

## Moving the Statute of Frauds to the Digital Age

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Most common law jurisdictions have adopted the provisions of the Statute of Frauds in some form which generally requires contracts for the sale of land to be in writing and signed by the party to be charged. Although the applicable principles are relatively settled the increasing use of electronic methods in contract formation will necessitate a revisiting of these principles and their application to an electronic medium. The two primary questions in this regard are:

- Whether an electronic document can be considered “in writing” for the purposes of the Statute of Frauds
- Can an electronic signature affixed to an electronic contract serve the same functions as a manuscript signature for the purposes of the Statute of Frauds

### **Is an electronic document “in writing”?**

Under the equivalent legislation to the Statute of Frauds in each state, a contract for the disposition of an interest in land will only be enforceable if the contract is “in writing” and signed by the party to be charged. The term is well understood to include paper and ink writings which have a physical form. The physical form satisfies the legislation’s original purpose of creating a permanent memorial of the bargain. The question in an electronic environment is whether something which may never take a physical form but could be permanently retained by the parties satisfies that same objective. The use of the phrase “in writing” will present difficulties for electronic contracts if it is determined that “in writing” requires not only words but a physical presence. Little guidance can be obtained from the Australian decisions as no consideration is given in the existing authorities to the question of whether a document is in “writing” according to the Statute of Frauds. This fact is usually assumed as being obvious in the circumstances. As a general principle, the reported cases indicate that the courts will be satisfied where the contract between the parties has been reduced to a tangible form which can later be relied upon as a record of the bargain between the parties. Until recently, the only method used by most parties of reducing a document to tangible form has been the creation of a physical contract or some other printed version of the parties’ agreement. Obviously, the situation where a document is created on a computer and printed for execution does not present any significant jurisprudential issues. Once the document is printed it will be readily accepted as being in writing. The fact it was created using a computer and printer instead of a pen and ink will not prevent the printed document

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from being considered writing. The difficulties arise, however, in stretching the current jurisprudence developed within a legal framework premised on the creation of physical documents, to a situation where an intangible electronic series of bits which convey no meaning without a computer and software to interpret has the same legal effect.

No indication of the view an Australian Court may take can be found in reported decisions concerning the Statute of Frauds as little consideration has been given to the meaning of the phrase in "writing". This fact is usually assumed as being obvious in the circumstances. However, in England evidence for the view that an electronic document which is visible on the computer screen is in writing is can be found in the interpretation of court rules providing for the service of a document by facsimile transmission. For example, in *Anson v Trump* [1998] 1 WLR 1404, the court held that a paper document required to be served as part of the litigation process could be served by facsimile transmission. The court recognised that between the time that the document was copied into the fax machine and the time that it was received in paper form at the recipient's machine, it underwent a conversion which constituted the transmission process, and the fact that it remained in the facsimile machine's memory in digital form before being printed or read was irrelevant. Similarly, in *Lockheed–Arabia v Owen* [1993] 3 All ER 641, Mann LJ was prepared to give the definition of writing in the *Acts Interpretation Act 1978* (UK) an expansive meaning in accordance with technological change. His Lordship concluded that a photocopy was writing.

Similar analogies have been drawn by the United States' courts between sending a facsimile and sending an email. However while the analogy with a facsimile transmission may in some ways be valid, the main difference between the use of a fax and that of a computer is that a fax document needs to be printed in order to be read whereas a document on a computer does not. The electronic document may never be printed and therefore never take on a physical form. The fax is merely a conduit for transmitting a paper document from one place to another. In the case of a computer, the computer serves the additional function of actually creating the document which is then stored on the computer.

In other contexts, United States Courts have also been willing to interpret legislative provisions widely to accommodate changes in business practices as a result of the advent of the computer age. For example, in *Wilkins v Iowa Insurance Commissioner* 457 NW 2d 1 (Iowa 1990), the court held that a requirement to keep a written record of an insurance contract was satisfied by the insurer keeping records in its computer system.

