

## **ELECTRONIC SIGNATURES AND LAWYERS: POTENTIAL NOT REACHED?**

### ABSTRACT

Electronic signatures ('e-signatures') have been an integral part of commercial transactions for decades. Despite the benefits e-signatures offer and the fact that they can represent a vehicle for achieving lawyers' utilitarian and value-expressive perspectives, their adoption in the course of legal transactions has been slow. Factors that underpin lawyers' reticent attitudes to adopt e-signatures are still — albeit less so as time passes — embedded in their psyche and reflect the regulatory and usage barriers to their adoption.

This article hence analyses lawyers' incentives to rely on e-signatures but also the barriers which prevent lawyers from using them to their full potential. The theoretical observations are informed by findings of a broader empirical study probing lawyers' approaches toward the adoption of innovative practices in the legal profession. The overall analysis illustrates that, while there has been a shift in the way lawyers perceive e-signatures, the potential for their use is far from being realised and more needs to be done with respect to the regulatory and usage barriers that may hinder lawyers' reliance on these signatures.

### I INTRODUCTION

The development of commercial transactions over decades has facilitated the introduction of legal frameworks for digital technology including electronic signatures ('e-signatures').<sup>1</sup> This is not surprising given that modern technology introduced

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<sup>1</sup> Agnessa O Inshakova, Alexander I Goncharov and Daniil A Salikov, 'Electronic-Digital Smart Contracts: Modernization of Legal Tools for Foreign Economic Activity' in Elena G Popkova and Bruno S Sergi (eds), *The 21<sup>st</sup> Century from the Positions of Modern Science: Intellectual, Digital and Innovative Aspects* (Springer, 2020) 3, 4.

tools which enable e-signatures to perform the same role as the wet ink alternatives.<sup>2</sup> Yet, despite this feature and the fact that the application of e-signatures may appeal to lawyers' utilitarian<sup>3</sup> and value-expressive perspectives,<sup>4</sup> their adoption into the legal profession has been slow. A range of reasons such as regulatory barriers (lack of uniformity) or practical barriers (cybersecurity issues) as well as the resistance toward losing certain ceremonial aspects associated with signing contracts have worked to prevent lawyers from fully embracing e-signatures.

Despite the technological innovations lawyers have adopted to streamline their legal processes and refine their practices,<sup>5</sup> it could be argued that the occurrence of the COVID-19 pandemic has encouraged or even pushed lawyers to revise their attitudes toward e-signatures. This shift has also been supported and facilitated by the introduction of temporary<sup>6</sup> and, in certain instances, permanent<sup>7</sup> exemptions, which lifted some of the regulatory barriers that may have prevented lawyers from embracing e-signatures. As a result, at present, e-signatures are more frequently used by lawyers although issues in their application across various legal transactions persist and prevent the full potential of their use being reached.

This article, accordingly, considers the laws which govern e-signatures to highlight the motivations and barriers that may affect lawyers' attitudes to the use of these signatures and their impact on the adoption of this mechanism. Part II will describe the methodology used by the authors to assess the views of lawyers about this mechanism. It will then provide a brief overview of the project that led to this article and the legal framework underscoring the application of e-signatures. This Part also examines the benefits of e-signatures and investigates the motives which drive lawyers to adopt them in practice. Part III further discusses the legislation

<sup>2</sup> Stephen Mason, *Electronic Signatures in Law* (University of London Press, 4<sup>th</sup> ed, 2016) 181.

<sup>3</sup> As will be discussed further in the paper, utilitarian perspectives place the focus on the importance of achieving desired goals and positive outcomes for lawyers themselves, their clients and their law firm: Harlan B Miller, 'On Utilitarianism and Utilitarian Attitudes' [1990] (Summer) *Between the Species* 128, 128.

<sup>4</sup> E-signatures may resonate with lawyers' value-expressive perspectives which allow individuals to remain authentic to their core personal values and self-image. See Daniel Katz, 'The Functional Approach to the Study of Attitudes' (1960) 24(2) *Public Opinion Quarterly* 163, 192.

<sup>5</sup> Michael Legg, 'New Skills for New Lawyers: Responding to Technology and Practice Developments' in Kevin Lindgren, François Kunc and Michael Coper (eds), *The Future of Australian Legal Education: A Collection by the Australian Academy of Law and Thomson Reuters' The Australian Law Journal* (Thomson Reuters, 2018).

<sup>6</sup> See, eg, *COVID-19 Emergency Response Act 2020* (ACT), as at 28 December 2022. A list of temporary changes to electronic signatures can be found later on in this article, particularly in Part III, Tables 1 and 2.

<sup>7</sup> See, eg: *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW); *Electronic Transactions Amendment (Remote Witnessing) Act (No 33) 2021* (NSW). A list of permanent changes to electronic signatures can be found in Part III, Tables 1 and 2.

surrounding e-signatures to put into perspective some of the regulatory barriers that may exist, while Part IV outlines the practical barriers pertinent to the application of this mechanism. Parts III and IV also propose solutions in terms of how these challenges could be tackled and eventually overcome. The overall analysis in the article is informed by the parallel observations regarding the utilitarian and value-expressive values that lawyers, and certainly our interviewees, consider vis-à-vis the application of e-signatures in practice. Part V provides concluding observations and highlights that, while there has been a shift in the way lawyers perceive e-signatures, more needs to be done to deal with regulatory and usage barriers that may hinder lawyers' reliance on these signatures.

## II ELECTRONIC SIGNATURES, THE LEGAL FRAMEWORK AND LAWYERS

The applicability and use of e-signatures in Australia is currently the subject of statutory regulation. The first legal instrument enacted to regulate electronic transactions including e-signatures was the *Electronic Transactions Act 1999* (Cth) ('*ET Act*'). By agreement with the federal government, each state and territory have enacted legislation substantially mirroring the *ET Act*'s guiding principles.<sup>8</sup> This legislative approach comprising federal and state laws, coupled with their inherent variations as well as numerous amendments of temporary and permanent character has caused havoc in the way lawyers intend to adopt e-signatures in practice. Hence, it not surprising that that during the interviews, lawyers have expressed different feelings regarding their application.

Before delving into a detailed analysis of lawyers' approaches to e-signatures, it is important to initially outline the methodology used by the authors to collect the data. This Part will subsequently discuss the legal principles surrounding the use of e-signatures. The focus will be then placed on discussing the findings regarding the appeal of e-signatures to lawyers as highlighted by both the literature and the empirical research conducted by the authors. This includes, inter alia, the improvement of operational efficiency, client experiences as well as supporting the new business models and sustainability. The following Parts discuss in greater detail each of these aspects by way of incorporating the feedback from our interviews.<sup>9</sup>

### A Study and Methodology

It should be mentioned at the outset that the findings that inform this article are not located in a research study that specifically addressed the use and applicability of e-signatures but rather in broader empirical research conducted by the authors on

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<sup>8</sup> *Electronic Transactions Act 2001* (ACT); *Electronic Transactions Act 2000 (No 8)* (NSW); *Electronic Transactions (Northern Territory) Act 2000* (NT); *Electronic Transactions (Queensland) Act 2001* (Qld); *Electronic Commerce Act 2000* (SA); *Electronic Transactions Act 2000* (Tas); *Electronic Transactions (Victoria) Act 2000* (Vic); *Electronic Transactions Act 2011* (WA).

<sup>9</sup> See Part II(B)–(D) and Parts III–V.

innovative practices in the legal profession.<sup>10</sup> As the study was considering legal innovation within the legal profession, interviews were conducted with practice leaders in 24 law firms, who branded themselves as having embraced innovative practices and had either advertised these practices or won industry innovation awards. The discussions were directed to assessing the way they approach and implement the innovative practices as well as the challenges they have faced.

Each interview lasted approximately one hour. The interview questions were semi-structured and broad in nature to allow the interviewees to raise both positive and negative feelings attached to the use of technology and the adoption of other innovative working methods that might change the way legal services are provided. Accordingly, it was striking that when we started our interviews in 2021 and raised the question about barriers to innovation, the first two interviewees highlighted their frustration regarding the use of e-signatures.<sup>11</sup> While both interviewees<sup>12</sup> were supportive of e-signatures and highlighted their importance as a tool for innovation, they also discussed the challenges they encountered when incorporating these signatures within their legal practices.

Subsequently, as part of the questions on the barriers to innovation, we delved more into the topic of e-signatures when the topic was raised by 17 of our 24 interviewees. The questions probed lawyers' views vis-à-vis the positive and negative aspects of adoption of e-signatures, the clarity of the existing rules associated with their use and the approaches to surmounting the challenges regarding their application in practice.<sup>13</sup> The findings regarding e-signatures were then divided into two thematic aspects which are incorporated in this paper: (1) the benefits of e-signatures; and (2) barriers that prevent these signatures from being used with a focus on regulatory and usage barriers.

In terms of the size of the law firms represented, e-signatures were referred to by 8 of 10 interviewees working at large firms, all 5 interviewees working in medium-sized law firms, and 4 of the 9 interviewees in small law firms. While the sample is small, it nevertheless indicates issues with the application of e-signatures which perhaps work to make this mechanism a barrier rather than a vehicle for innovation.

Apart from this, it could be argued that there are two additional limitations pertinent to this study. The first one is linked to the fact that the research study targeted early adopters of technology, hence, its findings highlight a mindset supportive of change and may not reflect the attitude of more risk-averse lawyers. Second, an argument might be made that conducting the interviews during the pandemic could potentially have contributed to reflect a shift in the way e-signatures were viewed by our

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<sup>10</sup> Ethical approval number: UNSW HC200941 (10 December 2020).

<sup>11</sup> Interviewees 5 and 7.

<sup>12</sup> Interviewees 1 and 2.

<sup>13</sup> References by the interviewees to e-signatures in the interviews have been analysed and the remainder of the article discusses the similarities and differences of the perspectives and views of the interviewees on this topic.

interviewees from commodity to necessity in jurisdictions where lockdown was in place. Yet, as discussed further in the study,<sup>14</sup> the fact that in the post-pandemic period many jurisdictions have continued to rely on permanent legalisation regarding the use of e-signatures — which is also embraced by lawyers — perhaps speaks against the validity of such a presumption.

### B *The Legal Framework: Promotion of Technological Neutrality*

As foreshadowed above, the use and application of e-signatures in Australia is regulated by the *ET Act* and the state and territory enacted legislation. The move to regulate the use of e-signatures was not surprising and followed international development in this sphere.<sup>15</sup> Similar to the international legislation upon which it was modelled,<sup>16</sup> the *ET Act*'s main objective was to facilitate the use of electronic transactions<sup>17</sup> by removing the legal obstacles (requirements such as written form and wet ink signatures) that might prevent a person from relying on e-signatures to satisfy their legal obligations.<sup>18</sup> To achieve this, Parliament embraced the principle of technology neutrality<sup>19</sup> and consequently the law does not discriminate between the different forms of technology.<sup>20</sup> Accordingly, the *ET Act* does not provide a black-letter definition of 'electronic signature'<sup>21</sup> nor specifies the form it needs to

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<sup>14</sup> See Part IV below.

<sup>15</sup> See, eg, *Model Law on the Electronic Commerce* GA Res 51/162, UN Doc A/RES/51/162 (16 December 1996, adopted 12 June 1996). This Model Law has had influence on the Australian legislative regime: see Explanatory Memorandum, *Electronic Transactions Bill 1999* (Cth) 26 ('Explanatory Memorandum').

<sup>16</sup> As highlighted in the Explanatory Memorandum (n 15) '[t]he Expert Group recommended that the Commonwealth should enact legislation based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce of 1996, with some modifications': at 1.

<sup>17</sup> *Electronic Transactions Act 1999* (Cth) ss 3(b)–(c) ('*ET Act*').

<sup>18</sup> Explanatory Memorandum (n 15) 2.

<sup>19</sup> A review of the literature highlights that technology neutrality may have different meanings. For the purpose of this article, technology neutrality is used to refer to a set of regulatory principles that may apply regardless of the technology used, see: Winston J Maxwell and Marc Bourreau, 'Technology Neutrality in Internet, Telecoms and Data Protection Regulation' (2015) 21(1) *Computer and Telecommunications Law Review* 1, 1; Explanatory Memorandum (n 15) 1–2.

<sup>20</sup> Explanatory Memorandum (n 15) 1–2.

