LEGAL RISKS: DIGITAL EXECUTION (Are they as good as wet ink signatures?)

27 February 2025

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INTRODUCTION

We have each entertained some doubt from time to time when considering whether a signature should be signed electronically or in "wet ink". Clients often expect lawyers to work at an impossibly fast pace when negotiating and entering into contractual relationships. This need for speed and the isolatory responses to COVID-19 have triggered a new digital pace that our world has not seen before.

In this environment, contracts are formed and real estate purchased solely relying on documents in digital form. It seems now that almost anything goes, provided the 'signature' in question was affixed with the authority of the person intending to be bound and the signatory's name is identified. In most cases, a standard generic document in digital form is a perfectly acceptable way of entering into legal relations. And through the power of legislation we can be confident that documents are not invalid merely because they are electronically signed and communicated provided we comply with the requirements set out it the *Electronic Transactions Act 2000* (NSW) "*ETA*". Where the provisions relate to general matters and not commonwealth specific authorities and Acts, the provisions generally mirror the commonwealth *Electronic Transactions Act* 1999 (Cth).

It doesn't apply *carte blanche.* We can't just assume that all Authorities, clients, customers, or business associates will agree to transact using electronic transactions – such methods require consent between the parties and those parties can revoke their agreement. Also the mere affixation of an electronic signature says nothing about the likelihood that it was actually affixed by the person purportedly signing or the intention of that person. Obtaining and storing evidentiary documentation can be very important.

The Act exempts certain legislation or Authorities from ETA application. Where this occurs, we are directed to follow the specific rules set by those Authorities. In the case of the more specific Conveyancing Rules and Corporation Rules, their guidelines point back to the ETA protocols but also add additional verification directives. Courts and Tribunals on the other hand have a modified adoption of electronic transactions and processes.

What is a signature?

Community attitudes and practices change over time. In an article from the Estates Gazette Journal, 5 October 2024, Guy Fetherstonhaugh KD and Toby Boncey give an interesting recount of attitudes held in the mid twentieth century. Of particular note, Lord Denning, in the Court of Appeal in his dissenting judgment in *Goodman* v *J Eban Ltd*[1] ….. said that when a document is required to be "signed by" someone, that means *"that they must write their name with their own hand on it." The* majority in the case however 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* stated in obiter that if he were deciding the matter free from authority, he would probably have agreed the signing could only be carried out by writing the name in one's own hand. However, Romer LJ said 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

[1] Goodman v J Eban Ltd [1954] 1 QB 550.

document as being that of, or as binding on the person whose name or mark is so written or affixed".[2] Romer LJ's view is that a typed name would suffice as much as the stamped facsimile signature. Attitudes change with the times. Only 2 years later in 1956 in the case of *Lazarus Estates v Beasley*[3] Lord Denning conceded that facsimile signatures were acceptable.

Given the shift in community expectations over time, the practical lawyer in each of us want to know what is the current law today and how to I sufficiently comply?
In this paper I will take you through the following:
Part A: Definition of terms and outline of the ETA
Part B: Electronic Execution and communication by parties to the transaction
Part C: Remote Witnessing of a party's electronic execution
Part D: Exceptions to the standard rule

PART A : DEFINITIONS AND OUTLINE

What is an Electronic Signature?

The *ETA* does not define what an "electronic signature" is but does prescribe at section 9 (1) that the communication of an electronic signature is satisfied if a method which is as reliable as appropriate is used to identify the person and indicate the person's intention with respect of the information communicated.
The general acceptance is that electronic signatures are separate from digital signatures, which are a cryptographic mechanism that is frequently used to implement electronic signatures. Cryptography is the method of hiding the contents of a message. While an electronic signature can be as simple as a name in an electronic document, digital signatures are increasingly being utilized in e-commerce and regulatory filings to implement electronic signatures in a cryptographically secure manner. Although the ETA would not invalidate a 'digital signature' because it is a more secure method of identifying the signatory, the ETA does not require such a high degree of secured verification - it merely calls for a method which is 'as reliable as appropriate'.
Thus an electronic signature is data that is logically linked to other data and utilized by the signatory to sign the linked data.[4] Alternatively, according to Stephen Mason, the better definition is that an electronic signature is a link between protocols of electronic devices that communicate via software, each with the other.[5]

An electronic signature can perform the same functions as a manuscript signature.[6] The difference is that the document to be signed does not exist as a physical object in the same way as the content of a document rendered on to a paper carrier, which means the quality and extent of the evidence to provide intent becomes vitally important in the event it is disputed that an electronic signature was affixed to a document or

[2] Goodman v J Eban Ltd [1954] 1 QB 550, 563.
[3] Lazarus Estates v Beasley [1956] 1 All ER 341, 343-344.
[4] Chao, Feng; Ji, Zhongyuan; Zhang, Jin "Comparative Analysis of Dynamic Characteristics between Electronic Signature and Conventional Signature Based on Computer Vision Technology" Computational Intelligence and Neuroscience: CIN: New York (2022).
[5]Stephen Mason, Daniel Seng "Electronic Evidence and Electronic Signature Fifth Edition" University of London Press, 2021, 297.
[6] Stephen Mason, Daniel Seng "Electronic Evidence and Electronic Signature Fifth Edition" University of London Press, 2021, 297.

communication, was not bypassed by a third party, or was affixed to the relevant document in a batch of documents.

Provided requirements of the specific Acts and Regulations under which it was established are complied with, electronic signatures can have the same legal standing as a handwritten signature.

The Electronic Transactions Act 2000 (NSW)

The *ETA* goes beyond just normalising mere electronic signatures, it deals simultaneously with electronic transactions more broadly by permitting communications, recordings and storage of information too. By so doing the ETA stimulates future economic and social prosperity of Australia. It facilitates and promotes business and community confidence in the use of electronic transactions.[7]

Rather than stating that a transaction is permitted to be carried out electronically, section 7 of the ETA instead provides that an electronic transaction is "not invalid because it took place by one or more electronic communications".[8]

> *Section 7 of the ETA*
>
> ***7 Validity of electronic transactions***
>
> *(1) For the purposes of a law of this jurisdiction, a transaction is not invalid because it took place wholly or partly by means of one or more electronic communications.*
>
> *(2) The general rule in subsection (1) does not apply in relation to the validity of a transaction to the extent to which another, more specific, provision of this Part deals with the validity of the transaction. This is virtually the same clause as section 8 of the Electronic Transactions Act 1999 (Cth).*

In just 16 sections and 1 schedule, the ETA standardises and sets a baseline for electronic non-paper based transactions for the purposes of providing information (communication), executing documents (forming contracts) and retaining information (storage).[9] The ETA distinguishes rules for party party signatures and rules for remote witness signatures and it provides a mechanism for the Attorney General to prescribe for Courts and Tribunals, their own levels of acceptability of electronic transactions.

Definitions

The ETA defines[10] a "transaction" 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

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

Section 5 of the ETA then defines other relevant terms as follows:

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[7] Section 3 of the *ETA 2000.*
[8] Section 7 of *ETA 2000.*
[9] Sections 8, 9, 10 and 11 of the *Electronic Transactions Act 2000* (NSW) ("*ETA 2000*").
[10] Section 5 ETA.