While some courts have appeared willing to stretch the common law view of what is writing some academic commentators have advanced the view that an electronic document is not writing because digital information is a series of electronic bits in a chip or some other recording medium and is not a visible representation or reproduction of words as required by

the definition of the Acts Interpretation Acts which defines writing as “any mode of representing or reproducing words in a visible form”. The argument being that as the emphasis of the Act is on visibility, an electronic document in its digital form does not qualify as writing. This view was rejected by the Law Commission for England and Wales (“Law Commission”) in their paper, “Electronic Commerce: Formal Requirements in Commercial Transactions – Advice from the Law Commission”, stating that while an electronic document may not be in writing, the screen display will satisfy the definition of writing. The Commission refers by analogy to the cases involving faxes and telexes and discounts the criticism that electronic messages should be read. In that respect, an electronic message is no different from a message contained in a document which could easily be delivered but not read. The fact that it remained unread would not affect its validity. This is consistent with the view in the United States as stated above that a document which can be easily printed and stored is in writing.

### **Do the Electronic Transactions Acts overcome the uncertainty?**

The Electronic Transactions Act in each State includes similar provisions for equating an electronic document to a paper document. By way of example s 11 of the *Electronic Transactions (Queensland) Act 2001* (Qld) provides that a State law which requires the giving of information in writing may be satisfied by the giving of the information by way of an electronic communication.

There are 3 requirements for section 11 to apply:

- a State law requires the giving of information in writing;
- the Information given must be readily accessible; and
- the person to whom the information is given consents to the information being given electronically.

The second and third requirements do not present any great difficulties provided the section actually has application to the Statute of Frauds. Crucial to an application of s 11 is that a State law “require the giving of information” in writing.

Section 10 of the Queensland Act provides some examples of giving information (such as making or lodging a claim, giving sending or serving notification, lodging a return, making a request) but none of the examples given suggest that the expression “give information” includes the creation of a “contract or memorandum”. Hence the first difficulty with section 11 (and its equivalents in other States) is whether section 11 would apply to the creation of a contract – it does not seem possible to paraphrase section 11 to read “If under a State law a person is required to [enter/form a contract] in writing”. The restriction to the “giving of information” in s 11 appears to exclude the operation of the Act to situations where the requirement of writing relates to a contract rather than the notification of information to a person.

The second difficulty with the section is the use of the word “require”. Does section 59 actually require a contract or memorandum to be in writing? Section 59 simply provides that a contract will not be enforceable unless it is in writing, but it does not actually require that the contract be in writing. To overcome this problem, it is suggested that the word “require” would need to be broadly interpreted to include not only a positive obligation but also where a failure to comply will result in an invalid transaction. This interpretive approach would mirror the provisions of the UNCITRAL Model Law on Electronic Commerce which specifically provides that its writing provision applies whether the requirement is in the form of an obligation or whether the law simply provides consequences for the information not being in writing.

### **3. What type of electronic signature is a Signature for the Statute of Frauds?**

Very little judicial or academic comment exists to define a signature at common law although in some cases courts have accepted a range of signatures including crosses, initials, printed names and rubber stamps all by analogy with a written signature. Some Acts Interpretation Acts define “sign” as including “the attaching of a seal and the making of a mark”, but does not define signature. An examination of the authorities indicates a concern to ensure that the function of requiring a signature is met by whatever method is used, but to date, the ordinary meaning of signature as being a mark on a written document has prevailed.

The central issue for the validation of electronic signatures is whether they can perform the same functions and have the same security as a manuscript signature. In the context of a transaction subject to the Statute of Frauds this would require the signature to have the following characteristics:

- it should be capable of being affixed to the electronic document and making a mark on the document;
- it must indicate the party’s approval of the contents of the document;
- it must be capable of identifying the party who has affixed the signature;
- it must have the same quality of integrity as a written signature such that if the signature has been removed from the document, falsely affixed to the document, forged by another party or the contents of the document have been altered this could be easily established where the reliability of the document is called into question.

