Not worth the paper they're not written on? — Executing documents (including deeds) under electronic documentation platforms

Diccon Loxton[2]

ABSTRACT

This paper examines the growing phenomenon of signing documents electronically through cloud-based platforms, and is in two parts. This Part A describes the process and concludes that documents signed in that way can generally satisfy requirements for signing and writing, not only when electronic transactions legislation is applied, but also under general law. Part B concludes that documents can be signed in that way under s 127 of the *Corporations Act 2001* (Cth). It also concludes that where electronic transactions legislation applies one can have effective electronic deeds. Where they would not be effective, then print-outs can be effective as signed original hard copy counterparts.

PART A

1 Introduction

In Australia and internationally, commercial parties are starting to execute documents electronically[3] using cloud-based platforms, both in volume retail transactions and in bespoke wholesale transactions. The market is increasingly interested, and can see significant commercial advantages. To take just a few examples: in Australia at least two major listed companies have started to execute their documents in that way, including in one case a large syndicated loan agreement; banks and financial institutions are using it for flow transactions; and property developers and real estate management companies are using it for sales contracts and leases.

This is part of a wider move in commerce away from paper and towards the electronic, for transactions great and small. This includes even that bastion of paper and formal requirements: conveyancing and land titles registers.

There are a number of such platforms available.[4] Are they effective? Can they create binding transactions when the law requires writing or signatures, or when a company is signing under s 127 of the Corporations Act? Can they be used for deeds?

Lawyers from five firms, aka the Walrus Committee,[4] have been examining the relevant legal issues. This paper developed from one initially prepared to assist that examination, although the Committee did not achieve unanimity on all its conclusions. It is structured as follows.

Part A

- a summary of my specific conclusions;

---

[2] Senior Finance Counsel, Allens, and part-time lecturer in law, Sydney University. I am very grateful for the research of Harry Stratton, and also for the comments and contribution of colleagues on the Walrus Committee, particularly the significant contribution of Rebecca Smith of Norton Rose Fulbright, and the thoughtful comments of Bruce Whittaker of Ashurst and Nuncio D'Angelo of Norton Rose Fulbright. Finally I have to thank colleagues at Linklaters for their insights. All mistakes are my own.

[3] By which I mean the insertion, in an electronic version of a document, of a person's signature or other mark by electronic means, rather than a digital signature (ie a secure, digital code attached to an electronic message that uniquely identifies and authenticates the sender, as is contemplated with e-conveyancing) or "click wrap" acceptance (ie acceptance of an electronic version of terms and conditions by the user clicking an "I accept" button or ticking a box (or similar) on a screen). It is distinguished also from "remote signing", ie the printing and signing of a document received by email, with a PDF of the signed document being returned by email, which involves the execution of a paper document. For further discussion of "remote signing", see The Walrus Committee, "Remote signing protocols for financing transactions" (2015) 43 ABLR 497 and B Whittaker, "Remote signings under Australian Law" (2016) 44 ABLR 229.

[4] They include DocuSign, https://www.docusign.com.au/; Hellosign, https://www.hellosign.com/; RightSignature, https://rightsignature.com/; SignNow, https://www.signnow.com/; Adobe Sign, https://acrobat.adobe.com/us/en/sign.html; eSignLive, https://www.esignlive.com/; RSign, http://www.rpost.com/products/rsign/; AssureSign, https://www.assuresign.com/; and eSignature, http://www.esignsystems.com/productsandservices/esignature.

[4] After Lewis Carroll in "The Walrus and the Carpenter": "The time has come, the walrus said, to talk of many things". It is an informal group comprised of senior practitioners from the firms Allens, Ashurst, Herbert Smith Freehills, King & Wood Mallesons and Norton Rose Fulbright.

- a description of the operation of a typical platform; and
- an examination of whether contracts signed using platforms can satisfy requirements as to writing and signing, in two stages: first, under the general law, and second, under electronic transactions legislation.

Part B

- an examination of the potential status of print-outs of electronically signed documents, as a backstop;
- a discussion of two areas of possible difficulty: first, s 127 of the Corporations Act 2001 (Cth), and second, deeds; and
- a summary of situations in which electronic signing may not be appropriate.

This paper does not discuss any potential security issues. Nor does it examine confidentiality, privacy, privilege or evidentiary issues or regulatory requirements.

2 Specific conclusions

Though its efficacy may be affected by the particular facts of the transaction and by other relevant legal requirements, a properly structured electronic documentation platform can be used as follows.

(1) Parties or their authorised signatories can enter into binding agreements (including, generally, agreements required to be signed or in writing).

(2) A company through its officers can execute a document under s 127(1) of the Corporations Act. If there are any doubts, they can be satisfied by a print-out of the e-signed version which contained suitable wording confirming the parties' intentions as to the print-out.[5]

(3) Electronic signing cannot be used for deeds executed by corporations under their common or official seal. But otherwise it can be effective for the execution of deeds, as follows.

(a) Where electronic transactions legislation applies then for the most part deeds can be executed, or the transactions effected by them validated, without needing to print out the deed.[6]

(b) Where electronic transactions legislation does not apply, then in some states there are arguments that deeds can be executed without being printed. However, prudence would dictate waiting for further clarification before relying on electronic signing without a print-out.

(c) In any event, a deed signed through such a platform can be effective when the deed is printed out and suitable language is included to make clear the print-out is an intended original or counterpart.[7]

(4) Such a platform may not be appropriate for documents requiring a wet-ink original for registration for documents that need to be physically stamped (though a print-out may be used) or for instruments with particular requirements.

[5] Not all members of the Walrus Committee are comfortable with this conclusion.

[6] Not all members of the Walrus Committee are comfortable with this conclusion.

[7] Not all members of the Walrus Committee are comfortable with this conclusion.

3 A description of electronic documentation platforms

3.1 What are they?

The electronic documentation platforms listed above in note 4 appear from a quick survey of websites to be similar. They are cloud-based and allow parties to enter into agreements in electronic form, by applying electronically a "signature" to an electronic "document".[8]

3.2 How do they work?

The following is a general description of the mechanism of one such platform.[8] There are various options for users. For the purposes of this paper a ***Platform*** is a platform having broadly the following features.

(1) The document to be signed is uploaded into the Platform by the person arranging signing (***Arranger***). It can be uploaded in different formats. But the uploaded document sits as a PDF within an envelope.

As is the case with all electronic data storage and communication systems, a document is stored as digital information that the system on demand displays in a visible format (on screen, or as a print-out).

(2) The Arranger enters the names and email addresses of all signers and other recipients.

(3) The Arranger places tags in the document where signers need to insert their signatures. Particular fields (eg text fields) can also be added for signers to complete. Tags and fields are assigned by the Arranger to particular signers who can only complete the tags and fields assigned to them.

(4) When the Arranger clicks "send", the Platform emails to recipients a link to the envelope. Recipients then click on the link to access the document. But the only person who can sign as a particular signer is a person who can open the email directed to that signer. Different security measures can be used. Under one, the recipient may have to enter particular data, such as a code sent by SMS to their mobile phone, or answer secret security questions, before they can enter the envelope. Under another, signers leave a voice message for the Arranger confirming signing.

(5) The documents in an envelope cannot be altered within the Platform other than:

(a) to add signatures or complete data fields which have been added by the Arranger; and

(b) where the Arranger has enabled the recipient to use the Platform's mark-up tool.

The mark-up tool allows a recipient to mark changes and then initial them. If the tool is used, all other signers are required to review and approve the changes.

(6) Signers must first click a box indicating their consent to signing electronically. They can accept geolocation showing their location.

(7) Signers then select a form of electronic signature. Signatures can be a representation of an actual written signature created by the signer (which can be a previously created representation, or created directly using a finger, mouse or stylus), or they can be a pre-configured typed or manuscript-style signature. They would normally be a rendition of the signer's name. They could also involve additional words or a symbol of a type sometimes used to seal a document (eg "LS" in a circle).

---

[8] For convenience, this section refers to the data held in an Electronic Platform as a "document", and the process by which parties agree to be bound by the document as "signing". Whether that is in fact the case is discussed in this paper.

[8] DocuSign. I am indebted to Rebecca Smith for much of the description.

(8) The signer then follows the tags, applies the signature and completes relevant data fields and clicks a "finish" or "confirm signing" button to complete the signing. The Platform automatically notifies the Arranger that signing is complete, and can also automatically notify the signer.

(9) The signature is recorded as electronic data and incorporated with the other data comprising the document in the Platform as PDF so that the signature will appear in the PDF on screen or in any downloaded or printed version of the document.

(10) The Platform can track where actions in the signing process occurred (eg which IP address and, using geolocation, where the computer is located) and at what time. This and the steps described in (4) above, and the notification referred to in (8), assist in maintaining and proving the authenticity of the signatures.