<sup>21</sup> Unlike the *ET Act* (n 17), some jurisdictions including the United States ('US') provide a specific definition for e-signature. For example, the federal legislation under the *Electronic Signatures in Global and National Commerce Act*, 15 USC § 7001, § 7006(5) (2000) defines 'electronic signature' as 'an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record'. The *Uniform Electronic Transactions Act 1999* (US) introduced a similar definition in s 2(8) which is now used as a model for defining e-signature under the legislation of 49 US states and two US territories. Precise definitions are also missing in the commentary on the topic. Instead of attempting a precise definition, some commentators simply

take to be valid. The mandatory criteria for proving the validity of an e-signature in electronic communications are minimal and mainly target proof of three things: (1) identity;<sup>22</sup> (2) reliability;<sup>23</sup> and (3) consent of the other party to accept the electronic commerce.<sup>24</sup> More precisely, a person has to use a method to identify themselves and indicate their intention ‘in respect of the information communicated’.<sup>25</sup> This broad view supports the stance that it is not the form that gives the legal effect to the signature but rather the intention of the parties behind it to enter into a transaction. Insofar as the form is concerned, the signature will be acceptable as long as it is reliable and appropriate in light of all circumstances.<sup>26</sup> This broad approach ensures that technology does not evolve beyond the law or enter into a ‘regulatory void’<sup>27</sup> or fall into regulatory disconnection.

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outline the fact that “[t]he term “electronic signature” has no universally accepted meaning and is variously defined in different statutes”: see Mark Sneddon, ‘Legislating to Facilitate Electronic Signatures and Records: Exceptions, Standards and the Impact of the Statute Book’ (1998) 21(2) *University of New South Wales Law Journal* 334, 337. Among the definitions that do surface, e-signature is defined as ‘a method by which a person or entity commits to a legal obligation electronically, in the absence of a physical, written, wet ink signature’: see Tony Joyner and Steph Walker, ‘COVID-19: Pressure Points: Electronic Signatures in a Time of Social Distancing (Australia)’, *Lexology* (Web Page, 23 April 2020) <<https://www.lexology.com/library/detail.aspx?g=9aab06cc-1a35-4fd5-aad3-daf07f9c7ac1>>.

<sup>22</sup> *ET Act* (n 17) s 10(1)(a).

<sup>23</sup> *Ibid* s 10(1)(b)(i). For a discussion on reliability including issues with the concepts see, eg: *United Nations Convention on the Use of Electronic Communications in International Contracts*, opened for signature 23 November 2005, 2898 UNTS 50525 (entered into force 1 March 2013) (‘ECC’); Explanatory Memorandum (n 15) 26–7; Aashish Srivastava, *Electronic Signatures for B2B Contracts: Evidence from Australia* (Springer, 2013) 122–3 (‘*Electronic Signatures for B2B Contracts*’). However, there is an alternative to this in case s 10(1)(b)(i) is not practical. In that instance, the parties can rely on the alternative test included in s 10(1)(b)(ii) proven in fact. It should be noted that the original provisions in the *ET Act* (and corresponding state and territory legislation) did not mention ‘intention’ but dealt with ‘approval’. The amendment of this provision to include the ‘proven in fact’ safety valve came as a result of the introduction of the *ECC*. Although Australia has not formally ratified the *ECC*, all states and territories and the Commonwealth have changed their legislation to comply with its provisions.

<sup>24</sup> *ET Act* (n 17) s 10(1)(d). As the *Corporations Act 2001* (Cth) (‘*Corporations Act*’) is exempt from the *ET Act*, new amendments to the provisions regarding the use of electronic deeds have excluded consent as a requirement. See below discussion on deeds signed by company at Part III.

<sup>25</sup> *ET Act* (n 17) s 10(1)(a).

<sup>26</sup> *Ibid* s 10(1)(b)(i).

<sup>27</sup> Lyria Bennett Moses, ‘How to Think about Law, Regulation and Technology: Problems with “Technology” as a Regulatory Target’ (2013) 5(1) *Law, Innovation and Technology* 1, 7.

The legislative approach conforms with the broad interpretation that Australian courts had put forward when considering what constitutes a signature. This has been confirmed in *Torrac Investments Pty Ltd v Australian National Airlines Commission*<sup>28</sup> where Queensland's Supreme Court accepted that a printed name on a telex<sup>29</sup> fulfils the requirement of a signature.<sup>30</sup> Similarly, in *eBay International AG v Creative Festival Entertainment Pty Ltd*,<sup>31</sup> the Court found that pressing the 'I agree' button in an electronic contract was sufficient to meet the requirements of valid e-signature. Hence, instead of limiting the validity of the signatures generated by certain types of technology, the *ET Act* and its variants<sup>32</sup> place the focus on the functionality of the signature.<sup>33</sup>

Observed from lawyers' perspectives, our interviews highlighted that the fact that the law promotes technological neutrality has been beneficial. It has, inter alia, allowed lawyers to adopt the most suitable e-signature in the provision of their legal services<sup>34</sup> including a degree of experimentation with one interviewee noting that they are currently building a 'full-blown digital signature system' through blockchain.<sup>35</sup> Furthermore, it has provided those lawyers an opportunity to achieve different values and benefits, as will be highlighted in the next part of this article.

### C *Lawyers' Incentives to Rely on E-Signatures*

In the course of our interviews, 17 interviewees who referred to e-signatures highlighted that they have embraced e-signatures in different forms because of their benefits. The majority viewed that the technological neutrality associated with e-signatures allowed them to adopt the most suitable system to achieve their utilitarian and value-expressive perspectives. The former perspectives target achievement of positive outcomes and avoid negative consequences. Hence, interviewees with a utilitarian perspective discussed the usefulness of e-signatures in achieving certain goals to which lawyers may aspire, such as improving operational efficiency and

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<sup>28</sup> (Supreme Court of Queensland, Derrington J, 20 August 1984) 15 (*Torrac Investments*).

<sup>29</sup> A telex is a communication service that provides printed messages transmitted through teletypewriters from one location to another.

<sup>30</sup> *Torrac Investments* (n 28) 15. As to the flexibility of the judiciary regarding this matter, see also: *Molodysky v Vema Australia Pty Ltd* (1988) 4 BPR 9552; *Luxottica Retail Australia Pty Ltd v 136 Queen Street Pty Ltd* [2011] QSC 162.

<sup>31</sup> (2006) 170 FCR 450.

<sup>32</sup> See above n 8.

<sup>33</sup> Aldrin De Zilva, 'Electronic Transactions Legislation: An Australian Perspective' (2003) 37(4) *International Lawyer* 1009, 1014.

<sup>34</sup> That is particularly important given that not every client has the same level of technological proficiency. Whilst tech-savvy clients can easily apply their digital signature to all legal transactions, the capabilities of technologically disadvantaged clients might be confined to typing their name into an email but exclude the use of digital platforms as a method of signing their document.

<sup>35</sup> Interviewee 7.

promoting new legal business models.<sup>36</sup> On the other hand, interviewees with value-expressive perspectives centred achieving individual values and self-conception such as promoting sustainability.<sup>37</sup> Another reason raised by the interviewees was enhancing clients' experience and this was referred to by both utilitarian and value-expressive leaning lawyers.

### 1 *Improving Operational Efficiency*

The process of relying on wet ink signatures may be slow and burdensome due to the ceremonial component associated with their use.<sup>38</sup> It, inter alia, involves the complexity of organising the meetings and bringing the parties involved into a place where the necessary formalities need to be completed before the document is signed.<sup>39</sup>

As a result, the use of electronic vis-à-vis wet ink signatures was viewed by interviewees with utilitarian perspectives as increasing operational efficiency and the utility of a law firm as the majority of tasks can be completed quickly online without the need to match availability between clients and lawyers.<sup>40</sup> Accordingly, moving away from the ceremonial element of wet ink signatures was not viewed as a loss. The benefits of this timesaving component of e-signature were confirmed by our interviewees, with one noting that implementing e-signing has reduced turnaround time for witnessing documents from days or weeks to minutes.<sup>41</sup>

This advantage is also reflected within the literature with one legal commentator who surveyed United States ('US') law firms noting that the use of e-signatures can speed up the process of sending and receiving signed documents by 'seven times when compared to the wet-signing alternative'.<sup>42</sup> It may also save, on average, eight

<sup>36</sup> Interviewees 3, 4, 6, 7, 9, 13, 14, 15, 16, 18, 19 and 24; Miller (n 3) 128.

<sup>37</sup> Interviewees 10, 17, 20, 21 and 23. Their behaviour is hence guided by those values rather than a cost-benefit analysis that might appeal more to utilitarian views: see generally Gregory R Maio and James M Olson, 'What Is a "Value-Expressive" Attitude?' in Gregory R Maio and James M Olson (eds), *Why We Evaluate: Functions of Attitudes* (Lawrence Erlbaum, 2000) 249.

<sup>38</sup> Information Security Committee, 'Digital Signature Guidelines: Legal Infrastructure for Certification Authorities and Secure Electronic Commerce', *American Bar Association* (Web Page, 1 August 1996) 5 <[http://apps.americanbar.org/dch/thedl.cfm?filename=/ST230002/otherlinks\\_files/dsg.pdf](http://apps.americanbar.org/dch/thedl.cfm?filename=/ST230002/otherlinks_files/dsg.pdf)>, archived at <<https://perma.cc/C4CB-22T5>>.

<sup>39</sup> Timothy Perry, 'Electronic Signatures: A Guide for Lawyers', *Thomson Reuters* (Blog Post, 24 January 2018) <<https://insight.thomsonreuters.com.au/legal/posts/electronic-signatures-guide>>.

<sup>40</sup> Interviewees 3, 4, 6, 7, 9, 13, 14, 15, 16, 18, 19 and 24.

<sup>41</sup> Interviewee 15.

<sup>42</sup> Yuri Eliezer, 'Enhancing Your Practice Efficiency with E-Signatures' (2017) 43(2) *Law Practice* 50, 53.



hours of administrative work devoted to the signing of documents per legal administrator per month.<sup>43</sup>

Furthermore, the interviewees whose attitude was more founded in a value-expressive perspective also observed that the flexibility and speed provided by the technology matched their core values that centred on catering to the needs of their time-poor and vulnerable clients.<sup>44</sup>

## 2 *Improving Client Experience*

E-signatures may also play a small role in improving clients' experience — a consideration that may be appealing from both utilitarian and value-expressive perspectives especially in a saturated legal market — as they may allow law firms to distinguish themselves from their competitors. Their use may help lawyers offer a client service which is more focused on the individual interaction between lawyer and client whereby the focus on client experience is promoted, representing a sum of 'all the client's touch points with' the law firm.<sup>45</sup> This is possible as this form of signature may benefit the clients in several ways.

First, e-signatures may benefit the client by lowering legal costs. In law firms that rely on time-cost billing, streamlining the process of signing a document into a simple use of software lowers the cost to clients<sup>46</sup> as it removes the need for human involvement in organising meetings, setting a time for signing to take place. This is especially the case in instances where legal documents involve multiple parties. Second, e-signatures help meet clients' expectations. A great number of clients are technologically advanced and already employ e-signatures in their day-to-day activities.<sup>47</sup> Consequently, the law firm would be meeting client expectations of efficient service through the use of basic and secure technological tools. Illustrative in this context is the observation of an interviewee who noted that they have always 'seen the benefits of using technology not just for efficiency, but to connect with

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<sup>43</sup> Ibid.

<sup>44</sup> Interviewees 10, 17, 20, 21 and 23.

<sup>45</sup> Jacqueline Fearnley, 'How to Deliver an Outstanding Client Experience in Law', *Legal Vision* (Blog Post, 28 February 2020) <<https://legalvision.com.au/tools-engagement-create-deliver-outstanding-client-experience-law/>>.

<sup>46</sup> Interviewees 10 and 15. See also Allens et al, Submission to Deregulation Taskforce, Department of the Prime Minister and Cabinet, Parliament of Australia, *Modernising Documentation Execution* (25 November 2021) 12 <<https://deregulation.pmc.gov.au/sites/default/files/consultations/submissions/2021/Joint%20submission%20of%20Allens%2C%20Ashurst%2C%20King%20%26%20Wood%20Mallesons%20and%20Norton%20Rose%20Fulbright.pdf>>.

<sup>47</sup> Lawyers Oliver Shtein, Priti Joshi and Lucinda Borgob observed that the question of whether or not the document can be signed electronically is often asked by their clients: Oliver Shtein, Priti Josh and Lucinda Borgob, 'Can I Sign This Document Electronically?', *Bartier Perry* (Blog Post, 12 December 2018) <<https://www.bartier.com.au/insights/articles/can-i-sign-this-document-electronically>>.

