



8 October 2021

Deregulation Task Force – MDE Consultations
Department of the Prime Minister and Cabinet
PO Box 6500
CANBERRA ACT 2600

Dear Sir/Madam,

SMSF ASSOCIATION SUBMISSION –MODERNISING DOCUMENT EXECUTION

The SMSF Association welcomes the opportunity to provide this submission in response to the Government’s public consultation paper. The temporary COVID-19 measures put in place by the States and Territories were needed and have been warmly welcomed. On the back of these and other Federal reforms, it is appropriate that we all cast our minds to more permanent reform.

As a business or as an individual, when and why do you use statutory declarations or deeds?
Please provide any examples of the costs involved in the process.
Why might you use a statutory declaration over a standard declaration, or a deed over a contract?

Self-managed superannuation funds (“SMSF”) are a form of special purpose trust. Any measures that seek to embrace technology, reduce red tape, cost and complexity are welcomed. At the same time, it is vital that we continue to preserve the integrity of the sector and protect individual’s retirement benefits from theft and fraud. Any measures implemented should not provide a platform that in effect legitimise illegal activities.

The types of trusts that impact our sector include:

1. SMSF trust deeds and related variations
2. Unit Trusts
3. Bare Trusts
4. Trust declarations

Whilst statutory declarations feature from time to time in our sector, of greatest impact to our sector is the trust deed element of the proposed reforms.

What barriers, challenges or difficulties have you experienced with physical document execution? Do you have examples relating to paper requirements, witnessing requirements or jurisdictional inconsistencies? Are there other barriers that aren’t captured here? What can we learn from international approaches?

Access to and retention of original documents is vital. A copy or facsimile of an executed deed is not always satisfactory and can have costly consequences where an original deed is lost. Where there is a chain of deeds this can causes problems in determining, which is the last, valid deed.



Where a deed is executed and stored electronically, how will the deed meet the definition of an 'original' deed? This is an answer that will need to be addressed with regards to digital signing, given the various methods available.

Correct signing, witnessing, and dating of documents is an issue for paper documents and requires a high level of diligence.

What would you consider to be a desirable outcome from reforming document execution? Are these the right principles for reform? Are there other outcomes or principles we should consider?

The objectives and principles of reform proposed in Part 4 of the consultation paper contain the right elements and are reasonable and appropriate.

Should electronic execution of statutory declarations and deeds be permitted? What would be the benefits and costs for you of digital options?

Is witnessing a necessary requirement for statutory declarations and deeds? Are there documents that should still require the presence of either a physical witness or a witness over AVL?

Do advances in digital identity verification make witnessing requirements redundant?

Unless an appropriately secure system such as the *Australian Government's Face Verification Service (FVS)* discussed at section 5.3 is implemented, the witnessing of documents provides important safeguards.

The definition of an independent witness needs to more clearly stated and enforced. We see that this may very quickly become a practical problem.

When documents are being signed and independently witnessed electronically or by audio visual link, it may be easier and quicker for the signees to rely on a witness with whom they are comfortable, know and trust, such as a beneficiary, their adult children or their relatives.

In fact, it may be difficult for them to seek out an independent witness to witness documents for them, unless it is set up through formal channels such as with their accountant. As we already see trust deeds signed by witnesses who are not truly independent. The concern is that this could become more widespread as a result of electronic witnessing.

What minimum reliability requirements should apply to the electronic execution of statutory declarations and deeds? Are the existing provisions in the ETA appropriate and effective?

From your perspective, would providing common requirements and definitions, enabling digital verification or improving national usability increase reliability?

What processes and/or technologies do you consider appropriate for executing statutory declarations and deeds electronically? Please provide examples.



There is a risk that elder and domestic abuse may be more readily concealed in a virtual environment. Whilst some couples choose to have a shared private email address, this is also a mechanism used in elder and domestic abuse cases.

We also need to ensure that the provisions do not provide a ready platform for exploitation by perpetrators of identity theft.

Some digital service providers allow a document to be signed by two (2) or more signatories from the same email address. Typically, the signatories email addresses are entered into the document, then the service sends it to the first recipient for signing. Once signed, it is then forwarded to the next signatory and so on. Where the email addresses are the same, the service just sends the document back to the same email address.

