Executing documents in a digital economy: rethinking statutory declarations and deeds in Australia

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Disclaimer

This paper was commissioned in 2021 to inform the Department of the Prime Minister and Cabinet's Deregulation Taskforce deep dive on Modernising Business Communications. The views that we express are our own.

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1. Introduction

Most important life events for ordinary Australians are marked by the creation of legal documents. Many of these are what historically were known as ‘solemn documents’ – for example, deeds, wills, powers of attorney, affidavits, statutory declarations, or certifications of document authenticity.

The original policy intent for solemn documents was to remind the parties that an act with serious legal consequences was occurring. Creating these documents was made intentionally cumbersome, in order to increase the likelihood that the document could be relied upon as being truthful and accurate. They were subject to strict rules about form and process, including execution through signing and being witnessed (by someone legally authorised to do so). These rituals were intended to discourage fraud, encourage truthful statements, and increase compliance with relevant laws and regulations.

Today, technology provides platforms for digital documentation that can replace paper, as well as tools that can provide more security than physical signatures in wet ink. We rely upon digital tools and technology-enabled communication for business and at home in ways that have become the ‘new normal’. Australia’s economy also depends to a high degree on trade and investment. Achieving or exceeding international best-practices in digital communication and digital documentation is a key element in keeping our economy open and supporting international business transactions.

COVID-19 has also highlighted the costs to business and consumers of paper documents that require witnessing.

At the same time, when the legal consequences of particular life-events and transactions are serious, vulnerable people require advice, accommodation and protection. So, rethinking the policy rationales for solemn document execution is also an opportunity to check that we are improving legal access and equity.

What regulatory problems need attention?

Statutory declarations and deeds are among the most frequently used solemn documents in Australia. The current state of law in Australia governing statutory declarations and deeds is dramatically inconsistent both across the laws that govern each type of document and between these and other types of solemn documents. Governments at Commonwealth, State and Territory level have responded quickly to help the economy recover from the COVID-19 pandemic, but inevitably this has created some regulatory burdens, inconsistencies and unintended consequences.

In a post-pandemic economy, there is a policy question about whether we need to preserve all of the solemnity of legal documents, and if so, in what ways and for what purposes?

Challenges of a federal legal system

In a country with nine different legislatures, multiple courts and administrative tribunals, a large number of Commonwealth and State and Territory regulators, and highly developed professional standards in law, accounting and business, our legal frameworks and standards will always be diverse.[1] However, we now have a once-in-a-generation opportunity to design legal frameworks and forms that are fit for a digital economy; will reduce the burden on individuals and businesses; and – if well-designed – could improve access to justice.

Outline of the paper

In this paper, we:

- describe some of the history and policy rationales for statutory declarations and deeds, as they originated in the common law and were then transmitted to Australia;
- consider how statutory declarations and deeds are currently used and regulated in Australia;
- discuss the impact of COVID-19, both as increasing community appetite for digital economy reforms and encouraging governments to reform document execution in response;
- look at the legal reform pathways for similar documents in other common law countries, such as the United Kingdom, the United States, Canada and Singapore -- as well as in the European Union; and
- suggest potential reform pathways for Australia and challenges and risks which may accompany these.

2. Solemn documents marking economic and life events

As individuals, we need witnesses to our signatures on a marriage certificate or a will or a power of attorney. We make a statutory declaration in front of a witness to make a passport application. Businesses, both small and large, routinely execute deeds in order to vary contracts, to purchase property, or to secure business loans. These are all forms of what historically were termed ‘solemn documents’.

[1] In Australia, we tolerate more regulatory diversity than many countries with unitary legal systems or a tradition of codification. Edward Glaeser and Andrei Shliefer famously opened up this debate in ‘Legal Origins’ (2002)117(4) *Quarterly Journal of Economics*, 1193, arguing that the less systematic approach of common law systems was in fact efficient because it represented responsiveness to market actors. Many legal scholars pointed to the over-simplification of the argument, but it suggests interesting comparisons based on the ease of understanding and navigating legal rules, in systems that are not federated, have a tradition of codification and where there is a strong norm of rule transparency.

What do solemn documents do?

Solemn documents can be created voluntarily (e.g., wills, powers of attorney, and deeds) or they may be required by statute or an administrative or legal process (e.g., affidavits, deeds, *apostilles*). They gain their legal validity from being in a particular form, or by following a procedure that is required by either the common law, or legislation, or both.[2] We think of them as private documents, but they are 'public' in the sense that they declare a transaction to be binding or a state of affairs to be true, in writing and in front of one or more witnesses. These legal acts differ from transactions that are generally not required to be in writing in order to be legally valid (e.g., contracts or trusts) and for which no public ritual, such as signing before a witness or swearing an oath, is required. The process for executing a solemn document gives it greater weight and probative value if it is later disputed or examined in a legal process.

Solemn documents were designed to be cumbersome. The degree of time and inconvenience required to create them varies with the type, but at a minimum they involve locating a suitable witness, and for documents such as wills, or deeds, often seeking legal advice. So, what is the policy rationale for imposing these burdens on people who need to create these kinds of documents? In practice, there are multiple policy goals that attach to different types of documents, contexts and users. We classify some of these functions of solemn documents as:

to bind

A solemn document (e.g. a deed) creates a legally binding agreement (in the case of a warranty or bargain and sale deed) or brings about a change of state that binds a party/parties (a dispositive deed, such as a transfer or property title or the creation of a legal interest). The binding power of the document was believed to come, in part, from its form and the rituals needed to execute it.

to inconvenience

Formalities for documents can be used by government and by the private sector to burden-shift. Statutory declarations are an example: by requiring a person or entity to provide routine information in a time-consuming way, regulators or employers or insurers can control the time frame for a claim, or control access to services.

to evidence

A signed document is presumptive evidence of person's intention to be bound and their consent to the transaction. Oath-taking, or a declaration, or a signature are also designed to signify a person's understanding of the document and its effect. Solemn documents may evidence a declared state of affairs or a change or transformation of legal status (e.g. a name change made by deed poll, or a legal power transferred through a power of attorney) or a change in a right or entitlement (e.g. a change of ownership of property made through a deed).

[2] Although the statutory declaration and the deed originate in the common law tradition, other legal traditions have formality requirements for validly executing different kinds of legal documents, including the use of writing and intermediaries. In civil law systems, the role of the professional notary is important for both authenticating documents and formalising a wide range of transactions. In legal systems in which Islamic law is an important component, the role of the *wakil*, or representative, is central to solemnising the marriage and also for enforcing the marriage contract.

to assert

A statutory declaration or an affidavit asserts that the statement made by a person is true. This may include facts (what happened) or a state of affairs (e.g. the settlement of a dispute, or the existence of a debt). Settling the facts may be an evidentiary step in a criminal process, or in an administrative or civil proceeding.

to solemnify

Rituals are designed to heighten parties' attention and make the meaning of a legal event weightier. Oath-taking or witnessing are intended to induce a psychological state that encourages truthfulness. A formal or unfamiliar setting, the presence of legal advisers and witnesses, materials such as specially formatted paper, and unfamiliar legal language can amplify this.

to validate

Creating a solemn document may involve a witness validating the identity of the parties. In some cases, the witness may also be required to check that the party has legal capacity (meaning that they understand the document) and that they are performing the legal act voluntarily (without duress).

Some formalities are designed to check the authenticity of documents that relate to the transaction. An *apostille*,[3] for example, requires a notary public to confirm, through signature and seal, the authenticity of copies of original documents for the purposes of using them in a legal transaction in a jurisdiction outside Australia. Legalisation is the process of verifying the signature, stamp or seal on original documents, to minimise document fraud.[4]

to embody

In some situations, a solemn document such as a statutory declaration is used to replace the original document (e.g. where a birth certificate, or marriage certificate or lease has been lost, or never existed).

to enforce

A will creates a 'safe harbour' that is intended to forestall disputes.[5] A statutory declaration or a power of attorney can be presumptive evidence in a litigated dispute, or in an administrative proceeding. In criminal prosecutions, the statutory declaration can function as an ancillary penalty for fraud. Businesses use statutory declarations as a way of strengthening their own personnel management or dealings with consumers.

[3] An *apostille* is a certificate issued by a government that authenticates the signature or seal of a public official on a public document issued by the government, for use in a foreign country. It is the international version of domestic notarisation or authentication of documents. Australia and many other countries are parties to the *Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents 1961* ('the Apostille Convention'), which removes the requirement for public documents to be re-authenticated in the destination country.

[4] See for example, the Australian government legalisation service: https://www.smartraveller.gov.au/consular-services/notarial-services/documents, at 20 September 2021

[5] Mark Glover, 'The Therapeutic Function of Testamentary Formality' (2012) 61 *University of Kansas Law Review* 139

to reassure

The formalities of a will or of a power of attorney help to create certainty regarding a future state. Some scholars argue that this is therapeutic: rituals help us manage emotion or anxiety.[6] Others observe that when an unexpected life event occurs that creates distress for vulnerable people, they are unlikely to understand the related legal documents.[7]

to publicly announce

Attestation (witnessing) is intended to be a declaration to the world at large, with the witness standing in for society. The ritual is intended to reinforce the shared social norms of honesty by requiring the person signing (and the witness) to do this publicly.

to protect

Witnesses are believed to function as a form of protection for vulnerable people, either against duress (pressure to sign the document) or mistake or misrepresentation or lack of capacity (inability to understand the document and its legal effect). Witnesses might be asked to give evidence in case of a dispute, but unless they are public officers or legal practitioners, they have no statutory or legal or fiduciary obligations towards the person creating the document (or other parties to whom any relevant duties may be owed).

3. Scope of this paper: statutory declarations and deeds

In this paper, we consider only two forms that are routinely used for administrative and commercial purposes in Australia: the statutory declaration and the deed. By 'deed' we primarily mean transactional deeds, rather than deeds of title for the purposes of conveyancing and property registration or deeds created by legislation.

Research commissioned by the Deregulation Taskforce suggests that 3.8 million statutory declarations and 4.5 million deeds are created annually in Australia.[8] This also aligns with the focus of work by the Deregulation Taskforce within the Department of Prime Minister and Cabinet in 2021.[9]

We acknowledge that there are policy and legal reform issues that intersect with statutory declarations and deeds that we do not directly consider in this paper. Those include:

- the many other forms of solemn document in Australia (e.g., wills, enduring powers of attorney, affidavits) and the reform trajectories for each of these;
- processes for document certification within Australia;
- formalities required for creating and using documents for legal processes outside Australia (e.g. the *apostille*);[10]

[6] Mark Glover, 'The Therapeutic Function of Testamentary Formality' (2012) 61 *University of Kansas Law Review* 139, 148
[7] Dorothy Ann Fauls, *Plain Language and the Law: Rethinking Legal Information for Vulnerable People in Australia*, (PhD Thesis, University of Queensland, 2018)
[8] Accenture, *Modernizing Business Communications Final Report* (March 2021) Department of the Prime Minister and Cabinet, (Unpublished)
[9] Department of the Prime Minister and Cabinet, Deregulation Taskforce: https://pmc.gov.au/area/deregulation-taskforce, at 20 September 2021
[10] See n 3, above

- processes for submitting electronic evidence in Australian courts and tribunals, and reforms to these;
- processes for registration of title for real property;
- earlier policy work to reform electronic transactions in Australia;[11] and
- international efforts to harmonise electronic transactions.[12]

The historical pathway for creating statutory declarations and deeds is distinct and their functions within the economy are different, so we consider those aspects separately for each type of document. The challenges and pathways for digitisation and for access and equity are similar for each type of document and so we discuss these together.

Deeds as solemn documents

Deeds are originally a product of the common law: the body of 'case law' created by judges and tribunals through written opinions and decisions. Deeds are notoriously difficult to define because their uses have expanded, and their forms have varied since they were originally conceived around 700CE. Deeds were regarded as the most solemn act that a person can perform[13] with respect to a particular piece of property or other right:[14] an instrument by which a person can notify the community that 'he most solemnly means what he is doing as being binding on him'.[15]
That conceptual flexibility has made deeds tremendously useful in economic life; they can be used for routine transactions ranging from a confidentiality agreement to the transfer of a right, interest or property from one party to another, to settle a dispute, or to acknowledge or discharge a debt.

Seddon argues that as the use of deeds has moved from property to contract, legal practitioners in Australia have become over-reliant on deeds, using them where a contract would be equally effective (and easier to create).[16] The United Kingdom Law Commission made a similar observation about the use of deeds, recommending a separate review of the law of deeds in the United Kingdom.[17]

As Seddon drily observes, 'Lawyers love deeds. Non-one else does.'[18] The flexibility of the deed was, until recently, constrained by the common law's relative inflexibility about how they must be created in order to be valid. The classic definition offered by Norton, the English treatise on deeds, is:

> A deed is a writing (i) on paper, vellum or parchment, (ii) sealed and (iii) delivered whereby an interest, right or property passes, or an obligation

[11] For example, the 2001 UNCITRAL Model Law on Electronic Signatures: https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_signatures, at 20 September 2021
[12] For example, the 2017 UNCITRAL Model Law on Electronic Transferable Records: https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_transferable_records, at 20 September 2021
[13] Or, in the immortal words of Stevie Wonder, "Signed, sealed, delivered, I'm yours", 'Signed, Sealed, Delivered' from *Live8* (2005) See: https://www.youtube.com/watch?v=gyZ0x0y_KtE
[14] *Manton v Parabolic Pty Ltd* (1985) 2 NSWLR 361, 369
[15] *Manton v Parabolic Pty Ltd* (1985) 2 NSWLR 361, 365
[16] Nicholas Seddon, *Seddon on Deeds*, (2015), 19
[17] United Kingdom Law Commission, *Report on Electronic Execution of Documents*, Law Com No 386 (2019),107
[18] Nicholas Seddon, *Seddon on Deeds*, (2015), 1

> binding on some person is created, or which is in affirmance of some act whereby an interest, or right to property has passed.[19]

That formula has been relaxed by contemporary Australian legislation and practice, as we discuss below, but the original definition matters because those recent reforms are all reactions to it.

Deeds may be unilateral or bilateral, meaning that they may be signed by only one of the parties to the deed (e.g., the seller of a property unilaterally executes a deed of sale, or someone makes a gift to another person using a deed) or by both parties (e.g. where both the seller and buyer sign the deed of sale). From the definition above, it is easy to see that a deed can also be a special kind of contract when it operates between two or more parties. In those situations, the deed generally contains a promise by one party to another to provide a good (e.g. credit upon delivery of goods) or perform a service (e.g. the transfer of shares).[20] A deed can also be a unilateral grant or disposition of a right or of property. A deed either of itself passes an interest, right or property (including shares), or amounts to an affirmation or confirmation of something which passes an interest, right or property.[21]

The promises contained in a bilateral deed do not depend for their enforceability upon the doctrine of valuable consideration that applies to simple contracts.[22] Parties may choose to execute their agreement as a deed (instead of a contract) to secure longer limitation periods in the event of litigation.[23] In practice, lawyers are advised to make the intention to create a deed clear, by showing at the head of the document that it is a 'deed'.

Statutory declarations as solemn document reform

The statutory declaration was created in the early 19th century as a deregulatory reform. Statutory declarations were intended to 'make provisions for the abolition of unnecessary oaths' in the United Kingdom and its (then) empire.[24] The oath (and later its secular form, the solemn affirmation) was retained for events such as taking up a public office, or for giving evidence in the courts (through oral evidence or in the written form of an affidavit).

An oath draws its power from being a promise made before a deity or transcendental authority; it retains its sacred character today, even while we also recognise its secular form, the solemn affirmation.[25] Although the statutory declaration was designed to operate separately from oaths, it travelled with the oath to the colonies

[19] Nicholas Seddon, *Seddon on Deeds*, (2015), 6 citing Morrison, RJS and Goolden HJ (eds*) Norton: A Treatise on Deeds* (2nd ed, 1928), 3
[20] See for example, Dianne Everett, 'The Role of Deeds in Property Transactions – Contractual and Dispositive Acts' (1989) 1(1) *Bond Law Review* 94
[21] *R v Morton* (1873) LR 2 CCR 22, 27
[22] *Howard F Hudson Ltd v Ronayne* (1972) 126 CLR 449, 463. This is because the deed itself is thought to constitute the most solemnly binding promise that two parties can make to one another, deemed to be legally binding without defined explicit 'value' or 'quid pro quo' being involved in the exchange.
[23] For example, under section 16 of the *Limitation Act 1969 (NSW)*, a cause of action founded on a deed can be maintained until 12 years after the cause of action accrues, twice the limitation period for a contract (section 14).
[24] *Statutory Declarations Act* 1835 (UK)
[25] See, for example, *So Help Me God: A History of the Oaths of Office*, PM Glynn Institute Occasional Paper No 3 (2020); Joshua Isaac Bishay, '"Solemnly declare to tell the truth": Internationalising the Solemn Undertaking before the ICC' in Julie Fraser and Leyhm Brianne McGonigle (eds), *Intersections of Law and Culture at the International Criminal Court* (2020)

of the British Empire.[26] This explains why the statutory declaration is still viewed by some policy-makers as serving the purpose of an oath;[27] why it is often legislatively regulated with oaths; and why, after federation, each jurisdiction used and reformed its statutory declarations differently.

The statutory declaration was intended to be the routine, 'all-purpose' way of creating reliable statements and narrations of events for administrative, civil and commercial purposes. It was, and remains, a voluntary act: the person asked to make such a declaration has an option whether to make it or not.[28]

4. Contemporary uses of statutory declarations

Statutory declarations today have a 'wide use'[29] in both private and public affairs.[30] In this paper, we classify the functions that statutory declarations perform in six ways, summarised in Table 1 (below).

1. Government and/or regulators collecting information from Individuals

Statutory declarations are used routinely by government or by regulators as a form in which to request information from individuals - usually because this is convenient for the government or the regulator. The statutory declaration may be explicitly required by legislation that sets out processes, for example, applying for government benefits, supplying information in support of immigration or citizenship applications, making an application to a compensation scheme, or supplying information for tax or superannuation regulatory purposes.[31] Alternatively the statutory declaration may be required in order to demonstrate compliance with a standard external to Australia – for example, a production standard for food exports.[32]

In public health, we see NSW regulations requiring those unable to wear a face mask to carry formal identification: a letter signed by a registered health practitioner, such as a doctor, or an NDIS provider, -- or a signed statutory declaration.[33] This is an example of the statutory declaration standing in for missing information, as it does in many other cases, such as to substantiate a health benefits claim.[34]

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[26] See, for example, Charles Ford, *Ford on Oaths for Use by Commissioners for Oaths and All Persons Authorised to Administer Oaths in the British Islands and the Colonies* (no date) (Waterlow and Sons., 6)
[27] See e.g., *Interpretation Act 1987* (NSW) s 21; *Oaths Act 1900* (NSW) s 15
[28] *New South Wales Fire Brigade Employees Union v The Crown in the Right of NSW (NSW Fire Brigades)* [2004] NSWIRComm 285, [14]
[29] See e.g., *New South Wales Fire Brigade Employees Union v The Crown in the Right of NSW (NSW Fire Brigades)* [2004] NSWIRComm 285, [14]
[30] https://www.ag.gov.au/legal-system/statutory-declarations/you-complete-statutory-declaration#why, at 20 September 2021
[31] For example, for the purposes of section 118-450 of the *Income Tax Assessment Act 1997*, section 268-40 and section 268-45 in Sch. 1 of the *Taxation Administration Act 1953*, and Reg. 12A.10 of the *Superannuation Industry (Supervision) Regulations 1994*
[32] An example is use of chemicals in the production of food such as pulses, where pesticide and fungicide residues matter for human consumption: https://www.pulseaus.com.au/growing-pulses/bmp/lentil/2020-fungicide-guide at 20 September 2021 and https://media.streem.com.au/restricted/PdblvKtvlY at 20 September 2021
[33] Seven Prime, *Seven News Orange*, 23 July 2021, 6:07pm
[34] For example, when it provides details about the exceptional circumstances preventing an individual from substantiating claimed Medicare or Child Dental Benefits Schedule (CDBS) services under the *Health Insurance Act 1973* (Cth) and the *Dental Benefits Act 2008* (Cth).

A statutory declaration can also attest to someone's state of mind or capacity, as part of a process such as assisted dying.[35]

Many of these requests for information are duplicative: the primary legislation governing the process requires truthful statements in support of applications, and prescribes a penalty for deliberately false statements, but also requires a statutory declaration.[36]

As a proxy for good character or confidence

In some cases, the statutory declaration is functioning as a proxy for 'good character' – as in a citizenship application,[37] or a licence,[38] or a medical procedure.[39]

Statutory declarations are also used routinely by government (and in the private sector) where there is no legislative requirement to do so. Common examples are human resources processes, such as an application for sick leave or a security clearance.

Importantly, some provision of important information to government (such as filing a tax return) does not require a statutory declaration; the individual or business supplying the information simply declares it to be accurate and acknowledges the statutory penalty for knowingly providing false information.

2. Government and/or regulators requesting information from business

Government collects information from business and industry through statutory declarations. Registered Training Organisations (RTOs) under the *National Vocational Education and Training Regulator Act 2011* (Cth), for example, are required to execute a Commonwealth statutory declaration to make 'fit and proper person' declarations and provide information as to the RTO's financial viability as part of an application process.

[35] See reportage on first case of assisted dying in Western Australia, 'I'm at peace': Aboriginal grandmother among first to use WA's new voluntary assisted dying laws': https://links.streem.com.au/sbs-news-20210729-R00vv2TOg0SVUNhGhP, at 20 September 2021, in which the description of the process includes:

> "Before it became legal we were getting (her application) ready to go," Mr Edwards says. "We had her mental assessment done, we came into hospital and got all that done, her mental capability (assessed). She signed a statutory declaration the other day on her mental capability. It has been a difficult process, but we were on to it early".

[36] The *Migration Act 1958* (Cth) penalises this in multiple ways: See for example sections 234, 245 and 268

[37] See, for example, *Wheeder v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] AATA 30, upholding denial of a citizenship application on the basis that knowingly making a false statutory declaration in 2018 evidenced failure of 'good character'.

[38] *Council of the Law Society of New South Wales v Kim* (2017) NSWCA 292

[39] For example, access to assisted reproduction, where applicants (in a practice now discontinued) were asked to assert that they had no history of domestic violence. See discussion Rachel Thorpe, Kerry Petersen, Marian K Pitts and HWG Baker, 'New assisted reproductive technology laws in Victoria: A genuine overhaul or just cut and paste? (2011) 18 *Journal of Law and Medicine* 835, 849

3. Private sector actors requesting information

Businesses use the statutory declaration to collect information for internal processes (e.g., in an insurance claim; or to verify missing documents such as receipts). They are also used in private transactions, such as transfers of property.[40]

Statutory declarations are frequently used for human resources purposes, for example to check facts relating to a workplace dispute or to establish a potential breach of a code of conduct or an employment contract or code. A recent example of the latter was the disciplining of rugby league players from the St George-Illawarra Dragons who had allegedly breached COVID-19 restrictions by holding a house party during an outbreak of community transmission in NSW.[41] Players were presented with a statutory declaration that sought to identify anyone other than team players attending the party.[42] The 'serious consequences' being threatened by the NRL were the criminal sanctions for a false statutory declaration, even although in practice this is likely to yield the lowest penalty, as we explain below.

4. Evidencing facts in administrative proceedings

Statutory declarations may be used (or required) in order to assemble and settle evidence being put before an administrative tribunal, for example an application to the Administrative Appeals Tribunal to review a Paid Parental Leave decision by an employer.[43] Other processes have removed the need for statutory declarations. For example, the *Fair Work Commission Rules 2013* previously required certain information to be included in the form of a statutory declaration for a Fair Work proceeding; since May 2020 a declaration is sufficient.[44] Statutory declarations have also been used extensively by industry-based dispute resolution bodies, notably in the construction industry, discussed below.

5. Evidencing facts in court proceedings

Statutory declarations function as part of the chain of evidence in a range of types of court proceedings. The affidavit is available as a sworn document for use in court proceedings, but the statutory declaration is presumably quicker and easier to create.

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[40] *New South Wales Fire Brigade Employees Union v The Crown in the Right of NSW (NSW Fire Brigades)* [2004] NSWIRComm 285, [14], suggesting that members of the community dealing with each other in relation to the transfer of property may find it 'convenient' to make use of a statutory declaration.

[41] The statutory declaration form prepared by the National Rugby League and presented to the players involved is extremely detailed: https://media.news.com.au/multimedia/2021/NED-4192-Statutory-Declaration/StatutoryDeclaration.pdf, at 20 September 2021

[42] The regulatory framework here is not only State rules governing social distancing, but the National Rugby League's own internal NRL 'Apollo' protocols for managing teams during the pandemic, which they claimed were stricter than NSW law. Sitting below these frameworks are the player contracts, termination of which would be the ultimate sanction. In this case team member organising the party was immediately dismissed. https://www.nrl.com/news/2021/07/12/dragons-duo-set-to-stay-outside-relocated-team-bubble/ protocols': https://www.nrl.com/news/2020/04/22/project-apollo/.

43 See the application form: https://www.aat.gov.au/AAT/media/AAT/Files/SSCSD%20documents/Forms/Application-for-review-form-PPL-employer.pdf, at 20 September 2021

[44] See: https://www.fwc.gov.au/resources/fact-sheets-guides-videos/guide-declarations-and-statutory-declarations, at 20 September 2021

The *Statutory Declarations Act 1959* (Cth) does not specifically authorise statutory declarations to be used as evidence in judicial proceedings, but it also does not prevent them from being so used.[45] The approximately 250 pieces of Commonwealth legislation that refer to the *Statutory Declarations Act 1959* (Cth), and their accompanying regulations, commonly allow for the use of statutory declarations as evidence. So, for example, statutory declarations are a prominently specified 'Type of Evidence' in the regulations[46] made under the *Migration Act 1958* (Cth).[47] In some cases, courts have found evidence presented insufficient to meet the requirements of the regulations, for example, if the statutory declaration is invalidly executed.[48]

How the courts weigh and consider the evidence in the statutory declaration varies from case to case. In *Ali v Minister for Immigration and Border Protection* (2021), the Federal Circuit Court noted that merits review tribunals may place limited evidentiary weight upon statutory declarations.[49] In that case, the statutory declarations served a limited evidentiary function, because they did not directly address the relevant question (the genuineness of a spousal relationship).[50] Similarly, another Federal Court case found that the 'evidence' provided by the statutory declaration 'did not rise above the level of bald assertion' and did not answer the question being considered.[51]

State-level legislation and regulations also provide for the use of statutory declarations as evidence.[52] For minor criminal offences, a statutory declaration made in front of a police officer or a Justice of the Peace is routine, as it is for challenging the imposition of a fine. In family law matters, when one party makes a serious allegation of fact against another that may impact financial or custody arrangements during a contested divorce – for example relating to domestic violence – this will typically be in the form of a statutory declaration.[53] In this situation, the statutory declaration also functions as a way of 'putting the client to proof' – which helps protect a legal representative (if the party has one) from not making statements to the court that they know, or suspect to be, false.

6. Replacing the original legal document

In some cases, the statutory declaration is substituting for a document that never existed (e.g., a debt or agreement created orally), has been lost or destroyed (e.g., a marriage certificate, a birth certificate), or is difficult to access (a public document located in a country in conflict). In business settings, a statutory declaration may be used to evidence a debt that is owed (for which there is no written contract or other documentation), or to describe the character of a transfer or funds for which there is no other documentation (e.g. a cash transfer that is a loan or a gift).

[45] *Statutory Declarations Act 1959* (Cth) s 6(3)
[46] *Migration Regulations 1994* (Cth) IMMI 12/116
[47] *Migration Act 1958* (Cth)
[48] See *Tith (Migration)* [2020] AATA 1825, [17]-[18]
[49] *Ali v Minister for Immigration and Border Protection* [2021] FCCA 981, [29]-[30]
[50] *Ali v Minister for Immigration and Border Protection* [2021] FCCA 981, [29]
[51] *FIG17 v Minister for Home Affairs* [2019] FCA 1105, [76]. On that basis, the Federal Court decided that consideration of the statutory declaration could not realistically have resulted in any different decision with respect to the applicant's protection
[52] See e.g., *Road Transport Act 2013* (NSW) s 190
[53] Domestic violence orders are issued under state and territory law but recognised nationally. See: https://www.ag.gov.au/families-and-marriage/families/family-violence/national-domestic-violence-order-scheme and https://dfvbenchbook.aija.org.au/protection-orders/recognition-of-interstate-orders/, at 20 September 2021

Table 1: Statutory Declarations: Function, Efficacy and Form

Example	Who creates?	Frequency	Is a statement efficient?	Do other sanctions apply?	Would an unwitnessed declaration be equivalent?	Fraud prevention function	Appropriate forms[54]
Individuals providing information to government /regulators							
Govt benefits	Individual	Routine	Yes	Yes	Yes	Low	1
Immigration Citizenship	Individual	One time	Yes	Yes	Yes	Low	1
Compensation schemes	Individual	One time	Yes	Yes	Yes	Low	1
Business providing information to government (Departments/regulators)							
ASIC	Business	Routine	Yes	Yes	Yes	Low	1
APRA	Business	Routine	Yes	Yes	Yes	Low	1
AusTrac	Financial institutions	Routine	Yes	Yes	Yes	Low	1
Providing information for business processes							
Employment	Business SMEs	Routine	Yes	Yes	Yes	Low	1
Insurance claims	Individual Business SME	Routine	Yes	Yes	Yes	Low	
Evidencing facts in contested proceedings (administrative)							
Fair Work Commission	Business SMEs Individual	Infrequent	Yes	Yes	Yes	Medium	2,3,4
Evidence of a debt (industry-based procedure)	Business SMEs Sole trader	Routine	Yes	Unclear	Yes	Medium	2,3,4
Debt in individual bankruptcy	Individual Sole trader	Infrequent	Yes	Unclear	No	Medium	2,3,4
Debt in corporate insolvency	Busines SMEs	Infrequent	Yes	Unclear	No	Medium	2,3,4
Criminal prosecutions	Individual Business	Infrequent	Yes	Unclear	No	Medium	2,3,4
Family law proceedings	Individual	Infrequent	Yes	Unclear	No	Medium	2,3,4
Creating a substantive legal document							
Power of attorney	Individual Business	One time	Yes	No	No	Medium	2,3,4
Substitute a document (e.g. birth certificate; contract)	Individual Business	One time	Yes	Possible	Possible	Medium	2,3,4

5. Australian regulation of statutory declarations

Because the statutory declaration is a creation of Commonwealth and State and Territory legislation, multiple regulatory frameworks govern how statutory declarations are made in Australia.

