

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

PART B

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ABSTRACT

This paper examines the growing phenomenon of signing documents electronically through cloud-based platforms, and is in two parts. The first, Part A, described the process and concluded 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. This second part, 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 such documents would not be effective, then print-outs can be effective as signed original hard copy counterparts

Introduction

Part A of this paper described the operation of a cloud-based platform for executing documents (a *Platform*). It concluded that, though such requirements need to be considered in their context, generally documents executed using a Platform satisfy requirements for signing and writing, not only when the electronic transactions legislation is applied, but also under general law.

This Part B goes on to contain:

- 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.

1 The use of electronic platforms to produce a print-out counterpart, as a backstop

In any situation where there are any doubts as to the efficacy of a soft version in satisfying requirements of writing and signing, they could in my view be removed by a print-out. When using the Platform as described in Part A, 3.2, a signer is inserting his or her signature not only in the soft version but also in every print-out. The resulting print-out is a physical document in which the signer's signature appears, initiated by the signer with the intention of binding the relevant party, and the intention that it appear on the print-out. As a matter of policy and, I suggest, logic, the signatory and the party for which he or she signs should be bound as much as if he or she had manually directly applied a signature to the paper document,

The system can be seen as a mechanism under which signers create a signature on a hard paper version. In a nutshell, it is a device under which electronic documents are signed electronically and paper documents are signed through an electronic process. The system is in a sense the pen used to sign the print-out. If the parties have the requisite intention, what is printed out is not a copy of the document, but an original or counterpart. The parties could make that clear in the document itself.

This is not a novel thought. In 1869, a New Hampshire court could say in relation to the use of the telegraph to sign a contract complying with the Statute of Frauds:²

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² *Howley v Whipple*, 48 NH 487 (1869).

"It makes no difference whether that operator writes the offer or the acceptance in the presence of his principal and by his express direction, with a steel pen an inch long attached to an ordinary penholder, or whether his pen be a copper wire a thousand miles long. In either case the thought is communicated to the paper by the use of the finger resting upon the pen; nor does it make any difference that in one case common record ink is used, while in the other case a more subtle fluid, known as electricity, performs the same office."

It is consistent with modern Australian and English authority. It is generally consistent with the string of cases allowing the affixation of a signature by mechanical means, such as an impress stamp³ or signature machine,⁴ discussed in Part A, 4.3. More directly, it is consistent with two authorities, each to the effect that the transmission of a signed document by facsimile is equivalent to the creation of a new signed document with the recipient.

Molodysky v Vema Australia Pty Ltd (1988) 4 BPR 9552 (***Molodysky v Vema***) concerned a contract document for the sale of land, signed by the vendors, and faxed to the purchaser. It was held that that constituted delivery of a signed agreement to the purchaser as required by Division 8 of Part 4 of the *Conveyancing Act 1919* (NSW).

Cohen J said (at [22]):

"When a person sends a signature with the intention that it should be produced by facsimile then that person is authorising the placing on the facsimile copy of a copy of his signature with the intention that it be regarded as his signature. [My emphasis] This of course does not apply in every case of a signature on a facsimile document but only if it is intention of the person concerned that what appears on the final copy is to be regarded as that person's signature for the purpose of authenticating the document. On that basis I see little difference between that and the authorising of the placing of a rubber stamp copy of the signature. The means of it actually appearing on the document are quite different but the effect is the same. I am therefore of the view that the copy of the agreement, when it bore the facsimile signature of the representative of the vendor, he intending it to be used for facsimile purposes and delivered as his signature, was a copy signed by that person."

In re a debtor (No 2021 of 1995) [1996] 2 All ER 345 (***Re a debtor***) concerned a proxy sent by fax to the chair of a creditors' meeting summoned under the *Insolvency Act 1986* (UK). Laddie J held that the proxy satisfied the Act's requirements of delivery of a signed proxy to the chair .

His judgment (at 351) is worth quoting at length:

"The requirement of signing in r 8.2(3) is to provide some measure of authentication of the proxy form. Of course even if the rule were strictly limited to signature by direct manual marking of the form, the authentication is not perfect. Signatures are not difficult to forge. Furthermore, in the overwhelming majority of cases in which the chairman of a creditors' meeting receives a proxy form the form will bear a signature which he does not recognise and may well be illegible...

It seems to me that the function of a signature is to indicate, but not necessarily prove, that the document has been considered personally by the creditor and is approved of by him... Once it is accepted that the close physical linkage of hand, pen and paper is not necessary for the form to be signed, it is difficult to see why some forms of non-human agency for impressing the mark on the paper should be acceptable while others are not.

³ *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: *Bennett v Brumfitt* (1867) LR 3 CP 28, 30; *Ex parte Dryden* [1893] NSW 77, 80; *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.

⁴ *Ramsay v Love* [2015] EWHC 65 (Ch).

For example, it is possible to instruct a printing machine to print a signature by electronic signal sent over a network or via a modem. Similarly, it is now possible with standard personal computer equipment and readily available popular word processing software to compose, say, a letter on a computer screen, incorporate within it the author's signature which has been scanned into the computer and is stored in electronic form, and send the whole document including the signature by fax modem to a remote fax. The fax received at the remote station may well be the only hard copy of the document. It seems to me that such a document has been 'signed' by the author. [*my emphasis*]...

When a creditor faxes a proxy form to the chairman of a creditors' meeting he transmits two things at the same time, the contents of the form and the signature applied to it. The receiving fax is in effect instructed by the transmitting creditor to reproduce his signature on the proxy form which is itself being created at the receiving station. It follows that, in my view, the received fax is a proxy form signed by the principal or by someone authorised by him."

He did make clear (at 352) that he was only considering the particular legislation and different considerations may apply elsewhere. But the reasoning seems generally applicable, and persuasive.

In both cases, the recipient's print-out of the fax was regarded as an original, and the signature appearing on it an original signature inserted by the signer. This principle should equally apply where a document is signed by one party using a Platform, and the signer intends the document to be printed out by it or another party. It is directly analogous. It might be suggested that the signer does not control the creation by the other party of the print-out incorporating the signer's signature, and that that creation involves a further step by the other party, and therefore it is the other party (the recipient) that inserts the signature. But that was not the view taken in the two cases. In the case of a fax, particularly when using a fax modem, the creation of the print-out is also in the control of the recipient. Nor is it right on analysis. While the creation of the particular hard copy document may be initiated by another party, the insertion of a signature in that hard copy is automatic and the result of the actions of the signer. The party printing out the document does not initiate that insertion. The creation of the print-out and the insertion of the signature are simultaneous.

If there is a delay between the signer initiating its signature and the print-out, there could be a slip "twixt cup and lip", for example if the signer's authority is revoked before the print-out. That possibility does not remove the efficacy when there is no such revocation: a gap in time should be no more a barrier than the gap in distance discussed by Laddie J. And the risk is within the control of the parties, who can print out the document quickly.

Of course creating a print-out removes one advantage of using a Platform, but does retain other significant advantages in the ease of obtaining signatures and version control.

The procedure is not radical. It is analogous to a practice currently accepted in the market where documents are to be executed for a company under s 127 Corporations Act by directors in different locations and parties are unwilling to accept "split execution" (where each director signs a separate counterpart). One director signs a counterpart and then emails a copy of the signed page to the second, who prints off a copy and signs it. That print-out is commonly accepted as signed by both.

2 Documents signed under section 127(1) of the Corporations Act

2.1 The section and the ETA

Australian companies sign many documents under s 127. The key relevant provision is s 127(1), which allows a company to execute a "document" if relevant officers "sign" it. Section 127(2) deals with the common seal and s 127(3) applies subsection (1) to deeds. Section 129(5) contains an assumption that a "document" has been executed by the company if the document appears to have been "signed" in accordance with s 127(1) (s 129(6) deals with the use of a common seal).

Can the document and signing be electronic? The ETA does not apply to the Corporations Act,⁵ and so is of no assistance in this particular respect. But, for the reasons set out in Part A, 6(2), this should not mean that ss 127 and 129(5) cannot apply to documents signed electronically. Further, ss 127 and 129 were introduced into the Corporations Law by the *Corporations Law Review Act 1998* (Cth). The Commonwealth ETA was passed in 1999. Sections 127 and 129 when originally introduced could not have been affected by it. The *Corporations Act 2001* (Cth) did post-date the ETA but the material provisions replicated identically the Corporations Law provisions.

2.2 What is a "document"?

For the Corporations Act, s 5C of the *Corporations Act* applies the *Acts Interpretation Act 1901* (Cth) as in force on 1 January 2005. As at that date s 25 of that Act contained the following definitions, which apply "unless the contrary intention appears":

"document" includes: ...

