



PAPERLESS SIGNATURES

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Signatures work with or without paper much the same.

This article address how efficacy of paperless signatures is confirmed and supported by the common law and the Electronic Transaction Acts.

What's in a Name?

What is the nature and function of the name at the bottom of this article?

A signature is a representation that identifies a person and indicates the adoption of some expression as their own.

What is an Electronic Signature?

Signatures are typically attached mechanically, whether a handprint on a cave wall, a carving in a stone tablet, a quill with ink or a thumbnail dipped in tar.

An electronic signature is a signature recorded in an electronic document by a person, for instance:

- typing a name,
- pasting a digitised image of a hand drawn signature,
- selecting an option in software that records signing,
- a stylus or finger on a touchscreen, or
- biometric identification.

In Australia, the law generally works the same for electronic and non-electronic signatures.

Australian law allows most documents to be signed using electronic signatures.

What is a Digital Signature?

A digital signature is an electronic signature where authentication technology evidences the signatory's identity and assent to a document, with verified information.

An electronic signature may just be text in a document. A digital signature will have unique electronic attributes to verify the signature more securely.

Many digital signatures rely on:

1. a private key only used by, and known to, the signatory, and
2. a related key shared publicly to those relying on the signature.

The digital signature is locked digitally in the document, often but not necessarily as an image, such as an electronic copy of the signor's paper signature.

What Does the Common Law require for a signature?

The common law has been flexible on signatories long before electronic documents.

Morton v. Copeland (1855), C. B. 517 is authority that "signature" does not necessarily require writing a person's name, but any mark may suffice which identifies the mark as the act of the party.

Durrell v. Evans (1862), 1 H. and San C. 174 confirms the location of a signature on the document was not critical to its status.

Goodman v. Eban (1954) 1 All E. R. 763 confirms that a signature did not necessarily require writing with an actual pen or pencil but any distinguishing mark including a rubber stamp could suffice. This flexibility as to marking has been confirmed in Australia in the 19th century, *R. v. Moore, Ex p. Myers (1884), 10 V. L. R. L. 322* and in the 20th century, *Taplin v. Hegney (1948), 50 W. A. L. R. 4*

The threshold for an electronic signature to be valid is generally quite low.

Even very simplistic methods of signature, like a counterparty's name appearing at the bottom of an email in normal typeface, have been held to be valid.

The court in *Stuart v Hishon [2013] NSWSC 766* adopted a typed first name at the end of an email as a valid signature for the purposes of section 54 of the *Limitation Act 1969* (NSW). That section required "An acknowledgment for the purposes of this section must

be in writing and signed by the maker." The court was forthright in saying that it would be an "almost lethal assault on common sense to take any other view."

A short email with the name appearing in the "From" field was held signed to satisfy section 54 of the *Limitation Act 1969* (NSW) by the court in *McGuren v Simpson [2004] NSWSC 35*.

An application for enrolment under the *Commonwealth Electoral Act 1918* (Cth) submitted via an online platform was held validly signed by a computer trackpad in *Getup Ltd and another v Electoral Commissioner [2010] FCA 869* despite concerns by the Electoral Commissioner the signature would be unreliable as a specimen signature.

In *Claremont 24-7 Pty Ltd v Invox Pty Ltd [No 2] [2015] WASC 220* in March 2015, a lease evidenced by email with the agreed terms and the Landlord's name was confirmed as signed, as required by the *Property Law Act 1969* (WA).

The case of *Kavia Holdings Pty Limited v Suntrack Holdings Pty Limited [2011] NSWSC 716* related to a contractual requirement for signing in the context of an option to renew a lease. The court stated that "the inclusion of the sender's name on the email amounted to 'signing' for the purposes of the clause. The requirement for signing is intended to identify the sender and authenticate the communication."

In *Smythe v Thomas [2007] NSWSC 844* the court considered the disputed purchase of an aircraft on eBay. The eBay terms and conditions stated that once a bid was received above the reserve price, both parties were bound to complete the transaction. The seller refused to accept the deposit, claiming that the purchaser was obliged to inspect the aircraft before a contract could be concluded. The court found for the purchaser, noting that no condition of sale requiring inspection by the purchaser had been stipulated. The parties were accordingly bound to complete the transaction.