[their] clients and meet their needs'.<sup>48</sup> Another interviewee stated that they 'use a lot of technology to make [their] lives and [their] clients' lives easier.<sup>49</sup> Third, e-signatures provide flexibility to clients by reducing the expense and removing the need to commute to the law firm's office.<sup>50</sup> The mere fact that e-signatures give clients the ability to sign the documents instantaneously from their homes or offices can, in parallel, also reduce the stress on lawyers associated with receiving the signed copies on time.<sup>51</sup>

### 3 *Supporting the Promotion of New Legal Business Models*

Technological innovations have provided law firms with the opportunity to adopt different business models with new value propositions for both lawyers and clients.<sup>52</sup> From a lawyer's perspective, this may support the creation of an agile workplace through the promotion of flexible work arrangements, a distributed workforce or even the creation of virtual law firms. As one interviewee noted:

I think that yes, we are paperless, and we use e-signatures. And, again, this helps our people. Because having all of our files online means, you know, we have lots of fantastic mums who have three, four, five-year olds. I have an eight-year-old and a five-year-old at home. It is really great. When I pick up my backpack at the end of the day and I take my Surface Pro home with me and it [sic] got everything on it, it just gives me peace and comfort of mind of knowing that if I am, if I am running a bit late, the next morning — as I go to take the kids to school — that I can get up early and log on and do some things on files, rather than being chained to the desk.<sup>53</sup>

The use of e-signatures also plays a small role in this context as it supports the establishment of a paperless environment where transactions can take place without the need for offices or face-to-face meetings with clients and where lawyers and clients may sign their documents electronically. Additionally, for some law firms, e-signatures constitute a vehicle to eschewing geographical boundaries and opening new cross-jurisdictional markets where they can reach and service clients in other states and territories.<sup>54</sup>

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<sup>48</sup> Interviewee 2.

<sup>49</sup> Interviewee 20.

<sup>50</sup> Daniel C Katzman, 'Are E-Signatures E-nough?' (2021) 109(3) *Illinois Bar Journal* 28, 49; Philippe Doyle Gray, 'New Legislation is Super-Charging Paperless Legislation' (2022) 86 (March) *Law Society Journal* 78, 79.

<sup>51</sup> Gray (n 50) 79.

<sup>52</sup> See, eg, Marina Nehme and Felicity Bell, *The Future of Legal Service Delivery: Sources of Innovation in the Legal Profession* (Report, 2021).

<sup>53</sup> Interviewee 11.

<sup>54</sup> Interviewees 11 and 14; Lauren Joy Jones and Ashley Pearson, 'The Use of Technology by Gold Coast Legal Practitioners' (2020) 2(1) *Law, Technology and Humans* 57, 68.

#### 4 *Supporting Sustainability*

The prolific use of paper in law firms is a concerning aspect from a business, client and community perspective. Absent any domestic statistics, the data that surfaces in the comparative literature illustrates that an average US lawyer uses around one tonne of paper,<sup>55</sup> and disposes around 150 kilograms of waste paper per year.<sup>56</sup> Both the production and the disposal of paper consume a large amount of energy and generate significant greenhouse gas emissions.<sup>57</sup> As such, supporting sustainability may suit a utilitarian perspective as it lowers the running cost of the law firm. However, as the protection of the environment is being viewed more and more as an ethical issue,<sup>58</sup> it is not surprising that this practice is being reconsidered.<sup>59</sup> There is a growing awareness amongst Australian law firms of the importance of building and supporting a sustainable future.<sup>60</sup> As one interviewee stated:

A lot of these platforms like electronic briefing of barristers and DocuSign work toward the elimination of the cost and the waste associated with paper. That aligns with our overall sustainability agenda and what we're trying to do in that space.<sup>61</sup>

This is not unique to the sample of lawyers we interviewed, with several law firms flagging their green credentials. For instance, Herbert Smith Freehills has noted on its website that

[a]s an international professional services business we are concerned about the impact of climate change both on a local and global scale. We work to reduce our environmental impacts by adopting sustainable business and we are committed to deliver challenging carbon reduction targets.<sup>62</sup>

DLA Piper issues a sustainability report to provide their stakeholders with an account of how the firm is addressing sustainability, environment, social and governance

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<sup>55</sup> R Steven DeGeorge, 'The Greening of a Law Firm' (1990) 17(3) *Barrister* 19, 19.

<sup>56</sup> Nicole C Kibert, 'Greening Your Law Firm' (2012) 86(10) *Florida Bar Journal* 53, 55.

<sup>57</sup> Michael J Nasi, 'Greening the Bar through Sustainability Initiatives' (2009) 72(4) *Texas Bar Journal* 262, 263.

<sup>58</sup> Tom Lininger, 'Green Ethics for Lawyers' (2016) 57(1) *Boston College Law Review* 61, 61.

<sup>59</sup> See State Bar of California, *State Bar of California Lawyers Eco-Pledge and Law Office Sustainability Policy* (Public Comment, 7 November 2011) <[http://www.calbar.ca.gov/portals/0/documents/publiccomment/2008/Lawyers-Eco-Pledge-Attachment%203\\_07-11-08.pdf](http://www.calbar.ca.gov/portals/0/documents/publiccomment/2008/Lawyers-Eco-Pledge-Attachment%203_07-11-08.pdf)> ('*Lawyers Eco-Pledge*').

<sup>60</sup> See generally 'AusLSA Members', *Australian Legal Sector Alliance* (Web Page) <<https://www.legalsectoralliance.com.au/AusLSA-members>>.

<sup>61</sup> Interviewee 15.

<sup>62</sup> 'Sustainability: Protecting the Environment and Tackling Climate Change', *Herbert Smith Freehills* (Web Page) <<https://www.herbertsmithfreehills.com/pro-bono-and-citizenship/sustainability>>.

issues.<sup>63</sup> Law firms have also joined legal sustainability networks.<sup>64</sup> Consequently, there is a trend nationally and internationally for law firms to reconsider the social and environmental impacts when using natural resources while achieving their business goals.<sup>65</sup>

Socially responsible law firms, hence, strive to address sustainability issues by developing sustainable business practices, based on a specific action plan. For instance, several of our interviewees observed that their law firms have reviewed or are reviewing their reliance on paper as they view this as central toward achieving sustainability.<sup>66</sup> Consequently, law firms are working on cutting the use of paper or are moving to a paperless environment.<sup>67</sup> In fact, eight interviewees noted that they have moved to a completely paperless environment,<sup>68</sup> with one noting the importance of this as it reflects that the values of the law firm are focused toward supporting a sustainable green future.<sup>69</sup> The use of e-signature facilitates, of course, supports this move. For instance, Clayton Utz has posted on its website that they aim to reduce paper consumption by encouraging their people to ‘view, sign and share documents electronically’.<sup>70</sup>

#### D *Barriers Undermining the Incentives to Rely on Electronic Signatures*

Despite the benefits that e-signatures offer and the desire of the 17 interviewees to completely embrace their use, the interviewees also expressed different feelings when navigating the use of e-signature. The data indicates that apart from the four interviewees who expressed satisfaction, four interviewees expressed annoyance, while nine interviewees expressed frustration regarding their use.

When querying these different perspectives, it was apparent that while the interviewees wanted to use unreservedly e-signatures in their legal practice, they have faced difficulties in their application due to legal and practical barriers, prompting even them to approach e-signatures with caution. This is a concerning fact given that the challenges faced by our interviewees, who are early adopters of technology, may prevent lawyers who are not keen on changing the way they operate from adopting

<sup>63</sup> See ‘Sustainability Reporting’, *DLA Piper* (Web Page, 3 October 2023) <<https://www.dlapiper.com/en-gb/about-us/sustainability/sustainability-reporting>>.

<sup>64</sup> ‘AusLSA Members’ (n 60); ‘The Legal Sustainability Alliance: The Only Not-For-Profit Sustainability Networks Run by Law Firms for Law Firms’, *Legal Sustainability Alliance* (Web Page) <<https://legalsustainabilityalliance.com/>>.

<sup>65</sup> *Lawyers Eco-Pledge* (n 59).

<sup>66</sup> For example, interviewees 11, 13, 15, 18, 20.

<sup>67</sup> For example, developing a green action plan can comprise creating a green procurement policy, employing the three R’s — Reduce, Reuse, Recycle — changing the relationship with paper, and maximising the office space, etc: see Kibert (n 56) 57.

<sup>68</sup> Interviewees 2, 8, 10, 11, 13, 15, 17 and 20.

<sup>69</sup> Interviewee 15.

<sup>70</sup> ‘Environmental Sustainability’, *Clayton Utz* (Web Page) <<https://www.claytonutz.com/about/community/environmental-sustainability>>.

e-signatures. The following discussion analyses in greater detail the impact of both the regulatory (Part III) and practical barriers (Part IV) on lawyers and proposes some approaches on how to surmount them.

### III ELECTRONIC SIGNATURES, LAWYERS AND REGULATORY BARRIERS

While the *ET Act* serves as the primary legal instrument that governs the use of e-signatures, as noted previously, it is not the only source applicable in this context. An additional set of federal legislation, as well as state and territory statutes also apply in this context.<sup>71</sup> Despite the technological neutrality of the law, the lack of uniformity in the legislative approach has caused havoc in the way lawyers intend to adopt e-signatures and led to what a range of interviewees have referred to as a regulatory barrier in their application.

#### *A Regulatory Barriers to Electronic Signatures: Lack of Uniformity*

The interviewees who referred to such a barrier pointed out three key problematic legislative areas: (1) documents to be personally served and witnessed such as deeds; (2) wills; and (3) powers of attorney.

The reason why e-signatures until recently were not applicable to these types of documents is because they essentially gain their validity from their solemn form.<sup>72</sup> This form mandates the signatory to attach the signature to a physical copy of the document in the presence of a witness. However, as one of the interviewees mentioned, these concerns are obsolete in the 21<sup>st</sup> century and the legislative framework needs to move away from the limitation imposed by the law.<sup>73</sup> This point seemingly became validated with the onset of the pandemic. The requirements for social distancing, self-isolation and travel restrictions made signing on a paper copy and physical witnessing challenging<sup>74</sup> if not impossible. As will be highlighted below, the federal and state/territory governments sought to remedy this issue by each introducing ‘instant’ measures to assist the parties in meeting legal obligations. As a result, the situation with the laws that govern these types of solemn documents became ‘dramatically inconsistent’, causing confusion for lawyers and clients and adding also a regulatory burden for regulators.<sup>75</sup>

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<sup>71</sup> See Part II.

<sup>72</sup> See generally *Manton v Parabolic Pty Ltd* (1985) 2 NSWLR 361, 367–8 (*Manton*).

<sup>73</sup> Interviewee 24.

<sup>74</sup> Law Society of New South Wales, *Implications of the Electronic Witnessing Provisions: Part 2B of the Electronic Transactions Act 2000 (NSW) and Its Impact on the Practice of Property, Wills and Estates Practitioners* (Paper, December 2021) <<https://www.lawsociety.com.au/sites/default/files/2021-12/Implications%20of%20Electronic%20Witnessing%20Provisions.pdf>>.

<sup>75</sup> Philippa Ryan and Veronica L Taylor, ‘Executing Documents in a Digital Economy: Rethinking Statutory Declarations and Deeds in Australia’ (Research Paper, Parliamentary Library, Parliament of Australia, September 2021) 7.

## 1 Deeds

Deeds can be generally defined as a binding promise or commitment to do something.<sup>76</sup> They are viewed as one of the most solemn types of documents,<sup>77</sup> and are usually required when there is no need for consideration or consideration will be difficult to prove.<sup>78</sup> Examples where deeds are used include: (1) one-way communication of confidential information; (2) financial guarantees; (3) indemnities; and (4) amendments to existing contracts.<sup>79</sup> As the element of consideration is not mandatory for these documents, the parties' intention to be bound by the deed will depend more on whether the parties have observed the formalities in the process of its execution.<sup>80</sup> For that reason, deeds must comply with more specific requirements at general law than contracts.<sup>81</sup> These requirements mandate that the deed is written, signed and witnessed by another party who is not party to the deed.<sup>82</sup>

Some of our interviewees<sup>83</sup> questioned the barriers for electronic execution of deeds in a number of Australian jurisdictions given that the formal deeds requirements were established to meet the needs of those who were entering into transactions more than two centuries ago.<sup>84</sup>

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<sup>76</sup> *Laszczuk v Bendigo and Adelaide Bank Ltd* (2020) 61 VR 1, 11 [38] ('*Laszczuk*').

<sup>77</sup> See *Manton* (n 72) 367–8 where Young J described deeds as 'the most solemn act that a person can perform with respect to a particular property or contract'.

<sup>78</sup> A valid deed will still require offer, certainty and acceptance of the terms of the agreement, as well as intention of the parties to be legally bound.

<sup>79</sup> Lauren McKee, 'What is the Difference between an Agreement and a Deed?', *LegalVision* (Blog Post, 3 November 2022) <<https://legalvision.com.au/difference-between-agreement-and-a-deed/>>.