(c) any article or material from which sounds, images or writings can be reproduced with or without the aid of any other article or device."

"Writing" was defined to include "any mode of representing or reproducing words, figures, drawings or symbols in a visible form".

The server, hard drive or other device containing the soft version of a document in a Platform, or downloaded from one, would satisfy paragraph (c). It is an article, or material, from which writing can be reproduced with the aid of a device (a computer or printer). The current definitions in s 2B of the *Acts Interpretation Act 1901* (Cth) and in the Dictionary to the *Evidence Act 2008* (Vic) are in very similar terms to the above definition. Paragraph (c) in those definitions is identical except they refer to "anything" rather than "any article or material". An email database and video tape were held to be "documents" under those definitions.⁶

But the definitions only apply "unless the contrary intention appears". Is there one? I would suggest no.

Looking at the context and purpose, both sections appear in Part 2B, headed "Basic features of a company". Section 127 is in Part 2B.1, entitled "Company powers and how they are exercised", with other provisions giving a company plenary capacity and powers,⁷ validating acts in breach of constitutional restrictions on powers,⁸ and allowing it to contract through agents without using a common seal.⁹ The part expands and regularises the way in which companies can act and deal with outsiders. It facilitates the ability of companies to be economic actors and removes the limitations that bedevilled those dealing with companies when I was a young lawyer.

Section 127 is entitled "Execution of documents (including deeds) by the company itself". Subsection (1) deals with the execution of documents by officers signing them. It removes the need for a company to execute by common seal, and thus removes a barrier to commerce (including electronic commerce). Subsection (2) deals with the affixation of the company's common seal to a document. It can only be satisfied in relation to physical documents. But it is only preserving, and facilitating, the use of a traditional device made redundant by subsection (1). It should not limit subsection (1). The fact that subsection (2) can only apply with respect to a subset of documents as defined should not of itself mean that the meaning of

⁵ Laws of the Commonwealth to which some or all of the Commonwealth ETA does not apply are listed in the Electronic Transactions Regulations. The current Regulations include as item 28 the "*Corporations Act 1989*" and as item 30 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*.

⁶ In *Collins v Trimatic Contract Services Pty Ltd (No 2)* [2014] FCCA 1608 and *Wade (a pseudonym) v The Queen* [2014] VSCA 13 [26] respectively.

⁷ Section 124, *Corporations Act 2001*.

⁸ Section 125, *Corporations Act 2001*.

⁹ Section 126, *Corporations Act 2001*.

"document" should be confined to that subset. Subsection (3) deals with deeds, which traditionally have been physical, but does not itself use the term "document".

Subsection (1) can operate without the meaning of "document" being confined. Were electronic documents contemplated? It was introduced before most of the cases on electronic signing cited above. But articles published at the time (and the introduction of the ETA) show that electronic signing was in general contemplation,¹⁰ and it post-dated cases deciding that the Statute of Frauds could be satisfied by telex¹¹ and by telegram.¹² And Laddie J in the excerpt quoted above¹³ from the roughly contemporaneous *Re a debtor* [1996] 2 All ER 345, 351 clearly had in mind electronically stored documents. One might ask, if electronic documents were in contemplation in 1998, why did the section not expressly refer to them? The answer is that "document" as defined in the Interpretations Act was sufficient to achieve that. In any event the context does not require the meaning to be limited to technology as contemplated as the time the legislation was passed. Statutes are generally interpreted to continue to speak.¹⁴ So a 1677 statute, the Statute of Frauds, and its early 20th century replicas, can accommodate 21st century technology.¹⁵

It might be said that the use of the word "sign" indicates that "document" has a restricted meaning, but as discussed in 2(3) below, that is sufficiently broad a concept to accommodate electronic documents. It is not a contrary indication.

Section 129 is in Part 2B.2, entitled "Assumptions that people can make in dealing with companies". The section lists the assumptions. They generally cover the apparent exercise of authority and compliance with duties and internal requirements. They are not limited to the execution of documents,¹⁶ let alone physical documents,

Like Part 2B.1, Part 2B.2 is designed to make it easier for companies to be participants in the world of commerce. Section 129(5) and (6) are merely instances of the wider principle. It would not facilitate the purpose of these provisions if they were interpreted in a way which did not keep pace with developments in that world.

It might be thought that the use of the word "appears" in s 129(5) indicates a reference to a physical appearance, but the word in this context can have a wide meaning. In any event the definition of "document" in paragraph (c) refers to something from which "images or writings [widely defined] can be reproduced". The requisite appearance could be in that reproduction. The requirement can be achieved on a screen or other visible representation, as can the reference in the next sentence to a statement being "next to their signature".

The Explanatory Memorandum for the legislation that introduced the provisions (the *Corporate Law Review Act 1998* (Cth)) is of little help on this issue, limiting itself to an incomplete description. It says (at [8.6] and [8.8]):

"Part 2B.1 also sets out a company's powers to execute a document (including a deed) or to appoint an agent to make contracts on behalf of the company. It will be clear that a company can exercise these powers without using a common seal, whether or not the company has a seal (Bill ss 126 and 127). Having a common seal will be optional for companies."

¹⁰ McCullagh A, Little P, and Caelli W, 'Electronic Signatures: Understand the Past to Develop the Future' (1998) UNSWLJ 452, 454-457.

¹¹ *Clipper Maritime v Shirlstar Container ('the Anemone')* [1987] 1 Lloyd's LR 546, 554.

¹² *Godwin v Frances* (1870) LR 5 CP 295, 305-306.

¹³ See 1 above.

¹⁴ Pearce D and Geddes R, *Statutory Interpretation in Australia* (8th ed, LexisNexis Butterworths, 2014) p 156; *Chappell and Co Ltd v Associated Radio Co of Australia Ltd* [1925] VLR 350, 361.

¹⁵ See cases listed in Part A, 4.1 and 4.2 above.

¹⁶ As noted in *Caratti v Mammoth Investments Pty Ltd* [2016] WASCA 84, [407].

"To facilitate the execution of deeds without the use of a seal, the person will be able to make assumptions regarding the execution of documents by company officers (Bill s 129(5))."

The focus on deeds is not comprehensive and draws attention to only one aspect of the application of the provisions. It is not an indication that "document" is confined to the physical. Its particular mention reflects the fact that s 127(3) simplifies for companies the traditional manner of execution of deeds, and this a significant step that could usefully be confirmed. The emphasis on removal of the need for a common seal, if anything, reinforces that the ambit of subsection (1) should not be confined by the contents of subsection (2) which deals with common seals.

In short the context does not require a narrower meaning of "document" — the full statutory definition can happily apply. The section makes perfect sense with the wider definition, and this is consistent with its purpose.

It is interesting to note that the courts have given "document" a wide meaning in other unrelated contexts where there is no particular definition, for example, in subpoenas or discovery, or the statutory provisions authorising them. In such contexts, a computer data base¹⁷ and video tape¹⁸ have been held to be documents. Audio tapes have been held to be¹⁹ and not to be²⁰ documents, but Mason J preferred the former view in *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582 at [23]. Video films,²¹ and, in another context, temporary advertisements flashing up on a screen,²² have been held not to be documents.

The UK Law Commission in 2001 concluded that information stored in electronic form is a "document" and would satisfy a statutory requirement for a document (except where the context otherwise dictates).²³ They cite the decision of the Court of Appeal in *Victor Chandler International v Customs and Excise Commissioners* [2000] 1 WLR 1296, 1302. English practitioners interpret a provision similar to s127(1) to apply to electronic documents and signatures.²⁴

2.3 What is "signing"?

As we have seen, in relation to a range of legislation, courts have taken the view that references to signing include a wide variety of means of authenticating a document or indicating assent, and can be electronic or printed.²⁵ Electronic documents can be "signed".

In the absence of a particular reason for a narrower meaning, that should apply in ss 127 and 129. "Document" has a wide meaning under the applicable statutory definition, and "signing" should be, and can be, applicable to that wider definition. I suggest that there is no reason to suppose that officers signing through a Platform would not be signing for the purposes of the section. The relevant officers are recording their assent and intention to bind the company. There is a verifiable and lasting record of adoption of the document by the relevant officers. This is consistent with the context; and the purposes of the section are

¹⁷ *Derby & Co. v Weldon (No 9)* [1991] 1 WLR 652, 657.

¹⁸ *Radio Ten Pty Ltd v Brisbane TV Ltd* [1984] 1 QdR 113, 122.

¹⁹ *Grant v South Western & County Properties* [1974] 2 All ER 465, 475.