It is evident from the number of statutes, orders and directives created within Australia, the United States and the European Union that the majority view is that not all types of electronic signatures will be able to fulfil the functions of a hand written signature. (See *Digital Signatures Act 1995* (Utah); *Digital Signature Act 1997* (Federal Republic of Germany); *Electronic Records and Signatures Act 1997* (Massachusetts); *Californian Government Code*). The Australian Electronic Commerce Expert Group considered that an electronic signatures in general would not satisfy all of the functions of a hand written signature and

therefore, legislation was required. Consistently with that view the *Electronic Transactions Acts* in each State provide for the satisfaction of a signature requirement by electronic means only in certain circumstances. Report of the *Electronic Commerce Export Group* is available at <http://www.law.gov.au/aghome/advisory/eceg/ecegreport.html>

#### **Do the Electronic Transactions Acts validate electronic signatures?**

Similarly to the approach with writing requirements the Electronic Transactions Act in each State provides that a requirement for a signature under a State law will be met for an electronic communication if certain requirements are met. The requirements are generally that the method used to sign the electronic document must:

- identify the person and indicate their approval
- be as reliable as was appropriate for the purposes for which the information was communicated

and the person to whom the signature is required to be given consents to the method being used.

The approach adopted in each of the Acts is consistent with the minimalist approach in the UNCITRAL Model Law on Electronic Commerce and is effective to give recognition to electronic signatures but the flexibility of choice will not effectively safeguard consumers and may need to be restricted in certain types of transaction to specific types of signatures. No specific method is mandated leaving the choice of method to the parties.

Although the deeming section in the relevant Electronic Transactions Act may have application to an electronic contract the central issue for a party agreeing to use an electronic method is whether the method is sufficiently reliable in the circumstances. The objectives of the *Property Law Act 1974* (Qld) in requiring a signature and the functions that the signature serves will be relevant to any consideration of reliability and appropriateness. A crucial factor will be the ability of the signature method to authenticate the document and maintain the integrity of the document for later reference.

This could be an area in which the court and the parties disagree with dire consequences for the validity of the agreement. It is suggested that the uncertainties created by this general approach need to be addressed through providing more specific criteria for the type of signature which will be effective, similarly with the approach in the UNCITRAL Model Law on Electronic Signatures or the European Union Electronic Signatures Directive.

#### **4. Conclusions**

Whilst the drafting of both the Commonwealth and State Electronic Transactions Acts appear to have achieved their initial purpose of facilitating the electronic submission of information to Government departments, it is suggested that the State based Electronic Transactions

legislation does not provide sufficient certainty or integrity for land transactions subject to the Statute of Frauds provisions in each State. Further attention needs to be given to both the requirements of writing and signature in the context of land transactions either through amendment of the Electronic Transactions legislation or the passing of new legislation.

The principal difficulties with the writing provision of the Electronic Transactions legislation stem from following the drafting style of the *Electronic Transactions Act 1999* (Cth) which is focussed on the validity of notice and other government information and not contracts. The limiting nature of the phrase “give information” is recognised in the recent proposal by UNCITRAL for a proposed Model Law for Electronic Contracting due to the fact the existing Model Law for Electronic Commerce upon which the *Electronic Transactions Act 1999* (Cth) is based is considered inadequate. The specific difficulties raised in an electronic context by real estate transactions are mentioned by the working group. The further uncertainty of the word “require” also adopted from the Model Law for Electronic Commerce could also be overcome in the same way as the *Electronic Transactions Act 2002* (NZ) where a specific section is devoted to legal requirements for documents to be “in writing”.

As for electronic signatures, it is suggested that the two tier concept as used in the Electronic Signatures Directive or the UNCITRAL Model Law on Electronic Signatures is preferable because it allows for flexibility– the first tier can apply to any type of electronic signatures (similar to the UETA and Qld ETA definitions). However the second tier requires more stringent conditions to be fulfilled, and those conditions satisfy the functionalities required of a signature under the Statute of Frauds. Since the electronic signature provision in the *Electronic Transactions Act 1999* (Cth) is based on the article 7 of the UNCITRAL Model Law on Electronic Commerce, one option for Australia would be to adopt the Model Law on Electronic Signatures. The Model Law through article 6 provides standards against which the technical reliability of electronic signatures may be measured without limiting the availability of the flexible criterion embodied in article 7 of the UNCITRAL Model Law on Electronic Commerce. This option is currently being considered as part of a review by the Attorney General’s department of the UNCITRAL proposed Model Law on Electronic Contracting.