"consent" *includes consent that can reasonably be inferred from the conduct of the person concerned, but does not include consent given subject to conditions unless the conditions are complied with.*
"data storage device" *means any article or material (for example, a disk) from which information is capable of being reproduced, with or without the aid of any other article or device.*
"electronic communication" *means--*
(a) a communication of information in the form of data, text or images by means of guided or unguided electromagnetic energy, or both, or
(b) a communication of information in the form of sound by means of guided or unguided electromagnetic energy, or both, where the sound is processed at its destination by an automated voice recognition system.
"law of this jurisdiction" *means any law in force in this jurisdiction, whether written or unwritten, but does not include a law of the Commonwealth.*
"this jurisdiction" *means New South Wales.*

Party Party Electronic Transactions

The key provisions are set out in Division 2 of PART 2 of the *ETA 2000* which is broken up into 4 sections[11] dealing in turn with the following requirements imposed under a law of NSW to generally be met in electronic form:

(i) a requirement to give information in writing (section 8),
(ii) a requirement to provide a signature (section 9),
(iii) a requirement to produce a document (section 10),
(iv) a requirement to record information or retain a document (section 11),

Division 3 of Part 2 of the ETA then provides guidance and assistance on miscellaneous matters such as timing requirements, jurisdictional matters and variation in respect of electronic transactions.

Remote witnessing of electronic signatures

Part 2B of the ETA allows for electronic remote witnessing of the signature of a document that is required to be witnessed.

Exemptions and non-application

The right to use electronic means to transact does not affect the substantive law[12] whether the substantive law is derived from legislation or common law. For example, electronic transactions do not affect how a document comes into existence, The common law requirement of offer, acceptance, consideration and intention in contract formation remain. Also the Act does not apply to override other more specific requirements set out in other legislation within that jurisdiction and subject matter.

[11] There were 5 sections (sections 8, 9, 10, 11 and 12) but section 12 was repealed leaving 4 sections.
[12] Section 7(2) of the ETA 2000.

Section 18 of Schedule 1 of the ETA specifically states that *"Part 2 does not apply to matters relating to the practice or procedure of a court including, in particular, matters relating to the filing, issue or service of documents."*

Section 6A of the ETA states that:

> ***6A Exemptions***
>
> *(1) The regulations may provide that all or specified provisions of this Act do not apply—*
>
> *(a) to transactions, requirements, permissions, electronic communications or other matters specified, or of classes specified, in the regulations for the purposes of this section, or*
>
> *(b) in circumstances specified, or of classes specified, in the regulations for the purposes of this section.*
>
> *(2) The regulations may provide that all or specified provisions of this Act do not apply to specified laws of this jurisdiction.*

Subsections 8(3), 9(2) and 10(4) of the ETA specifically particularise, in case there was any doubt, that their main provisions do not affect the operation of any other law in NSW that makes more specific provisions for electronic transacting.

And the Electronic Transaction Regulation 2017 reinforces again the fact that Division 2 of Part 2 of the Act does not apply to certain laws, requirements and permissions in force in NSW.

Specifically the *Electronic Transaction Regulations 2017 (NSW)* ("*ETR*") provides at regulation 7 that Division 2 of Part 2 of the Act does not apply to *Government Information (Public Access) Act 2009, Local Government Act 1993, Parliamentary Electorate and Elections Act), Election Funding, Expenditure and Disclosures Act 1981, Poisons and Therapeutic Goods Act 1966* etc.[13]

Regulation 5 & 6 provides that Division 2 of Part 2 of the ETA does not apply to certain requirements and classes of requirements and permissions and classes of permissions including requirements or permissions to lodge or file a document with a judicial body in connection with legal proceedings, sign a document to be lodged or filed with a judicial body, produce a document to a judicial body or in relation to legal proceeding, retain documents that have been admitted into evidence or issued by a judicial body and with respect to service and verification, authentication, attestation or witnessing etc[14]

At part D of this paper, we provide examples of some alternate and more specific rules prescribed and enforced by the Authorities.

PART B : ELECTRONIC EXECUTION AND COMMUNICATIONS BY PARTIES TO THE TRANSACTION

Electronic Signatures

Section 9 of the ETA provides that a document may be signed electronically if subsections 9(1)(a), (b) and (c) are satisfied.

[13] Regulation 7 of the Electronic Transaction Regulation 2017.
[14] Regulation 5 & 6 of the Electronic Transaction Regulation 2017.

If a signature is required then that requirement is taken to have been met electronically if the signatory is identified and indicates that signatory's intention of the information communicated, the method used is reliable to prove the identification and intention of the signatory and the signatory consents to the method used. Section 9 of the ETA states:

"(1) if, under a law of the jurisdiction, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication if;

(a) a method is used to identify the person and to indicate the persons intention in respect of the information communicated, and

(b) the method used was either –

(i) as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in light of all the circumstances, including any relevant agreement, or

(ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself altogether with further evidence, and

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

(2) this section does not affect the operation of any other law of this jurisdiction that makes provision for or in relation to requiring-

(a) an electronic communication to contain an electronic signature (however described), or

(b) an electronic communication to contain a unique identification in an electronic form, or

(c) the particular method to be used in relation to an electronic communication to identify the originator of the communication and to indicate the originators intention in respect of the information communicated.

(3) the reference in subsection (1) to a law that requires a signature includes a reference to a law that provides consequences for the absence of a signature."

Broadly, there are 3 requirements for a valid electronic signatures – the identification, reliability and consent requirements.

<u>The Identification Requirement</u>

Identity

The recipient must be able to determine from the method of execution, the identity of the person signing. Identity could be shown by a typed name, a personal mark, a personal email, or use of an online identity verification method. This is mostly straight forward and requires factual determination. By demonstration of how amiable this requirement is, even emails can link and identify a person. Caselaw repeatedly finds that the name in an email address is capable of identifying a person.

Kavia v Suntrack[15] involved a case of an option to renew a lease which contractual requirement called for written notice and a signature on the notice. The notice was sent by email. Pembroke J said:[16]

> *"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 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[17] involved a loan repayment which the lender claimed was reset by a confirmatory email from the borrower "Tom Stuart" in reply to the lender's request for payment within in the limitation period. The conversation included:

Ms Hishon: *"Well, it is now 2008 - please deposit funds to Jaykay Pty Ltd - BSB [supplied] Account No: [supplied]. Urgently - and let me know when it is done and amount. Far too long between deposits not drinks. Katrina."*

Mr Stuart: *"Sorry for the delay in response, but I have had to change ISP as old one giving me major headaches. This is current one and for future. I only clear the old one from time to time. Since last email contact, I had an accident which put me in hospital, then basically bed for 6-8 weeks. Have not been able to work since end October, still not right. So I am in difficulties myself. Coupled with that I was ill earlier in the year for a month or so. I am therefore unable to deal with this matter at the moment. I will contact when I can. Tom."*

The Court found that a typed first name at the end of an email was enough to satisfy the signing requirement required under s 54 of the Limitation Act 1969 (NSW). Harrison J said "Mr Stuart typed hi name on the foot of the email. He signed it by doing so. It would be an almost lethal assault on common sense to take any other view."

In Islamic Council (SA) v Federation of Islamic Councils (Aust),[18] the Defendant was an umbrella association comprised of many Islamic entities as its members. The 1st and 3rd Plaintiffs were member entities. The 2nd plaintiff was a supposedly struck off member. The Defendant failed to call a meeting to determine the membership of plaintiff 2 Constitution required that the secretary had to call a meeting if at least 4 members requested a meeting. The 3 Plaintiffs and others so requested the meeting but the umbrella association claimed that a request received by email was invalid and therefore did not satisfy the required 4 requests. The 1st Plaintiff wrote

[15] Kavia Holdings Pty Ltd v Suntrack Holdings Pty Ltd [2011] NSWSC 716.
[16] Kavia Holdings Pty Ltd v Suntrack Holdings Pty Ltd [2011] NSWSC 716, [33].
[17] Stuart v Hishon [2013] NSWSC 766.
[18] Islamic Council of South Australia Inc v Australian Federation of Islamic Councils Inc [2009] NSWSC 211, [20], [22].