²⁰ *Beneficial Finance Corporation Co Ltd v Conway* (1970) VR 321, 322.

²¹ *Senior v Holdsworth, Ex parte Independent Television News Ltd* [1976] QB 23, 32.

²² *Victor Chandler International Ltd v Customs and Excise Commissioners* [1999] 1 WLR 2160, 2166.

²³ The Law Commission, *Electronic Commerce: Formal Requirements in Commercial Transactions* (2001) p 16 [3.41].

²⁴ Section 44(2) Companies Act 2006 (UK). See the practice note "Execution of a Document Using Electronic Signature" issued 13 July 2016 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, available at <http://www.lawsociety.org.uk/support-services/advice/practice-notes/execution-of-a-document-using-an-electronic-signature/>.

²⁵ See Part A, 4.1, 4.2 and 4.3.

served if a document is signed in that way.²⁶ Section 127(1) allows officers to bind the company. It does not specify any formality. That subsection and the assumption are focused on issues of authority more than the physical process.

One benefit of the use of Platforms is that issues relating to "split execution"²⁷ will not arise as both officers are signing the one document.

2.4 A contrary view

At the time of writing Austin and Black in their on-line commentary on the Corporations Act²⁸ take a contrary view:

"Section 127 is to be read together with ss 129(5) and (6), which set out the assumptions that a person dealing with the company may make with respect to the execution of documents without or with a seal. "Company" is defined in s 9. "Document" is broadly defined in s 25 of the Acts Interpretation Act 1901, as in force on 1 January 2005 (see CA s 5C), to encompass certain electronic communications, but the extended definition probably does not apply for the purposes of s 127, because the references to signing and witnessing of documents appear to envisage a hard copy document (note that s 10 of the Electronic Transactions Act 1999, which makes provision for a form of electronic "signature", does not apply for the purposes of the CA: Electronic Transactions Act, s 13; Electronic Transactions Regulations 2000, reg 5 and Sch 1, item 30)."

With respect, as discussed above in 2.2, I would suggest that there does not appear to be sufficient contrary indication to displace the definition in the Acts Interpretation Act.

The exclusion of the definition is said to arise because of references to witnessing and signing. The only reference to "witnessing" is in subsection (2), which relates to an affixation of a common seal, which must be a physical step requiring a physical document. The ambit of that subsection is limited not by the definition of "document", but by the affixation of the common seal. There is no need to adopt a narrow definition of document to have that effect, as discussed above. There is no mention of witnessing in subsection (1), which is designed to extend methods of execution beyond the common seal. In any event, as we have seen,²⁹ witnessing can occur as much with a soft document as a physical one. "Signing" is referred to in subsection (1), but that term has generally been given a wide meaning when used in other legislation.³⁰ The term does need to be looked at in the particular context and purpose of the legislation. But as discussed above I would respectfully suggest that this does not lead to a narrow view or a confinement of "document" to hard copies. It would be somewhat ironic if a section designed to free up the methods by which companies can enter documents and participate in commerce was unable to keep pace with technological changes.

2.5 A backstop solution

In any event, even if the soft version of the document on a drive or other device were not a "document" and not "signed", then a print-out can be a document as outlined in 1 above, and it will contain physical signatures, albeit printed.

²⁶ See 2.2 above.

²⁷ See D'Angelo N, "'Split executions' and s 127 of the Corporations Act 2001" (2015) 31 Australian Banking & Finance Law Bulletin.

²⁸ Austin R and Black A, *Austin and Black's Annotations to the Corporations Act* (Lexis Nexis online, subscription service) at [2B.127], <http://www.lexisnexis.com.au/en-au/products/austin-blacks-annotations-to-the-corporations-act.page> viewed 26 April 2016.

²⁹ Part A, 3.3.

³⁰ See Part A, 4.1, 4.2 and 4.3.

3.1 Introduction — traditional and general law requirements

Deeds are instruments that are given particular legal status by satisfying certain technical formalities.³¹ Traditionally they are that the document be in writing, be sealed and delivered and be made out of certain materials (paper, parchment or vellum).³² There must be an intention to create a deed. These formal requirements have been altered or ameliorated in many cases by statute.³³ Many statutes have added a requirement of signing, at least for individuals, and many expressly remove the requirement of sealing. Some have removed the requirement of delivery. And the common law requirements, while long standing, have not remained immutable. In particular over time delivery and sealing have changed from a physical action and a physical seal to requirements that can be satisfied respectively by intention,³⁴ and by the writing or printing of a symbol or words.³⁵

Under statute, different requirements apply in different jurisdictions when deeds are executed by individuals, by companies, and by foreign corporations. The degree to which the ETA applies varies. Traditionally, deeds have been seen as physical instruments. Does that still apply? Many of the requirements can be satisfied without a physical instrument, but the greatest difficulties flow from the requirement of paper or parchment, and in some cases, for a seal. I will first survey the statutes, and the requirements which apply, and then look at whether each of the requirements can be satisfied electronically.

3.2 Statutory requirements for deeds

(a) Deeds executed by individuals

All states and territories by statute significantly alter the requirements for deeds executed by individuals³⁶ (which are generally regarded as extending to deeds executed by attorneys for corporations).³⁷ But the approaches vary, and there is room for argument as to the extent of the modification.

(i) The basic requirements, signing, sealing, witnessing and delivery

³¹ *Manton v Parabolic Pty Ltd* (1985) 2 NSWLR 361, 369.

³² See the definition in Norton R, Morrison R and Goolden H, *A Treatise on Deeds* (2nd ed, Sweet & Maxwell, London, 1928) p 3. The definition has been cited with approval on many occasions. For just one example, see *Scook v Premier Building Solutions Pty Ltd* (2003) 28 WAR 124 [22]. But it has been criticised as to some aspects, Seddon N, *Seddon on Deeds* (The Federation Press, Sydney, 2015) p 6.

³³ See 3.2 below.

³⁴ Norton, Morrison and Goolden, n 31, p 13; Seddon, n 31, p 116; *Vincent v Premo Enterprises (Voucher Sales) Ltd* [1969] 2 QB 609, 619; *Federal Commissioner of Taxation v Taylor* (1929) 42 CLR 80, 87.

³⁵ Norton, Morrison and Goolden, n 31, p 8; Seddon, n 31, 41-42; *First National Securities v Jones* [1978] Ch 109, 111.

³⁶ *Conveyancing Act 1919* (NSW), s 38; *Property Law Act 1958* (Vic), ss 73, 73A and 73B; *Property Law Act 1974* (Qld), s 45; *Property Law Act 1969* (WA), s 9; *Law of Property Act 1936* (SA), s 41(1)(a); *Conveyancing and Law of Property Act 1884* (Tas), s 63; *Law of Property Act* (NT), s 47; *Civil Law (Property) Act 2006* (ACT), s 219.

³⁷ Seddon, n 31, p 65-66, 74.

In all states and territories, such deeds must be signed.³⁸ Except in Victoria (and, if the document is sealed, NT) they must be witnessed.³⁹ Subject to the deed satisfying certain requirements, in no state or territory is it necessary for such a deed to be sealed.⁴⁰

In NSW, Victoria, Queensland, NT and the ACT, deeds must be delivered. In WA, "formal delivery" is not necessary,⁴¹ but delivery in the sense of intending to be bound has been held still to be necessary.⁴² In SA, delivery is not necessary, and this may apply to any form of delivery.⁴³ The Tasmanian statute deals with delivery in the same way as SA.⁴⁴

- (ii) Do the other requirements (eg paper, parchment, vellum) apply? — NSW and Queensland
Peter Young J, in *Manton v Parabolic Pty Ltd* (1985) 2 NSWLR 361 (*Manton v Parabolic*), suggested, obiter, that, in relation to individuals, the requirement that the deed be paper or parchment has been removed by s 38 of the *Conveyancing Act 1919* (NSW). He said at 366:

"In earlier days, signing was not necessary, but other requirements such as the document having to be written on paper or parchment were strict requirements to qualify as a deed."

and at 369:

"Formal requirements with respect to these have changed from time to time. Coke on Littleton prescribed 10 requirements for a deed including the requirement that either paper or parchment must be used – nothing else would suffice. In New Zealand in 1905, the requirements were reduced to two, namely signing and attestation. In New South Wales, by the *Conveyancing Act*, s 38, the requirements were reduced to four, namely, signing and sealing, delivery and attestation, though some modifications are made in what constitutes sealing."

There is not a great deal of analysis as to why this is the case, and it is obiter. It may not be safe to follow it without further judicial clarification. It may be inconsistent with the general approach taken in the WA cases mentioned in note 45 below, and *Hooker Industrial Developments Pty Ltd v Trustees of the Christian Brothers* (1977) 2 NSWLR 109.

