

# THE PAPERLESS CONTRACT

Despite increasing demand, and the *ETA* being in place for 15 years, Australian lawyers are yet to embrace the paperless contract. To do so requires a good understanding of the law and the technical options available. **By Peter Moran**

I'm a fan of technology: I love my Fitbit and music streaming services and I have helped manage the process of updating my firm's document management systems three times. Despite this, I still print and bind many of my contracts. The rest are emailed in a PDF form, printed by the counterparties, signed in a hard copy form, and either scanned back in and exchanged via email or the signed originals (eventually) are sent back. When receiving contracts from other firms, the methods and proportions are roughly the same.

It struck me that this was possibly absurd. Here I was trying to run my files on a paperless basis and yet I had made an exception in my mind for contracts. Contracts cannot be paperless because they need to be signed in an original form. Signing software is not safe, it is not legal. There are too many risks in relying on electronic contracts. Really?

## BRIEF POLICY AND LEGISLATIVE HISTORY

In 1996, the United Nations Commission on International Trade Law (UNCITRAL) published the *Model Law on Electronic Commerce* 1996. The purpose of the Model Law is "to enable and facilitate commerce conducted using electronic means by providing national legislators with a set of internationally acceptable rules aimed at removing legal obstacles

and increasing legal predictability for electronic commerce".<sup>1</sup>

In 1999, the Commonwealth government passed the *Electronic Transactions Act* 1999 (Cth) (*ETA*) as "part of its strategic framework for the development of the information economy in Australia".<sup>2</sup> The Bill was based on UNCITRAL's Model Law. The state governments all then followed – in Victoria the *Electronic Transactions (Victoria) Act* 2000 (*ETA Vic*) was passed a year later. The state laws largely resemble the *ETA*.

## THE LEGISLATION

There are five core sections to the *ETA*.

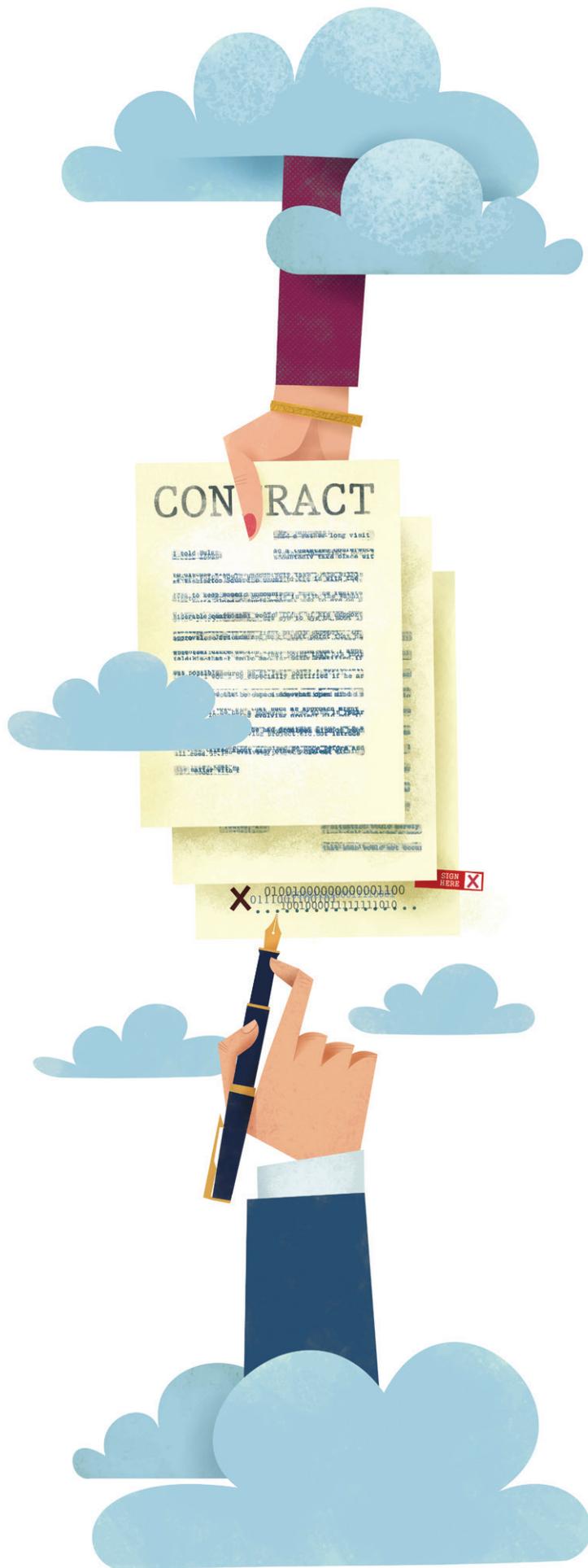
1. Section 8 provides that a transaction is not invalid because it took place wholly or partly by means of one or more electronic communications (see also s7(1) of the *ETA Vic*).
2. Section 9 provides that a requirement to give information in writing is satisfied by an electronic communication provided it is readily accessible and the party receiving the information consents (see also s8(1) (a) of the *ETA Vic*).
3. Section 10 provides that a requirement for a signature is satisfied in relation to an electronic communication if:
  - a method is used to identify the person and to indicate the person's intention;
  - the method is as reliable as it is appropriate; and