This is both a benefit and a concern. Where recipients share the one email address, it allows them to get the document signed from the same email address. This can be of benefit to older recipients who are technologically challenged, and as a result, it is not uncommon for them to only operate from the one, joint email address.

This process may be acceptable for minutes and financial statements, but we have concerns regarding its suitability for documents such as deeds and statutory declarations.

The concern is that this situation could easily give rise to fraud. One example is, where one trustee wants a document signed (such as a trust deed amendment) and enters their email address for both recipients and effectively signs the document twice themselves.

In the above scenario, there is no way of knowing whether the second recipient has actually signed the document in good faith, or whether the document has been signed fraudulently. Current document signing software or services, whilst an important innovation and advancement, do allow for document signing by multiple parties using a single email address.

Have you experienced problems with executing documents across jurisdictions? Please outline what issues you faced. How would greater consistency affect you?

We saw various temporary concessions applied across the States and Territories under the various COVID-19 measures adopted. This highlights the need for a consistent approach and uniform law across jurisdictions.

Deeds may need to be signed across different jurisdictions or used in different jurisdictions such as when acquiring property in a different state. Consistency in the legislation will provide essential certainty.

Are there risks with document execution that might lead to an adverse outcome for you, your clients or other third parties as a result of reforms to document execution?

With the introduction of the various COVID-19 concessions, we saw some advice recommending that regardless of the concessions, a best practice approach was for the use of 'wet' signatures to be applied in the presence of an independent witness.



This was likely due to the different approaches adopted across the States and concerns around the lack of certainty on how these documents will be treated in the future.

This highlights the needs for uniform law and for certainty in any measures adopted.

Our members report a broad range of document signing issues where practical issues arise when dealing with large organisations such as banks, financial product providers and other financial institutions. Whilst these issues relate to documents outside of this consultation paper, it is not uncommon for different standards to be applied across different businesses within the sector.

A concern is that we will see these key businesses adopting an internal policy that does not wholly accept any new standards legislated. We acknowledge the responsibilities that fall upon these institutions for fraud prevention, compliance with the anti-money laundering and counter terrorism funding laws as well as managing business risk.

Certainty and clear standards will be essential for all users. Otherwise, there is a real risk this will result in different operational standards applied across the sector.

SMSFs are required to be audited each year by an ASIC registered SMSF auditor. In preparing our submission we engaged with several of our leading SMSF audit members.

Understanding whether a deed is valid or not is essential for the auditor. They need to understand what deed rules apply in ensuring that the SMSF Trustee has complied with the deed rules. This can be problematic where there is a chain of deed updates as it needs to be determined if all the deeds are all valid and therefore the most recent deed can be relied upon. Or if a deed at an earlier point in time is in fact the most recent, valid deed.

Other forms of trust are also important, such as the use of unit trusts, bare trusts, and trust declarations. Incorrect or invalid deeds can trigger significant compliance issues for the SMSFs. In the case of bare trusts within a SMSF limited recourse borrowing arrangement, it is not only the regulatory compliance issues that are of concern, but also the added risk of double stamp duty where the underlying bare trust arrangement is deemed to be invalid.

Whilst an auditor is not expected to be a legal practitioner or a forensic document expert, our members have expressed concerns about the professional risk that may arise. SMSF trustees will likely expect that any issues with the deeds would be identified by the auditor.

The protocol legislated needs to be uniform, clearly documented and easily understood by all users and stakeholders. It also needs to be able to demonstrate that the deed or declaration has been 'signed':

- By the right person; and
- In accordance with the legislated protocol



If you have any questions about our submission, please do not hesitate to contact us. We thank you again for the opportunity to provide this submission.

Yours sincerely,

A handwritten signature in black ink, appearing to be "Peter Burgess".

Peter Burgess
Deputy CEO/Director of Policy and Education
SMSF Association

ABOUT THE SMSF ASSOCIATION

The SMSF Association is the peak body representing SMSF sector which is comprised of over 1.1 million SMSF members who have more than \$700 billion of funds under management and a diverse range of financial professionals servicing SMSFs. The SMSF Association continues to build integrity through professional and education standards for advisors and education standards for trustees. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial planners and other professionals such as tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them access to independent education materials to assist them in the running of their SMSF.