the Northern Territory, Queensland, South Australia, Tasmania and Victoria, it is prudent to include a seal or a place for a seal for a body politic. In the case of the Commonwealth, it is also prudent to include a seal or place for a seal where execution is governed by the law of the Australian Capital Territory. If you are in any doubt about the execution requirements for a body politic, you should seek legal advice.

### *Delivery*

Delivery has always been a common law requirement of a valid deed. Traditionally, formal delivery by an individual consisted of the person touching or indicating the document and saying words to the effect of 'I deliver this my act and deed' or 'I deliver this as my deed'. A particular form of words or conduct is no longer required for delivery. Instead, what is necessary is the intention to deliver, which can be established by any words or conduct that shows that the party who executes the instrument regards it as presently binding on that party. For example, there is case law to suggest that intention will not be present unless all parties have executed the document and legal obligations have arisen.

## Electronic deeds

Legislation in New South Wales, Victoria and Queensland has abrogated or modified some of the common law requirements for deeds discussed above.

### **New South Wales**

Under New South Wales law, deeds can be electronically created, signed and attested. This applies to deeds made both by individuals and corporations (*Conveyancing Act 1919* (NSW) s 38A).

### **Victoria**

Section 12A of the *Electronic Transactions (Victoria) Act 2000* (Vic) allows for deeds to be created in electronic form and signed by electronic communication.

Section 9 of the *Electronic Transactions (Victoria) Act 2000* (Vic) provides that a requirement for the signature of a person is taken to have been met in relation to an electronic communication if:

- a method is used to identify the person and to indicate the person's intention in respect of the information communicated, and
- the method used was either:
  - as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement, or
  - proven in fact to have fulfilled the functions described in the first dot point, by itself or together with further evidence, and
- the person to whom the signature is required to be given consents to the use of the method mentioned in the first dot point.

Deeds are not required to be attested by a witness under Victorian law.



## Queensland

In Queensland, deeds may be in the form of an electronic document and may be electronically signed by both individuals and corporations (*Property Law Act 1974 (Qld) ss 46C–46G*). Electronic signing must occur via an ‘accepted method’, which means a method that:

- identifies the signatory and their intention in relation to the contents of the document, and
- is either:
  - as reliable as appropriate for the purposes for which the document is made or signed, having regard to all the circumstances, including any relevant agreement, or
  - proven in fact to have fulfilled the functions described in the first dot point, by itself or together with further evidence, and
- is consented to by each other signatory to the document (*Property Law Act 1974 (Qld) s 44*).

Deeds are not required to be attested by a witness under Queensland law.

## Statutory deeds

The above execution requirements relate to execution of deeds as that term is usually used to refer to the common law concept of a deed. Legislation may state that a document satisfying relevant requirements will be a deed or have effect as a deed, even though the document would not otherwise be a deed (for example, deeds of company arrangement under the Corporations Act or registered dealings affecting Torrens title land).

These types of statutory deeds may have different execution requirements. If legislation requires that a deed be used, it is a question of statutory interpretation whether ‘deed’ means an ordinary deed or a statutory deed. If you are uncertain of what method of execution may apply, you should seek legal advice.

## Other Australian entities

When dealing with other entities, such as local governments and universities, you should check the relevant legislation or other relevant constituent documents to determine whether the entity has the power to enter into the relevant arrangement and, if it does, the methods by which it may execute a document or deed.

If you are unclear about whether an entity has the power to enter into the relevant arrangement, or the methods by which it may execute a document or deed, you should seek legal advice.

## Foreign entities

Section 46F(5) of the *Property Law Act 1974 (Qld)* specifies that a corporation not incorporated under an Australian law should execute a deed in a way authorised by the law of the place in which that corporation is incorporated. However, other than Queensland, there is no Australian legislation which governs how foreign entities should execute documents or deeds.