(11) Once signing of a document has been completed, the data recording the document as a PDF can be accessed by recipients, for viewing, printing, or downloading to their own system or device. Each downloaded version and each print-out contains the signatures. The PDF is I understand set up to be tamper-proof, in the sense that an internal digital certification falls away if an attempt is made to amend the document.

The signed document is therefore recorded in the Platform, in any downloaded versions and in any print out, and can be seen on screen. At least the soft version kept by the Platform, and the print-outs, are secure and enduring. When a signer completes the signing process he or she inserts his or her signature into all of them.

3.3 Witnessing

Platforms generally do not make specific provision for witnessing, but do allow for signatures to be entered in a specific order. They can record witnesses' signatures in such a way that the signatures appear in the visible document against the appropriate attestation.

A witness needs to see the act of execution, and then to attest that he or she has done so by signing the document with the appropriate attestation. The witness should be present when the signatory is "signing" and have sight of the screen (and keyboard, mouse, pad or stylus, as applicable) of the signatory. The witness then adds his or her attestation to the electronic version, by signing through the Platform. This paper leaves for another day the question as to whether witnessing can be remote, for example by Skype or FaceTime.

Of course it is possible for a witness to purport to attest without having actually witnessed, but that risk applies in relation to a wet-ink process, and the steps referred to in 3.2(10) above can reduce the risk.

4 Electronic signing under general law without relying on electronic transactions legislation

Platforms are often said to rely upon the electronic transactions legislation described in 5.1 below and Part B, 3.3(e).[9] But that legislation has exceptions and conditions, and will not always apply.[10] It is relevant then to consider the position under general law, as well.

For most contracts there is no legal requirement of writing or signature (though they are common commercial practice). The procedures outlined above would normally be sufficient both to signify the requisite offer and acceptance and to constitute a record of the terms agreed. For certain transactions the law does impose specific formalities or requirements, or give benefits if they are satisfied. They vary, but may include any or all of the following:

[9] Including, for example, in DocuSign's materials – see http://8f412ee59816569e29bc-59e03d7a13f642c7860aa0ff425878b9.r69.cf2.rackcdn.com/Legality_and_Security_Australia.PDF.

[10] See 5 and 6 below.

- that the transaction or its terms be "in" or "evidenced by" "writing";[11]
- that it be "signed";[12]
- that it be "under the hand" of a party;[13]
- that there be a "document";[14] and
- in the case of deeds, that they satisfy the requirements set out in Part B, 3.

There is a significant body of case law on writing and signature requirements, outlined in 4.1 to 4.5 below. That case law may also inform the last two points which are dealt with in Part B, 2 and 3.

4.1 Australian cases on electronic signing

A 1998 paper,[15] quoting an 1884 Victorian case,[16] suggests that a signature: does not require physical pen to paper, but can be accomplished by mechanical means; is to authenticate the genuineness of a document; and requires the signer to put his or her mind to it. it goes on to set out a variety of functions for signatures It suggests that electronic signatures should suffice.

This has been borne out by case law. There is now a substantial body of Australian authorities which support the use of electronic signatures in both statutory and contractual contexts, even without relying on the electronic transactions legislation. Most relate to emails. They include the following.

McGuren v Simpson [2004] NSWSC 35 [22] (***McGuren***): an email with the person's name appearing in the "From" field was held to be signed for the purposes of s 54 of the Limitation Act 1969 (NSW).

Kation Pty Ltd v Lamru Pty Ltd [2012] NSWSC 356 (***Kation***): Ball J suggested a purposive test for determining whether a name included in an electronic communication was a signature. He held that names appearing in headings to columns identifying amounts payable were not included for the purpose of acknowledging the claim and were not signatures.[17]

Kavia Holdings Pty Limited v Suntrack Holdings Pty Limited [2011] NSWSC 716 (***Kavia***) related to a contractual requirement for signing in an option to renew a lease. Pembroke J said, at [33]:

> "In my view the inclusion of the sender's name on the email amounted to "signing" for the purpose of the clause. The requirement for signing is intended to identify the sender and authenticate the

---

[11] For example, disposition of interests in land: see *Conveyancing Act 1919* (NSW), s 23C; *Property Law Act 1958* (Vic), s 53; *Property Law Act 1974* (Qld), s 11; *Property Law Act 1969* (WA), s 34; *Law of Property Act 1936* (SA), s 29; *Conveyancing and Law of Property Act 1884* (Tas), s 60; *Law of Property Act* (NT), s 10; *Civil Law (Property) Act 2006* (ACT), s 201. See also *Personal Property Securities Act 2009* (Cth), s 20(2); and the provisions listed in note 12 and 13 below (except the *Corporations Act 2001* (Cth)).

[12] For example, different states' versions of the Statute of Frauds for contracts for the sale of land: see *Conveyancing Act 1919* (NSW), s 54A; *Instruments Act 1958* (Vic), s 126; *Property Law Act 1974* (Qld), s 59; *Law Reform (Statute of Frauds) Act 1962* (WA), s 2; *Law of Property Act 1936* (SA), s 26; *Conveyancing and Law of Property Act 1884* (Tas), s 36; and *Law of Property Act* (NT), s 26. For guarantees, see *Instruments Act 1958* (Vic), s 126; *Property Law Act 1974* (Qld), s 56; *Law Reform (Statute of Frauds) Act 1962* (WA), s 2; *Mercantile Law Act 1935* (Tas), s 6; *Law of Property Act* (NT), s 58. For land transfers, see *Property Law Act 1974* (Qld), s 10; *Law of Property Act* (NT), s 9. For assignments of copyright, see *Copyright Act 1968* (Cth), s 196. For bills of exchange, see *Bills of Exchange Act 1909* (Cth), s 8. See also *Corporations Act 2001* (Cth), ss 127(1) and 129(5).

[13] For assignments of choses in action see *Conveyancing Act 1919* (NSW), s 12; *Property Law Act 1958* (Vic), s 134; *Property Law Act 1974* (Qld), s 199; *Property Law Act 1969* (WA), s 20; *Law of Property Act 1936* (SA), s 15; *Conveyancing and Law of Property Act 1884* (Tas), s 86; *Law of Property (Miscellaneous Provisions) Act 1958* (ACT), s 3; *Law of Property Act* (NT), s 182 (which also require them to be "under the hand of the assignor").

[14] For example, *Corporations Act 2001* (Cth), s 127.

[15] McCullagh A, Little P, and Caelli W, "Electronic Signatures: Understand the Past to Develop the Future" (1998) UNSWLJ 452, 454-457.

[16] *R v Moore; Ex parte Myers* [1884] 10 VLR 322, 324.

[17] *Kation Pty Ltd v Lamru Pty Ltd* [2012] NSWSC 356 [30] – [32].

> communication. That is sufficiently achieved in an email by the setting out of the sender's name together with the email address from which the email is despatched. The name of the sender and his email address are readily and rapidly verifiable. Any other conclusion would produce a capricious and commercially inconvenient result that might have wide-reaching and unintended consequences in modern day trade and commerce."

Stuart v Hishon [2013] NSWSC 766 (***Stuart v Hishon***) found that a typed first name at the end of an email was enough to satisfy the relevant legislative signing requirement (in this case under s 54 of the *Limitation Act 1969* (NSW)) based on *Kation* and *Kavia*.

Torrac Investments Pty Ltd v Australian National Airlines Commission [1985] ANZ ConvR 82 (***Torrac***): It was held that a telex from a solicitor setting the terms of an agreed variation of a land sale contract would have been a signed note or memorandum in writing satisfying s 59 of the *Property Law Act 1974* (Qld), but the solicitor lacked the necessary authority.

Molodysky v Vema Australia Pty Ltd (1988) 4 BPR 9552 (***Molodysky v Vema***): a contract document for the sale of land, signed by the vendors, and sent by facsimile to the purchaser, was held to suffice for the purposes of the relevant legislation.

Islamic Council of South Australia Inc v Australian Federation of Islamic Councils Inc [2009] NSWSC 211 (***Islamic Council***): Brereton J said of an email, at [20]:

> "To my mind, it is nonetheless writing, if it appears on a computer screen, as a result of the entry of data into a computer"

and obiter at [22]:

> "…but if it were necessary that it be formally signed, the word "Ramzi" was subscribed to the email with the intent of authenticating the communications, and constitutes a signature notwithstanding that it appears in typewritten and not handwritten form."

eBay International AG v Creative Festival Entertainment Pty Limited (ACN 098 183 281) [2006] FCA 1768: Rares J said that the act of clicking acceptance of terms and conditions appearing in a website was signing a contract in writing (although it should be noted that there was no requirement for either writing or signing).[18]

4.2 Cases in other jurisdictions on electronic signing

English courts have also considered electronic signing in a variety of contexts.

In *J Pereira Fernandes SA v Mehta* [2006] 1 WLR 1543 (***Pereira***), Pelling J said, at [29]:

> "I have no doubt that if a party creates and sends an electronically signed document then he will be treated as having signed it to the same extent that he would be more be treated as having signed a hard copy of the same document. The fact that the document is created electronically as opposed to as a hard copy can make no difference."