"...I think a Council meeting at the very least would allow you to consider the wishes of Council members on key matters. I hope we can put a Council meeting in before the end of the year, AA Ramzi"

Brereton J said of an email, "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: "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."

The Identification Requirement requires both the recipient of the electronic communication to have separately verified the identity of the signatory and their intention in relation to the information communicated (which can be satisfied by referring to other evidence).

In Russells v McCardel, legislation required a lawyer to have a written cost agreement signed by the client and required the solicitor to provide in clear plain language, disclosure of costs. After providing litigation legal services, the solicitor charged $617,912, which is a substantial increase from the originally disclosed $200,000 and the client refused to sign a new costs agreement after receiving that bill. When pressed the client sent this email:

"From: Sam McCardel …
Sent: Monday, 15 October 2012 12:26PM
To: 'Stephen Russell
Subject: RE:McCardel & Ors v Fredersdoff & Anor — S CI 2006 9707
Dear Steve
As per our conversation just now, I confirm our discussion and agreement to sign the cost retainer with clause 13.6 amended from $650 to $1.5m to just cover all costs to date (ODS ~ $300k, plus MB ~ $160k, plus Russells ~ $977k as per your cost estimate/budget, a min success fee to cover all cost to date). As discussed, we regard a minimum successful settlement in this matter, post your recommended final undue influence amendment, to be north of $4.5m gross, where such costs to date are then covered, replacing the ~ $3m of capital lost 10 years ago. Stephen, we feel we lack the rational legal commercial skills for this kind of complex decision, other than to say we trust you and that you will do the right thing by our family. I will arrange for the disbursements to be paid today.
Kind regards,
Sam"

That is, he would sign the new costs agreement with certain amendments. This electronic communication was held to fail the Identification Requirement, as intention to be bound by the cost agreement was not demonstrated.[19] The onus of proof was on Russells.

Intention could be shown by a clear agreement, signing on the dotted line, or something extra in the context of a response. It must be shown that the person signing intends to be bound by the information communicated

[19] Russells v McCardel [2014] VSC 287, [57]-[62].

(typically an electronic signature accompanied by the signatory's name and position to indicate that they wish to be bound by the contract they have signed).

Depending on the circumstances, an electronic signature could be:

- drawn onto a screen or uploaded from a picture, before being sent electronically
- made by emailing a signature, or a statement of acceptance
- done by clicking an 'I accept' box on an online form before submitting
- made and sent through a digital signing platform.

The intent behind the affixing of the name is relevant and requires consideration. The name of the party to be bound must be intended as a signature.

In Welsch v Gatchell, the surviving registered proprietor of subdivided land refused to honour an agreement to sell a parcel of land that she and her husband had agreed to sell before his death. Her argument was never concluded in a formal contract and it is inequitable as market value is much higher. The purchasers argued the agreement was made partly orally and partly in writing as the Seller had faxed him a handwritten letter with a printed heard of the sender's name and address. The 9 November 2003 fa was hand written but the printed fax header recorded the Gatchells' surname and initials, with their fax number. The full text of the document, including the header, said:

> *"09/11/2003 09.53 03-574-2194 A & G Gatchell*
> *I/we agree to purchase a section from A & G Gatchell 273 Queen Charlotte Drive being part of DP 10537 Lot 2 for a cost of $65,000.00 (sixty five thousand dollars) plus the costs of preparation of section sale eg surveyor, engineer, resource consent, valuer, Council reserve fund and lawyers fees. Plus any other costs pertaining to sale of section – example (road access) and power supply, right of way over our land by power lines known as the "Poo trail" will have permanent access to section – via access road. There will be a $10,000.00 deposit and $55,000.00 when title to property arrives."*
> *The evidence educed was that Mr Gatchell called Mrs Welsh and said that he was happy with the document and confirmed their agreement. Afterwards the Gatchells signed a handwritten agreement and sent it to the Gatchells under cover of a letter that started with "I hope this draft is ok, if not just let me know" . Mr Welsh then sent a $10,000 cheque 'so you can bank it when things become finalised".*

Miller J said *"… a name written on a fax may amount to a signature. But a fax header printed using the machine's capacity to add writing to the document as it is copied and sent cannot serve as a signature unless, perhaps, there is evidence that is was specifically inserted for the transaction concerned.."*[20]

In Evans v Hoare, Cave J considered, at 597, that the place of the signature was not relevant: *'In the first place, there must be a memorandum of a contract, not merely a memorandum of a proposal; and secondly, there must be in the memorandum, somewhere or other, the name of the party to be charged, signed by him or by his authorized agent. Whether the name occurs in the body of the memorandum, or at the beginning, or*

[20] NZHC 1898, [2009] 1 NZLR 241, [53], (2007) 8 NZCPR 708, (2007) 5 NZ ConvC 194,549 (21 June 2007).

at the end, if it is intended for a signature there is a memorandum of the agreement within the meaning of the statute."

In the case of Tourret v Cripps,[21] Mr R.L. Cripps wrote in his own hand on a sheet of memorandum paper an offer to lease parts of some land. It was not signed but contained, in its header, the typed words "From Richard L. Cripps" and his address. THIS printed name served as a signature to hold him to the promise he had made.

Bassano v Toft[22] concerned a requirement under UK consumer credit legislation for documents to be signed by the borrower. In his decision, Popplewell J said:[23] *"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 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."*

The Reliability Requirement

Section 9(1)(b) of the ETA further requires that the method of electronic execution is either "as reliable as appropriate" or fullfuls the functions of identification and intentions required in 9(1)(a).

Reliability is the trustworthiness of the content of a document as fact. Inferences can be drawn from factors such as competence (the authority and capacity) of the author, the completeness of the form and the control over the process of production of the document. The ETA allows this to be satisfied in a number of ways. One way is the method used to sign must be 'as reliable as appropriate' for the purpose and in light of all the circumstances, which requires consideration of the context in which the document is signed. This is objectively determined by considering all relevant circumstances and the purpose for which the signature is required. Depending on the nature of the contract and circumstances, it may be sufficiently reliable that a password protected email account is used to send the communication or that software is used which requires a password or authentication before a digital signature is inserted.

The ways in which judges have tested the validity of a signature has altered over time. From concentrating on the form a signature takes (such as whether a mark was made or written by an illiterate or literate person), judges later went on to question its validity by considering the function the signature performs. The Act allows reliability to be satisfied through function also. A signature can serve a number of functions. Each function can have varying degrees of importance, including complying with a legal requirement that something be signed. It depends on the nature and content of the document to which it is affixed.

[21] (1879) 48 L J Ch 567, 27 WR 706.
[22] Bassano v Toft [2014] Bus LR D9; [2014] EWHC 377 (QB).
[23] Bassano v Toft [2014] Bus LR D9; [2014] EWHC 377 (QB), [42].