As a general rule for all Australian jurisdictions, foreign entities should execute a document or a deed in accordance with the laws of their jurisdiction. Depending on the nature of the transaction, it may be appropriate to require the foreign entity to provide an opinion letter from its external legal advisers in favour of the Commonwealth entity stating that the document has been executed in accordance with all local legal requirements. For low-risk arrangements, you should obtain written confirmation from a senior officer of the entity to the same effect. For high-risk or high-value transactions, you should consider whether specific advice should be sought from a legal adviser practising in the relevant jurisdiction.

Where a foreign entity is executing a deed, it should do so by affixing its seal if it has one. If it does not have one, the execution clause should include a place for a seal to ensure that the deed complies with Australian legal requirements.

A foreign company that is carrying on a business in Australia must be registered under Pt 5B.2 of the Corporations Act. Upon registration, the foreign company receives an Australian Registered Body Number (ARBN). The foreign company must set out the following information in its business documents:

- its name
- its ARBN

- its place of incorporation or formation
- that the liability of members is limited (if appropriate).

Information on registered foreign companies, including details of directors and local agents, can be obtained from the Australian Securities and Investments Commission. This information can be used to confirm details of the officers that have executed the document.

Where execution of a document by a foreign company takes place outside of Australia, you should consider requiring the execution to be notarised by a notary public so that you can be confident that the signatories have been properly identified and the method of execution is appropriate for the relevant jurisdiction.

## Partnerships

Generally, a document (other than a deed) will be binding on a partnership if it is executed by a partner for the purposes of the business of the partnership, unless the partner:

- has no authority and the counterparty knows that the partner has no authority, or
- the counterparty does not know or believe that the signatory partner is actually a partner.

For a partnership to be bound by a deed, either all partners to the partnership or an individual authorised by all the partners (regardless of whether the individual is a partner) should execute the deed. Typically, documents or deeds will be executed by a partner on behalf of a partnership.

An authorised individual may only execute a deed on behalf of a partnership where, by a deed executed by all the partners in the partnership, they have been authorised to do so.

To verify that an individual is validly authorised to enter into an arrangement on behalf of a partnership, you should request a copy of the relevant authority given by the partnership. This authority may be set out in the partnership deed or a power of attorney. If you cannot obtain a copy of the relevant authority, you should consider requiring the individual to give a representation and warranty in the execution clause that they have authority to execute the document or deed on behalf of the partnership.

Under the Partnership Acts in each state and territory, an incorporated limited partnership (in those jurisdictions in which they exist) may execute a document:

- without using a common seal (whether it has one or not) if the document is signed by a general partner, or
- as a deed if the document is:
  - expressed to be executed as a deed
  - is executed with the use of a common seal or by being signed by a general partner.

Refer also to 'Execution by attorney or agent' below.

## Trusts

Dealing with trusts can raise complex legal issues. A trust is not a legal entity, so it cannot contract in its own right. Documents and deeds relating to trusts are entered into by the trustee of the trust, which is a legal entity.

The execution clause that should be used will depend on what type of legal entity the trustee is (for example, a company execution clause should be used if the trustee is a company). You can usually confirm the trustee has the power to enter into the arrangement by examining the trust instrument. If you are unable to confirm this, you should consider requiring the trustee to give a representation and warranty that it has the power to execute the document or deed on behalf of the trust.

While a trust is not a legal entity, it may be a tax entity. Where the trust is registered for GST purposes, it will have its own ABN. You should therefore confirm that the ABN being used is the ABN of the trust and not the ABN of the trustee. For example, for a trust where a company is trustee, the description of the party should read 'Company X ACN XXX XXX XXX ABN YY YYY YYY YYY (trustee for the Y trust)' where ABN YY YYY YYY YYY is the ABN of the trust.

To determine the risks involved in including any trust provisions or acknowledgments in the document or deed, it is important to know the nature of the trust involved.

