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MARCH MASTERY
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Electronic Execution Essentials

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PROPERTY LAW INTENSIVE: WEDNESDAY 12 MARCH 2025



Introduction



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Topics

Contract formation and formalities

What is a valid signature?

What constitutes 'in writing'?

Electronic Exchange

Common law requirements for deeds

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Statutory Declarations

Back to basics...Contracts

Agreement (comprised of an offer and acceptance)

- Offer: An offer is a *'statement of the terms by which the person making the offer is prepared to be bound.'*
- Acceptance: The offeree's act of agreeing to the offer.

Consideration

- *'...Consideration must be satisfied in the form of a price in return for the promisor's promise or quid pro quo. The price can be in the form of an act, forbearance or promise.'*
- Consideration is not required if a contract is executed in the form of a deed (more on deeds later...)

Intention to create legal relations

- There must be a *'common intention of the parties to enter into legal obligations, mutually communicated, expressly or impliedly.'*
- To determine this involves *'an objective assessment of the state of affairs between the parties.'*

Certainty of terms

A contract may be void if:

- It is uncertain if in relation to an essential term *'the language used is so obscure and incapable of any precise or definite meaning that the court is unable to attribute to the parties any particular contractual intention';* or
- It is incomplete insofar as *'all of the essential and critical terms have not been agreed upon.'*

Formality requirements for contracts

- No common law requirement for a contract to be signed or in writing to be binding
- Contracts can be written, oral, inferred from conduct or a combination
- But:
 - Parties' intention may be that no contract is formed unless and until a contract is signed and is in writing; or
 - There may be a statutory requirement for certain contracts to be **signed** and **in writing**.

Civil Law (Property) Act 2006 (ACT)

204 Proceedings do not lie on certain unwritten agreements

- (1) A proceeding does not lie against a person on a contract for the sale or other disposition of land unless the agreement on which the proceeding is brought, or a memorandum or note of the agreement, is in writing signed by the person or by the person's agent properly authorised in writing.
- (2) This section—
 - (a) applies to contracts whenever they were made; and
 - (b) applies to land under the *Land Titles Act 1925*; and
 - (c) does not affect the law about part performance or sales by a court.

Part 2.2 General rules about property

Division 2.2.1 Rules of law on certain points

201 Instruments required to be in writing

- (1) An interest in land cannot be created or disposed of by a person except—
 - (a) by writing signed by the person or by the person's agent properly authorised in writing; or
 - (b) by the person's will; or
 - (c) by operation of law.

Note 1 The [Legislation Act](#), dict, pt 1 defines *interest*, in relation to land and other property, and *land*.

Note 2 See also the [Legislation Act](#), s 168 (References to person with interest in land include personal representative etc).

What is a valid signature?

A signature must evidence:

- the signatory's identity; and
- the signatory's intention to be bound by the document.

As stated in *Bendigo and Adelaide Bank Limited v DY Logistics Pty Ltd* [2018] VSC 558 at [50]:

'What is required for signing to be effective is that there be some kind of "personal authentication of the individual 'signing''.'

Commentary on electronic signature under common law

In *Stuart v Hishon* [2013] NSWSC 766, a typed name in the foot of an email was a valid signature for the purposes of a statutory requirement for an acknowledgment to be 'signed.'

In *DPP v Currie* [2021] VSCA 272, an electronic signature was a valid signature for the purposes of a statutory requirement for a notice of appeal to be 'signed'.

In *Re M; Appln For Parentage Order* [2023] NSWSC 531, a statutory requirement that a surrogacy agreement be 'signed' was satisfied by an electronic signature inserted by a PDF editing tool.

In the latter case, Parker J states at [18]:

'[An electronic document] may be "signed" by pasting an image of a handwritten signature into it, or by typing a person's name into the signature space on the document, as was done in the present case. If this is done by the party to an agreement with the intent to signify acceptance of the terms, I see no reason why it should not amount to the party's signature on the (electronic) document in the ordinary sense of the term.'

Commentary on electronic signature under common law

'Parker J in *RE M: Appln For Parentage Order* [2023] NSWSC 531 at [17]-[20]:

'The mere production of an electronic document with the typewritten name of a party appearing in the place for that party's signature does not however provide that it was actually the party's signature. In this regard, there is a difference with a handwritten signature on a hard copy document, where inferences may be drawn from similarity to other documents admitted or proved to bear the signature of the party.'