With electronic signatures, the person does not physically sign anything, but causes software to sign electronically using an untrustworthy machine for knowing what document has been signed. [24] This is significant, because the act of signing using an electronic signature has a different symbolic meaning to that of a manuscript signature, and suggests a weaker sense of the involvement of the person in the process of signing. [25]

The function that the ETA focuses on is that a signature can authenticate the identity of the person signing the document. For example a signature can be to reinforce the causal link between the signature and a name printed on a document, such as a name printed on a chequebook or credit card.A variety of circumstances may satisfy this requirement depending on the purpose and context. New Zealand courts have said that a variety of actions can constitute a signature. In *Welsh v Gatchell,* Miller J said:[26] *"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."* Courts have continued to hold that stamped facsimile signatures can satisfy statutory requirements.[27] 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.[28]
In particular, modern times call for modern practices. It is commonly accepted now that a contract can be formed by facsimile and emails text alone. In 1988 in the case of Molodysky v Vema Australia,[29] 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 Div 8 of Pt 4 of the *Conveyancing Act 1919* (NSW). *Molodysky v Vema* held that that constituted delivery of a signed agreement to the purchaser for the purposes of that legislation. Cohen J said: "*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*. *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."*

To be considered valid, an electronic signature must be sent by the purported originator or with their authority.

[24] According to Stephen Mason and and Daniel Send "Electronic Evidence and Electronic Signatures Fifth Edition" Institute of Advanced Legal Studies 2021, 284.
[25] According to Stephen Mason and and Daniel Send "Electronic Evidence and Electronic Signatures Fifth Edition" Institute of Advanced Legal Studies 2021, 284.
[26] Welsh v Gatchell [2009] 1 NZLR 241, [51]. See also Northcott v Davidson [2012] NZHC 1639, [31]-[38].
[27] Lazarus Estates v Beasley [1956] 1 All ER 341, 343-344; Welsh v Gatchell [2009] 1 NZLR 241.
[28] World of Technologies (Aust) Pty Ltd v Tempo (Aust) Pty Ltd [2007] FCA 114, [92]-[96].
[29] Molodysky v Vema Australia Pty Ltd (1988) 4 BPR 9552. See discussion in note 33.

A person can be delegated to sign a document, as in the Australian case of *Whittaker v Child Support Registrar*[30] where a person affixed the scanned electronic signature of another to a letter with authority.[31]

In the digital context, the moment of authentication may be when the person actually types in their name or adopts the signature text at the end of the email, or at the moment the signature is put in automatically when a new email is begun where the program is set up to include a signature at the end of the email.

Re a Debtor [32]concerned a proxy sent by fax to the chair of a creditors' meeting summoned under the *Insolvency Act 1986* (UK) which required the proxy to be signed and delivered. Laddie J held that the proxy satisfied the Act's requirements of delivery of a signed proxy to the chair. His judgment is worth quoting at length:[33] "*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. 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. … 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 [emphasis added]"

In Stellard v North Queensland Fuel,[34] 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

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[30] *[2010] FCA 43 (5 February 2010).*
[31] *Athena Brands Ltd v Superdrug Stores Plc [2019] EWHC 3503 (Comm), [2019] 12 WLUK 279, His Honour Judge David Cooke concluded that employees had the authority to bind their respective organizations in email exchanges*
[32] Re a Debtor(IVO 2021 2021 of 1995), [1996] 2ALL ER 345; see also discussion in note 33.
[33] Diccon Loxton discusses in his article *"Not Worth the Paper They're not Written on? Executing Documents (Including Deeds) Under Electronic Documentation Platforms: Part B" (2007) 91 ALJ 205, 206.*
[34] Stellard Pty Ltd v North Queensland Fuel Pty Ltd [2015] QSC 119.

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. See section 9 (1) (b) (ii). 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

The counterparty to the document being electronically signed must agree to the document being signed electronically. As the receiving entity, the receiving party may impose technical requirements in connection with the signature.

Section 5 of the ETA then defines

"consent" *includes consent that can reasonably be inferred from the conduct of the person concerned, but does not include consent given subject to conditions unless the conditions are complied with.*

In *Harding v. Brisbane City Council & Ors [2008] QPEC 75* (16 October 2008), Brisbane City Council consented to and on its website facilitated electronic Development Application Submissions – IPA requirements of writing and signature intended to be satisfied under ETA. The question was, was Mr Harding entitled to bring this adverse submitter appeal under s 4.1.28 of the Integrated Planning Act 1997 (IPA) It was alleged that an objector's electronic submission was not "properly made" as defined in the act as it contained an inadvertent error in one digit (of 8) in appellant's driver licence number. The drivers licence was proffered as identification in an online process for submission of objections to Council. The submission needed the objectors 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.[35] In this instance, the Council had indicated its consent to electronic submissions make the "context" more conclusive to the finding that this method of ID was reliably appropriate. In this case, it is key to note that Council had consented to electronic submissions. Compare this to the case of Morgan v Toowoomba Regional Council where 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 Morgan's case.[36]

The parties' conduct may be sufficient to constitute a tacit agreement to conduct the transaction electronically. However, once a party agrees to conduct a transaction electronically, that party may rightfully and legally refuse to conduct further transactions by electronic means.

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. This evidence can be documented and stored in the document executed or separately and outside it.

BALANCE OF DIVISION 2 OF PART 2 ETA

[35] First National Securities v Jones [1978] Ch 109, 111.
[36] Curtis v Singtel Optus Pty Ltd (2014) 225 FCR 458 [49].

Giving information

Section 8(1) and (2) provides that if a person is required to or is permitted to give information in writing, they can do so electronically if it was reasonable to expect that technology can access and retrieve it.

The provider of the electronic transaction may give the information in writing where at the time of giving it, the giver reasonably expected that the information would be readily accessible and usable for subsequent reference.

This is virtually the same as section 9 of the ETA 1999 (Cth)

Electronic provision of information can be used for:

(a) making an application,

(b) making or lodging a claim,

(c) giving, sending or serving a notification,

(d) lodging a return,

(e) making a request,

(f) making a declaration,

(g) lodging or issuing a certificate,

(h) making, varying or cancelling an election,

(i) lodging an objection,

(j) giving a statement of reasons.

Production of a document

Section 10(1) and (2) provides that if a person is required to or permitted to produce a document that is in the form of paper, an article or other material, they can do so electronically if:

- At the time the communication was sent, the method used was a reliable means of maintaining the integrity of the information
- At the time the communication was sent, it was reasonable to expect that the information would be readily accessible and usable for subsequent reference
- The recipient consents to the form of electronic communication

Section 10(3) provides that the integrity of information is maintained if the information has remained complete and unaltered apart from; -

a) The addition of any endorsement
b) Or any immaterial change

which arises in the normal course of communication, storage and display.

Retaining and storing a document

Section 11(1) provides that if a person is required to record information in writing or retain a document for a particular period, that recording and retention can be performed electronically where:

- At the time of recording the information, it was reasonable to expect that the information would be readily accessible and usable for subsequent reference
- if the regulations require that the information be recorded on a particular kind of data storage device--that requirement has been met.

Section 11(2) If you are required to retain information, for a particular period, you can do so electronically where:

- It is reasonable to expect that the information would be reasonable accessible so as to be usable and for subsequent reference and
- If any particular kind of data storage device is required that requirement is met

The integrity of the retained information must be complete and unaltered apart from;

a) The addition of any endorsement or
b) any immaterial change

which arises in a normal course of communication storage and display.