The dictum is arguably applicable also in Queensland, where the legislation is similar in substance.

- (iii) Do the other requirements (eg paper, parchment, vellum) apply? — WA, SA and Tasmania

³⁸ *Conveyancing Act 1919* (NSW), s 38(1); *Property Law Act 1958* (Vic), s 73(1); *Property Law Act 1974* (Qld), s 45(1); *Property Law Act 1969* (WA), s 9(1)(a); *Law of Property Act 1936* (SA), s 41(1)(a); *Conveyancing and Law of Property Act 1884* (Tas), s 63(1); *Law of Property Act* (NT), s 47(1); *Civil Law (Property) Act 2006* (ACT), s 219(1)(a).

³⁹ *Conveyancing Act 1919* (NSW), s 38(1); *Property Law Act 1974* (Qld), s 45(2); *Property Law Act 1969* (WA), s 9(1)(b); *Law of Property Act 1936* (SA), s 41(2); *Conveyancing and Law of Property Act 1884* (Tas), s 63(2); *Law of Property Act* (NT), s 47(2); *Civil Law (Property) Act 2006* (ACT), s 219(1)(b).

⁴⁰ *Conveyancing Act 1919* (NSW), s 38(3); *Property Law Act 1958* (Vic), s 73A; *Property Law Act 1974* (Qld), s 45(2); *Property Law Act 1969* (WA), s 9(2); *Law of Property Act 1936* (SA), s 41(3); *Law of Property Act* (NT), s 47(2); *Civil Law (Property) Act 2006* (ACT), s 219(3).

⁴¹ *Property Law Act 1969* (WA), s 9(3).

⁴² *Monarch Petroleum NL v Citco Australia Petroleum Limited* [1986] WAR 301, 353-355; *Scook v Premier Building Society Limited* (2003) 28 WAR 124 [23].

⁴³ Seddon, n 32, p 120-121, citing *Sandhurst Trustees Ltd v Tame Holdings Pty Ltd* [2005] SADC 16 [37].

⁴⁴ *Conveyancing and Law of Property Act 1884* (Tas), s 63(3).

Section 9(4) of the *Property Law Act 1969* (WA) provides:

"Every instrument expressed or purporting to be an indenture or a deed or an agreement under seal or otherwise purporting to be a document executed under seal and which is executed as required by this section has the same effect as a deed duly executed in accordance with the law in force immediately prior to the coming into operation of this Act."

That would appear at first sight to remove the requirement of paper or parchment for "instruments". So long as an "instrument" purports to be a deed or under seal and satisfies the relevant execution requirements in the section, it takes effect as a deed. It doesn't need to satisfy the other requirements for a deed. It doesn't even have to purport to be a deed, merely executed under seal.

But does an "instrument" need to be a physical document? Can it be electronic?

"Instrument" is defined inclusively in s 7 to include "deed or will but does not include a statute, unless the statute creates a settlement." By contemplating at least some statutes, it seems to contemplate documents which, while written, are not on paper.

"Instrument" is defined by the Oxford English Dictionary to include "A formal or legal document", and by the Macquarie to include "a formal legal document, as a contract, promissory note, deed, grant, etc." Cases interpreting the term in other statutes have generally discussed it in terms of documents.⁴⁵

Arguably, then, an "instrument" need not be physical (and could be electronic) but there is insufficient clarity on this point.

Further, the WA Supreme Court has held that "duly executed" in s 9(4) is limited to signing and sealing and does not cover delivery, arguing that clear words were necessary to remove a common law requirement.⁴⁶ Though the language of s 9(4) may seem clear, and it does remove the historical requirement that the document be expressed to be a deed, the Court's approach may extend to preserving other historical requirements like the materials.

In SA, s 41(5) of the *Law of Property Act 1936* (SA) is similar to s 9(4) in WA. Section 63(5) of the *Conveyancing and Law of Property Act 1884* (Tas), is in similar terms and the same issues should apply. "Instrument" is defined to include "deed, will, schedule of easements under the *Local Government (Building and Miscellaneous Provisions) Act 1993*, and Act".

(b) Deeds executed by Australian companies

⁴⁵ *R v Riley* [1896] 1 QB 309, 314; *R v Cade* [1914] 2 KB 209, 212; *Re Rolls-Royce Co* [1974] 1 WLR 1584, 1592; *Chittick v Ackland* (1984) 1 FCR 254, 264; *Azevedo v Secretary* (1992) 35 FCR 284, 299-300; *Heslehurst v Government of New Zealand* [2002] FCA 429 [13]; *R v Ng* [2002] VSCA 108 [48].

⁴⁶ *Scook v Premier Building Society Limited* (2003) 28 WAR 124 [23] adopting remarks by Kennedy J in *Monarch Petroleum NL v Citco Australia Petroleum Limited* [1986] WAR 301, 353-355 who did not express a concluded view. The Court also cited remarks by Helsham CJ in Eq in *Hooker Industrial Developments Pty Ltd v Trustees of the Christian Brothers* (1977) 2 NSWLR 109, 122.

In some jurisdictions the statutory provisions outlined above do not apply to deeds executed by corporations, other than by attorney.⁴⁷ In others they only apply partly or in a different way.⁴⁸ But most jurisdictions do have provisions expressly dealing with execution by corporations.⁴⁹ Generally they provide for the affixation of the corporation's common seal attested by a director and a secretary. Some allow expressly for execution by an attorney.

Nevertheless most deeds in Australia executed by companies other than by attorney are now executed under s 127(3) of the *Corporations Act 2001* (Cth). That provides that an Australian company may execute a document as deed if it is expressed to be executed a deed and it is executed under s 127(1) (by officers signing) or s 127(2) (by common seal). Section 127(4) allows other methods of executing deeds. These have been held to include being executed by an attorney appointed under seal or, on some authorities, by a director.⁵⁰

The main question as to the applicability of s 127 is whether a document created through a Platform is a "document" that is "signed" by the relevant officers as described in subsection (1). Those issues are dealt in 2 above. As stated above the Electronic Transactions Act of each Australian jurisdiction (*ETA*) does not apply to the *Corporations Act*.⁵¹

Does s127(3) override all other requirements for deeds? This is not dealt with expressly in any authority, but cases on deeds and s 127 proceed on the assumption that if a document has been executed under s 127(1) it does not need to be witnessed.⁵² This is explicable on the basis that s 127(3) sets out how the document is executed and can be said to overrule other execution requirements for execution, including witnessing. The subsection only deals with execution. It may well be going too far to suggest that on its own it can overcome other traditional general requirements for deeds including delivery and being on paper, parchment or vellum. At least one case appears to have proceeded on the assumption that deeds executed under s 127 still need to be delivered.⁵³

(c) Deeds executed by foreign corporations

Foreign corporations and corporations which are not companies (and do not have a similar provision to s 127 in their relevant statute) cannot avail themselves of s 127.

⁴⁷ *Conveyancing Act 1919* (NSW), s 38(5); *Property Law Act 1958* (Vic), ss 73 and 73A; *Property Law Act 1974* (Qld), s 45(5); *Civil Law (Property) Act 2006* (ACT), s 219(5); *Law of Property Act* (NT), s 47(5).

⁴⁸ *Property Law Act 1969* (WA), s 9(2): "It is not necessary to seal any deed except in the case of a deed executed by a corporation under its common or official seal." Otherwise s 9 applies to corporations. In s 41 of the *Law of Property Act 1936* (SA) some but not all provisions apply only to corporations or only to individuals. In s 63 of the *Conveyancing and Law of Property Act 1884* (Tas) some but not all provisions apply only to corporations or only to individuals. Witnessing is only required for individuals.

⁴⁹ *Conveyancing Act 1919* (NSW), s 51A; *Property Law Act 1958* (Vic), s 74; *Property Law Act 1974* (Qld), s 46; *Property Law Act 1969* (WA), s 10; *Law of Property Act 1936* (SA), s 41; *Conveyancing and Law of Property Act 1884* (Tas), s 63; *Civil Law (Property) Act 2006* (ACT), s 227; *Law of Property Act* (NT), s 48.

⁵⁰ See *Black v Decker v GMCA Pty Ltd (No 2)* [2008] FCA 504 [144]; *Prime Constructions Pty Limited v Westbridge* [2004] NSWSC 861 [18] (on the basis of an estoppel); and *Nom De Plume Nominees Pty Ltd v Fingal Developments Pty Ltd* [2016] VSCA 159.

⁵¹ 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).

⁵² See for example *George 218 v Bank of Queensland* (2015) 303 FLR 231; [2015] WASC 434 [53] where an individual's signature was witnessed but not a person signing on behalf of a company.