<sup>80</sup> In *Morley v Boothby* (1825) 3 Bing 108; 130 ER 455, 456 Best CJ outlined that '[t]he common law protected men against improvident contracts. If they bound themselves by deed, it was considered that they must have determined upon what they were about to do, before they made so solemn an engagement; and therefore it was not necessary to the validity of the instrument, that any consideration should appear on it'.

<sup>81</sup> *Laszczuk* (n 76) 11 [38].

<sup>82</sup> *Goddard v Denton* (1584) 2 Co Rep 4b; 76 ER 396, 398: 'there are but three things of the essence and substance of a deed, that is to say, writing in paper or parchment, sealing and delivery' (citations omitted) ('*Goddard's Case*'). See, eg, *Property Law Act 1969* (WA) s 9. The statutes of the different states and territories have modified in a number of instances the common law position which required that the deed is written on parchment, vellum or paper, sealed with a seal placed on the document and physically delivered to the other party. It has been observed in the past that '[p]art of that security [of deeds] comes from the way in which it is created': Ryan and Taylor (n 75) 41.

<sup>83</sup> Interviewees 5, 16 and 24.

<sup>84</sup> As to the historical developments prompting the establishment of the formal deeds' requirements see generally Graham McBain, 'Abolishing Deeds, Specialties and Seals: Part I' (2006) 20(1) *Commercial Law Quarterly* 15, 19–25. See also *Goddard's Case* (n 82) 398.

Thus, it is not surprising that there are calls for legislative changes to these requirements so that the accent is on the fact that the ‘deed was made, and that it was delivered, regardless of the form of its delivery’.<sup>85</sup> Some jurisdictions have, in the past, responded to these initiatives. For instance, even before the pandemic, Victoria removed the requirement for the signature of the deed to be witnessed.<sup>86</sup> South Australia and Tasmania introduced provisions that delivery is not necessary in each case,<sup>87</sup> while the laws of Western Australia specify that ‘[f]ormal delivery [is] ... not necessary in any case’.<sup>88</sup> These individual approaches implemented by jurisdictions changed the manner in which deeds were generated.<sup>89</sup> The COVID-19 pandemic has further illustrated the need to change the way deeds are dealt with and this has occurred through some of the legislative amendments that have been enacted as a result.

(a) *Deeds Signed by Companies*

As a result of lawyers lobbying, a perfect example of a positive change in the way e-signature is relied on can be found in the context of deeds signed by companies. Corporations are exempt from the application of the *ET Act*.<sup>90</sup> Consequently, up until 2020, s 127 of the *Corporations Act 2001* (Cth) (*‘Corporations Act’*) precluded companies from signing deeds electronically.<sup>91</sup> Furthermore, if e-signature was used, the protections under s 129 which are available to parties signing contracts with a company could not be relied on as those protections are dependent on compliance with s 127.<sup>92</sup> As such, the safest way for a contract to be signed was using wet ink signatures.

However, as a result of the pandemic, temporary amendments to this legislation were needed and initially introduced under the *Corporations (Coronavirus Economic*

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<sup>85</sup> Adrian McCullagh, Peter Little and William Caelli, ‘Electronic Signatures: Understand the Past to Develop the Future’ (1998) 21(2) *University of New South Wales Law Journal* 452, 462. In their joint submission to the Deregulation Taskforce, four big law firms Allens, Ashurst, King & Wood Mallesons and Norton Rose Fulbright outlined that deeds are ‘overdue for general reform’: Allens et al (n 46) 2. These firms further argued that contracts and deeds enjoy the same level of importance so the ways in which they are executed should be the same: at 2.

<sup>86</sup> *Property Law Act 1958* (Vic) s 73; Diccon Loxton, ‘Not Worth the Paper They’re Not Written On? Executing Documents (Including Deeds) under Electronic Documentation Platforms: Part B’ (2017) 91(3) *Australian Law Journal* 205, 212.

<sup>87</sup> See: *Law of Property Act 1936* (SA) s 41(3); *Conveyancing and Law Property Act 1884* (Tas) s 63(3).

<sup>88</sup> *Property Law Act 1969* (WA) s 9(3); Loxton (n 86) 212–13.

<sup>89</sup> Loxton (n 86) 212–13.

<sup>90</sup> *Electronic Transactions Regulations 2020* (Cth) reg 6 sch 1 cl 1 items 23, 24.

<sup>91</sup> See, eg, *Bendigo and Adelaide Bank Limited v Russo* [2019] NSWSC 661, [91]: ‘it is still the case that a deed must be written on parchment or paper’.

<sup>92</sup> See *Corporations Act* (n 24) ss 129(5), (6) as at 25 January 2022. Section 129 provides a number of assumptions that an outsider may make when dealing with a company.

*Response) Determination (No 3) 2020* (Cth).<sup>93</sup> These amendments relaxed the requirements under s 127 of the *Corporations Act* and allowed documents, including deeds, to be signed and executed electronically but only for a limited period of time. Legal practitioners were very receptive of the changes introduced with the temporary amendments.<sup>94</sup> One of the interviewees remarked that

[o]ne of the good aspects of COVID was that the government put in place temporary COVID measures which actually allowed corporations — or removed some of the great uncertainty for corporations — to execute documents electronically and that really gave us a lot of impetus because many or most of our clients are corporations. ... So, that looked really, really promising but alas, the COVID measures were only temporary and they expired.<sup>95</sup>

The positive effects and opportunities offered by the electronic signing of documents prompted legal practitioners to take an active part in lobbying<sup>96</sup> and consulting the governmental bodies that considered the need for a permanent reform of the law in this area.<sup>97</sup> More specifically, along with industry stakeholders,<sup>98</sup> lawyers supplied their proposals to the government with respect to the potential reforms of ss 126 or 127 of the *Corporations Act*<sup>99</sup> and they supported the move toward an e-signature

<sup>93</sup> See *Corporations (Coronavirus Economic Response) Determination (No 3) 2020* (Cth) s 6. The *Treasury Laws Amendment (2021 Measures No 1) Act 2021* (Cth) sch 1 pt 3 cl 34 extended their application until March 2022 due to the continuing impact of the pandemic.

<sup>94</sup> See John Keeves, ‘*Treasury Laws Amendment (2021 Measures No 1) Act 2021: Now in Force*’, *Johnson Winter Slattery* (Blog Post, August 2021) <<https://jws.com.au/en/insights/articles/2021-articles/tlab-1-passes-senate-with-amendments>>: ‘[t]his is a welcome and overdue reform’.

<sup>95</sup> Interviewee 19.

<sup>96</sup> Diccon Loxton, ‘Signing Documents Remotely’, *Allens* (Web Page, 3 March 2022) <<https://www.allens.com.au/insights-news/insights/2021/08/signing-documents-remotely-a-regulatory-timeline/#anchor12>>.

<sup>97</sup> ‘As a part of the Government’s Digital Business Plan in the 2020–21 Budget, the Government consulted on making the temporary relief permanent’: Revised Explanatory Memorandum, Corporations Amendment (Meetings and Documents) Bill 2021 (Cth) 4 (‘Revised Explanatory Memorandum’). The consultation process is summarised at 42–5.

<sup>98</sup> Revised Explanatory Memorandum (n 97) 44. This document outlined that apart from the Law Council of Australia, other institutions including the Australian Banking Association, Australian Institute of Company Directors, Australasian Investor Relations Association, Business Council of Australia and Governance Institute of Australia took an active role in the consultation and made submissions: at 45.

<sup>99</sup> These submissions were addressed to the Deregulation Taskforce within the Department of the Prime Minister and Cabinet who was entitled to enforce the Government’s Deregulation Agenda. For a discussion of the options put forward, see: Revised Explanatory Memorandum (n 97) 32, 48–9; Law Council of Australia, Submission to Deregulation Taskforce, Department of the Prime Minister and



in the context of deeds in corporate law.<sup>100</sup> The calculations made as a part of the consultation process demonstrated that if the legislator opts for the use of e-signatures, then the regulatory savings from companies being able to sign and send documents electronically might lead up to \$430 million per year over the course of 10 years.<sup>101</sup>

All this lobbying resulted in the introduction of the Corporations Amendment (Meetings and Documents) Bill 2021 (Cth).<sup>102</sup> The new Bill inserted legislative notes to sub-ss (1), (2A) and (3) of s 127 of the *Corporations Act* to amend the text and to make it clear that company documents, including deeds, can be executed ‘in flexible and technology neutral manners’.<sup>103</sup> The Bill received royal assent on 22 February 2022, meaning that from 1 April 2022, companies were no longer required to sign, seal and deliver their deeds in paper form but could execute them electronically. The method of signing a contract is now inclusive of electronic forms.<sup>104</sup> This further mirrors to a large extent s 10 of the *ET Act*. However, one key difference is that there is no mention of consent under ss 110, 110A of the *Corporations Act*.<sup>105</sup> These changes to the *Corporations Act* were greatly welcomed by corporate law firms that had been keen to adopt e-signatures when dealing with corporations but had been hesitant in the past to do so.

#### (b) *Deeds Signed by Individuals*

Some of our interviewees flagged that the lack of harmonisation between the laws attached to deeds in the different states and territories was a regulatory barrier that had led them in the past to either shy away from the use of e-signatures or stop them from practising in these areas.<sup>106</sup> This perspective is not new but is also reflected in the Law Council of Australia’s submission on this topic where it outlined that

the various and inconsistent formal (and in some cases archaic) state-by-state requirements mean that electronic document execution of deeds across jurisdictions is at worst impossible, and at best fraught with danger.<sup>107</sup>

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Cabinet, *Modernising Document Execution* (8 October 2021) <<https://deregulation.pmc.gov.au/sites/default/files/consultations/submissions/2021/Law%20Council%20of%20Australia.pdf>> (‘Law Council of Australia Submission’).

<sup>100</sup> Revised Explanatory Memorandum (n 97) 28–9.

<sup>101</sup> For further information on how this amount is calculated and where the savings come from, see *ibid* 38, 40.

<sup>102</sup> *Ibid* 47.

<sup>103</sup> *Ibid* 5; Corporations Amendment (Meetings and Documents) Bill 2021 (Cth) sch 1 cls 6–10.

<sup>104</sup> *Corporations Amendment (Meetings and Documents) Act 2022* (Cth); *Corporations Act* (n 24) ss 110(1), 110A. It is noted at s 110A(1) that a ‘document (including a deed) may be executed by or on behalf of a company without the use of paper, parchment or vellum: see subsections 126(6) and 127(3A)’.

<sup>105</sup> Consent provisions are included under *ET Act* (n 17) s 10(1)(d). See also *Corporations Act* (n 24) ss 110, 110A.

<sup>106</sup> Interviewees 8 and 16.

<sup>107</sup> Law Council of Australia Submission (n 99) 7 [18].

As a result of these risks, lawyers at some of the big law firms reported that they were advising clients to avoid using deeds where possible.<sup>108</sup> Further, in their lobbying for change, lawyers have questioned the necessity and purpose of preserving the solemnity of the deeds in a post-pandemic world. The Law Council of Australia hence recommended that the execution of deeds should be facilitated with the use of e-signatures and audio-visual link ('AVL') witnessing.<sup>109</sup> The Law Council of Australia went even further to recommend that witnessing is dispensed 'where technology can provide sufficiently robust evidence of due execution'.<sup>110</sup>

Today, despite all the lobbying that has taken place, the legislative landscape still remains divided between opposition to and support for e-signatures.<sup>111</sup> For example, South Australia<sup>112</sup> and Western Australia,<sup>113</sup> are among the jurisdictions which have continued to apply their existing prohibition on e-signatures in the text of their respective legislation.<sup>114</sup> This means the deed cannot be executed electronically. Given that the pandemic has not led to months of lockdown in these jurisdictions, reforms of the legislation in this area of e-signatures have been slow.

Other jurisdictions in Australia have a different attitude. For instance, even prior to the pandemic, New South Wales had passed legislation amending the *Conveyancing Act 1919* (NSW) in 2018 to allow deeds to be made and signed electronically.<sup>115</sup>

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<sup>108</sup> Allens et al (n 46) 6.

<sup>109</sup> Law Council of Australia Submission (n 99) 9–10.

<sup>110</sup> Ibid 10 [36]. In making this recommendation, the Law Council of Australia pointed to Queensland and Victoria where the absence of witnessing requirements 'does not appear to have created significant problems in this regard': at 10 [35]. A similar recommendation was made in Clayton Utz, Submission to Deregulation Taskforce, Department of the Prime Minister and Cabinet, *Modernising Document Execution* (8 October 2021) 2 <<https://deregulation.pmc.gov.au/sites/default/files/consultations/submissions/2021/Clayton%20Utz.pdf>>.

