

Electronic contracts and electronic signatures under Australian law



An electronic signature is a signature which is applied by electronic means to a document in electronic form.

Australian law generally recognises that deeds and agreements can be executed via electronic means and by way of an electronic signature.

The Electronic Transactions Act 1999 (Cth) and its State and Territory equivalents (together, 'ETAs') facilitate the use of electronic transactions by giving legal recognition to transactions and contracts which are entered into electronically, as well as to electronic signatures. Subject to some specific carve-outs discussed below, the ETAs provide that transactions and contracts are not invalid because they take place by means of electronic communications. Under the ETAs, if a law requires information to be given in writing, this may be done electronically and if a law requires a signature, it may be electronic. There also are specific carve-outs to the ETAs where the use of electronic signatures is set out in common case law, rather than being specifically covered under the statutory language of the ETAs.

The Australian Courts further reinforce the broad acceptable use of electronic contracts and electronic signatures through their historical willingness to adapt the common law in Australia to apply to new applications of technology to traditional use cases. For example, Australian Courts have reaffirmed that a document in electronic form is a 'document' and satisfies the requirement that a document be in 'writing'. The Courts also have repeatedly reconfirmed that electronic signatures are valid and capable of creating an enforceable agreement provided that:

- the person signing the document intended to be bound by it; and
- any formalities relating to execution of that document are satisfied. These formalities specifically could consist of a requirement under a statute, a contract or be imposed by a regulatory authority.



While Australian law has broadly recognised that electronic contracts and electronic signatures are valid, there are 3 areas that are not as clear:

(a) electronic execution of deeds, (b) electronic execution by companies under s127 of the Corporations Act 2001 (Cth) (“Corporations Act”) and (c) remote witnessing.

In the wake of the COVID pandemic, Commonwealth and some States recognized the need to address these less certain specific use cases and passed legislation to facilitate the execution of contracts using electronic signatures and audio-visual witnessing. Such reforms are set out below.

(a) Requirements for deeds

Australian Courts recently have reiterated that the common law still generally requires that a deed be on paper, vellum or parchment (“paper requirement”). Where the ETAs apply, some believe it remains unclear whether the ETAs override the common law requirements in relation to deeds to allow a deed to be in electronic form or electronically executed.

However, New South Wales addressed this issue by passing legislation that validated electronic deeds governed by New South Wales law, which are signed by individuals under hand or as attorney for a company. Further, as a result of legislation passed in the wake of the COVID pandemic, individuals also can electronically sign deeds governed by the law of New South Wales, Victoria and (temporarily) Queensland, including an individual who is signing as an agent or attorney for a corporation. The Queensland government further has passed legislation to make their temporary reforms permanent which is to commence on a day to be fixed by proclamation.

(b) Companies signing under s127 of the Corporations Act

Section 127(1) of the Corporations Act 2001 (Cth) allows a company to execute a “document” 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). If a document appears to be signed in accordance with s127, the counterparty assumes that the document has been duly executed: see ss128 and 129(5).

Previously, some commentators suggested that it was unclear whether an agreement, which was in electronic form and which was signed electronically, was afforded the benefit of s127 because:

- the “no validity” and signature provisions of the Commonwealth ETA do not apply to the Corporations Act;
- it was unclear whether a “document” for the purposes of s127 had to be a paper document; and
- there may need to be a “single document” which may not be satisfied if an electronic signing platform creates a new copy of the document with every signature so that each officer signs a different (although substantially identical) document.

However, where the requirements for s127 are not satisfied, the document may still be validly electronically executed, but the counterparty merely may not rely on the protection afforded by the statutory assumption as to due execution under the Corporations Act. Rather the counterparty merely would need to separately verify whether the company has duly signed the document by checking board minutes, powers of attorney and corporate constitutions to ensure there are no limits to execution, and ideally to find specific authorisation for the relevant officers to sign the relevant document.

We are encouraged to see that Section 127 has been temporarily amended to make it clear that an agreement or deed can be in electronic form and signed electronically by company officers. Further, a bill has been introduced to Federal Parliament which provides for such clarifications to be made permanent to ensure that it is clear that the Corporations Act can be relied upon to electronically sign such documents.

(c) Witnessing and attestation

Previously, some suggested that it was unclear how the signing of an electronic document should be properly witnessed and attested. This is important because a deed signed by an individual must be witnessed and attested in all jurisdictions in Australia, except Victoria where witnessing is not required for a deed. Unfortunately, there are no Australian legal cases which have considered whether a witness must be physically present when the document is signed or whether it is sufficient if the witness is present “virtually” or “remotely” and sees the signing of a document by electronic means. In the absence of an authoritative decision, the conservative approach taken by some was to still seek to have the witness be physically present.