Under section 11(4)(c) if the retaining party retains information because they are required to for a particular period of time, they may do so electronically under the same protocols as above but they must also identify

- The origin of the electronic communication,
- The destination of the electronic communication common
- The time when the electronic communication was sent and received

Documentary authenticity in the digital environment is the trustworthiness of a document – it is what it purports to be, untampered with and uncorrupted.

Integrity refers to the quality of being complete and unaltered in all essential respects.

DIVISION 3 of PART 2

Jurisdiction

Section 14A provides that where the formation or performance of a contract requires that NSW jurisdiction applies, then on its formation under NSW law, the contract can be electronically whether some or all of the parties are located within Australia or elsewhere and whether the contract Is for business, personal, family or household or other purposes.

Variation

Section 14D makes provision for variations of an electronically signed document. That is, a person or their representative has the right to withdraw the portion of the electronic communication in which the input error was made if that party notifies the other person asap of the error and the person or the person's representative hasn't used or received any material benefit or value from the goods or services, if any, received from the other party.

PART C: REMOTE WITNESSING

Part 2B of the electronic transactions act Deals with remote witnessing

Section 14G states that a 'Document' can be witnessed by audiovisual link.

Section 14F defines

> ***"audio visual link"*** *means technology that enables continuous and contemporaneous audio and visual communication between persons at different places, including video conferencing.*
>
> ***"document"*** *includes the following documents, but does not include a document excluded from this definition by the regulations--*

(a) a will,

(b) a power of attorney or an enduring power of attorney,

(c) a deed or agreement,

(d) an enduring guardianship appointment,

(e) an affidavit, including an annexure or exhibit to the affidavit,

(f) a statutory declaration.

Section 14G(1) states:

(1) Despite any other Act or law--

(a) if the signature of a document is required under an Act or another law to be witnessed, the signature may be witnessed by audio visual link, and

(b) arrangements in relation to witnessing signatures and the attestation of documents may be performed by audio visual link.

The requirements are set out in section 14G(2) and are that the witness must:

a) Observe the person signing the document sign the document in real time
b) Attest or confirm the signature was witnessed by signing the document or a copy of the document and new line be reasonably satisfied the document the witness signs is the same document or a copy of the same document signed by the signatory and
c) Endorse the document (or copy) specifying the method used to witness the signature of the signatory and that the document was witnessed in accordance with this section.

The statute provides an example of a statement which would satisfy section 14 G(2)(d) - " The document was signed in counterpart and witnessed over Audiovisual link in accordance with section 14 G of the electronic transactions act 2000"

Section 14(G)(3) – without limiting the ways, the witness can confirm the signature was witnessed by

(a) Signing a counterpart of the document as soon as possible after witnessing; or
(b) If the signatory scans and sends a copy, Counter sign the document as soon as possible after witnessing

Section 14I Confirms that a document may be witnessed electronically under this act even if 1 or both signatory witnesses are Outside this jurisdiction.

The Act provides at section 14G that:

. (2) A person witnessing the signing of a document by audio visual link (the ***"witness"*** *) must--*

(a) observe the person signing the document (the ***"signatory"*** *) sign the document in real time, and*

(b) attest or otherwise confirm the signature was witnessed by signing the document or a copy of the document, and

(c) be reasonably satisfied the document the witness signs is the same document, or a copy of the document signed by the signatory, and

(d) endorse the document, or the copy of the document, with a statement--

(i) specifying the method used to witness the signature of the signatory, and

(ii) that the document was witnessed in accordance with this section.

***Note--:** A document may be endorsed under paragraph (d) with a statement, for example, that the document was signed in counterpart and witnessed over audio visual link in accordance with section 14G of the Electronic Transactions Act 2000 .*

(3) Without limiting the ways a witness may confirm the signature was witnessed, the witness may--

(a) sign a counterpart of the document as soon as practicable after witnessing the signing of the document, or

(b) if the signatory scans and sends a copy of the signed document electronically--countersign the document as soon as practicable after witnessing the signing of the document.

(4) Without limiting subclause (1)(b)--

(a) arrangements in relation to witnessing signatures by audio visual link include the following--

(i) certification of matters required by an Act or another law,

(ii) confirming or verifying the identity of the signatory to a document,

(iii) attestation of a signature,

(iv) swearing or affirming the contents of an affidavit,

(v) seeing the face of the signatory, and

(b) a requirement in an Act or another law for the presence of a witness, signatory or other person is taken to be satisfied if the witness, signatory or other person is present by audio visual link.

Suggested wording for person WITNESSING execution electronically in compliance with section 14G(2) (see green highlights)**:**

I, [insert full name of witness] of [insert address of witness] confirm that I witnessed [insert full name of person who signed] of [insert address of person who signed] ('Signatory') signing this document by audio visual link [insert the method used to witness the signature of the signatory] in accordance with section 14G of the *Electronic Transactions Act*. I further confirm:

I observed the Signatory signing the document in real time;

the Signatory's signature was witnessed by signing the document or a copy of the document; and

I am satisfied the document I signed is the same document, or a copy of the document signed by the signatory.

Signed by the witness as a true and correct record.

——————————————————————— Date: / /2025

An example of an execution block for intercepting laws in s14G(2) of the ETA and the Conveyancing Rules (yellow highlights)

Signed sealed and delivered by [**insert full name of guarantor**] in the presence of:	)))	
		Signature of Guarantor
Signature of witness (strikethrough if not applicable) Electronic signature of me, _____, affixed by me, or at my direction, on _____(date) Witnessed via audio visual link and countersigned in accordance with section 14G of the Electronic Transactions Act 2000 (NSW)		(strikethrough if not applicable) Electronic signature of me, _____, affixed by me, or at my direction, on _____(date)
Name of witness (please print)		
Address of witness (please print)		

PART D: EXCEPTIONS TO THE STANDARD RULE –SPECIFIC RULES OF PARTICULAR AUTHORITIES

In this part, we discuss briefly the exceptions in relation to

1. Corporations act
2. Conveyancing Rules under the RPA
3. Wills, statutory declarations, affidavits, Power of attorneys, enduring guardianship appointments
4. Courts and evidence

CORPORATIONS ACT

A corporation may execute a document in one of 5 ways:

- by affixing the common seal (pursuant to section 127(2) of the Corporations Act)
- by the company officers without a common seal (pursuant to section 127(1) of the Corporations Act)
- by an agent (pursuant to section 126 of the Corporations Act)
- by an attorney (pursuant to section 8 Power or Attorney Act)
- by an alternative method in the company's constitution (pursuant to section 127(4) of the Corporations Act)

The NSW ETA does not apply to the Corporations Act but section 110A of the *Corporations Act 2001* (Cth) expressly authorises a document (including a deed) to be signed flexibly and neutrally using "electronic means" when exercising execution powers in section 127 and 126 of the Corporations Act. Section 110 clarifies that this division does not limit the means by which a person can execute using electronic means; for example pursuant to replaceable rules set out in a Constitution or 'for and on behalf' of the corporation.[37]

Companies do not have to use any specific type of technology or platform for signing documents. The signing procedures set out in section 110A(2) use terminology we are now familiar with from section 9 of the ETA, namely:

"(2) A method of signing satisfies this subsection if:

(a) the method identifies the person and indicates the person's intention in respect of the information recorded in the document; and

(b) the method was either:

(i) as reliable as appropriate for the purpose for which the information was recorded, in light of all the circumstances, including any relevant agreement; or

(ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence."