<sup>111</sup> Australasian Cyber Law Institute Electronic Wills and Online Witnessing Committee, Submission to Deregulation Taskforce, Department of the Prime Minister and Cabinet, *Modernising Document Execution* (14 October 2021) 11 <<https://deregulation.pmc.gov.au/sites/default/files/consultations/submissions/2021/Australasian%20Cyber%20Law%20Institute%20-%20Electronic%20Wills%20and%20Online%20Witnessing%20Committee.pdf>> ('ACLIEWOWC Submission'); Loxton (n 86) 224.

<sup>112</sup> *Law of Property Act 1936* (SA) s 41. Without express provision regarding the application of the signature, s 7 of the *Electronic Communication Act 2000* (SA) does not apply to deeds in this context as deeds fall under the exclusion in reg 5(1)(a) of the *Electronic Communications Regulations 2017* (SA).

<sup>113</sup> *Property Law Act 1969* (WA) s 9. Without express provision regarding the application of the signature, s 8 of the *Electronic Transactions Act 2011* (WA) does not apply to deeds in this context as deeds fall under the exemptions in reg 3(1)(b) of the *Electronic Transactions Regulations 2012* (WA).

<sup>114</sup> Similar prohibitions are also in place in the Australian Capital Territory, the Northern Territory and Tasmania where the common law principles regarding the execution of deeds as modified by statute still apply and as such the statutory provisions require a clear acceptance of electronic signatures. See, for example, the discussion on this in Nicholas Seddon, *Seddon on Deeds* (Federation Press, 2015) 97–101.

<sup>115</sup> *Conveyancing Act 1919* (NSW) ss 38, 38A.

Yet, despite the fact that the witnessing of deeds was a mandatory requirement at the time in New South Wales, the legislator did not incorporate provisions for remote witnessing within the law.<sup>116</sup> The pandemic, however, highlighted the need for change in this regard. This gap was filled with the enactment of the *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW) which allows for documents, including deeds, to be witnessed by way of AVL.<sup>117</sup> This temporary legislative amendment, which was set to expire on 1 January 2022, has been made permanent through the recent enactment of the *Electronic Transactions Amendment (Remote Witnessing) Act 2021* (NSW). Similarly, as a result of the pandemic, other jurisdictions such as Queensland<sup>118</sup> and Victoria<sup>119</sup> have also introduced legislation of a permanent character, allowing parties to sign their deeds electronically by removing the requirement for these documents to be signed, sealed, delivered and also witnessed.<sup>120</sup>

## 2 Wills

Another area highlighted by some of our interviewees as problematic with respect to the application of e-signatures was wills. As with deeds, the challenges here arise due to the requirements one needs to observe with respect to the solemn form and the discrepancy in the state and territory laws in the use of e-signatures. As discussed below, prior to COVID-19, the formal requirements which make a will legally binding target evidence of a signature by the testator in the physical presence of at least two witnesses whose signatures are affixed on the same copy of the document.<sup>121</sup> Consequently, in the past, it has been observed that the ‘formalities of a will or of a power of attorney help to create certainty regarding a future state’.<sup>122</sup> Scholarly observations on the topic indicate that formalities have a therapeutic role given that rituals can often help manage anxiety and other emotions pertinent to

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<sup>116</sup> Ibid.

<sup>117</sup> An audio visual link (‘AVL’) is defined as ‘technology that enables continuous and contemporaneous audio and visual communication between persons at different places, including video conferencing’: *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW) sch 1 cl 2.

<sup>118</sup> See *Justice and Other Legislation Amendment Act 2021* (Qld) pt 8, amending *Property Law Act 1974* (Qld).

<sup>119</sup> See *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic) s 67. According to the Explanatory Memorandum,

[n]ew section 12(4) clarifies that new section 12(1) does not otherwise interfere with other laws of Victoria including common law and equity, such as the law of misrepresentation, unconscionability, undue influence or duress. Parties and witnesses are still bound by these doctrines and are still required to meet the common law or equitable duties that may arise in witnessing a transaction.

Explanatory Memorandum, *Justice Legislation Amendment (System Enhancements and Other Matters) Bill 2021* (Vic) 40.

<sup>120</sup> See, eg, *Justice and Other Legislation Amendment Act 2021* (Qld) s 51, amending the *Property Law Act 1974* (Qld).

<sup>121</sup> See, eg, *Succession Act 2006* (NSW) s 6.

<sup>122</sup> Ryan and Taylor (n 75) 11.

the security of the documents.<sup>123</sup> Insofar as witnessing is concerned, the ritual ‘is intended to reinforce the shared social norms of honesty by requiring the person signing (and the witness) to do this publicly’.<sup>124</sup> The solemn form of wills also creates a range of problems for the lawyers who need to store the copies of those documents often for a very long period of time. To that end, lawyers have advocated that there should be a national wills bank which stores digital copies of these documents.<sup>125</sup>

Even the onset of the pandemic did not result in the introduction of uniform legislation in this area. While some jurisdictions such as the Australian Capital Territory,<sup>126</sup> New South Wales,<sup>127</sup> and Victoria<sup>128</sup> made changes to their existing legislation offering flexibility in using e-signatures for wills, other jurisdictions such as the Northern Territory,<sup>129</sup> Queensland,<sup>130</sup> South Australia,<sup>131</sup> Tasmania,<sup>132</sup> and Western Australia<sup>133</sup> remain reticent in this regard without judicial approval.

<sup>123</sup> Ibid. See also Mark Glover, ‘The Therapeutic Function of Testamentary Formality’ (2012) 61(1) *University of Kansas Law Review* 139.

<sup>124</sup> Ryan and Taylor (n 75) 11.

<sup>125</sup> ACLIEWOWC Submission (n 111) 24.

<sup>126</sup> *COVID-19 Emergency Response Act 2020* (ACT) s 4, as at 28 September 2022. This provision expired on 29 December 2022.

<sup>127</sup> *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW); *Electronic Transactions Amendment (Remote Witnessing) Act 2021* (NSW); *Electronic Transactions Act 2000* (NSW) s 14F(a) (definition of ‘document’).

<sup>128</sup> *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic) pt 12.

<sup>129</sup> See *Wills Act 2000* (NT) s 8. However, the Court may dispense with formal requirements: at s 10.

<sup>130</sup> In Queensland the provisions allowing for remote witnessing of wills via AVL under pt 2 of the *Justice Legislation (COVID-19 Emergency Response — Wills and Enduring Documents) Regulation 2020* (Qld) were repealed on 1 July 2021, meaning that these documents now must have wet ink signatures witnessed by physically present witnesses according to s 10 of the *Succession Act 1981* (Qld). Yet, according to ss 18(1)–(2) of the *Succession Act 1981* (Qld), the requirements regarding the execution, alteration or revocation of a will, whether targeting the whole document or part of a document which ‘forms a will, an alteration of a will, or a full or partial revocation of a will, of [a] deceased person’ may be dispensed with ‘if the court is satisfied that the person intended the document or part to form the person’s will, an alteration to the person’s will or a full or partial revocation of the person’s will’. In making this decision, ‘the court may, in addition to the document or part, have regard to: — (a) any evidence relating to the way in which the document or part was executed; and (b) any evidence of the person’s testamentary intentions, including evidence of statements made by the person’: at s 18(3). See, eg, *Re Nichol* [2017] QSC 220.

<sup>131</sup> *Wills Act 1936* (SA) s 8. However, the Supreme Court of South Australia may dispense with the formal requirements pursuant to s 12 of this Act.

<sup>132</sup> *Wills Act 2008* (Tas) s 8. However, the Supreme Court of Tasmania may dispense with the formal requirements pursuant to s 10 of this Act.

<sup>133</sup> See *Wills Act 1970* (WA) s 8. However, the Supreme Court of Western Australia may dispense with the formal requirements pursuant to s 32 of this Act.

**Table 1: E-Signatures for Wills**

Jurisdiction	Law	Legislative amendments implemented to allow e-signature and remote witnessing of wills
<b>Status of the amendments — Permanent</b>		
<b>New South Wales</b>	<i>Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020</i> (NSW); and <i>Electronic Transactions Amendment (Remote Witnessing) Act 2021</i> (NSW)	Pursuant to these amendments, which are now incorporated into the <i>Electronic Transactions Act 2000</i> (NSW), a will <sup>134</sup> can be electronically signed and witnessed if all of the requirements of the remote witnessing procedure are followed. This requires the witness to: <ul style="list-style-type: none"> <li>• observe the testator signing the document ‘in real time’;<sup>135</sup></li> <li>• ‘attest or otherwise confirm the signature was witnessed by signing the document or a copy of the document’;<sup>136</sup></li> <li>• be ‘reasonably satisfied’ that the document they sign is the same document that the testator signed;<sup>137</sup> and</li> <li>• endorse the document with a statement specifying how the document was witnessed,<sup>138</sup> and that the document was witnessed in accordance with the law.<sup>139</sup></li> </ul>

<sup>134</sup> While this table is focused on wills, the provisions also apply to a range of other documents including a power of attorney or an enduring power of attorney, a deed or agreement, an enduring guardianship appointment, an affidavit, including an annexure or exhibit to the affidavit and a statutory declaration.

<sup>135</sup> *Electronic Transactions Act 2000* (NSW) s 14G(2)(a).

<sup>136</sup> *Ibid* s 14G(2)(b).

<sup>137</sup> *Ibid* s 14G(2)(c).

<sup>138</sup> *Ibid* s 14G(2)(d)(i).

<sup>139</sup> *Ibid* s 14G(2)(d)(ii).

<b>Jurisdiction</b>	<b>Law</b>	<b>Legislative amendments implemented to allow e-signature and remote witnessing of wills</b>
<b>Victoria</b>	<i>Justice Legislation Amendment (System Enhancement and Other Matters) Act 2021</i> (Vic) <sup>140</sup>	<p>Pursuant to these provisions which amended the <i>Wills Act 1997</i> (Vic):</p> <ul style="list-style-type: none"> <li>• it is mandatory that all parties are present at the time the testator signs the will, either physically or via AVL;<sup>141</sup></li> <li>• in the case where the testator signs the will in the presence of a witness who is present remotely, one of the witnesses must be a special witness;<sup>142</sup></li> <li>• all witnesses (attending physically or via AVL) must be able to see clearly the signature of the will by the testator,<sup>143</sup> or the substitute signatory that signs the will on their behalf;<sup>144</sup></li> <li>• once the testator or the substitute signatory signs the will, they need to transmit it to the witnesses attending by AVL who must then affix their signatures;<sup>145</sup></li> <li>• the special witness is the last person to sign the will,<sup>146</sup> given that the law imposes an obligation on them to determine if the will is signed in accordance with the remote execution procedure requirements; and<sup>147</sup></li> <li>• all of these actions need to be carried out on the same day and all parties need to be within Victoria.<sup>148</sup></li> </ul>

<sup>140</sup> Section 81 of the *Justice Legislation Amendment (System Enhancement and Other Matters) Act 2021* (Vic) amended the *Wills Act 1997* (Vic) by inserting ss 8A and 8D.

<sup>141</sup> *Wills Act 1997* (Vic) s 8A(4)(a).

<sup>142</sup> *Ibid* s 8A(2).

<sup>143</sup> *Ibid* s 8A(4)(a).

<sup>144</sup> *Ibid* s 8A(4)(b).

<sup>145</sup> *Ibid* s 8A(7).

<sup>146</sup> *Ibid* s 8A(6).

<sup>147</sup> *Ibid* s 8A(7)(d).

<sup>148</sup> *Ibid* s 8A(3).

Jurisdiction	Law	Legislative amendments implemented to allow e-signature and remote witnessing of wills
<b>Status of the amendments — Temporary</b>		
<b>Australian Capital Territory</b>	<i>COVID-19 Emergency Response Act 2020</i> (ACT) <sup>149</sup>	Under this <i>Act</i> , a witness was required to: <ul style="list-style-type: none"> <li>• observe the signing in ‘real time’;<sup>150</sup></li> <li>• confirm that the signature was witnessed by signing the same document or a copy of the document signed by the testator;<sup>151</sup></li> <li>• be ‘reasonably satisfied’ that the document the witness signed is the same document, or a copy of the document, signed by the testator;<sup>152</sup> and</li> <li>• endorse the document with a statement specifying the method used to witness the signature and that the witnessing was in accordance with the <i>Act</i>.<sup>153</sup></li> </ul>

Yet the fact that legislative amendments enabled the process of remote execution does not mean that it became immune to challenges. Its complexity surfaced in *Re Curtis*.<sup>154</sup> In this case the Supreme Court of Victoria found that a will was not properly executed given that the testator’s laptop and hand were not visible on the screen during the process of remote execution via AVL.<sup>155</sup> As observed by the Court:

In the context of an electronic signature, ‘clearly seeing’ the signature ‘being made’ requires the witnesses to observe the testator operating the computer or device to apply the signature, and the signature appearing on the electronic document as they do so. This may be achieved by the testator sharing their screen whilst they appear on the audio-visual link. Alternatively, in circumstances like the present, it may require adjusting the angle of the camera on the device from which the audio-visual link is being operated to allow the witnesses to see the testator, their actions and the document. It is only by seeing the testator operating the computer or device to apply the signature and the signature appearing on the electronic document that the witnesses can be truly satisfied that it is the testator who has applied the electronic signature.<sup>156</sup>

<sup>149</sup> This Act introduced temporary arrangements during the COVID-19 pandemic and expired on 29 September 2023.