Publicly traded trusts, such as listed property trusts and investment funds, have a high degree of public visibility of their financial circumstances through their published accounts and prospectuses. When dealing with these types of entities, the trustee will often seek to include provisions limiting their liability to the assets of the trust and include an acknowledgment in the execution clause that they are signing as 'trustee for the X trust'.

Private trusts (for example, special purpose trusts, such as property development or investment vehicles, or businesses running a trading trust) are likely to have a significantly different risk profile. Risks may arise in the context of including provisions limiting the liability of the private trust to the trust assets, particularly in the case of a small trust. This risk can also arise by inserting a reference to the trust in the execution clause (for example, signed as 'trustee for the X trust'), as this may limit liability by implication. If you are dealing with a private trust, there are some measures you can take to mitigate risks:

- Ensure the document contains appropriate representations and warranties covering all eventualities. These need to be tailored for the circumstances, but they could include words in the interpretation section to the effect that 'if [Contractor] is a trustee, [Contractor] enters this contract personally and in its capacity as trustee and represents and warrants that it has the power to perform its obligations under this contract'.
- Obtain a copy of the trust deed to find out whether the transaction is within the scope of the trust and the extent to which the trustee is indemnified.
- Have a financial adviser review the financial statements of the trust, and consider the assets of both the trust and the contracting party in its own right.

Caution should be exercised in arrangements involving private trusts. Legal advice should be sought to ensure that the arrangements and matters concerning the description of the parties in the documents or deeds for those arrangements, and the execution of those documents or deeds, are appropriate.

## Incorporated associations

You should ask for a copy of the association's rules and statement of purposes to determine:

- who is authorised to sign a document on behalf of the association (usually, 2 committee members)
- whether the document to be executed is one that the association can validly enter into.

Generally, it is the act of registration that establishes an incorporated association as a legal entity. The association's status as a legal entity in turn gives it the capacity to enter into arrangements. You should ensure that the association is in fact incorporated by checking the status of its incorporation under the relevant state or territory associations incorporation legislation.

## Unincorporated associations

An unincorporated association is not a legal entity, so it cannot contract in its own right. As a general rule, arrangements involving unincorporated associations should be treated with care. You should seek legal advice where a party is an unincorporated association.

## Execution by attorney or agent

### Power of attorney

In some cases, a party will execute a power of attorney authorising a person to bind it in certain circumstances. Powers of attorney are subject to different statutory requirements in each state and territory. You should ask to see a copy of the power of attorney to check that:

- it is current
- it appears to be executed in a way which will bind the other party
- it covers execution of the document or deed in question
- it has been registered (if required).

In Tasmania, a power of attorney must be registered in all circumstances. Registration is not required in South Australia, Victoria and Western Australia. In South Australia and Western Australia, for the attorney to have

power to exercise dealing in relation to land, the relevant power of attorney document will need to be filed/ deposited with the relevant land registry. In the other states and territories, a power of attorney must be registered:

- in New South Wales, if it gives the attorney the power to execute a deed or to transfer an interest in land (other than a lease or an agreement for a lease for not more than 3 years)
- in the Australian Capital Territory and Queensland, if it gives the attorney the power to execute a deed or to transfer an interest in land, to enable a dealing with land by the attorney to be registered
- in the Northern Territory, if it gives the attorney the power to exercise dealings in relation to land (other than a lease of land for a period of not more than one year).

It may be prudent to include in the execution clause a statement from the attorney that the attorney has no knowledge that the power of attorney has been revoked.

## Agents

When a party intends to execute an agreement using an agent, it is important to ensure that the principal has given the agent the requisite authority. As discussed earlier, the Corporations Act allows agents of Corporations Act companies to execute deeds without necessarily being appointed by a deed. If you are unsure about whether an agent has the requisite authority, you should seek legal advice.

Where an agent is proposing to execute a document or deed on behalf of a principal, you should ask to see a copy of the power of attorney or other deed authorising the agent to execute the document or deed.

