



## JHK LEGAL

# Electronic signatures: commentary on the legal framework and a brief guide to the signing requirements

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You have agreed to provide goods or services to your customer on a credit basis. You have issued to your customer a credit application and the documents have been returned having being executed with an electronic signature.

Do you accept it? What are the risks?

With the increasing use of electronic signatures comes further opportunities for fraudulent transactions to be entered into. This article will focus on the application of electronic signatures in Victoria and commentary surrounding the execution of different documents by way of electronic signature.



### The Legislative Framework – definitions of electronic communication and electronic signatures

The *Electronic Transactions Act 1999* (Cth) (“**the Commonwealth Act**”) applies to dealings to which a Federal law applies by “*promot[ing] business and community confidence in the use of electronic transactions and enabl[ing] business and the community to use electronic communications in their dealings with government*”<sup>1</sup>. Each state and territory have legislation that substantially mirrors the Commonwealth Act to further regulate electronic transactions that apply in their respective jurisdictions. There are exceptions to the validity of electronic signatures in each states and territory.

In the context of both the Commonwealth Act and the *Electronic Transactions (Victoria) Act 2000* (Vic) (“**the Victorian Act**”), *electronic communication* is defined as:

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<sup>1</sup> *Electronic Transactions Act 1999* (Cth) s 3.

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- (a) a communication of information in the form of data, text or images by means of guided or unguided electromagnetic energy, or both; or
- (b) a communication of information in the form of sound by means of guided or unguided electromagnetic energy, or both, where the sound is processed at its destination by an automated voice recognition system.”<sup>2</sup>

The Victorian Act and the Commonwealth Act do not contain a definition for *electronic signatures* however there are many widely accepted ways in which a person may be taken to have electronically signed a document, for example:

- In the decision of *Stuart v Hishon*<sup>3</sup> the Supreme Court of New South Wales considered that as Mr Stuart had “*typed his name on the foot of [his] email*”<sup>4</sup>, he was held to have signed the email and was thereby bound by its contents. This finding is distinguished in fact situations where the email signature is automatic and the sender has not deliberately inserted their name.
- In *Getup Ltd and another v Electoral Commissioner*<sup>5</sup>, the Court held that an electronic signature effected by a stylus was sufficient execution of the federal voting enrolment form.

Further examples that may be considered as an electronic signature could include:

1. an image of a wet-ink signature inserted into a document;
2. a signature generated by use of a digital pen<sup>6</sup>; or
3. as a typed name on a form of guarantee;<sup>7</sup>

What the above demonstrates is that it would be prudent for both parties to establish the method by which the document is intended to be executed prior to execution and exchange of documents.

### Signing requirements

One of the purposes of the Victorian Act is to recognise that “*transactions effected electronically are not by that reason alone invalid*”<sup>8</sup>. This purpose is mirrored in the Commonwealth Act. However, as outlined above, exemptions do apply – for example under the *Electronic Transactions (Victoria) Regulations 2010* (“**the Regulations**”), the Victorian Act does not apply to transactions seeking to create, execute or revoke a will, codicil “or any other testamentary instrument”.<sup>9</sup>

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<sup>2</sup> *Electronic Transactions Act 1999* (Cth) s 5; *Electronic Transactions (Victoria) Act 2000* (Vic) s 3.

<sup>3</sup> *Stuart v Hishon* [2013] NSWSC 766.

<sup>4</sup> *Stuart v Hishon* [2013] NSWSC 766.

<sup>5</sup> *Getup and another v Electoral Commissioner* [2010] FCA 869.

<sup>6</sup> *Getup and another v Electoral Commissioner* [2010] FCA 869.

<sup>7</sup> *Parkesinclair Chemicals (Aust) Pty Ltd v Asia Associates Inc* [2000] VSC 362, [107]

<sup>8</sup> *Electronic Transactions (Victoria) Act 2000* (Vic) s 1.

<sup>9</sup> *Electronic Transactions (Victoria) Regulations 2010* s 6.

