

Electronic signatures in Australia: Legal considerations and recommended best practices

An Adobe/Norton Rose Fulbright Whitepaper



1 Executive summary

Worldwide, organisations are adopting electronic signature solutions to help reduce their carbon footprint, streamline business processes, improve security and record-keeping, and reduce costs.

It is projected that over 100 million electronic signature transactions will be made annually in Australia by 2020.¹ Yet, a recent study has found that less than 20% of Australian businesses are currently prepared for this.²

Australian law allows nearly every document to be signed using electronic signatures. In these cases, electronic signatures are legally equivalent to their wet-ink counterparts and businesses would benefit from their adoption. Almost all agreements used in typical business departments, such as sales, human resources, legal and procurement in their day-to-day operations, are capable of being signed electronically.

In this paper, we will review the law as it relates to electronic signatures by analysing how such signatures are treated under the Commonwealth and State electronic transactions legislation (**ET Legislation**) and how such signatures are treated under general law.

2 Electronic signatures in Australia

2.1 Electronic transactions legislation

Australian law recognises that a transaction can be executed through electronic communications. The ET Legislation facilitates electronic transactions rather than imposing any additional regulatory burden.

A legal requirement for a "signature" is met under ET Legislation if the following three requirements are satisfied:

(1) Identification Requirement

The method used to sign identifies the person who is signing and indicates an intention by them to sign that document.

Electronic signature solutions will generally satisfy this requirement.

(2) Reliability Requirement

The method used to sign was reliable in light of all the circumstances.

This is objectively determined with reference to a number of factors, including the type of document being signed. A wide variety of signature methods have been found to be "reliable". For example, a simple exchange of emails has been held to satisfy this requirement.

Electronic signature solutions will generally satisfy this requirement.

(3) Consent Requirement

The counterparty to the document being electronically signed has consented to the signing party signing the document by way of electronic signature.

Electronic signature solutions will generally satisfy this requirement.

¹ Forrester Consulting, Adobe eSignature Market study (2016)

² Ibid

2.2 Guidance on the signing requirements of the ET Legislation

Australian cases on electronic signatures generally indicate that:

- (1) Courts consider that the relevant electronic transactions legislation was intended to facilitate electronic signing;
- (2) The Identification Requirement does not require the recipient of the electronic communication to have separately verified the identity of the signatory, only that the identity of the signatory and their intention in relation to the information communicated can be determined (including by referring to other evidence);
- (3) The particular purpose for which the signature is required (e.g. the type of document, the value and importance of the transaction) needs to be considered in each case, since it could affect whether the method used for signing satisfied the Reliability Requirement; and
- (4) The Consent Requirement is unlikely to require anything in addition to the relevant party's act of signing electronically.

Getup Ltd and another v Electoral Commissioner [2010] FCA 869

Ms Trevitt applied for enrolment under the Commonwealth Electoral Act 1918. Her application was submitted via an online platform which included provision for electronic signing by using a stylus or finger on the computer trackpad. When printed, the signature had a similar appearance to a faxed signature (i.e. slightly pixelated). The application was rejected by the Electoral Commissioner citing concerns regarding the signature and that it would not be reliable for use as a specimen signature in future. The court rejected these concerns and held that the signature was valid.

Claremont 24-7 Pty Ltd v Invox Pty Ltd [No 2] [2015] WASC 220

In March 2015, the court considered the requirements in the context of whether an agreement for lease of land evidenced by email had been signed. The lessor sent an email (with his name) attaching the agreed terms to the proposed lessee, confirming that they were acceptable. The court held that that the lease was in writing and had been signed as required by the Property Law Act 1969 (WA).

2.3 Electronic signing under general law

The ET Legislation does not apply universally. There are certain documents which are excluded from the operation of the ET Legislation.

Wills, powers of attorney and documents relating to dealings with land are some examples of documents which are excluded from the operation of the ET Legislation.

However, exclusion from the ET Legislation does not necessarily preclude a document from being signed electronically.

If a document is excluded, the general law supports the efficacy of electronic signing without the need to rely on any facilitating legislation. The general law requirements in relation to electronic signing are no more onerous than the requirements of the ET Legislation. This can be seen from the cases discussed below, many of which rely on the general law to determine the validity of electronic signatures without relying on the ET Legislation.

As can be seen, the threshold for an electronic signature to be valid is generally quite low. Even very simplistic methods of signature, like a counterparty's name appearing at the bottom of an email in normal typeface, have been held to be valid.

