

**Promoting
greater usage of
electronic contracts
and electronic
signatures under
Australian law**

Background

Parties are increasingly entering into transactions and contracts electronically (whether by typing their names on documents via emails, signing with a stylus on a tablet, clicking a click to accept button within a computer browser, or electronic signing via a cloud platform such as DocuSign eSignature). These methods are accepted by businesses and Australian courts alike as a valid, secure and efficient way of doing business in Australia.

While Australian law generally and broadly recognises that contracts can be reliably signed by electronic means, there currently are specific areas where particular uncertainties remain: signing deeds, signing by companies and witnessing. Such uncertainties in these areas largely arise because the law unfortunately has not kept pace with the progress of technology. Many of the rules around signatures were created when contracts were signed on paper (eg “wet” signatures). Such rules continue to apply despite significant technological advances that provide for signatures to be even more reliable and secure through electronic means. These uncertainties impact the use of electronic signatures by imposing certain unnecessary additional costs and delays in doing business by requiring parties to sign contracts the old-fashioned way, with paper and ink.

This article outlines these very specific areas where uncertainties remain that negatively impact everyday business and how the Australian legal framework can be clarified in a simple manner to allow contracts to be entered into with electronic signatures consistently with the otherwise ubiquitous approach of electronic signatures in Australian’s digital economy.

Further information on the more general transactional categories where broad acceptance of electronic signatures in Australia already exists, can be found DocuSign, Inc. at <http://docusign.com.au/electronic-contracts>

Australian law position on electronic contracts and electronic signatures

The Commonwealth Electronic Transactions Act 1999 (Cth) and its State and Territory equivalents (together, “ETAs”) promote the use of electronic transactions by giving legal recognition to transactions and contracts that are entered into electronically, as well as to electronic signatures. However, the ETA is subject to certain specific carve-outs which default certain types of transactions back to more general traditional laws that often pre-date the advent of various modern digital technologies that are commonly used in commercial transactions. Overall, Australian Courts historically have shown a willingness to interpret their laws to encompass these new digital technologies. Specifically, Australian cases consistently confirm that a document in electronic form is a “document” under the law and also satisfies the requirement that it be in “writing”. Cases also confirm that electronic signatures are valid and capable of creating an enforceable agreement.

Areas of uncertainty

However, while Australian Courts have broadly recognised that electronic contracts and electronic signatures are valid, there are uncertainties in three specific areas of the law, which unfortunately create ambiguities around electronic signatures and electronic contracts in Australia:

(a) Deeds

A deed is a special type of contract that must be used in certain circumstances. As a result, deeds are commonly used in Australian law transactions (eg confidentiality deeds, deeds of release, indemnity deeds, security trust deeds). Deeds have to comply with more specific requirements at general law such as needing to be written on parchment, vellum or paper; a seal needing to be placed on the document; and needing to be delivered to the counterparty. These requirements are in fact at the very origin of the expression “signed, sealed and delivered”. One of the particular requirements, which specifically creates a tension with electronic signatures, is the requirement that deeds are to be signed on physical paper.

It unfortunately is unclear whether the ETAs generally override this paper requirement to allow a deed to be in electronic form or electronically signed. New South Wales, specifically passed legislation explicitly setting out that certain deeds can be signed electronically (these are deeds signed by an individual including an individual who is signing as an attorney for a company). However, in all other Australian jurisdictions, the general law rule still applies and a deed cannot exist only in electronic form or be electronically signed. This means that a person purporting to sign a deed still has to print the document out and physically sign the document (eg in wet ink).

(b) Companies signing under s127 of the Corporations Act

A company that is registered under the Commonwealth's Corporations Act 2001 ("Corporations Act") can execute a "document" under s127 of the Corporations Act if specified officers "sign" it (two directors or a director and a company secretary or in the case of a proprietary company with a sole director/company secretary, that sole director/company secretary). Such documents include deeds and agreements.

However, there is uncertainty over whether s127 applies to documents that are signed electronically. This ambiguity leaves open whether a "document" for the purposes of s127 must be a paper document, which would preclude the use of electronic signatures

A document which has been electronically signed may still be validly signed even if the requirements of s127 are not satisfied. However, the counterparty who receives a document which has been electronically signed by a company cannot assume that this is the case and would separately need to (or need to engage lawyers to) obtain evidence that the document has been validly signed. This less than optimal approach results in the ability to use an electronic signature, but at an additional cost and complexity.

(c) Witnessing and attestation

There is uncertainty over how the signing of an electronic document can be properly witnessed and attested. Witnessing is observing the signing of a document and attestation is the recording on the document that the witness has observed the signing. This is significant because a deed signed by an individual must be witnessed and attested in all jurisdictions in Australia except Victoria. There however is no authoritative Australian case law that has considered whether a witness must be physically present and so the conservative interpretation is to require that the witness be physically present.