*In the case of an electronic signature on an electronic document, it **remains necessary in each case** to prove that the **signature was in fact placed by the party on the document** and that the party did so in order to **signify acceptance** of the terms.'*

Statutory support for electronic signature

- The *Electronic Transactions Act 1999* (Cth) and similar state and territory legislation (**ETAs**) facilitate the electronic execution of many documents
- Valid electronic signature under ETAs broadly requires the 'identification', 'reliability' and 'consent' criteria to be met

Electronic Transactions Act 2001 (ACT)

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Signatures

- (1) If, under a territory law, a person's signature is required, that requirement is taken to have been met for an electronic communication if—
 - (a) a method is used to identify the person and to show the person's intention in relation to the information communicated; and
 - (b) the method was either—
 - (i) as reliable as was appropriate for the purpose for which the electronic communication was generated or communicated, in the circumstances, including any relevant agreement; or
 - (ii) proven in fact to have fulfilled the functions mentioned 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 using the method mentioned in paragraph (a).
- (2) This section does not affect the operation of any other territory law that provides 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 for an electronic communication to identify the originator of the communication and to show the originator's intention in relation to 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.

What constitutes 'in writing'?

Legislation Act 2001 (ACT)

'writing' includes any way of representing or reproducing words in visible form

Interpretation Act 1987 No 5

(NSW)

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

Case law commentary

- In *McGuren v Simpson* [2004] NSWSC 35, Harrison M held that a statutory requirement for a 'written' acknowledgement was met by an email;. At [21]: *'It is my view that as in Lockheed-Arabia s54 of the [Limitation Act 1969 (NSW)] ought to be read to **accommodate technological change** and that, accordingly, the **email sent by the plaintiff constitutes a written document**'*
- In *Islamic Council of South Australia Inc v Australian Federation of Islamic Councils Inc* [2009] NSWSC 211, Brereton J held that an email constituted 'written' request as required under an association's constitution.

Statutory support for electronic documents

Electronic Transactions Act 2001 ACT)

Section 7(1) – For a territory law a transaction is not invalid because it took place wholly or partly by means of 1 or more electronic communications.

Electronic Transactions Act 2000 (NSW)

Section 7(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.

Under both, 'transaction' includes—

- (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.

Intention to create legal relations – Electronic exchange

McHugh JA in *G R Securities v Baulkham Hills* (1986) 40 NSWLR 631 at 634 stated:

*'In New South Wales, **real estate is ordinarily sold by signing and exchanging contracts** in the form approved by the Real Estate Institute and Law Society. Accordingly, even though the parties agree in writing that real estate is sold for a specified price, the **presumption is that no binding contract exists until "contracts" are exchanged**: *Smith v Lush* (1952) 52 SR (NSW) 207 at 212; *Allen v Carbone* (1975) 132 CLR 528 at 533. The vendor contends that the proper conclusion to be drawn from the sale of land, buildings and equipment which constitute a hospital containing sixty two beds is that the sale was to be the subject of a formal contract drawn up by lawyers.'*

Intention to create legal relations – Electronic exchange

'However, **the decisive issue is always the intention of the parties** which must be **objectively ascertained** from the terms of the document when read in the light of the surrounding circumstances: *Godecke v Kirwan* (1973) 129 CLR 629 at 638; *Air Great Lakes Pty Ltd & Ors v KS Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309 at 332-334, 337. **If the terms of a document indicate that the parties intended to be bound immediately, effect must be given to that intention irrespective of the subject matter, magnitude or complexity of the transaction.'**

The Law Society of the Australian Capital Territory – ACT Contract for Sale CS10 -2024

1.8 Without limiting clause 13, the parties agree that for the purposes of the *Electronic Transactions Act 2001* (ACT) and the *Electronic Transactions Act 1999* (Cth), this Contract may be signed and/or exchanged electronically.

Key Takeaway:

Contracts (not in the form of a deed) can generally be in electronic form and signed electronically.

Common law requirements for deeds

Written on paper, parchment or vellum
(the paper rule)

Sealed

Delivered

Modification by statute – *Civil Law (Property) Act 2006* (ACT)

Part 2.3 General rules about deeds and documents of corporations

Division 2.3.1 Deeds and their effect

219 Signature and attestation of deeds

- (1) A deed (whether or not it affects property) must be—
 - (a) signed and sealed; and
 - (b) attested by at least 1 witness who is not a party to the deed, using any form of words.
- (2) Indenting is not necessary.
- (3) An instrument executed after 1 July 1920 that is signed and attested in accordance with this section is taken to be sealed if the instrument is expressed to be an indenture or deed or to be sealed.
- (4) A deed executed and attested in accordance with this section may be proved in the same way that a deed not required by law to be attested may be proved.
- (5) This section does not affect—
 - (a) the execution of a deed by a corporation; or
 - (b) a deed executed before 1 November 1951.