[54] Key to Forms:
1: In an official document already imposing penalties for false declarations
2: Stand-alone hard copy with wet signature
3: Stand-alone soft copy with electronic signature
4: Stand-alone soft copy with cryptographic verification of identity

At a Commonwealth level, statutory declarations are primarily regulated by the *Statutory Declarations Act 1959* (Cth).[55] That Act also governs statutory declarations for the Australian Capital Territory. The Act outlines the conditions under which statutory declarations may be made and used,[56] provides for the application of Chapter 2 of the Commonwealth *Criminal Code*[57] to all statutory declaration-related offences,[58] and specifies how jurisdictions may prosecute violations.[59]

The Act is interpreted and applied through the *Statutory Declarations Regulations 2018*, which explain definitions not covered in the Act,[60] particularise the text and form of Commonwealth and ACT statutory declarations,[61] and list the persons authorized to 'witness' their performance.[62]

All States have their own legislation governing the regulation of statutory declarations. In NSW for example, statutory declarations are regulated alongside affidavits under the *Oaths Act 1900* (NSW); in Western Australia, under a consolidated *Oaths, Affidavits and Statutory Declarations Act 2005* (WA).[63]

In each of the Commonwealth and State and Territory jurisdictions, the form of the statutory declaration is similar and its policy purpose identical. What differs is the identity and the responsibilities of the authorised witness (where witnessing is required); the penalties for a false declaration; and whether the declaration can be created electronically and signed and/or witnessed at a distance.[64]

Policy intent: What were statutory declarations designed to do?

The original policy intent of the statutory declaration was to control fraud: to enable reliance on truthful, written statements of fact. It was designed to do this in two ways:

- **the signature** of the person making the declaration evidences that: (i) they claim that their statement truthful (and thus can be relied upon); and (ii) they acknowledge the penalty for intentionally making an untrue declaration;
- **the attestation** (act of **witnessing** and signature by the witness) is evidence that (i) the witness has checked the identity of the person making the declaration; and (ii) the declaration was made on the date and in the location stated. The implied role of attestation is that the witness is also confirming that the declaration was made voluntarily and that the person making it understood their act and its consequences.[65]

[55] *Statutory Declarations Act 1959* (Cth)
[56] *Statutory Declarations Act 1959* (Cth) s 6
[57] *Statutory Declarations Act 1959* (Cth) s 5A
[58] *Criminal Code Act 1995* (Cth)
[59] *Statutory Declarations Act 1959* (Cth) s 11
[60] *Statutory Declarations Regulations 2018* (Cth) s 5
[61] *Statutory Declarations Regulations 2018* (Cth) s 6, sch 1
[62] *Statutory Declarations Regulations 2018* (Cth) s 7, sch 2
[63] Replacing earlier regulation under the *Evidence Act* 1906 (WA), then the *Declarations Attestations Act* 1913 (WA)
[64] See *Oaths Act 1900* (NSW) s 34(1), *Oaths and Affirmations Act 2018* (Vic), *Oaths Act 1867* (Qld), *Oaths Act 1936* (SA), *Oaths, Affidavits and Statutory Declarations Act 2005* (WA), *Oaths Act 2001* (Tas), *Oaths, Affidavits and Declarations Act 2010* (NT)
[65] This role of the witness is reflected in some, but not all, of the legislative frameworks in Australia; see Table 3, below.

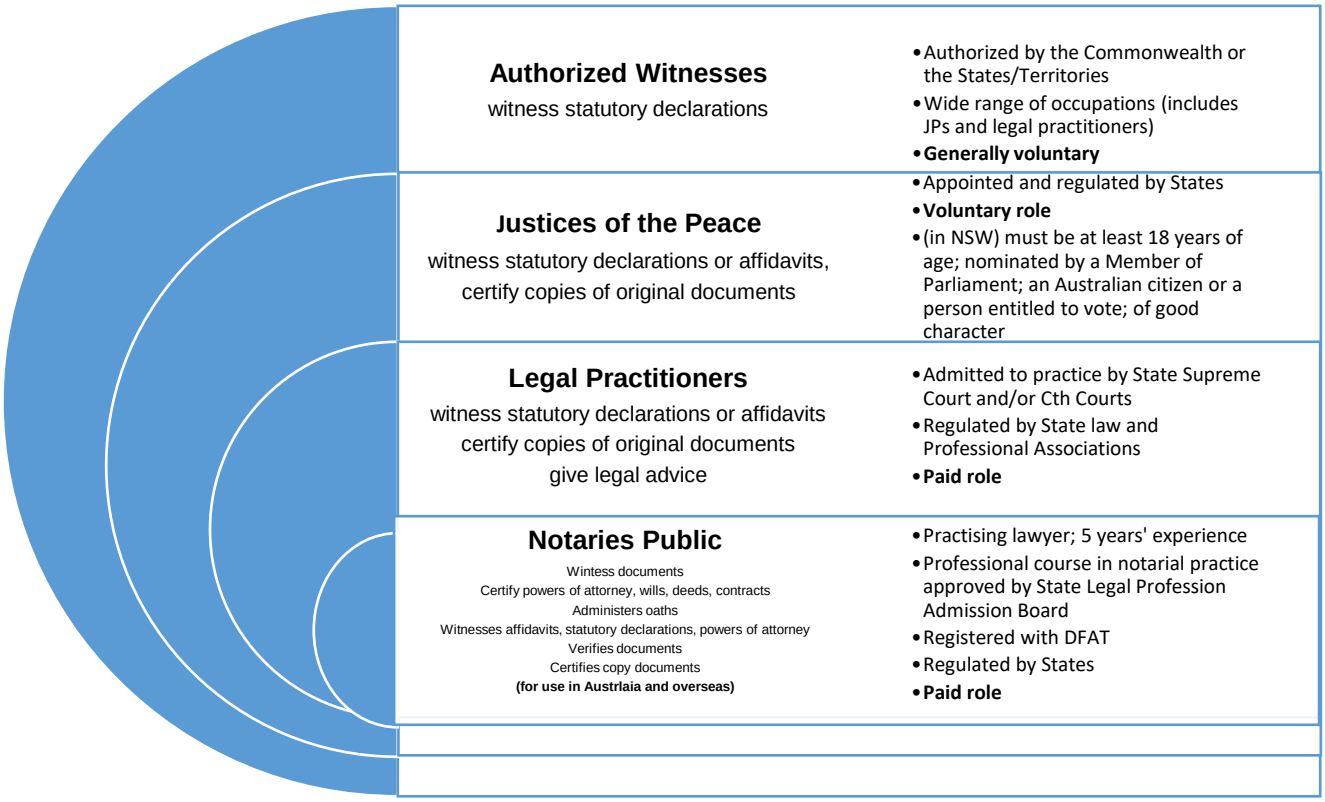
What the variation in the treatment of how statutory declarations are executed across Australia shows us is that they have progressively become detached from the original policy intent behind them.

6. Witnessing a statutory declaration

Who is authorised to witness a statutory declaration in Australia?

The general requirement for witnessing a legal document in Australia is that the witness is an adult, is legally competent and is not themselves a party (and so a signatory) to the document. However, other types of documents require authorised witnesses, as we see in Table 2, below.

Table 2: Service providers for statutory declarations and related documents



The witnessing function (attestation) of the statutory declaration is not well understood in Australia. Witnesses for statutory declarations in Commonwealth countries have never been required– or able– to verify the truthfulness of the statutory declaration, or the authenticity of any documents attached to or referenced by the statutory declaration. They do not function as public officials, in the same way as the professionalised notaries public in Europe or the United States.[66]

[66] See, for example, Michael L. Closen, 'The Public Official Role of the Notary' (1998) 31 (3) *John Marshall Law Review* 651; Jason R Levine, 'Notary Law and Practice: An Annotated Bibliography' (1998) 31(3) *John Marshall Law Review* 1007

Justices of the Peace

Justices of the Peace in Australia are a class of authorised witness who perform a public function authorised by a State or Territory government and are sworn so to do (see Table 2 above). They have a quasi-professional status, in the sense that they are authorised and supported by government (usually the State Attorney General) and they are bound by detailed practice instructions and Codes of Conduct.[67] However they are volunteers (and are prohibited from using their office to benefit other professional or business roles that they may hold).[68] Justices of the Peace are generally not practising lawyers and are not able to give legal advice.

Authorised witnesses

The wide range of other people and professions who may witness statutory declarations include, but are in no way limited to, legal professionals admitted to practise – some of whom are also notaries public (see Table 2, above). We discuss these occupational groups further below. Most authorised witnesses will perform their role in Australia, but for Commonwealth statutory declarations, all authorised witnesses can do so even if the authorised witness is overseas, provided that they have a connection to Australia -- as can notaries who are appointed by governments outside Australia.[69]

Witness responsibilities

Policy makers in Australia have different views about whether confirming the identity of the person making a statutory declaration is a primary purpose of witnessing. Legislation in South Australia and New South Wales requires this, but Victoria, the Commonwealth, the Australian Capital Territory and Western Australia jurisdiction do not. NSW goes further by restricting the range of authorised witnesses[70] and, since 2012, requiring the witness to see the face of the person making the statutory declaration or affidavit.[71]

Jurisdictions also divide on how much action the witness must take to ensure that the person making the declaration understands the purpose and process of the statutory declaration. In Victoria, for example, the person making the declaration must recite it aloud to the witness,[72] while in NSW, Victoria , Western Australia and South Australia the witness must also remind the declarant or ask them if the declaration is true. However, that obligation does not apply in the Commonwealth, Queensland, Tasmania or the Northern Territory.

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[67] See, for example, Government of South Australia Attorney General's Department, *Justice of the Peace Handbook* (no date): https://www.agd.sa.gov.au/sites/default/files/0007_jphandbook_v6_web.pdf, at 20 September 2021

[68] See for example, Acting Justice Peter W Young AO, 'Current issues: Justices of the Peace: Do we Need Them?' (2014) 88 *Australian Law Journal* 223 (Arguing that they are not substitutes for legally trained professionals) and Acting Justice Peter W Young AO, 'Current issues: Justice of the Peace: Are they An Endangered Species?' (2009) 83 *Australian Law Journal* 507 (commenting on the move by States to limit the number of Justices of the Peace appointed and limit their terms of appointment).

[69] See Commonwealth Attorney General's Department website: https://www.ag.gov.au/legal-system/statutory-declarations/who-can-witness-your-statutory-declaration#find, at 20 September 2021

[70] Section 21 of the *Oaths Act 1900* NSW restricts this to 'the Registrar-General, a Deputy Registrar-General or any justice of the peace, notary public, commissioner of the court for taking affidavits, Australian legal practitioner authorised by section 27 (1) to take and receive any affidavit, a federal judicial officer, or other person by law authorised to administer an oath'.

[71] *Oaths Act 1900* NSW (s. 34)

[72] https://www.justice.vic.gov.au/statdecs#making-a-statutory-declaration-in-person

Table 3, below, shows what someone witnessing a statutory declaration in different Australian jurisdictions is required to do. We consider separately in sections below the differences in penalties for those making declarations and for witnesses across those jurisdictions, as well as the range of accommodations for people requiring additional support in order to complete and understand a statutory declaration.

Table 3: Statutory declaration witness responsibilities by jurisdiction

Witnessing Requirements	Check Text fulfils legislative requirements / sign all pages	Confirm declarant identity	Cross out blank space	Tell/check declarant understands legal penalty	Remind/ask declarant if declaration is true	Observe declarant sign declaration	Provide contact details
NSW	*	*	*	*	*	*	*
VIC	*		*		*	*	*
Qld	*		*				
WA	*				*		
SA	*	*	*	*	*	*	*
TAS	*						
Cth/ACT							*
NT	*					*	*

Legal practitioners as witnesses

Legal practitioners are accepted as a type of authorised witness across all jurisdictions in Australia. One policy reason for that is that legal practice is separately regulated at State and Commonwealth level: practitioners complete a standard course of academic and professional training; are admitted to practise in the relevant State Supreme Court (and then in the Federal and High Court, as needed) and are subject to the regulations and discipline of their State-based legal professional associations.

One requirement common to those professions is that lawyers must 'know' their client, which is a subset of their duties not to deceive or mislead the court and to uphold the administration of justice.[73] As the Law Institute of Victoria observes, lawyers should check the identity of their clients using state-issued documents (such as passports or driver licences), particularly in instances where the client is new and the meeting or document creation may involve video-conferencing.[74]

Document certification

Adding to this complexity, the statutory declaration may also require certified copies of documents (e.g. identification documents such as birth certificates or a driver

[73] See for example, Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015: https://legislation.nsw.gov.au/view/whole/html/inforce/current/sl-2015-0244, at 20 September 2021

[74] Law Institute of Victoria, 'COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020: Practice Note' (October 2020), 10

licence). Document certification is a different process from executing a statutory declaration, and the class of people accepted at Commonwealth and State level to certify a document are not the same as those authorised to witness a statutory declaration.[75] In some jurisdictions, such as NSW, there appears to be no controlling law that specifies or restricts the type of original documents that may be certified as true copies, or when a certified copy is acceptable in place of an original, or who may do the certification.

If the documents are being witnessed and certified for use outside Australia through an *apostille* procedure, the class of people able to do this is smaller again: generally, this requires a notary public (see Table 2, above).[76]

The ritual quality of witnessing

The weight of the statutory declaration ritual declined from the moment that it was intentionally separated from oath-taking. When a statutory declaration today is witnessed as a routine piece of paperwork in a workplace, or a local library or the office of a local professional, it has become what Goffman would call a 'light' or 'interaction' ritual[77] – informal, fleeting and spontaneous.

Signing before a local witness in an informal setting presents an opportunity to assert or consolidate an identity but is not freighted with heavy symbolic or sacred meaning. Even when the ritual is deeper – as with oaths – the effect is to create public confidence in the process or the institution that utilises the oath, and help reconfirm public norms of honesty, but not actually to dissuade those determined to lie.[78]

Who can witness a statutory declaration?

One reason for the variation in witness roles in Australia is the belief that the ritual of physical witnessing performs a secondary function of enhancing truth-telling. In regulatory terms, it is a 'nudge'; or a reminder of a choice that the declarant has, and a designed encouragement of a socially constructive choice.[79] Although there seems to be a strong belief in the value of this nudge, there is no body of empirical evidence that supports this. Anecdotally, some observers doubt that a declaration made, for example, at a Post Office counter, is particularly solemn or a strong safeguard against fraud. There is an open question about whether witnessing is sufficient to deter the rational choice to break the norm of truthfulness.

This point was made as long ago as 1978, in a Report by the Western Australian Law Reform Commission, where the (then) Commissioner of Titles commented:

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[75] For example, in Victoria, the Oaths and Affirmations Act 2018 allows for a very broad range of people to act as authorised certifiers: https://www.justice.vic.gov.au/certifiedcopies, at 20 September 2021

[76] On the challenges facing notaries in Australia see: Noel Cox, 'Challenges Facing the Notariat in Australasia in the 21st Century' (2014) 42 *Australian Business Law Review* 456

[77] Erving Goffman, *Interaction Ritual* (1982). See also Randall Collins, *Interaction Ritual Chains*, (2005) (Arguing that failed rituals drain emotional energy)

[78] Boudewijn de Bruin, 'Epistemic Corporate Culture: Knowledge, Common Knowledge, and Professional Oaths' (2020) 43 *Seattle University Law Review* 807. On the history of oaths see: Simon John Horsington, 'Oaths and Perjury in a Protestant Monarchy' (2014) 66(3) *Revue Internationale De Droit Comparé* 745

[79] Popularised by Richard H Thaler and Cass R Sunstein in *Nudge: Improving Decisions about Health, Wealth, and Happiness* (2008)

> I do not think that any practical formality can be devised which will dissuade the person who is determined to mislead us from so doing. The statutory declaration is a useful sword in dealing with the business of the vast majority of bona fide transactions, it is not an infallible shield against the fraudulent minority.
>
> The essential element is that the declarant should be aware that if he makes a false declaration he can be punished if that requirement can be fulfilled without recourse to an attesting witness, then I think an attesting witness is not necessary.[80]

The Report goes on to note that 'the threat of a criminal sanction may well be a greater deterrent that the formality, such as it is, involved in making an attested statutory declaration'.[81]

Creating witness occupational groups

Those authorised to witness statutory declarations were originally Justices of the Peace, notaries public, and 'other officers authorised by law'. Over time, the range of people authorised to act as witnesses has widened. In Australia, for example, the (now replaced) *Statutory Declarations Act 1911* (Cth) required declarations to be made before police, stipendiary magistrates, special magistrates, Justices of the Peace, or a Commissioner for Declarations. By 1944 this had been broadened to 'a person before whom a statutory declaration may be made', a category then progressively widened to include multiple public and private sector occupations.[82]

Currently in Australia there are broadly three approaches to designating groups of people authorized to witness statutory declarations:

the narrow approach

tracks historical categories of public officials or publicly appointed groups and keeps statutory declarations linked to the procedures for swearing affidavits (and so the classes of people empowered to administer oaths) (e.g. NSW);[83]

the broad approach

recognises a very wide range of occupational groups (e.g. Commonwealth,[84] Victoria, ACT, Tasmania and Western Australia);[85] and

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[80] Commissioner of Titles, Mr N.J. Smyth, cited in Western Australian Law Reform Commission, *Official Attestation of Forms and Documents* (1978), 7

[81] Western Australian Law Reform Commission, *Official Attestation of Forms and Documents* (1978), 7

[82] See *Statutory Declarations Act* 1959 (Cth)

[83] New South Wales limits this to Justices of the Peace, Notary Publics, Commissioners of the Courts, and other legal practitioners.

[84] *Statutory Declarations Regulations 2018* (Cth) sch 2, pt 1(1). including those with registered occupations such as migration agents, pharmacists and architects and in *Statutory Declarations Regulations 2018* (Cth) sch 2, pt 2(2) others such as permanent employees of the Commonwealth with five or more years continuous service, Justices of the Peace and Members of Commonwealth or State Parliaments, Territory Legislatures or local government authorities.

[85] In Victoria, statutory declarations can also be witnessed by pharmacists, medical practitioners, architects, nurses and a range of other people licensed or registered in particular occupations. In the ACT and Tasmania, statutory declarations can be witnessed by an Australian Public Service employee with five or more continuous years of service, a senior executive of a State, Territory or Commonwealth authority, or a Commonwealth SES employee. *Statutory Declarations Regulations 2018* (Cth) s 7, sch 2; *Oaths Act 2001* (Tas) s 12. In these two jurisdictions (and WA), current defence force officers and warrant officers are also authorised to witness statutory declarations. *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) sch 2.

the minimalist approach

represented by the Northern Territory, which permits any adult over the age of 18 to be a witness, regardless of occupation.[86]

As we saw above, each State imposes different levels and types of responsibilities upon authorised witnesses.[87] Adding to the complexity, Justices of the Peace are in some jurisdictions authorised to witness statutory declarations for use in other jurisdictions.[88] There are other nuances: for example, a Chartered Accountant practising in NSW is authorised to witness a Commonwealth statutory declaration,[89] but not a NSW statutory declaration.[90]

The broad approach raises the question 'Why some occupations and not others?'. The reform pathway for the Commonwealth Statutory Declarations Regulations gives a good indication of the factors that shape that choice. In 2017, the Commonwealth Attorney-General's Department conducted a review of the *Statutory Declarations Regulations 1993* (the Regulations) in anticipation of the Regulations' sun setting on 1 October 2018. The review looked at the list of authorised witnesses (Schedule 2 of the Regulations), which sets out the categories of persons before whom a Commonwealth statutory declaration may be made.

As part of the review process, the Department invited public submissions in early 2017 about whether the Regulations were still fit for purpose and continued to meet the needs of the community.[91]

New categories were assessed on the basis of (i) whether they satisfied an unmet need in the community; (ii) whether members of the new category are subject to a Code of Conduct or a Code of Ethics; and (iii) whether the new occupations were registered under a law of the Commonwealth, State or Territory. The revised 2018 Regulations resulted in the list being broadened to include architects, midwives, migration agents, occupational therapists, financial advisers and financial planners, and broadening the (then) current category of engineers as well consolidating some categories, such as accountants, into a single item.[92]

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[86] *Oaths, Affidavits and Declarations Act 2010* (NT) s 19

[87] See *Oaths Act 1900* (NSW) s 21; *Oaths and Affirmations Act 2018* (Vic) s 19; *Oaths Act 1867* (Qld) s 13(1); *Oaths Act 1936* (SA) s 7; *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) sch 2; *Oaths Act 2001* (Tas) s 12; *Oaths, Affidavits and Declarations Act 2010* (NT) s 19

[88] See e.g., *Oaths and Affirmations Act 2018* (Vic) s 33

[89] *Statutory Declarations Regulations 2018* (Cth) sch 2, pt 2(2)

[90] *Oaths Act 1900* (NSW) s 21

[91] The changes reflected consideration of stakeholders' views expressed during the six-week public consultation process conducted by the Department in 2017, in addition to views provided via correspondence to the Department received over the previous ten years.

[92] The amendments to the Regulations, which were remade on 1 October 2018, also:

- updated references to authorised witnesses where the names of bodies or organisations have changed. This includes updating references to employees of the Commonwealth to be consistent with the *Public Service Act 1999*;
- provided another option for people who need to have a Commonwealth statutory declaration witnessed while overseas. The Regulations provide that Notary Publics (however described) who are appointed outside Australia, in accordance with their functions in that place, can also witness a Commonwealth statutory declaration;
- amended the Commonwealth statutory declarations form to provide the option for the declarant and authorised witness to provide either their email address or phone number to make it easier for receiving organisations to verify the declaration;
- amended the definition of 'address' to clarify that the declarant and authorised witness are not compelled to provide their residential address, acknowledging that there may be privacy concerns in providing a person's residential address; and
- included a definition for 'Commonwealth authority'.

This principles-based approach is an instance of meta-regulation; the Commonwealth is harnessing each occupation's self-regulatory capacity (either voluntary or imposed by statute) to assist with managing the risk of witness fraud by declarants and by witnesses. This also goes some way to explaining the anecdotal evidence that occupational groups actively seek to be recognised as authorised witnesses, because they see it as conferring legitimacy and prestige on their occupational group.[93]

Whilst certain authorised witnesses, such as Justices of the Peace and notaries public, receive training in the administration and witnessing of statutory declarations, there is no formal training for most other occupational groups. That is significant when we consider express[94] or implied expectations that witnesses will assist vulnerable people, which we discuss in Section 18, below.

7. When are Statutory Declarations invalidated?

A government agency or a business or a court or tribunal can decide whether the requirements of a statutory declaration have been met and whether they regard the statutory declaration as valid. Sometimes, a government agency or court or tribunal may 'cure' small mistakes and accept the form, but in other cases, they take a strict approach.

The 'wrong form' problem

The fact that a statutory declaration created in one Australian jurisdiction is not recognised in another has been acknowledged as a policy and practice problem for decades. The consequences of this can be serious. In *Mohamed v Minister of Immigration and Citizenship* (2007) 96 ALD 114, for example, in a visa application case, the wrong form rendered the statutory declaration invalid, with the invalidity contested and upheld on appeal.[95]

Invalidity

A statutory declaration may be declared invalid if it fails to comply fully with the statutory regulations governing its execution in a particular jurisdiction.

The Commonwealth and the ACT

Under the *Statutory Declarations Act 1959* (Cth), a statutory declaration may be made in relation to any matter,[96] including for the purposes of a law of the Commonwealth or of a Territory.[97] The Act governs witnessing requirements for

[93] Jostling for government attention and expanding the range of an occupation's functions is well-understood as part of the process of creating and maintaining status as a 'profession': Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (1988)
[94] See for example the Justice Victoria instruction that 'A person making a statutory declaration may need help with reading, writing, translation or other kinds of assistance. As an authorised statutory declaration witness, you can provide this help to the person making the statutory declaration: https://www.justice.vic.gov.au/justice-system/legal-assistance/information-for-authorised-statutory-declaration-witnesses
[95] In *Mohamed*, the lower-level tribunal had also disbelieved the truthfulness of the declaration, which alleged domestic violence by the (male) applicant's (female) sponsor and her family toward him and denied the visa application.
[96] *Statutory Declarations Act 1959* (Cth), s 6(1).
[97] *Statutory Declarations Act 1959* (Cth), s 6(2) (a).

statutory declarations where other Commonwealth or ACT laws require these to be made 'before some other person'.[98]

Prior to 1991, section 8 of the Act was permissive, providing that a statutory declaration 'may' be in accordance with the form in the Act's schedule and 'may' be made before the authorized persons listed.[99] Following the 1991 amendment, section 8 now requires that it 'must' be in the prescribed form[100] and made before a prescribed person.[101] The most recent guidelines for how the Act should be interpreted and applied are provided in the *Statutory Declarations Regulations 2018*, which explain definitions not covered in the Act,[102] particularises the text and form of statutory declarations executed under Commonwealth and ACT jurisdictions,[103] and lists the persons authorized to 'witness' their performance.[104] As we noted above, this list is extensive.[105]

State-level validation

Similar requirements operate at State level, but legislation and case law also specifically permit minor mistakes in order not to invalidate the form.[106] So, for example in a recent case, the New South Wales Supreme Court stopped short of declaring a defective statutory declaration invalid where, the two statutory declarations relevant to the plaintiff's case did not have appropriate form[107] or consistent vocabulary.[108] However, the court did hold that the evidence they purported to provide was 'quite unreliable'.[109] Specifically, the court had 'grave doubts as to the circumstances in which the declarations were brought into existence',[110] including the application of liquid paper which 'obliterated' the printed date, and the insertion of an 'indecipherable date' over it.[111]

[98] *Tith (Migration)* [2020] AATA 1825, [16]; *Statutory Declarations Act 1959* (Cth) s 10
[99] *Re Applications By Gregory Vincent O'Dowd and Peter Kevill Sullivan of Inquiries Into An Election In the Commonwealth Bank Officers' Association* [1984] FCA 255, [13]
[100] *Statutory Declarations Act 1959* (Cth), s 8(a)
[101] *Statutory Declarations Act 1959* (Cth), s 8(a)
[102] *Statutory Declarations Regulations 2018* (Cth) s 5
[103] *Statutory Declarations Regulations 2018* (Cth) s 6, sch 1
[104] *Statutory Declarations Regulations 2018* (Cth) s 7, sch 2
[105] *Statutory Declarations Regulations 2018* (Cth) sch 2, pt 1(1). including those with registered occupations such as migration agents, pharmacists and architects and in *Statutory Declarations Regulations 2018* (Cth) sch 2, pt 2(2) others such as permanent employees of the Commonwealth with five or more years continuous service, Justices of the Peace and Members of Commonwealth or State Parliaments, Territory Legislatures or local government authorities.
[106] For example, in Victoria: 'Small mistakes in a statutory declaration: A statutory declaration may still be valid if a person makes a small, insignificant mistake that does not strictly comply with a requirement. This will depend on each case, and may ultimately depend on a court ruling': https://www.justice.vic.gov.au/justice-system/legal-assistance/information-for-authorised-statutory-declaration-witnesses, at 20 September 2021
[107] *Official Trustee in Bankruptcy v Macalindong* [2016] NSWSC 1735, [32]
[108] *Official Trustee in Bankruptcy v Macalindong* [2016] NSWSC 1735, [30]
[109] *Official Trustee in Bankruptcy v Macalindong* [2016] NSWSC 1735, [50]
[110] *Official Trustee in Bankruptcy v Macalindong* [2016] NSWSC 1735, [21]
[111] *Official Trustee in Bankruptcy v Macalindong* [2016] NSWSC 1735, [29]

8. Enforcing statutory declarations

Penalties for declarant

In theory, people intentionally making false statutory declarations are exposed to the criminal penalty under the relevant statute. The range of penalties across Australian jurisdictions is set out in Table 4, below:

Table 4: Statutory Declarations – Penalties for Declarants and Witnesses

Jurisdiction	Penalties for Declarants	Penalties for Witnesses
Commonwealth	For intentionally making a false declaration: **Imprisonment for 4 years.** *Statutory Declarations Act 1959* (Cth) s 11.	*No relevant legislative penalties.*
New South Wales	For wilfully and corruptly making a false declaration: **Imprisonment for 5 years.** *Oaths Act 1900* (NSW) s 25.	For taking and receiving a declaration in a capacity not authorised by law: **Liability on summary conviction before the Local Court to imprisonment for a term not exceeding 12 months or a penalty not exceeding 2 penalty units.** *Oaths Act 1900* (NSW) s 21A.
	For wilfully and corruptly making a false declaration and deriving or attempting to derive a material benefit as a consequence: **Imprisonment for a term not exceeding 7 years.** *Oaths Act 1900* (NSW) s 25A.	
Victoria	For knowingly making a false declaration: **600 penalty units or imprisonment for 5 years or both.** *Oaths and Affirmations Act 2018* (Vic) s 36. **600 penalty units or imprisonment for 5 years or both (s 36)**	For witnessing a declaration whilst knowingly unauthorised to do so: **60 penalty units or imprisonment for 6 months or both.** *Oaths and Affirmations Act 2018* (Vic) s 31(1).
	For making a false or misleading statement as to the making of a declaration: **10 penalty units.** *Oaths and Affirmations Act 2018* (Vic) s 37.	For representing oneself as an authorised witness when knowingly unauthorised to do so: **10 penalty units.** *Oaths and Affirmations Act 2018* (Vic) s 31(2).
Queensland	For knowingly making a false declaration: **Imprisonment for a term not exceeding 3 years.** *Criminal Code 1899* (Qld) s 194.	*No relevant legislative penalties.*

South Australia	For knowingly making a false declaration: **Imprisonment for a term not exceeding 4 years.** *Oaths Act 1936* (SA) s 27.	*No relevant legislative penalties.*
Western Australia	For knowingly making a false declaration: **Imprisonment for a term not exceeding 5 years. (Note: Summary conviction - imprisonment for 2 years and a fine of $24,000).** *Oaths, Affidavits and Statutory Declarations (Consequential Provisions) Act 2005* (WA) s 41.	For falsely and knowingly pretending or asserting oneself to be to be an authorised witness: **Imprisonment for 12 months.** *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) s 17.
Tasmania	For wilfully making a false declaration: **Guilty of a crime and liable for a fine, a jail term, or both.** *Criminal Code Act 1924* (Tas) sch 1 s 113.	*No relevant legislative penalties.*
Australian Capital Territory	For intentionally making a false statement: **Imprisonment for 4 years.** *Statutory Declarations Act 1959* (Cth) s 11.	*No relevant legislative penalties.*
Northern Territory	For knowingly making a false declaration: **Imprisonment for a term not exceeding 3 years.** *Criminal Code Act 1983* (NT) sch 1 s 119.	For intentionally altering a statutory declaration in a way that results in it becoming false or misleading: **Maximum of 400 penalty units or imprisonment for 4 years.** *Oaths, Affidavits and Declarations Act 2010* s 27(1).
		For recklessly altering a statutory declaration in a way that results in it becoming false or misleading: **Maximum of 200 penalty units or imprisonment for 2 years.** *Oaths, Affidavits and Declarations Act 2010* s 27(2).