The Explanatory Memorandum notes that these requirements mirror those in s 10(1)(a) and (b) of the Electronic Transactions Act 1999 (Cth) which also mirrors those in section 9 the ETA 2000 (NSW) which I have taken you through in this paper.

Failure to comply with these limitations can result in the document not being legally enforceable.

Section 110 summaries that the Division applies to 'documents' including deeds and refers to a 'document' as defined in the Acts Interpretation Act 1901 (Cth) namely;

"document" *means any record of information, and includes:*

(a) anything on which there is writing; and

(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and

(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; and

(d) a map, plan, drawing or photograph.

Section 110A provides for considerable flexibly and clarification;

[37] See note at section 110A(1) and sections 126(6) and 127(3A).

- to accommodate minor differences which arise from the way a document is signed, section 110A(3) sets out the things in relation to which a person is not required to indicate their intention for the purposes of s 110A(2)(a). These include the signature of another person, and the common seal.
- Section 110A(4) provides, among other things, that it is not a requirement that each party sign the document in the same manner. For example, one director may sign by hand and another may sign by electronic means. Ie split execution is permitted. Further, it is no longer a requirement that a person sign the entire contents of the document.
- Section 110A(5) allows a person to sign a document in more than one capacity, by signing only once, if the document requires or permits this and states the capacities in which the person is signing the document. The Act provides explicit examples of the use of this subsection.

Section 126 of the Corporations Act permits a corporation to sign document through its agent. NSW laws provide in section 5 of the ETA that a Document includes a deed and pursuant to the Real Property Act, e-signing of deeds relatively straight forward. Pursuant to cth powers in s 126 of the Corporations Act, an agent can exercise a company's power to execute documents, including deeds.

However there are differences in the sealing and delivery requirements of a deed in other states (including attestation and witnessing) and the law of the states and territories may prevail over Commonwealth law to the extent of inconsistency. This reversal of the usual Corporations Act rule means that it is prudent to adopt a conservative practice of always requiring a witness to an agent's signature on behalf of a company. It is also prudent to explicitly state that the document that is a deed is 'signed as a deed' and ensure the execution block is 'signed, sealed and delivered'.
Section 38A of the Conveyancing Act 1919 (NSW) was added to provide that a deed may be created in electronic form and electronically signed and attested to in accordance with the general rules in relation to deeds that are set out in the relevant part of the Act. Section 127(3) of the Corporations Act also specifically states that a company may execute a document as a deed.

Does your constitution authorise electronic signing?
A company's constitution may provide an alternative method by which the company may execute a document although most companies rely on sections 126 and 127. In case a special condition exists, the company's constitution should be consulted.

Some constitutions, particularly older ones, do not have provisions to authorise electronic execution and there may also be uncertainty if the express provisions of the constitution conflict with s110A. For example, the constitution may require that the company's board of directors pass a resolution authorising the affixing of the common seal to a document.

Overlap with the Conveyancing Rules

When a Corporation executes or approves a mortgage and the Corporations Act intersects with the Conveyancing Rules in relation to the National Mortgage Form, financers are taking a more prudent approach in now requiring directors signatures to also be witnessed. See certification process below.

CONVEYANCING RULES

Section 12E of the *Real Property Act 1900 (NSW)* empowers the Registrar-General to determine rules for or with respect to the preparation of documents to give effect to conveyancing transactions including matters to be certified and the execution and attestation of documents that give effect to conveyancing transactions.

Section 12E(8) of the Real Property Act 1900 (NSW) provides that *"A person lodging a document giving effect to a conveyancing transaction must comply with the conveyancing rules."*

Pursuant to section 117 of the RPA "*The Registrar-General may reject, or refuse to accept or to take any action in relation to, any primary application, dealing, caveat or priority notice unless it is certified as required by the conveyancing rules."*

The current versions of the conveyancing Rules are the:

1. Conveyancing Rules - Section 12E Real Property Act 1900 - Version 6.0[38] and
2. Conveyancing Rules - (COVID-19 Pandemic) Amendment (December 2021).

The Rules relevant to electronic execution

12.3 Division 2, Part 2 of the Electronic Transactions Act 2000 applies to the execution of:

(a) any instrument that is to be lodged for registration under the Real Property Act 1900;

(b) a certificate referred to in Rule 6.1.2 (a) or (b); (c) an instrument under section 88B of the Conveyancing Act 1919; and (d) any other instrument that is to be lodged for registration with a plan.

12.4 A person who signs electronically under Rule 12.3 must confirm their identity and their intention to sign the instrument electronically by either:

(a) including a statement on the instrument near or above their electronic signature to the following effect: Electronic signature of me, [insert full name], affixed by me, or at my direction, on [insert date], OR

(b) using a digital signing platform that indicates on the instrument that an electronic signature was applied, and the date and time that this occurred.

12.5 A copy of a document signed electronically in accordance with this Schedule may be lodged as an original of that document.

[38] The full Conveyancing Rules can be found here https://www.registrargeneral.nsw.gov.au/__dacts/assets/pdf_file/0006/1036797/Conveyancing-Rules-COVID-19-Pandemic-Amendment-Dec-2021.pdf and takes effect on 21 December 2021.

Or in other words, the Conveyancing Rules refer back to and are not inconsistent with the ETA but do make additional provisions for the requirement to verification of identity and the standards for verification of identity.

In addition to the verification of identity requirements in 12.4 above, the Conveyancing Rules also deal with rules for the authority to deal, standard of verifications, supporting evidence, certifications, electronic lodgements, National Mortgage Forms and Client Authorisations.

For clarification and certainty, the Amendment Act provides the following notes:

1. Rule 12.3 applies to overcome the current prohibition created by clause 6 of the Electronic Transactions Regulation 2017 (which make Division 2 of Part 2 of the ETA not applicable to certain laws, requirements and permissions.).
2. Witnessing requirements may be satisfied using an audio-visual link in accordance with Division 2, Part 2B Electronic Transactions Act 2000.
3. Where a digital signing platform is used that does not indicate on the instrument the date and/or time that the electronic signature is affixed, Rule 12.4 may be satisfied provided this signature is accompanied by the statement set out in 12.4(a).

These electronic Conveyancing Rules are separate from the Registrar-General's Lodgement Rules empowered by section 12F of the RPA 1900 (which lodgement rules shall not make provision for matters covered by section 12E Conveyancing Rules).

National Mortgage Forms

s 56C(1) of the Real Property Act requires the mortgagee to confirm and certify the mortgagor's identity as the same as the registered proprietor.

> *"(1) Before presenting a mortgage for lodgment under this Act, the mortgagee must take reasonable steps to ensure that the person who executed the mortgage, or on whose behalf the mortgage was executed, as mortgagor is the same person who is, or is to become, the registered proprietor of the land that is security for the payment of the debt to which the mortgage relates."*

The implication of a failure to comply with s 56C(1) is that the Registrar General may take action to cancel a mortgage recorded in the register. Section 56C does not create any private rights. The Registrar General would have to be convinced of the facts and circumstances in order for them to reverse the record.