Section 10 of the Commonwealth Act (in relation to a signature given to a person who is neither a Commonwealth entity nor a person acting on behalf of a Commonwealth entity)<sup>10</sup> and section 9 of the Victorian Act set out the legal requirements in determining whether an electronic signature is valid:

1. A method is used to identify the person and to indicate the person's intention in respect of the information communicated<sup>11</sup>;
2. That particular method used to identify their identity must be reliable as appropriate for the purpose for which the electronic communication was generated or communicated in light of all of the circumstances including any relevant agreement or proven in fact to have fulfilled this function by itself or together with further evidence<sup>12</sup>; and
3. The person 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 1.<sup>13</sup>

### **Execution Pursuant to Section 127 of the Corporations Act 2001 (Cth) ("the Corporations Act")**

Where a document is signed pursuant section 127 of the *Corporations Act 2001 (Cth)* ("**the Corporations Act**") using a wet-ink signature, parties to a contract are able to rely on various assumptions about the signatory, including that the signatory, signing on behalf of a company has been duly appointed, is authorised to do so and the company ought to be bound.<sup>14</sup>

It is important to be aware of the distinction and varying views where documents are executed on behalf of a company using an electronic signature. The *Electronic Transactions Regulations 2000 (Cth)* ("**the Commonwealth Regulations**") lists the various Commonwealth laws to which some provisions of the Commonwealth Act does not apply, which includes the Corporations Act.<sup>15</sup> As such, it is argued by some that where a document has been executed on behalf of a company by way of electronic signature, the assumptions normally available to the other party under section 129 of the Corporations Act no longer apply.

The alternative view is that an electronic document could satisfy the broad definition of a *document* under the *Acts Interpretation Act 1901 (Cth)*.<sup>16</sup> It is also contended that whilst section 127 of the

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<sup>10</sup> This section does not affect the operation of any other law of the Commonwealth that makes provision for or in relation to requiring:

(a) an electronic communication to contain an electronic signature (however described); or

(b) an electronic communication to contain a unique identification in an electronic form; or

(c) a particular method to be used in relation to an electronic communication to identify the originator of the communication and to indicate the originator's intention in respect of the information communicated.

<sup>11</sup> *Electronic Transactions (Victoria) Act 2000 (Vic)* s 9(1)(a).

<sup>12</sup> *Electronic Transactions (Victoria) Act 2000 (Vic)* s (1)(b).

<sup>13</sup> *Electronic Transactions (Victoria) Act 2000 (Vic)* s 9(1)(c).

<sup>14</sup> *Corporations Act 2001 (Cth)* s 129.

<sup>15</sup> *Electronic Transactions Regulations 2000 (Cth)* Schedule 1.

<sup>16</sup> *Act Interpretation Act 1901 (Cth)* s 2B.

Corporations Act has been interpreted as requiring a wet-ink seal by a company, this narrow interpretation should not limit the definition of a document so as to exclude electronic documents

and invalidate electronic signatures noting that section 127 of the Corporations Act states that this section “*does not limit the ways in which a company may execute a document*”<sup>17</sup>.

The position in Victoria remains unclear on this point. Where a document is executed on behalf of a company using an electronic signature, we often recommend that the counterparty receiving the executed document as a minimum take reasonable steps to establish that director/s of the company executing the document intended to do so<sup>18</sup> and that where the document was executed by an agent of the company, the agent was duly authorised to do so. Such reasonable steps may also include seeking a copy of a power of attorney under which the authorised person may have signed or requesting part of the company meeting minutes. This may remove the need to rely on the section 129 assumptions within the Corporations Act, the application of which is contentious in these circumstances.

### **Where a document must be witnessed – Victorian jurisdiction**

Taking the example of a guarantee and indemnity, where a director or other individual giving a guarantee authorises a colleague (i.e. a personal assistant) to insert the electronic signature of the director or other individual into the document, the witness of that signature must not be the same colleague who has inserted the electronic signature.

### **Where documents are to be lodged with a third party or government authority**

It is prudent when executing documents to be lodged with regulatory or government bodies that you review their published guidelines and requirements (commonly found on their website) in order to determine whether an electronic signature will be accepted.

When in doubt we recommend executing all documents to be lodged with either a regulatory or government body with a wet-ink signature, as this is a common requirement.

### **What can JHK Legal do to help?**

Whether you are considering executing a document by way of electronic signature, or you have received an electronically executed document, JHK Legal will be able to assist in advising whether the electronic signature may be considered effective.

Our team at JHK Legal can also provide you with further advice in mitigating risk surrounding the acceptance and use of electronically executed documents.

Should you have any further queries in relation to this article, please contact our Victorian office on 03 9927 3600.

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<sup>17</sup> *Corporations Act 2001* (Cth) s 127(3).

<sup>18</sup> *Electronic Transactions Act 1999* (Cth) s 10(1)(a).

***\*\*\* NB: the Electronic Transactions Act differs in each State and Territory. Whilst each State and Territory has adopted a similar model, it is important to confirm the legal requirements and obligations under the legislation of your State or Territory.***