False statutory declarations can also operate as 'false or misleading' information for the purposes of a civil action or penalty under, for example, consumer law.

It is not clear why statutory declarations, whether made at Commonwealth or State and Territory level, should attract penalties ranging from 2 to 7 years' imprisonment, when the act of making a false declaration is the same in each case. But we recognise that making criminal law and procedure is concurrently a Commonwealth and a State power. In practice, judges impose penalties in cases based on full consideration of the offender and circumstances and often as part of multiple offences governed by different legislation. In practice, the penalties imposed may not be as different as the legislative provisions above suggest.

We see that the Commonwealth Act prescribes 'Imprisonment for 4 years' (s 11) for a false declaration. The *Criminal Code Act 1995* (Cth) applies to all offences against the *Statutory Declarations Act 1959* (Cth).[112] Other, subject-specific legislation that refers to the *Statutory Declarations Act* may also provide for penalties for non-compliance with the regulations governing statutory declarations. For example, the *Migration Act 1958* (Cth) provides penalties of 12 months' imprisonment or a fine of AUD12,000 for a statutory declaration involving a false or misleading statement.[113] So this is a parallel or layering of penalties by two discrete pieces of Commonwealth legislation that apply to the same set of acts and documents.

The effect of that layering was demonstrated *in Ahmadi and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Citizenship)* [2021] AATA 1877. In *Ahmadi*, the applicant appealed a decision to reject his application for citizenship. In the view of the delegate, he failed to meet the test of good character under section 21 (2) (h) of the *Citizenship Act* 2007 (Cth), evidenced by a series of elaborate, but false, statutory declarations about his identity, background and marital status. The applicant later recanted those statements and made new statutory declarations, which were accepted in reviewing his refugee status. The tribunal found that the proper time to determine his good character was at the time of his citizenship application (the tribunal finding that it was now established), rather than 10 years earlier (when it would certainly have been disproved by the false statutory declarations).

Where statutory declarations are not required by law, but are being used in an employment situation (e.g. security vetting or to establish the facts in a workplace dispute), the actual penalty for a false declaration if discovered is also likely to be suspension or termination of employment, linked to the terms of an employment agreement.

[112] *Statutory Declarations Act 1959* (Cth) s 5A
[113] *Migration Act 1958* (Cth) s 245

Prosecution of False Declarations

In practice, false statutory declarations appear not to be energetically enforced. However, we see some recent evidence of stronger intent to enforce them when they are linked to other important policy goals – for example, wearing a face mask during the COVID-19 pandemic. In NSW an exemption from wearing a facemask requires a medical certificate or a statutory declaration, and NSW Police have commented:

> If police ask to see the exemption people are required to present that documentation, and we will investigate all exemptions. Make no mistake, police are investigators by trade. If we have any reasonable doubt that a document may be false, we can and will investigate these matters thoroughly to bring people before the courts[114]

Cases in which a false statutory declaration was pivotal, such as *R v Einfeld*[115], are well-known but unusual. In *Einfeld*, a distinguished lawyer and retired Federal Court judge was charged with five counts of intending to pervert the course of justice under section 319 of the *Crimes Act NSW*. The evidence of that intent was a series of statutory declarations that he submitted over some years, to avoid paying fines for speeding (or contesting the fines in court). In each case he asserted that the driver was not him, but someone living overseas. In more than one case he knew that the person he claimed to be the driver was, in fact, deceased. He was apparently relying on the fact that the statutory declarations would never be examined. And they were not – he succeeded in this strategy multiple times. The last attempt, however, piqued journalists' interest and led to the trail of fraud.

James J held that the perversion of the solemn document through 'deliberate, premeditated perjury'[116] to avoid a minor speeding ticket and demerit points struck 'at the heart of the administration of justice'.[117] The breach of the rules of the statutory declaration under the *Oaths Act 1900* (NSW)[118] was held to be one of 'gravity'[119] and 'objective seriousness'.[120]

After a series of appeals, Einfeld served a two-year jail sentence for perjury and perverting the course of justice and was stripped of his honours. The court of first instance and the appellate courts saw the fraudulent statutory declarations as both premeditated and evidence of bad character. Hall, a specialist in regulation of the legal profession, observes that a feature of the case was Einfeld's persistent refusal to admit to wrongdoing, claiming that he had simply 'made a mistake' – in psychological terms the kind of self-delusion that often correlates with highly competent, egocentric personality types.[121] This is the type of actor for whom the designed checks and nudges described above would be ineffective.

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[114] https://links.streem.com.au/police-nsw-20210804-yEqVvouKaOfVU7hKh3
[115] [2009] NSWSC 119
[116] *R v Einfeld* [2009] NSWSC 119, [75]
[117] *R v Einfeld* [2009] NSWSC 119, [183]
[118] See *Oaths Act 1900* (NSW) s 25 which makes it an indictable offence with liability of up to 5 years imprisonment for a person to wilfully and corruptly make a declaration knowing it to be untrue.
[119] *R v Einfeld* [2009] NSWSC 119, [183]
[120] *R v Einfeld* [2009] NSWSC 119, [196]
[121] Kath Hall, 'A Tragedy in Two Acts: Marcus Einfeld & Teresa Brennan' (2012) 37(3) *Alternative Law Journal* 212, citing Charles V Ford, *Lies! Lies! Lies! The Psychology of Deceit* (1996), 35–45

Data on enforcement

We considered two datasets on statutory declaration enforcement for the purposes of this paper. The first is Commonwealth Director of Public Prosecutions (CDPP) data relating to the prosecution of offences under section 11 of the *Statutory Declarations Act 1959* (Cth).[122] Since 1983, 121 matters have been referred to CDPP, where the primary offence was a breach of section 11. There were a further 96 matters referred to the CDPP where the primary offence was under another Act but also involved an offence against section 11: 217 cases in total. This represents an average of just over 3 cases per year, or just under 6 cases per year if the secondary offences are included.

Other offences involving misleading or false information that have been referred to the CDPP (in addition to offences under section 11 of the *Statutory Declarations Act 1959* (Cth)) were in relation to a wide range of State and Commonwealth legislation, set out in Appendix A, below.[123]

We do not currently have comparable prosecution data at State and Territory level. However, a second data set may point toward possible patterns. A preliminary search for 'statutory declaration' in Australian reported cases (2005-2020) in the Lexis database yielded 12,221 mentions.[124] Of these, 436 cases (or 3.6%) used it as a catchword or in the case summary. Broken down over time, those references decline, with 110 catchwords/17 case summary mentions for the period 2015-2020.[125] The largest number of mentions occur in Commonwealth courts and tribunals where we know that statutory declarations are required procedurally or under subject-specific Commonwealth legislation. By State court, the largest concentration was in NSW (2,007 references) with WA, Qld and Victoria clustering in the same band (461; 410 and 395 references respectively) and then NT, SA, Tas and ACT all clustering together (81; 74; 63 and 47 mentions respectively).[126]

We know that reported cases represent only a fraction of actual instances of use of statutory declarations. One hypothesis suggested by the two data sets is that there is a high level of compliance with the truth requirement of a statutory declaration. Another is that there is a negligible chance of a false statutory declaration being checked and leading to a prosecution. In *Einfeld* and *Kim* (discussed below), this clearly contributes to a culture of disregard for honesty among those who have an incentive to lie. This is 'regulatory ritualism' of the wrong kind[127] – where people are simply going through the motions of creating a legal document in order to avoid or deflect an obligation or a more serious criminal charge.

[122] Information provided by the Commonwealth Attorney-General's Department
[123] Information provided by the Commonwealth Attorney-General's Department
[124] Accenture, Preliminary research results (2021)(Unpublished)
[125] Within the Commonwealth courts and tribunals, the five jurisdictions with the most frequent mentions are the Federal Circuit Court (1,911) the Federal Magistrates Court (1,468), the Federal Court (1,660), the Administrative Appeals Tribunal (946), and Fair Work Australia (2009-2021), Fair Work Commission- Enterprise Agreement (704) and Fair Work commission (254): Accenture, Preliminary research results (2021)(Unpublished)
[126] Accenture, Preliminary research results (2021)(Unpublished)
[127] A concept developed in John Braithwaite, Val Braithwaite and Toni Makkai, *Regulating Aged Care: Ritualism and the New Pyramid* (2007)

Dishonesty and systemic fraud

Case of dishonesty in creating statutory declarations are not difficult to find, particularly in relation to traffic offences. A recent example is case of an enraged drunk driver in Tasmania who lost control of his car and crashed into a café shopfront following an argument with his girlfriend. In the statutory declaration he gave to police, he claimed that his car had been stolen and that he had found it, crashed, at the café. He was given a six-month suspended sentence and his licence was cancelled.[128]

Those individual cases, even where they involve repeat offenders, such as in *Einfeld* and *Kim*, are different from cases of systemic fraud in the use of statutory declarations. In the building industry, in multiple jurisdictions, for example, statutory declarations have been used routinely to establish that a builder has paid all wages due and payable to its employees and any payments due to its sub-contractors, as a pre-condition for the builder submitting a request for payment under State-level Security of Payment (SOP) legislation. In 2015 the Senate Economics References Committee (SERC) noted in its report into the industry[129] that

> '[the fact that] false statutory declarations are signed and that the victims of such [are] not acted on by the proper authorities, possibly due to lack of resources, weakens the effectiveness of SOP legislation and threaten the insolvency and viability of honest industry participants'.[130]

A leading case evidencing the practice is *470 St Kilda Road v Robinson*,[131] where the Federal Court imposed a personal liability on a director for making a false statement in a statutory declaration in a payment claim under the *Building and Construction Industry Security of Payment Act* 2002 (Vic).

Here we are not making an argument in favour of increasing penalties for statutory declaration fraud, or for more punitive sentencing in criminal cases; rather, we observe that in the cases considered here, the statutory declaration is a preliminary diagnostic element in a larger story of intentional dishonesty.

Third party protections

There is an open question about whether third parties are able to rely on an apparently valid statutory declaration, or conversely, avoid an obligation where the statutory declaration subsequently proves to be false. A recent example is *Roude v Helawi*,[132] where an electrical contractor was claiming a debt from the builder/owner for work carried out on a residential property, for which there was no contract in writing. He was ultimately successful on a claim of *quantum meruit* (reasonable compensation), for which the court accepted his estimate. However, he was

[128] 'Jail for Road Rage Café Smash', *The Mercury* (Hobart), 3 July 2021, 22
[129] The Senate Economics References Committee Report, 'Insolvency in the Australian Construction Industry', 3 December 2015 https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction, at 20 September 2021
[130] The Senate Economics References Committee Report, 'Insolvency in the Australian Construction Industry', 3 December 2015, 138
[131] [2013] FACA 1420
[132] [2020] NSWCA 310

unsuccessful at District Court level in persuading the court to accept that a statutory declaration made to a third party, in which the defendants (appellants) had already admitted the debt to him, was admissible and good evidence of the amount owed to him.

Penalties for witnesses

There is anecdotal evidence that witnesses are confused about both their responsibilities and their (potential) liability in relation to statutory declarations. As we saw in Table 4 (above), where penalties for witnesses are stipulated, they vary considerably. The *Oaths Act 1900* NSW, for example, prescribes a criminal penalty for taking a statutory declaration without authority as up to 12 months 'imprisonment or up to 2 penalty units (s 21A). In Victoria, the *Oaths and Affirmations Act 2018* VIC makes it an offence to take a statutory declaration when knowingly not a statutory declaration witness (60 penalty units or imprisonment for 6 months or both) as well as falsely representing oneself as a statutory declaration witness (10 penalty units) (section 31).

Some employers are said to actively discourage their employees from witnessing statutory declarations for this reason, or limiting the witnessing to statutory declarations that relate to their professional domain (e.g. medical services). Other occupational groups issue detailed guidelines for their members.[133]

That confusion is understandable, because while most of the legislative frameworks for statutory declarations penalize a person who acts as a witness when not authorized to do so, or who intentionally and falsely holds themselves out as being authorized, they do not directly consider other issues such witness responsibility for protecting privacy or confidentiality.

Not surprisingly, we found few cases where witnesses were penalized in relation to the *content* of a statutory declaration being false. However, knowingly making or facilitating a false declaration may also be a separate criminal office, as illustrated by the recent case of *Council of the Law Society of New South Wales v Kim.*[134] In *Kim*, the respondent was a legal practitioner and so authorised under the *Oaths Act* 1900 NSW to take and receive statutory declarations. Amongst other things, she had received direct payment from a client for falsely stating that he was not the driver in relation to ten traffic infringement notices he had received. She then had used identification details of her ex-husband and a client, without their knowledge, to take false declaration in relation to penalty notices issued for a speeding offence by her son and her father.

She pleaded guilty to, and was convicted of, two offences under section 192J of the *Crimes Acts* 1900 NSW (dealing with intention to commit or facilitate the commission of an indictable office) and two offences under 25(b) of the *Oaths Act 1900* (NSW) (wilfully and corruptly making and subscribing a false declaration). She received a 2-year good behaviour bond and a $2,200 fine. The reported case concerned the Law

[133] See for example, the Australian Nursing and Midwifery Federation (Victorian Branch) Policy: https://www.anmfvic.asn.au/~/media/files/anmf/anmf%20policies%20position%20statements/witnessing%20a%20statutory%20declaration%20policy.pdf, at 20 September 2021

[134] (2017) NSWCA 292

Society's decision to strike her from the Roll of registered legal practitioners on the grounds of professional misconduct. The Court of Appeal comprehensively upheld the Law Society's appeal, on the basis that Kim had demonstrated 'a pattern of knowingly dishonest conduct' and because she had abused the trust that Parliament had placed in solicitors by giving them the power to administer oaths. So in this case -- as with *Einfeld* -- the court was particularly focused on the fact that the defendant was a lawyer and thus should be held to a high professional standard.

9. Form requirements for statutory declarations

Paper based requirements

Historically, all jurisdictions in Australia required a statutory declaration to be made in writing, on paper. That original policy choice was underscored when statutory declarations were exempted from the *Electronic Transactions Act 1999* (Cth) and the corresponding State and Territory law frameworks.

Subsequent legislative reforms allowed the paper statutory declaration to be signed and transmitted electronically (as in Victoria) and following COVID-related reforms in Queensland, to be made in the form of an electronic document and signed electronically.[135] At the same time, numerous forms required by various government agencies in Australia incorporate a statutory declaration under the relevant primary legislation, but do not use the standard statutory declaration form.[136] We could view these as, in effect, electronic forms of the statutory declaration, whether or not they enable electronic or digital signatures.

Exemption from Electronic Transactions Act 1999 (Cth)

The *Statutory Declarations Act 1959* (Cth) is currently exempt from the application of the *Electronic Transactions Act 1999* (Cth) (the ETA). The ETA is an act of general application that allows for electronic communication to be acceptable, regardless of whether legislative instruments expressly provide for this. If Commonwealth law requires an entity to give information in writing, provide a handwritten signature, produce a document in material form, or record or retain information, the ETA operates to ensure these things can be done electronically.

[135] See, for example the Queensland reforms: Section 12H, *Justice Legislation (COVID 19 Emergency Response – Documents and Oaths) Regulation 2020* (Qld)*:* https://www.legislation.qld.gov.au/view/html/inforce/current/sl-2020-0072*,* now proposed as permanent reforms: *Justice Legislation (COVID-19 Emergency Response – Permanency) Amendment Bill 2021* (Qld) https://documents.parliament.qld.gov.au/bills/2021/3074/Justice-Legislation-(COVID-19-Emergency-Response-Permanency)-Amendment-Bill-2021-a164.pdf, at 20 September 2021 and the accompanying Explanatory Note: https://documents.parliament.qld.gov.au/bills/2021/3076/Police-Legislation-(Efficiencies-and-Effectiveness)-Amendment-Bill-2021---Explanatory-Notes-7db2.pdf, at 20 September 2021

[136] Examples of such bespoke forms for the particular area can be found in the *Personal Injuries Proceedings Act 2002* (Qld) Form I https://www.justice.qld.gov.au/__data/assets/pdf_file/0003/26724/Personal_injury_form_1.pdf and Form 2 https://www.justice.qld.gov.au/__data/assets/pdf_file/0004/26725/Personal_injury_form_2.pdf; at 20 September 2021 and the claim form for the Motor Accident Insurance Commission, Queensland under the *Motor Accident Insurance Act 1994* (Qld): https://maic.qld.gov.au/wp-content/uploads/2020/03/Notice-of-Accident-Claim-Form-Non-Fatal-March-2020.pdf*,* at 20 September 2021

Creating a genuinely digital form of the statutory declaration, as we discuss below, thus either requires statutory declarations to be removed from list of exemptions to the Commonwealth ETA and its State and Territory equivalents, or for each jurisdiction to make specific provision for statutory declarations, declarations, and affidavits to be created and signed electronically under the relevant legislation – in most cases an *Oaths Act.* This is the permanent reform proposed in in Queensland Part 6 of the *Justice Legislation (COVID-19 Emergency Response – Permanency) Amendment Bill 2021* (Qld).[137]

The effect of removing the ETA exemption would be that individuals could use electronic signatures on a statutory declaration form (if the form was modified to allow for this). The treatment of electronic signatures under the ETA is broad enough to embrace more secure forms of digital signature, as we discuss below.

However, section 8(b) of the *Statutory Declarations Act 1959* (Cth) requires the declaration, including signature, to be 'made before' an approved witness. So simply removing the ETA exemption would not affect this witnessing requirement under section 8(b), or any of those in its State and Territory equivalents. Both the *Statutory Declarations Act 1959* (Cth) and the State-equivalent *Oaths Acts* would need to be amended in order to remove the witnessing requirement.

State-led reform

We can see a pathway to reforming the ETA in the State-level reforms enacted in, for example, Victoria and Queensland. In Victoria, recent changes to the law enable statutory declarations to be made using electronic signatures and for the witness to be 'present' by audio visual link, rather than in person. This is clearly intended to make statutory declarations more accessible. Where the reforms follow the approach to electronic signatures used in the ETA, they are arguable broad enough to allow for a more secure form of electronic signature that might also incorporate verification of identity. We discuss this in more detail below.

10. Do current regulatory frameworks meet the policy intent?

We have characterized statutory declarations as a convenient way for government, business and individuals to collect information and to establish facts by relying on what should be a truthful account – of both the declarant's identity and the content of the document. It seems likely that most people make statutory declarations truthfully most of the time, and that they are inconvenienced by, but not influenced by, the formality requirements.

Do we need statutory declarations?

This raises the question of whether we need statutory declarations at all. The Western Australian Law Reform Commission in 1978 thought not.[138] They recommended adopting an unattested declaration, made by signing under an

[137] See n 136, above
[138] Western Australian Law Reform Commission, Report, '*Official Attestation of Forms and Documents'* Project No. 28 (1978)

acknowledgement of the penalty (either for the declaration itself, or in embedded in relevant subject-specific legislation). In doing so, they referenced the process used then and now for filing tax returns – a routine and important transaction between government and its citizens.

That recommendation also aligns with pragmatic adjustments made to statutory declarations in 2020-21 in response to the COVID-19 pandemic, such as in the National Redress Scheme. That Scheme is administered by the Commonwealth Department of Social Services (DSS) and provides support to people who experienced institutional child sexual abuse. It was designed as an online application process, but the application needs to be supported by a (hard copy) statutory declaration. For most of 2020, DSS suspended that requirement and accepted unsigned and unwitnessed statements instead.[139] That change has now been proposed as a permanent measure.[140]

What this suggests is that there is scope to examine what kinds of information-gathering, for which government purposes, needs to be supported by a statutory declaration. Arguably, many do not.

It is likely that signed, unattested declarations would be sufficient for a wide range of government information-gathering functions. Those signed declarations could adopt a standard formula that acknowledges legal penalties for a false declaration. In some cases, those penalties already exist under separate, subject-specific legislation, but where they do not – and where the declaration is functionally important, the subject-specific legislation could be amended to make this clear and impose a penalty for false declarations.

It follows that, where a signed declaration is adopted, the requirement for attestation (witnessing) becomes unnecessary. The argument for removing witnessing is stronger where the form of the declaration is digital, as we discuss in Section 17, below.

Do we need witnesses?

The 1978 Reference to the Western Australian Law Reform Commission on 'Oaths, statutory declarations, acknowledgement and the like (except notarial acts)' was intended to contribute to 'the development of uniform provisions within could be adopted as a model for the Commonwealth and the States'.[141] The Commission's key recommendation was that the attested (witnessed) form of the statutory

[139] Note: For the period 1 March 2020 to 31 December 2020 inclusive, the Scheme can accept and process redress applications where you were unable to sign the statutory declaration or get it witnessed due to coronavirus-related restrictions or concerns See: https://www.nationalredress.gov.au/applying/start-continue-application

[140] As part of Amendment Bill: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr6772_ems_e96f35da-bcde-4a93-bd97-7707edd24b48%22;src1=sm1, at 20 September 2021. The proposed amendments implement the recommendations of Robyn Kruk, *Final Report: Second Year Review of the National Redress Scheme* (March 2021; publically released on 23 June 2021)(including a powerful critique of why the statutory declaration is unnecessary and how much hardship and grief it causes applicants. It recommends the removal of a requirement for a statutory declaration that is 'in line with contemporary practice', 11)

[141] Western Australian Law Reform Commission, Project No. 28 *Official Attestation of Forms and Documents*, Report, November 1978, 1

declaration should be abolished. The recommendation to remove the witnessing requirement was based on,

> an overwhelming response [by commentators on their draft report] who represented a broad spectrum, in favour of the introduction of an unattested statutory declaration.[142]

That recommendation was not taken up by the Western Australian government of the day.[143]

One of the common arguments in favour of witnessing is that it provides protection for vulnerable people. We consider this in Section 18, below.

Residual uses for statutory declarations

Are there categories or situations where we may continue to need statutory declarations? In the business examples given earlier in the paper, there is an argument that business harnesses the statutory declaration in order to add (potential) criminal penalties to its own business and legal sanctions for false statements. In those settings, the false statement is generally going to be grounds for breach of contract. Business may be reluctant to give up the threat of those criminal sanctions, even though they may not be relied upon in practice.

A more important use of statutory declarations, however, seems to be their evidentiary value in the early stages of either a criminal prosecution or an application for intervention or protection (such as in domestic violence cases), or in an administrative proceeding before a tribunal or in a civil dispute before a court.

11. Harmonising our approach to statutory declarations

The form of the statutory declaration is similar and its policy purpose identical across Australian jurisdictions. However, the witnessing requirements and the penalties for false declarations are different.

The earlier efforts at reform in Western Australia may explain why the requirements for statutory declarations in Western Australia incorporate the witnessing requirements of the Commonwealth legislation -- a voluntary harmonisation.[144] This has ripple effects, when other legislation imports the statutory declaration witness qualifications into other forms of document, such as Enduring Powers of Guardianship, such as under the *Guardianship and Administration Regulations 2005* WA (and so importing the Commonwealth witnessing categories). The application of

[142] Western Australian Law Reform Commission, Project No. 28 *Official Attestation of Forms and Documents*, Report, November 1978:6

[143] Perhaps because 'The [WA] Law Society was divided on the question': Western Australian Law Reform Commission, Report, '*Official Attestation of Forms and Documents'* Project No. 28 (1978) 6, note 26

[144] Aligning with recommendations about the desirability of a uniform national approach: Western Australian Law Reform Commission, Report, '*Official Attestation of Forms and Documents'* Project No. 28 (1978), 15

the Commonwealth legislation to statutory declarations in the ACT also accomplishes a similar effect.

All jurisdictions currently retain the requirement that a statutory declaration be witnessed, whether through a paper-based process or electronic process, as we discuss below.

Of necessity, States have had to consider how to accommodate the needs of a mobile population. But the reforms to allow this have been piecemeal. So, in Victoria, for example, the *Oaths and Affirmations Act* 2018 allows statutory declarations made outside Victoria, for use in Victoria, to be witnessed by, inter alia, 'any person having authority to administer an oath or affirmation in that place' (s.33). Significantly the Act does not permit a person having authority to witness a statutory declaration in another jurisdiction to witness a Victorian one (unless they are also the class of public official who is authorized to administer an oath).

Implications of Regulatory Differences

Differences in regulation of statutory declarations by the Commonwealth, States and Territories have implications for business and for individuals in Australia. First, there is currently no mechanism for mutual recognition and interoperability of statutory declarations across Australia. So, neither users nor governments can take full advantage of legal infrastructure available in other jurisdictions. Second, different witnessing requirements create uncertainty and increase the likelihood of error. At best that requires a user to repeat the process of making a statutory declaration, but in some cases it may invalidate the process or application for which they need it. Third, the requirement to create a witnessed statutory declaration as a paper document (in the jurisdictions that require this) is itself a regulatory burden in many routine processes, such as applying for a passport or a visa or a driver's license. The time and inconvenience become harder to justify if the process to which the statutory declaration is attached is itself digital, or if it includes (or could include) a declaration built into the process that links to primary legislation, or a contract of employment, or a code of conduct.

Mutual recognition

In principle, where statutory declarations are still useful, there seems no reason why they should not be mutually recognized by all Australian jurisdictions.

The mutuality increases if jurisdictions adopt a digital pathway in addition to the paper and electronic forms currently in use, as we discuss in Section 14, below.

Whether we abolish the statutory declaration (and rely on a declaration and penalty) or retain the statutory declaration and add a digital pathway to the current paper pathway supplemented by electronic transmission (noting the availability of the electronic form in Queensland), the truth and the evidential value of the declaration still needs to be examined. The government or business or adjudicative process that requests it will still need to decide whether to rely on it, as is currently the case.

12. Contemporary types and uses of deeds

Unlike statutory declarations, deeds were created and recognized historically as part of common law. In contemporary Australia, they are also governed by legislation.[145] Key examples of where legislation requires or suggests the use of deeds include:

(a) **limitation period extension** for bringing an action, meaning that absent agreement to the contrary, the time period for challenging the agreement in a deed would be considerably longer than that for a contract;

(b) **real property** that is 'old system' and not converted to Torrens title, must be conveyed in most states, in the form of a deed;

(c) **powers of attorney**, which are a matter of State and Territory law. Under common law these require a deed, but the States have different requirements of form that approximate common law deeds and so creating a valid deed would satisfy both requirements;

(d) **conveyancing** and property legislation across the States and Territories require a power of appointment to be in the form of a deed; and

(e) **personal insolvency** agreements, which must be in the required form of a deed.[146]

Deeds are used routinely to establish trusts and to vary contracts – and to vary existing deeds. At common law, a deed was traditionally necessary to make a conveyance of any intangible property interest that could be inherited (such as an easement) (an 'incorporeal hereditament') or any estate or interest in that estate.[147] However, statutory enactments in each jurisdiction now govern the use of deeds in relation to property interests and conveyancing generally.[148] Even with the introduction of the Torrens system throughout Australia, where changes in property ownership and rights are effected through registration, dealings lodged under the system are deemed to be deeds.[149]

Policy intent of form and formalities for deeds

Historically, in order to constitute a valid deed at common law, the document had to comply with a number of form requirements -- originally writing on paper or parchment or vellum, which was accompanied by the procedure of being signed

[145] The leading case being *MYT Engineering Pty Ltd v Mulcon Pty Ltd* in which a deed of company arrangement required under the corporations legislation was deemed to meet the requirements of a deed: Nicholas Seddon, *Seddon on Deeds*, (2015), 7. Seddon observes that there are a range of 'trust deeds' created by statute which are quite distinct from more familiar transactional deeds, at 29.
[146] Nicholas Seddon, *Seddon on Deeds*, (2015), 26-28
[147] *Bryan v Whistler* (1828) 8 B&C 288
[148] See e.g., *Conveyancing Act 1919* (NSW) s 23B (1) (assurances of land to be by deed), *Property Law Act 1958* s 52(1) (conveyances to be by deed)
[149] See e.g., *Real Property Act 1900* (NSW) s 36(11)

simultaneously by parties who were physically present, 'sealed' through affixing a seal or sticker, or imprint or stamp or making a mark on the document and 'delivered' (in order to take effect).[150] Today this is usually an 'execution block' which declares the deed has been 'signed, sealed and delivered'. Subsequent legislative requirements added witnessing in some jurisdictions. Together, there had to be acts or words sufficient to show that the party making the deed intended the deed to be presently binding on him or her.[151] The policy reasons for these formalities were to serve evidential, cautionary, and protective purposes.[152]

Deeds as rituals

The older procedures for creating deeds are what the sociologist Durkheim would call 'weighty' ritual – repeated acts that are symbolically charged, that mark turning points and that have a sacred quality. These function to 'assert and reaffirm commitment to a shared moral order'.[153] The formality of the deed meant that when validly created, it was perceived as certain and secure. Part of that security comes from the way in which it is created, and for bilateral deeds, from the fact that, as we noted earlier, a deed does not require consideration in the way that a contract does. The content and effect of a deed is not as vulnerable to later challenge as a contract can be, provided that it is validly created.

Over time, those formalities have changed: the wax seal or thumbprint or indentation has been replaced by a sticker, or a printed mark, or a circle initialed with 'LS' (*locus sigilli*, 'place of the seal') literally meaning 'seal placed here'. Parchment and vellum have been replaced with paper and the in-person simultaneous signing has, in jurisdictions that permit it, been replaced by electronic execution using electronic signatures, as has witnessing in jurisdictions that require it (see Table 5, below). We discuss these changes further below.