## Execution by counterparts

It is common commercial practice for parties to execute documents by exchanging counterparts. This method is legally effective for contracts.

Apart from where a deed is signed by a Corporations Act company or in Queensland, the legal position for execution of deeds in counterparts is less clear owing to the 'delivery' formality requirement for deeds. Nonetheless, it is common commercial practice to execute deeds by counterparts.

The position on execution of deeds in counterparts is clearer for Corporations Act companies. The Corporations Act permits deeds signed by companies to be executed in counterparts. The *Property Law Act 1974* (Qld) has also recently been amended to confirm that entities executing deeds in Queensland can do so in counterparts.

Except to the extent that the legislation permits execution of deeds in counterparts, each party should exchange a duly executed counterpart of the whole deed. To mitigate against the risk created by the 'delivery' requirement, it is also prudent to include a clause in the deed to record the parties' agreement that the deed may be executed in counterparts.

## Witnessing

Certain documents, such as deeds in most jurisdictions, must be attested by a witness.

Normally contracts do not require witnessing, but it would be prudent to check the requirements of any legislation that applies to the arrangement. Absent any legislative requirement, a witness is not required in order to ensure legal effectiveness. However, it is common for contracts to be witnessed for evidentiary reasons. For example, a witness may be able to confirm whether the signatory did in fact sign the document if this were ever disputed.

In some jurisdictions there have been statutory modifications to permit witnessing by audio-visual link. However, subject to these modifications a witness needs to be physically proximate when the signatory signs and must see the physical act of execution before attesting to that fact by themselves signing the same document. These requirements pose a difficulty in certain contexts, such as any requirements for social distancing.

'Certain documents, such as deeds in most jurisdictions, must be attested by a witness.'

## New South Wales

Any document which is required to be witnessed under New South Wales law can be witnessed by audio-visual link (*Electronic Transactions Act 2000* (NSW) s 14G) (for example, by using Zoom or Skype with video).

A person witnessing the signing of a document by audio-visual link must (s 14G(2)):

- observe the person signing the document (the signatory) sign the document in real time
- attest or otherwise confirm they witnessed the signature by signing the document or a copy of the document
- be reasonably satisfied the document they sign is the same document, or a copy of the document signed by the signatory
- endorse the document, or the copy of the document, with a statement:
  - specifying the method used to witness the signature of the signatory
  - that the document was witnessed in accordance with s 14G of the *Electronic Transactions Act 2000* (NSW).

The following is an example of wording that might be used where a document is witnessed by audio-visual link under New South Wales law:

This document was witnessed and signed over audio-visual link in accordance with section 14G of the *Electronic Transactions Act 2000* (NSW)

This wording should be inserted immediately below the signature of the witness.

A witness may confirm the signature was witnessed by signing a counterpart of the document, or, if the signatory scans and sends a copy of the signed document electronically, by countersigning the document as soon as practicable after witnessing the signature (s 14G(3)).

## Victoria

Section 12 of the *Electronic Transactions (Victoria) Act 2000* (Vic) permits witnessing by audio-visual link. For witnessing by audio-visual link to be valid, the following requirements must be met:

- The witness saw the signatory sign the document.
- The witness is reasonably satisfied that the document signed as a witness is the same document or a copy of the document.
- The witness includes a statement on the document signed as a witness that all requirements of s 12 of the *Electronic Transactions (Victoria) Act 2000* (Vic) have been met.
- The above requirements all occurred on the same day.

The following is an example of wording that might be used where a document is witnessed by audio-visual link under Victorian law:

This document was witnessed and signed over audio-visual link in a manner which met the requirements of section 12 of the *Electronic Transactions Act (Victoria) 2000* (Vic).

This wording should be inserted immediately below the signature of the witness.

The *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic) also provides for witnessing via audio-visual link with regard to the *Oaths and Affirmations Act 2018* (Vic), *Powers of Attorney Act 2014* (Vic) and *Wills Act 1997* (Vic).