- the person receiving the signature consents to it being provided by use of the method referred to above (see also s9(1) of the *ETA Vic*).
4. Section 12 provides that if, under a law of the Commonwealth a person is required to retain for a particular period a document that is in the form of paper, an article or other material, that requirement is taken to have been met if the person retains, or causes another person to retain, an electronic form of the document throughout the period where:
    - the method of generating the electronic form of the document provides a reliable means of assuring the maintenance of the integrity of the information contained in the document;
    - at the time of the generation of the electronic form of the document, it was reasonable to expect that the information contained in the electronic form would be readily accessible; and
    - any requirements of the regulations are satisfied (see also s11(2) of the *ETA Vic*).

5. Division 3 then deals with when electronic communications are deemed to be dispatched or received and could itself be the subject of a separate article.
 

"Electronic communications" are then defined in a very broad technology and media neutral way to include the major forms of electronic communications used currently: email, direct messaging services such as SMS, uploading to and downloading from websites etc.

Our governments want us to use electronic means of communications and contracting. Presumably that includes paperless contracts. This is further supported by other statutory measures such as s126(2) of the *Instruments Act* 1958 (Vic) which provides that s126(1) of the *Instruments Act* (being the requirement for certain transactions to be in writing, such as dispositions of land) can be met in accordance with the *ETA Vic*. Yet we, as practitioners, are largely yet to embrace this notion.



## EXCEPTIONS

There are several explicit regimes carved out from the *ETA* and *ETA Vic*.

In terms of Victoria, a will, codicil or any other testamentary trust instrument is exempt from the operation of s7(1) of the *ETA Vic*, which is the rule that provides that a transaction will not be invalid because it took place wholly or partly by electronic means (reg 6 of the *Electronic Transactions (Victoria) Regulations 2010* (Vic)). This has generally been interpreted by Victorian lawyers to mean that wills, codicils and testamentary trusts must be signed in a paper form and not executed electronically.

The requirement that a will be in writing is set out in another s7(1), namely s7(1) of the *Wills Act 1997* (Vic) which provides that a will be in writing, signed by the testator in the presence of two or more witnesses present at the same time who also must sign in the presence of the testator. The regulations do not exempt the application of s9 of the *ETA Vic* by way of satisfying the writing requirement and s10 of the *ETA Vic* by way of satisfying the signing requirement. The main difficulty with satisfying s7(1) of the *Wills Act* with a paperless will is in demonstrating that the witnesses also signed “in the presence of the testator”. Until we have an authority for online parties “executing in the presence of one another” (or the *Wills Act* is amended), wills and testamentary trusts will probably have to remain paper based.

At the Commonwealth level, a long list of federal regimes has been carved out from the operation of s8 of the *ETA* by schedule 1 of the *Electronic Transaction Regulations 2000* (Cth). Many relate to the functioning of government departments and are not relevant to commercial transactions. Many are carved out because there are already provisions in those regimes dealing with electronic communications (for example ss161 and 162 of the *Evidence Act 1995* (Cth)). When advising clients who are complying with a federal regime and who want to know whether they can do so electronically, practitioners need to refer to the list of exemptions in the regulations and ensure that their client’s regime is not carved out.

The Corporations Law (which incorporates the *Corporations Act 1989* (Cth) and is separately referred to in the regulations) is one of the regimes exempted by the regulations (although the *Corporations Act 2001* (Cth) is not listed). “Corporations Law” is, rather unhelpfully, not defined. Commentary posits that companies cannot look to the *ETA* to demonstrate compliance with s127 of the *Corporations Act 2001* (Cth) in that “signing” an agreement electronically is not made valid by s8(1) because of this exemption.<sup>3</sup> This commentary, in my view, is wrong. Even if the reference to Corporations Law was intended to include the *Corporations Act* (which I do not think it was) it is only s8(1) that is excluded. Section 10, which sets out when a requirement for a signature can be satisfied electronically, is not excluded. In my view, provided the three core elements of s10 are satisfied, company directors and secretaries can execute agreements electronically, safe in the knowledge that they are authorised to do so by virtue of s10 of the *ETA* and s127 of the *Corporations Act*.

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**SOME CONSIDERATION OF THE ETA BY THE COURTS**

The *ETA* and the related state regimes have been given scant consideration by the courts in Australia. This, I think, can be attributed at least in part to our own unwillingness as practitioners to embrace the regime.

