

**AllA Submission to**

***Modernising Document Execution* Discussion Paper  
Consultation**

8 October 2021

## **About the AIIA**

The Australian Information Industry Association (AIIA) is Australia's peak representative body and advocacy group for those in the digital ecosystem.

Since 1978, the AIIA has pursued activities to stimulate and grow the digital ecosystem, to create a favourable business environment for our members and to contribute to Australia's economic prosperity.

We do this by delivering outstanding member value by:

- providing a strong voice of influence
- building a sense of community through events and education
- enabling a network for collaboration and inspiration; and
- developing compelling content and relevant and interesting information.

We represent the end-to-end digital ecosystem in Australia, including:

- multinational companies
- large Australian technology, telecommunications and digital and cloud infrastructure companies; and
- a large number of small and medium businesses, start-ups, universities and digital incubators.

## **Introduction**

The AIIA is supportive of government efforts to make permanent the measures introduced in the context of Covid-19 enabling electronic document execution. The AIIA welcomes the Government's ambitions to modernise document execution in this way. The execution of documents is a natural site of focus and partnership for government and digital leaders within industry given the sophisticated 'out-of-the-box' technologies available and ready to be employed to facilitate secure, certified e-signature workflows.

In the context of extended Delta variant lockdowns across Australia, rather than relying on patchwork workarounds for the execution of documents, the legal, business and general Australian community is craving certainty and solutions that may be both depended upon into the future, and fit for the future. The global pandemic has increased the demand for mechanisms of non-physical document execution and made it more difficult to adhere to physical document execution requirements.

The AIIA supports the provision of digital-first, paperless, permanent means for the execution of legally significant documents. The AIIA believes that the act of securely and personally marking a page is what is legally significant about executing documents, not the nature of the mark ('wet' or electronic). The government should prioritise security, cross-jurisdictional applicability and accessibility for individuals and businesses of all size as it pursues these reforms.

## **Leading by example**

As a first principle as the government initiates reform, the AIIA would urge Commonwealth agencies to lead by example. Commonwealth agencies ought not insist on rigid or overly conservative approaches to contracting with suppliers, including an unnecessary insistence on using deeds (for example, for complex standing offer arrangements).

### **Standards, common definitions and consistency**

The provision of nationally consistent minimum standards and common definitions should be a priority for government, although the acceptable method of electronic signing should not be overly prescriptive or complex in order to ensure accessibility by individuals and small and medium enterprises (**SMEs**).

A key difficulty with statutory declarations is that the approved forms and execution rules between the various jurisdictions can vary widely. For example, Commonwealth statutory declarations can be taken before a wide range of authorised persons, including dentists, pharmacists, financial planners and nurses. State statutory declaration requirements are usually much narrower, permitting only qualified persons such as lawyers, JPs or commissioners for declarations to do so. The various states may also have different formal requirements. This patchwork can be challenging as, for example, a Queensland company undertaking a project in NSW, may be required to comply with NSW formalities, but is unlikely to be able to use a Commonwealth statutory declaration form or avail itself of the wider range of authorised persons as Commonwealth statutory declarations are less common in business.

There must also be consistency between organs of government on these reforms. The work of the Digital Transformation Agency on its Digital Identity framework, with the Exposure Draft recently released, must dovetail with the Federal Government's progress in this area of modernising document execution.

### **Differing kinds of legal documents**

Government needs to be alive to the difference in threshold that may become necessary between the likes of deeds and the likes of statutory declarations. The status of statutory declarations and deeds and their separate witnessing requirements should be considered separately, and deed reform has not been accompanied by statutory declaration reform, with harmonisation needed between states and territories on the latter issue. The ability to use a statutory declaration from any jurisdiction in any jurisdiction would be a welcome stop-gap measure. The AIIA believes that while these reforms are afoot, government should capitalise upon momentum and introduce a framework that is as comprehensive as possible, bringing many different kinds of legal document into scope so that document execution may truly 'go digital' across the board.

For statutory declarations, AIIA members have suggested that some additional measures in addition to signing should be considered, be that remote witnessing or use of a digital signature (without witness) on an approved electronic form. Alternatively, an unwitnessed statutory declaration might be allowed for some purposes, such as where the party to be provided with the declaration is a government agency (which may be able to take further steps verify its authenticity). Each jurisdiction should recognise another's statutory declaration as sufficient.

Certainty and reform about whether deeds can be electronic, as opposed to paper documents, is needed from government. The lack of decided cases in this area has led to lawyers taking a

conservative approach to the signing of deeds such that clients are encouraged to maintain wet-ink signing. Although there have been simplified rules for the signing of deeds introduced under the *Electronic Transactions Act*, this issue of whether deeds need be physical documents has not been resolved.

### **Considerations for overseas-based parties**

There are two examples of where electronic execution may save time and considerable cost where overseas parties are involved. Where a settlement deed, for example, needs to be signed with overseas-based companies, a physical document needs to be used. This can involve physically couriering copies of the deed overseas, possibly to multiple countries if there are several parties, with the settlement potentially not confirmed until it is signed by all parties and a copy back in Australia, which can take weeks. There are measures to mitigate these difficulties, but these can be complex and the 'wet ink' signing of a document is still needed at some point in the process. Electronic signing – as currently allowed under the temporary COVID measures – would permit instant agreement.

Further, an overseas party to an Australian contract required to submit a statutory declaration for a routine matter, may need to attend an Australian Consulate to have it witnessed by a properly qualified person. In one situation, this would have required travel by a subcontractor in a regional town in Asia to a major centre where there was a consulate, provided they could get an appointment. An electronic alternative would potentially save days and make document execution independent from physical locality as well as from destabilising global events.

### **Interoperability and system design**

The interoperability of private transactional and governmental systems with document execution platforms would be a desirable end and will rely on thoughtful system design by existing sophisticated players in the document and signature market.

### **E-Signature workflows and integration**

E-signature workflows should be integrated with systems of record, accompanied by a reviewable audit trail, and in the cases of serious documents such as deeds and statutory declarations, should be validated by trusted certificate authorities (**CAs**) or trust service providers (**TSPs**).

### **Conclusion**

The AIIA would welcome further opportunities to partner with government in implementing these reforms across industry, leveraging the expertise of its members. Should you have any questions about the content of this submission, please contact [policy@aiia.com.au](mailto:policy@aiia.com.au).

Yours sincerely,



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