

## Electronic Signing of Documents in the age of COVID-19

With most of us practising social distancing to prevent the spread of COVID-19, many Australian businesses and individuals are turning to electronic means to sign and agree contracts and other documents.

Certain legal requirements must be followed to ensure that documents signed and executed using electronic signatures are effective and legally binding.

This article summarises what you need to do to meet these requirements.

### **Where the relevant contract contains a clause allow e-signing, the requirements of that clause must be followed.**

Many contracts include a term allowing parties to sign documents by exchanging 'counterparts' electronically. Each party places a 'wet' physical signature on a hard copy document, and then scanned copies are exchanged by email.

Contracts that contain electronic counterparts clauses can be signed effectively by following the requirements of these particular clauses.

### **In other cases, the law usually allows e-signing provided that three requirements are met. E-signing software can assist in meeting these requirements.**

Under the uniform 'electronic transactions' legislation in each State and Territory across Australia, purely electronic signatures are also effective where the following conditions are all met:

1. **Identity:** the signatories must use a method to identify themselves and show their intention to sign the document;
2. **Reliability:** the method of identification used by the signatories must be reliable; and
3. **Consent:** both signatories must consent to the electronic signature being given as acceptance of the contract, and to the method of identification used.

The first two requirements can be met by using one of the common 'e-signing' software products on the market, such as Adobe Sign and DocuSign. E-signing software generates a private numerical 'key' for each user, and a 'public', shareable key for each document that the user signs. This identifies signatories and their intention to sign a document in a reliable way. In many cases, this is more reliable than a 'wet' signature.

Less rigorous methods (including scanned signatures or even typed email signatures) may also be sufficient as evidence of identity and intention for a signed document to be binding. However whether this is reliable and effective must be assessed on a case by case basis. Cautious businesses and individuals that wish minimise the risk of their documents being unenforceable may choose to avoid using these methods.

To meet the third requirement of 'consent', parties to a contract or other document should establish as early as possible how they intend to sign it.

Of course, when using e-signing software there still remains a risk of identity theft. While the risk may be low in many cases, the more cautious among us may wish to implement additional measures to ensure that e-signing is secure. There are various measures that can be adopted, which involve varying amounts of effort (including, for example, using external online certification authorities).

### **Sometimes electronic signatures cannot be used**

E-signatures cannot be used in all cases. For example, there are difficulties with 'witnessing' a person's e-signature, which is a legal requirement to sign some documents such as wills (though this is not strictly necessary for ordinary contracts). Problems can also arise when executing 'deeds' as distinct from ordinary contracts.

Executing hard copy documents remains preferable in these cases.

### **Electronic signature under section 127 of the Corporations Act**

There is also some legal debate about whether directors of a company can execute a document 'under section 127 of the *Corporations Act*' using an electronic signature.

Execution under section 127 involves two directors (or a director and company secretary) signing the contract, and is the most common way for companies to execute documents. The benefit of execution under section 127 is that where a company signs a document in his manner the other party can assume that the document has been duly and properly executed.

To minimise the risks involved in electronic signature under section 127, some best practice methods are to ensure that:

1. the parties agree up front that the electronic signature of the person signing will be acceptable;
2. the people signing the document print and 'wet' sign the document, then scan the signed document (ideally, one director should 'wet' sign and scan the document, then the other director or secretary should print the scanned and partly signed document, 'wet' sign it, and then rescan it); and
3. a printed copy of the fully executed document is kept in company records.

Where these methods are not possible, it may be possible to take other steps to confirm that people signing electronically are authorised to do so (such as sighting a power of attorney or company meeting minutes authorising the person signing to do so). Another alternative we sometimes see is for parties to undertake to sign a hard copy under section 127 in due course (though, obviously, there is a risk that parties will never get around to doing so).

CCK Lawyers has extensive experience in technology law and all other areas of commercial law. If you need advice contact Adam Rosser or John Vozzo.

*This article provides general comments only and does not constitute specific legal advice. As always, you should always seek specific advice in respect of your circumstances.*