There also is debate over whether a witness can attest by electronically signing. Some commentators have taken the conservative view that a witness cannot sign a document using an electronic signing platform if the platform creates a new copy of the document with every signature as this means that the signatory and witness each sign a different (although substantially identical) document. Others have viewed this interpretation as too literal and that electronic signing is permissible.

Fortunately, many of these issues have been addressed in certain Australian jurisdictions under temporary amendments to legislation introduced in response to the COVID-19 pandemic – see below for details.

Temporary COVID-19 reforms

In the wake of the COVID19 pandemic, Commonwealth and State and Territory legislation has been passed to facilitate electronic signatures by making it easier to electronically sign documents and witness the signing of documents by audio-visual link.

However, these measures currently:

- are only available for a temporary period;
- have not been passed in every State and Territory;
- only apply in certain circumstances;
- are inconsistent between States and Territories; and
- do not resolve all the uncertainties in this area.

These outstanding challenges mean that some of the uncertainties continue to apply and/or will apply again if the emergency legislation is not converted in some form into permanent legislation before it expires. However, there is encouraging momentum that these temporary reforms are beginning to be extended and there are active discussions as to whether such reforms should be made permanent.

To help summarize the current state of the law in light of the emergency legislation, the table below sets out, as of the date of publication of this article, whether the law of an Australian jurisdiction permits an agreement or deed to be in electronic form and electronically signed while the temporary COVID-19 legislation applies.

Where a company is signing a contract (whether in the form of a deed or agreement) under s127 of the Corporations Act, a party, irrespective of the governing State or Territory law of the document, may rely upon an electronic signature to sign that contract. However, even though emergency provisions to the Corporations Act have provided greater clarity regarding allowing company officers to electronically sign documents, the fact that the emergency determination is silent on its application to deeds has led some commentators to take a conservative view and suggest there is still uncertainty about whether the reforms are intended to override the common law State and Territory requirements for deeds. However, others have made the determination that companies can sign deeds electronically under s127.

The Australian Banking Association, together with other organisations including King & Wood Mallesons and DocuSign is urging the Australian government to explore ways to further harmonise the States and Territories laws to ensure greater consistency in laws applying electronic signing witnessing and attesting of documents, throughout the country.

In all other situations where the Corporations Act does not apply, the signing requirements for deeds, and requirements for witnessing and attestation, will depend on the law of the State or Territory intended to govern that document.

Below is a table that sets out how electronic signatures are treated in the above three specific areas in the Commonwealth and the States and Territories under temporary COVID-19 legislation:

	CTH	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Can an individual electronically sign a deed?	N/A	✗	✓	✗	✓	✗	✗	✓	✗
Can a Corporations Act company electronically sign an agreement or deed under s127?	✓ (This is the case irrespective of the State/Territory governing law)								
Can a signature on an agreement or deed be witnessed by an A/V link?	✗	✗	✓	✗	✗	✗	✗	✓	✗

Key: Cth: Commonwealth; ACT: Australian Capital Territory; NSW: New South Wales; NT: Northern Territory; QLD: Queensland; SA: South Australia; TAS: Tasmania; VIC: Victoria; WA: Western Australia

Next Steps

Uncertainty over whether parties in Australia can electronically sign specific types of deeds unfortunately has imposed unnecessary procedural burdens on businesses. On a daily basis, to avoid such ambiguities, many parties have had to physically sign, or circulate, a paper document, even though there are technologies that are more secure and efficient. These challenges have been further exacerbated as parties have had to more regularly work remotely.

The temporary COVID-19 legislation has helped to mitigate these legal limitations by embracing electronic signatures as a vehicle to more efficiently and securely work remotely. To help further promote these legal reforms and assist in increasing business certainty, facilitating a greater ease of doing business, promoting online commerce and reducing transaction costs, the Australian Banking Association, together with other organisations including King & Wood Mallesons and DocuSign, are engaging with the Commonwealth and the States and Territories, to advocate for the temporary COVID-19 legislative reform becoming permanent.

In addition, this group is urging the Australian government to explore ways to further harmonise the States and Territories laws to ensure greater consistency in laws applying electronic signing, witnessing and attesting of documents, throughout the country.

For more details on these advocacy efforts, see docusign.com.au.

About DocuSign

DocuSign helps organisations connect and automate how they prepare, sign, act on, and manage agreements. As part of the DocuSign Agreement Cloud, DocuSign offers eSignature: the world's #1 way to sign electronically on practically any device, from almost anywhere, at any time. Today, more than 500,000 customers and hundreds of millions of users in over 180 countries use DocuSign to accelerate the process of doing business and to simplify people's lives.

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