But he held that an e-mail which only bore the name of the sender because the email address was added automatically on sending, was not "signed".

His dictum was accepted by the parties and referred to without demur by the court in *Green (Liquidator of Still Construction Ltd v Ireland* [2011] EWHC 1305 (Ch) (***Green v Ireland***). Richards J said (at [44]) that by inserting their names at the end of e-mails sent by them, the parties had "signed" them for the purposes of s 2 of the *Law of Property (Miscellaneous Provisions) Act 1989* (UK).

[18] *eBay International AG v Creative Festival Entertainment Pty Limited (ACN 098 183 281)* [2006] FCA 1768 [24], [48]-[49].

Orton v Collin [2007] EWHC 803 (Ch) concerned court rules requiring acceptances of settlement offers to be signed. The Court held they were satisfied by typing the sender's name in an email.

In *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] 1 WLR 3674 (***Golden Ocean***), the Court of Appeal found that typing a name at the end of an e-mail was sufficient to satisfy the signature requirement for guarantees under of the Statute of Frauds 1677.[19]

Two cases held that a "signed" telex satisfied statutory requirements for signatures and writing: one, in the Statute of Frauds (*Clipper Maritime v Shirlstar Container ('the Anemone')* [1987] 1 Lloyd's LR 546, 554), the other for an acknowledgement under the *Limitation Act 1980* (UK) (*Good Challenger Navegante SA v Metalexportimport SA* [2004] 1 Lloyd's Rep 67 [22]).

In *In re a debtor (No 2021 of 1995)* [1996] 2 All ER 345 (***Re a debtor***), Laddie J held that a requirement in bankruptcy legislation for a signed proxy to be submitted for a creditors' meeting could be satisfied by a signature on a fax. In *Beatty v First Explor. Fund* (1987) 25 BCLR (2d) 377 Hind J of the British Columbia Supreme Court came to a similar conclusion.[20] The New Zealand High Court has held that a signature on a fax may suffice as a signature for the requirements of the Statute of Frauds, but that a fax header might not.[21]

WS Tankship II BV v The Kwangju Bank Ltd [2011] EWHC 3103 (Comm) (***WS Tankship***) concerned a guarantee sent by a bank through the SWIFT messaging system. The Court said, at [155]:

> "In fact however, the conclusion [that it is not signed] is in my view erroneous, because the words "Kwangju Bank Ltd" are contained in the header to the SWIFT message. It is said on behalf of Kwangju Bank that this is not text which it typed in, but an output message header, that is, text generated by the SWIFT messaging system.
>
> That may be correct, but the name appears, and in my opinion it is a sufficient signature for the purposes of the Statute of Frauds. The words "Kwangju Bank Ltd" appear in the header, because the bank caused them to be there by sending the message. They were "voluntarily affixed"… Whether or not automatically generated by the system, and whether or not stated in whole, or abbreviated (in fact the name of the bank appeared here in complete form), this is in my judgment a sufficient signature for the purposes of the Statute of Frauds."

Bassano v Toft [2014] Bus LR D9; [2014] EWHC 377 (QB) (***Bassano v Toft***) concerned a requirement under consumer credit legislation for documents to be signed by the borrower. It was held that a document accepted under the following procedure ([40]) was signed.

> "Mrs Bassano was present at Borro's offices in the company of a representative of Borro. All loans by Borro are made online… When the loan terms are agreed, as a first stage the customer is presented on screen with a pre-contract agreement setting out the proposed terms of the loan. The customer then acknowledges and accepts this information, following which the formal loan agreement is presented on the screen. It includes amongst other things the name of the borrower as part of the agreement. The customer indicates acceptance of that loan agreement by clicking on an acceptance button marked "I Accept" which is in a defined field on the screen. The concluded agreement is then generated in PDF form, which is available to the customer at any stage by logging on to the customer account and using the chosen password; and is available to be printed as a PDF document."

Popplewell J said at [42]:

> "Generally speaking a signature is the writing or otherwise affixing of a person's name, or a mark to represent his name, with the intention of authenticating the document as being that of, or

[19] *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] 1 WLR 3674, [31] – [32].

[20] *Beatty v First Explor. Fund* (1987) 25 BCLR (2d) 377 [20].

[21] *Welsh v Gatchell HC Blenheim* [2009] 1 NZLR 241 [63].

> binding on, the person whose name is so written or affixed. The signature may be affixed by the name being typed in an electronic communication such as an email…"

In 2001 the UK Law Commission expressed the view that scanned manuscript signatures, the typing of a name in an email, and even clicking on a website button indicating acceptance, could constitute a signature satisfying relevant requirements.[22]

Blount in his book sets out a survey of US and other cases on electronic documents satisfying requirements of writing and signing.[23]

4.3 Cases on signing requirements more generally

Courts have given wide meanings to the requirement that a writing be "signed" by a party under the Statute of Frauds and other legislation. For example,[24] a writing has been held to be signed if the party's name appears:

- in the letterhead of a sale document prepared by the party;[25]
- on the front page of a sale catalogue that an auctioneer cuts out and pastes (physically) into the book that the auctioneer uses to record a sale made as the party's agent;[26]
- as the addressee of a letter that is prepared by the party for execution by the other party;[27]
- in a record of the agreement prepared by a third party, if the party does an act by which he or she recognises it as a record of the agreement;[28]
- in a telegram when received by the recipient (albeit in obiter);[29]
- in a form for the sale of property where the auctioneer as vendor's agent inserted the vendor's initials and surnames before the sale;[30]
- as a printed name on a pawn ticket;[31]
- as a typed name on a form of guarantee;[32]
- as a mark, such as an "X", rather than a name;[33]

---

[22] The Law Commission, *Electronic Commerce: Formal Requirements in Commercial Transactions* (2001) p 16 [3-39]. Similar views have recently been expressed by a joint working party of the Law Society Company Law Committee and the City of London Law Society Company Law and Financial Law Committees. See the practice note "Execution of a Document Using Electronic Signature" issued 13 July 2016 available at http://www.lawsociety.org.uk/support-services/advice/practice-notes/execution-of-a-document-using-an-electronic-signature/.

[23] Blount S, *Electronic Contracts: Principles from Common Law* (2nd ed, LexisNexis Butterworths, Sydney, 2015) pp 11- 24.

[24] I am indebted to Bruce Whittaker for some of this list.

[25] *Schneider v Norris* (1814) 105 ER 388, 389.

[26] *Cohen v Roche* [1927] 1 KB 169, 176-179.

[27] *Evans v Hoare* [1892] 1 QB 593, 598-599.

[28] *Durrell v Evans* (1862) 158 ER 848, 855.

[29] *Godwin v Frances* (1870) LR 5 CP 295, 305-306.

[30] *Leeman v Stocks* [1951] Ch 941, 952.

[31] *R v Moore; Ex parte Myers* [1884] 10 VLR 322, 324

[32] *Parkesinclair Chemicals (Aust) Pty Ltd v Asia Associates Inc* [2000] VSC 362 [107].

[33] *Baker v Dening* (1838) 8 A&E 94, 97-8. See also *Morton v Copeland* (1885) 16 CB 517, 535; *R v Moore; Ex parte Myers* [1884] 10 VLR 322, 324; *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27 [18].

- as initials;[34]
- as a false name;[35]
- as a facsimile of the signature applied by an impress stamp;[36]
- using a signature writing machine operated by an agent;[37] and
- as a seal or chop that bears no resemblance to a written signature.[38]

Some may be seen as extreme — courts taking a wide view to prevent parties resisting enforcement of obligations undertaken, even to the extent of taking parties to have adopted written versions of their name which were initially created for purposes other than adopting the contract. Cave J in *Evans v Hoare* [1892] 1 QB 593 said, at 597, "No doubt, in attempting to frame a principle, one is obliged to depart somewhat from the strict lines of the statute". The cases that involved the apparent adoption of a letterhead or previously printed name can be said to involve the "authenticated signature fiction".[39] But printed names can be signatures because they are printed by the signer or because they are recognised by the signer and "brought home to him as having been done with his authority so as to appropriate it to the particular instrument'.[40] And many cases involve the addition of a name or mark for the clear purpose of adopting the contract or document, without involving a handwritten signature, and are consistent with cases in other contexts.

There have been two cases where English judges have expressed a more restrictive view.

In *Goodman v J Eban Ltd* [1954] 1 QB 550 (***Goodman v Eban***), the Court of Appeal by a majority thought that a rubber stamped version of a solicitor's signature was sufficient execution on a bill of costs to satisfy statutory signing requirements. Evershed MR expressly did not decide as to whether a rubber stamp of the printed name, or the printing of the name, would be sufficient, but thought it would not have the same authenticity. Denning LJ in dissent thought that only a manuscript signature would do. He was influenced by the fact that preceding statutes required the bill to be under the hand of the solicitor, and by the fact that no two persons' handwriting is identical. He also said (at p561) "In modern English usage, when a document is required to be 'signed by' someone, that means that he must write his name with his own hand upon it."