In some state and territory jurisdictions, case law and legislation suggest that the common law requirement of paper, parchment or vellum has been displaced.[154] Further, the non-binding comments made *obiter dicta* by Young J in *Manton v Parabolic Pty Ltd*[155] suggest that the execution requirement of sealing may have been overridden by the *Conveyancing Act 1919* (NSW), acknowledging that 'formal requirements… have changed from time to time'.[156] In other jurisdictions, courts

[150] As traditionally defined by Robert Norton, Robert Morrison and Hugh Goolden, *A Treatise on Deeds* (Sweet & Maxwell, 2nd ed, 1928), cited with approval in many Australian cases such as *Scook v Premier Building Solutions Pty Ltd* (2003) 28 WAR 124, [22].
[151] *Scook v Premier Building Solutions Pty Ltd* (2003) 28 WAR 124, [24]-[25] (Steytler J)
[152] United Kingdom Law Commission, *Electronic Execution of Documents,* Consultation Paper 237, (2018), 2
[153] See, for example, David E. Greenwald, Durkheim on Society, Thought and Ritual, *Sociological Analysis*, Vol. 34, No. 3 (Autumn, 1973), pp. 157-168
[154] For example, see section 12A(1) of the *Electronic Transactions (Victoria) Act 2000* and section 38A of the *Conveyancing Act 1919* (NSW)
[155] *Manton v Parabolic Pty Ltd* (1985) 2 NSWLR 361, 366. (Noting the presumption under the *Conveyancing Act 1919* (NSW), s 38(3), that a document will be taken as sealed if there is an instrument which is "expressed to be a deed", will be satisfied, even in the absence of the word "deed", if it clearly appears from the face of the document itself that the parties are intending a deed.)
[156] *Conveyancing Act 1919* (NSW) s 38

have observed that electronic signatures can be applied by others who are not the stated signatory.[157]

Statutory Regulation

Regulations governing how *corporations* must execute deeds are outlined in the *Corporations Act 2001* (Cth).[158] The execution of deeds by *non-incorporated* entities and *individuals* is regulated at a state and territory-level and is typically housed within their respective conveyancing and property Acts.[159]

Invalid deeds

A deed may be declared invalid if it fails to fully comply with the applicable common law formalities and the statutory regulations governing its execution. As an older case puts it, the 'absolute and solemn attributes of a deed to not attach to it unless it first becomes effective' and duly consummated.[160]

A high point in confusion about the validity of electronic execution was reached in the 2019 case, *Bendigo and Adelaide Bank Ltd & Ors v Kenneth Ross Pickard & Anor* [161]*. Pickard* stands for a number of different propositions, flowing from a complicated fact situation. Here, the plaintiff bank was pursuing a claim for money owed under what they characterized as a guarantee by the defendants, contained in a loan deed. That loan deed was executed on behalf of the defendants by a company purporting to act on their behalf in reliance on a power of attorney contained within a loan application. The loan deed was then purportedly signed on behalf of the defendants by the attorney company under section 127 of the *Corporations Act 2001* (Cth). The electronic signatures of two directors of the attorney company were applied to an electronic copy of the deed, but not by those directors Significantly, the deed was executed after the bank had made the loan that they claimed was subject to the defendants' guarantee.

The defendants claimed that the deed was invalid because it was improperly executed – it did not meet the common law requirements of a deed (namely that it was not written on 'paper, parchment or vellum'). The court found that the loan deed was not executed in accordance with section 127 as the company's officers did not intend to authenticate the loan deed by the placement of their signatures and had no involvement in the production or authentication of the loan deed. Because of this, section 127 had not been complied with and the loan deed had not been validly executed.

The court also observed that section 127(1) contemplated 'a' document being executed by two officers signing it, and that therefore there is 'good reason to consider' that there must be 'a single, static document' that both officers sign, rather than there being a situation where two electronic signatures are sequentially applied to an electronic document. For those reasons, the document was not properly

[157] See *Bendigo and Adelaide Bank Ltd & ORS v Kenneth Ross Pickard & Anor* (2019) SASC 123
[158] *Corporations Act 2001* (Cth) s 127
[159] See e.g., *Conveyancing Act 1919* (NSW) s 38-38A, *Property Law Act 1958* (Vic) s 73
[160] *Re Goile; ex parte Steelbuild Agencies Ltd* [1963] NZLR 666, 682
[161] (2019) SASC 123

executed as a deed and could not be enforced as a deed. Nor could it be deemed to be a contract, because if lacked the necessary binding consideration.

The legal practice response to *Pickard* was to recommend that deeds be signed in wet ink, and not electronically, or that a valid contract be used in pace of a deed. The amendments to section 127 of the *Corporations Act 2001* (Cth) passed in August 2021 now clarify this issue; we summarise those in Section 13, below.

Unenforceable deeds

Even where a party may have executed a deed in full compliance with the formalities required in that jurisdiction, where they have been induced to do so[162] by some false representation or misstatement of a material fact,[163] the deed is voidable by the party deceived or misled.[164] A deed executed by someone who is illiterate has been held to be not binding if it has been falsely explained, whether by the grantee or by a stranger.[165]

Thus, in the recent case of *Tomanovic Multiown Pty Ltd v Interlux Projects Pty Ltd*, the New South Wales Supreme Court determined the enforceability of a contractual arrangement by closely examining an accompanying deed of loan.[166] The court found that the terms of the loan - as evidenced by the deed - were the result of the exertion of undue influence and thus the arrangement was unenforceable.[167]

Utility of deeds

The practical benefit of deeds is the certainty that they promise for commercial and individual legal planning. This happens through the binding, evidentiary, symbolic effect of the deed. Once a deed has been properly executed and delivered, the party making the deed becomes conclusively bound by the provisions of the deed and cannot thereafter 'resile from or recall it'.[168] A deed functions as strong prima facie evidence of a clear agreement, or creation or transfer of a legal right.

In *Liristis v Bank of Western Australia*, for example, the plaintiff challenged the validity of the appointment of receivers by the defendant lender.[169] In determining that the bank was entitled to enforce the securities, the court the referred primarily to a bilateral moratorium deed that purported to record the entire agreement between the parties.[170] The court held that the very 'existence of the moratorium deed is a circumstance which means that there is quite a strong case' on the part of the defendant.[171]

In *Gillett v Nelson (No 2)*, the court referred to a Deed of Gift as significant evidence that the donor had done everything which was necessary to effect a transfer of legal

[162] *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563, 578-80
[163] LexisNexis, *Halsbury's Laws of Australia*, vol 15 (at 21 June 2021) 110 Contract, 'Vitiating Factors' [5045-5075]
[164] LexisNexis, *Halsbury's Laws of Australia*, vol 15 (at 21 June 2021) 110 Contract, 'VI Vitiating Factors' [5025]
[165] *Vella v Permanent Mortgaged Pty Ltd* [2008] NSWSC 505, 620 (Young CJ)
[166] *Tomanovic Multiown Pty Ltd v Interlux Projects Pty Ltd* [2021] NSWSC 190, [78]
[167] *Tomanovic Multiown Pty Ltd v Interlux Projects Pty Ltd* [2021] NSWSC 190, [98]
[168] *Hooker Industrial Developments Pty Ltd v Trustees of the Christian Bros* [1977] 2 NSWLR 109, 118
[169] *Liristis v Bank of Western Australia* [2002] NSWSC 1119, [4]
[170] *Liristis v Bank of Western Australia* [2002] NSWSC 1119, [10]
[171] *Liristis v Bank of Western Australia* [2002] NSWSC 1119, [14]

title.[172] A gift would generally not be enforceable as a contract in Australia, because it lacks consideration (something of value being offered reciprocally). Specific terms of the deed were examined to support the existence of such an intention on behalf of the donor,[173] such that, despite a lack of valuable consideration, principles of equity would recognise the gift.[174]

But as Seddon observes, although 'a well-drafted deed can minimize risk of uncertainty …the very solemnity of a deed is a trap'.[175] In other words, a deed that fails to step through the necessary formalities risks being invalidated.[176] In his view, 'Practitioners sometimes use deeds when a contract will suffice. As a general rule, a contract should be preferred over a deed if there is a choice'.[177] Despite this, Seddon also concedes that deeds also gain their utility from familiarity – the deed is a convenient way for lawyers to set out the terms of a trust or a partnership agreement,[178] or a settlement.

Pragmatic reforms to de-solemnify deeds

Assuming that lawyers (and their clients) will continue to choose deeds as a transactional form, is there any reason in principle why deeds cannot change form in response to a pandemic and changes in the digital economy? As a practical matter, State and Commonwealth reforms have already answered that question. Deeds are not required to be witnessed in Victoria[179] and the proposed permanent amendments to section 127 of the *Corporations Act 2001* (Cth) confirm deeds entered into by a corporation (including a sole proprietor corporation) do not require witnessing unless they are being signed through the affixation of a common seal.[180] At both Commonwealth and State level, electronic document execution enabled by temporary COVID-19 reforms has, or is likely to, become permanent. We discuss this in Section 13, below.

These reforms change the way we think about and regulate 'solemn documents', by jurisdiction, but also by transaction type and user. We are currently in a situation in Australia where it will be easier to companies to create a transactional deed than it is to for individuals to make a statutory declaration, even though deeds were historically the most complex solemn documents and statutory declarations were created as a simplified, deregulatory reform.

However, two groups of solemn documents continue to be the focus of more stringent policy requirements. They include deeds relating to real property transactions, and solemn documents that involve people who may be vulnerable.

[172] *Gillett v Nelson (No 2)* [2014] NSWSC 580, [112]
[173] *Gillett v Nelson (No 2)* [2014] NSWSC 580, [116]
[174] *Gillett v Nelson (No 2)* [2014] NSWSC 580, [113], quoting *Corin v Patton* (1990) 169 CLR 540, 559
[175] Nicholas Seddon, *Seddon on Deeds*, (2015), 20
[176] *Locnere Pty Ltd v Jakk's Bagel & Bread Co Pty Ltd* [2003] NSWSC 1123 (where failure to execute the deed after exchanging amendments by email meant that the deed of compromise to settle the dispute did not function as a settlement)
[177] Nicholas Seddon, *Seddon on Deeds*, (2015),19
[178] Nicholas Seddon, *Seddon on Deeds*, (2015), 32
[179] See sections 73 and 73A of the *Property Law Act 1958* (Vic)
[180] See: https://treasury.gov.au/consultation/c2021-203516, at 20 September 2021

Regulation of deeds for real property transactions

A significant sub-set of deeds are created for transactions involving real property. The ownership of real property is evidenced by a deed of title; in a Torrens system of registration (covering most property in Australia), registration creates a presumptively valid title and gives priority to the registered ownership interest.[181] Other interests in land (for example mortgages, covenants, leases and trusts) -- typically documented as deeds – are then usually required to be registered because they are significant interests in property. Many jurisdictions also require registration of enduring powers of attorney where they relate to financial matters.[182]

Maintaining the integrity of the titles register then becomes an important policy goal. The Registrar of Land and Titles is responsible for maintaining the integrity of the register and typically an assurance fund is set up to cover compensation claims in a case where property interests have been affected by, for example, a fraudulent registration.[183] It follows that Registrars typically require the strongest possible form of document solemnity and execution, including witnessing by a type of witness accepted by the Registrar. So, even when the conveyance and registration of the land title is done through e-conveyancing, for example, it may still require the registration of a mortgage created on paper in the form of a deed, including witnessing.[184] For those reasons, the temporary (and in some cases, permanent) reforms to electronic document execution detailed below typically contain 'carve outs' for documents required to be registered in real property transactions.

An important regulatory overlay for conveyancing in Australia is the Australian Registrars National Conveyancing Council (ARNECC), established under a 2011 Intergovernmental Agreement (IGA) entered into by the State and Territory governments, the Electronic Conveyancing National Law Agreement.[185] The *Electronic Conveyancing National Law (ECNL)* governs the provisioning and operation of electronic conveyancing in Australia and is enacted in corresponding legislation at State and Territory level. For our purposes, one of the important features of the regulatory framework is the participation rules for each State and Territory, which govern, among other things, who may be a 'subscriber' for the purpose of lodging document electronically. Subscribers are subject to extensive 'good character' requirements[186] which also flow to their principals and officers accessing the system.

[181] For a short summary see Paul White, 'Torrens Title Still Holds the Title' (2008) 82 (12) *Law Institute Journal*, 56 https://www.liv.asn.au/LIV-Home/Practice-Resources/Law-Institute-Journal/Archived-Issues/LIJ-December-2008/Torrens-system-still-holds-the-title

[182] See, for example the Queensland requirement: https://www.titlesqld.com.au/manual-guides/guides-to-common-registry-transactions/registering-a-power-of-attorney/

[183] See for example, the South Australian Office of the Registrar General Assurance Fund: https://dpti.sa.gov.au/land/office_of_the_registrar_general/safe_title/assurance_fund_claims, at 20 September 2021; in NSW it is the Torrens Assurance Fund: https://www.registrargeneral.nsw.gov.au/title-guarantee/taf-compensation

[184] See, for example, the Land Titles Practice Manual, Queensland: https://www.titlesqld.com.au/manual-guides/land-title-practice-manual/, at 20 September 2021

[185] Australian Registrars National Conveyancing Council (ARNECC) www.arnecc.gov.au

[186] Seem for example the current South Australian Participation Rules (Rule 4.2) South Australian Participation Rules Version 6 (arnecc.gov.au), at 20 September 2021

What types of documents should not be 'de-solemnified'?

Many jurisdictions, both within and outside Australia exclude some types of documents from digitisation and electronic signatures because of the policy fear that this poses risks for vulnerable people (see for example, Table 8 below). These 'carve outs' include enduring powers of attorney for financial matters or care; guardianship arrangements; undertakings about end-of-life decisions; and wills -- as well as identifying documents such as birth, deaths and marriage certificates.

In the case of powers of attorney, it is not uncommon for these to be incorporated within a deed and so there is question is do the form and formality requirements for the two legal instruments align – and if not, which one governs? We consider these issues in Section 21, below.

13. COVID-19 reforms to document execution

Changes to Australian deeds through temporary COVID-19 measures

After the impact of the COVID-19 pandemic began to be felt in Australia from February 2020 onwards, both the Commonwealth and State governments responded quickly by either relaxing requirements for hard copy documents or document formalities, or by quickly permitting electronic means of executing these. In the face of rolling lockdowns, business throughout Australia, as well as many individual consumers, had come to expect, and to rely on, being able to create and execute legal documents electronically.

Most amendments made during COVID-19 contained sunset dates for the temporary measures, but the reforms allowing electronic document execution in Victoria were made permanent in April 2021.[187] Amendments in New South Wales, Victoria and Queensland allow or allowed individuals and non-incorporated bodies to sign deeds electronically, with Queensland also removing witnessing requirements for deeds (but not those required to be registered). The status of these reforms in shown in Tables 5 and 6, below.

Amendments to section 127 of the *Corporations Act* 2001 (Cth)

At a Commonwealth-level, temporary COVID-19 amendments enabled the electronic execution of deeds under the *Corporations Act 2001* (Cth). These amendments expired in March 2021 but were presented to Parliament in July 2021 and passed on 10 August 2021, extending their effect to 31 March 2022.[188] The revisions to section

[187] Note that deeds have never required witnessing in Victoria (s73 *Property Law Act*). The *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic) made permanent a range of temporary measures previously introduced by the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) and its accompanying regulations. Legislation amended by the 2021 Act (to permanently allow for electronic signing and remote witnessing) includes the *Electronic Transactions (Victoria) Act 2000* (Vic) and the *Oaths and Affirmations Act 2018* (Vic).

[188] See: https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/extending-relief-virtual-meetings-and-electronic, at 20 September 2021 and Treasury Laws Amendment (2021 Measures No. 1) Bill 2021; See: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6674, at 20 September 2021

127 are now proposed as permanent and a consultation draft Bill released.[189] This would confirm that transactional deeds can be executed in flexible and technology neutral ways. The effect of these reforms is that deeds may be signed physically, by hand, or electronically.

Electronic signature for the purpose of this amendment uses the approach of the *Electronic Transactions Act 1999* (Cth),[190] which while it does not define electronic signature, sets out validity requirements for 'signature' in electronic communications (s10(1) *Electronic Transactions Act 1999* (Cth).[191] Significantly, the amendments to section 127 of the *Corporations Act 2001* (Cth) do not require consent for an electronic signature to be valid.

Multiple signatories may sign different forms of the document, different pages of the document or use different methods to sign the document or parts of the document. [192] Where a company seal is used to execute a document, that may be witnessed electronically, provided that the witness observes the sealing.

The ability for companies to execute documents in flexible and technology neutral ways is extended to proprietary companies with a sole director and no company secretary under the proposed permanent reforms. The proposed permanent amendment to section 126 of the Act is intended to allow agents to more easily execute documents (including deeds) on behalf of companies and, in the case of deeds, the appointment of the agent need not itself be done by deed. This is also the approach taken in the reforms proposed as permanent in Queensland, which expressly seek to track the *Corporations Act* reform approach.[193]

These are pragmatic responses to COVID-19, intended to reduce burdens for business transactions. An unintended consequence is that the cumulative effect of

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[189] See the Treasury Exposure Draft Legislation and the Explanatory Memorandum: https://treasury.gov.au/consultation/c2021-203516, at 20 September 2021

[190] Section 127(3B) stipulating that an electronic signature must include:
(a) a method is used to identify the person and to indicate the person's intention to sign a copy or counterpart of the document; and
(b) the copy or counterpart includes the entire contents of the document; and
(c) the method used was either:
(i) as reliable as appropriate for the purpose for which the document was generated or communicated, in light of all the circumstances, including any relevant agreement; or
(ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence.

[191] Section 10 of the *Electronic Transactions Act 1999* (Cth), stipulating that:
(1) If, under a law of the Commonwealth, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication if:
(a) in all cases—a method is used to identify the person and to indicate the person's intention in respect of the information communicated; and
(b) in all cases—the method used was either:
(i) as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
(ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence; and
(c) if the signature is required to be given to a Commonwealth entity, or to a person acting on behalf of a Commonwealth entity, and the entity requires that the method used as mentioned in paragraph (a) be in accordance with particular information technology requirements—the entity's requirement has been met; and
(d) if the signature is required to be given to a person who is neither a Commonwealth entity nor a person acting on behalf of a Commonwealth entity—the person to whom the signature is required to be given consents to that requirement being met by way of the use of the method mentioned in paragraph (a).

[192] See the Explanatory Memorandum: https://treasury.gov.au/consultation/c2021-203516

[193] 'This approach mirrors the execution requirements for corporations under section 127 of the Corporations Act 2001 (Cth)': Explanatory Note: https://documents.parliament.qld.gov.au/bills/2021/3076/Police-Legislation-(Efficiencies-and-Effectiveness)-Amendment-Bill-2021---Explanatory-Notes-7db2.pdf, 5, at 20 September 2021

Corporations Act reforms over time is that deeds – at least as far as corporations are concerned – are no longer 'solemn documents' in the sense that the use of paper, ink, and seals are optional and witnessing is not required, other than where the company seal is used. What remains of the classic form of the deed is the core requirement – the party intention to create a deed rather than a contract. For clarity and certainty that should probably be shown clearly, for example by labelling the document a 'deed'.

Table 5: COVID-19 Reforms – Deeds

Jurisdiction	Pre-COVID Requirements	Temporary COVID Amendments	Expiry Date of Temporary Amendments
Corporations under the *Corporations Act 2001* (Cth)	**Perceptions that physical signing (without common seal) was required or physical witnessing (with common seal).**[194] *Corporations Act 2001* (Cth) s 127(1)-(2).	**Electronic creation, signing and audio-visual witnessing.** *Corporations (Coronavirus Economic Response Determination) (No 3) 2020* (Cth) s 6.	**Renewed until 31 March 2022.** The Government has consulted on draft legislation to make these changes permanent.
New South Wales	**Signing and witnessing.** *Conveyancing Act 1919* (NSW) s 38-38A (s 38A permits deeds in electronic form and electronic signatures)	**Audio visual link witnessing.** *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW) Sch 1 Part 1.	**1 January 2022**
Victoria	**Physical creation and signing but no witnessing requirements.** *Property Law Act 1958* (Vic) s 73.	**Electronic creation and signing.** **Audio visual link witnessing (if applicable).** *COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020* (NSW) Part 2 Division 3.	**Permanent reform Bill passed 16 March 2021** *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021*[195]
Queensland	**Physical creation, signing and witnessing.**	**Electronic creation and signing.**	**30 September 2021**

[194] There is a strong argument that electronic execution was not prohibited under s 127(1) (pre-COVID) and that 'physical' execution was not expressly required and that there there is no legal basis to 'read in' such a requirement (a position supported by comments made in passing (*obiter dicta*) in case law.

[195] Thomson Reuters Practical Law, 'COVID-19: Australian commercial real estate transactions: legislation and resources tracker' See: https://content.next.westlaw.com/Document/I95ad8c90801411ea80afece799150095/View/FullText.html?originationContext=document&transitionType=DocumentItem&ppcid=c0e95493428744bb87978f57d5657aff&contextData=(sc.DocLink)#co_anchor_a975579 (at 15 August 2021). Note that the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) (the Act) and *COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020* (Vic) (the Regulations) have limited application to land registration services.
In particular they do not vary or override the requirements in the *Transfer of Land Act 1958* (Vic) and *Subdivision Act 1988* (Vic) that instruments be lodged in an approved form, including the specific signing and witnessing requirements applying to those forms

	Property Law Act 1974 (Qld) Part 6.	**Removal of witnessing requirements.** *Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Regulation 2020* (Qld) Part 3D	*Proposed to be extended to 30 April 2022, subject to passage of Justice Legislation (COVID-19 Emergency Response – Permanency) Amendment Bill 2021* (Qld)[196]
South Australia	**Physical creation, signing and witnessing.** *Law of Property Act 1936* (SA) s 41.	**No amendments regarding creation or signing.**	
Western Australia	**Physical creation, signing and witnessing.** *Property Law Act 1969* (WA) s 9	**No relevant amendments**	
Tasmania	**Physical creation, signing and witnessing.** *Conveyancing and Law of Property Act 1884* (Tas) s 63.	**No relevant amendments**	
Australian Capital Territory	**Physical creation, signing and witnessing.** *Civil Law (Property Act) 2006* (ACT) s 219.	**Physical creation and signing, but audio-visual link witnessing.** *COVID-19 Emergency Response Act 2020* (ACT) s 4.	**End of COVID-19 emergency period per *Emergencies Act 2004* (ACT)**
Northern Territory	**Physical creation, signing and witnessing.** *Law of Property Act 2000* (NT) s 47.	**No relevant amendments.**	

Rethinking deeds after COVID-19

The COVID-19 accommodations for executing deeds at a distance built on case law and practice that had already relaxed some of the strict requirements for execution -- in particular, moving away from paper and using electronic signatures. But in some cases the reforms confused, rather than clarified, understanding of the rules.

Resolving confusion about execution requirements for deeds

Prior to the temporary COVID-19 reforms to section 127 of the *Corporations Act 2001* (Cth) being extended in August 2021, sections 126, 127 and 129 of the

[196] See: https://documents.parliament.qld.gov.au/bills/2021/3074/Justice-Legislation-(COVID-19-Emergency-Response-Permanency)-Amendment-Bill-2021-a164.pdf, at 20 September 2021

Corporations Act 2001 (Cth)[197] had been excluded from the operation of the *Electronic Transactions Act 1999* (Cth).

However, State-level case law and legislation had appeared to permit deeds to be executed electronically. The *Property Law Act 1969* (WA), for example states that '*every instrument* expressed or purporting to be… a deed', if sealed an executed as required, should be considered a deed.[198] However, the term "instrument" is ambiguously defined in the Act, and it has been unclear whether a digital document would constitute an instrument for the purposes of the Act. In case law, *obiter dicta* (non-binding comments) by Young J in the New South Wales case of *Manton v Parabolic Pty Ltd*[199] suggested that the execution requirement of sealing may have been overridden by the *Conveyancing Act 1919* (NSW), acknowledging that 'formal requirements… have changed from time to time'.[200]

For some specific property-related deeds such as mortgages, New South Wales, Victoria, Queensland and South Australia enacted e-conveyancing legislation permitting these particular deeds to be executed electronically.

Neither physical or electronic signatures of themselves prove that a document has been signed by a particular signatory and so courts have held that electronic signatures do not prove that the deed has been signed by the bearer of the signature.[201]

That confusion was moderated for companies by the temporary amendments to the *Corporations Act 2001* (Cth) (now proposed as permanent changes, as noted above), where the requirement of paper, parchment or vellum was effectively modified by the definition of 'document' to include electronic forms of deeds for the purposes of section 127(1) of the *Corporations Act 2001* (Cth).

Differential treatment of deeds by user and type

This mix of permanent and temporary reforms in Australia has created a situation in which the requirements for the creation and validity of deeds vary with the status of the person or entity executing them, as well as the transaction type. Deeds are used by a wide range of individuals and entities, including:

- Individuals (including unincorporated business owners)
- Partnerships
- Incorporated associations
- Australian companies - with a common seal
- Australian companies - without a common seal
- Foreign Corporations[202]
- Statutory Corporations
- Trustees – individuals
- Trustees – corporate with a common seal

[197] The excepting provision is contained in Schedule 1 of the *Electronic Transactions Regulations 2000* (Cth), which were amended in 2020.
[198] *Property Law Act 1969* (WA) s 9(4)
[199] *Manton v Parabolic Pty Ltd* (1985) 2 NSWLR 361, 366
[200] *Conveyancing Act 1919* (NSW) s 38
[201] See *Bendigo and Adelaide Bank Ltd & ORS v Kenneth Ross Pickard & Anor* (2019) SASC 123
[202] Excluded from the operation of the *Corporations Act 2001* (Cth)

- Trustees – corporate without a common seal
- Governments

The question of whether government itself at State and Commonwealth level (when not in the form of a statutory corporation) can create or enter into deeds is not clearly addressed in legislation and this requires reliance on the common law (and complying with its formalities).[203] Seddon's view is that the inconsistency that this creates could be avoided by passing legislation governing government execution of deeds.[204]

We consider the opportunity here to harmonize the execution formalities for deeds, both across jurisdictions and across transaction types, in Section 20, below.

Covid-19 accommodations for statutory declarations

Commonwealth statutory declarations

There was no Ministerial determination to alter the witnessing and signature requirements for Commonwealth statutory declarations during the time when the temporary measures were available.[205] This was even although – as we saw above – individual Departments in some cases relaxed the requirements for information, including suspending the need for statutory declarations. The previous temporary measures ceased on 31 December 2020. A new measure to extend the power of responsible Ministers until 31 December 2022, to make new temporary arrangements in response to COVID-19 restrictions, is included in the *Treasury Laws Amendment (COVID-19 Economic Response No 2.) Act 2021* (Cth).

State responses affecting statutory declaration

During COVID-19, some jurisdictions such as New South Wales removed requirements for statutory declarations in specific government processes. Additionally, most jurisdictions passed legislative amendments during COVID-19 allowing for remote witnessing over audio-visual link and electronic signatures as part of the statutory declaration process.

In Queensland, only a smaller subset of authorised witnesses ('special witnesses') are permitted to witness statutory declarations over audio-visual link (in part to address the vulnerability issues discussed in Section 18 below),[206] but the category of witnesses able to witness in person was expanded to match the Commonwealth list of authorized witnesses.[207] Though South Australia's amended regulations do not

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[203] See Australian Government Solicitor, Fact Sheet No 37, 'Execution Clauses' February 2019 See: https://www.ags.gov.au/sites/default/files/2020-07/Fact_sheet_No_37.pdf, at 20 September 2021

[204] Nicholas Seddon, *Seddon on Deeds*, (2015), 94

[205] In response to difficulties experienced by stakeholders and members of the public in meeting the physical witnessing, production and signature requirements in Commonwealth legislation due to COVID-19 restrictions in 2020, the Government included a measure in the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* (the Act). Schedule 5 of the Act, which commenced on 9 April 2020, provided a general instrument-making power that enabled responsible Ministers to make a determination temporarily adjusting arrangements for meeting information and documentary requirements under Commonwealth legislation in response to COVID-19 restrictions. Schedule 5 was repealed on 31 December 2020.

206 *Justice Legislation (COVID-19 Emergency Response – Documents and Oaths) Regulation 2020* (Qld) s 16(1). Section 5 defines special witnesses to include 'an Australian legal practitioner; or a justice or commissioner for declarations either approved by the chief executive or employed by the law practice that prepared the document and who witnesses documents in the course of that employment; or a notary public.

[207] See: https://www.justice.qld.gov.au/initiatives/documents-during-covid/statutory-declarations

accommodate remote witnessing or electronic signatures,[208] it expands the list of approved witnesses.[209] Those changes are shown in Table 6 below.

Table 6: COVID-19 Reforms – Statutory Declarations

Jurisdiction	Pre-COVID Requirements	Temporary COVID Amendments	Expiry Date of Temporary Amendments
Commonwealth	**Physical signing and physical witnessing. Statutory Declarations Act 1959 (Cth) Statutory Declarations Regulations 2018 (Cth)**	**Nil**	**Nil**
New South Wales	**Physical signing and physical witnessing.** *Oaths Act 1900* (NSW) Part 4.	**Audio visual link witnessing.** *Electronic Transactions Act 2000* (NSW) Part 2B	**1 January 2022**
Victoria	**Physical signing and physical witnessing.** *Oaths and Affirmations Act 2018* (Vic) Part 4.	**Electronic signing and audio-visual link witnessing.** *COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020* (Vic) Part 3.	**Permanent reform Bill passed 16 March 2021** *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021*
Queensland	**Physical signing and physical witnessing.** *Oaths Act 1867* (Qld) Part 4.	**Electronic signing and audio-visual link witnessing. Expanded list of approved witnesses for physical signing.** *Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Regulation 2020* (Qld) Part 3B	**30 September 2021** *Proposed to be extended to 30 April 2022, subject to passage of Justice Legislation (COVID-19 Emergency Response – Permanency) Amendment Bill 2021* (Qld)
South Australia	**Physical signing and physical witnessing.** *Oaths Act 1936* (SA) Part 3.	**Expanded list of approved witnesses for physical signing.** *COVID-19 Emergency Response (Section 16) Regulations 2020* (SA) s 4, sch 1.	**17 September 2021** *Proposed to be extended to 30 April 2022, subject to passage of legislation*
Western Australia		**Electronic signing and audio-visual link witnessing.**	**31 December 2021**

[208] *COVID-19 Emergency Response (Section 17) Regulations 2020* (SA) s 4
[209] *COVID-19 Emergency Response (Section 16) Regulations 2020* (SA) s 4, sch 1

	Physical signing and physical witnessing. *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) Part 4	*COVID-19 Response and Economic Recovery Omnibus Act 2020* (WA) Part 2, Division 4	
Australian Capital Territory	**Physical signing and physical witnessing.** *Statutory Declarations Act 1959* (Cth); *Statutory Declarations Regulations 2018* (Cth).	**Electronic signing and audio-visual link witnessing** (**limited to** affidavits, wills, health directions under the *Medical Treatment (Health Directions) Act 2006* and general or enduring powers of attorney under the *Powers of Attorney Act 2006*) *COVID-19 Emergency Response Act 2020* (ACT) s 4.	**End of COVID-19 emergency period per *Emergencies Act 2004* (ACT)**
Tasmania	**Physical signing and physical witnessing.** *Oaths Act 2001* (Tas) s 14.	**Electronic signing and audio-visual link witnessing.** *Notice 18/2020 under s 17 of COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Tas) and Notice 2/2021 *under s 17 of COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Tas).	30 March 2022[210]
Northern Territory	**Physical signing and physical witnessing.** *Oaths, Affidavits and Declarations Act 2010* Part 4.	**No relevant amendments**	

All of these reforms represent relatively ‘quick fixes’ to the question of how to enable document execution at a distance, electronically. What they do not do is open up pathways that are genuinely digital and that accommodate current and future technologies.

