

Electronic contracts and electronic signatures under Australian law

Background

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

Australian law generally recognises that deeds and agreements can be executed via electronic means and by way of an electronic signature, however there are some uncertainties impacting deeds, execution by companies and witnessing.

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

The common law in Australia supports the use of electronic contracts and electronic signatures and Australian Courts have historically shown a willingness to adapt the common law to encompass new technology. Australian cases accept that a document in electronic form is a 'document' and satisfies a requirement that a document be in 'writing'. They also confirm that electronic signatures are valid and capable of creating an enforceable agreement provided that:

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

A survey of the case law is set out in section 2 below.

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

(a) Requirements for deeds

Recent case law has confirmed that the common law still requires that a deed be on paper, vellum or parchment ("paper requirement"). Where the ETAs apply, it is not clear whether the ETAs override the common law requirements in relation to deeds to allow a deed to be in electronic form or electronically executed. Some specific State provisions validate electronic deeds (e.g. for deeds governed by New South Wales law which are signed by individuals under hand or as attorney for a company).

(b) Companies signing under s127 of the Corporations Act

Section 127(1) of the Corporations Act 2001 (Cth) ("Corporations Act") allows a company to execute a "document" if specified officers "sign" it (two directors or a director and a company secretary or in the case of a proprietary company with a sole director/company secretary, that sole director/company secretary). If a document appears to be signed in accordance with s127, the counterparty assumes that the document has been duly executed: see ss128 and 129(5). It is unclear though the extent to which an agreement, which is in electronic form and which is signed electronically, is afforded the benefit of s127 because:

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

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

(c) Witnessing and attestation

It also is unclear how the signing of an electronic document should be properly witnessed and attested. This is important because a deed signed by an individual must be witnessed and attested in all jurisdictions in Australia except Victoria. There is no Australian case which has considered whether a witness must be physically present when the document is signed or whether it is sufficient if the witness is present "virtually" or "remotely" and sees the signing of a document by electronic means.

Analysis of Australian case law involving electronic signatures

A survey of cases across all Australian jurisdictions (up to May 2020) where the Court indicated that an electronic signature (whether applied through a platform similar to DocuSign eSignature or an alternative method) was used reveals that an electronic signature is enforceable.

These cases fall into the following categories:

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

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

Electronic signature applied using an online platform acknowledged as legally binding

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

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

FCA 869

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

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

NSWSC 1907

Williams Group Australia Pty Ltd v. Crocker [2016]

NSWCA 265

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

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

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

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

VSC 790

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

Other forms of electronic signature

These cases highlight the range of electronic signing methods which the Court has held to form a binding agreement.

(a) **Molodysky v. Vema Australia Pty Ltd (1988)**

4 BPR 9552

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

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

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

(b) **McGuren v. Simpson [2004]**

NSWSC 35

Mr Simpson sought the recovery of certain money from Ms McGuren on the basis that the money had been improperly applied. One of the questions considered by the Court was whether the words "yes I spent the money and I shouldn't have" in the email to Mr Simpson with Ms McGuren's name appearing in the "From" field was confirmation of a cause of action by the plaintiff under section 54 of the Limitation Act 1969 (NSW). If answered in affirmative, the email would have confirmed the cause of action before the expiration of the limitation period, such that the defendant's alleged cause of action was not statute barred. The appellate Court (upholding the primary judge's reasoning) found that the email was recognisable as a note of a concluded agreement. Accordingly, the plaintiff was entitled to maintain proceedings.

(c) **eBay International AG v. Creative Festival Entertainment Pty Ltd (2006)**

170 FCR 450

Creative cancelled several tickets that were sold on eBay's online auction site after introducing a condition that tickets resold via online auction sites will be cancelled if resold. Creative argued that a contract in writing was not made on the terms displayed on Creative's website, but instead was signed electronically by the purchaser through: his or her clicking on the relevant buttons agreeing to the terms and conditions then and there available; making payment; and receiving the webpage and email confirmations of the order. The Federal Court held that the act of clicking acceptance of terms and conditions appearing in a website was signing a contract in writing.

(d) Islamic Council of South Australia Inc v. Australian Federation of Islamic Councils Inc [2009]

NSWSC 211

Brereton J stated in obiter, in relation to an email, that a typewritten signature is no less valid than a handwritten one.

(e) Kavia Holdings Pty Ltd v. untrack Holdings Pty Ltd [2011]

NSWSC 716

In this dispute about a contractual requirement for signing in an option to renew a lease, Pembroke J reasoned that “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.”

(f) Stuart v. Hishon [2013]

NSWSC 766

Mrs Hishon sought to establish that Mr Stuart had confirmed her cause of action prior to the expiration of the limitation period and acknowledged the claimed debt by email. Mr Stuart argued that the Court of first instance erred in law by finding that the email was “signed”. The appellate Court held that Mr Stuart had “typed his name on the foot of [his] email” and therefore had signed the email and was bound by its contents. This finding was distinguished from situations where the email signature is automatic, and the sender has not deliberately inserted his or her name.

DocuSign eSignature acknowledged as enforceable

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

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

FCA 1408

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

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

NSWSC 535

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

Disclaimer

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