***McGuren v Simpson* [2004] NSWSC 35**

Mr Simpson sought the recovery of certain money from Ms McGuren. It was held that a short email from Ms McGuren with her name appearing in the "From" field in the email was signed for the purposes of section 54 of the Limitation Act 1969 (NSW).

***Stuart v Hishon* [2013] NSWSC 766**

The court found that a typed first name at the end of the email in question was enough to constitute a signature for the purposes of section 54 of the Limitation Act 1969 (NSW). The court noted that it would be an "almost lethal assault on common sense to take any other view."

***Kavia Holdings Pty Limited v Suntrack Holdings Pty Limited* [2011] NSWSC 716**

This case related to a contractual requirement for signing in the context of an option to renew a lease. The court stated that "the inclusion of the sender's name on the email amounted to 'signing' for the purposes of the clause. The requirement for signing is intended to identify the sender and authenticate the communication."

***Smythe v Thomas* [007] NSWSC 844**

The court considered the disputed purchase of an aircraft on eBay. The eBay terms and conditions stated that once a bid was received above the reserve price, both parties were bound to complete the transaction. The seller refused to accept the deposit, claiming that the purchaser was obliged to inspect the aircraft before a contract could be concluded. The court found for the purchaser, noting that no condition of sale requiring inspection by the purchaser had been stipulated. The parties were accordingly bound to complete the transaction.

3 Which documents can be signed electronically?

Most agreements by individuals and companies may be signed electronically in Australia.

In practice, the vast majority of agreements used in typical day-to-day business, like:

- (1) Sales contracts;
- (2) Quotes;
- (3) Nondisclosure agreements;
- (4) Offer letters;
- (5) Licence agreements;
- (6) Statements of Work; and
- (7) Other similar agreements,

are capable of being signed electronically.

4 Some considerations when signing documents electronically

4.1 Documents which need to be witnessed

There is some inconsistency in the ET Legislation with respect to whether a document can be witnessed by electronic signature. The general law in relation to the electronic witnessing of documents is largely untested. We suggest you get specific legal advice if you want to use electronic signatures to witness documents.

4.2 Documents which need to be registered

While it may be possible for some documents which need to be registered with a third party (such as a government agency) to be signed electronically (and create a valid agreement), this does not mean that they will necessarily be accepted for registration in that form.

For example, in New South Wales, a lease which is being entered into by an individual can be signed electronically. However, if that lease needs to be registered, it will need to be prepared in registrable form, which will require the lessee's signature to be witnessed, taking it outside the ET Legislation and in practical terms, requiring wet-ink signatures.

In these cases, it may be necessary to check with the registering authority to ensure that it will accept the electronically signed document.

Concerns about the mode of signature does not affect registration under the *Personal Property Securities Act 2009* (Cth) because that is not a document registration system. Registration is of an online "financing statement".

4.3 Documents signed in terms of the *Corporations Act 2001* (Cth)

The Commonwealth ET Legislation does not apply to the Corporations Act. As a result, the facilitating procedures set out in the Corporations Act for the signing of a document by an Australian company (particularly sections 127 and 129(5)) do not enjoy the benefit of the ET Legislation. This does not, of itself, preclude an Australian company from signing a document using an electronic signature if the company's constitution does not forbid it and the relevant signatories have been duly authorised to execute the document in that manner. It simply means that there may be a risk that the facilitating procedures under the statute will not be available where a document is signed electronically.

Where two signatories are necessary, it is arguable that section 127(1) of the Corporations Act requires the two signatories to sign the same document, which may not be possible when signing electronically (e.g. by using a simple string of emails). However, most electronic signature solutions have the capability to create a single virtual document within the platform that is signed by all parties, which overcomes any risk which may be associated with signing two separate documents.

Some commentators have noted that section 127(1) appears to envisage a "hard copy document" (with the result that it cannot be satisfied by electronic signing). This conclusion is based on a very narrow definition of the word "document" in the Corporations Act. There are many who argue that there is no need to adopt such a narrow definition, and that a "document" includes an electronic document. This is consistent with the purpose of the section, which is to free up the manner by which companies can conclude agreements to keep pace with technological changes.

If the statutory assumptions cannot be relied upon, then it will be important to satisfy yourself that the relevant signatories had actual authority to sign by applying an electronic signature (e.g., by obtaining an extract of minutes or a power of attorney).