Before considering how to expand document execution to include digital pathways in Australia, we look at similar reforms in other jurisdictions in the common law world and harmonisation efforts in the European Union, which has been a frontrunner in adapting document execution in a multi-jurisdictional environment and for digital economies.

[210] Note that precise cessation date of the measures was unclear at the time of writing this paper.

14. From electronic to digital document execution

Australians have generally been early and willing adopters of new forms of technology. The tools for digitising routine legal documentation have been available for decades, but the appetite for digitisation of legal documentation now emerging arguably marks a unique moment in our economic and social history. Although we have a developing digital economy, like many legal systems worldwide, we have not yet created regulatory frameworks that fully enable digital document execution.

A second policy gap for Australia is full engagement with the utility (and necessary protections) for creating and using a public digital identity and accessing government services digitally.[211] Creating a national digital identification system has been a developing area of policy in Australia, as it has been elsewhere.[212] The initial vacuum created by the absence of a mandated public identity and access management tool in Australia has been rapidly filled by private sector actors that maintain user digital identities for their proprietary platforms (e.g. Google, Facebook). On the other hand, we see quasi-public providers of digital identification and verification systems that enjoy high degrees of trust in Australia,[213] such as Australia Post,[214] with more private sector providers likely to enter the market. How we manage digital identification and the multiple priorities of privacy, data protection and inclusion, as well as competition oversight of pricing mechanisms and aggregations of 'big data' are questions are outside the scope of this paper, but we note that they require sustained policy attention.

Distinguishing between 'electronic' and 'digital' execution

The COVID-19-induced legislative reforms summarized above generally take paper processes as their starting point. They allow the paper document to be executed using an electronic means of transmission -- for example, signing a document in wet ink; witnessing that signing via video-link; scanning the signed document; and then transmitting the document by email or fax for a wet-ink witness signature, followed by retransmission. These methods of signing a legal document continue to be widely used and regarded as reliable. In many cases they will also be convenient for users.[215]

This of course leads to situations where parts of a document can be signed and/or witnessed separately and the question of whether the document will then be legally valid. The temporary and proposed permanent reforms to section 127 of the *Corporations Act 2001* (Cth), described above, confirm that the practice of 'split

[211] See for example, current work by the Digital Transformation Agency: https://www.dta.gov.au/our-projects/govx

[212] See the thoughtful analysis by Elisabeth M. Renieris, 'Identity in a "Phygital" World: Why the Shift to Machine-Readable Humans Demands Better Digital Governance' August 16 2021, Centre for International Governance Innovation: https://www.cigionline.org/articles/identity-in-a-phygital-world-why-the-shift-to-machine-readable-humans-demands-better-digital-id-governance/, at 20 September 2021

[213] For Australia Post, Deloitte Access Economics 'Australia Post in Rural and Remote Communities' (2020), finding that Australia Post is 'among the most trusted service providers in rural and remote communities, behind only the local doctor and the police' (p 5) See: https://auspost.com.au/content/dam/auspost_corp/media/documents/australia-post-in-regional-rural-and-remote-communities.pdf

[214] See for example, Australia Post's marketing of a personal 'Digital iD': https://www.digitalid.com/personal, at 20 September 2021

[215] For a clear discussion and summary of current practice, see Mark Burrows (2020) 'Redesigning Signing' (2020) *Law Institute Journal*, 28

execution' – where different parts of the document are signed and witnessed simultaneously or sequentially and then recombined – is a valid mode of execution for corporations.

Electronic signatures come in as many forms as physical signatures. They can include typing the signatory's name in an email; typing letters into a text box on a digital document; confirming agreement via an email message or an SMS text; inserting a scanned version of a handwritten signature or using an electronic signature software or an electronic pen to mark a digitized document. Any of all of these methods of signing can be effective, and indeed are widely used. In some situations where being able to verify the identity of the person signing is important, they may be less effective than the original 'wet' handwritten signature or mark because there is scope for a second person to intervene or use the electronic signature. Depending on the type of document to which the electronic signature is being affixed, there may also be questions about whether it is tamper-proof.

Digital signatures were developed to address situations where a heightened need for document security is needed. They generally refer to a subset of electronic signatures that are encrypted in some way, usually combined with a secure means of identifying the signatory and capturing, protecting and storing the signature. This is a significantly higher level of security than a simple electronic signature. As we see in the discussion that follows, it may not be necessary -- except for transactions that require a high level of security and thus justify the cost the platforms and services needed to support digital signatures.

Table 7: Different forms of signature defined[216]

Type of Signature	Description	Examples
Physical or 'wet ink'	The method of marking a physical document to indicate assent to its terms	• Handwritten signature made with ink on a physical document. • A person's mark on a physical document.
Electronic	Distinct from physical signatures in that they leave no physical impression on the document that they relate to.	Essentially, any electronic communication which satisfies the characteristics of a signature (i.e., evidencing identity and intention) has the potential to be a legally effective electronic signature. • Typing a name in electronic format. • Scanning and inserting (pasting) a physical signature into an electronic document. • A name appearing in the 'From' field in an email. • Clicking an 'I accept' button.
Digital	A type of electronic signature that incorporates a verification element, most often cryptographic	Digital signatures under a Public Key Infrastructure (PKI) system provide high standards of assurance of signatory identity, document confidentiality and integrity and non-repudiation. To use digital signatures, a specialised platform or software is required; a platform or software that it is based on PKI is preferred.

[216] Australian Government Solicitor (2020) Fact Sheet 38: 'Execution solutions for remote working arrangements' See: https://www.ags.gov.au/sites/default/files/2021-04/Fact%20sheet%20No%2038%20April%202021.pdf, at 20 September 2021

	authentication technology.	

How digital signatures work in practice

As we saw in Table 7 above, an electronic signature can be as simple as a scan of a handwritten signature, or typing the letters of a name into a box. While in theory the wet-ink handwritten signature is unique to its creator, neither the cut-and-paste of a scanned image or typing letters is way uniquely linked to an individual, or verifiable as being the act of a specific person. Digital signatures are used to overcome the risks of fraud that some forms of electronic signature invite.

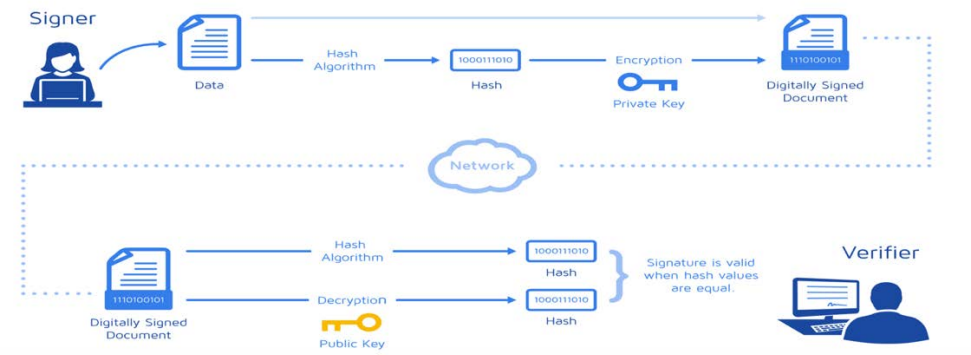
The key attribute of a digital signature is that it is unique to the signer. The 'public key infrastructure' (PKI) is a protocol that requires digital signature providers to use an algorithm to create two numbers (called 'keys'), one public, one private.

When a person signs a document electronically, their signature is created using the private key (which is they keep securely). They generate this by providing personal data such as their name, email address and mobile phone number (which the service user and service provider need to safeguard in conformity with the *Privacy Act 1988* (Cth). Digital signatures can be further enhanced by linking them to an identity verification platform, such as Australia Post's Digital iD, which can be used to verify a person's identification by linking it back to public identification documents.

The algorithm creates data matching the signed document, (called a 'hash' and encrypts that data. The encrypted data is the digital signature. The signatory's public key (which is openly available) is used by those who need to validate the electronic signature, to decrypt the data and verify the signature.

While the document is being signed and transmitted, it generally sits on a cloud-based server linked to the service provider; once signed the document is downloaded and used or stored by the service provider's client.

Figure 1: Digital signing process[217]



Once signed, the document is marked with the time that the document was signed and service providers generally also offer a log of actions or chain of custody or certificate to accompany the signed document, which shows, through an encrypted hash that the document has not been modified since its completion. The document itself is generally in a tamper-proof form.

Keeping the keys secure is important and usually requires the services of a Certificate Authority (CA), a type of Trust Service Provider, which creates and saves the keys securely. This is usually a third-party organization accepted or authorized as reliable provider of key security services.

The evidence of a digital signature on a document is usually a visual representation of the fact of the signature, the fact that it has been verified (sometimes also a record of the signatory's IP address), sometimes a reason for signing or confirmation of having read and confirmed the contents of the document, a timestamp of the signature and sometimes a log of other people who are signatories to, or who have viewed, the document. The appearance of the signature block and verification or certification will be different in each case, depending on the document template, the digital products and platforms being used.

15. Comparative perspectives on digital execution

Because multiple forms of technology have evolved for creating and verifying electronic signatures, jurisdictions around the world have begun to recognize a hierarchy of electronic signatures, including:

- **simple electronic signatures** (SES);
- **'advanced electronic signatures'** (AES) (usually requiring some kind of authentication and signatory identification);

[217] This process diagram is created by commercial services provider DocuSign, one of a number of commercial providers of digital documentation services in Australia: https://www.docusign.com.au/how-it-works/electronic-signature/digital-signature/digital-signature-faq, at 20 September 2021

- **digital signatures** (employing some encryption to add a higher level of security); and
- **'qualified' electronic signatures** (QES), meaning that they meet a government-mandated or government licensed standard that identifies the signatory, authenticates the signature; and is tamper-proof, including dual factor authentication and encryption internally.

This kind of hierarchical classification does not yet contemplate the application of block chain technology, which is in part a sequenced verification system and can already be used to create 'smart contracts'.[218]

A common concern about electronic signatures is that they offer less reliable ways of identifying a signatory and less protection against tampering and fraud than a physical signature in wet ink. This 'trust deficit' in electronic execution can be met by adopting (or encouraging the adoption of) forms of electronic signature that do offer identification verification and means of protecting the integrity of the signature.

Digital and qualified electronic signatures use technologies that can meet (and arguably exceed) identification and security functions of physical signatures. Determann observes, however, that these forms of electronic signature are currently underutilized:

> [D]ecades after some U.S. States adopted digital signature laws and the European Community tried to harmonize digital signature requirements, first with the Electronic Signature Directive in 1999 and then with eIDAS in 2014, qualified electronic signatures are rarely used in practice, due to the costs and inconveniences associated with acquiring the licensed technologies and the fact that uncertainties remain because technologies approved in one country by a government authority may not be recognized in other countries.
>
> Also, even qualified electronic signatures cannot achieve the objectives of all form requirements, for example, the purpose of witness, notarisation and recording requirements.[219]

Do we need a shared definition of electronic signature and digital signature?

Some stakeholders have asked whether Australia needs an agreed definition of an electronic signature. The *Electronic Transactions Act 1999* (Cth) (the ETA) and its corresponding State and Territory ETAs adopt a standards-based approach – they do not define an electronic signature as such, but describe the functions it should perform, rather than its attributes.

Section 10(1) of the Act is designed to permit the use of signatures in electronic communications, where the method used to identify the person signing and their

[218] Philippa Ryan, 'Smart Contract Relations in e-Commerce: Legal Implications of Exchanges Conducted on the Blockchain (2017) *University of Technology Sydney Law Review* 24; Mark Fenwick and Erick P.M. Vermeulen,' A Primer on Blockchain, Smart Contracts & Crypto-Assets' (2019) *Lex Research Topics in Corporate Law & Economics* Working Paper No. 2019-3, Available at SSRN: https://ssrn.com/abstract=3379443, at 20 September 2021

[219] Lothar Determann, 'Electronic Form Over Substance: eSignature Laws Need Upgrades' (2021) 72 *Hastings Law Journal* 1385, 1407

intention is ‘reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in light of all the circumstances’.[220]

In defence of that ETA drafting of nearly 25 years ago, we should note that it was consistent with the common law treatment of physical signatures, where different kinds of marks have been accepted as valid as signatures.[221] This approach has the advantage of being open-textured and neither restricting the form of electronic signatures nor foreclosing the development of future technologies. What it does not do is give guidance on the levels of security and functionality that attach to different types of electronic and digital signatures. Nor does it reassure government agencies and private sector actors who want to control for the risk that an electronic signature has been made or altered fraudulently.

A key issue is that the ETA does not clearly signpost:

- attributes of different types of electronic signature (including the difference between a simple electronic signature and a digital signature);
- types of transactions for which electronic forms will be valid by default; and
- situations or transaction types in which the more secure form of electronic signature (the digital signature) is really required.

A second issue is the ETA does not cover the field: it does not override any other Commonwealth legislation that may also make provision for (a) ‘an electronic signature (however described); or (b) a unique identification in an electronic form; or (c) a particular method … to identify the originator of the communication and to indicate the originator’s intention in respect of the information communicated (section 10 (2)). This is not of itself a problem; it leaves open the potential for different government agencies or functions to prescribe what type of electronic signature they require for their processes – in much the same way as land and title registries do in relation to formalities for documents that they will accept, and as courts and tribunals do for paper and electronic filing.

A third issue is that the ETA permits, but does not encourage or require, the use of electronic signatures and electronic means of communication. In practice, government agencies have been able to limit the use of both, by making their processes exempt from the operation of the ETA – at least until the COVID-19 reforms described above gained momentum. The ETA also operates on the basis that people or entities that are not part of the Commonwealth need to consent to information being provided through electronic communication (s 9(1) (d)), although

[220] A definition that one private stakeholder has described as ‘complete waffle’ (Personal communication, August 2021)

[221] As the UK Law Commission noted in its 2019 Report:

> The courts have, for example, held that the following non-electronic forms amount to valid signatures: a. signing with an ‘X’; b. signing with initials only; c. using a stamp of a handwritten signature; d. printing of a name; e. signing with a mark, even where the party executing the mark can write; and f. a description of the signatory if sufficiently unambiguous, such as “Your loving mother” or “Servant to Mr Sperling”.
>
> Electronic equivalents of these non-electronic forms of signature are likely to be recognised by a court as legally valid. There is no reason in principle to think otherwise. The courts have, for example, held that the following electronic forms amount to valid signatures in the case of statutory obligations to provide a signature where the statute is silent as to whether an electronic signature is acceptable: a. a name typed at the bottom of an email; b. clicking an “I accept” tick box on a website; and c. the header of a SWIFT message. (United Kingdom Law Commission, *Report on Electronic Execution of Documents*, Law Com No 386 (2019) (Summary of Report), 4.

the requirement is sometimes overridden, as in the August 2021 reforms to section 127 of the *Corporations Act 2001* (Cth).

A fourth issue is clarity and predictability – people seeking to create and use electronic documents in a digital economy need much clearer and better designed guidance on what forms of document require what type of execution, for what types of transaction in which jurisdictions -- and why. We are currently a long way from that level of regulatory responsiveness, for both businesses and individuals in Australia.

European Union Regulatory Framework

The European Union had a similar problem after it adopted the 1999 Directive on Electronic Signatures. The legislative response was a new Regulation in 2014 (the eIDAS Regulation) specifically designed to provide a regulatory framework to digital signatures, digital document execution and the ancillary trust services needed for electronic transactions.

The 2011 *Single Market Act* set out 12 policy initiatives to boost growth and strengthen the economy in Europe.[222] As part of the strengthening of a single digital market, they included the overhaul of the Directive on Electronic Signatures (1999/93/EC) (e-Signature Directive),[223]

> to make secure, seamless electronic interaction possible between businesses, citizens and public authorities, thereby increasing the effectiveness of public services and procurement, service provision and electronic commerce (including the cross-border dimension).[224]

The e-Signature Directive made electronic signatures possible, without delivering a comprehensive cross-border and cross-sector framework for secure, trustworthy and easy-to-use electronic transactions. The key drawback of the e-Signature Directive was that it allowed member states to implement it by creating different national rules on electronic signatures.

Regulation (EU) No 910/2014 (the electronic identity and trust services regulation or 'eIDAS Regulation')[225] came into force in 2016 and repealed the e-Signature Directive. The Regulation has direct effect in Member States and is intended to ensure uniformity across the EU, realising a legal framework for electronic identity systems (eID) for those states that choose to implement them; single points of contact for the interoperability of those systems; and other essential related electronic trust services all built on the platform created by the Directive.

[222] See: www.practicallaw. com/6-513-7368; Sumroy et al, 'Electronic signatures: breaking down barriers?' (2014) https://ca.practicallaw.thomsonreuters.com/3-581-9070, at 20 September 2021
[223] Directive 1999/93/EC of the European Parliament and of the Council
[224] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0206, at 20 September 2021
[225] Regulation (EU) No 910/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 July 2014, repealing Directive 1999/93/EC See: https://ec.europa.eu/futurium/en/system/files/ged/eidas_regulation.pdf, at 20 September 2021

One significant criticism of the eIDAS approach is that it is overly prescriptive in relation to electronic signatures. This is because the eIDAS Regulation distinguishes between different types of electronic signature, based on the level of security offered by each:

Standard electronic signature

An SES is "any data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign" (Article 3(10). In other words, it is the electronic equivalent of a handwritten signature and can range from a typed name in an email to biometric data, such as a retina scan.

Advanced electronic signature

The AES is a more sophisticated and secure form of electronic signature. It is a digital signature that is created with public key cryptography (PKI) and inserted into the code of the electronic document. The legal requirements for an AES are laid out in Article 26 (see box "Requirements for an advanced electronic signature").

Qualified electronic signature

The QES is a digital signature created by a qualified electronic signature creation device. It provides the highest level of admissibility in the EU courts and has the equivalent legal effect of a handwritten signature (Article 25(2)).

Only the most secure form of electronic signature -- a qualified electronic signature (QES) -- is automatically granted the equivalent legal effect of a handwritten signature. A qualified electronic signature based on a qualified certificate issued in one member state is also mutually recognized in all other member states[226].

The eIDAS Regulation modifies the definition of advanced electronic signatures, which now include those using electronic signature creation data, 'which the signatory can, with a high level of confidence, use under his sole control'. This allows for the use of the latest technologies, such as mobile devices.'[227]

At the national level, Article 25 'saves' the other forms of electronic signature by ensuring that an electronic signature should not be denied legal effect and admissibility as evidence in legal proceedings just because it is electronic or fails to meet the requirements for a qualified electronic signature. This leaves national law to define the legal effect of electronic signatures, except for the issue of equivalence to the legal effect of a handwritten signature.

Neither the eIDAS Regulation nor the 1999 e-Signature Directive favoured any specific technology. However, other trust services used alongside the electronic signature to ensure validity are covered by the Regulation, such as:

[226] 'Provisions specify the proper certification of qualified electronic signature devices, the requirements for the validation of qualified electronic signatures, and who can preserve those (*Articles 30, 32 and 34*). Qualified certificates and secure signature creation devices that complied with the Directive will continue to be recognised in accordance with transitional measures outlined in the Regulation': Sumroy et al (2014) 'Electronic signatures: breaking down barriers?' https://ca.practicallaw.thomsonreuters.com/3-581-9070, at 20 September 2021

[227] Sumroy et al 'Electronic signatures: breaking downbarriers?' (2014) https://ca.practicallaw.thomsonreuters.com/3-581-9070, at 20 September 2021

- **time stamping**: the date and time on an electronic document which proves that the document existed at a point-in-time and that it has not changed since then
- **electronic seal**: the electronic equivalent of a seal or stamp which is applied on a document to guarantee its origin and integrity
- **electronic delivery**: a service that, to a certain extent, is the equivalent in the digital world of registered mail in the physical world
- **legal admissibility of electronic documents** to ensure their authenticity and integrity
- **website authentication**: trusted information on a website (e.g. a certificate) which allows users to verify the authenticity of the website and its link to the entity/person owning the website

High and low levels of security and assurance for signatures

The EU framework now recognizes variable levels of security for digital signatures. While a high level of security is needed to ensure mutual recognition of electronic signatures, and this is explicitly permitted by Commission Decision 2009/767/EC,[228] in general electronic signatures with a lower security assurance should also be accepted.

Points of single contact

Part of the reason for permitting a range of forms and levels of security and assurance for electronic signatures in the EU is because they relate to so many legal processes and services at national and EU level. Directive 2006/123/EC[229] requires Member States to establish 'points of single contact' (PSCs) to ensure that all procedures and formalities relating to access to a service activity and its processes can be easily completed, at a distance and by electronic means, through the appropriate PSC with the appropriate authorities. Many online services accessible through PSCs require electronic identification, authentication and signature.

United Kingdom Regulatory Framework

With the exit of the United Kingdom from the European Union in 2020, the UK had to consider afresh the question of how to realize electronic execution of documents. Following the UK withdrawal from the EU, the eIDAS Regulation was preserved as part of UK law with some amendments by *The Electronic Identification and Trust Services of Electronic Transactions (Amendment etc.) (EU Exit) Regulations* 2019.The UK did not adopt Chapter II of the eIDAS Regulation, which governs electronic identity. The existing UK trust services legislation, *The Electronic Identification and Trust Services for Electronic Transactions Regulation* 2016 (2016 No 696) was also amended. These regulations comprise the UK eIDAS Regulations.[230]

This means that the sources of law relating to electronic signatures in the UK include the common law (articulated in case law), the *Electronic Communications Act* 2000

[228] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009D0767&from=EN, at 20 September 2021
[229] Directive 2006/123/EC of the European Parliament and of the Council
[230] United Kingdom Information Commissioner's Office, 'What is the eIDAS Regulation?'(no date) https://ico.org.uk/for-organisations/guide-to-eidas/what-is-the-eidas-regulation/, at 20 September 2021

(UK) (as amended) and the eIDAS Regulations referred to above. For this reason, the 2019 UK Law Commission *Report on Electronic Document Execution* recommended the codification of a single definition of electronic signature – a recommendation that was not directly endorsed in the government's response to the Report.

This preservation of the eIDAS approach (including distinguishing different types of electronic signature by level of security) in the UK is consistent with a legal posture that is generally positive toward electronic signatures. Under English common law, a written signature is not necessarily required for a valid contract - contracts are generally valid if legally competent parties reach an agreement, whether they agree verbally, electronically or in a physical paper document. Case law, including the decision of the Court of Appeal in *Golden Ocean Group v Salgaocar Mining Industries* in 2012[231], specifically confirms that contracts cannot be denied enforceability merely because they are concluded electronically.[232]

Electronic signatures are widely used in the UK for:

- human resources documents, including employment contracts, benefits paperwork and other new employee onboarding processes;
- commercial agreements between corporate entities, including non-disclosure agreements, procurement documents, sales agreements;
- consumer agreements, including new retail account opening documents;
- certain real estate documents, including documents usually signed under hand (e.g., not as a deed) and where such documents are not to be lodged at the Land Registry and are not registrable;
- certain securitisation documents, such as a guarantee.

Use cases identified in the UK as being not typically appropriate for electronic signature include:

- Handwritten documents such as real property documents submitted for registration with Land Registry and Land Charges Registry (including deed of transfer, certain leases, grants or transfers of a charge);
- Handwritten documents which are registrable or need to be filed with an authority which requires wet-ink signature, such as documents required to be sent to HM Revenue and Customs, where stamp duty is payable;
- Handwritten documents such as wills and lasting powers of attorney.

Electronic execution of deeds in the United Kingdom

The UK Law Commission formally considered the electronic execution of documents in 2019. Chapter 6 of the Commission's Report considered the formalities for deeds, and even the concept of deeds in general. It suggested that deeds may not be fit for purpose in the twenty-first century and recommended that the law relating to deeds should be reviewed as a separate future workstream. Nonetheless, the Law

[231] [2012] EWCA Civ 265

[232] In that decision by the Court of Appeal in *Golden Ocean Group*, Lord Tomlinson examined the requirement that a guarantee must be both in writing and signed by the guarantor. There was nothing in the Statute of Frauds containing an express indication that the agreement in writing must be in one, or even a limited number of, documents. The purpose of the requirement that the agreement must be both in writing and signed by the guarantor was not there to ensure that the documentation was economical. The reason was to ensure that the parties knew exactly what had been promised and to avoid ambiguity and the need to decide which side was telling the truth about whether or not an oral promise had been made. This reasoning follows Lord Hoffman in *Actionstrength Ltd v International Glass Engineering SPA* [2003] 2 AC 541.

Commission did not question the current position at law, which is that deeds must be witnessed in person.

The Commission supported the legal practice that has developed as 'the Mercury Rules' for signing documents in the wake of *R (Mercury Tax Group Ltd) v Her Majesty's Commissioners of Revenue and Customs* (2008), in which the court referred, in non-binding comments, to a requirement that a document must be 'a discrete physical entity … at the moment of signing'.[233] The Report observed that the majority of consultees supported the Law Commission's provisional proposal that it should be possible to execute a deed by witnessing an electronic signature via video link and then attest the document. However, having considered the responses, the Commission concluded that they were not convinced that the need for legislation allowing video witnessing had been demonstrated. The Commission did not consider the possibility of opening up a fully electronic form of deed that might remove the need for witnessing altogether.

The main perceived obstacles to the electronic execution of deeds in the UK seemed to be:

- for electronic signature platforms, having to pre-identify a witness before starting the signing process;
- the need to sequence the signing to ensure that the witness signs after the signatory;
- maintaining the confidentiality of the document;
- whether a witness should attest a document using the same device as the signatory or a separate device (which may lead to confidentiality concerns).

These technical, practical issues do not require legislative reform and the Law Commission recommended that they be considered by an industry working group, as suggested by the City of London Law Society and the UK Law Society.

Singapore Regulatory Framework

Electronic signatures are commonly used for all types of transactions in Singapore, and their use is increasing as a result of expanded use by local companies. Singaporean law makes a distinction between electronic signatures and secure electronic signatures, with digital signatures backed by certificates from trusted service providers being treated as a form of secure electronic signature.

In Singapore, the use of electronic and secure electronic signatures is governed by the *Electronic Transactions Act, Cap 88* (*Singapore ETA)* and the *Electronic Transactions (Certification Authority) Regulations 2010*. The *Personal Data Protection Act 2012 (*PDPA*)* is also relevant to personal information used in secure electronic signatures.

Singapore follows a heavily modified EU/ UK approach to electronic signatures by distinguishing among two different types of electronic signature with different levels of security in the Singapore ETA.

[233] [2008] EWHC 2721 (Admin)

For an electronic signature to be valid, it must meet the following conditions:

- There must be reliable assurance about the integrity of information in the electronic record, from the time it was first made in its final form;
- Where the electronic record is to be provided to a person, it must be capable of being displayed to that person; and
- It must comply with any additional requirements relating to electronic records specified by the public agency supervising the provision or retention of such records.

A 'secure electronic signature' is defined in section 18 of the Singapore ETA as valid if it can be verified that, at the time it was made, it was:

- unique to the person using it;
- capable of identifying such person;
- created in a manner or using a means under the sole control of the person using it; and
- linked to the electronic record to which it relates in a manner such that if the record was changed the electronic signature would be invalidated.[234]

The Act then defines 'digital signature'[235] as a form of secure electronic signature 'consisting of a transformation of an electronic record using an asymmetric cryptosystem and a hash function such that a person having the initial untransformed electronic record and the signer's public key can accurately determine — whether the transformation was created using the private key that corresponds to the signer's public key and whether the initial electronic record has been altered since the transformation was made'.

However, the Law Society of Singapore submission to the Public Consultation on the Singapore ETA in 2019 makes clear that, in practice, the two are fairly indistinguishable, particularly to the ordinary person:

> Finally, we wish to point out that under the current [Singapore] ETA, the only difference between using a "secure electronic signature" and an "electronic signature" is that the use of the former creates evidential presumptions regarding the authenticity and provenance of the electronic record. An evidential presumption can be rebutted by producing evidence to the contrary, such as the conduct of the parties after the date of execution of the electronic contract.[236]

The Law Society cautioned against the proposal by Singapore's Infocomm Media Development Authority (IMDA) to require 'secure electronic signatures' to be used for transactions involving immovable property, on the basis that:

> [This] greatly accentuates the legal impact of having appended a "secure electronic signature" versus an "electronic signature", and it would be

[234] *Electronic Transactions Act, Cap 88* (Singapore ETA*)* s 18
[235] *Electronic Transactions Act, Cap 88 (*Singapore ETA*)* Third Schedule Part 1 (1)
[236] Law Society of Singapore Response Appendix A, p 4 See: https://www.imda.gov.sg/-/media/Imda/Files/Regulation-Licensing-and-Consultations/Consultations/Consultation-Papers/Public-Consultation-on-the-Review-of-the-Electronic-Transactions-Act/LSS-Appendix-A.pdf, at 20 September 2021

unfortunate that a measure meant to mitigate fraud and create greater certainty will end up causing more uncertainty of its own.