## Queensland

In Queensland, a 'special witness' can witness certain documents, including affidavits and declarations, remotely via audio-visual link (*Oaths Act 1867* (Qld) ss 31E, 31J). Special witnesses include Australian legal practitioners, justices or commissioners for declarations and notary publics (s 12). For witnessing by audio-visual link to be valid, the following requirements must be met:

- The audio-visual link enables the witness to be satisfied, in real time, by the sounds and images made by the link, that the signatory is signing the document.
- The witness is satisfied that the signatory is freely and voluntarily signing the document.

- The witness must confirm the document as soon as practicable after witnessing it, which may or may not be the day on which the document is witnessed.
- The person may confirm a document as the document witnessed by the person only if the person is satisfied the document:
  - is the document signed by the signatory or substitute signatory
  - is a true copy of the document signed by the signatory or substitute signatory
  - is a counterpart for the document signed by the signatory or substitute signatory.
- After a witness confirms a document over audio-visual link, the witness must give the document, a true copy or a counterpart of the document to the signatory or the person the signatory directs the document to be given.

Where a corporation or the state executes a deed by affixing its seal, the affixing of the seal can also be witnessed via audio-visual link (*Property Law Act 1974* (Qld) ss 46F(3), 46GA(3)). Witnesses are not required where deeds are signed by individuals, partnerships or unincorporated associations (*Property Law Act 1974* (Qld) ss 46E, 46G).

## Other jurisdictions

During the COVID-19 pandemic from 2020 to 2022, various temporary measures were put in place in most jurisdictions to allow for remote witnessing of certain documents. Aside from New South Wales, Victoria and Queensland, where the arrangements have been made permanent, these temporary measures have now lapsed. The exception is Tasmania.

### Tasmania

In Tasmania, the COVID-19 Disease Emergency Notice 18/2020 under s 17(1) of the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Tas) permits remote witnessing by audio-visual link of certain types of documents. This includes statutory declarations under s 14 of the *Oaths Act 2001* (Tas) but does not include deeds. For the remote witnessing to be valid, the following requirements must be met:

- The person observes, in real time, the action being taken.
- The person satisfies themselves that the document in relation to which the action is taken is the same document, or a copy of the document, to which the person is to apply their signature in accordance with the next subparagraph.
- The person attests to the observation made by signing the document, or a copy of the document, and endorsing the document, or the copy of the document, with a statement specifying that the document was sworn, made or signed, respectively, and witnessed, in accordance with this notice.

Further Disease Emergency Notices (2/2021 and 12/2021) have provided for electronic service, signing and witnessing of other types of documents, including certain documents under the *Local Government Act 1993* (Tas).

## Solutions for jurisdictions which do not permit the electronic creation and signing of deeds

### Using contract form instead of a deed

Agreements that may originally be intended to be created in the form of a deed but are capable of satisfying the formalities of a contract (that is, essentially where consideration is passing) and which do not need to be in the form of a deed may be reframed as a contract and signed electronically. Also, a document which purports to be a deed but which fails to satisfy the formalities of a deed may nevertheless be enforceable as a contract if it otherwise satisfies the requirements of a contract.

In deciding whether a deed might be reframed as a contract, the following benefits of deeds should be considered:

- They are valid without the need to establish that consideration has been provided.
- The limitation period for enforcing rights under deeds is longer than under contracts.

- They may be binding on each party immediately on that party signing and delivering their counterpart, even in the absence of the other party signing.
- There may be additional remedies available under some forms of deed.
- They may contain provisions which appoint one party as the attorney of the other permitting the appointed attorney to sign (other) deeds.

### Agreement to execute deed via ‘wet ink’ in future

A further option to consider is for the parties to electronically sign an agreement which:

- annexes the form of deed (and any other related document which the parties intend to be signed in hard copy with a ‘wet ink’ signature in due course)
- commits the parties to execute that or those annexed documents at the earliest opportunity, and in the interim confirms that the parties agree to comply with the terms of the annexed deed/documents as if they were formally executed.