Relevantly a NSW Mortgage form certification states:

> *"**Mortgage Execution***
>
> *The Certifier has retained the evidence supporting this Registry Instrument or Document.*
>
> *The Certifier has taken reasonable steps to ensure that this Registry Instrument or Document is correct and compliant with relevant legislation and any Prescribed Requirement.*

The Certifier, or the Certifier is reasonably satisfied that the mortgagee it represents,:

(a) has taken reasonable steps to verify the identity of the mortgagor, or his, her or its administrator or attorney; and

(b) holds a mortgage granted by the mortgagor on the same terms as this Registry Instrument or Document. …"

The case of PF 473 Pty Ltd v Qasim[39] is a recent example of the use of ETA for signing mortgage documents using the certification process by the mortgagee. In this case, the terms of mortgage were varied after the borrower and guarantor signed the mortgages but under the circumstances of this case:

1. Re-execution of the mortgage and loan documents weren't warranted after the signed mortgage was varied as the variations were in writing in emails and the statute of frauds was satisfied by the name of the mortgagee's solicitor appearing at the foot of the relevant email and pursuant to the ETA section 9(1)(b)(i), the exchange of emails was a method as reliable as appropriate
2. requirement under s 56C that the mortgagee take "reasonable steps" to identify that the mortgagee is the registered proprietor did not require the same process to be repeated when the parties agreed to the revised terms.

Finally, Subscribers (commonly, law firms and banks) to Electronic Conveyancing must follow the Model Participation Rules published by the Australian Registrars National Electronic Conveyancing Council ('ARNECC') or their State participation rules. The NSW Participation Rules are made and enforced by the Registrar General under section 23 of the Electronic Conveyancing National Law. The Participation Rules are thorough and prescriptive to balance the powers that Subscribers are given to carry out e-conveyancing transactions on behalf of the transacting party. Most subscribers to electronic conveyancing (though platforms like PEXA) are well versed in compliance with these rules as they can not complete conveyancing registrations without it. Under s.23 of the Electronic Conveyancing National Law, the Registrar in each jurisdiction has determined Participation Rules for their State or Territory, based upon the Model Participation Rules developed by ARNECC.

For completeness,

1. the Model Participation Rules (Version 7) (effective 28 March 2024) can be found here: https://www.arnecc.gov.au/wp-content/uploads/2021/08/Model-Participation-Rules-Consultation-Draft-7-clean.pdf
2. the NSW Participation Rules (version 7) (effective 28 March 2024) can be found here: https://www.registrargeneral.nsw.gov.au/__data/assets/pdf_file/0003/1286751/NSW-Participation-Rules-Version-7.pdf

ESTATES

[39] [2024] NSWSC 874.

The formal requirements for execution of Wills are provided for in section 6 of the Succession Act 2006 (NSW). It provides that a Will must be in writing and signed by the Testator or by a person in the presence of and at the direction of the testator and the signature must be witnessed by *2 or more competent witnesses and those witnesses must attest and sign the will in the presence of the testator. The testator's signature must be affixed with the intention of executing the will. And section 10 requires that the 2 witnesses must not be 'interested witnesses' (ie not beneficiaries under the Will).*

In theory, provided both the Succession Act and ETA signing and entry requirements are met, a Will can be signed electronically.

Infact, section 14 of the ETA specifically defines ***"document"*** to include *"(a) a will"*

However practitioners are right to be more cautious with electronic execution of Wills because of the potentially long time between the signing of the Will and the time the Will becomes effective (ie on death). This means any errors will remain dormant and unknown for some time and only be discovered after any error is irreparable and irreversible. Getting it wrong also complicates probate applications forcing a grieving family to seek the Court's dispensation of the unsatisfied formal requirements of Will formation.

Recent Caselaw has also created confusion in this space.

In the case of Re Curtis (2022)[40] the Supreme Court of Victoria (McMillan J)[41] considered the operation of the "remote execution procedures" for the execution of wills. This particular Will was signed pursuant to the Victorian Parliament emergency legislation enabling wills to be executed remotely. Later in March 2021, permanent changes were made to SECTION 8 OF the Wills Act 1997 (Vic), introducing a "remote execution procedure".
The deceased, and each of the attesting witnesses, were in different locations, and participated in the procedure by a Zoom conference. The procedure was conducted using the DocuSign program, with the testator and each witness in turn using the program to sign the will. The testator operated the Zoom and DocuSign software on different computers. The application was supported by an audiovisual recording of the procedure, made with the consent of all parties using the Zoom software. The recording was in "active speaker" view, meaning that it only displayed the video of the participant actively speaking.

The court found that the procedure had not been complied with because the witnesses and testator could not "clearly see" signatures being made. That is the witness didn't see the hand of the signatory sign. The court did, however, endorse the use of software, such as DocuSign, to undertake the remote execution procedure.

[40] 25(6) INTLB 82.
[41] Remotely executed wills — clear-sighted consideration: Re Curtis (2022) 25(6) INTLB 82.

In the case of *The Estate Of Elizabeth Seabrooke (Deceased) [2023]*[42] *in the* Supreme court of South Australia the deceased, Elizabeth Seabrooke, died on 24 April 2022 at Woodville South. Before her death, on 15 October 2018 Elizabeth signed a document on an iPad using an iPad pencil to affix her signature to the final page and was witnessed in the same way. The Will named Natalie Basford as executor. The ipad belonged to Natalie. The signed pdf version of this Will produced to Court was downloaded from Natalie's ipad and sought to be admitted to probate as Elisabeth's last will and testament.

The applicant gave evidence that she did not edit the electronic Will after its execution on 15 October 2018. She believes the deceased would not have amended the will document or made any further Will without telling her. The question was whether the electronic document executed and witnessed on the iPad was a valid Will. In this case, the Court discussed a wide range of authorities in relation to what might constitute a 'document' for the purposes of the Wills Act 1936 (SA). It referred to:

1. *In the Estate of Robin Michael (deceased)*,[43] where a copy of a 'document' on the hard drive of the deceased's laptop computer, and both the 'document' on the laptop computer and the printed copy, bore a digital or facsimile copy of the deceased's signature. The court found that the testator in affixing his facsimile signature on the digital computer file document, and hence on the print out, did so with the intention of giving effect to the document as his will.
2. *In the Estate of Torr*,[44] Besanko J held that photographs could be admitted to probate as documents under section 12(2).
3. In *Mellino v Wnuk*,[45] Dalton J was satisfied that a DVD was a document for the purposes of the *Succession Act 1981* (Qld).
4. And Justice Windeyer in *Cassie v Koumans*,[46] held that a video tape constituted a document for the purposes of the New South Wales wills legislation.
5. *In Estate of Edwards,*[47] where it was held that a, audio cassette constituted a document. The court referred to section 18A of the Acts Interpretation Act 1987 for the definition of "document".

In relation to Elizabeth's Will, his Honour stated: "For such a claim to succeed, it is necessary to show that there is a document which embodies the testamentary intentions of the deceased and which the deceased intended to operate, in this case, as an amendment to her 1977 will. The question then is whether or not the document does so operate."

The Acts Interpretation Act current at that time defined 'document' to include at (d) "any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device;" There is no contrary intention in the *Wills Act* that would prevent the general definition of the word document in the *Acts Interpretation Act* from having application.

His honour found that the electronic will, although it was only executed and witnessed on the final page, met the formal requirements of s 8 of the Act. He admitted the document into probate. He found that the document

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[42] Sasc 122 (11 September 2023).
[43] [2016] SASC 164 at [25].
[44] [2005] SASC 49; (2005) 91 SASR 17.
[45] [2013] QSC 336.
[46] 2007] NSWSC 481.
[47] [2000] NSWSC 846; (2000) 49 NSWLR 739.

sets out the deceased's testamentary intentions and that in affixing her electronic signature to the electronic document she intended that document to constitute her will.