In other words, the Law Society urged the retention of a more open-textured definition and use of electronic signature.

United States Regulatory Framework

In the United States, the *United States Electronic Signatures in Global and National Commerce (E-SIGN) Act* 2000 applies where federal law applies; for commercial transactions this covers most contracts through the constitutional Interstate Commerce power. The *Uniform Electronic Transactions Act* 2000 (UETA) is a framework for States to adopt harmonized law on the enforceability of e-signatures and electronic records, and almost all States and Territories have done so.[237]
Both of these key legislative frameworks adopt the 'open' definition of electronic signatures that we see in the Australian ETA.
The E-Sign Act and the UETA in general terms define an electronic signature as 'an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record' and an 'electronic record' as a record that is 'created, generated, sent, communicated, received, or stored by electronic means'.

This legislation is designed to permit the use of electronic signatures and sets out four major requirements for an electronic signature to be recognized as valid under U.S. law:

> **Intent to sign**: electronic signatures, like traditional wet ink signatures, are valid only if each party intended to sign;
>
> **Consent to do business electronically**: the parties to the transaction must consent to do business electronically. Establishing that a business consented can be done by analysing the circumstances of the interaction. Consumers require special considerations. Electronic records may be used in transactions with consumers only when the consumer has:
>
> - Received UETA Consumer Consent Disclosures
> - Affirmatively agreed to use electronic records for the transaction
> - Has not withdrawn such consent
>
> **Association of signature with the record**: In in order to qualify as an electronic signature under the E-SIGN Act and UETA, the system used to capture the transaction must keep an associated record that reflects the process by which the signature was created, or generate a textual or graphic statement (which is added to the signed record) proving that it was executed with an electronic signature;
>
> **Record retention**: U.S. laws on eSignatures and electronic transactions require that electronic signature records be capable of retention and accurate

[237] The three exceptions have adopted substantively similar legislation: These statutes are the Electronic Signatures and Records Act (ESRA) in New York; the Electronic Commerce Security Act (ECSA) in Illinois, and; the Electronic Authorization Act (EAA) in Washington.

reproduction for reference by all parties or persons entitled to retain the contract or record.

Most of the *Uniform Commercial Code* (UCC), other than Article 2 and 2A (governing the sale of goods and leases), is excluded from coverage under both UETA and the E-Sign Act. However, the latest versions of the UCC articles governing funds transfers, letters of credit, documents of title, security interests in personal property and investment securities all permit the use of certain electronic records and signatures for many purposes, according to their own terms. The UCC has been adopted in all US states with some variation.[238]

Canadian Regulatory Framework

The use of electronic signatures in Canada has increased in recent years and it is expected that this trend will continue. Courts and judges across Canada have generally been supportive of the use of electronic signatures. The Government of Canada has also acknowledged the increased use of electronic signatures and provided its own internal guidance (the Government of Canada Guidance on Using Electronic Signatures).

However, there is a mix of provincial and federal legislation governing the use of electronic and digital signatures in Canada. The *Uniform Electronic Commerce Act of Canada* (2000) (UECA) is a piece of model legislation that each province and territory (except for Quebec) uses as a model for its e-signature legislation. An electronic signature under that law means “information in electronic form that a person has created or adopted in order to sign a document and that is in, attached to or associated with the document."

Despite the legislative goal of uniformity under the UECA, Provinces have adopted different laws and regulations that govern the use of electronic signatures and secure electronic signatures. Ontario law provides that an e-signature can satisfy any legal requirement that a document be signed so long as the e-signature is reliable for the purposes of identifying the person and the association between the e-signature and the relevant electronic document is reliable.[239] Prince Edward Island, on the other hand, has adopted a stricter reliability test including specific criteria to link an e-signature to the identity of the signatory.[240]

Canada’s *Personal Information Protection and Electronic Documents Act* 2015 (PIPEDA), enacted by the federal government, provides that an electronic signature can be used to fulfill any signature requirement that is listed in specified provisions of federal laws. The *Secure Electronic Signature Regulations* 2005 are attached to both PIPEDA and the *Canada Evidence Act*, and these provide the requirements for’ secure electronic signatures’, meaning digital signatures with an associated digital signature certificate.[241]

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[238] Mark Tibberts, ‘The Law of E-Signatures in the United States and Canada’ (2020), See: https://www.bakermckenzie.com/en/insight/publications/2020/03/the-law-esignatures-us-canada, at 20 September 2021
[239] *Electronic Commerce Act*, 2000, S.O. 2000, c. 17
[240] *Electronic Commerce Act*, RSPEI 1988, c E-4.1
[241] https://laws-lois.justice.gc.ca/eng/regulations/sor-2005-30/index.html

However, it is important to note that where a given statute or regulation is silent on the method of execution, electronic signatures are generally acceptable and enforceable in court. If certain legislation specifies requirements for document execution (e.g., paper, original, in writing, non-electronic, signature is required, etc.), the document can only be executed electronically if permissible under applicable provincial or federal legislation.

16. Implications of comparative approaches for Australia

What most of the current legislative frameworks internationally have in common with Australia's is that they adopt a minimalist approach to electronic signatures. This means that the legislation is framed in non-discriminatory terms, allowing electronic signatures to be used in place of physical signatures, but not affirmatively approving them for use in all the situations in which a physical signature would be legally required.

Styles of electronic signature frameworks internationally

In a recent article surveying regulatory frameworks for electronic signatures internationally, Determann characterizes these approaches as belonging to one of three styles:[242]

> EU-style systems
>
> which tend to adopt a hierarchy of electronic signatures and nominate specific technologies for each. True harmonisation within the EU itself is only achieved through the qualified electronic signature (QES), which has the most complicated technical requirements[243] and involves licensing particular technology platforms. Countries following this style distinguish between certified and uncertified electronic signatures and give higher probative value to certified or qualified forms of electronic signature. [244]
>
> US-style systems
>
> (including Australia, Canada and China), use open and technology-neutral approaches. They create a legal framework for using electronic signatures but do so in a non-discriminatory style (as in the U.S federal E-SIGN legislation) and less often in a default validity style (as in the UETA discussed above). None of the U.S. legislation defines different types of electronic signatures or require a specific form of electronic signature in order for it to be valid – this is also the case for Australia.
>
> Other approaches
>
> (including Singapore and Japan). In Singapore, the type of technology for creating the electronic signature is not restricted, but the party using it has the burden of proof to show that the electronic signature meets the legislative

[242] Lothar Determann, 'Electronic Form Over Substance: eSignature Laws Need Upgrades' (2021) 72 *Hastings Law Journal* 1385, 1434-1445
[243] Lothar Determann, 'Electronic Form Over Substance: eSignature Laws Need Upgrades' (2021) 72 *Hastings Law Journal* 1385, 1433
[244] Civil law-based jurisdictions such as Argentina, Mexico and Russia: Lothar Determann, 'Electronic Form Over Substance: eSignature Laws Need Upgrades' (2021) 72 *Hastings Law Journal* 1385, 1438

requirements. A 'secure electronic signature' has a statutory presumption that the person using it is the signatory and that they are intending to be bound, unless the presumption is rebutted by evidence to the contrary.[245] The person using a secure electronic signature needs to show that the technology fulfils the functions set out in the legislation.

Table 8: Styles of electronic signature frameworks internationally

Features of eSignature frameworks	**eSignature permitted**	**eSignature valid by default**	**eSignature type defined by technology**	**Qualified eSignature valid - equivalent to physical signature**	**Harmonized definition and use of eSignature**
EU	EU eSignature Directive	2014 eIDAS Regulation	Simple Advanced Qualified	Yes	Only for QES; National laws control use of SES and AES
UK		UK adoption of eIDAS	Yes (as above)	Yes; Scotland requires the use of QES for certain transaction including real property[246]	Yes
US	Yes: Federal E-SIGN law	Yes: State-level UETA	No	No	Partial (through UETA)
Australia	Yes	---	No	No	Partial (Commonwealth and State-level adoption of ETA framework; harmonised set of requirements allow signatures in electronic transactions to be valid
Canada	Yes	--	No	No	No
China	Yes	---	No	No	Yes (unitary legal system)
Singapore	---	Yes	Partial	'secure electronic signature' presumptively valid in legal proceedings	Yes (unitary legal system)
Japan	---	Yes	No	eSignatures that do not use a public key may not be recognized	Yes (unitary legal system)

A shared shortcoming of all of these legislative approaches is that they use confusing terminology and definitions; they allow different classes of document to be exempted from being created and signed in an electronic form; they fail to identify the classes of document that can be validly created and signed using an electronic form; and they fail to stipulate what level of security is required from the electronic signature for a particular type of document or transaction.

[245] Lothar Determann, 'Electronic Form Over Substance: eSignature Laws Need Upgrades' (2021) 72 *Hastings Law Journal* 1385, 1445

[246] See: https://www.lawscot.org.uk/members/business-support/technology/electronic-signatures-guide/, at 20 September 2021

Excluding documents from ETA legislation

Part of the catalyst for Singapore reviewing its *Electronic Transactions Act* in 2019 was the realisation that the extensive list of transactions excluded from the operation of the legislation was potentially impeding the full realisation of a digital economy. The IMDA Public Consultation paper observes that,

> It is in Singapore's interest to ensure that its laws continue to facilitate and support electronic communications and transactions in a future where everything is increasingly digitalized, even if it means moving ahead of international norms and practices.[247]

The IMDA then observed that the (then) current version of the ETA excluded negotiable instruments; wills; indentures, trusts and powers of attorney; contracts for immovable property and contracts for conveyancing of immovable property.[248] By contrast, it noted that jurisdictions internationally such as the U.K., Norway and New Brunswick in Canada permit all of those transactions to be in electronic form and to use electronic signatures. In Australia, this is the current position in Victoria and Queensland (see Tables 5 and 6, above). We can summarise the comparative approach to exclusions in a general way like this:

Table 9: Document types excluded from electronic signature frameworks internationally

Document types excluded from electronic signature regulatory frameworks	
EU	Varies with country
UK	No
US	Extensive
Australia	Extensive (but note reforms such as those in Victoria and Queensland (Tables 5 and 6) that reduce the range of excluded documents
Canada	Yes (e.g. in Ontario, wills, trusts created by wills, powers of attorney relating to individual financial affairs or care, negotiable instruments)
China	Yes (marriage, adoption, succession documents; transfers of real property; other legislative exclusions)
Singapore	Yes, but government committed to progressive removal of exclusions from 2021[249] (including lasting powers of attorney)
Japan	Yes (e.g., land and building leases; voluntary guardianship; notarized wills)

[247] Singapore, *Consultation Paper Issued by the Infocomm Media Development Authority on Review of the Electronic Transactions Act (ETA*)(CAP 88)(27 June 2019), 34 See: https://www.imda.gov.sg/-/media/Imda/Files/Regulation-Licensing-and-Consultations/Consultations/Consultation-Papers/Public-Consultation-on-the-Review-of-the-Electronic-Transactions-Act/Public-Consultation-Paper-on-the-Review-of-the-Electronic-Transactions-Act-27-Jun-2019.pdf, at 20 September 2021

[248] Singapore, *Consultation Paper Issued by the Infocomm Media Development Authority on Review of the Electronic Transactions Act (ETA*)(CAP 88)(27 June 2019), 34 See: https://www.imda.gov.sg/-/media/Imda/Files/Regulation-Licensing-and-Consultations/Consultations/Consultation-Papers/Public-Consultation-on-the-Review-of-the-Electronic-Transactions-Act/Public-Consultation-Paper-on-the-Review-of-the-Electronic-Transactions-Act-27-Jun-2019.pdf, at 20 September 2021

[249] See:https://www.imda.gov.sg/news-and-events/Media-Room/Media-Releases/2021/Electronic-Transactions-Act-Amended-To-Facilitate-Electronic-Transactions-Providing-Convenience-And-Strengthening-Singapores-Trade-Competitiveness, at 20 September 2021

As the examples in Table 9 suggest, the real issue with excluding documents from electronic signature regimes is policy nervousness about vulnerable users. We discuss this in Sections 20 and 21, below.

Lack of international harmonisation

This also raises the issue of the validity of electronic document forms and electronic signatures when they are used in transnational business transactions. At present we have no comprehensive, internationally harmonized framework for electronic document forms and electronic signatures, despite early and ongoing efforts by UNCITRAL to create a model law framework[250]. So, for example, a qualified electronic signature created in accordance with eIDAS in the EU is unlikely to be automatically recognized outside the EU. Within the EU, the Rome I Regulation works to validate contracts that touch multiple jurisdictions, even although the national laws on electronic signatures may be different.[251]

Outside the European Union, the validity of the form of the electronic document and the electronic signature in an international business transaction needs to be determined by applying the conflict of laws rules that apply to the law of the contract or transaction, location and parties.

Pathways to better regulatory frameworks

It is now more than 20 years since the first recognition of electronic signatures in legislation, including Australia's ETA. The pathway to updated regulatory frameworks, Determann suggests, is through legislative provisions that are technology neutral, particularly at a time when new technologies such as block chain are emerging. Moreover, legislation needs to avoid overly rigid definitions of electronic forms and electronic signatures.

Determann advocates for a principles-based approach to updating national legislation that includes:

- Clearer default rules favoring – rather than simply permitting equivalence for - electronic documents and electronic signatures;
- 'Whitelists' that actually show which transactions can be given effect through electronic forms and electronic signatures;
- 'Blacklists' that show transactions that cannot be give effect through electronic forms and electronic signatures, based on a demonstrated, compelling need;[252]
- Uniform terminology and simple definitions;

[250]See generally the work of the United National Commission on International Trade Law (UNCITRAL) Working Group IV Electronic Commerce and the suite of model laws that is has developed and propagated over the last two decades: https://uncitral.un.org/en/working_groups/4/electronic_commerce, at 20 September 2021

[251] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual obligations (Rome I) art 11, 2008 O.J. (L 177(6))

[252] Here Singapore's public consultation on the *Electronic Transactions Act* in 2019 yielded very informative submissions. In particular, the Law Society of Singapore and other private sector actors argued in favour of reducing the number and kind of transactions on the exclusion list for the operation of the *Electronic Transactions Act*. See: Singapore, *Consultation Paper Issued by the Infocomm Media Development Authority on Review of the Electronic Transactions Act (ETA*)(CAP 88)(27 June 2019 See: https://www.imda.gov.sg/regulations-and-licensing/Regulations/consultations/Consultation-Papers/2019/Public-Consultation-on-the-Review-of-the-Electronic-Transactions-Act, at 20 September 2021

- Clear conflicts of laws rules – ideally permissive ones paired with bilateral or multilateral mutual recognition that helps drive international harmonisation.[253]

Determann does not give much attention to the policy hesitation about using electronic forms and electronic signatures in transactions that involve vulnerable people – wills and enduring powers of attorney being paradigm examples. We consider this question further below.

17. Towards digital execution in Australia

Could digital declarations replace statutory declarations?

We have suggested in this paper that the simplest way to achieve the policy intent of a statutory declaration would be to adopt unwitnessed declarations. The most efficient way of doing this is to present the declaration in plain language that reminds the person making it that they need to be truthful and that there are legal consequences for a false declaration. This is what we do when we (or our agents) complete our tax return annually.

In some cases, the most efficient form of declaration would be a signed paper form, but in many cases it is likely to be an electronic or web-based form that can be signed electronically by any of the means that we described above. Functionally, this is a statutory declaration without witnessing.

Where statutory declarations in their current form continue to be relevant, they would need to be witnessed, either in person or using the video-conferencing formats where currently in use in many jurisdictions. We have argued that physical witnessing is a weak check on the identity of the person making the declaration in most jurisdictions in Australia. However, where there are problems with statutory declarations, they tend to flow from declarants who are determined to make a false declaration, rather than from identity fraud.

The check on identity is more completely fulfilled if we use available technology (such as two-factor verification) to confirm the identity of the person making the declaration. Creating a digital pathway for making declarations – meaning using digital signatures that are verified -- could eliminate the need for physical witnessing, except for situations in which the declaration needs to be made on paper.

There is a question about whether we really need the heightened security of a digital signature for an everyday document like a statutory declaration (which we argue could be effective as an unwitnessed declaration). The advantage is that a digital signature that is traceable and verifiable, and thus eliminates the need for witnessing (and in doing so solves the issue of the wide discrepancies in who is authorized to witness statutory declarations in different Australian jurisdictions). The disadvantage is that it requires an investment in products and platforms an open and competitive sourcing of technology solutions. That level of investment may be hard to justify for declarations and may not make the process more accessible for vulnerable people.

[253] Lothar Determann, 'Electronic Form Over Substance: eSignature Laws Need Upgrades' (2021) 72 *Hastings Law Journal* 1385, 1451

However, we also note that there is currently heightened public interest in the possibilities of a secure, tamper-proof digital documents of all kinds – the most recent being calls for a 'digital vaccination passport' to enable mobility domestically and internationally once high levels of COVID-19 vaccination are reached. It would be consistent, in a digital economy, to make the most routine documents and processes – such as statutory declarations or unwitnessed declarations - available in accessible ways that include a simple electronic form.

Retaining the paper pathway (including the electronic transmission of the paper form and witnessing, either in person or remotely) for statutory declarations may still be useful:

(a) for technology neutrality purposes;
(b) for access and equity reasons. Not everyone in Australia has access to technology and not everyone is able to use it easily; and
(c) for fulfilling evidentiary requirements for legal processes located outside Australia in which an apostille may be required, or where there is no pathway for accepting and recognising a digital document that would be valid in Australia.

If the paper and electronic pathways are retained, there is a strong argument for redesign of the statutory declaration form for access and equity reasons. We discuss this in Section 18 below.

Could deeds be fully digital?

Private sector demand has already resulted in deeds being validly created and signed electronically. Once that has happened in both Commonwealth and some State jurisdictions in Australia, it is difficult to argue that there are reasons in principle why other State jurisdictions should not treat this form as legally legitimate. A second question is whether or why we would demand different kinds of formalities for different types of deeds.

Policy anxiety about witnessing

Historically, witnessing was a procedural element added legislatively in many jurisdictions to the common law requirements for a deed, and thus came to distinguish deeds from contracts.[254] Statutory reforms in Australia are rapidly unwinding witnessing as a required element for deeds. One likely consequence is that this will create policy anxiety in settings where the formalities of deeds are relied upon to mitigate fraud – for example in registering real property interests. The result in practice seems to be that users who need this level of assurance (such as Registrars of Titles) are able to require document forms and formalities that meet their policy needs.[255]

[254] Nicholas Seddon, *Seddon on Deeds*, (2015), 18-19
[255] See for example the proposed Queensland reforms which would require that 'deeds lodged or deposited in relation to land and water dealings must continue to be executed in accordance with the Land Title Act 1994 and Land Act 1994: Explanatory Note: https://documents.parliament.qld.gov.au/bills/2021/3076/Police-Legislation-(Efficiencies-and-Effectiveness)-Amendment-Bill-2021---Explanatory-Notes-7db2.pdf, at 20 September 2021

Digital deeds as secure transactions

An electronically transmitted deed that is not witnessed may not meet the policy need for a fraud protection function of the kind that is important for registering property interests, but a fully digital deed might. A fully digital form of deed could add the functional security that the historical form of the deed was intended to have.

Digital deeds would meet the original policy purposes of a deed by providing a means by which a solemn undertaking may be made, and received, in relation to a state of affairs or future intentions and obligations of parties. Digital deeds may overcome some of the challenges of paper-based deeds in the following ways:

(a) digital deeds may be created in a form that is encrypted and secure – and thus less vulnerable to alteration than a paper or electronic document;
(b) commercial technology solutions offer more reliable processes for verifying party identity (e.g. through two-factor authentication);
(c) a well-designed electronic signature platform would effectively substitute for attestation (witnessing), but witnessing could be retained as an option;
(d) a digital deed can be designed to either include or exclude attestation (witnessing). Where witnessing is included, a digital form can avoid attestation error by, for example, rejecting a witness electronic signature that is identical to that of one of the signatories;
(e) a digital time stamp for a digital deed would offer robust proof of 'delivery' of the deed, meaning the time at which it was validly concluded and became effective – which matters for party performance but also potentially for enforcement and calculation of limitation periods;
(f) a digital deed is easier to share securely with interested parties (including third parties), including locations where the document needs to be registered, so it better fulfils the clarity and public announcement features of a paper deed.

Nothing in the current form of the *Electronic Transactions Act* framework in Australia prevents the use of more secure form of electronic signature on a secure form of digital document.

Risks or challenges of digital deeds

In principle the risk of creating and recognising digital deeds in the way that we describe above is no greater than creating a deed (or a contract) in paper or electronic form.

There is a question about who bears the cost of accessing the commercial technology services and platform that enable digital execution, as well as the cost of digital identity verification, but in commercial transactions those are costs that a competitive market can determine and that users can plan for. A second question is whether digital signatures are well understood and defined; a third question is whether regulatory actors such as land registers are set up to accept digital forms and are able to stipulate the degree of security they require from a digital signature.

The more significant risk, as we discuss in Sections 20 and 21 below, is the individual user who may need support to understand the underlying transaction or who has the kind of vulnerability that really indicates a need for more intervention

before the point of document execution.

Towards Australian consistency in deeds

Opening up a genuinely digital pathway for creating deeds in Australia would help close the gap in the rules regarding formation of deeds at present in Australia. All deeds, whether paper or digital, should be formed in a way that accommodates signing by an individual on their own behalf or on behalf of an incorporated or unincorporated entity. This uniformity – the principle of non-discrimination – would provide certainty for the parties to the document. A useful analogy is the flexibility with which property transfer documents have been digitized in light of the use of PEXA to settle transfer and registration of title in real estate.

A consistent approach to formation and enforceability of deeds across all Australian jurisdictions is desirable for a digital economy. It would ensure that all parties can rely on the form and function of the executed document, no matter where in what form the document was signed. The key policy reasons in support of this approach are:

(1) Rules can be readily updated via the *Corporations Act* and its regulations or schedules, without Parliaments in each state having to 'keep up';
(2) Uniformity would support the principle of finality of proceedings that is a tenet of all common law courts: it means that parties cannot create side litigation on the basis that a deed was relied upon contrary to a local State rule;
(3) Streamlining international dealings between individuals and corporations would be supported by ensuring a uniformly Australian approach to execution of important documents.

If the successful digitisation of deeds can promote uniformity of form and function, this may provide impetus for extension to other statutory documents and processes in Australia.

In the absence of absolute agreed consistency, mutual recognition of deeds formed in different ways in different Australian jurisdictions would be necessary, which may require a supportive interpretation of conflicts of laws principles.

How should we accommodate vulnerable users?

What neither witnessed nor unwitnessed paper or digital documents can do, of course, is to fully guard against vulnerabilities or external influences on the person signing the document. That issue was considered in submissions to the review of Singapore's *Electronic Transactions Act* in 2019. In their submission, the multinational law firm Linklaters observed:

> We note the IMDA's concern about the potential for abuse in personal or familial transactions where family members or close relations may have access to accounts, passwords, and authentication devices of the vulnerable.
>
> In practice, documents for personal or familial transactions are seldom signed electronically. If there are any real concerns, these should be addressed in

> specific legislation dealing with such transactions. Retaining "true agency" POAs [Powers of Attorney] and declarations of trust relating to immovable property or dispositions of equitable interest in the First Schedule because of perceived concerns arising in personal or familial transactions has the inadvertent effect of unduly restricting commercial transactions where these documents are used.[256]

What we seem to have done in Australia is pushed forward with business-sensitive reforms, without being clear about whether we are treating deeds as a single document type or regulating them by reference to their users. So, for example, the COVID-related reforms in Victoria allow the electronic signing and remove witnessing of deeds and mortgages, statutory declarations, power of attorney (POAs) and wills, although with prescriptive criteria that balances the benefits and safety net of the regulations. On the other hand, the proposed permanent reforms in Queensland distinguish between powers of attorney for business (corporations, partnership and unincorporated associations, but not sole traders) – which may be signed electronically – and those for individuals in the form of a deed, which must be a physical document that is signed in the presence of a witness (unless part of a commercial or other arms-length transaction. [257]

If we are concerned about regulating the execution of deeds by reference to user group, there has been relatively little discussion about whether and how existing legal principles can protect vulnerable users as we move to new modes of execution. We consider a risk-based approach to vulnerability for all forms of what were historically classed as 'solemn documents' in Sections 18 and 19, below.

18. Inclusion and safeguards for vulnerable people

The separation between a 'business' context for a statutory declaration or deed and one in which an individual may be vulnerable is not as clear-cut as we imagine: small businesses overlap with family relationships; remote Indigenous communities run corporations that are engaged in complex transactions; deeds bind employees.

Australia is diverse: about 2.5% of the population identifies as Aboriginal or Torres Strait Islander; more than 20% of Australian households use languages other than English.[258] People in Australia have diverse forms of ability, disability and socio-economic disadvantage, and those vulnerabilities can intersect.[259]

Here, we consider the extent to which the forms and formalities of statutory declarations and deeds are suited to contemporary Australia, both as a multicultural

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[256] Linklaters, Submission to Public Consultation on the Review of the Electronic Transactions Act, 27 August 2019, p 6 https://www.imda.gov.sg/-/media/Imda/Files/Regulation-Licensing-and-Consultations/Consultations/Consultation-Papers/Public-Consultation-on-the-Review-of-the-Electronic-Transactions-Act/Linklaters-Singapore_IMDA-response-to-consultation-paper-on-ETA.PDF, at 20 September 2021

[257] Explanatory Note: https://documents.parliament.qld.gov.au/bills/2021/3076/Police-Legislation-(Efficiencies-and-Effectiveness)-Amendment-Bill-2021---Explanatory-Notes-7db2.pdf, at 20 September 2021 See also: Mark Burrows (2020) 'Move to E-Signing' *Law Institute Journal* December 2020, 75

[258] In a country where we have 300 languages, including indigenous languages: https://www.abs.gov.au/ausstats/abs@.nsf/lookup/media%20release3, at 20 September 2021

[259] Socio-economic disadvantage data from the Australian Bureau of Statistics, plotted geographically within Australia: https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2033.0.55.001~2016~Media%20Release~Census%20shows%20our%20most%20advantaged%20&%20disadvantaged%20areas%20(Media%20Release)~25, at 20 September 2021

and multilingual country, as an affluent economy with significant areas of socio-economic vulnerability and as a federation of legal (and regulatory) system within which meeting diverse needs and accommodating disadvantage are important declared values. We treat these issues as being common to statutory declarations and deeds in this section and Section 19, below.

Diversity and inclusion: Statutory declarations

The form of the statutory declaration has remained remarkably similar since the early 19th century. When someone is asked to make a declaration saying:

> "And I make this solemn declaration, as to the matter (or matters) aforesaid, according to the law in this behalf made – and subject to the punishment by law provided for any wilfully false statement in any such declaration",[260]

they are not using any language spoken by anyone in Australia today.

The Commonwealth and Victorian versions of the statutory declaration (and the alternative NSW version) are all worded more clearly, but not designed in any way[261] that conforms to contemporary thinking about making law more accessible or understandable to ordinary citizens, much less to people with vulnerabilities.[262] There is also a question about whether they meet emerging standards of distributing government information indicated by, for example, the *Disability Discrimination Act 1992* (Cth).[263]

When statutory declarations were first devised, a key policy question was how to disseminate that legal reform throughout the then British Empire. An early 'forms book' provided guidance on how to modify the statutory declaration form and process for people who were blind or illiterate.[264] This followed the pattern of modifying oaths for places where Judaism and Christianity were neither the only nor the dominant belief systems, and later, where the person called to make a statement had no religious affiliation.[265]

Minimalist accommodation

That pattern of 'minimalist accommodation' in the 19th century flows through into our contemporary statutory declaration framework. The key accommodations within the legislation, shown in Table 10 below focus on 'disability' in the form of physical disability or cognitive disability or (in some cases), lack of capability in English[266] - the same categories in use in the 1850s.

Strikingly, there is no consistency across the jurisdictions; the majority of make no

[260] NSW Statutory Declaration Form (Schedule 9)
[261] For a useful checklist for universal design principles applied to document design see: https://desbt.qld.gov.au/__data/assets/pdf_file/0012/10614/universal-design-principles-checklist.pdf, at 20 September 2021
[262] For a comprehensive overview of what 'design thinking' means for law and policy making see: Amanda Perry-Kessaris, 'Legal Design for Practice, Activism, Policy, and Research (2019) 46(2) *Journal of Law and Society* 185
[263] See, for example: https://humanrights.gov.au/our-work/information-standards-plain-language-summary
[264] Charles Ford, *Ford on Oaths for Use by Commissioners for Oaths and All Persons Authorised to Administer Oaths in the British Islands and the Colonies* (no date) (Waterlow and Sons., 6)
[265] See, for example, *So Help Me God: A History of the Oaths of Office*, PM Glynn Institute Occasional Paper No 3 (2020)
[266] Kathy Laster and Veronica L. Taylor, *Interpreters and the Legal System* (Federation Press, 1994)

accommodations for users within the statutory declaration legislation itself. This is difficult to reconcile with the statutory declaration as a routine legal document in Australian life.

Table 10: Statutory Declarations – Accommodations

Jurisdiction	Accommodations
Commonwealth	*No relevant legislative accommodations.*
New South Wales	For declarants who are blind, illiterate or otherwise unable to read English, the authorised witness must certify that: a) the declaration was read to the declarant; b) the declarant appeared to understand the declaration; and c) the declarant signed the declaration in the presence of the authorised witness**.** *Oaths Act 1900* (NSW) s 24A.
Victoria	For declarants with a disability preventing them from acting in accordance with the processes required by the Act, an authorised witness may make or permit reasonable modifications. (E.g., A person who is unable to speak may listen to the declaration being read and nod assent). *Oaths and Affirmations Act 2018* (Vic) s 34.
	For declarants who appear to the authorised witness to be illiterate, blind or cognitively impaired, the witness must certify that the declaration was read to the declarant. *Oaths and Affirmations Act 2018* (Vic) s 35.
Queensland	*No relevant legislative accommodations.*
South Australia	*No relevant legislative accommodations.*
Western Australia	For declarants that are blind or illiterate, the authorised witness must certify that: a) the declaration was read aloud to the declarant; and b) the witness is satisfied that the declarant understood what was read aloud. *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) s 13.
	For declarants not sufficiently conversant with English to make the declaration in English, the declarant may make the declaration in another language. (Note: Such a declaration is not admissible in a court unless it is translated into written English by a suitably qualified translator). *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) s 14.