There also was debate over whether a witness can attest by electronically signing. Some commentators took the view that a witness could not 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. Since the COVID pandemic, the above conservative posture has been permanently addressed by legislation in Victoria and New South Wales (NSW), which explicitly permits signatures to be witnessed remotely by audio visual link and for witnesses to sign documents electronically. This applies to a range of documents including deeds where required.

For example, in NSW, electronic witnessing has been enabled for:

- (a) a will,
- (b) a power of attorney or an enduring power of attorney,
- (c) a deed or agreement,
- (d) an enduring guardianship appointment,
- (e) an affidavit, including an annexure or exhibit to the affidavit,
- (f) a statutory declaration.

In Victoria, electronic witnessing has been enabled for

- (a) Oaths and Affirmations
- (a) Wills ('special witness' conditions)
- (a) Power of Attorney (Some 'special witness' conditions)

In Queensland, temporary legislation removed the requirement for witnessing deeds altogether. The Queensland government recently passed legislation which permanently removes the need for witnessing of an individual's signature on a deed in certain circumstances and allows for witnessing to take place remotely by audio visual link for a range of other documents. In particular, the new legislation in Queensland has enabled audio visual witnessing for a range of documents including Oaths, Affidavits, Power of Attorney (but Wills have not been included at this time). Such legislation will commence on a day to be fixed by proclamation.

Australian electronic signature case law

A survey of cases across Australian jurisdictions (up to November 2021) where the Court indicated that an electronic signature (whether applied through a platform similar to DocuSign eSignature or an alternative method) was used reveals that an electronic signature is enforceable.

These cases fall into the following categories:

- cases in which electronic signatures applied using an online platform similar to DocuSign eSignature were acknowledged as enforceable in face of a direct challenge;
- cases in which other forms of electronic signature were found to be enforceable; and
- cases in which the signature was identified as a DocuSign eSignature and the document was viewed as enforceable on the basis that it was signed electronically.

A summary of some of the key cases is set out below.



Electronic signature applied using an online platform acknowledged as legally binding

In these cases, the use of an electronic signature through a platform similar to DocuSign eSignature was not central to the dispute over enforceability of the contract terms but was acknowledged by the Court as part of the facts.

(a) Getup Ltd and another v. Electoral Commissioner [2010]

FCA 869

The applicant applied for enrolment to vote in a federal election via an online platform which included provision for electronic signing using a stylus or finger on mouse trackpad. When printed, the signature was slightly pixelated. The Electoral Commissioner rejected the application because the signature was not sufficient to use as a comparison to future signatures. The Court found that the difficulties identified by the Commissioner also applied to application forms emailed or faxed to the Commissioner and so the application was not invalidated by the fact that it was signed via an online platform.

(b) Williams Group Australia Pty Ltd v. Crocker [2015]

NSWSC 1907

Williams Group Australia Pty Ltd v. Crocker [2016]

NSWCA 265

In this matter, Williams sought to enforce a guarantee allegedly given by Mr Crocker to secure the terms of a trade credit agreement. The primary judge (whose reasoning was upheld on appeal) reviewed the audit trail of the electronic signing platform (comparable to DocuSign eSignature's certificate of completion) and found that the signature had been applied without Mr Crocker's knowledge or consent as follows:

- Mr Crocker's signature was placed on the guarantee by access to the platform from the Murwillumbah office, at which time Mr Crocker was not in Murwillumbah; and
- the times at which the electronic signing platform was accessed indicated that Mr Crocker did not have knowledge of the guarantee before it was signed; and
- the signature that was applied to the guarantee was uploaded on the same day it was applied.

The Court also considered the platform's follow-up and confirmation emails in relation to requests for signature, as well as the signatory's ability to see a list of documents that had been executed with his signature. However, the case did not turn upon these procedures. The use of the electronic signature platform and the fact that Mr Crocker did not change his password for the platform did not amount to a representation of authority by Crocker of his authorisation for his signature to be applied to the guarantee, and so he was not personally bound to the obligations imposed by the documents.