Other interesting cases in Australia regarding Wills include:

1. Re Yu [2013] QSC 322, where shortly before the deceased took his own life he created a series of documents on his iPhone, typing his name at the end of the document in a place where on a paper document a signature would appear, followed by the date, and a repetition of his address;
2. Re Nichol; Nichol v Nichol [2017] QSC 220, where the deceased created a text message stating a testamentary intention on his mobile telephone without sending it shortly before he took his own life, signing it 'MRN190162Q', which matched the deceased's initials and date of birth, 19 January 1962;
3. However in Mahlo v Hehir [2011] QSC 243, an unsigned electronic document was held to not be a Will in circumstances where the alleged testator she knew that in writing a new will, she had to do more than type or modify a document upon her computer. She understood that she also had to sign it;
4. Re Estate of Wai Fun Chan, Deceased [2015] NSWSC 1107, the deceased made a will by video;
5. The Estate of Roger Christopher Currie, late of Balmain [2015] NSWSC 1098, a will was written by the deceased in a computer file, ending 'Signed by the writer Roger Christopher Currie on this day Wednesday, 1 April 2009', was granted probate;
6. South Australia, In the Estate of Wilden (Deceased) [2015] SASC 9, the deceased left two items of a testamentary nature, a DVD containing a video recording of the deceased and a typed document signed by the deceased but not witnessed.

The most interesting and somewhat concerning case is a case in relation to a parentage document which, if correct, means that a will which is electronically signed by a party but not then 'electronically communicated' is not a document signed pursuant to the ETA.

In the case of *Re M; Application for Parentage Order 2023*, s34 of the Surrogacy Act required a surrogacy agreement to be in the form of an agreement in writing and signed by the birth mother and the applicant or applicants. This agreement was signed by the applicants in wet ink but the birth mother gave witness testimony that "As I did not have access to a printer to print a hard copy of the agreement, I accessed an electronic copy of the agreement from my home computer … I used an online PDF editing tool to insert my digital signature". The court was satisfied that all the mandatory preconditions to the surrogacy agreement was satisfied (like the age and circumstances of the birth mother, the timing etc), said that section 34 of the surrogacy act was not a mandatory precondition and determined that section 9 of the ETA "provides for the authentication of an "electronic communication"". Parker J said "I think that the surrogacy agreement in question is not an "electronic communication" because it is not a "communication of information". Communication implies the passing of information between two different persons. One party's authentication of a document by expressing assent to its content is not a communication in that sense."

If you think back to s9 of the ETA, it states “(1) If, under a law of this jurisdiction, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication if—(a),… (b),… (c) " using the Court’s discretionary powers, his Honour allowed the surrogacy agreement anyway but relying on the definition of ‘sign’ in the Acts Interpretation Act and not in reliance on the ETA. If Parker J is correct, this makes it difficult to argue that a Will which embodies the testamentary intention of one person which is signed and kept, is also an electronic communication and therefore capable of execution under the ETA. Rather perplexing. This casts doubt on many other deed polls or declarations or statements also.

Statutory Declaration and Affidavits

Section 14 of the ETA specifically defines ***"document"*** to include *“(a) a will (b) a power of attorney or an enduring power of attorney, ...(d) an enduring guardianship appointment, (e) an affidavit, including an annexure or exhibit to the affidavit, (f) a statutory declaration.”*

Thus a Statutory Declaration and Affidavit might in theory be executed electronically in NSW however the issue of “electronic communication” of those documents is concerning if Parker J in *Re M* is correct. Of course, those executions must also comply with the Oaths Act. Provisions for making a statutory declarations are set out in Part 4 of the Oaths Act 1900 (NSW) and affidavits are set out in Part 5 of the Oaths Act. And again such documents do not apply to an oath or affidavit made in any judicial proceeding of any Court which have their own rules.[48]

POA, Guardianship,

Similarly the same principles apply to Power of Attorney and Enduring Guardianship Appointments and section 8 of the Powers of Attorney Act 2003 and section 6C of the Guardianship Act 1987 must be complied with. The concerns in relation to *Re M* also remain.

Section 8 of the Powers of Attorney Act 2003 No 53 provides:

> *Creation of prescribed power of attorney*
> *An instrument (whether or not under seal) that is in or to the effect of a form prescribed by the regulations for the purposes of this section and is duly executed creates a prescribed power of attorney for the purposes of this Act.*

Section 6C of the Guardianship Act 1987 No 257 provides:

> *6C Method of appointment*
> *(1) An instrument does not operate to appoint a person as an enduring guardian unless—*
> *(a) it is in or to the effect of the form prescribed by the regulations, and*
> *(b) it is signed—*
> *(i) by the appointor, or*
> *(ii) if the appointor instructs—by an eligible signer who signs for the appointor in the appointor’s presence, and*

[48] Section 19, Oaths Act 1900 (NSW).

(c) it is endorsed with the appointee's acceptance of the appointment, and

(d) the execution of the instrument by the appointor and appointee is witnessed by one or more eligible witnesses, and

(e) each witness certifies that the person or persons whose execution of the instrument is witnessed executed the instrument voluntarily in the presence of the witness and appeared to understand the effect of the instrument, and

(f) if the instrument is signed for the appointor by an eligible signer—the person who witnesses the signature certifies that the appointor, in the witness's presence, instructed the signer to sign the instrument for the appointor.

(2) Without limiting subsection (1) (b) (i), an instrument is signed by the appointor if the appointor affixes his or her mark to the instrument.

(3) If an eligible signer signs an instrument on behalf of an appointor as provided by subsection (1) (b) (ii), the appointor is taken to have signed the instrument for the purposes of this Act (including subsection (1) (e)).

(4) For the purposes of subsection (1) (d)—

(a) the execution of the instrument by or for the appointor and by the appointee may be witnessed by the same person or by different persons, and

(b) the execution of the instrument by or for the appointor does not need to be witnessed at the same time and place as the execution of the instrument by the appointee.

COURT AND TRIBUNALS

As we are not presenting today in the litigation stream, we only time to briefly say that ETA does not apply to filings and steps in a case in Court.

The Court's Rules that you must follow when filing documents, and dealing and communicating with the Courts and taking any other step in a case are found in the Uniform Civil Procedure Rules (UCPR). The Courts are relatively conservative in their approach.

Electronic evidence is also not covered in this paper save only to say that fact that evidence takes electronic form has not been an instant impediment to its admissibility. Judges have admitted digital records of a broad range of documents includes mechanical devices, automatic recordings, photographs, tape recordings, automatic radar recordings, microfilm, printouts of breath test results, video recordings, computer printouts, oral statement of testamentary intentions on a DVD. The types and categories of electronic evidence are not closed.

Evidence is admitted into legal proceedings if it is relevant to an issue in dispute, subject to a number of exceptions. It is a matter of law for a judge to determine whether evidence is admissible.

When digital material is duplicated either for forensic purposes or to be submitted as evidence, two principles must be respected: the Principle of Non-interference, which means that the method used to

reproduce or recreate digital entities does not change them, and the Principle of Identifiable Interference, which means that, if the method used does alter the entities, the changes are identified and identifiable and that information is provided about who and what introduced the changes so that witnesses can testify as to them.

These conceptual changes affect authentication of digital entities. In the digital environment, authentication is a declaration of authenticity at one point in time, based on either direct knowledge, material proof, inference or deduction.
A digital continuity of evidence (also called chain of custody) to preserve information about the material and its changes, to show that specific data was in a particular state at a given date and time.