Tasmania	*No relevant legislative accommodations.*
Australian Capital Territory	*No relevant legislative accommodations.*
Northern Territory	*No relevant legislative accommodations.*

Principles of access and inclusion

Minimalist accommodation that focusses on visible types of disability, does not adequately capture the range of vulnerability or disadvantage affecting people in Australia. In particular, it does not capture the conditions that prevent people from fully understanding legal documents such as statutory declarations and deeds. Simplifying the forms or formalities for these is a necessary, but not sufficient, step in making routine legal transactions accessible to the widest range of people in Australia.

From disability to vulnerability

In the field of development studies, the 'deficit' model of assessing people with regard to their disabilities or capacities has been displaced by a focus on how to fully realize human capability, an idea articulated by economist and philosopher Amartya Sen and in legal scholarship most fully developed by feminist theorist Martha Nussbaum.[267] In her 2018 study, Fauls draws on the capabilities approach[268] to investigate how vulnerable users understand legal documentation in Australia.[269]

Her example is a legal information sheet, of the kind distributed by a community legal service, drafted using plain language principles, and explaining eligibility for disability or other benefits. Although statutory declarations are not part of the study, they are documents that could be required in such an application process.

Currently there is no single, agreed government definition of vulnerable people in Australia for the purposes of legal, regulatory or welfare policy delivery. The Australian Charities and Not-for Profits Commission, for example, defines vulnerable people as including those who are:

- children and seniors
- people with impaired intellectual or physical functioning
- people from a low socio-economic background
- people who are Aboriginal or Torres Strait Islanders
- people who are not native speakers of the local language
- people with low levels of literacy or education

[267] Martha Nussbaum, *Women and Human Development: the Capabilities Approach* (2000)

[268] Dorothy Ann Fauls, *Plain Language and the Law: Rethinking Legal Information for Vulnerable People in Australia*, (PhD Thesis, University of Queensland, 2018), 60

[269] Dorothy Ann Fauls, *Plain Language and the Law: Rethinking Legal Information for Vulnerable People in Australia*, (PhD Thesis, University of Queensland, 2018) 8

- People subject to modern slavery, which involves human exploitation and control, such as forced labour, debt bondage, human trafficking, and child labour.[270]

Fauls broadens that definition, based on empirical data from legal advisors' everyday work in Queensland and the Northern Territory. Using that 'bottom-up' approach, participants in her study identified 'vulnerable' clients as people who are:

- experiencing homelessness
- transitioning from the child protection system
- suffer from physical or mental illness, or have a disability
- refugees, or from culturally and linguistically diverse backgrounds
- experience socioeconomic disadvantage
- have low levels of education and literacy
- victims of domestic violence.[271]

Unsurprisingly, Fauls' participants finds that these kinds of clients are unlikely to understand printed legal information, even when it is presented in plain language. That lack of capability is the product of overlapping types of vulnerability, which multiply when there is a life crisis or triggering event. At that point, clients in this study had limited ability to understand the law or the legal procedures that they needed to navigate – they were overwhelmed, and simply needed 'a solution'.[272]

Digital disadvantage

Fauls' study also suggests that other forms of disadvantage affect capability, such as being in a remote location; and not having access to the internet**.** The 2019 UK Law Commission Report refers to this as 'digital poverty'.[273]

A significant number of the Australian clients seen by advisors from community legal services in Fauls' study were affected by either or both of these conditions. In response, the advisors gave telephone advice, and provided information to clients by both email and post, 'recognising that their clients did not always have the capacity or resources to access the internet or printed information from a website'.[274]

[270] https://www.acnc.gov.au/tools/topic-guides/vulnerable-persons-or-people, at 20 September 2021
[271] Dorothy Ann Fauls, *Plain Language and the Law: Rethinking Legal Information for Vulnerable People in Australia*, (PhD Thesis, University of Queensland, 2018), 83
[272] Dorothy Ann Fauls, *Plain Language and the Law: Rethinking Legal Information for Vulnerable People in Australia*, (PhD Thesis, University of Queensland, 2018), 93
[273] United Kingdom Law Commission, *Report on Electronic Execution of Documents*, Law Com No 386 (2019) (Summary of Report), 27
[274] Dorothy Ann Fauls, *Plain Language and the Law: Rethinking Legal Information for Vulnerable People in Australia*, (PhD Thesis, University of Queensland, 2018), 85

Intermediation: advisors and witnesses

A shared feature of solemn documents historically is that they were intermediated – they required a third person (usually a witness) to be present in order to validly create the document. When legal practitioners think about formal legal documents their posture is likely to be that, the more vulnerable the person, and the more consequential the document, the more important it is to have someone present to protect or advise the person signing the document.

In practice, the more complex forms of solemn documents, such as deeds, wills and powers of attorney often involve legal advice. In places where solemn documents have been digitized, there is still considerable policy reluctance to dispense with witnessing requirements for important life events such as births, deaths, marriages, wills and enduring or medical powers or attorney.[275] We also see a great deal of cross-referencing among common law jurisdictions such as the UK, Australia, Singapore and New Zealand on this issue.[276]

Protecting against duress and undue influence

One of the assumed, or implicit, functions of witnessing is to check the parties' legal capacity – both any inherent vulnerabilities they have, as well as their understanding of the document and its legal consequences. In theory a witness could be called to give evidence about whether a party signed a solemn document voluntarily – whether there was any visible coercion or intervention from other people present.

The UK Law Commission considered the question of witnessing in its Report on *Digital Document Execution*, commenting that (in the context of deeds),

> Depending on the transaction, it is possible that the person applying the pressure may act as the witness themselves. Similarly, witnessing will not protect against fraud and forgery, because there is no legal requirement that the witness must be independent. Nor is there a requirement that the witness must know or be able to identify the signatory.[277]

Witnesses are unlikely to be able to detect invisible forms of vulnerability or assess the mental state of a person signing a solemn document. In Fauls' study, even legal professionals in community legal services whose clients are vulnerable found this assessment difficult.

Strictly speaking, a witness who is not a legal practitioner is also not qualified to offer legal advice, although in practice we also know that legal advice comes in many forms. The unaffordability of professional legal advice for individuals and small businesses is a live policy issue in Australia and other post-industrial economies.[278]

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[275] See Table 9, above

[276] See for example, Singapore, *Consultation Paper Issued by the Infocomm Media Development Authority on Review of the Electronic Transactions Act (ETA)*(CAP 88)(27 June 2019), 34

[277] United Kingdom Law Commission, *Report on Electronic Execution of Documents*, Law Com No 386 (2019) (Summary of Report) 76-77

[278] See, for example J M Barendrecht (2009) 'Best Practices for an affordable and sustainable dispute system: A toolbox for Microjustice' (TISCO Working Paper Series Vol 003/2009) Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems (TISCO) http://ssrn.com/abstract=1334619, at 20 September 2021; Canadian Bar Association, 'Underexplored Alternatives for the Middle Class: Envisioning Equal Justice' (2013) www.cba.org; Community Law Australia, 'Unaffordable and Out of Reach' (2012) www.communitylawaustralia.org.au, at 20 September 2021

Legal advice, vulnerability and technology

Legal advice is not a requirement for creating a statutory declaration or a deed. Where a person can access legal advice, a legal practitioner is likely to ensure that the formalities are complied with, so the document will be legally valid. The more important role of a legal advisor, however, is to provide advice and confirmation that the person or people creating the document understand its effect and consequences.

Where a person signing the document is vulnerable in one or more ways, being able to access face-to-face advice may be critically important. Many of the respondents in Fauls' study stressed the importance of face-to-face meeting, or a phone conversation to support the client with conversation and advice about the legal information. They also pointed to the tension between the ethos of a community legal sector that seeking to empower clients – by giving them adequate legal information so that they could act themselves – and the reality of their situations, which undercut the ideals of choice and agency. As one participant put it,

> Actually many of the more vulnerable clients really need the verbal explanation, I think…But maybe in addition to a verbal explanation its more valuable, for many people -- the verbal explanation and the engagement and discussion with me -- you just feel this light bulb go off.[279]

Those observations are consistent with self-assessments by the legal profession. The Queensland Law Society has produced thoughtful guidance on assessing capacity when advising clients via video conference during COVID-19,[280] which usefully draws on knowledge from aged care and emphasizes the importance of prior knowledge of the client and their circumstances.

Such guidance is useful, but only to the extent that a client is able to, and chooses to, access legal advice.

Vulnerability of unrepresented people

In some of the more egregious case law scenarios, the vulnerable person has not been protected by a legal advisor. In one case, an elderly woman making a statutory declaration to evidence a 'gift' of funds to a couple with whom she shared a house was found to have made this under duress or without full understanding of the consequences.[281] The court invalidated the underlying transaction on the basis that couple had agreed that she would live with them permanently in a shared home and then sought to evict her and to characterize her financial contribution as a gift. In this case, the victim had sought legal advice, but her solicitor advised her against the arrangement and then withdrew when she decided to continue with it.

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[279] Dorothy Ann Fauls, *Plain Language and the Law: Rethinking Legal Information for Vulnerable People in Australia*, (PhD Thesis, University of Queensland, 2018), 92

[280]QLS Ethics and Practice Centre (August 2021) 'Tips for Assessing Capacity via Video Conference during COVID-19 Available at: https://www.qls.com.au/Content-Collections/Guides/Tips-for-assessing-capacity-via-video-conferencing, at 20 September 2021

[281] *Field v Loh* [2007] QSC 350 See also the discussion in Tina Cockburn and Barbara Hamilton, 'Equitable Remedies for Elder Financial Abuse in inter vivos transactions' (2011) 31 *Queensland Lawyer* 123

In the case of *Kim* [282], discussed above, the problem was a predatory solicitor. One of the false declarations was made by Kim's client, who felt pressured to acquiesce in the scheme because he feared that Kim would stop acting for him as his solicitor, leaving him legally exposed.

Access to justice for Indigenous and Torres Strait Islander people

Disadvantage is magnified where people experience intersections in the circumstances or life events that produce different types of vulnerability. This is well recognized in the case of Indigenous Australians and Torres Strait Islanders, and directly linked to their ability to access legal and regulatory services. The Productivity Commission's 2014 report, *Access to Justice Arrangements* outlines some of those issues.[283] While focussing on how to better meet the needs of Indigenous Australians in family law and civil law matters and disputes (which can overlap with, or precede, criminal law matters) the Commission noted the vulnerability that flows from communication barriers; socioeconomic disadvantage and geographic isolation; differences between traditional lore and the formal legal system and gaps in interpreter services.

The *Access to Justice Arrangements Report* is primarily concerned with funding and distribution of legal services in Australia, but it does hint at how these affect the most routine legal life events for vulnerable people. In an example from the Shoalcoast Community Legal Centre, someone in a remote community receives a speeding ticket, when in reality their cousin was actually driving the car. Not being able to manage this problem at an early stage means that it spirals into unpaid fines, a cancelled licence, unemployment, debt, health issues, alcohol abuse and mental fragility.[284] The example does not mention a statutory declaration, but this would be a procedural step in the legal process (although whether it would resolve the problem in ways that make sense locally for that person would be a different question). The implication of the example is that the person affected would be unlikely to navigate their own way through the early stages of the legal problem without advice and support.

Remoteness is its own form of vulnerability in Indigenous Australia. Submissions to the same Inquiry pointed out that,

> The further away Indigenous communities are from urban (and to a lesser extent, regional) centres, the less likely they are to access legal assistance and information. … In a number of Indigenous communities visited by the ILNP, the only legal assistance provided is criminal law-related and any outreach is provided to correspond with the timetabling of the (criminal) circuit court.[285]

[282] (2017) NSWCA 292
[283] Productivity Commission, (2014) *Access to Justice Arrangements*, Productivity Commission Inquiry Report No 72. 5 September 2014, 761 and following
[284] Productivity Commission, (2014) *Access to Justice Arrangements*, Productivity Commission Inquiry Report No 72. 5 September 2014, 781
[285] Productivity Commission, (2014) *Access to Justice Arrangements*, Productivity Commission Inquiry Report No 72. 5 September 2014, 782 (citing Submission105, 7)

The reference to funded legal assistance for criminal justice matters in the submission is significant because the Report finds that in many remote locations, there is significant unmet demand for assistance with routine civil law matters. The Inquiry found, for example, that,

> Inadequate support for vulnerable Centrelink customers (such as many Aboriginal and Torres Strait Islander people) in navigating systems when they have a problem can result in financial hardship as well as long periods waiting for a review if they do not agree with a decision … Further, the Ombudsman noted that the impact of service delivery problems for vulnerable customers can be disproportionately large, especially for customers who are unable to take advantage of Centrelink's digital service delivery Even so, qualitative evidence suggests that the level of unmet need appears to be highest in more remote locations.[286]

Plain Language and Languages Other than English

The *Access to Justice Arrangements Report* noted that shortages in the supply and quality of interpreter services also affects access to justice.[287] That is true within remote Indigenous communities, where English is not a first language for many people, and it remains the case for many migrant communities in Australia and for many people seeking asylum and refugee status.

The standard policy accommodation to this social reality is to provide or permit interpreting or translation. The availability of the full range of those services is beyond the scope of this paper, but we consider below two important design considerations for legal documents and statutory declarations and deeds that are necessary before the addition of translation or interpreting.

Utility of plain language

Australia has been at the forefront of the 'plain language' movement to convert legal information and legal documents to a writing style that is comprehensible to ordinary users.[288] This is important for access to justice, but it also matters at a time when average reading and comprehension ability within the Australian education system is not improving and unevenly distributed.

Plain language drafting principles include using active, rather than passive language, avoiding or explaining terms that can only be understood by people with legal training. However, plain legal languages presupposes that vulnerable people can understand the content and make decisions or act based on this.

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[286] Productivity Commission, (2014) *Access to Justice Arrangements*, Productivity Commission Inquiry Report No 72. 5 September 2014, 782 (Citing Commonwealth Ombudsman, 2014 Department of Human Services: Investigation into service delivery complaints about Centrelink, April, 1/2014, https://www.ombudsman.gov.au/__data/assets/pdf_file/0021/25851/April-2014-Department-of-Human-Services.pdf) (at 20 September 2021)

[287] Productivity Commission, (2014) *Access to Justice Arrangements*, Productivity Commission Inquiry Report No 72. 5 September 2014, 782

[288] See, for example, the Office of Parliamentary Counsel: https://www.opc.gov.au/drafting-resources/plain-language, at 20 September 2021 and work by the Victoria Law Foundation: https://victorialawfoundation.org.au/for-the-legal-sector/plain-language-training, at 20 September 2021

As one advisor comments,

> I think the challenge is that the client will be able to read that and understand everything themselves, independently, and kind of be able to take steps once they get it. I think a lot of our clients have a lot of other issues going on at the time and other stressful events happening, so just being able, for them to be able to actually use it to help them, to actually take positive steps.[289]

In practice, simply converting legal information to a plain language format is unlikely of itself to lead to better understanding. What is more likely is that the plain language resources that are developed by legal service providers are driven by organisational convenience:

> [W]ithout thinking about the user, and whether perspective is, and how they process information, their language, their level of literacy, their experience of the world. So I think a lot of legal information doesn't speak to them in terms that they understand.[290]

User-centered design

The plain English movement has now spurred interest in how good design principles can contribute to both processes and comprehension within legal systems.[291] User-centred design has been applied to designing the processes for filing court documents in Canada, for example, by observing the life cycle of the document – how it is created, who actually uses it, and how.

For documents themselves, design principles offer persuasive guidance on laying out a document in a way that makes sense to the person creating it, as well as the formatting features that will make it easier to read and understand (for example, the use of sans serif fonts, font size, navigational headings). An important finding from design work is that 'white space' and infographics can be used very effectively to draw the reader's attention to what to do; what happens next; what the consequences of completing the document will be; and where to go for assistance.

Policy makers understand these design principles and use them when, for example, re-designing contemporary websites in compliance with universal access principles.[292] But that does not necessarily flow through to document design: most statutory declaration forms, for example, violate more than one principle of good design.[293]

Digitisation as document and process redesign

One risk in reforming statutory declarations and deeds is that we digitally recreate –

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[289] Dorothy Ann Fauls, *Plain Language and the Law: Rethinking Legal Information for Vulnerable People in Australia*, (PhD Thesis, University of Queensland, 2018), 87

[290] Dorothy Ann Fauls, *Plain Language and the Law: Rethinking Legal Information for Vulnerable People in Australia*, (PhD Thesis, University of Queensland, 2018), 92

[291] Thought leadership for this field has come from Legal Design Finland: http://www.legaldesignsummit.com/our-story

[292] See for example, the user-friendly website for the Department of Justice and Community Safety Victoria: www.justice.vic.gov.au, at 20 September 2021

[293] See the examples in Appendices B, C and D, where the language is unfamiliar; the font is small, serif and sometimes italic; the forms provide very little signposting of what is required and why; and there are no lateral links to where to go to get information or help.

and electronically transmit -- these without re-designing them. That would be a lost opportunity to deliver a digital user experience that is efficient, accessible and builds better understanding of the law. Commercially available platforms for creating digital documents have the capability to:

- accept well-designed templates;
- accept additional documents, such as translated versions of the form and responses;
- provide for 'designed-in' checkpoints to ensure that the user has understood the document before proceeding;
- Provide for 'designed-in pauses' if a user needs to step out of a process to seek legal advice.

A truly user-centred redesign process would actually seek data from different types of users about their experience and suggestions for improvement and then design 'backwards' from the user standpoint to the entity that was requiring the document.

Avoiding the statutory declaration 'battle of the forms'

Because statutory declarations perform identical functions across Australian jurisdictions, it is difficult to argue that each jurisdiction needs a unique form. There is an opportunity here to invest in designing a single, model form that conforms to plain legal language and user-centred design principles and that facilitates the mutual recognition discussed above.

19. Reform Pathways for statutory declarations

Routine, Risk and Regulatory Burden

Statutory declarations are used routinely in Australia for hundreds of government processes, by businesses and in contested administrative and court proceedings. That wide range of uses invites a classification by function, risk and regulatory burden: in what situations are statutory declarations really needed; what is the risk the flows from a false declaration; does witnessing actually reduce the risk of fraud; and is the regulatory burden proportionate to the risk?

Removing statutory declarations from routine government processes

We suggest that there is a weak case for retaining statutory declarations to perform the function of collating routine information. In situations where government needs reliable information, an unattested declaration is likely to be sufficient – as it is for tax returns. It would be more efficient and less burdensome to rely on signposting the primary legislation and ensuring that it has penalties embedded in it, in order to heighten the declarant's awareness of the consequences of knowingly providing false information.

A secondary benefit for government in removing redundant statutory declarations is that it creates an opportunity to review whether and how the legal information about the primary process or legislation is communicated. There is little evidence that the current form of a statutory declaration does this, but an unattested declaration or a

redesigned statutory declaration, in a website or form that is designed using user-centred principles has the potential to improve understanding of the legal system.

Unattested declarations

Replacing the statutory declaration with an unattested declaration has the potential to be both more effective and more efficient for government and reduce the regulatory burden for citizens. That could be an unwitnessed wet signature (but more likely to be an electronic signature) placed under an acknowledgement of the penalty for providing a false statement, which is specific to and embedded in the administrative process that asks for the information.

Residual uses for statutory declarations

Business

Businesses appear to use statutory declarations as a way of harnessing (potential) criminal penalties for employment purposes, although we found little evidence of prosecution by business, except as part of larger commercial disputes or systemic fraud. It seems likely that the real penalties for making a false declaration in the workplace are more likely to flow through an employment contract or a process under a code of conduct. In that case, the unattested declaration pathway outlined above for government could equally apply to business, referencing and employment, rather than a statutory penalty.

It is also possible that statutory declarations may continue to be useful for businesses, as a way of invoking criminal penalties to strengthen human resources processes, or to screen consumer claims. In those cases, business is likely to argue that the regulatory burden for the employee or the claimant is justified by the risk of fraud and associated costs for the business.

Administrative, civil and criminal proceedings

The strongest case for retaining a statutory declaration seems to be its utility as part of the chain of evidence in contested administrative, civil or criminal proceedings, although we note that some administrative adjudication (e.g., WorkSafe) no longer requires statutory declarations. A simple declaration would accomplish the same effect – warning a declarant about the consequences of making a false statement. In court proceedings, a sworn affidavit is available, but a statutory declaration is probably easier and cheaper to create.

In some cases, putting a declarant to the test of making a statutory declaration is important because another party will bear the risk of a false declaration (for example in domestic violence or contested family law proceedings, or in migration matters) and this could have life-changing consequences. On the other hand, as we have seen, when people perceive the legal stakes to be high and or are seeking to avoid legal consequences for their actions, they have an incentive to lie, and a statutory declaration is not a fail-safe protection against that – the court or tribunal needs to examine and weigh its content.

Attestation (witnessing) and fraud prevention

Authorized witnesses are required in order to make a statutory declaration in most jurisdictions in Australia. However, when the witness is not a legal practitioner, witnessing is generally an unpaid role that is distributed among many occupational groups. The witness' functions include (in some jurisdictions) checking the identity of the declarant and confirming the time and location of them signing the form. Some jurisdictions also require them to check that the person making the declaration understands its significance and effect, reminding them not to make a false statement -- but these functions are not uniform across Australia's different statutory frameworks.

In practice, a witness is a weak safeguard against identification fraud (either the declarant's or their own) and no protection against false declarations. At most, witnessing may be a reminder to respect the social norm of honesty (although this has not been tested empirically) but the case data suggests that fraud is not the norm. It is not clear that witnessing actually deters bad actors from making or witnessing false declarations. Witnessing is certainly a regulatory burden, but probably a weak protection against (the small proportion of) false declarations.

Compliance and Enforcement

Knowingly making a false statutory declaration is a criminal offence across all the jurisdictions in Australia, but it is seldom prosecuted. Reported cases across the Commonwealth and the State and Territory jurisdictions also show very few cases in which the statutory declaration is the primary focus; more often its invalidity or fraud is a marker for a larger legal problem or offence.

Compliance with statutory declarations is probably high, although whether witnessing actually contributes to this is unclear. It seems likely that false declarations are either uncommon or undetected, or both. Case law suggests that those individuals or industries committed to making false declarations are outliers and are likely to be detected eventually in the process for which the declaration is being used.

Electronic and digital declarations

Where statutory declarations continue to be useful, they should be available in the most efficient form. The current pathway for creating most statutory declarations is paper based, with some jurisdictions allowing that paper to be witnessed and then transmitted electronically, through audio-visual means, scanning, and fax or email. Depending on the user, the context, and conditions such as COVID-19 lockdowns, this electronic pathway may be more – or less - burdensome than the original paper pathway.

A fully digital process would include a well-designed digital document; the ability to use an electronic signature (or for maximum security, a digital signature using two factor identification and a direct link to a verified primary form of identification); digital verification of the time and place of the digital signature; and a digital platform for managing the document flow and submission. This kind of digital declaration could be enabled by removing the exemption for statutory declarations under the *Electronic Transactions Act 1999* (Cth) and its State and Territory equivalents.

Since physical witnessing is a weak fraud control, using available technology (such as two-factor verification) to confirm the identity of the person signing the declaration would strengthen that policy purpose. Adding a fully digital pathway would eliminate the need for physical witnessing. By doing so, it would indirectly address the inconsistency of approach to who can be authorized to witness statutory declarations in different Australian jurisdictions.

Retaining paper

Where statutory declarations matter, retaining the paper pathway (including the electronic transmission of paper) – whether or not this includes in-person or remote witnessing -- for statutory declarations could be useful:

- for technology neutrality purposes;
- for access and equity reasons. Not everyone in Australia has access to technology and not everyone is able to use it easily; and
- for fulfilling evidentiary requirements for legal processes located outside Australia in which an *apostille* may be required, or where there is no pathway for accepting or recognising a digital document that would be valid in Australia.

Costs of digitisation

There is an open question about the cost of adding and adopting a fully digital pathway for statutory declarations, how that cost should be apportioned, and how to ensure that there is an open and competitive use of technology solutions.

Access, Equity and Inclusion

User-centred design

Currently in Australia we have a range of statutory declaration forms in use at Commonwealth and State level, as well as numerous forms required by various agencies that incorporate a statutory declaration under the relevant legislation. As we noted above, those forms of statutory declaration do not meet best practice standards for legal document design or for the use of plain language. It is unlikely that they promote understanding of the law, of the document itself, or of the consequences of making a false declaration.

It may not be practical to aim for a single, all-purpose statutory declaration form. However, it should be possible to develop a model template or templates that incorporate user-centred legal design principles.

We have an important opportunity to design templates that more effectively direct people's attention to the purpose of the declaration, whether unattested or in the current statutory declaration form.

A well-designed form – whether it is an unwitnessed declaration, a paper statutory declaration or an electronic form -- could help vulnerable people seek advice (including legal advice), or provide support for languages other than English, and by doing so, enhance understanding of the consequences of non-compliance.

Vulnerable people

In the paper-based form of statutory declarations, there is an implicit expectation the witness will assist the declarant – and in some jurisdictions, that form of assistance (e.g., translation or reading the declaration aloud) will be noted. Current empirical research also suggests that vulnerable people need in-person assistance to navigate routine legal processes, which include statutory declarations and unwitnessed declarations.

Opening up a digital form for statutory declarations does not, of itself, solve vulnerability challenges; it could increase them by adding the difficulty of navigating a digital form and digital signature. If we remove the requirement for witnessing, the physical presence of the witness falls away. That may actually disadvantage some vulnerable people, even assuming a well-designed form that has links to translations or to contact numbers for support and advice services. This is why we recommend retaining the option of the paper-based statutory declaration, with in-person witnessing, where an unwitnessed declaration is not sufficient. Here the policy goals of verifying identity and encouraging honesty need to give way to the different policy goal of ensuring that vulnerable people understand the process that they are participating in (something that is implicit, but not explicit, in our contemporary regulation of statutory declarations).

Undue influence and duress

Witnessing is to believe to offer some protection against undue influence and duress. This is something than an unattested declaration and an unattested, digitally signed form cannot do. We consider this further in Section 20, below.

Mutual recognition, interoperability and consolidation

Mutual recognition

Statutory declarations have an identical policy purpose and similar range of uses across all Australian jurisdictions. There seems no reason in principle why, once validly created in one jurisdiction, they should not be mutually recognized for all

purposes, in all jurisdictions. There is no evidence at present that any one jurisdiction's statutory declarations perform better than another's.

It would follow that, a statutory declaration validly created in one State or Territory would be automatically recognized in another, and that State and Commonwealth statutory declarations would be mutually recognized. It would be necessary to flow through statutory amendments to create that mutual recognition and confirmation of validity.

Consolidation

If we accept that principle, then the next logical step would be to create a national model for a declaration or statutory declaration form that reflects user-centered design principles – in both paper and digital format. Creating one of these is likely to be more cost-effective than single jurisdiction revisions. The second step would be to create a national process for executing statutory declarations that allows for electronic signatures (and stipulates what form those need to take). If the choice is a form that allows identification verification, then the need for physical witnessing falls away.

In the case of retained paper statutory declarations, the witnessing requirements could be consolidated by mutual recognition of all of the lists of authorised witnesses established at State and Commonwealth level. If that kind of consolidation occurs, then the 'hierarchies' of witnesses fall away; the minimum requirement for witnessing would be the same as it is for contracts and deeds – someone above the age of 18 who is legally competent and not a related party. It would follow that the 'lists' of authorized witnesses would be closed.

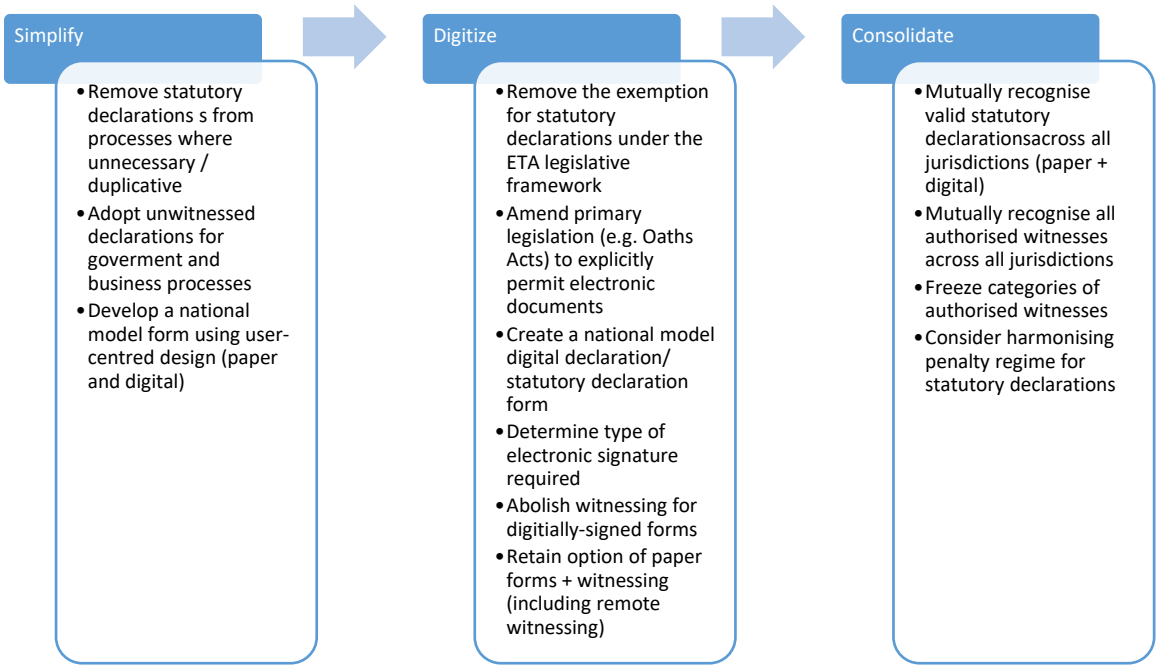
Harmonized penalty regime

There seems to be no strong policy reason in principle why the penalties for false declarations (and witness offences) diverge across Australian jurisdictions, particularly where the case law suggests that the full range of penalties are not applied. There is an opportunity to harmonize and consolidate the penalty regimes for statutory declarations.

Reform pathway diagram: Statutory Declarations

We can summarize the suggested reform pathways for statutory declarations, as shown in Table 10, below.