On the other hand, Romer LJ approved a statement in Stroud's judicial dictionary, 3rd Edition, Volume 4, p 2789 that:

> "speaking generally, a signature is the writing, or otherwise affixing, a person's name, or a mark to represent his name by himself or by his authority... with the intention of authenticating a document as being that of, or as binding on the person whose name or mark is so written or affixed..."[41]

Romer LJ seemed to suggest that a typed name would suffice as much as the stamped facsimile signature.

---

[34] *Bosaid v Andry* [1963] VR 465, 473-4; outside of the Statute of Frauds context, see *Charlton v Hindmarsh* (1859) 1 Sw. & Tr. 433, 439.

[35] *Byers v Brown* (1859) 2 Legge 1136.

[36] *Welsh v Gatchell HC Blenheim* [2009] 1 NZLR 241 [49]; *Northcott v Davidson* [2012] NZHC 163 [39]. In relation to statutes other than the Statute of Frauds, see *Bennett v Brumfitt* (1867) LR 3 CP 28, 30; *Ex parte Dryden* [1893] NSWR 77, 80; *R v Moore; Ex parte Myers* [1884] 10 VLR 322, 324; *Goodman v J Eban Ltd* [1954] 1 QB 550, 557; *USA v Yiu* [1991] HKCFI 312 [10]; *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27 [18]; *Ex parte Durack* (1915) 32 WN (NSW) 18; *R v Brentford Justices, Ex parte Catlin* [1975] QB 455, 462-3; *Korber v Police* [2002] SASC 441 [20];]; *Lazarus Estates v Beasley* [1956] 1 All ER 341, 343-4; *Ex parte McQuillan, Re Priddis* (1932) 49 WN (NSW) 87, 89; *R v Burchill and Salway, Ex parte Kretschmar* (1947) QSR 249, 254.

[37] *Ramsay v Love* [2015] EWHC 65 (Ch).

[38] *Fujian Xun Jie Telecommunication v Tsang* [2010] HKCFI 816 [80].

[39] Discussed in *Pirie v Saunders* (1961) 104 CLR 149, 154.

[40] *R v Moore; Ex parte Myers* [1884] 10 VLR 322, 324-325

[41] *Goodman v J Eban Ltd* [1954] 1 QB 550, 563.

Goodman v Eban predated the relevant cases on electronic signing, and of course digital electronic communication itself. "Modern English usage" would now contemplate the "signing" of emails and the use of styluses, and is not limited to handwritten wet-ink signatures. Denning LJ seemed to believe manuscript signatures were necessary for ensuring signatures were authentic, but it is hard to reconcile that with the long-standing use of marks, and the other authorities referred to above (including a large number of cases on the use of stamped facsimile signatures),[42] and it would leave little room for the illiterate or disabled, or for signing through an agent. He later recognised that facsimile signatures were acceptable, citing *Goodman v Eban.*[43]

In *Firstpost Homes Ltd v Johnson* [1995] 1 WLR 1567, the Court of Appeal thought that the vendor's letterhead in a letter sent by it to a purchaser for signing did not satisfy the signing requirements in s 2 of the *Law Reform (Miscellaneous Provisions) Act 1989* (UK). It distinguished *Hoare v Dresser* (1859) 7 HLC 291. Unlike the Statute of Frauds which it replaced, s 2 provided that writing and a signature were necessary for there to be valid contract for sale of land, not just for the contract to be enforceable. The contract needed to be in writing, not just a note or memorandum of it. They said that the Statute of Frauds cases should not continue to govern s 2. Though he quoted Denning LJ and Evershed MR in G*oodman v Eban*, Peter Gibson LJ (with whom the others agreed) said that his decision was limited to the situation where the vendor sends a letter under its letterhead for the purchaser to sign.[44]

Section 2 was the provision considered in *Green v Ireland*, discussed above.

Those two English cases were examined by McPherson JA in *Commonwealth Bank of Australia v Muirhead* [1997] 1 QdR 567. He thought that three intermediate appellate courts in Australia had taken a less restrictive view than the English cases. He declined to follow the English cases. However, it should be noted that his decision and those three appellate cases were in the context of allowing signature by an agent.[45]

In *Ramsay v Love* [2015] EWHC 65 (Ch) (which involved the use of a signature writing machine) in elaborating on the position accepted by the parties the Court said (at [7]) that the statements in *Goodman v Eban* and *Firstpost Homes* were "not designed to distinguish between signing by use of a pen held in the executing party's own hand as distinct from the use of a signature writing machine."

New Zealand courts have accepted that a restrictive view of what constitutes a signature should be adopted for a provision requiring guarantees to be in writing and signed to be valid, but said a variety of actions can constitute a signature. In *Welsh v Gatchell HC Blenheim* [2009] 1 NZLR 241, Miller J said:

> "Although the content of the document and the signature upon it may be written at the same time and by the same person, they serve different legal purposes. A signature is a distinct personal act that identifies the party to be charged and evidences his or her intention to be bound by the contents of the document. For that reason, a name may not be interpreted as a signature where it serves some other purpose, as in the case where it appears as part of the substantive content. A signature may appear in any position, but it must govern the whole. A name, initials, or other mark that identifies the party to be charged may suffice as a signature. It need not be handwritten; in particular, it may be stamped or typed."[46]

[42] See the cases listed in note 36 above.

[43] *Lazarus Estates v Beasley* [1956] 1 All ER 341, 343-4.

[44] *Firstpost Homes Ltd v Johnson* [1995] 1 WLR 1567, 1576.

[45] *McRae v Coulton* (1986) 7 NSWLR 644, 663; *Deputy Commissioner of Taxation (Vic) v Boxshall* (1988) 83 ALR 175, 180; *Vincent v Johnstone Shire Council* [1977] 1 QdR 554, 572.

[46] *Welsh v Gatchell HC Blenheim* [2009] 1 NZLR 241 [63]. See also *Northcott v Davidson* [2012] NZHC 1639 [31] – [38].

Courts have continued to hold that stamped facsimile signatures can satisfy statutory requirements.[47] However, a stamp with just the name of a company might not suffice, at least in the absence of evidence as to the authorisation of the affixation.[48]

4.4 Cases on "under the hand of" a party

There are no cases that examine whether electronic signatures can be said to be "under the hand of" the signer.

There are generally fewer cases concerning the expression, and therefore less clarity. Authorities vary. In some the expression is treated as synonymous with signing.[49] But occasionally when the phrase is used in administrative law concerning the exercise of administrative or judicial power, it is found to have a narrow meaning, limiting delegation,[50] though not in the context of the exercise of a contractual right.[51]

That said, in a context where a narrow meaning may be expected, it has been held to allow signature by a stamp. And that, I suggest, may be seen as analogous to use of a Platform. *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27, concerned s 62(a) of the *Justices Act 1902 (NSW)*, which required a warrant to be issued "under the hand and seal" of a justice. The High Court rejected special leave to appeal, Windeyer J saying, at [18]:

> "But when a document is required by statute to be under a man's hand or signed by him what is ordinarily meant is that he must personally sign it, with his name or his mark, by a pen or by a stamp."

He cited a number of cases on signing, including *Ex parte Durack* (1915) 32 WN (NSW) 18 . That case allowed a stamped facsimile signature under the same provision.[52]

4.5 Cases on the requirement of writing

In Australia, a number of the cases referred to above in 4.1 provided that electronic documents can satisfy statutory requirements for a contract or a memorandum in writing, without relying on the electronic transactions legislation. *McGuren*, *Stuart v Hishon*, *Islamic Council* and *Kavia* all held that emails constituted writing in the context of the statutes considered. *Torrac* held, obiter, the same for a telex.

In England, *Golden Ocean*, *Pereira*, and to a lesser extent, *Green v Ireland*, are all authorities where statutory requirements for writing or a memorandum in writing were held to be satisfied by electronic means. The telex and facsimile cases referred to above in 4.2 also are relevant.[53]

In *Mackay Sugar Ltd v Quadrio* [2015] QCA 41, a contract for the sale of sugar cane was shown in a PowerPoint projection to a grower who then signed a printed last page. That was held to satisfy the requirement of a written contract under s 29 of the *Sugar Industry Act 1999* (Qld).

---

[47] *Lazarus Estates v Beasley* [1956] 1 All ER 341, 343-4; *R v Brentford Justices, Ex parte Catlin* [1975] QB 455, 462-3; *Korber v Police* [2002] SASC 441 [20]; *Welsh v Gatchell HC Blenheim* [2009] 1 NZLR 241 [49]; *Northcott v Davidson* [2012] NZHC 163 [39]; *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27, [18].