Deed must be signed and sealed.

Deeming provision for 'sealed.'

Deed must be witnessed.

There is no provision for remote witnessing in the ACT.

The 'paper rule' has not been displaced.

Delivery has not been displaced.

Modification by statute – *Conveyancing Act 1919* (NSW)

Conveyancing Act 1919 No 6 [NSW]

Part 3 General rules relating to deeds

Division 1 Deeds and their effect

38 Signature and attestation

- (1) Every deed, whether or not affecting property, shall be signed as well as sealed, and shall be attested by at least one witness not being a party to the deed; but no particular form of words shall be requisite for the attestation.
- (1A) For the purposes of subsection (1), but without prejudice to any other method of signing, a deed is sufficiently signed by a person if—
- (a) by the direction and in the presence of that person the deed is signed in the name of that person by another person,
 - (b) the signature is attested by a person who is not a party or signatory (except by way of attestation) to the deed, and
 - (c) the person attesting the signature certifies in his or her attestation that he or she is a prescribed witness and that the signature was affixed by the direction and in the presence of the person whose signature it purports to be.
- (1B) For the purposes of subsection (1) but without prejudice to any other method of signing, a deed is sufficiently signed by a person if—
- (a) that person affixes his or her mark to the deed,
 - (b) the affixing of the mark is attested by a person who is not a party or signatory (except by way of attestation) to the deed, and
 - (c) the person attesting the affixing of the mark certifies in his or her attestation—
 - (i) that, before the mark was affixed, he or she explained the nature and effect of the deed to the person making the mark, and
 - (ii) that he or she believed, at the time the mark was affixed, that the person making the mark understood the explanation.
- (2) Indenting shall not be necessary in any case.
- (3) Every instrument expressed to be an indenture or a deed, or to be sealed, which is signed and attested in accordance with this section, shall be deemed to be sealed.
- (4) Every deed, executed and attested in accordance with this section may be proved in the same manner as a deed not required by law to be attested might have been proved heretofore.
- (5) Nothing in this section contained shall affect—

Deed must be signed and sealed.

Deeming provision for 'sealed.'

The 'paper rule' has been displaced.

A deed may be created in electronic form.

A deed may be electronically signed and attested.

Deed must be witnessed.

Sections 14F to 14J of the *Electronic Transactions Act 2000* (NSW) permit witnessing to be done by audiovisual link, subject to the remote witnessing requirements set out in those sections.

Delivery has not been displaced.

Conveyancing Act 1919 No 6 [NSW]

- (a) the execution of deeds by corporations, or
- (b) the provisions of section 184F(4), or
- (c) any deed executed prior to the commencement of this Act.

38A Electronic form deeds

- (1) A deed may be created in electronic form and electronically signed and attested.
- (2) Section 38(5)(a) does not limit the application of this section to the execution of deeds by corporations.

Key Takeaway:

In the ACT, deeds cannot be:

- in electronic form; and
- it follows that, a deed cannot be electronically signed.

In NSW, deeds can be:

- in electronic form; and
- electronically signed and attested.

Can your client sign a deed electronically in the ACT if it is then printed?

Could this approach still satisfy the paper rule?

This is an interesting idea however we would **not recommend this approach** as a printout is merely a copy of the original deed (the original deed being the version signed electronically).

How can a deed be delivered?

As noted before, delivery of a deed is required in the ACT and NSW.

A summary of some of the principles of delivery is provided in *Scook v Premier Building Solutions Pty Ltd* (2003) 28 WAR 124; [2003] WASCA 263 at [25]:

- There must be acts or words sufficient to show that the document is intended by the party to be executed as his or her deed, **presently binding** on him or her.
- **No requirement for physical delivery** of the deed.
- Whether there has been delivery is a **question of fact**.
- Intention to deliver may be **expressly proved or inferred from circumstances**.

How can a deed be delivered?

So, what's the easiest way to show that the deed has been delivered?

Use the words '**signed, sealed and delivered**' to show that the party executing intends to be bound on execution.

This is supported by Richmond J's comments in *KPE Superannuation Fund Pty Ltd v Two Tempe Holdings Pty Ltd* [2022] NSWSC 1614 at [101]:

'...A presumption of delivery also arises where the document is expressed to be “signed sealed and delivered”, given that the word “delivered” has been used: Wardley Australia Ltd v McPharlin (1984) 3 BPR 9500 at 9503...

...

However, in both cases the presumption is capable of being rebutted by evidence that establishes that the party executing the deed did not intend to be bound immediately: Wardley at 9503.'