Table 10: Reform pathway diagram: Statutory Declarations



20. Reform Pathways for Deeds

Routine, Risk and Regulatory Burden

Deeds were historically complicated to create as a matter of policy intent, because they dealt with transfers of property and wealth that required certainty and reliability. They are now routine and often used in place of contracts. Deeds are also required by or created by legislation, notably for transferring funds such as grants, and for registering real property interests.

Ritual

The ritual of signing and sealing a deed was believed to give the document solemnity and gravitas and this was enhanced by witnessing requirements. These formalities helped to make a deed a deed and distinguish it from a contract. However, paper, signatures in wet ink, physical sealing and delivery and witnessing are disappearing as rituals of execution for deeds in Australia.

Attestation (witnessing) of deeds

Deeds executed by corporations covered by the *Corporations Act 2001* (Cth) not be witnessed (unless being executed with a common seal) and from August 2021 and in Victoria have never required witnessing. This raises the question of whether witnessing remains a meaningful process for deeds not covered by current reforms.

Witnesses for the purpose of creating a deed generally do not require any authorisation and do not have a legislated role description in the way that authorised witnesses for statutory declarations do. Without witnessing and with other formalities removed or relaxed, it can be argued that a deed, is no longer a 'solemn document' of the kind imagined at common law, but is reduced to its essence, party intention to create a deed. For that reason, it is recognized legislatively as functioning as a legislatively valid as a deed if the parties make that intention.

Probative value of witnessing deeds

An implicit function of witnessing is to provide probative evidence later, if required, that the person or persons who signed the deed did so voluntarily and without duress and that they understood the document. However, witnesses have no special qualifications beyond being an adult, legally competent not also a signatory to the deed. So whether witnessing works in this way probably needs to be tested empirically; case law captures only a fraction of transactions that go awry. We consider this in relation to vulnerable people, below.

Attestation (witnessing) and fraud prevention for deeds

By signing the document after the party/parties to the deed, the witness is attesting to the fact that they saw the document and observed the party sign the document on the date shown adjacent to the signature. So one explicit function of witnessing a deed is fraud control. However, a witness to a deed is not legally responsible for verifying the identity of the person(s) signing, or the authenticity of their signature, or checking that they have the authority to sign the document.

Thus the fraud control function of witnessing for deeds, as with statutory declarations, appears weak. In practice, in business settings where deeds are being created, it is likely that the intermediation by legal advisors and/or the fact that the parties to the deed are known to each other is providing the fraud control function, rather than witnessing - which in many cases is not required.

If witnessing is required, using a digital platform with a strong verification capability (such as two factor identification and a direct link to verification through a primary form of identification) would provide an even more reliable way of minimising signature fraud. Those digital platforms can also confirm the date, time and location of the signatures. They can also eliminate some invalidity situations, such as where a proposed witness is already a signing party.

The argument for retaining witnessing for deeds, irrespective type of user thus does not seem strong, even although some jurisdictions choose to regulate non-commercial powers of attorney in the form of a deed differently from their commercial counterparts.[294]

[294] See, for example Queensland: Explanatory Note: https://documents.parliament.qld.gov.au/bills/2021/3076/Police-Legislation-(Efficiencies-and-Effectiveness)-Amendment-Bill-2021---Explanatory-Notes-7db2.pdf, at 20 September 2021

However, we acknowledge the policy concerns of other regulatory actors such as registrars of land and property, who require a maximally reliable and tamper-proof document to evidence rights which, once registered, become presumptively valid and are relied on by third parties. Some of those policy concerns may be alleviated by prescribing through regulations the level of security a digital signature would be required to have for registrable deeds, to eliminate the need for physical witnessing.

Non-discrimination

The reform pathways for deeds in Australia are complicated by the fact that each reform is using a different unit of analysis. The section 127 reforms to the *Corporations Act 2001* (Cth) described earlier in this paper hinge on the entity – the corporation, including sole proprietor corporations -- and what it can legally do, and how. This excludes most unincorporated entities. One unintended consequence of the section 127 reforms is that in privileging business efficiency, execution requirements remain difficult for ordinary and non-corporate users of deeds. [295]It is now easier for a corporation to execute a multi-million-dollar commercial deed, for example, than it is for a non-profit incorporated association to execute a $2000 community grant from a government entity, unless State-level reforms address that type of user. The State-level reforms also tend to create 'carve-outs' from electronic reforms for land-related transactions that are registrable.

The combined effect of these reforms is that we now have significant inconsistency in how we execute deeds across Australia. One way to resolve this differential treatment of deed users is to adjust the execution requirements for all deeds to align with the section 127 reforms – so establish a consistent framework for deed execution for individuals and entities not covered by section 127. In essence this means removing the witnessing requirement and enabling digital execution for all deeds. A second, additional resolution is to 'fill out' the section 127 reforms by ensuring that there are pathways for forming digital deeds using current and future technologies.

The principle of non-discrimination would suggest that any additional execution requirements (so non-alignment with the simplified section 127 regime) would require justification and notice to users. The two likely categories are registrable documents relating to real property and deeds created by vulnerable people – discussed below.

Digital pathways for deeds

[295] Recent advice from the Australian Government Solicitor analyzes the effect on government entities. See Australian Government Solicitor (2021) 38 Fact Sheet: Execution Solutions for Remote Working Arrangements, 20 April 2021 https://www.ags.gov.au/sites/default/files/2021-04/Fact%20sheet%20No%2038%20April%202021.pdf, at 20 September 2021

Because deeds are routine and important documents for individuals and businesses, it is desirable that they be created in the most efficient way. This suggests that we should create and recognise fully digital deeds.

The August 2021 reforms to the section 127 of the *Corporations Act 2001* (Cth) and the proposed permanent amendments enable corporations to execute deeds electronically, including through split execution, and enable remote witnessing in the case where the deed is created through affixing a common seal.

Those changes incorporate the definition of electronic signatures from the *Electronic Transactions Act 1999* (Cth) but do not seem to contemplate technology applications that are currently available (including digital signatures and Blockchain technology) or those that may be created in future. Fully digital deeds, for example, could eliminate any residual need for witnessing (both physical and remote) because they could perform the identity verification for the party signature(s). Those technologies also allow simultaneous or time-restricted e-signatures and countersignatures, and document encryption that prevents tampering with the contents. Whether the transaction needs this level of security is something that commercial parties and their advisers can price and decide as a practical matter.

Digital signatures for deeds

It seems clear that some forms of electronic signature are more vulnerable to fraud than others and some have stronger or weaker forms of verification attached to them. It is possible to define the forms of electronic signature in a revision of the *Electronic Transactions Act* framework in Australia, but the more important issue seems to be designating which form is acceptable for which kind of transaction, regarding the level of risk in the transaction.

So, for example, where deeds are consensual commercial documents, parties that choose to execute them using electronic signatures can decide what form of electronic signature is sufficient, and if they do not designate a security level, any of the forms recognised under the current (or future) ETA framework would be valid.

Where deeds have a public character, for example as registrable documents dealing with property interests, the relevant registrar can – as they currently do – stipulate what type of document execution is required for registration purposes. If digital deeds and digital signatures are permitted, as they should be, then a strong, secure form of digital signature could be required. It would be open to the registrar to insist on a witnessed deed – whether in person or electronically – even where a digital signature with identification verification would arguably be sufficient. The platform for creating harmonised regulation of deeds for that purpose already exists through Australian Registrars National Conveyancing Council (ARNECC), discussed in Section 12, above.

Retaining paper

The principle of technology neutrality would ensure that executing a deed in paper (with the option of witnesses) or electronically and transmitting it electronically for signature could continue to be used for deeds that do not use those technology platforms. Retaining the paper pathway (including optional in-person witnessing) for deeds may be important:

- for technology neutrality purposes;
- for administrative purposes – although many registries are now digitised, a fully-digital deed presupposes a public or a private repository in which it can be stored and accessed;
- Potentially for access and equity reasons. Not everyone in Australia has access to technology and not everyone is able to use it easily;
- for use in situations involving vulnerable people, to help establish the presumption that the transaction was informed and voluntary; and
- for fulfilling evidentiary requirements for legal processes located outside Australia in which an *apostille* may be required, or where there is no pathway for accepting and recognising a digital document that would be valid in Australia.

Protection for vulnerable users of deeds

When we remove witnesses from the execution of deeds and open up the use of digital platforms, there is no longer any human intermediation that could potentially check the voluntariness of the party signature(s) and ask whether the person(s) signing understood the deed and its legal effect.

In theory witnessing provides some protection against duress (someone signing the deed under pressure) or misrepresentation, or lack of capacity (someone signing a document that they do not fully understand). The usual explanation is that this flows from both the presence of the witness and the possibility that they could be called to give evidence about what they observed if there is a later dispute. But as the UK Law Commission commented in 2019:

> We agree that a witness who is physically present may further the protective function in some circumstances. Equally, it is important to be realistic and practical about the level of this protection. Undue influence and duress are more likely to take the form of a sustained campaign against the signatory, which the witnessing requirement cannot protect against, rather and a 'gun to the head'-type scenario.[296]

The need for protection from any of the factors that undermine voluntary consent is likely to be stronger in family, or non-commercial or consumer or workplace settings, particularly where there is no independent legal advisor involved. The problem is that deeds are used for a very wide range of transactions and there is no absolute, clear division between business and non-business contexts.

[296] United Kingdom Law Commission, *Report on Electronic Execution of Documents*, Law Com No 386 (2019), 75

If we are concerned about vulnerable people and their ability to understand the content and consequences of a transactional deed, then those protections – and independent advice -- need to come earlier than the instant of signing. In practice, we rely on the professionalism of lawyers and other intermediaries to provide those.

Controlling the document through execution formalities and then seeking evidence from a witness in a contested dispute later are fairly weak alternatives to advice and/or the presence of an independent advisor. However, one way of accommodating situations in which one of the parties is not a business would be for parties to choose to retain witnessing. While the reform pathway in Australia is likely to remove the requirement for witnessing, it does not prohibit it. Nothing prevents private sector actors from adding witnesses to a deed (in the way that is often done with contracts) in order to strengthen the presumption that there was no visible fraud or duress and to provide an additional source of evidence in the case of a later dispute.

Ways to balance the policy goals of efficiency and protection might include:

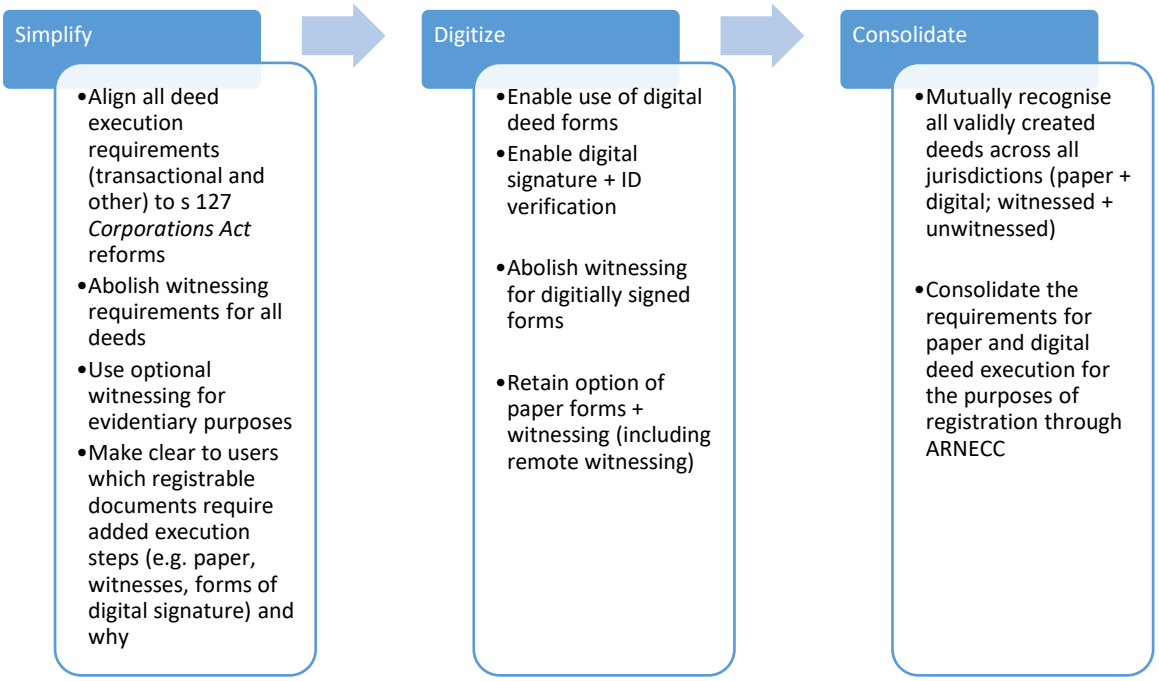
Abolish witnessing as a requirement (but retain it as an option)

Nothing in the section 127 or other reforms to date prevents the use of witnesses as part of deed execution. The choice to include witnesses could be presumptive evidence of a lack of duress or factors that might undermine voluntary consent by the party or parties signing.

Harness design features to check consent

Where the deed is executed electronically and there are no witnesses ensure that as a matter of practice, the signatory block on a paper document and the design of a digital deed build in re-confirmation that the signatory has understood and consents to the transaction. Again, this is presumptive rather than conclusive evidence, but it functions as a ‘pause’ in the document execution process.

Table 11: Reform pathway diagram: deeds



21. Implications for other forms of solemn documents

Statutory declarations and deeds have become more explicitly regulated (there are more pathways, and so more rules) but less solemn (meaning more disconnected from their original execution rituals). That raises questions about whether 'solemn document' remains meaningful as a category; whether there is (or should be) a cascade effect on other forms of solemn document; or whether each type of transaction and the document that embodies needs to be considered separately, or by reference to its users and underlying risks.

Solemn documents as safeguards

Safeguards for consent and for vulnerability was – and remains - one of the functions of execution formalities for solemn documents. When we are anxious about the effect of the document – and its voluntariness – we increase the formalities. We see this in the expansion of the role of witnesses for statutory declarations in NSW and Victoria in recent years, and the restrictions on special witnesses for audio-visual witnessing in Queensland,[297] as well as in the lack of policy enthusiasm for completely relaxing the formalities for wills, enduring powers of attorney and end of life directives, as well as those such as birth, death and marriage certificates.

[297] Explanatory Note: https://documents.parliament.qld.gov.au/bills/2021/3076/Police-Legislation-(Efficiencies-and-Effectiveness)-Amendment-Bill-2021---Explanatory-Notes-7db2.pdf, at 20 September 2021

What those residual groups of documents show us is that there is an implicit policy concern with:

> (a) people who are creating documents with significant, lasting legal effect and who may be vulnerable in one or multiple ways (including vulnerable to influence); and
> (b) the integrity and security of primary identification documents.

These concerns are really recognitions of forms of risk that attach to types of users and legal events. For transactions made by vulnerable people there is a risk of the individual's choice being overborne by pressure or fraud, or a mistake due to lack of understanding -- both leading to serious legal consequences.

For the identity-creating life events, there is a risk that those identities may be fraudulently created or stolen. Identity-creating documents are controlled by the States and Territories in Australia and there seems no strong policy reason to relax the formalities required for their creation, particularly as they become more important as the authentication base for digital forms of identification and signature. So, they are high-risk documents that require maximum procedural protection in their creation and form.

Separating user and risk from the document form

For transactional documents – those created by companies and individuals, the analysis in this paper suggests that the form and formalities of a solemn document are fairly weak safeguards against the risks of fraud or undue influence, or unconscionable conduct. The document itself cannot replace the need for advice, ideally delivered in person.

The background paper and several submissions to the Singapore Public Consultation on the ETA in 2019 were concerned about this. Several submissions pointed out that, as new forms of document execution are developed, for example digital execution, the risk to vulnerable users lies in the lead up to the transaction, rather than the form of the document execution, or the technology, itself. In other words, if a family member is executing a solemn document electronically on behalf of a (non-consenting or unaware) vulnerable person, this is probably a late indicator of pre-existing financial abuse, for which earlier and better intervention is required.

How to design comprehensive regulation to safeguard vulnerable people across all categories of transaction involving solemn documents is beyond the scope of this paper and is a policy question that has not been fully resolved in other jurisdictions.[298] However, some general regulatory implications might include:

[298] See for example a recent paper by Stelma-Roorda, reviewing the patchwork approach to continuing (or enduring) powers of attorney in Europe: Rieneke Stelma-Roorda, 'The Misuse or Abuse of Continuing Powers of Attorney: What Are Appropriate Safeguards?' (2021) *International Journal of Law, Policy and The Family*, 1

Common law protection continues to operate

Vulnerability is already recognised as vitiating factor in important transactions involving solemn documents, if and when those are legally challenged. Nothing in the current or proposed changes to document execution discussed in this paper displaces the well-established legal principles relating to fraud, *non est factum* (lit. 'not my act'), duress or unconscionable conduct.

Categories of vulnerability are wider than lack of legal capacity

The classical protections offered by the common law flow from fairly narrow categories of impaired legal or mental capacity (e.g., not being fluent in English, being illiterate, having a sight or hearing disability) and those have been expanded through case law determinations by judges looking at individual facts patterns.

We do not have a nationally agreed definition of 'vulnerability' and there is no guarantee that case law will expand to comprehensively cover the types of vulnerability that policy and research studies point to. It is true that we regulate some types of vulnerability very closely through legislation -- legal capacity requiring guardianship is a paradigm example. It is also true that we do not have a consistent approach to other forms of vulnerability (e.g., old age, economic disadvantage, Aboriginal and Torres Strait Islander/First Nations status; or relational vulnerability that flows from ethnicity and culture), or the vulnerability that flows from ceding control of personal affairs through a power of attorney.

Independent advocacy and advice are critical, but not guaranteed

The purpose of formalities for solemn documents has been to pause a transaction to check for consent and visually assess the absence of pressure on a person signing, but evidence of independent legal advice before that moment of signing is likely to be a much stronger safeguard. Where there is no independent advocacy or advice, and a party has one or more types of vulnerability, it would be up to the party seeking to rely on the transaction to provide evidence of consent. One way of doing this would be to point to legal advice received – although such advice, particularly for non-criminal matters, can be expensive. There is a tendency in both practice-oriented and scholarly writing to 'assume a legal advisor'.[299]

Regulation by user type, rather than transaction type seems indicated

Submissions to the Singapore consultation referenced above also pointed out that solemn documents involving vulnerable people are regulated as specific classes of document (e.g. wills) and so their re-regulation can be assessed on a category-by category basis. That is true, but it is a better approach is to think about what is required to mitigate risk for different categories of user, rather than start with the document type itself.

A user-centred approach is particularly important for types of documents that have many different types of user – powers of attorney being the paradigm case. Submissions to the Singapore consultation were concerned to draw a distinction between commercial powers of attorney (those given to, for example, a legal representative in the ordinary course of business) and those given by individuals in order to manage personal affairs. In practice, the distinction is not clear-cut – a

[299] As Stelma-Roorda does: see note above

vulnerable person can issue a time-limited or an enduring power of attorney that allows their agent to deal in property, for example, which is why enduring powers of attorney are registrable documents in some jurisdictions. The Queensland reforms proposed as permanent deal with this problem by creating a typology, distinguishing between users and contexts to determine whether and what mode of witnessing is required for:

- enduring powers of attorney;
- general powers of attorney;
- powers of attorney created by deed 'for business';
- those created as general powers of attorney or by deed for individuals for non- business purposes;
- those created as general powers of attorney or by deed for individuals for business purposes; and
- those used for a land or water dealing. [300]

This type of approach could help solve the problem of the 'nested document' – a power of attorney nested within a deed, for example – by looking at the user status and context rather than the document type.

The issue here is not the form of document – the power of attorney – but the capacity and understanding of the person creating it – suggesting that we need a more consistent regulatory approach that tracks users rather than document types.

[300] Explanatory Note: https://documents.parliament.qld.gov.au/bills/2021/3076/Police-Legislation-(Efficiencies-and-Effectiveness)-Amendment-Bill-2021---Explanatory-Notes-7db2.pdf, at 20 September 2021

Appendices

Appendix A: CDPP cases 1983-2020 (Commonwealth legislation references)

Australian Citizenship Act 2007 (Cth) s50 (1)
Australian Federal Police Act 1979 (Cth) s64 (1)
Australian Passports Act 2005 (Cth) ss 29 (1) and 32(1)
Bail Act 1977 (Vic) s 30
Bail Act 1978 (NSW) ss 30 (1) and 51(1)
Bankruptcy Act 1966 (Cth) ss 265 (1) (f) and (8)
Commonwealth Electoral Act 1918 (Cth) s 339 (1) (a)
Crimes Act 1914 (Cth) ss 20A, s 20A (5), 29A (1), 29B, 29C, 29D, 35(1), 67(b), 71(1), 71(3), 85K (1) (c) and 86(1) (b)
Crimes Act 1900 (Cth) ss 178BA, 192E (1) (b) and 254
Criminal Code (Cth) ss 134.1, 134.2, 135.1, 136.1, 137.1, 142.1, 142.2, 145.1 and 148.1
Criminal Code (WA) ss409 (1) (c) and 424(d)
Customs Administration Act 1985 (Cth) s 16 (2) (b)
Defence Act 1903 (Cth) ss80A (1), 80B (1), 82(3), 84
Financial Management and Accountability Act 1997 (Cth) s60 (1)
Financial Transaction Reports Act 1988 (Cth) s24 (6)
Income Tax Assessment Act 1936 (Cth) ss220AAR (3) and 221F
Marriage Act 1961 (Cth) s 94
Migration Act 1958 (Cth) ss 114ZZM(1)(a), 167, 171(2), 234(1)(a)-(c), 240(1), 240(3), 245(1)(b), 31, 491, 65, 80(2)(c), 81(1)(b)-(c), 81(2)(b), 83(1), 83G(1) and 389A(1)(a)
Navigation Act 1912 (Cth) s 389A (1) (a)
Passports Act 1938 (Cth) ss 10 (1) (a) and 21(2)
Police Act 1892 (WA) s90A
Public Service Act 1922 (Cth) s 96 (1) (b)
Social Security Act 1947 (Cth) ss 138 (1) (d), 239(1) (b), 1344, 1347 and 1348
Student Assistance Act 1973 (Cth) s 49 (1) (b)
Summary Offences Act 1966 (Vic) s 26
Taxation Administration Act 1953 (Cth) s 8C (1) (a)

Appendix B: Examples of Statutory Declaration Forms: Commonwealth

Commonwealth of Australia
STATUTORY DECLARATION
Statutory Declarations Act 1959

1 Insert the name, address and occupation of person making the declaration

I,[1]

make the following declaration under the *Statutory Declarations Act 1959:*

2 Set out matter declared to in numbered paragraphs

[2]

I understand that a person who intentionally makes a false statement in a statutory declaration is guilty of an offence under section 11 of the *Statutory Declarations Act 1959*, and I believe that the statements in this declaration are true in every particular.

3 Signature of person making the declaration

[3]

4 [Optional: email address and/or telephone number of person making the declaration]

[4]

5 Place
6 Day
7 Month and year

Declared at [5] on [6] of [7]

Before me,

8 Signature of person before whom the declaration is made (see over)

[8]

9 Full name, qualification and address of person before whom the declaration is

[9]

made (in printed letters)

10

10 [Optional: email address and/or telephone number of person before whom the declaration is made

Note 1 A person who intentionally makes a false statement in a statutory declaration is guilty of an offence, the punishment for which is imprisonment for a term of 4 years — see section 11 of the *Statutory Declarations Act 1959*.

Note 2 Chapter 2 of the *Criminal Code* applies to all offences against the *Statutory Declarations Act 1959* — see section 5A of the *Statutory Declarations Act 1959*.

A statutory declaration under the *Statutory Declarations Act 1959* may be made before–

(1) a person who is currently licensed or registered under a law to practise in one of the following occupations:

Architect	Chiropractor	Dentist
Financial adviser	Financial Planner	Legal practitioner
Medical practitioner	Midwife	Migration agent registered under Division 3 of Part 3 of the *Migration Act 1958*
Nurse	Occupational therapist	Optometrist
Patent attorney	Pharmacist	Physiotherapist
Psychologist	Trademarks attorney	Veterinary surgeon

(2) a person who is enrolled on the roll of the Supreme Court of a State or Territory, or the High Court of Australia, as a legal practitioner (however described); or

(3) a person who is in the following list:

- Accountant who is:
  - a) a fellow of the National Tax Accountants' Association; or
  - b) a member of any of the following:
    - i. Chartered Accountants Australia and New Zealand;
    - ii. the Association of Taxation and Management Accountants;
    - iii. CPA Australia;
    - iv. the Institute of Public Accountants
- Agent of the Australian Postal Corporation who is in charge of an office supplying postal services to the public
- APS employee engaged on an ongoing basis with 5 or more years of continuous service who is not specified in another item in this list
- Australian Consular Officer or Australian Diplomatic Officer (within the meaning of the *Consular Fees Act 1955*)
- Bailiff
- Bank officer with 5 or more continuous years of service
- Building society officer with 5 or more years of continuous service
- Chief executive officer of a Commonwealth court
- Clerk of a court
- Commissioner for Affidavits
- Commissioner for Declarations
- Credit union officer with 5 or more years of continuous service
- Employee of a Commonwealth authority engaged on a permanent basis with 5 or more years of continuous service who is not specified in another item in this list
- Employee of the Australian Trade and Investment Commission who is:
  - (a) in a country or place outside Australia; and
  - (b) authorised under paragraph 3 (d) of the *Consular Fees Act 1955*; and
  - (c) exercising the employee's function at that place
- Employee of the Commonwealth who is:
  - (a) at a place outside Australia; and
  - (b) authorised under paragraph 3 (c) of the *Consular Fees Act 1955*; and
  - (c) exercising the employee's function at that place
- Engineer who is:
  - a) a member of Engineers Australia, other than at the grade of student; or
  - b) a Registered Professional Engineer of Professionals Australia; or
  - c) registered as an engineer under a law of the Commonwealth, a State or Territory; or
  - d) registered on the National Engineering Register by Engineers Australia
- Finance company officer with 5 or more years of continuous service
- Holder of a statutory office not specified in another item in this list
- Judge
- Justice of the Peace
- Magistrate
- Marriage celebrant registered under Subdivision C of Division 1 of Part IV of the *Marriage Act 1961*
- Master of a court
- Member of the Australian Defence Force who is:
  - a) an officer
  - b) a non-commissioned officer within the meaning of the *Defence Force Discipline Act 1982* with 5 or more years of continuous service
  - c) a warrant officer within the meaning of that Act
- Member of the Australasian Institute of Mining and Metallurgy
- Member of the Governance Institute of Australia Ltd
- Member of:
  - a) the Parliament of the Commonwealth
  - b) the Parliament of a State
  - c) a Territory legislature
  - d) a local government authority
- Minister of religion registered under Subdivision A of Division 1 of Part IV of the *Marriage Act 1961*
- Notary public, including a notary public (however described) exercising functions at a place outside
  - a) the Commonwealth
  - b) the external Territories of the Commonwealth
- Permanent employee of the Australian Postal Corporation with 5 or more years of continuous service who is employed in an office providing postal services to the public
- Permanent employee of
  - a) a State or Territory or a State or Territory authority
  - b) a local government authority

  with 5 or more years of continuous service, other than such an employee who is specified in another item of this list
- Person before whom a statutory declaration may be made under the law of the State or Territory in which the declaration is made
- Police officer
- Registrar, or Deputy Registrar, of a court
- Senior executive employee of a Commonwealth authority
- Senior executive employee of a State or Territory
- SES employee of the Commonwealth
- Sheriff
- Sheriff's officer
- Teacher employed on a permanent full-time or part-time basis at a school or tertiary education institution

Appendix C: Examples of Statutory Declaration Forms: Victoria

Instructions for completing a statutory declaration
Please complete the following form using the notes in the left-hand margin for guidance. More guidance on making statutory declarations can be found at www.justice.vic.gov.au.
When making the statutory declaration the declarant must say aloud:
I, *[full name of person making declaration]* of *[address]*, declare that the contents of this statutory declaration are true and correct.

Statutory Declaration

Insert the name, address and occupation (or alternatively, unemployed *or* retired *or* child*) of person making the statutory declaration.*

I,

make the following statutory declaration under the **Oaths and Affirmations Act 2018:**

Set out matter declared to in numbered paragraphs. Add numbers as necessary.

1.

I declare that the contents of this statutory declaration are true and correct and I make it knowing that making a statutory declaration that I know to be untrue is an offence.

Signature of person making the declaration

Place (City, town or suburb)

Declared at

***in the state of Victoria**

Date

on

Signature of authorised statutory declaration witness

I am an authorised statutory declaration witness and I sign this document in the presence of the person making the declaration:

Date

on

Name, capacity in which authorised person has authority to witness statutory declaration, and address (writing, typing or stamp)

A person authorised under section 30(2) of the **Oaths and Affirmations Act 2018** to witness the signing of a statutory declaration.

The witness must only sign this section if the person making the statutory declaration is illiterate, blind or cognitively impaired and the statutory declaration is read to them.

I certify that I read this statutory declaration to *[name of the person making the statutory declaration]* at the time the statutory declaration was made.

This section must be signed by any person who has assisted the person making the statutory declaration, for example by translating the document or reading it aloud. If no assistance was required, this section does not need to be completed.

I certify that I have assisted *[name of the declarant]* by *[insert assistance provided, for example translating the document*].

Signed:

Date

On:

Name and address of person providing assistance

Name and address of person providing assistance:

Appendix D: Examples of Statutory Declaration Forms: NSW

Statutory Declaration

OATHS ACT 1900, NSW, EIGHTH SCHEDULE

I, ... , do solemnly and sincerely declare that
[name of declarant]

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and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the *Oaths Act 1900*.

Declared at: ..... on .....
[place] *[date]*

.....
[signature of declarant]

in the presence of an authorised witness, who states:

I, ..., a ..... ,
[name of authorised witness] *[qualification of authorised witness]*

certify the following matters concerning the making of this statutory declaration by the person who made it: *[* please cross out any text that does not apply]*

1. *I saw the face of the person *OR* *I did not see the face of the person because the person was wearing a face covering, but I am satisfied that the person had a special justification[301] for not removing the covering, and
2. *I have known the person for at least 12 months *OR* *I have confirmed the person's identity using an identification document and the document I relied on was .....
[*describe identification document relied on]*

....
[signature of authorised witness] *[date]*

[301] The only "special justification" for not removing a face covering is a legitimate medical reason (at September 2018)