[48] See the discussion in *World of Technologies (Aust) Pty Ltd v Tempo (Aust) Pty Ltd* [2007] FCA 114 [92] - [96].

[49] *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27 [18]; *Commonwealth v Rian Financial Services and Developments* (1992) 36 FCR 101, 104.

[50] *Dhillon v Minister for Immigration* (1989) 86 ALR 651, 653-654, but see *Re Diptford Parish Lands* [1934] Ch 151, 161; *Bateman Television Ltd v Coleridge Finance Co Ltd* [1969] NZLR 794, 80.

[51] *Commonwealth v Rian Financial Services and Developments* (1992) 36 FCR 101, 104. In private law documents, the more narrow expression, '"under his own hand" has been held to exclude delegation: *Bray v Federal Commissioner of Taxation* (1968) 117 CLR 349, 352; *Robbins v Federal Commissioner of Taxation* (1974) 129 CLR 332, 338-9.

[52] It is interesting to note that the Western Australian District Court allowed a certificate bearing a facsimile signature as "under the hand" of the Deputy Commissioner of Taxation. See *Horner v Deputy Commissioner* [2003] WADC 60 [21].

[53] *Clipper Maritime v Shirlstar Container ('The Anemone')* [1987] 1 Lloyd's LR 546, 554; *Re a Debtor, ex parte Inland Revenue Commissioners* [1996] 2 All ER 345, 351; *Good Challenger Navegante SA v Metalexportimport SA* [2004] 1 Lloyd's Rep 67 [22].

In reviewing the particular legislative requirements one should of course check the context, and whether there is a statutory definition of "writing" applicable to the legislative provisions. For example, s 10 of the *Personal Property Securities Act 2009* (Cth) sets out an expansive definition of "writing" which is clearly satisfied by the electronic records of agreements in Platforms. In other statutes usually "writing" is defined by the relevant state or Commonwealth interpretation legislation.[54] The definitions vary. Perhaps the narrowest definition is that contained in the *Interpretation Act 1987* (NSW):

> "'Writing' includes printing, photography, photocopying, lithography, typewriting and any other mode of representing or reproducing words in visible form."

That is virtually identical to the definition in schedule 1 of the *Interpretation Act 1978* (UK). *Golden Ocean* and the other English cases referred to above did not consider that language expressly.

This should cover documents created or stored on a Platform. The process by which a Platform receives, stores and then reproduces data representing writing and signatures and shows it on screen or on paper is another method of "reproducing words in visible form". A screen is visible.

In Australia, similar definitions have been held to cover email,[55] computer codes,[56] and information stored on a computer.[57]

The High Court of Singapore interpreted a similar definition in the relevant interpretation legislation in Singapore to allow a visible representation on screen of an electronically created and stored document to satisfy legislation re-enacting the Statute of Frauds.[58]

The UK Law Commission in 2001 concluded that if a document held or transmitted electronically could be read on screen or by other means, then it satisfied statutory requirements of writing, and fell within the definition of writing in the *Interpretation Act 1978* (UK). They recognised that there were contrary views,[59] but it should be noted that was before the cases named above, and the Joint Working Party Practice Note referred to in note 22 . Their view applied whether or not the document is actually read.[60] They said an email or website transaction is generally capable of satisfying a writing requirement. But the requirement in the *Interpretation Act* definition for "words in a visible form" meant that the transmission of data alone could not satisfy that definition unless the words can be in a visible form.[61]

Two articles by a group of authors published in 2003, before the bulk of the cases on electronic signing, concluded that electronic documents, as then understood, could satisfy Statute of Frauds-style requirements for writing.[62] They cited US authorities on e-mail signatures.[63]

They suggested the requirement of writing is to satisfy a number of policy imperatives:

- the need for certainty within contractual relationships;

---

[54] *Acts Interpretation Act 1901* (Cth), s 2B; *Interpretation Act 1987* (NSW), s 21(1); *Interpretation of Legislation Act 1984* (Vic), s 38; *Acts Interpretation Act 1954* (Qld), Schedule 1; *Interpretation Act 1984* (WA), s 5; *Acts Interpretation Act* 1915 (SA), s 4(1); *Acts Interpretation Act 1931* (Tas), s 24(b); Dictionary to the *Legislation Act 2001* (ACT); *Interpretation Act* (NT), s 26.

[55] *Lewis v Chief Executive Department of Justice and Community Safety and Sentence Administration Board of the Australian Capital Territory* [2013] ACTSC 198 [134].

[56] *Computer Edge Pty Ltd v Apple Computer Inc* (1986) 161 CLR 171 [9]-[10].

[57] *Re Australian Federation of Air Pilots v Australian Airlines Limited* [1991] FCA 62 [19]-[20].

[58] *SM Integrated Transware Pte Ltd v Shenker Singapore (Pte) Ltd* [2005] 2 SLR 651 [79] – [80].

[59] The Law Commission, n 22, pp 7-11.

[60] The Law Commission, n 22, p 11 [3.21] - [3.22]

[61] The Law Commission, n 22, p 8 [3.8].

[62] Christensen S, Duncan W and Low R, "The Requirements of Writing for Electronic Loan Contracts – the Queensland Experience Compared with Other Jurisdictions" (2003) 10 (3) *Murdoch University Electronic Law Journal*; Christensen S and Low R, 'Is an electronic document in writing?' (2003) 77 ALJ 416.

[63] Christensen, Duncan and Low, n 62, p 4. For further discussion of US authority, see Blount, n 23.

- the importance of the parties giving serious deliberation to a decision to enter a transaction concerning land;
- the need to memorialise the agreement for later reference; and
- the importance of authentication of the contract to inhibit the likelihood of fraud.[64]

4.6 Conclusions on the use of Platforms without the ETA

It is of course trite to observe that any requirement in a statute needs to be analysed in the context of that particular statute, and that global statements need to be treated with caution. Having said that, though, there is a clear recognition in case law that "writing" can exist in a non-tangible format, and that a person can "sign" such a writing by entering appropriate identifying details into a computer. I have not yet found a relevant Australian, New Zealand or English case to the contrary.

In the absence of any particular policy or interpretive quirks in particular legislation, documents executed through Platforms should qualify. They satisfy the usual policy requirements. There is a permanent record of the terms of the document, giving certainty. Signing in that way gives the requisite deliberation, authentication and assent, and is a permanent record of that assent, reducing the possibility of fraud. Of course fraud and forgery are a possibility with an electronic signature, but wet-ink signatures are by no means proof against them, and the use of marks and stamps and other generally accepted methods can be more fraught.[65] It could in fact be argued that the record-keeping, email location and other functionality of Platforms can give some advantages over other methods in this respect.[66]

It might be said that some of the Statute of Frauds cases involve strenuous efforts by the courts to prevent parties reneging on obligations, which might not be replicated in other contexts.[67] But similar considerations would apply whenever a party seeks to deny being bound by a document to which it assented by arguing that it not satisfy a requirement of signing or writing. In any event in a Platform a party actively indicates its assent to a document by inserting its name, and that is a much clearer case than those cases that involved the apparent adoption of a letterhead or other pre-printed form prepared for other purposes. No "authenticated signature fiction" is necessary. And it is consistent with cases in a variety of contexts, including those involving electronic documents and signatures.

Cases on the creation and execution of documents by email[68] are relevant to the use of Platforms. There seems no reason why they are not a direct analogue. An email and its attachments are only transmitted and stored electronically as a digital record. They can only be read on screen or as a print-out. Assent is signified by the insertion of a name in the email. Two other cases – *WS Tankship* and *Bassano v Toft* discussed above[69] – involve systems also analogous to Platforms.

[64] Christensen, Duncan and Low, n 62, p 3.

[65] See the passage in *Re a Debtor (No 2021 of 1995)* [1996] 2 All ER 345, 351 set out in Part B, 1.

[66] See also the discussion in 5.5(a) below.

[67] See the discussion in 4.3 above.

[68] *SM Integrated Transware Pte Ltd v Shenker Singapore (Pte) Ltd* [2005] 2 SLR 651; *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] 1 WLR 3674; *Austral-Asia Freight Pty Ltd v Turner* [2013] FCCA 298.

[69] See 4.2 above.

5 The effect of the electronic transactions legislation

5.1 Electronic transactions legislation

In Australia, Platforms are often said[70] to rely on the applicable electronic transactions legislation in each jurisdiction (the "***ETA***").[71] References to section numbers below are to the Commonwealth ETA, the *Electronic Transactions Act 1999* (Cth).

The object of the ETA is set out in s 3:

> "The object of this Act is to provide a regulatory framework that:
>
> (a) recognises the importance of the information economy to the future economic and social prosperity of Australia; and
>
> (b) facilitates the use of electronic transactions; and
>
> (c) promotes business and community confidence in the use of electronic transactions; and
>
> (d) enables business and the community to use electronic communications in their dealings with government."

