

# A sign of things to come: Electronic signatures in Western Australia

By David Nicholson

During such unprecedented and challenging times, we have witnessed the rising trend of work-from-home solutions, Zoom meetings and electronic transactions. As many of us have been separated from co-workers and clients, it became increasingly easier and necessary to render electronic signatures to execute documents. There is no denying the popularity of cloud-based signing platforms, Adobe Sign or DocuSign who have over 200 million users world-wide. While electronic signatures are not a recent phenomenon, there is still some uncertainty as to their legal validity in Western Australia.

Examples of electronic signatures may include (but not limited to):

- Signatures rendered with a stylus, trackpad or mouse;
- Biometric signature;
- A typed name;
- Inserting a copied image of a signature; or
- Creating a formal signature via Adobe Sign or DocuSign.

## Legal Requirements

In Western Australia, electronic transactions are governed by the *Electronic Transactions Act 2011* (WA) (**ETA**). The ETA provides that a transaction is not invalid if it has taken place wholly or partially by way of electronic communication,<sup>[1]</sup> with certain exceptions (discussed later below). The ETA provides that an electronic signature is valid,<sup>[2]</sup> if the following requirements are met:

### 1. Identity & Intention

There must be a method which can identify the person and indicate their intention in respect of the information communicated. In *Claremont 24-7 Pty Ltd v Invox Pty Ltd* (**Claremont 24-7 case**),<sup>[3]</sup> Le Miere J held that a printed email signature at the foot of the email under the word 'sincerely' was sufficient identification and intention of the person. The signature may also be as simple as including a person's first name at the end of an email.<sup>[4]</sup> In *Getup Ltd and another v Electoral Commission*,<sup>[5]</sup> the Federal Court ruled that due to the application of similar principles under the *Electronic Transactions Act 1999* (Cth), rendering an electronic signature using a digital pen, mouse or laptop trackpad to sign their name was sufficient for their enrolment to vote.

### 2. Reliability

The method of signing must be 'reliable as appropriate for the purpose for which the electronic communication was generated or communicated'. This may be way of a software such as Adobe Sign or DocuSign or an exchange of emails. In

*Attorney-General (SA) v Corporation of the City of Adelaide*,<sup>[6]</sup> a legal practitioner was requested to sign a 'Certificate of Validity' for a by-law for the City of Adelaide Council. The practitioner stated his name in the email attaching the certificate and the Court held that his sign-off 'unequivocally signified' his view that the by-law was valid for the purposes of regulation 19 of the *Local Government (General) Regulations 1999* (SA)

### 3. Consent

The person to whom the signature is required to be given to must provide their consent to an electronic signature. The method must identify the reliability and authenticity of the party's willingness to be bound by the signature.<sup>[7]</sup> This may be as simple as saying that the person conducts business electronically

#### **Documents that may be signed electronically**

Common forms of documents that may be entered into electronically include (but not limited to):

- Agreements;
- Contracts for Sale;
- Employment Agreements;
- Licence Agreements; and
- Unregistered Leases (leases for a term of less than three years).

With the rise of the Property Exchange Network Australia (**PEXA**) electronic conveyancing platform, the Western Australian Land Information Authority (**Landgate**) has dispensed with the requirement for physical execution of some (but not all) property documentation. Electronic signatures may be rendered by persons or their representatives by way of authorised signatories. The documents that are capable of being lodged on PEXA include (but are not limited to):

- Caveats;
- Withdrawals of Caveats;
- Mortgages;
- Transfers; and
- Consents

#### **Exceptions**

##### 1. Landgate documents

At the date of this article, there are certain property documents which cannot be electronically signed as such documents are required to be to be lodged at Landgate in their original form with accompanying witness signatures. The examples of such documents include (but not limited to):

- Easements;
- Restrictive Covenants;
- Notifications;
- Applications; and

- Leases (for a period of three or more years)

## 2. Deeds

Deeds are required to be signed, attested to by at least one witness and expressed 'as a Deed' in accordance with s 9 of the *Property Law Act 1969* (WA). The attestation by the witness must occur at the same time as the signature by the signing party.<sup>[8]</sup> The ETA does not apply to Deeds or any documents which require 'verified, authenticated, attested or witnessed under the signature of a person other than the author of the document' by virtue of regulation 3(1) of the *Electronic Transactions Regulations 2012* (WA). This includes Statutory Declarations, Wills, Codicils and Powers of Attorney.