There would need to be consideration for this agreement to be enforceable as a contract. This may be problematic if consideration does not pass under the annexed deed, and solutions within the terms of the agreement may be required. Note that an exchange of promises may be sufficient consideration.

An advantage of this approach is that it will ultimately result in the parties physically signing the annexed deed and other documents. At its simplest, this could be achieved by an exchange of emails annexing the agreed deed/documents and agreeing in the terms of the email both to be bound by them and to execute hard copies at the earliest opportunity.

### Signing pursuant to authority

A deed may be signed on behalf of another person or on behalf of a company if the authority of the person signing also derives from a deed (that is, a power of attorney). Accordingly, this option will only be viable for deeds to be signed by that attorney or authorised person if the original authority can be granted via a deed.

### Governing law and deeds

There is some legal uncertainty around whether the governing law of the deed, the law of the forum or the laws of the place of execution will apply to determine the validity of execution. In circumstances involving higher risk transactions, where the jurisdiction in which execution occurs does not permit electronic execution by a party, it is safest for a deed to be:

- expressed to be ‘signed sealed and delivered’
- signed in wet ink
- attested by a physically proximate witness.

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## Appendix 1 – Commonly used contract execution clauses

As noted above (see ‘Witnessing’), it is generally unnecessary for a contract to be witnessed for it to have legal effect. Given that, these examples include provision for witnesses as optional elements in placeholders. Whether signing by a witness is required or it is considered appropriate for evidentiary reasons should be considered based on the circumstances of each matter.

### Execution by the Commonwealth

SIGNED for and on behalf of the )  
 Commonwealth of Australia ^as )  
 represented by^ ^name of agency^ )  
 by: )

\_\_\_\_\_  
 Name of signatory

\_\_\_\_\_  
*Signature*

^In the presence of:

\_\_\_\_\_  
 Name of witness

\_\_\_\_\_  
 Signature of witness^

### Execution by an individual

SIGNED for and on behalf of )  
 ^Party Name^ by: )  
 )

\_\_\_\_\_  
 Name of signatory

\_\_\_\_\_  
*Signature*

^In the presence of:

\_\_\_\_\_  
 Name of witness

\_\_\_\_\_  
 Signature of witness^



## Execution in accordance with section 127 of the Corporations Act

EXECUTED by ^Party Name^ )  
 ^Party ACN^ in accordance with )  
 the requirements of section 127 of )  
 the *Corporations Act 2001* (Cth) )  
 by:

\_\_\_\_\_  
 Name of director

\_\_\_\_\_  
*Signature of director*

\_\_\_\_\_  
 Name of director/secretary

\_\_\_\_\_  
*Signature of director/secretary*

## Execution by affixing the company seal

THE COMMON SEAL of ^Party )  
 Name^ ^Party ACN^ the affixing of )  
 which was witnessed by: )

\_\_\_\_\_  
 Name of director

\_\_\_\_\_  
*Signature of director*

\_\_\_\_\_  
 Name of director/secretary

\_\_\_\_\_  
*Signature of director/secretary*

## Execution by a Power of Attorney

SIGNED for and on behalf of )  
 ^Party Name^ ^Party ACN^ by: )  
 )

\_\_\_\_\_  
 ^Name of signatory^

\_\_\_\_\_  
*Signature*

who is authorised by Power of Attorney ^Number or Date^ ^insert details of registration (if any), for example 'and registered with the office of the NSW Registrar-General'^ and who declares that ^he/she^ has at the time of execution of this document no notice of its revocation.