It is generally facilitative. There are some provisions, like sections 14 to 15D inclusive, which do regulate all behaviour within their ambit, but the main relevant sections discussed in this paper validate conforming behaviour rather than invalidate non-conforming behaviour. See the discussion in 5.6(b) below.

Each of the ETAs contains the following provisions in virtually identical terms, as well as a further provision dealing with requirements for paper referred to in Part B, 3.3(e), which is relevant for deeds. There are exclusions discussed in 6 below.

(a) The no invalidity provision (section 8)

Section 8(1) of the Commonwealth ETA is the general provision validating electronic transactions:

”For the purposes of a law of the Commonwealth, a transaction is not invalid because it took place wholly or partly by means of one or more electronic communications."[72]

"Transaction" is defined in s 5 to include:

> "(a) any transaction in the nature of a contract, agreement or other arrangement; and
>
> (b) any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract, agreement or other arrangement; and

---

[70] For example, DocuSign says it does so in its materials.

[71] That legislation comprises the *Electronic Transactions Act 1999* (Cth), together with the following State and Territory statutes: *Electronic Transactions Act 2000* (NSW), *Electronic Transactions (Victoria) Act 2000* (Vic), *Electronic Transactions (Queensland) Act 2001* (Qld), *Electronic Transactions Act 2011* (WA), *Electronic Transactions Act 2000* (SA), *Electronic Transactions Act 2000* (Tas), *Electronic Transactions (Northern Territory) Act* (NT) and *Electronic Transactions Act 2001* (ACT). There are also regulations in most jurisdictions.

[72] State and territory equivalents are virtually identical, but there are significant wording differences with the New Zealand equivalent, s 8 of the *Electronic Transactions Act 2002* (NZ), which reads:

"To avoid doubt, information is not denied legal effect solely because it is —

(a) in electronic form or is in an electronic communication;

(b) referred to in an electronic communication that is intended to give rise to that legal effect."

(c) any transaction of a non-commercial nature."

"Law of the Commonwealth" is defined to include "written or unwritten law". Section 15E of the Commonwealth Act applies to contracts as if the words "For the purposes of the law of the Commonwealth" were omitted. It is unclear why this is thought necessary.

Section 8 is general, the next two provisions deal with specific requirements.

(b) The signing provision (section 10)

Section 10 provides that a legal requirement for a signature is met in relation to an "electronic communication" if the following conditions are satisfied:

(a) a method is used to identify the person and to indicate the person's intention in respect of the information communicated (***Identification Requirement***);

(b) the method used was either:

(i) 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

(ii) proven in fact to have fulfilled the functions described in (i), by itself or together with further evidence (***Reliability Requirement***);

(c) the person to whom the signature is required to be given consents to that requirement being met by way of the use of the method mentioned in paragraph (a) (***Consent Requirement***).

"Electronic communication" is defined to include "a communication of information in the form of data, text or images by means of guided and/or unguided electromagnetic energy". "Information" is defined to mean information in the form of data, text, images or speech. The terms used are deliberately broad and non-specific.

(c) The writing provision (section 9)

Section 9 provides that where a person is required or permitted under a law of the Commonwealth to give "information" in writing, that is met if the person gives the information by means of an "electronic communication", if conditions are met. For dealings between commercial parties, the relevant conditions are two:

(a) it was reasonable to expect that information will be readily accessible so as to be usable for a subsequent reference (***Accessibility Requirement*);** and

(b) the other party consents (***Consent Requirement***).

5.2 The effect of the no invalidity provision (section 8)

The no invalidity provision offers significant protection. It was utilised in some of the cases listed in 5.3 below,[73] and in other cases,[74] including to validate a contract formed by exchange of emails.[75] And the scope is wide — unlike the signing and writing provisions there are no preconditions or qualifications to its application. There just needs to be a "transaction". But there are limitations, because the provision deals only with the "validity" of a "transaction".

[73] *Getup Ltd v Electricity Commissioner* [2010] FCA 69 [10] – [23]; *Curtis v SingTel Optus Pty Ltd* (2014) 225 FCR 458 [50] - [53]; *Austral-Asia Freight Pty Ltd v Turner* [2013] FCCA 298 [30].

[74] *Finlayson and Migration Agents Registry Authority* [2005] AATA 112 [19]; *Amasya Enterprises Pty Ltd v Asia Developments (Aust) Pty Ltd (No. 2)* [2015] VSC 500 [122].

[75] *Ford v La Forrest* [2002] 2 QdR 44 [35].

- It does not deal with unenforceability. Some statutory requirements which replicate the Statute of Frauds only provide that a contract is unenforceable unless it, or a note of it, is not in writing.[76] Unwritten contracts may be valid, but unenforceable. This provision on its own may not save them, unless a very wide meaning is given to "validity".
- "Transaction" is widely defined to include "any transaction in the nature of a contract, agreement or other arrangement". The definition is broad and inclusive. But it is not absolutely clear that this covers all documents.[77]
- In commercial life there are often transactions evidenced by deeds which do not need to be a deed to be valid. For example, some contracts for which there is valuable consideration are executed as deeds. Where such a "deed" is created electronically, the invalidity provision on its own may not be sufficient to preserve the effect as a deed, though it validates the transaction.

Clearly, the provision does not validate every transaction effected electronically despite any defect of any kind whatsoever. For example, it would not validate a contract without consideration. But how far does it go? Unfortunately there is little academic or judicial discussion on the subject. A narrow view would be that it merely records that transactions can be valid if done electronically. That would rob it of any effect. I suggest that the preferred view should be that transactions are validated where a requirement which would otherwise apply is directly contradicted, and impossible to fulfil, if the transaction occurs electronically. For example, if an electronic transaction would be regarded as not being in writing, simply because it is electronic, then it would be validated by the no validity provision. This is consistent with the Queensland Court of Appeal decision in *Ford v La Forrest* [2002] 2 QdR 44.[78]

5.3 The effect of the signing provision (section 10)

There is limited relevant guidance in the statutory materials. Australian cases which have discussed it include the following.[79]

Claremont 24-7 Pty Ltd v Invox Pty Ltd (No 2) [2015] WASC 220: the Court held that an agreement for lease evidenced by email was in writing and had been signed as required by s 34 of the Property Law Act 1969 (WA). The parties agreed terms which were then to be put into the lessor's preferred format. The lessor sent an email attaching the agreed terms to the lessee confirming they were acceptable. The court stated that it satisfied the Identification, Reliability and Consent Requirements under the WA ETA.

Getup Ltd and another v Electoral Commissioner [2010] FCA 869 concerned an application for enrolment under the Commonwealth Electoral Act 1918 via an online platform. The form was electronically signed using a stylus or finger on a track pad. When printed, the signature was similar in appearance to a faxed signature (ie slightly pixelated).

The Commissioner rejected the application. He was not satisfied as to reliability of the application as it could not be used to check whether any subsequent signature of the applicant was genuine.

Perram J stated that 'the provision sets a standard which, in this instance, is to be ascertained and applied by the court', not the Commissioner.[80] There was no basis for the Commissioner's rejection:

- there was no difference between the reliability of applications submitted via fax and email (which the Commissioner routinely accepted) and the online application in relation to appearance of the signature; and
- the potential for identifying fraud on the basis of the appearance of the signature was no different.

---

[76] For example, *Conveyancing Act 1919* (NSW), s 54A; *Instruments Act 1958* (Vic), s 126; *Property Law Act 1974* (Qld), s 59; *Law of Property Act 1936* (SA), s 26; *Conveyancing and Law of Property Act 1884* (Tas), s 36; *Law of Property Act* (NT), s 62.

[77] See the discussion in Part B, 3.3(e)(ii).

[78] *Ford v La Forrest* [2002] 2 QdR 44 [35].

[79] I am indebted to Rebecca Smith for a number of these summaries.

[80] *Getup Ltd and another v Electoral Commissioner* [2010] FCA 869 [15].

The Corporation of the City of Adelaide v Corneloup & Ors [2011] SASCFC 84 concerned whether the required certification of a proposed council by-law was signed by the legal practitioner providing the certificate. The signatory's name had been inserted in the relevant form but there was no signature. The form had been emailed to the council by the legal practitioner. The High Court upheld the decision of the Full Court of the SA Supreme Court that the certificate was signed by virtue of the SA ETA. It had found that "the certificate was provided by an email in circumstances which allowed the identification of the legal practitioner and unequivocally showed that he subscribed to the view expressed in the certificate even though he did not sign it".[81]

In *Harding v Brisbane City Council & Others* [2008] QPEC 75 (***Harding***) an online process for submission of objections to Council to developments required objectors to enter their name and address as well as details of another form of identification. When an objector entered his driver's licence number as his identification one of the digits was incorrect. The court rejected arguments that it failed the Reliability Requirement, saying that entering the driver's licence number was just one aspect of the signing process which did not have any significant effect.[82]

In *Morgan v Toowoomba Regional Council & Ors (No. 2)* [2011] QPEC 61 electronic submissions were not accepted. *Harding* was distinguished on the basis that in that case the council indicated its consent to electronic submissions, and there had been no consent in this case.[83]

Faulks v Cameron [2004] NTSC 6: the Court held that a "separation agreement" which was evidenced by email correspondence was "signed" in accordance with s 9 of the NT ETA for the purposes of subsection 45(2) of the *De Facto Relationships Act* (NT).