⁵³ See *400 George Street (Qld) Pty Limited & Ors v. BG International Limited* [2012] 2 QdR 302.

As outlined in the Walrus paper "Execution of deeds by foreign corporations",⁵⁴ in most jurisdictions, in order to satisfy Australian formalities for a deed, such a corporation would need to seal the deed or execute through an agent.⁵⁵ If executed through an agent the agent would need to comply with any witnessing or other requirements applicable to execution of deeds by individuals and, generally, the agent would need to be appointed under seal.⁵⁶ Where a foreign company does not have a common or official seal, then sealing can be by printing of the symbols outlined above (such as "LS" in a circle).

Where a foreign company is executing the deed under its common or official seal, then it would need to execute a physical document. The other parties may be able to sign electronic counterparts physically.

3.3 Can the various requirements for deeds be satisfied electronically?

(a) Signing

Where the signing provisions of the ETA (s 10 or its equivalents) apply, then signing by electronic means will be sufficient, as set out in Part A, 5.

Where the ETA does not apply, then signing through a Platform should also suffice. As set out in Part A, 4.1 and 4.2, there is general support in the case law for electronic signatures to satisfy signature requirements in relation to agreements even without considering the ETA.

Dr Seddon, however, raises the possibility that in the case of deeds, the idea of signatures may need to be more restrictive than is indicated by the Statute of Frauds cases. He says of those cases:

"it is probably not safe to rely on this case law as a deed is a much more formal document than a note or memorandum evidencing a contract. For example, a signature appearing anywhere in the document suffices in Statute of Frauds cases but, in a deed, there is usually a specific place for a signature and a written name of a party appearing elsewhere may not be regarded as a subscription that authenticates the document".⁵⁷

He cites *R (on the application of Mercury Tax Group Ltd) v HMRC* [2008] EWHC 2721 (Admin) as a further example of the fact that a deed may require a greater degree of formality. That was a case where execution pages were signed well before the form of deed or its substantial terms were settled. The court said that the whole physical document must be signed. The deed was not signed. The decision did not involve the form of signature. Nor did it involve any electronic process or document. It related to a physical document, and an attempt to execute it before it existed.

Signing is not a traditional formal requirement.⁵⁸ It arises under statute. The relevant statutory provisions should, I suggest, be treated like any other statutory requirement of signing, and those requirements generally allow a variety of actions, including electronic signatures.⁵⁹

⁵⁴ The Walrus Committee, "Legal and Regulatory Update: Execution of deeds by foreign corporations" (13 May 2014), <https://www.aplma.com/en/news/legal-regulatory-updates?page=3> viewed 10 May 2016.

⁵⁵ WA may be an exception where the corporation is not using a common or official seal: *Property Law Act 1969* (WA), s 9(2).

⁵⁶ The exception is Victoria: *Property Law Act 1958* (Vic), s 73B.

⁵⁷ Seddon, n 32, pp 51-52.

⁵⁸ *Manton v Parabolic Pty Ltd* (1985) 2 NSWLR 361; Seddon, n 31, 41; Norton, Morrison and Goolden, n 32, p 4; Coke E, *The Institutes of the Laws of England, or, a Commentary upon Littleton* (W Clarke & Sons, 17th ed, first published 1628, 1817) vol 1, 35b; vol 2, 171b. Blackstone does say that "in most cases" it is advisable to both sign and seal a deed. But he also explicitly says that the Norman custom of deeds being sealed and not signed continued into his time, and that signing is made necessary by the Statute of Frauds. He does not seem to consider signing a common law requirement. See Blackstone W, *Commentaries on the Laws of England* (William S Hein & Co, New York, first published 1766, 1992) vol. 2, 305-306. Interestingly he also says that "good consideration" (widely defined) is a requirement: p 296.

⁵⁹ See Part A, 4.1, 4.2, 4.3 and 4.6.

Dr Seddon mentions some "diversity of judicial opinion" as to whether a statutory requirement of signature requires a handwritten signature,⁶⁰ referring on the one hand to some of the cases listed in Part A, 4.3 and on the other to the dissenting judgement of Denning LJ in the 1954 case of *Goodman v J Eban Ltd* [1954] 1 QB 550 (*Goodman v Eban*), to the effect the relevant statute required an actual signature in the signer's handwriting. Dr Seddon says that none of the cases specifically dealt with deeds, "apart from Denning LJ's statement".⁶¹ I was unable to find any mention of deeds in Denning LJ's judgment. His lordship's view if applied to deeds would be inconsistent with the ability to "sign" deeds with a mark.⁶² And he was in the minority: the majority held otherwise. Lord Denning himself later held that a private person can sign a document by impressing a rubber stamp with a facsimile signature, not a handwritten signature, citing *Goodman v Eban*.⁶³ There are a number of cases, before and after *Goodman v Eban*, which have held that a facsimile signature suffices, in a variety of contexts.⁶⁴ Any diversity of judicial opinion seems to have been resolved. See the discussion on the case in Part A, 4.3.⁶⁵

The cases supporting signature by electronic⁶⁶ or mechanical⁶⁷ means are not limited to the Statute of Frauds. Some concern situations which might be expected to be solemn and formal, such as judicial process.⁶⁸

The provisions that impose a signing requirement for deeds also generally remove the necessity of sealing. As Dr Seddon points out,⁶⁹ the requirement of sealing was able to be satisfied by symbols, and "[t]he substitution of signature for seal should arguably be treated with the same approach."⁷⁰ The formal requirement of sealing could be satisfied quite informally, and it should be the same for signing.

⁶⁰ Seddon, n 32, p 53.

⁶¹ Seddon, n 32, p 53.

⁶² See *Dwyer v O'Mullen* (1887) 13 VLR 933, 937, now under statute in some jurisdictions: see *Conveyancing Act 1919* (NSW), s 38(1B); *Property Law Act 1958* (Vic), s 73(1); *Property Law Act 1974* (Qld), s 45(1); *Law of Property Act 1936* (SA), s 41(1)(a); *Law of Property Act* (NT), s 47.

⁶³ *Lazarus Estates v Beasley* [1956] QB 702, 710.

⁶⁴ See the discussion in Part A, 4.3. See also *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: *Bennett v Brumfitt* (1867) LR 3 CP 28, 30; *Ex parte Dryden* [1893] NSW 77, 80; *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.

⁶⁵ And more generally see the discussion in Part A, 4.1, 4.2, 4.3 and 4.5.

⁶⁶ *McGuren v Simpson* [2004] NSWSC 35 [22]; *Kavia Holdings Pty Limited v Suntrack Holdings Pty Limited* [2011] NSWSC 716; *Stuart v Hishon* [2013] NSWSC 766; *Islamic Council of South Australia Inc v Australian Federation of Islamic Councils Inc* [2009] NSWSC 211; *eBay International AG v Creative Festival Entertainment Pty Limited (ACN 098 183 281)* [2006] FCA 1768; *Orton v Collin* [2007] EWHC 803 (Ch); *In re a debtor (No 2021 of 1995; Bassano v Toft* [2014] Bus LR D9; [2014] EWHC 377 (QB).

⁶⁷ *R v Moore; Ex parte Myers* [1884] 10 VLR 322, 324; *Bennett v Brumfitt* (1867) LR 3 CP 28, 30; *Ex parte Dryden* [1893] NSW 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.

⁶⁸ *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].

⁶⁹ Seddon, n 32, p 53.

⁷⁰ This is recognised by statute in NSW: see *Conveyancing Act 1919* (NSW), s 38(1B).

In any event it is not apparent why entering a signature through a computer or other device is less formal or solemn than a using a pen or impress stamp, or making a mark.

This is of course only an issue where the signing provision of the ETA (s 10 of the Commonwealth ETA, and equivalents) does not apply.

(b) Attestation

In a 1998 paper, McCullagh, Little and Caelli suggest that traditional witnessing concepts may not be readily implanted into the authentication of electronic documents.⁷¹ They suggest that there needs to be a "trusted path" to ensure that the screen display corresponds with the contents of memory and that all keystrokes effected by the user will directly correspond with what the user intended under the relevant application. They say that neither the signer nor the attester can be absolutely certain that what is on the computer screen corresponds with what is in the memory and that when the attester physically sees the signer pressing the keyboard, the attester will not know with certainty what is actually happening. But this is not the case with a Platform. I suggest that the procedures outlined in Part A, 3.2 do give sufficient certainty that the document on the screen corresponds to the document on memory, and that if signer and witness follow the procedures set out in Part A, 3.3 they can be sure as to what is happening. There is no legal or practical impediment to it being a proper attestation.