(c) Career Academy Australia Pty Ltd v. Do More Pty Ltd [2018]

VSC 790

In this case, the Victorian Supreme Court was required to determine whether there was a "genuine dispute" as to whether a Career Academy was bound by a contract, giving rise to a debt, which was signed using an electronic signing platform similar to DocuSign eSignature. The Court held that there was a genuine dispute as to whether the signatory had apparent authority to sign the contract, and whether Career Academy had subsequently ratified the agreement, but acknowledged that if either of these were made out on the facts, then the contract would be binding. No judicial determination has been made to date as to the enforceability of the contract.

(d) Youssef v. Shepherd [2021]

NSWSC 1355

Case resolved on the separate issue of Mr Shepherd's application to have a default judgement obtained against him set aside. One of Mr Shepherd's arguments was that the relevant deed executed on behalf of the company was not valid because it was signed electronically.

Mr Shepherd alleges that the deed was signed electronically and at different times and locations, with one director located in South Africa while Mr Shepherd signed from Tasmania.

The court considered that the deed may be invalid based on the above claim by Mr Shepherd, applying *Bendigo Bank v Pickard* [2019] SASC which held that s 127(1) of the Corporations Act required that there must be a single, static document rather than a situation where two electronic signatures are sequentially applied to an electronic document. This issue was not resolved in this judgement.

In an incidental remark, the court endorsed the idea that electronic signatures would not be an impediment to the validity of a deed under Victorian Law per the Electronic Transactions Act and that in Tasmania, under s 63(4) of the Conveyancing and Law of Property Act 1884 (Tas) allows a deed that has been defectively executed by a party to be taken to have been validly executed if it appears from external evidence that the party intended to be bound.

(e) DPP v. Currie [2021]

VSCA 272

Mr Molodysky, a purchaser under an agreement for the sale of land, received a facsimile copy of an agreement which bore, also in facsimile form, a signature of a person in control of Vema, the vendor. The defendant questioned whether the delivery of a facsimile copy of the agreement was in fact the service of an agreement signed by the vendor.

The Court relied upon the English law test that the essential requirement of signing is the affixing in some way, whether by the writing with a pen or a pencil or by otherwise impressing upon the document one's name or "signature" so as to personally authenticate the document. Accordingly, when a person sends a signature with the intention that it should be produced by facsimile, then that person is authorising the placing of his/her signature with the intention that it be regarded as his/her signature.

Although the facsimile signature of the vendor on the agreement was intended by him to be regarded as his signature, in this case the preliminary agreement did not constitute the contract which the parties intended to enter into.

(f) Resolute Corporate Services Pty Ltd (formerly Goudhurst Pty Ltd) v. Wearing [2020]

WADC 132

This case confirms that a written name in an email can be a sufficient electronic signature.

(g) Marketlend Pty Ltd v. Blackburn [2020]

NSWDC 358

This case is regarding a series of loan agreements where Marketlend was advancing a line of credit to Blackburn. The agreements were made on the basis that Blackburn's obligations would be guaranteed by the directors of the company, Matthew and Sarah Blackburn.

The case turned on a factual question of whether Sarah used her DocuSign eSignature account to sign the First Agreement on the 2nd of November 2017. The court found in favour of Sarah Blackburn, concluding that Matthew had signed the agreement using her DocuSign eSignature account without her knowledge or consent.

DocuSign eSignature acknowledged as enforceable

In these cases, the use of DocuSign eSignature to execute the relevant document was not central to the disputed but was acknowledged as part of the facts surrounding the agreement.

**(a) Australian
Competition and
Consumer Commission
v. Cornerstone
Investment Aus Pty
Ltd (in liq) (No 4)
[2018]**

FCA 1408

Students were signed up to tertiary education programs through DocuSign eSignature. Many of the sales representatives selling the programs created a new email address or sent the DocuSign eSignature request for signature to themselves and forged the signatures of the students. Their conduct was found to be against Australian Consumer Law, but the validity of the DocuSign eSignatures which were legitimately signed by the students was not questioned.

**(b) Zhao v. Bonheur
Holdings Pty Ltd
[2020]**

NSWSC 535

In this proceeding, the first plaintiff received a document from the defendant through DocuSign eSignature, but did not review or sign the document. The second defendant then sent an email to the second plaintiff attaching a link to the relevant document and including a DocuSign eSignature record that the document had been viewed and signed by the first plaintiff earlier in the day. It was not pleaded, and the Court did not suggest that the document was invalid due to the electronic nature of the signatures.

Disclaimer

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[Visit the DocuSign E-Signature Legality Guide](#) to learn about current electronic signature laws, local legal systems, and technology preferences for countries around the world.

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