The signature footer of an email was a signature in *Luxottica Retail Australia Pty Ltd v 136 Queen Street Pty Ltd [2011] QSC 162*.



IMAGE: ADOBE STOCK

In The Corporation Of The City of Adelaide v Corneloup & Ors [2011] SASCFC 84, an email sufficiently identified the signatory and showed that he subscribed to an attached document by saying ; “please find attached document, regards.”

In Stellard Pty Ltd v North Queensland Fuel Pty Ltd [2015] QSC 119, an email was held to be in writing signed by a seller to answer to the Statute of Frauds on the basis the signatory could be identified and their intention could be established by evidence made up of various conversations before the email was sent, together with an admission in the pleadings about who sent the email.

What is the Statute Law for a Signature?

The Electronic Transactions Acts in each of the Commonwealth, and the States and Territories of Australia

- are almost uniform;
- support and facilitate electronic transactions rather than imposing any additional regulatory burden;
- don’t displace the common law unless expressly apparent in the statute; and
- confirm as valid transactions subject to conditions, rather than to invalidate transactions that don’t conform.

The Electronic Transactions Acts confirm

an electronic signature as effective where:

- The signatory uses a method to identify themselves and indicate their intention;
- The method of identification is appropriately reliable considering the purpose of the communication;
- The non-signatory consents to the use of electronic communication to meet the requirement for a signature and to the method of identification.

The wording in Section 7 of the *Electronic Transactions Act 2000* (Tas) is:

Signatures

(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) a method is used to identify the person and to indicate the person’s 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 the 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; and

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

(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) a particular method to be used in relation to an electronic communication to identify the originator of the communication and to indicate the originator’s 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.

Reliability of method is assessed objectively according to the circumstances and the particular purpose for which the signature is required, for example the type of document, the value and importance of the transaction.

Identification does not require the recipient of the electronic communication

to separately verify the identity of the signatory, only that the identity of the signatory and their intention in relation to the information communicated can be determined (including by referring to other evidence).

What Documents are Excluded under the Electronic Transactions Acts?

The Electronic Transactions Acts do not apply to all documents.

Regulation 5 of the *Electronic Transactions Regulations 2011* (Tas) provides.

Division 2 of Part 2 of the Act does not apply to –

- (a) a requirement or permission relating to the execution or revocation of a will, codicil or other testamentary instrument; or
- (b) a requirement or permission relating to enduring guardians or powers of attorney; or
- (c) a requirement that information or a document be delivered only by personal service.

Division 2 of Part 2 of the Act has the general provision, on signatures and documents in writing.

Regulation 4 of the *Electronic Transactions Regulations 2011* (Tas) provides:

Section 5(1) of the Act does not apply to –

- (a) a transaction by which a will, codicil or any other testamentary instrument is executed or revoked; or
- (b) a transaction by which an instrument is created appointing an enduring guardian or appointing an attorney to manage a person's affairs; or
- (c) a transaction required to be effected only by personal service.

Section 5(1) of the Act is the general confirming provision that a transaction is not invalid because it was based on electronic communications.

Documents excluded from the Electronic Transactions Acts may still be held to be signed by virtue of the common law.

There is some uncertainty in relation to the electronic witnessing of documents. The better view seems to be that electronic signatures can be witnessed, and presumably electronically recorded as witnessed.

Where documents need to be registered (such as a government agency), the registry may have rules that require ink on paper.

The *Personal Property Securities Act 2009* (Cth) is not a document registration system and allows registration of an online "financing statement."

As the Commonwealth *Electronic Transactions Act* does not apply to the *Corporations Act*, including the provisions facilitating the signing of a document by an Australian company (sections 127 and 129). This leaves some uncertainty.

There is also uncertainty under general law whether a deed can be created purely electronically or by its nature requires physical endorsement.

Conclusion

The common law is flexible on signatures and electronic signatures. The *Electronic Transactions Acts* support use of electronic signatures.

Some uncertainty and limits remain.

Although basic best practice is generally the same with electronic and paper signatures, best practice also varies with the media.

An article to appear in a subsequent *Law Letter* will address best practice and how the basic differences in digital and paper media carry different inherent efficiencies and security strengths and weaknesses.

The Signature!

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