The witness does need to attest by signing, but under general law, signing can be done electronically, and a signature through a Platform should suffice.⁷² Where it applies the signing provision of the ETA should assist to confirm that a witness can sign electronically. However, the signing provisions of the ETAs of some states (NSW, Queensland, SA and WA) do not apply to witnessing requirements. These are discussed in 3.3(e)(ii)(B) below.

Dr Seddon suggests that it is possible that the statutory requirements may not necessarily require the witness to see the person signing the deed,⁷³ citing *Shah v Shah* [2002] QB 35. As he says, however, that view has been criticised in Australia. The use of the term of "witness" in the legislation would suggest that the person in question actually witnessed the activity attested. On the other hand he also raises the possibility that the witness may need to attest in the presence of the person signing.⁷⁴ If both possibilities were correct, it would give the strange result that the signer has to see the witness signing but the witness does not need to see the signer signing. The only authority cited for the second possibility is *Roberts v Phillips* (1855) 4 El & Bl 450, 453; 119 ER, 164. That involved a particular statutory requirement for the attestation of wills (where traditionally the testator and witnesses need to see each other sign), which has no parallel in relation to deeds or other documents. It was cited by Edelman J in *Netglory Pty Ltd v Caratti* [2013] WASC 364 as authority for the meaning of attestation. But on a careful reading this relates to the requirement that the witness be present and sign the document.

(c) Delivery

The requirement of delivery does not present a significant hurdle for electronic documents. Delivery requires only that the party demonstrate an intention to be immediately bound by the deed — it does not require physical delivery.⁷⁵

(d) Writing

⁷¹ McCullagh, Little and Caelli, n 9, 464.

⁷² See Part A, 4.1, 4.2, 4.3 and 4.6.

⁷³ Seddon, n 32, p 61.

⁷⁴ Seddon, n 32, p 60.

⁷⁵ Seddon, n 32, pp 116-118 and the cases referred to, *Xenos v Wickham* (1866) LR 2 HL 296, 312; *Vincent v Premo Enterprises (Voucher Sales) Ltd* [1969] 2 QB 609, 619; *Scook v Premier Building Solutions Pty Ltd* (2003) 28 WAR 124 [23]; *Re Carile* [1920] VLR 427, 433. See also the discussion in 3.4 below.

The requirement of writing does not present a difficulty. Where the ETA applies the writing provision (s 9 of the Commonwealth ETA, and its equivalents) is easily satisfied using a Platform, see Part A, 5.5(b). But even where the ETA does not apply, there is a substantial body of case law that electronic documents satisfy the requirement for writing, see Part A, 4.4, though none relate to deeds, and documents created through Platforms should suffice, see Part A, 4.5.

(e) Paper, parchment or vellum

The common law requirement of paper, parchment or vellum would seem to present the biggest potential hurdle.

In English law this hurdle has been removed under the *Laws of Property (Miscellaneous Provisions) Act 1989* (UK).⁷⁶

What about Australia? We look first at the general law position before exploring the effect of the ETA.

(i) Without the ETA

The requirement is ancient, and has not been subject to any direct judicial examination for centuries.

Norton on Deeds, in including the requirement in its definition of deed, quotes the venerable texts *Coke on Littleton* and *Blackstone's Commentaries* and cites the Year Books, but no more recent cases.⁷⁷

Coke on Littleton gives as the basis of the rule the relative difficulty of writings on paper or parchment being "vitiating, altered or corrupted" when compared to wood, cloth or stone.⁷⁸ This is echoed in *Blackstone's Commentaries*.⁷⁹ *Sheppard's Touchstone*⁸⁰ gives a similar reason:

"Wood or stone may be more durable and linen less liable to erasures, but writing on paper or parchment unites in itself, more perfectly than any other way, both those desirable qualities,"

Technology has moved on since the 17th and 18th Century. Other durable materials and media are now available, including electronic ones. It would have been impossible then to conceive of a durable record in immaterial form, It might be suggested that the common law should catch up, and extend the range of permissible materials and media. This might go far as to extend to a cloud-based document stored with an independent third party or a document in multiple locations. That will also be durable and proof against alteration, particularly if digitally protected. A group of commentators have suggested the law should so adapt.⁸¹

⁷⁶ This would seem to remove the main impediment to electronic deeds in England. A brief article, without exposition, said that "opinion remains divided" on the issue, and that practical difficulties in attestation may render them more problematic. Hill R, Johnson L, Conway J, "Using electronic signatures in finance transactions" (2016) 31 JBFL 174. But a large working group of leading London commercial law firms, with the advice of senior counsel, has since concluded these issues have been resolved. See the Law Society practice note, n 24.

⁷⁷ Norton, Morrison and Goolden, n 32, pp 3-4. Strictly the older texts just refer to paper or parchment, but vellum (being made from the skin of a calf) can be seen as a subset or variant of parchment (made from animal skin).

⁷⁸ Norton, Morrison and Goolden, n 32, pp 3-4; Coke, n 57, 35b.

⁷⁹ Blackstone, n 57, 297.

⁸⁰ Sheppard W, *Touchstone of Common Assurances* (Samuel Brooke, 8th ed, first published 1641, 1826), Vol 1, 56. This rationalisation based on the supposed superiority of paper over rock (or cloth) in alterability and durability does not seem particularly credible, except perhaps to devotees of "rock, paper, scissors".

⁸¹ McCullagh, Little, and Caelli, n 9, 462.

As we have seen, in some states there may also be statutory arguments that the requirement of paper, parchment or vellum no longer applies in relation to deeds signed by individuals.⁸²

But it is not sufficiently clear that these suggestions and arguments would succeed without the benefit of the ETA or other legislation or judicial clarification.

Dr Seddon says that paper, parchment or vellum remain a requirement under Australian general law, quoting the *Norton on Deeds* definition.⁸³ Norton's definition has been cited (as to other requirements) in Australian case law.⁸⁴ Dr Seddon does not in this context mention *Manton v Parabolic* or the WA, SA or Tasmanian provisions discussed above in 3.2(a), or explore the background to the requirement.⁸⁵ He says that the requirement cannot be satisfied electronically.⁸⁶

(ii) With the ETA

Can the ETA help? There are two possible relevant provisions. While both do not apply to the Corporations Act,⁸⁷ it should be remembered that any requirement for paper, vellum or parchment applies to deeds signed by companies in spite of s 127, rather than because of it. The provisions of the ETA can still apply to that requirement.

(A) The no invalidity provision (s 8 Commonwealth ETA and equivalents)

In most Australian jurisdictions (except WA in relation to individuals) the no invalidity provision⁸⁸ discussed in Part A, 5.1(1) and 5.2 may assist by providing that "a transaction is not invalid because it took place wholly or partly by means of one or more electronic communications".

"Transaction", as we have seen, is defined inclusively and broadly.⁸⁹ But does this provision do the trick in relation to a soft copy? Dr Seddon is not convinced that it does:

"There is some difficulty in applying this to a deed as a physical object... The apparent intent of the definition is to focus on the more amorphous concept of contract ("transaction") as an arrangement rather than as a document. A deed is not itself an arrangement although it may bring about an arrangement. And it is at least awkward to say that a deed "took place" by electronic means."

But there are a number of relevant contrary points. First, the transaction validated is the transaction evidenced, effected or created by the purported deed. In that sense the transaction (be it a conveyance, contract, or declaration of trust etc) still has full legal effect even if the deed itself were found not to be a transaction and therefore itself not effective as a deed. The transaction is preserved. Ultimately what the parties are interested in is the transaction, not the technical document. Second, most deeds or purported deeds are themselves transactions, creating legal relationships, rights or obligations, except perhaps for some deeds poll. Many deeds are arrangements. Third, "transaction" is widely defined in the statute. The concept of what is a "transaction" has been given a very wide import by the courts in examining other legislation.⁹⁰

⁸² See 3.2(a) above.

⁸³ Seddon, n 32, p 41.

⁸⁴ *Scook v Premier Building Solutions Pty Ltd & Ors* [2003] WASCA 263 [22]; *400 George Street (Qld) Pty Limited & Ors v. BG International Limited* [2010] QSC 66 [44]; *Davey v Herbst, Herbst and Bray (No. 2)* [2012] ACTCA 19 [86].

⁸⁵ Seddon, n 32, p 97.

⁸⁶ Seddon, n 32, p 97.

⁸⁷ See 2.1 above.

⁸⁸ Section 8 of the Commonwealth ETA (or its equivalent in the States and Territories).