## 3. Corporations

Prior to COVID-19 measures, the law in Western Australia was unclear on whether companies may electronically sign documents in accordance with s 127(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**). The Commonwealth equivalent legislation, the *Electronic Transactions Act 2000* (Cth) does not apply to the Corporations Act. Section 127(1) states that a corporate entity may execute a document (with or without a common seal) by way of signatures by:

1. Two officers;
2. One officer and One company secretary; or
3. A sole director who must also be the sole secretary.

In light of COVID-19 and social distancing measures, the Federal Government introduced the *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* (Cth) (**Determination**) which temporarily permitted companies to electronically sign documents with signatures from two officers, officer and secretary or a sole director and company secretary. Officers are not required to sign the same physical document. This Determination is given effect from 6 May 2020 till 21 March 2021.. This Determination does not apply to any document that has been electronically signed prior to 6 May 2020 and will cease to apply to any cases after 21 March 2021, subject to any further Federal Government measures. It will be interesting to see if this may open the way for future reform in this area.

### **Tales of caution**

While advancements in electronic signatures have improved efficiency, it is important to consider the very likely risk of inadvertent electronic signatures. The Claremont 24-7 case involved a lease of a premises between Invox Pty Ltd (**Lessor**) and Claremont 24-7 Pty Ltd (**Lessee**). Patel, the representative of the Lessee, sent an email attaching the terms of a lease and a signed 'offer to lease' to Cheah, the representative of the Lessor. Cheah replied to Patel with the words '*the enclosed terms in the Offer by Snap Fitness is acceptable to both parties*' and concluded with his email signature '*sincerely James Cheah*'.<sup>[9]</sup> Le Miere J concluded that there was a valid agreement to lease by reason of the fact that the words '*sincerely James Cheah*' met the requirements under the ETA and Cheah had communicated to Patel that the Lessor agreed to lease the premises on the terms in the offer.

Another risk of rendering electronic signatures is the increased potential for fraudulent or forgery activity.<sup>[10]</sup> There is no foolproof method to guarantee a person's identity over virtual platforms. There are certain measures in place to prevent this from occurring. This may be by way of Digital Certificates issued by third party Certificate Authorities such as 'Verisign' or

'Entrust'. These Certificates provide password-protected digital identification to allow electronic signatures by authorised persons. Landgate have also attempted to resolve this by way of client authorisation forms as part of the Western Australian Participation Rules. Essentially, an agent may only carry out digital signatures on behalf of their clients if they have been granted standing or specific authority. In the case of specific authority, the authority is limited to specific transactions whereas standing authority may expire at a specified date. The transaction is repudiated if the electronic signature was by a person not authorised in the form.

### **Conclusion**

With the rise of e-commerce and globalisation, platforms such as PEXA are only the beginning of a paperless world. Given that there are temporary changes to accommodate COVID-19 restrictions, it is likely that new changes may be introduced into this area. Local governments are involved in a myriad of transactions with individuals and corporations alike and it is prudent to seek legal advice in relation to the validity, appropriateness and implications of using electronic signatures. In light of the Claremont 24-7 case, even an exchange of emails may come under scrutiny.

The information contained in this article should not be relied on without obtaining further detailed legal advice in the circumstances of each case. For further information please contact David Nicholson at [dnicholson@mcleods.com.au](mailto:dnicholson@mcleods.com.au).

### **Footnotes**

[1] *Electronic Transactions Act 2011 (WA)* s 8(1).

[2] *Electronic Transactions Act 2011 (WA)* s 10(1)(a)-(c).

[3] *Claremont 24-7 Pty Ltd v Invox Pty Ltd [No 2]* [2015] WASC 220, [82].

[4] *Limitation Act 1969 (NSW)* s 54; See also *Stuart v Hishon* [2013] NSWSC 766.

[5] *Getup Ltd and another v Electoral Commission* [2010] FCA 869, [28]-[30].

[6] *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3; (2013) 295 ALR 197, 205 [23]-[24].

[7] LexisNexis, *Halsbury's Laws of Australia* (online at 18 September 2020) 110 Contract,' (8) Formalities: Contracts Requiring Writing' [110-1030].

[8] *Netglory Pty Ltd v Caratti* [2013] WASC 364.

[9] *Claremont 24-7 Pty Ltd v Invox Pty Ltd [No 2]* [2015] WASC 220, [82]-[83].

[10] See -

<https://www.theguardian.com/money/2020/mar/29/coronavirus-social-disease-fraudsters-adapt-old-scams>.