<sup>150</sup> *COVID-19 Emergency Response Act 2020* (ACT) s 4(3)(a), as at 28 December 2022.

<sup>151</sup> *Ibid* s 4(3)(b).

<sup>152</sup> *Ibid* s 4(3)(c).

<sup>153</sup> *Ibid* s 4(3)(d).

<sup>154</sup> (2022) 68 VR 40 (*‘Re Curtis’*).

<sup>155</sup> According to s 8A(4) of the *Wills Act 1997* (Vic), remote execution requires that the will is signed in the presence of witnesses who must be able to see ‘clearly’ the testator’s signature being made by AVL.

<sup>156</sup> *Re Curtis* (n 154) 66 [116].

This decision arguably provides the needed guidance to practitioners who are utilising the remote execution procedure under the *Wills Act 1997* (Vic), as will be noted later on in this article.

### 3 Powers of Attorney

Further to deeds and wills, another document pointed out by some of our interviewees as problematic in this context was powers of attorney given that they cannot be signed electronically in a range of jurisdictions.<sup>157</sup> This exclusion is perhaps understandable as this legal document grants a person, or trustee organisation, the legal authority to act for or to manage a person's assets and make financial and legal decisions on their behalf.<sup>158</sup>

The relevant legislation in the Northern Territory,<sup>159</sup> South Australia,<sup>160</sup> Tasmania,<sup>161</sup> and Western Australia<sup>162</sup> does not allow documents attesting creation or revocation of a power of attorney to be signed or executed electronically. At the outset of the pandemic, the Australian Capital Territory introduced temporary laws that enabled powers of attorney to be signed electronically and witnessed by AVL in the presence of a special witness.<sup>163</sup> Similar stances were adopted by New South Wales,<sup>164</sup> Queensland,<sup>165</sup> and Victoria,<sup>166</sup> with a difference being that the amendments in these jurisdictions are not temporary but permanent. This is summarised below in Table 2.

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<sup>157</sup> See: *Powers of Attorney and Agency Act 1984* (SA) ss 5–6; *Powers of Attorney Act 2000* (Tas) s 9; *Guardianship and Administration Act 1990* (WA) s 104.

<sup>158</sup> See 'What is a Power of Attorney?', *NSW Trustee and Guardian* (Web Page) <<https://www.tag.nsw.gov.au/wills/make-power-attorney/what-power-attorney>>.

<sup>159</sup> *Electronic Transactions (Northern Territory) Regulations 2001* (NT) reg 3(1).

<sup>160</sup> *Powers of Attorney and Agency Act 1984* (SA) s 6.

<sup>161</sup> *Electronic Transactions Regulations 2011* (Tas) s 4; *Powers of Attorney Act 2000* (Tas) s 9.

<sup>162</sup> *Guardianship and Administration Act 1990* (WA) s 104.

<sup>163</sup> *COVID-19 Emergency Response Act 2020* (ACT) reg 4, as at 28 December 2022.

<sup>164</sup> *Electronic Transactions Amendment (Remote Witnessing) Act 2021* (NSW).

<sup>165</sup> *Justice and Other Legislation Amendment Act 2021* (Qld) pt 7.

<sup>166</sup> *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic) pt 12.



**Table 2: E-Signatures for Powers of Attorney**

Jurisdiction	Law	Legislative amendments implemented to allow e-signature and remote witnessing of powers of attorney
<b>Status of the amendments — Permanent</b>		
<b>New South Wales</b>	<i>Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020</i> (NSW); and <i>Electronic Transactions Amendment (Remote Witnessing) Act 2021</i> (NSW).	The procedure for e-signature and remote witnessing of powers of attorney and enduring powers of attorney by the principal is the same as the one for wills (see above Table 1 for specifications). <sup>167</sup>
<b>Victoria</b>	<i>Justice Legislation Amendment (System Enhancement and Other Matters) Act 2021</i> (Vic) <sup>168</sup>	The procedure for e-signature and remote witnessing of powers of attorney by the principal is the same as the one for wills (see above Table 1 for specifications). <sup>169</sup>
<b>Queensland</b>	<i>Justice and Other Legislation Amendment Act 2021</i> (Qld) <sup>170</sup>	Powers of attorney may be in the form of an electronic document and electronically signed as long as an accepted method for electronically signing is followed. <sup>171</sup> A method is considered accepted if it is: <sup>172</sup> (a) a method prescribed under section 24G; or (b) if no method is prescribed, and subject to a regulation prescribing under section 24G a method that is not an accepted method for electronically signing a general power of attorney, a method that — (i) identifies the signatory for the document and the signatory's intention in relation to the contents of the document; and

<sup>167</sup> *Electronic Transactions Act 2000* (NSW) s 14G.

<sup>168</sup> Section 90 of the *Justice Legislation Amendment (System Enhancement and Other Matters) Act 2021* (Vic) amended the *Powers of Attorney Act 2014* (Vic) by inserting ss 5A–5D.

<sup>169</sup> *Powers of Attorney Act 2014* (Vic) ss 5A–5D.

<sup>170</sup> Section 46 of the *Justice and Other Legislation Amendment Act 2021* (Qld) amended the *Powers of Attorney Act 1998* (Qld) by inserting ch 2 pt 3A which regulates the method of e-signature of powers of attorney.

<sup>171</sup> *Powers of Attorney Act 1998* (Qld) s 24F.

<sup>172</sup> *Ibid* s 24A.

<b>Jurisdiction</b>	<b>Law</b>	<b>Legislative amendments implemented to allow e-signature and remote witnessing of powers of attorney</b>
		(ii) is either — (A) as reliable as appropriate for the purpose for which the document is signed, having regard to all the circumstances, including any relevant agreement; or (B) proven in fact to have fulfilled the functions described in subparagraph (i), by itself or together with further evidence.
<b>Status of the amendments – Temporary</b>		
<b>Australian Capital Territory</b>	<i>COVID-19 Emergency Response Act 2020 (ACT)</i>	The procedure for e-signature and remote witnessing of powers of attorney and enduring powers of attorney by the principal is the same as the one for wills (see above Table 1 for specifications). <sup>173</sup>

### B Implications of the Lack of Uniform Law

While at first glance, regulatory barriers to e-signatures are not apparent due to the electronic neutrality of the law, 13 interviewees, despite being supportive of the use of e-signatures, had negative feelings attached to their use. These feelings were centred around the lack of harmonisation of the law of e-signatures in the area of deeds, wills and powers of attorney. This lack of harmonisation is summarised in the below table.

<sup>173</sup> *COVID-19 Emergency Response Act 2020 (ACT)* s 4(3)(a), as at 28 December 2022. See above Table 1.

**Table 3: Summary of Pre-Temporary and Post-COVID Positions**

Documents	Pre-COVID Position	COVID Impact — Temporary Measures	Post COVID Position — Permanent Arrangements
Deeds	With the exception of New South Wales whose legislation allowed for e-signature of deeds, <sup>174</sup> the formal requirements implemented in all Australian jurisdictions prohibited e-signature of deeds by individuals. Additionally, there was no option for the signature to be witnessed via AVL.	The Commonwealth <sup>175</sup> and some states and territories <sup>176</sup> introduced temporary amendments to allow for e-signatures, split execution and remote witnessing of these documents.	At a federal level, e-signature and split execution of documents has become a permanent option. <sup>177</sup> New South Wales, <sup>178</sup> Victoria, <sup>179</sup> and Queensland <sup>180</sup> allow the signature and execution of their deeds electronically (no requirement for witnessing of the signature). There has been no change for the remaining states and territories. <sup>181</sup>

<sup>174</sup> *Conveyancing Act 1919* (NSW) ss 38, 38A.

<sup>175</sup> *Treasury Laws Amendment (2021 Measures No 1) Act 2021* (Cth) sch 1 amending *Corporations Act* (n 24) s 127.

<sup>176</sup> Temporary legislation was introduced in New South Wales through the *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW) sch 1 which amended the *Electronic Transactions Regulation 2017* (NSW) by inserting sch 1 (titled ‘Response to COVID-19 pandemic’). In Queensland, temporary measures for the electronic signing of legal documents were introduced under the *Justice Legislation (COVID-19 Emergency Response — Documents and Oaths) Regulation 2020* (Qld). Both jurisdictions now have permanent legislation. Permanent legislation was also introduced in Victoria: see *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic) s 67, amending *Electronic Transactions (Victoria) Act 2000* (Vic).

<sup>177</sup> The *Corporations Amendment (Meetings and Documents) Act 2022* (Cth) sch 1 (titled ‘Signing and executing documents’) amended the *Corporations Act* (n 24) by inserting pt 1.2AA ss 110, 110A, 110B, 126, 127, 129(5)–(6).

<sup>178</sup> The *Electronic Transactions Amendment (Remote Witnessing) Act 2021* (NSW) sch 1 amended the *Electronic Transactions Act 2000* (NSW) ss 14F, 14H–14L. The *Electronic Transactions Amendment (Remote Witnessing) Act 2021* (NSW) sch 2 amended the *Oaths Act 1900* (NSW) ss 18, 26.

<sup>179</sup> *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic) is comprehensive legislation that amends various Victorian statutes including the *Electronic Transactions Act 2000* (Vic), *Oaths and Affirmations Act 2018* (Vic), *Wills Act 1997* (Vic) and the *Powers of Attorney Act 2014* (Vic).

<sup>180</sup> The *Justice and Other Legislation Amendment Act 2021* (Qld) is comprehensive legislation that amends various Queensland statutes including the *Oaths Act 1867* (Qld), *Powers of Attorney Act 1998* (Qld) and the *Property Law Act 1974* (Qld).

<sup>181</sup> See: *Civil Law (Property) Act 2006* (ACT) ch 2 pt 2.3 div 2.3.1; *Law of Property Act 1936* (SA) s 41; *Conveyancing and Law of Property Act 1884* (Tas) s 63; *Property Law Act 1969* (WA) s 9.

Wills	There existed a general prohibition on the use of e-signatures in Australia.	Few states introduced temporary measures. <sup>182</sup>	Except for New South Wales <sup>183</sup> and Victoria, <sup>184</sup> the other jurisdictions do not have permanent arrangements for the signing and execution of wills electronically. <sup>185</sup>
Powers of Attorney	The formal requirements implemented under the laws of all Australian jurisdictions prohibited electronic execution of powers of attorney.	Few states introduced temporary measures. <sup>186</sup>	Except for New South Wales, <sup>187</sup> Queensland, <sup>188</sup> and Victoria, <sup>189</sup> the other jurisdictions <sup>190</sup> do not have any permanent legislation that is applicable in the context of e-signature of powers of attorney.

Consequently, law firms who wish to operate nationally in these areas have to comply with requirements under multiple regimes to enforce valid e-signatures for their documents. The patchwork of regimes has proved particularly burdensome and frustrating for these lawyers.<sup>191</sup> One interviewee reflected this reality, stating that, although improvements have occurred as a result of COVID, ‘[i]t’s still a lot to

<sup>182</sup> Queensland used to rely on temporary legislation under the *Justice Legislation (COVID-19 Emergency Response — Wills and Enduring Documents) Amendment Regulation 2020* (Qld), which has since been repealed.

<sup>183</sup> See above n 178.

<sup>184</sup> *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic) pt 12 made numerous amendments to the *Wills Act 1997* (Vic).

<sup>185</sup> See: *Wills Act 1936* (SA) s 8; *Wills Act 2008* (Tas) s 8; *Wills Act 1970* (WA) s 8. As noted previously the court may dispense with formalities under certain circumstances. See, eg: *Wills Act 2000* (NT) s 10; *Succession Act 1981* (Qld) s 18; *Wills Act 1936* (SA) s 12; *Wills Act 2008* (Tas) s 10; *Wills Act 1970* (WA) s 32.

<sup>186</sup> See above n 182.

<sup>187</sup> See above n 178.

<sup>188</sup> The *Justice and Other Legislation Amendment Act 2021* (Qld) pt 7 amended the *Powers of Attorney Act 1998* (Qld) ss 12, 44 and inserted a new ch 2 pt 3A and ch 9 pt 5.