^In the presence of:

\_\_\_\_\_  
 Name of witness

\_\_\_\_\_  
 Signature of witness^

## Appendix 2 – Commonly used deed execution clauses

### Execution by the Commonwealth

SIGNED, SEALED AND DELIVERED )  
for and on behalf of the )  
Commonwealth of Australia ^as )  
represented by^ ^name of agency^ )  
by:

\_\_\_\_\_  
Name of signatory

\_\_\_\_\_  
*Signature*

In the presence of:

\_\_\_\_\_  
Name of witness

\_\_\_\_\_  
*Signature of witness*

### Execution by an individual

SIGNED, SEALED AND DELIVERED )  
for and on behalf of )  
^Party Name^ by: )  
)

\_\_\_\_\_  
^Name of signatory^

\_\_\_\_\_  
*Signature*

In the presence of:

\_\_\_\_\_  
^Name of witness^

\_\_\_\_\_  
*Signature of witness*

## Execution in accordance with section 127 of the Corporations Act

EXECUTED AS A DEED by ^Party Name^ )  
 ^Party ACN^ in accordance with )  
 the requirements of section 127 of )  
 the *Corporations Act 2001* (Cth) )  
 by:

\_\_\_\_\_  
 Name of director

\_\_\_\_\_  
*Signature of director*

\_\_\_\_\_  
 Name of director/secretary

\_\_\_\_\_  
*Signature of director/secretary*

## Execution by affixing the company seal

THE COMMON SEAL of ^Party )  
 Name^ ^Party ACN^ the affixing of )  
 which was witnessed by: )  
 )

\_\_\_\_\_  
 Name of director

\_\_\_\_\_  
*Signature of director*

\_\_\_\_\_  
 Name of director/secretary

\_\_\_\_\_  
*Signature of director/secretary*

## Execution by a Power of Attorney

SIGNED, SEALED AND DELIVERED for and on behalf of )  
 ^Party Name^ ^Party ACN^ by: )  
 )

\_\_\_\_\_  
 Name of signatory

\_\_\_\_\_  
*Signature*

who is authorised by Power of  
 Attorney ^Number or Date^ ^insert  
 details of registration (if any), for  
 example 'and registered with the  
 office of the NSW Registrar-  
 General'^ and who declares that  
 ^he/she^ has at the time of  
 execution of this document no  
 notice of its revocation.

In the presence of:

\_\_\_\_\_  
 Name of witness

\_\_\_\_\_  
*Signature of witness*

## Appendix 3 – Table of execution requirements for deeds across the states and territories

	CTH	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
<b>Applicable legislation</b>	<i>Corporations Act 2001 (Cth)</i>	<i>Civil Law (Property) Act 2006</i>	<i>Conveyancing Act 1919</i>	<i>Law of Property Act 2000</i>	<i>Property Law Act 1974</i>	<i>Law of Property Act 1936</i>	<i>Conveyancing and Law of Property Act 1884</i>	<i>Property Law Act 1958</i>	<i>Property Law Act 1969</i>
<b>Must be signed (not just sealed)</b>	No s 127(2) permits deeds to be executed without a signature	Yes s 219(1)(a)	Yes s 38(1)	Yes s 47(1)	Yes s 46E	Yes s 41(1)(a)	Yes s 63(1)(a)	Yes s 73(1)	Yes s 9(1)(a)
<b>Must be witnessed (attested) by a non-party</b>	No s 127(1) permits deeds to be executed without a witness, whilst s 127(2) does not require the fixing of the seal to be witnessed by a non-party.	Yes s 219(1)(b)	Yes s 38(1)	Yes, unless actually sealed s 47(2)	s 46E(2), except for power of attorney documents under s 46A(1) which must be witnessed	Yes s 41(2)(a)	Yes s 63(2)	No	Yes s 9(1)(b)
<b>Must be sealed</b>	No s 127(1)	Yes Sufficient if document is expressed to be a deed or indenture or as being sealed s 219(1)(a); (3)	Yes Sufficient if document is expressed to be a deed or indenture or as being sealed s 38(1); (3)	Yes Sufficient if document is expressed to be a deed or indenture or as being sealed s 47(2)(b)	No s 46C(2)(c)	Yes Sufficient if document is expressed to be a deed or indenture or as being sealed and delivered or, for natural persons, sealed s 41(1)(b); (5)	Yes Sufficient if document is expressed to be a deed or indenture or as being sealed and delivered or, for natural persons, sealed; corporations only need seal if so required by enactment under which it is created or any other law s 63(1)(b); (5)	Yes Sufficient if expressed to be sealed s 73A	No Only corporations need to seal deeds s 9(2)
<b>Must be delivered</b>	No If the execution methods under s 127 (1) or (2) are complied with, delivery is not required. s 127(3B)	Yes Common law	Yes Common law	Yes Common law	Yes Words expressing delivery sufficient s 47(2)	No s 41(3)	No s 63(3)	Yes Common law Common law rule that agent must be authorised under seal to deliver on behalf of the principal revoked (s 73B)	Yes 'Formal delivery' is not necessary, but the intention to be immediately bound is still required s 9(3); <i>Monarch Petroleum NL v Citco Australia Petroleum Ltd</i> [1986] WAR 310
<b>Inference of delivery from execution</b>	Delivery not required	Yes Common law	Yes Common law	No s 49	No s 47(1)	Delivery not required	Delivery not required	Yes Common law	Yes Common law
<b>Saving provision for defectively executed deed</b>	No	No	No	No	No	Yes Provided that 'it appears from evidence external to the deed that the party intended to be bound by it' s 41(4)	Yes Provided that 'it appears from evidence external to the deed that the party intended to be bound by it' s 63(4)	No	No

Appendix 3 – Table of execution requirements for deeds across the states and territories (cont.)

	CTH	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
<b>Potential conflict with Corporations Act s 127 execution methods</b>	N/A	No Benefits of the general formalities provisions may not apply s 219(5)(a); s 227(8)	No Benefits of the general formalities provisions may not apply s 38(5)(a); s 51A(6)	No Benefits of the general formalities provisions may not apply s 47(5)(a); s 48(6)(b)	No s 46F(2A)	No There is no inconsistency, as the saving provision in s 41(4) permits validation of defective execution where Corporations Act s 127 differs from the requirements of s 41: <i>Gibbons v Pozzan</i> [2007] SASC 99	No Only provision in s 63 dealing with corporations states use of common seal is not required unless specified by law or enactment under which the corporation is created s 63(1)(b) As with SA, there is also a saving provision in s 63(4)	No s 74(6)	No s 10(7)
<b>Additional provisions supporting execution by corporations</b>	N/A	Yes s 227	Yes s 51A	Yes s 48	Yes s 46(F)	Yes s 41(1)(b)	Yes s 63(1)(b)	Yes s 74	Yes s 10
<b>Provisions for electronic deeds</b>	Yes s 110A and s 127(3A) contemplate that deeds can be created and signed electronically in accordance with s 127.	No	Yes Deed may be created in electronic form and electronically signed and attested in accordance with Pt 3 s 38A	No	Yes s 46D, unless it is a power of attorney for non-commercial purposes which must be in paper form s 46A(1)	No	No	Yes Deeds may be created in electronic form and signed by electronic communication <i>Electronic Transactions (Victoria) Act 2000</i> (Vic) s 12A	No
<b>Remote witnessing of deeds</b>	Yes s 127(2A)	No	Yes ss 14F – 14L <i>Electronic Transactions Act 2000</i> (NSW)	No	Yes (for corporations sole and statutory corporations) s 46F(3) <i>Property Law Act 1974</i> (Qld) As noted above, there is no witnessing requirement for deeds signed by some entity types in Queensland.	No	No	Yes (where required by Victorian law) s 12 <i>Electronic Transactions Act 2000</i> (Vic) As noted above, there is no witnessing requirement for deeds signed by some entity types in Victoria.	No