Stellard Pty Ltd and Others v North Queensland Fuel Pty Ltd [2015] QSC 119: the parties exchanged emails relating to the sale of a service station. The defendant claimed that the email accepting the plaintiff's offer had not been signed as required by s 59 of the *Property Law Act 1974* (Qld). The entity accepting the offer was not identified in the email. Martin J held that:

- Compliance with the Identification Requirement can be established by reference to evidence other than the email itself. The various conversations between the parties, the offer email and the defendant's admission in pleadings as to the identity of the sender of the email were sufficient.
- The Consent Requirement was satisfied: "In circumstances where parties have engaged in negotiation by email and, in particular, where an offer is made by email, then it is open to the court to infer that consent has been given by conduct of the other party."[84]

Russells v McCardel [2014] VSC 287: legislation required a lawyer to have a written cost agreement signed by the client. A client sent an email to his lawyers agreeing that he would sign the cost agreement submitted by the lawyers with certain amendments. This was held to satisfy the Consent Requirement (consent by the lawyers could be inferred), and the Reliability Requirement, but not the Identification Requirement, as intention to be bound by the cost agreement was not demonstrated. [85]

Curtis v SingTel Optus Pty Ltd (2014) 225 FCR 428: the Full Court of the Federal Court of Australia decided that the ETA was of no assistance in determining whether attachments to an email bankruptcy

[81] *The Corporation of the City of Adelaide v Corneloup & Ors* [2011] SASCFC 84 [29].

[82] *Harding v Brisbane City Council & Others* [2008] QPEC 75 [10].

[83] *Morgan v Toowoomba Regional Council & Ors (No. 2)* [2011] QPEC 61 [3].

[84] *Stellard Pty Ltd and Others v North Queensland Fuel Pty Ltd* [2015] QSC 119 [68], citing *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2011] 1 WLR 2575, and the appeal from that decision, *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] 1 WLR 3674.

[85] *Russells v McCardel* [2014] VSC 287 [57] – [62].

notice complied with requirements in bankruptcy legislation for documents to be attached to the notice and each other. The court decided that the documents were sufficiently attached.[86]

Legal Services Board v Forster (2010) 29 VR 277: a typed name in an email from a member of the Legal Services Board adopting a resolution agreeing to appoint a receiver was a sufficient signature. The decision of the remainder of the Board to proceed was taken to be consent.[87]

Luxottica Retail Australia Pty Ltd v 136 Queen Street Pty Ltd [2011] QSC 162: a footer on an email in negotiations for renewal of a lease was a sufficient signature and satisfied the identification, reliability and consent requirements of s 14 of the Queensland ETA.[88] There are New Zealand cases on the equivalent provision.[89]

While the facts of the above cases vary considerably, they generally indicate that:

- courts have generally given a very broad interpretation of the ETAs to facilitate electronic signing;
- the Identification Requirement does not require the recipient of the electronic communication to have separately verified the identity of the signatory, only that the identity of the signatory and their intention in relation to the information communicated can be determined (which can be by referring to other evidence);
- the Consent Requirement is unlikely to require anything in addition to the relevant party's act of using the chosen electronic mechanism (whether email or a Platform) or engaging with the process; and
- the Reliability Requirement is objectively determined and can be satisfied easily, for example, by an email.

5.4 The effect of the writing provision (section 9)

There are surprisingly few Australian superior court decisions which expressly consider the writing provision. Those that have been decided tend to deal with the service of notices and the making of submissions rather than the entry into agreements or other formal legal documents. In a number of the cases on the Signing Provision listed in 5.3 above relating to electronic documents, there was a requirement that the document be in writing, but presumably in those cases it must have been regarded as a given that the requirement was satisfied by the electronic document in question.

The decisions which did expressly examine the writing provisions are as follows.

C&P Syndicate Pty Ltd v Reddy [2013] NSWSC 643: notice in writing could be given by email.[90]

Tugun Cobaki Alliance Inc v Minister for Planning and RTA [2006] NSWLEC 396: "giving" a document electronically was held to include attaching it to an email and attaching a link to it in an email, but probably not putting the report on a website and notifying the person that it is there.[91]

Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd [2014] QSC 30: an applicant tried to serve a respondent by an email link to a DropBox folder with a relevant electronic file. The file was held not to be served because it was not part of the electronic communication.[92]

---

[86] *Curtis v SingTel Optus Pty Ltd* (2014) 225 FCR 428 [49], [51].

[87] *Legal Services Board v Forster* (2010) 29 VR 277, 289.

[88] *Luxottica Retail Australia Pty Ltd v 136 Queen Street Pty Ltd* [2011] QSC 162 [32].

[89] *Welsh v Gatchell HC Blenheim* [2009] 1 NZLR 241*; RD2 International Limited v NDP 2010 Limited* [2013] NZHC 1892.

[90] *C&P Syndicate Pty Ltd v Reddy* [2013] NSWSC 643 [110] – [111].

[91] *Tugun Cobaki Alliance Inc v Minister for Planning and RTA* [2006] NSWLEC 396 [111].

[92] *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* [2014] QSC 30 [36] – [37].

In *Harding*, discussed above in 5.3, the Court quoted the Queensland writing provision in deciding that an electronic submission satisfied signing and writing requirements (at [10]), but did not discuss it further.

The only Australian case which expressly contemplated the writing provision in the context of an agreement was *Austral-Asia Freight Pty Ltd v Turner* [2013] FCCA, a decision of the Federal Circuit Court. In New Zealand an emailed written confirmation of a guarantee was held to satisfy the relevant statutory requirements for writing.[93]

5.5 Compliance of Platforms with the ETA writing and signing provisions

(a) Signing provision (s 10 and equivalents)

In an early article after the introduction of the ETA, Christensen, Duncan and Low queried whether executing contractual documents can be seen as giving "information" by an "electronic communication" for the purposes of the signing provision, that is, whether the provision would apply.[94] But in a number of the subsequent cases referred to in 5.3 above the provision was held to cover the entry into contractual and similar documents, though the particular point was not discussed.[95] That would seem correct. The language is deliberately broad. A contract or other legal document created and stored electronically is a communication between the parties and between writer or signer and reader. It is entered through the system to be retrieved or available. It consists of data or text.

The signing provision should generally easily apply to documents signed through Platforms (except where exclusions apply). The procedures described above in 3.2 would seem well able to satisfy the Identification, Consent and Reliability Requirements.

Identification is readily achieved by the use of the signer's name[96] and boosted by the other precautions in those procedures. Generally the signer's intention in signing the document would be apparent. If it is not, then the position would broadly be no different from the situation which would occur with a wet-ink signature applied in the same way.

Consent of parties signing through a Platform is built into the procedure, see step (6) in 3.2. For the other parties, their participation in the signing process, and their acceptance of and reliance on the document (including by seeking to enforce it) should be sufficient consent under the principles adopted in the cases outlined in 5.3 above.[97]

The cases listed in 4.1 above would inform the Reliability Requirement and give comfort. A wide variety of signature methods is acceptable generally. If the courts accept contracts signed by email, why should they not accept documents signed in a different electronic manner? Emails are stored and signed electronically without many of the precautions built in to Platforms. Some of the cases listed in 5.3 give general comfort.[98]

It might be suggested that signatures through Platforms are not sufficiently reliable. A printed name or artificially generated signature may be seen as less reliable than a facsimile signature or a stylus or mouse. A signer's secretary or colleague may sit at the purported signer's computer or other device and insert the purported signer's name or a facsimile signature. A person with

---

[93] *C A Sanson v Parval Marketing Ltd* [2008] NZHC 87 [39].

[94] Christensen, Duncan, and Low, n 62.

[95] *Faulks v Cameron* [2004] NTSC 61 [63]-[64]; *Claremont 24-7 Pty Ltd v Invox Pty Ltd (No 2)* [2015] WASC 220 [82]; *Stellard Pty Ltd v North Queensland Fuel Pty Ltd* [2015] QSC 119 [62]-[69]; *Austral-Asia Freight Pty Ltd v Turner* [2013] FCCA 298 [30].

[96] The test is liberally applied, see *Claremont 24-7 Pty Ltd v Invox Pty Ltd (No 2)* [2015]; *Attorney General (SA) v Corporation of the City of Adelaide and Others* [2013] HCA 3; *Legal Services Board v Forster* (2010) 29 VR 277; *Luxottica Retail Australia Pty Ltd v 136 Queen Street Pty Ltd* [2011] QSC 162.