⁸⁹ Section 5 of the Commonwealth ETA (or its equivalent in the States and Territories), see Part A, 5.1(a), 5.2

⁹⁰ In the context of tax legislation, *Grimwade v Federal Commissioner of Taxation* (1949) 70 CLR 199, 222; in the context of the *Personal Property Securities Act 2009* (Cth), *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd & Ors*

Finally, the purpose of the provision is clearly to validate transactions which otherwise would have required a physical document — the point is to remove the requirement of physicality. This is consistent with the ETA as a whole.

There are limitations. The application of the section to deeds relies either on a deed being itself a transaction, or on the transaction being invalid if it were not by deed. If the purported deed is not a transaction, and the transaction it effects would still be valid if the document were not a deed, the section will not of itself assist in preserving the document as a deed. For example, when the purported deed is also a contract and effective as a contract the no invalidity provision may not have the effect of preserving it as a deed.

Dr Seddon goes on to point out that in some jurisdictions the ETA does not deal with the requirement of witnessing. The requirement is exempted from at least some provisions of the ETA.

But the extent of the exemption varies, as follows. Four states (NSW, Queensland, WA and SA) do exempt the requirement of witnessing from the operation of the signing and writing provisions.⁹¹ In NSW the exemption does not apply to the no invalidity provision. The no invalidity provision still applies. The only states in which the no invalidity provision is affected are Queensland, SA and WA. But there are differences.

- In Queensland and SA, it is only the witnessing requirement that is exempted from the no invalidity provision. In other words, all other requirements in relation to the deeds are not so exempt. If the document is successfully witnessed for the purposes of general law, then it should still be possible for the deed to be validated by the no invalidity provisions.
- In WA the exemption is drafted in a different way, so that the no invalidity provision does not apply to transactions where there is a witnessing requirement.⁹² As under WA law these include deeds executed by individuals (but not companies executing under s127(1)), it means that such deeds cannot take advantage of the no invalidity provision.

Generally, therefore, the no invalidity provision should validate transactions which are, or are effected by, electronic "deeds" which would otherwise be invalidated by the lack of paper, parchment or vellum, except in WA in relation to deeds executed other than by companies under s127(1). To hold otherwise would be inconsistent with the purpose of the ETA.

(B) Section 11 Commonwealth ETA and equivalents

The section commences:

"Requirement to produce a document

(1) If, under a law of the Commonwealth, a person is required to produce a document that is in the form of paper, an article or other material, that requirement is taken to have been met if the person produces, by means of an electronic communication, an electronic form of the document, where:

(a) in all cases — having regard to all the relevant circumstances at the time of the communication, the method of generating the electronic form of the document provided a reliable means of assuring the maintenance of the integrity of the information contained in the document; and

[2014] VSCA 326 [110]; and in the context of voidable transactions under the *Corporations Act 2001* (Cth), *Australian Kitchen Industries Pty Ltd v Albarian & Anor* [2004] NSWSC 1047 [24].

⁹¹ *Electronic Transactions Regulations 2012* (NSW), Reg 5(f); *Electronic Transactions Regulations 2002* (SA), Reg 4(1)(b); *Electronic Transactions Regulations 2012* (WA), Reg 4(1)(c); *Electronic Transactions (Queensland) Act 2001* (Qld), s 7A(1) and Schedule 1, clause 6.

⁹² *Electronic Transactions Regulations 2012* (WA), Reg 3(1)(b).

(b) in all cases — at the time the communication was sent, it was reasonable to expect that the information contained in the electronic form of the document would be readily accessible so as to be useable for subsequent reference; and..."

Paragraphs (c) and (d) appear only in the Commonwealth ETA, and deal with methods of delivery and verifying receipt where the document is to be produced to a Commonwealth entity or its representative. Paragraph (e) requires the consent of the recipient if it is someone else, and is replicated as paragraph (c) in state and territory ETAs.

So there are in each ETA three requirements for the provision to apply to the electronic production of documents: reliability, accessibility and consent. They are similar to requirements for the signing and writing provisions, which have been interpreted liberally.⁹³ Platforms should readily satisfy them.⁹⁴

Dr Seddon says this provision is of no help for deeds, on the basis that it only deals with the production of documents already written and executed.⁹⁵ He does not elaborate on that view. I suggest, with respect, that looking at the language and purpose of the provision and the overall purpose of the legislation, the section is not so confined.

Looking at the actual language used in the section it is not immediately apparent that the "document" referred to does need to be a pre-existing document, and cannot be a new document, or that the section should be limited to producing existing documents (or copies of them). One can of course be called upon to "produce" an existing document like a driver's license. But a new original document can be said to be "produced" by being created. The use of the present indicative "is" is also consistent with referring to the end result as much as an existing item. It reflects the modern push to use that tense and voice in drafting. A requirement for a painter to produce a painting that "is" "in the form of" a Madonna or an oil painting, or for the painting to be in Cubist "form", would not require the painter to find an existing painting. If the section only referred to the production of existing documents it would have little work to do.

The production of the relevant document does need to be "by means of an electronic communication" and in paragraphs (c), (d) and (e), to be "to" someone. That might be seen as narrow. But "electronic communication" is defined very widely in s 5 to include the communication of information that is data, text or images. The operative words of the writing and signing provisions (ss 9 and 10 of the Commonwealth ETA) use very similar terminology, which has been interpreted to cover the formation of agreements.⁹⁶ The concepts and language used in the ETA are deliberately very broad and non-specific.

In any event, it is not stretching the language, particularly in the context of the legislation and its purpose, to see a deed as a communication between parties or between signer and reader. It effects and communicates the legal intentions of the parties. It is data or text.

As to the context and purpose, the stated purpose of the ETA (in s3) is to facilitate the use of electronic transactions. The section follows three sections which each deal with original transactions, but does precede a section dealing with the retention of information and existing documents.

The Commonwealth Explanatory Memorandum is of assistance on this issue. It reads as follows.

"Clause 11 is based upon article 8 of the UNCITRAL Model Law. This article refers to the concept of both original documents and the production of original documents. The concept of an original document is generally not used in Commonwealth Laws.

⁹³ See Part A, 5.3, 5.4 and 5.5.

⁹⁴ See Part A, 5.5.

⁹⁵ Seddon, n 32, p 101.

⁹⁶ See Part A, 5.3 and 5.4.

Instead, clause 11 refers to the production of documents which is a more appropriate term."

The Victorian and ACT equivalents also specify that the section covers the creation of original documents. Other state and territory explanatory notes and memoranda do not go into that level of detail, or were not produced, but the relevant legislation closely follows the Commonwealth model.

There is very little case law on the provision, but in *Curtis v Singtel Optus Pty Ltd* (2014) 225 FCR 458 at [49] the Full Court of the Federal Court referred to it and other ETA provisions in its reasons for holding that an emailed bankruptcy notice with attachments satisfied the relevant requirements of the *Bankruptcy Act 1966* (Cth). It did not give any analysis as to the operation of the provision, but it did not differentiate between the original notice and its copy attachments.

It would I suggest be surprising if legislation introduced with the purpose of facilitating electronic commerce and removing barriers comprised by physical requirements were to be interpreted so as to preserve a requirement for paper, parchment or vellum.

(f) Sealing

For individuals and Australian companies, seals have been removed as an essential requirement, but they are optional in some cases.⁹⁷ They still remain a requirement for foreign corporations and corporations that are not companies and have no equivalent to s 127 in the applicable legislation, and are not signing through an attorney.

Sealing no longer requires the addition of a wax or wafer seal. Where there is no common seal courts have said the requirement of a seal can be satisfied by symbols written or printed on the page, such as a circle containing "LS"⁹⁸ or the word "seal" in parentheses.⁹⁹ Courts' attitude to the sealing requirement is relaxed. If signatures can be inserted electronically under general law, such symbols should be able to be inserted electronically. Sealing may connote a physical process, but in accepting written or printed symbols the courts have already departed from that notion. Signatures also once equally connoted a physical process. The law and commerce have moved on from sealing wax and quilled pens.

This has not been tested in the courts. If there were any doubt then the no invalidity provisions of the ETA discussed above¹⁰⁰ should assist where it applies.

Of course this does not apply to physical common or official seals.

3.4 The print-out satisfying the physical requirement, a backstop

For the reasons set out above I suggest that there are compelling arguments that deeds can be created electronically where the ETA applies. A case can be made for arguing that this can occur in some jurisdictions even where the ETA does not apply, but this may not be sufficiently reliable without further judicial support.