<sup>189</sup> *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic) pt 13 amended the *Powers of Attorney Act 2014* (Vic). See in particular *Powers of Attorney Act 2014* (Vic) ss 5A–5D.

<sup>190</sup> See: *Powers of Attorney Act 1980* (NT) s 6; *Powers of Attorney and Agency Act 1984* (SA) s 6; *Powers of Attorney Act 2000* (Tas) s 9; *Guardianship and Administration Act 1990* (WA) s 104.

<sup>191</sup> See: LodgeX Legal, Submission to Deregulation Taskforce, Department of the Prime Minister and Cabinet, *Modernising Document Execution* (8 October 2021) 2 <<https://deregulation.pmc.gov.au/sites/default/files/consultations/submissions/2021/LodgeX%20Legal.pdf>>; Allens et al (n 46) 4; Clayton Utz (n 110) 1.

work through ... obviously there's still not a consistency of approach'.<sup>192</sup> Another interviewee noted that '[d]igital signing needs an extreme overhaul in this country. It is getting closer as a result of COVID, but it is still quite ad hoc'.<sup>193</sup> Further, two interviewees noted that they do not extend their legal services to deeds, wills and powers of attorney as it is just too hard to juggle in law firms that are providing services to different jurisdictions.<sup>194</sup>

### *C Surmounting the Regulatory Barriers: Uniformity as a Way Forward?*

Accordingly, to deal with this justifiable frustration, a regulatory change is needed to align the positions in the different states and territories. For instance, national e-signature legislation that applies to all types of legal documents should be introduced. In an age of globalisation where legal transactions extend beyond jurisdictional lines, state-confined approaches (and their attendant divergences) are no longer appropriate to govern this aspect of law.<sup>195</sup> Uniformly applicable laws could provide a single regime for e-signatures for all transactions. Such an instrument could increase the clarity and predictability of the rules, enabling more efficient enforcement beyond jurisdictional lines.

Whether an initiative for harmonisation will be pursued, or whether a consensus will be reached on a national level, remains uncertain for now. Legal practitioners are, however, strongly supporting it.<sup>196</sup> Implementing a uniform instrument is not an easy process, not only because such efforts are 'often seen as an affront to sovereignty but also because of differences of opinion about what the various provisions of the harmonized laws mean and how those laws should be applied and enforced'.<sup>197</sup> However, it is important to remember that such a change will play a big role in removing the regulatory barriers to the use of e-signatures and consequently greater application of e-signatures. Perhaps, in the interim, to enable lawyers to further embrace the use of this mechanism, education and guidance is needed from employers, the law society of each state and territory, and regulators. The same will help to elucidate the similarities between electronic and wet ink signatures, and address practical, especially usage, barriers preventing the adoption of e-signatures by lawyers.

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<sup>192</sup> Interviewee 15.

<sup>193</sup> Interviewee 5.

<sup>194</sup> Interviewees 8 and 9.

<sup>195</sup> Law Council of Australia Submission (n 99) 14.

<sup>196</sup> See, eg: LodgeX Legal (n 191) 5; Clayton Utz (n 110) 1.

<sup>197</sup> Sharon K Sandeen, 'Through the Looking Glass: Trade Secret Harmonization as a Reflection of US Law' (2019) 25(2) *Boston University Journal of Science and Technology Law* 451, 452.

## IV ELECTRONIC SIGNATURES, LAWYERS AND PRACTICAL BARRIERS

In addition to the regulatory barriers, our interviews highlighted that in some instances lawyers' perceptions towards e-signatures and embracing change were the reasons why law firms have shied away from its use until recently. Those law firms found that they not only needed to surmount regulatory barriers but also remedy lawyers' existing and sometimes entrenched prejudices toward e-signatures. For instance, one interviewee summarised the issue in the following manner:

We understand that adoption, the regulatory part is one thing, but then adoption and the way people pick up and run with these tools is another thing. So, we understand that there is maybe a usage barrier there, but I think that has more to do with behaviours and people willing to change versus an actual regulatory barrier.<sup>198</sup>

*A Conservative Perceptions and Risk-Averse Attitudes as a Barrier*

One barrier to adopting e-signatures reflects the usage issue attached to e-signature and the way lawyers may perceive such usage.<sup>199</sup> Peoples' attitudes may be influenced by:<sup>200</sup>

- direct vs indirect experiences;
- good vs bad outcomes; and
- approach vs avoidance behaviours.

For a long time, lawyers have been hesitant to embrace technological changes because of negative direct or indirect experience, bad outcomes, or simply to avoid the unknown. The latter is especially true due to lawyers' conservative perceptions and risk-averse attitudes regarding the use of technology.<sup>201</sup> For instance, one interviewee noted that in terms of using new technology:

[In law firms], you've got 20 per cent laggards who are never going to change; you've got 10 per cent early adopters, who are out there ahead of the pack; then you've got 70 per cent in the middle. What we need to do in my job is to convert that 70 per cent, and then the 70 per cent will convert the 20 per cent. I just need to ignore the 20 per cent. I need the 70 per cent.<sup>202</sup>

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<sup>198</sup> Interviewee 4.

<sup>199</sup> See Geoffrey Haddock and Gregory Maio, 'Attitudes' in Miles Hewstone, Wolfgang Stroebe and Klaus Jonas (eds), *An Introduction to Social Psychology* (Blackwell, 5<sup>th</sup> ed, 2012) 171, 177.

<sup>200</sup> Gregory Maio, Geoffrey Haddock and Bas Verplanken, *The Psychology of Attitudes and Attitude Change* (SAGE, 3<sup>rd</sup> ed, 2019) 192.

<sup>201</sup> Agnieszka McPeak, 'Disruptive Technology and the Ethical Lawyer' (2019) 50(3) *University of Toledo Law Review* 457, 471.

<sup>202</sup> Interviewee 16.

Accordingly, shifting behaviour can be a challenge. The pandemic, however, has pushed and forced people, including those 20% ‘laggards’, to be exposed to different technologies such as e-signatures. As another interviewee noted:

COVID’s been extremely helpful for an innovator. ... One of the silver linings of COVID, the pandemic and the remote working, particularly from last March and April, is the increase of reliance on technologies [that lawyers were not comfortable with due to the attitude] if it ain’t broke, don’t fix it. So, [this attitude] does make it challenging [to alter behaviour].<sup>203</sup>

*B Surmounting the Conservative Perceptions and Risk-Averse Attitudes:  
The Pandemic and Education as a Remedy?*

It could be, therefore, argued that the pandemic has helped deal with instances where lawyers did not consider or ignored the benefits of e-signatures.<sup>204</sup> This is the case as the pandemic ensured that lawyers are exposed to a range of technology and must rely on e-signatures. This direct experience had a positive role in shaping lawyers’ perception, especially in New South Wales and Victoria where lockdowns were imposed for extended periods of time and the rules for social distancing and isolation made the physical signing of documents inconvenient and often impossible. The gravity of the situation prompted lawyers to re-evaluate the use of e-signatures, urging those who were previously reticent to embrace their use to see them gradually as an essential tool for the effectuation of legal transactions.<sup>205</sup>

Perceptions have hence changed during the pandemic, prompting lawyers to view e-signatures no longer as a commodity but a necessity.<sup>206</sup> For example, one interviewee noted that ‘[n]o firms were using e-signatures before COVID-19 hit. Things have changed now’.<sup>207</sup>

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<sup>203</sup> Interviewee 19.

<sup>204</sup> As to the psychological factors which may underpin lawyers’ attitudes regarding e-signatures prior to the pandemic, see Daryl J Bem, ‘Self-Perception Theory’ (1972) 6(1) *Advances in Experimental Social Psychology* 1, 2.

<sup>205</sup> The use of e-signatures intensified with the start of the pandemic. See: Nadia Rawlings, ‘Signing Electronically Explained’, *Bennett & Philp Lawyers* (Blog Post, 7 April 2021) <<https://www.bennettphilp.com.au/blog/signing-electronically-explained>>; Peter Sise, ‘The Legal Ramifications of a Falsely Applied Electronic Signature’, *Clayton Utz* (Blog Post, 1 October 2020) <<https://www.claytonutz.com/knowledge/2020/october/the-legal-ramifications-of-a-falsely-applied-electronic-signature>>.

<sup>206</sup> Eight of the participants in the study noted that their offices are completely paperless: interviewees 2, 8, 10, 11, 13, 15, 17 and 20. For pre-pandemic perceptions of e-signatures, see generally: Aashish Srivastava, ‘Legal Understanding and Issues with Electronic Signatures: An Empirical Study of Large Businesses’ (2008) 35(1) *Rutgers Computer and Technology Law Journal* 42, 42–59 (‘Legal Understanding and Issues with Electronic Signatures’); Aashish Srivastava, ‘Businesses’ Perception of Electronic Signatures: An Australian Study’ (2009) 6(1) *Digital Evidence and Electronic Signature Law Review* 46.

<sup>207</sup> Interviewee 16.

Further, to ensure a positive experience for perhaps more risk-averse lawyers in respect of the use of technology, education is needed. For instance, one interviewee distinctly highlighted this need by noting:

I mean because of the changes that were made to allow e-signatures throughout the COVID period, we used Adobe sign. As part of that we did have extensive education processes throughout at the start of [COVID] in terms of, okay we are now obviously going to be signing more documents electronically, what does that mean? What are the products that we can use? When you need to be wary, when do we need to be, you know, be careful? What do we see is acceptable? And there was a lot of thought put in by the partners who are experts in that area to understand what we were comfortable to do as a firm and then what was the technology to support that.<sup>208</sup>

It is important for these questions to be seriously considered by law firms so that lawyers appreciate the benefit of e-signatures. This education would add to the supportive law firm environment which may help shape lawyers' experiences and make them more positive.<sup>209</sup> This will also help lawyers shift their perception toward e-signatures.<sup>210</sup>

However, as lawyers are generally risk-averse,<sup>211</sup> risk attached to e-signatures as highlighted in the *Re Curtis* case discussed in Part III<sup>212</sup> needs to be considered. This point was reflected by one interviewee who noted that '[e]verybody was too cautious, being too risk-averse saying, we don't know whether [the use of] e-signature's going to be enforceable or safe. So we don't want to use it'.<sup>213</sup>

### C Security Concerns

Some concerns that are often associated with e-signatures relate to the ability of these signatures to emulate the same level of security and functional equivalence of handwritten signatures in terms of the identity of the signer and integrity of the message as well as compliance with other substantive laws, especially in the context of legal transactions.<sup>214</sup> One of the factors which may hinder lawyers' belief in their ability to use these signatures is the neutrality of the *ET Act* itself as there is little guidance on what to use in the legislative setting.

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<sup>208</sup> Interviewee 15.

<sup>209</sup> Maio, Haddock and Verplanken (n 200) 173.

<sup>210</sup> Shelly Chaiken and Mark W Baldwin, 'Affective-Cognitive Consistency and the Effect of Salient Behavioral Information on the Self-Perception of Attitudes' (1981) 41(1) *Journal of Personality and Social Psychology* 1.

<sup>211</sup> Julie Schaeffer, 'Lawyers Are Generally Risk-Averse' [2015] (January/February/March) *American Builders Quarterly* <[https://www.gibbsgiden.com/pdf/ABQ56\\_Gibbs%20Giden\\_ePrint.pdf](https://www.gibbsgiden.com/pdf/ABQ56_Gibbs%20Giden_ePrint.pdf)>.

<sup>212</sup> *Re Curtis* (n 154).

<sup>213</sup> Interviewee 16.

<sup>214</sup> Yee Fen Lim, 'Digital Signature, Certification Authorities and the Law' (2002) 9(3) *Murdoch University Electronic Journal of Law* 25.



This is compounded by the fact that, for a long time, there was a belief that wet ink signatures reflect ‘the attributes of both signer authentication and document authentication’.<sup>215</sup> For example, with the handwritten signature, the identity of the signer can be easily determined if the parties are physically present and they witness the moment of signing the document. But even if that is not the case, say the parties were not present and the identity of the signer is challenged, any issues can easily be resolved with the assistance of a handwriting analyst.<sup>216</sup> This analysis determines if the signature can be attributed to the signer via comparison of the challenged signature with a sample of the signatory’s signature signed naturally in other circumstances.<sup>217</sup> Given the difficulty of replicating the signatures of others,<sup>218</sup> it can be argued that it will be unlikely that another person can reproduce a signature identical to the signer’s.<sup>219</sup>

E-signatures, on the other hand, are not generally accompanied by any personal physical act of signing.<sup>220</sup> A question that hence arises is how the identity of the person who signed the document can be established. The mere fact that the legislation validates legal documents signed by typing a name into an email,<sup>221</sup> or putting a mark by the signer, increases the possibility that some of those documents are signed by one who acts under a false identity.<sup>222</sup> If this scenario eventuates, the

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<sup>215</sup> Edward D Kania, ‘The ABA’s Digital Signature Guidelines: An Imperfect Solution to Digital Signatures on the Internet’ (1999) 7(2) *CommLaw Conspectus: Journal of Communications Law and Policy* 297, 299.