[97] In particular, *Claremont 24-7 Pty Ltd v Invox Pty Ltd (No 2)* [2015]; *Luxottica Retail Australia Pty Ltd v 136 Queen Street Pty Ltd* [2011] QSC 162 ; *Russells v McCardel* [2014] VSC 287; *Stellard Pty Ltd and Others v North Queensland Fuel Pty Ltd* [2015] QSC 119.

[98] *Claremont 24-7 Pty Ltd v Invox Pty Ltd (No 2)* [2015]; *Getup Ltd and another v Electoral Commissioner* [2010] FCA 869; *Luxottica Retail Australia Pty Ltd v 136 Queen Street Pty Ltd* [2011] QSC 162; *Russells v McCardel* [2014] VSC 287.

authority to insert a "signature" in one context may insert it in another context without authority.[99] Reproductions of signatures, and printed names, may be less open to verification than a wet-ink hand signature.

But I suggest that would greatly overstate the issue.[100] It would be inconsistent with the cases referred to above, and would set a higher standard than adopted in those cases. The general law as to signatures has never had high standards of reliability. It has long been accepted that the addition of a mark,[101] or the insertion of a name by a person at the direction of another, is a signature.[102] Stamped facsimile signatures are acceptable and printed names have been accepted,[103] as has the use of signing machines (despite allegations of unauthorised use).[104] Signatures as so accepted lack the attribute of being verifiable in all circumstances. Under other methods, handwritten or other signatures can be faked, or the party receiving a document has no way of knowing whether the signature is genuine.[105] In wholesale commerce, the practice has grown of executing documents by exchanging emailed copies of counterparts. Those counterparts can easily be signed with an electronic facsimile signature inserted directly into the pdf. That could be done by a secretary or colleague. It can also be said that the steps and precautions referred to in 3.2(4), 3.2(8) and 3.2(10) can enhance reliability, potentially to a higher level than other remote mechanisms. In particular someone wanting to sign needs to have access to the email received by the signer..

That of course does not alter the need for commercial parties to make their own assessment of the risk of fraud or forgery, and the acceptability of that risk, as they would for any process.

References in the Signing Provision to a requirement for a signature are, I suggest, wide enough to cover requirements that a document be "under the hand" of a party. As discussed in 4.4 above, it has been regarded as synonymous with signing, and further, it has been held (obiter) to include signature by an impress stamp,[106] and that may be seen as analogous to use of a Platform.

(b) Writing provisions (section 9 and equivalents)

Platforms appear readily able to satisfy the Accessibility and Consent Requirements. Consent is dealt with or inferred as part of the process, as discussed above. The Accessibility Requirement should be easily satisfied, though there appear to be no decisions of superior courts on the Requirement.[107] The document remains available under the Platform. Were there any doubts, they can be resolved by a download.

(c) Limitations

Though Platforms are capable of satisfying the signing and writing provisions of the ETAs, and the no invalidity provisions may also assist, that is not the end of the matter:

- while the ETAs facilitate electronic execution of documents, they may not override other legal requirements or considerations as to the proper execution of documents;

---

[99] As occurred in *Williams Group Australia Pty Ltd v Crocker* [2015] NSWSC 1907 [20].

[100] See the excerpt of Laddie J's judgement in *In re a debtor (No 2021 of 1995)* [1996] 2 All ER 345, 351 quoted in Part B, 1 of this paper.

[101] *Baker v Dening* (1838) 8 A&E 94, 97-8. See also *Morton v Copeland* (1885) 16 CB 517, 535 and *R v Moore; Ex parte Myers* [1884] 10 VLR 322, 324.

[102] *Harrison v Elvin* (1842) 3 QB 117, 119; *Helsham v Langley* (1841) 62 ER 842, 844.

[103] *Lazarus Estates v Beasley* [1956] QB 702, 710; *R v Brentford Justices, Ex parte Catlin* [1975] QB 455, 462-3; *Korber v Police* [2002] SASC 441 [20]; *Welsh v Gatchell HC Blenheim* [2009] 1 NZLR 241 [49]; *Northcott v Davidson* [2012] NZHC 163 [39]. See the cases referred to in note 36 above.

[104] As occurred in *Ramsay v Love* [2015] EWHC 65 (Ch).

[105] See the discussion in 4.2 above; *Re a debtor (no 2021 of 1995)* [1996] 2 All ER 345, 351.

[106] *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27[18]

[107] A Victorian tribunal thought the Accessibility Requirement is satisfied if the notice is available to be read, even if it went to the recipient's junk mail folder (though there is a question as to whether accessibility also means the information should be easily understood). See *Brown Bros Cabinetworks Pty Ltd v Graham (Civil Claims)* [2012] VCAT 70 [27].

- there are several exclusions from the signing, writing and other provisions of the ETAs, see below;
- parties still need to carry out customary procedures for verifying the authority of signatories etc, or statutory requirements to check their identity; and
- in particular cases there may be contrary specifications by the parties.

5.6 Exclusions from the ETA

(a) The source of the exclusions

There are a number of exclusions from the operation of the ETA.

First, ss 9(3) and 10(2) of the Commonwealth ETA (and their equivalents) exempt from the writing and signing provisions respectively the operation of other specific laws which make certain requirements as to electronic communications, data storage or information.

Second, each of the ETAs or related regulations also includes a list of documents and in some cases legislation excluded from the operation of the relevant ETA.[108] For the Commonwealth, there is a long list of exempted legislation, which includes the *Corporations Act*.[109]

(b) The effect of the exclusions

Excluding something from provisions of the ETA of course removes it from the protection of the ETA. But does it mean that a party cannot sign documents electronically where it would have been able to do so under general law?

As we have seen, electronic signatures and documentation have been held to be effective without the benefit of the ETA.[110]

Section 3, setting out the ETA's objects, makes clear that the legislation is facilitative. This is supported by Singapore authority on similar legislation.[111] Divisions 1 and 2 of Part 2 are facilitative rather than mandatory and provide a mechanism under which parties that can satisfy legislative requirements electronically. They are there to allow transactions to be effected electronically which would not have been possible but for the ETA. Section 8 prevents transactions which otherwise would have been invalid, from being invalid. It does not say that transactions outside its compass are invalid, or that transactions that would have been valid are now invalid. Sections 9 and 10 provide that signing and writing requirements are taken to be satisfied in certain ways. They do not limit the other ways in which the requirements can be taken to be satisfied.

There is nothing in the ETA to indicate that it codifies the law with respect to electronic signing or transmission (beyond the mandatory provisions referred to above).

---

[108] *Electronic Transactions Act 1999* (Cth), ss 7A and 7B; *Electronic Transactions Regulations 2000* (Cth), reg 4, Sched 1; *Electronic Transactions Act 2012* (NSW), regs 4-7; *Electronic Transactions (Victoria) Act 2000* (Vic), s 6A; *Electronic Transactions (Victoria) Regulations 2010* (Vic), reg 6; *Electronic Transactions (Queensland) Act 2001* (Qld), s 7A, Sched 1; *Electronic Transactions Act 2011* (WA), s 7; *Electronic Transactions Regulations 2012* (WA), regs 3 and 4; *Electronic Transactions Act 2000* (SA), s 6A; *Electronic Transactions Regulations 2002* (SA), regs 3 and 4; *Electronic Transactions Act 2000* (Tas), s 4A; *Electronic Transactions Regulations 2011* (Tas), regs 4 and 5; *Electronic Transactions (Northern Territory) Act* (NT), s 6A; *Electronic Transactions (Northern Territory) Regulations* (NT), regs 2-4; *Electronic Transactions Act 2001* (ACT), s 6A.

[109] Laws of the Commonwealth to which some or all of the Electronic Transactions Act does not apply are listed in the Electronic Transactions Regulations. In the current Regulations, listed at item 28 is the *Corporations Act 1989* and at item 30 is the Corporations Law. Section 1407 of the Corporations Act 2001 provides that those references are to be taken to include reference to the *Corporations Act 2001* (Cth). See the discussion in Part B, 2 of this paper.

[110] See 4.1, 4.2 and 4.4 above.

[111] *SM Integrated Transware Pte Ltd v Shenker Singapore (Pte) Ltd* [2005] 2 SLR 651 [75] - [76].

Nor should it be taken as meaning that electronic signatures and documents cannot be used in situations covered by exempted legislation. Even if the ETA did codify the law, and it were the case that, within its ambit, the ETA does comprehensively deal with electronic communications, that does not mean that it has any effect outside of its ambit, in the areas exempted or excluded from its reach, or that it affects the interpretation of exempted legislation. Where legislation is "exempted" from the operation of ETA in circumstances where electronic dealings would have been acceptable under the legislation before the ETA, it would be a strange result if that meant that electronic dealings are no longer acceptable under that legislation. That would mean that the ETA changes the effect of legislation to which it does not apply. Exemption of an activity or law only withholds from it the benefits of the ETA. It does not further restrict it.