Nevertheless, where there are any doubts expressed as to whether deeds can be purely electronic, on the basis of the requirement of paper, parchment or vellum, or a printed seal, that may in practice be an issue best avoided, if that can be done easily. And the issues will in practice need to be avoided where the ETA does not apply. It is possible to avoid the issues quite easily in relation to documents created through Platforms, by ensuring there is a print-out, because the print-out can be not just a copy, but an end-result of the process and an original. As discussed in 1 above, the signer is carrying out a process which places his or her signature on the print-out just as much as he or she would be doing so using a pen. The print-out can be

⁹⁷ See 3.2(a) and 3.2(b) above.

⁹⁸ *First National Securities v Jones* [1978] Ch 109, 111.

⁹⁹ *Santander UK PLC v Parker* [2012] NICH 20 [14].

¹⁰⁰ See 3.3(e)(ii) above.

as much a counterpart or original as the soft version. This can be confirmed by the terms of the document. This can extend to any symbol representing a seal inserted with a signature.

The end result would normally be a document printed on paper which could contain all the terms and the necessary language to indicate it is intended to be a deed, and forms of the signatures (and, if applicable, printed seals) with appropriate attestations. That can satisfy all the requirements for a deed.

But what about delivery? In the end, delivery is made by having the relevant intention at the relevant time,¹⁰¹ and is presumed on execution, unless rebutted.¹⁰² Delivery can be contemporaneous with execution. There is no need for formal acts or words.¹⁰³ Signing (and if required) sealing a printed document which is to be an original counterpart is a process initiated by the relevant computer entries and completed on printing. It does not cease to be the act of the signer. Assuming he or she wishes to be bound, the signer would normally maintain the requisite intention as to delivery throughout. Delivery will occur at completion of the process — printing — without requiring more from the signer, unless the requisite intention has been removed or ceased (in which case there may be an estoppel). It can be reflected by the usual attestation language, such as "signed, sealed and delivered", which would appear in the printed document.

That can still be the case if the printing of the document is carried out by another party, though the timing of delivery taking effect will be in the hands of that other party. That does not make the other party the agent for the purposes of delivery. In any event it would not be fatal if delivery does not occur, and the document is not binding, until a step is completed by another party. This can occur where a party executes a physical document which is to be executed by others, but not to be bound until it is executed by all, and the document is passed round a table, or round a city.¹⁰⁴ It is also not dissimilar from the position that applies on exchange. In that circumstance, a deed is not binding or delivered until exchanged with another party, even if exchanged by a solicitor as agent.¹⁰⁵

The above would mean that, if it turned out that the electronic version stored on the system was not itself a deed, there would be no binding deed until such time as a party printed out the document. A party seeking to enforce the document could always print it out. In theory issues could arise, for example, if in the meantime the authority or capacity of a person signing had ceased, or he or she ceased to intend that the document be delivered, or if priorities were judged from the time of execution. But this would not arise in normal practice, The situation is entirely under the control of the relevant parties. Any well-advised party (and indeed any party that keeps paper records) would immediately print out a counterpart following signing. The Platform described in Part A, 3 records in the document certificate the time of first print-out by a party.

Dr Seddon analyses (on pp 98 and 99) whether a printed copy of an electronic document can satisfy the necessary formalities, and comes to the conclusion that arguably it may not, saying "this is the same as a photocopy and runs into the difficulty of simply not being the original." But, with respect, that analysis covers a situation where the print-out is a copy of some original document, and not itself an original. His discussion of *Molodsky v Vema* reflects this view. He says that it is not clear from the decision whether a PDF copy of a properly executed deed would be regarded as a legally effective deed. He believes that what appears on the print-out are copies of signatures and not the actual signatures. But while it did not deal with

¹⁰¹ *Segboer v AJ Richardson Properties Pty Ltd* [2012] NSWCA 253 [53] – [54]; *Federal Commissioner of Taxation v Taylor* (1929) 42 CLR 80, 878. See Bradbrook A, "The Delivery of Deeds in Victoria" (1981) 55 ALJ 267, and Seddon, n 32, pp 116-117.

¹⁰² *Hall v Bainbridge* (1848) 116 ER 1032, 1036. See also *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] Ch 88, 98 and *Hooker Industrial Developments Pty Ltd v Trustees of the Christian Bros* [1977] 2 NSWLR 109, 119.

¹⁰³ *Keith v Pratt* (1862) 10 WR 290, 296.

¹⁰⁴ See *400 George Street (Qld) Pty Ltd v BG International Ltd* [2012] 2 QdR 302 [56] and the authorities and texts cited there: *Longman v Viscount Chelsea* (1989) 58 P & CR 189, 195; *Bolton Metropolitan Borough Council v Torkington* [2004] Ch 66, 75-7; and Lewison K (ed), *Woodfall's Landlord and Tenant* (29th ed, 2009, Street and Maxwell, London, 2009), [4.008] - [4.009]. This is distinct from signing in escrow on condition that other parties execute, in which case the escrow is irrevocable: see, for example, *Scook v Premier Building Solutions Pty Ltd* (2003) 28 WAR 124 [26].

¹⁰⁵ *Hooker Industrial Developments Pty Ltd v Trustees of the Christian Brothers* (1977) 2 NSWLR 109, 116-8.

a deed, what *Molodysky v Vema* makes clear is that what appeared on the facsimile copy was to be regarded as an actual signature. *Re a debtor* does the same. Artificially created signatures can still be signatures.¹⁰⁶ As discussed in 1 above, signers are taking steps to ensure that their signature appears in a print-out, and those signatures (and seals) so printed out can be regarded as originals.

3.5 Conclusions on deeds

There are a number of requirements for deeds. All of them can be satisfied electronically, with the assistance of the ETA. Where the ETA does not apply then they can be satisfied with a print-out.

There may be an ingrained notion that beyond those requirements there is still a platonic idea of a deed impervious to change and to all but the most direct legislative assault.¹⁰⁷ But what now constitutes a deed varies significantly. There is no one platonic concept. If there were, it would only be a creature of common law (and statute) that can change and adapt. While deeds are solemn and formal, the components have changed over time. And this has occurred at the hands not only of statute, but also the courts (if one considers what now suffices as a seal and delivery). Though paper and physicality may be traditional, they are not sacrosanct. They are not a rock so fundamental to the common law that they are proof against all change, including the ETA — legislation that has the express purpose of allowing electronic commerce and freeing it from physical restraints, and the clear effect of validating electronic transactions and removing requirements for paper.

Finally it would be curious if the legislation, and the law generally, were applied to hold back commerce, and not adapt to new technologies, and were to cling to the notion of using the skin of a calf in preference to computers.

Nevertheless at this stage some feel that to have sufficient certainty to rely on such deeds they would need the assurance of an appellate judgment or legislation directly referring to the issue. And there are exceptions to the ETA. To achieve full immediate acceptance in the market, legislative reform would be useful.

3 Summary of documents and situations in which signing via Platforms may not be appropriate

Documents which cannot or should not be signed electronically are:

- documents which need to be registered where the registration regime requires paper, wet-ink signatures or satisfaction of other conditions which preclude electronic signing;
- documents required to be physically stamped (though a print-out could suffice);
- a counterpart executed by affixation of a corporation's common or official seal being affixed (though other parties may execute through the Platform); and
- any other documents requiring signing which are excluded by virtue of the ETAs and could not under general law be signed electronically.

4 General conclusion

Consistent with the general move to electronic commerce, a wide variety of documents (including deeds) can be signed and transactions effected electronically through Platforms. Companies can use them to sign under s 127(1) of the Corporations Act.

¹⁰⁶ See the authorities cited above: *Clipper Maritime v Shirlstar Container ('the Anemone')* [1987] 1 Lloyd's LR 546, 554; *Molodysky v Vema Australia Pty Ltd* (1988) 4 BPR 9552 [22]; *Re a debtor ex parte Inland Revenue Commissioners* [1996] 2 All ER 345, 351; *Korber v Police* [2002] SASC 441 [20]; *Good Challenger Navegante SA v Metalexportimport SA* [2004] 1 Lloyd's Rep 67 [22]; *McGuren v Simpson* [2004] NSWSC 35 [22]; *WS Tankship II BV v The Kwangju Bank Ltd* [2011] EWHC 3103 (Comm) [155]; *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] 1 WLR 3674 [31] – [32].

¹⁰⁷ A concept that seemed to underlay the discussion in *Scook v Premier Building Society Limited* (2003) 28 WAR 124 [23], but see contra *Manton v Parabolic Pty Ltd* (1985) 2 NSWLR 36.

The law generally should follow commerce, and facilitate it. In my view in this case the existing law is already very well placed to do so. Existing statute and case law is generally sufficient. Nevertheless, in relation to some aspects (deeds and s127), some express legislative changes would be useful to achieve immediate full acceptance by everyone in the market .