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## Electronic signatures – how and when can they be used?

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With the increase in remote working as a result of the Covid-19 pandemic, our reliance on technology has necessarily increased, and this has included the signing of documents electronically. This article describes when electronic signatures can be used, and how enforceable they are.

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### Electronic signatures

The Contract and Commercial Law Act 2017 (*Act*) defines the term “electronic signature” in relation to information in electronic form, as “a method used to identify a person and to indicate that person’s approval of that information”.

This could include anything from the scanned version of a signature, the ticking of an “I accept” option or a signature formed by a finger on a tablet or smartphone.

The Act provides for statutory validation of an electronic signature, subject only to a few exceptions. The general rule is that, where any legislation requires dealings to take place on paper, that dealing is also permitted to take place electronically, provided the signature meets certain requirements, both parties agree and the dealings are not expressly excluded from the Act.

### Signature requirements

A valid electronic signature can be broken down into the following three requirements:

- the signature must be in electronic form;
- the signature must be used to identify a person; and
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the signature must be used to indicate that person's approval of that information.

Any signature used to identify a person must be reliable. There is a presumption in section 228 of the Act that an electronic signature is reliable if:

- it is linked to the signatory only and to no other person;
- the means of creating it were under the control of the signatory only;
- any alteration made after signing is detectable; and
- its purpose is to provide assurance as to the integrity of the information to which it relates.

Section 226(1)(a) of the Act requires that a signature must “adequately [indicate] the signatory's approval of the information to which the signature relates. The ADLS signing system, for example, inserts a sentence after the signature stating that the person intends to be bound by the document they are signing.

### **Types of documents that can be electronically signed**

The Act does not list the documents permitted to be electronically signed. Instead, it lists documents that may not be (see below).

In practice, the following documents can be electronically signed:

- commercial agreements and deeds;
- agreements for the sale and purchase of land or interests in land;
- leases;
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director, shareholder and trustee resolutions;

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Authority and Instruction forms (*A & I Forms*) authorising a lawyer or conveyancing practitioner to sign a land transaction document electronically, although with some limitations as set out below; and

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information that is required to be given in writing in person, but only if the person receiving the electronic signature consents to it.

### **Types of documents you cannot electronically sign**

Schedule 5 of the Act provides examples where an electronic signature cannot be used, including:

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election and referendum documents;

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certain notices given under citizenship laws;

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wills;

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affidavits;

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statutory declarations;

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documents that are given on oath or affirmation;

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powers of attorney and enduring powers of attorney;

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warrants authorising entry to premises; and

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information that is required to be given in writing in person.

### **A & I Forms**

A & I Forms are the method used by clients to instruct lawyers and conveyancing practitioners to certify and sign land transaction documents. Lawyers and conveyancing practitioners rely on properly signed and witnessed A & I Forms to electronically sign land transaction documents in a system known as Landonline.

The reliance on A & I Forms is regulated by Land Information New Zealand (*LINZ*) and is subject to audit. LINZ issues guidelines setting out requirements for the use of A & I Forms.

For a lawyer or conveyancing practitioner to rely on an electronically-signed A & I Form, the lawyer or conveyancing practitioner must be certain that:

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the means of creating the electronic signature is linked to the signatory and to no other person;

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the means of creating the electronic signature was under the control of the signatory and of no other person;

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any alteration to the electronic signature made after the time of signing is detectable; and

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where the purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.

Recent guidance from LINZ also requires that the electronic system provide the lawyer or conveyancing practitioner with:

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audit records that can be produced if the transaction is audited; and

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assurance – i.e. the system provides sufficient information and safeguards to

ensure that lawyers and conveyancing practitioners can make certifications on the basis of the information supplied to them.

As A & I Forms are used to enable changes to the land transfer register, it is crucial that lawyers and conveyancing practitioners are certain that all of the above requirements are met. We expect that the above requirements are likely only complied with if the lawyer or conveyancing practitioner sets up the electronic signing process using a program known to the lawyer or conveyancing practitioner or otherwise obtains comfort about the system used by their client.

In addition, the electronic signature must be witnessed by a “trusted professional” (except for some governmental or publicly-listed entities, where no witness is required). This normally requires that a lawyer or similar professional be present when the signature is applied (through an electronic signing program or with ink) to the A & I Form. Remote witnessing by audio-visual technology is available, but that witness must then be the lawyer or conveyancing practitioner who will be relying on the A & I Form to sign the land transaction document.

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