Execution of documents (including deeds) by Corporations Act companies

127 Execution of documents (including deeds) by the company itself

Executing a document without a common seal

- (1) A company may execute a document without using a common seal if the document is signed by:
- (a) 2 directors of the company; or
 - (b) a director and a company secretary of the company; or
 - (c) for a proprietary company that has a sole director—that director, if:
 - (i) the director is also the sole company secretary; or
 - (ii) the company does not have a company secretary.

Note 1: If a company executes a document in this way, people will be able to rely on the assumptions in subsection 129(5) for dealings in relation to the company.

Note 2: The requirement to sign may be satisfied electronically; see Division 1 of Part 1.2AA (about technology neutral signing).

Note 3: Because a CCIV has no natural person directors and no company secretary, it executes documents through the directors and company secretary of its corporate director: see section 1223.

Executing a document with a common seal

- (2) A company with a common seal may execute a document if the seal is fixed to the document and the fixing of the seal is witnessed by:
- (a) 2 directors of the company; or
 - (b) a director and a company secretary of the company; or
 - (c) for a proprietary company that has a sole director—that director, if:
 - (i) the director is also the sole company secretary; or
 - (ii) the company does not have a company secretary.

Note 1: If a company executes a document in this way, people will be able to rely on the assumptions in subsection 129(6) for dealings in relation to the company.

Note 2: Because a CCIV has no natural person directors and no company secretary, it executes documents through the directors and company secretary of its corporate director: see section 1223.

- (2A) For the purposes of subsection (2), the fixing of a common seal to a document is taken to have been witnessed by a person mentioned in paragraph (a), (b) or (c) of that subsection if:

- (a) the person observes, by electronic means or by being physically present, the fixing of the seal; and
- (b) the person signs the document; and
- (c) a method is used to indicate that the person observed the fixing of the seal to the document.

Note: For provisions about technology neutral signing, see Division 1 of Part 1.2AA.

Executing a document as a deed

- (3) A company may execute a document as a deed if the document is expressed to be executed as a deed and is executed in accordance with subsection (1) or (2).

Note: For provisions about technology neutral signing, see Division 1 of Part 1.2AA.

- (3A) A company may execute a document as a deed in accordance with subsection (1):

- (a) without that execution being witnessed; and
- (b) regardless of whether the document signed by the director or company secretary of the company, as applicable, is in physical form or electronic form.

Note: An effect of paragraph (b) of this subsection is that, despite any common law rule, the document may be executed without the use of paper, parchment or vellum.

- (3B) Delivery is not necessary if a company executes a document as a deed in accordance with subsection (1) or (2).

Other ways of executing documents not limited

- (4) This section does not limit the ways in which a company may execute a document (including a deed).

Note: For example, a company's constitution may set out other ways in which a document (including a deed) may be executed.

- A company may execute a document without using a common seal under section 127(1).
- A company can execute a deed if the document is **expressed to be executed as a deed** and is executed in accordance with section 127(1) or (2).
- A company can execute a document as a deed in accordance with section 127(1):
 - in electronic form (paper rule is **displaced**);
 - without a witness; and
 - without delivery (delivery is **displaced**).

Electronic signing by Corporations Act companies

Section 110A(1) of the *Corporations Act 2001* provides that a person may sign a **document, including a deed**, by:

- a) signing a physical form of the document by hand; or
- b) signing an electronic form of the document using **electronic means**,
if the method of signing satisfies section 110A(2).

Section 110A(2) requires that a method of signing:

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

Key takeaway:

Corporations Act companies can sign documents (including deeds) in electronic form and by electronic signature.

What do electronic signature platforms say about electronic signature?

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Summary

- **Generally, contracts (not in the form of a deed) can be in electronic form and executed by electronic signature**
- **In the ACT, it is not recommended that deeds be in electronic form or executed by electronic signature**
- **In the NSW, deeds can be in electronic form and executed by electronic signature**
- **Corporations Act companies can execute any documents (including deeds) in electronic form and by electronic signature**

Registration requirements

*Be aware that there may be specific execution requirements for the purposes of **registering** or **filing** a document.*

Statutory Declarations – Commonwealth and ACT

Statutory Declarations Act 1959 (Cth)

7A Technology neutral signing

- (1) For the purposes of this Act, a person may sign a statutory declaration by signing:
 - (a) a physical form of the declaration by hand; or
 - (b) an electronic form of the declaration using electronic means;if the method of signing satisfies subsection (2).
- (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 declaration; 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.

Statutory Declarations - NSW

Electronic Transactions Act 2000 (NSW)

14G Witnessing and attestation of documents by audio visual link

(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.

(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.

Questions?

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