4.4 Deeds

There is uncertainty as to whether a deed by definition needs to be a physical instrument under general law. Until there is judicial authority on this point, we would advise against signing a deed by electronic means if it is essential for legal or regulatory reasons that it be a deed. A document (including an electronic document) which fails to satisfy the formal requirements for a deed might still be enforceable as a simple contract, provided all the usual contract formalities are satisfied.

5 Recommended best practices when signing documents electronically

5.1 Who signed the document?

An electronic signature platform should enable you to satisfy yourself as to the identity of the person who signed the document through an appropriate form of authentication.

Failure to verify the identity of an electronic signatory will have similar consequences as the failure to verify the identity of a wet-ink signatory, namely exposure to the risk of identity fraud or innocent use of the signature without authority (e.g., which can happen if a person other than the signatory has possession of login details) and repudiation of the signature.

It is important to ensure that the signatory uses a strong password on their email account, as a bare minimum. Organisations should also consider using a more robust electronic signature solution that provides a range of methods to increase assurances of the signer's identity, as necessary. Different levels of security can then be used to handle different levels of risk, from simple purchase contracts to high value, high risk agreements.

The case below illustrates why a simple email password management system may not be sufficient in all circumstances, and how a more robust system will assist in ensuring that the person whose signature appears on the document has authorised it.

***Williams Group Australia Pty Ltd v Crocker* [2016] NSWCA 265**

The director of a company did not change the password to a system by which his electronic signature could be affixed to documents. The director's electronic signature was affixed to a credit application and personal guarantee without his knowledge or authority. The parties agreed that the director was not the person who affixed the signature to the guarantee. The creditor attempted to enforce the guarantee against the director on the basis that the person who did affix the signature had ostensible authority to do so. The creditor argued that making use of the system – and failing to change his password – amounted to a representation by the director that the person who affixed the signature was authorised to do so. The court rejected this argument and held that the guarantee could not be enforced against the director.

5.2 Did the signatory intend to sign?

The platform should include a step where the signatory performs a clear, positive action in the process like typing, drawing their name or clicking a button to make it clear that they had the intention to sign the document.

Where the signatory is required to input any information prior to this positive act of signature, the solution should incorporate a "review screen" which permits the signatory to review and correct any errors immediately prior to signing. Failing this, the ET Legislation may give the user certain rights to withdraw from the contract in limited circumstances.

5.3 What has been signed?

The electronic signature solution should enable you to be sure that a document is exactly the one that was offered for signature, and that the document has not been subsequently amended.

The best signature solutions automatically deliver a final executed copy of the document to all parties. These solutions also generate audit trails that track each step of the signature process. These executed copies and audit trails should be encrypted, digitally sealed, tamper evident, and stored securely so that they can be used in court to help prove who signed the document and when they signed it.

5.4 Did the signatory consent to sign electronically?

Although the Consent Requirement does not appear to require anything other than the party signing the document to do so electronically, some companies choose to add an extra step that requires the signatory's express consent to conduct business electronically. The platform should provide this functionality as an option.

5.5 Exclusions

As outlined above, some documents are not capable of being signed electronically. Most of these exceptions relate to documents which companies will not ordinarily sign in their day-to-day operations. However, if a company envisages that it may need to execute documents that are not capable of being signed electronically, it would be best practice to list those documents in an internal legal policy to avoid any potential confusion.

6 Conclusion

Organisations around the world are transforming their businesses, replacing manual, paper-based processes with electronic alternatives that increase efficiency, reduce costs, and provide a competitive advantage. Transforming signature processes can have great benefits, and Australian law is designed to encourage this transition.

The ET Legislation takes a minimalist approach, setting only a few core guidelines for the legality of electronic signatures. This makes it easy to implement and use electronic signatures in a legally "compliant" manner in most regular business processes.

That being said, we recommend that you carefully consider and document your methods for proving signer identity, reliability, and consent, because they will be the key factors in ensuring a successful outcome should you ever be challenged in court.

While a simple email exchange has been shown effective in some court cases, you can reduce your risk and make sure you are better prepared for a challenge if you take advantage of some of the additional measures that are provided by purpose-built electronic signature solutions.

Norton Rose Fulbright, 2016

DISCLAIMER: This information is general in nature and not legal advice. It cannot be relied on as legal advice. If legal advice is required you should consult a lawyer.