<sup>216</sup> Srivastava, *Electronic Signatures for B2B Contracts* (n 23) 111–13. Currently, there are a number of technological tools that might be used for a verification of the authenticity of the signature and texts. For example, there has been some suggestions that US secret service bodies use a special ‘software program called Forensic Information System for Handwriting (FISH) that enables document examiners to scan and digitize text writings such as threatening correspondence’ and identify their authenticity: Mason (n 2) 12.

<sup>217</sup> Mason (n 2) 12.

<sup>218</sup> Kalama M Lui-Kwan, ‘Recent Developments in Digital Signature Legislation and Electronic Commerce’ (1999) 14(1) *Berkeley Technology Law Journal* 463, 469.

<sup>219</sup> Handwritten signatures are arguably more secure than the standard forms of electronic signature but less secure than more advanced digital signatures which prove almost impossible to forge. See, eg, Pankaj Kumar and Saurabh Kumar Sharma, ‘An Empirical Evaluation of Various Digital Signature Scheme in Wireless Sensor Network’ (2022) 39(4) *IETE Technical Review* 974.

<sup>220</sup> Stephen Mason, for example, observes that ‘[w]ith electronic signatures, the person does not physically sign anything, but causes software to sign electronically using an untrustworthy machine’ which in turn evokes ‘a weaker sense of the involvement of the person in the process of signing’: Mason (n 2) 9, citing Eileen Y Chou, ‘Paperless and Soulless: E-Signatures Diminish the Signer’s Presence and Decrease Acceptance’ (2015) 6(3) *Social Psychological and Personality Science* 343, 343.

<sup>221</sup> See *Stuart v Hishon* [2013] NSWSC 766.

<sup>222</sup> Greg Casamento and Patrick Hatfield, ‘The Essential Elements of an Effective Electronic Signature Process’ (2009) 6(1) *Digital Evidence and Electronic Signature Law Review* 83, 84. According to one study, the challenges associated with the identity

person who has received such a document would not be able to enforce it against the party with whom they thought they were entering into a transaction.<sup>223</sup> These scenarios prove specifically challenging for lawyers who often electronically send documents to their clients, rely on their written confirmation, or act on their behalf when undertaking legal action. If a document was signed by an imposter (say via an email) any enforcement activity might have detrimental consequences both for the lawyer and the client.

Similarly, the use of e-signatures can prove challenging not only when verifying the identity of the signer but also when verifying the authenticity of the content of the document that needs to be signed — the so-called repudiation risk.<sup>224</sup> With electronic communications, it is always possible for a message to be altered (intentionally or not) between the time it leaves the sender’s system and when it is received by the recipient.<sup>225</sup> After all, a message sent electronically may pass through multiple devices and computer systems, each owned and operated by different technology providers. There is a risk that ‘[a]t every stage in this process the message is vulnerable to alteration’.<sup>226</sup> Hence, even though e-signatures might have an audit trail to verify the message integrity and ‘the signer’s identity, [that] trail may not always be secure’.<sup>227</sup> The repudiation risk does not necessarily exist with handwritten signatures or can be avoided because the integrity of the message can easily be verified by way of comparing the original document with the document in question.<sup>228</sup> Therefore, it appears that the principle of technology neutrality, though beneficial for lawyers, can also create some challenges vis-à-vis the level of cyber-security perception of the communicated content.<sup>229</sup>

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of the party that signed the contract or the other party’s potential claim that ‘he never signed it and that somebody else hacked into the system and maliciously affixed his electronic signature’ was one of the main reasons to disfavour the use of e-signatures: Srivastava, ‘Legal Understanding and Issues with Electronic Signatures’ (n 206) 54.

<sup>223</sup> Casamento and Hatfield (n 222) 84.

<sup>224</sup> ““Document authentication” requires that the signature identify the data the signatory accepted so one may not alter the data after the signature has occurred”: Kania (n 215) 299. See also Casamento and Hatfield (n 222) 84.

<sup>225</sup> C Bradford Biddle, ‘Misplaced Priorities: The Utah Digital Signature Act and Liability Allocation in a Public Key Infrastructure’ (1996) 33(3) *San Diego Law Review* 1143, 1146.

<sup>226</sup> *Ibid.*

<sup>227</sup> Hana Lee, ‘E Signing in the Time of Coronavirus’, *Forty Four Degrees Lawyers and Consultants* (Blog Post, 13 March 2020) <<https://www.fortyfourdegrees.com.au/e-signing-in-the-time-of-coronavirus>>.

<sup>228</sup> However, it is important to acknowledge that documents may be intercepted physically and substituted.

<sup>229</sup> See Jonathan E Stern, ‘The Electronic Signatures in Global and National Commerce Act’ (2001) 16(1) *Berkeley Technology Law Journal* 391, 411.

### D *Surmounting the Security Concerns*

When exploring lawyers' cognitive responses to addressing the security concerns regarding e-signatures, it is instructive to rely on the Elaboration Likelihood Model of Persuasion.<sup>230</sup> This model postulates that people are motivated to 'form correct attitudes (ie, those that will prove useful in functioning in one's environment) as a result of exposure to a persuasive communication, but there are a variety of ways in which a reasonable position may be adopted'.<sup>231</sup>

For instance, lawyers may benefit from exposure to the fact that their security concerns linked to signer identification and non-repudiation may be tackled by way of using more sophisticated technology in the form of a digital signature.<sup>232</sup> This would include a more secure subset of e-signatures which are tied to the document and difficult to forge.<sup>233</sup>

Furthermore, digital signatures may be even more secure than handwritten signatures as, while both have mechanisms to prove that the signer has read the document and affixed the signature to indicate the approval of its content, digital signatures can highlight that the document has not been altered.<sup>234</sup> In a physical document, alteration in terms of substitution of pages may take place. Digital signatures authenticate these components by using a certificate-based digital ID usually by asymmetric encryption, which consists of a pair of public and private keys.<sup>235</sup> The initial step in the process of signing the document digitally is the creation of a hash value or a message digest.<sup>236</sup> The hash value is the result of a mathematical calculation (an algorithm also called a 'hash function') which transforms the document into a unique array of numbers and letters.<sup>237</sup> The message digest is encrypted by the sender's private key and added to the document which outputs the private key of the sender. At the point when the addressee receives the document, they can apply the

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<sup>230</sup> See Richard E Petty and John T Cacioppo, *Communication and Persuasion: Central and Peripheral Routes to Attitude Change* (Springer-Verlag, 1986) ch 1.

<sup>231</sup> Richard E Petty et al, 'Source and Message Factors in Persuasion: A Reply to Stiff's Critique of the Elaboration Likelihood Model' (1987) 54(3) *Communication Monographs* 233, 233.

<sup>232</sup> Biddle (n 225) 1146–7.

<sup>233</sup> The security of digital signature has been acknowledged for some time. See, eg, Tiffany A Mendez, 'Adopting the Digital Signature Guidelines in Implementing Public Key Infrastructure for Federal Procurement of Electronic Commerce' (2000) 29(2) *Public Contract Law Journal* 285, 287. For a more recent reference on methods to make the digital signature more secure, see Kumar and Sharma (n 219).

<sup>234</sup> Paul R Katz and Aron Schwartz, 'Electronic Documents and Digital Signaturing: Changing the Way Business Is Conducted and Contracts Are Formed' (1996) 14(2) *IPL Newsletter* 3, 4. See also Hua-Lei Yin et al, 'Experimental Quantum Secure Network with Digital Signatures and Encryption' (2023) 10(4) *National Science Review* 228.

<sup>235</sup> Lee (n 227); Lim (n 214).

<sup>236</sup> Lim (n 214).

<sup>237</sup> *Ibid*; Biddle (n 225) 1148–50.

sender's public key to check its integrity through the same hash algorithm used by the sender.<sup>238</sup> If the document has not been altered or tempered, the algorithm will remain the same.<sup>239</sup> Once lawyers are aware of this, the below perception of one of the interviewees in our study would become the norm:

In fact, the concept of a [handwritten] signature itself is pretty meaningless in the electronic age. So the technology clearly exists to make that completely seamless, that everyone can have a digital signature that can be universally applied with verification with the concept of witnessing. Because of that, [handwritten signature] is pretty archaic in fact. So, we could do away with a lot of that old school hard copy thinking and replace it with something way better.<sup>240</sup>

This awareness of the similarities between digital and handwritten signatures may be raised through a range of stakeholders: law firms (employers), the law society of each state and territory, and regulators. As the message is endorsed by relevant authorities, lawyers would be more likely to alter their negative beliefs about e-signatures.<sup>241</sup> The message should be broader than just education about the safety attached to digital signatures or other forms of signatures and present incentives for attitude change to deal with practical, especially usage, barriers.

## V CONCLUSION

The above analysis elucidates a conclusion that the current legislative framework under the *ET Act* gives a very broad meaning to the concept of e-signature.<sup>242</sup> In effect, 'any medium that is capable of linking a legal entity with a document (electronic or paper or other)' could be an acceptable form of signature.<sup>243</sup> This broad

<sup>238</sup> Lim (n 214). Regarding the public key submission see further the *Model Law on the Use and Cross-Border Recognition of Identity Management and Trust Services* GA Res 77/101, UN Doc A/RES/77/101 (7 December 2022, adopted 7 July 2022) ('*Model Law on the Use and Cross-Border Recognition of Identity Management and Trust Services*').

<sup>239</sup> BP Aalberts and S van der Hof, 'Digital Signature Blindness Analysis of Legislative Approaches to Electronic Authentication' (2000) 7(1) *EDI Law Review* 1, 6. This will especially be the case with the use of public key substitution. See for example a discussion on cryptographic techniques and algorithms: Dilip Kumar Sharma et al, 'A Review on Various Cryptographic Techniques & Algorithms' (2022) 51(1) *Materials Today: Proceedings* 104. See also *Model Law on the Use and Cross-Border Recognition of Identity Management and Trust Services* (n 238).

<sup>240</sup> Interviewee 24.

<sup>241</sup> Joseph R Priester and Richard E Petty, 'The Influence of Spokesperson Trustworthiness on Message Elaboration, Attitude Strength, and Advertising Effectiveness' (2003) 13(4) *Journal of Consumer Psychology* 408, 418–19.

<sup>242</sup> See *ET Act* (n 17) s 10.

<sup>243</sup> John D Gregory, 'Must E-Signatures Be Reliable?' (2013) 10(1) *Digital Evidence and Electronic Signature Law Review* 67, 68.

stance has provided lawyers with an opportunity since 2000 to embrace the type of e-signatures that they consider appropriate for their needs. As a result, the innovation-oriented lawyers have greatly appreciated this possibility and taken the benefit of applying it to improve operational efficiency, improve clients' experience, support the promotion of new legal business models, and support sustainability.

However, the observations made by lawyers in the present study indicate that despite their desire to embrace innovation and cutting-edge technology, many have approached e-signature with caution due to regulatory and usage barriers. The gravity of the situation surfaced during the pandemic. The move to online working environments pushed lawyers who were risk-averse to embrace e-signatures, making what once was a commodity to become a necessity. This meant that accommodation needed to be made by law firms and new regulation was necessary to allow for legal transactions to continue, especially in the jurisdictions that were under severe lockdowns.

Against such a background, many jurisdictions took individual approaches to tackle regulatory barriers and introduced instant measures to this end. It remains, however, questionable as to whether this patchwork of regimes facilitated the use of e-signatures or perhaps introduced further confusion. As the Law Council of Australia noted, the 'various and inconsistent formal ... state-by-state requirements mean that electronic document execution ... across jurisdictions is at worst impossible, and at best fraught with danger'.<sup>244</sup>

This article hence argues for uniform legislation in this area that could increase clarity and predictability of the rules, enabling more efficient enforcement beyond jurisdictional lines. The legislative intervention needs to be combined with education and further support from employers, the law society of each state and territory, and regulators to elucidate the similarities between electronic and wet ink signatures, and address practical, especially usage, barriers preventing the adoption of e-signatures. Uniform legislation and greater education will play a significant role in removing the current barriers to the use of e-signatures and consequently enable lawyers to fully embrace their application. Without these initiatives and further action, the potential of the use of e-signatures will not be reached.

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<sup>244</sup> Law Council of Australia Submission (n 99) 7.