A good case in point is the recent Federal Circuit Court of Australia’s decision in *Curtis v Singtel Optus Pty Ltd & Anor*.<sup>4</sup> In that case, the parties were arguing over whether a bankruptcy notice that had been served electronically met the requirements of the *Bankruptcy Act 1966* (Cth). As Judge Lloyd-Jones noted: “None of the parties to these proceedings in their written or oral

submissions raised or commented on the impact of the *Electronic Transactions Act*”. Luckily for the respondent creditors, Judge Lloyd-Jones took it upon himself to refer to, analyse and apply the *ETA*, ultimately determining that the legislation was both relevant to the requirements of the *Bankruptcy Act* and also supported his finding that the debtor’s application to have the bankruptcy notice set aside should fail.

In *Getup Ltd v Electoral Commissioner*,<sup>5</sup> the political activist group Getup brought a test case against the Electoral Commissioner who had rejected an enrolment application where the applicant had provided her signature electronically via a digital pen. Justice Perram found that s10 of the *ETA*, having been satisfied by the method of signing used, ensured

that the signing requirements of ss98(2)(b) and 102(1) of the *Electoral Act 1918* (Cth) had been met. His Honour noted that while such a form of signing could be subject to abuse through forging or manipulation of the signature, he could not discern any greater risk in this situation than with enrolment applications provided via fax or email scans, which the Commissioner already accepted.

**SIGNATURES – SOFTWARE AND CASE LAW**

There is perhaps little debate these days that emails and electronic communications constitute writing and that contractual relations can be entered into via email exchanges.<sup>6</sup> The more problematic part of paperless contracts appears to be in how they are signed electronically.

There are now many e-signing software solutions available for use by practitioners and clients. Docusign appears to be the market leader, followed closely by Echosign. Others include Sertifi, RightSignature, Signority, Skysignature, e-SignLive and Pandadoc. Many can be used cheaply or

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free of charge and many offer a variety of additional services such as encryption of documents, identity checking for signatories, date stamping etc. Is there a legal obstacle to utilising these tools and completing a purely paperless contract process?

The case law considering electronic signatures in Australia is also scant. Merely typing a person's name in an email and stating: "the signature is typed as I am away at the moment and don't have access to a printer" has been held to be sufficient for the *ETA's* purposes.<sup>7</sup> Clicking on "send this order" and "purchase tickets" buttons on an online form (after having provided identification) have likewise been held to constitute the signing of an electronic contract.<sup>8</sup> The transmission of an electronic application which states: "I agree by transmitting [this submission] electronically . . . it has the same status as if I had signed it" was held to be equivalent to a signature.<sup>9</sup>

Despite the dearth of judicial authority and in light of the decisions above, it would appear that the use of an e-signing software tool, which sets out a quite specific method of identifying a party and providing a verifiable

record of the document being agreed, is likely to satisfy the requirements of the *ETA*.

**WHAT ELSE?**

Clients in Australia will probably increasingly push for electronic contracts and electronic authentication in the future. In the United States, many states already use completely paperless processes for conveying including the contracts for the sale of land. Many US companies are moving to an entirely paperless environment, including with their contracts. As clients encounter this in their dealings overseas, they will start to ask for or demand the same of their contracts from their Australian lawyers.

There will no doubt be issues and detail to work through. How documents are witnessed electronically is one. The core elements of s10 of the *ETA*, namely what constitutes identification of the signee and their intention; what is a reliable method of signing, and how is consent to the method demonstrated, will also probably be the subject of much litigation as electronic signing becomes more prevalent.

Security and confidentiality will also need to be assured by the software companies.

However, as practitioners, we can either sit passively as our clients or our competitors determine how the contractual process will move to the online space or we can be on the front foot and take the lead in helping influence the paperless contracts process. ●

**PETER MORAN** is a commercial lawyer and principal at Norton Gledhill and focuses on contracts, technology and intellectual property law. He is a founding member of the LIV Technology and the Law Committee.

1. Statement of Purpose – UNCITRAL Model Law on Electronic Commerce (1996).
2. Revised Explanatory Memorandum, *Electronic Transaction Bill 1999* (Cth).
3. Electronic Signatures: when are they effective? Alastair Keith, *ClearDocs*, November 2013.
4. (2014) 286 FLR 96.
5. (2010) 189 FCR 165.
6. See, for example, *Ford v La Forrest* [2001] QSC 261 and *La Forrest v Ford* [2002] 2 Qld 44 which both devote no more than a few sentences to the issue.
7. *Legal Services Board v Forster* [2010] VSC 102.
8. *eBay International AG v Creative Writing Festival Entertainment Pty Ltd* (2006) 170 FCR 450.
9. *Harding v Brisbane City Council* [2009] 197 QPCLR 207.



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