

Electronic signatures: risks and best practice recommendations

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The signature has forever been an icon of a binding agreement, but with the introduction of electronic transactions, the law surrounding signatures has come to the forefront.

The shift towards “paperless office” practices in the real estate industry has seen a marked increase in the use of electronic signatures. Notwithstanding the prevalence of the practice, there remains concern amongst agents as to whether the use of an electronic signature affects the validity and enforceability of the document.

The legislation governing the use of electronic signatures is comprised of the *Electronic Transactions Act 1999* (Cth) and complementary legislation enacted by the states. In Queensland, the *Electronic Transactions (Queensland) Act 2001* (Qld) (**the Act**) recognises that electronic signatures have the same effect as handwritten signatures. However, the Act does specify a number of requirements which must be satisfied in order for an electronic signature to be valid. In this article, we will outline the requirements prescribed by the legislation and discuss exclusions to the general principles created by the Act. We will also offer a number of best practice recommendations for agencies.

What is an electronic signature?

An electronic signature is simply defined as a signature used on an electronic document or transmission. An electronic signature can take a variety of forms, such as a copy-paste photo of an individual’s handwritten signature, or may even be as basic as the signer typing their name or marking the signature line with an “X”. Examples include a signature footer of an email¹, signing with one’s finger onto a laptop trackpad², or simply sending via email, an attachment of

a document that is to be signed, but lacks an actual signature³.

As agents will be aware, there are now third party software products available for purchase which can generate digital signatures. Digital signatures are a special type of electronic signature that can be overlayed with security cryptography in order to verify the identity of the signer. While the legislation does not mandate the use of digital signature software, some businesses prefer to use these products for the enhanced security measures which they offer.

Electronic Transactions (Queensland) Act 2001 (Qld)

The *Electronic Transactions (Queensland) Act 2001* (Qld) mirrors the relevant provisions of the Commonwealth Act and is applicable only to documents where a signature is required under Queensland legislation. The Act prescribes the general requirements which must be satisfied in order for an electronic signature to be deemed a valid substitute for a handwritten signature.

Pursuant to section 14, if a document requires an individual’s signature, the requirement is taken to have been met by an electronic communication, as long as:

1. A method is used to **identify** the signer;
2. A method is used to indicate the signer’s **intention** in regards to the information communicated in the document;
3. The method used for the electronic communication is **reliable** and **appropriate**, having regard to all of the circumstances; and

4. The signer **consents** to the use of an electronic signature as a means of executing the document.

Relevantly, the legislation is silent in regards to what constitutes a “reliable” or “appropriate” method for the electronic communication. Therefore, agents should be aware that a subjective test will apply with regard given to all of the circumstances of the matter, if a challenge as to the validity of a document arises.

Excluded transactions

Schedule 1 of the Act sets out exclusions for the operation of the above requirements, including:

“A requirement or permissions for a document to be attested, authenticated, verified or witnessed by a person other than the author of the document.”

Agents will be aware that the signature block in the current version of the Form 18a – General Tenancy Agreement, provides for the document to be signed by the each party in the presence of a witness. Accordingly, the signing of documents such as the Form 18a, requires the witness and signer to be in the same room as each other when signing occurs. The witness must sign to attest that the document was legitimately signed by the correct person. Therefore, any document requiring a signature to be witnessed needs to be printed and signed by hand in the presence of the witness.

However, there is nothing to suggest that the document, once signed by hand and correctly witnessed, cannot be transferred between the parties electronically, for example via email.

Best practice recommendations

It is clear that the increase in the use of electronic signatures brings with it a raft of associated risks, such as legal challenges regarding validity of documents, security infringements, identity theft issues and privacy concerns.

However, it is evident that many businesses, particularly real estate agencies, can benefit and streamline internal practices by using electronic signatures. Therefore, if agencies do opt to use electronic signatures, we recommend the following best practice tips:

1. Create an electronic signature policy and procedure manual, so that all staff members are fully conversant with the legislative requirements and to ensure consistency throughout your agency.
2. Consider purchasing a third party software product to generate digital signatures which offer the enhanced security measures. However, the usefulness of these products in practice will largely depend upon how technologically

savvy or commercially aware an agency's staff and clients are.

3. Ensure that your agency has an up-to-date privacy policy which has a clear provision regarding the storage, collection and use of personal data for the purposes of electronic communications and transmissions.
4. Ensure that consideration is given to the signature requirements of each document being signed. For example, does the signature need to be witnessed by a third party? Does the document type require a physical signature in order to be enforceable (as is the case with trust deeds and appointment of company directors)? Are any of the signatories residing interstate or out of the country which may mean other legislation may apply?
5. Where circumstances permit, it is always recommended that documents be physically signed.

Of course, if agents are in any in any doubt as to the validity or enforceability of documents executed using an electronic signature, they should refer to the relevant legislation and, if necessary, seek advice from the REIQ Agency Advisors, which can be contacted on 3249 7347.

¹ *Luxottica Retail Australia Pty Ltd v 136 Queen Street Pty Ltd* [2011] QSC 162, in which the signature footer of any email was enough to prove the sender "signed" the email.

² *Getup Ltd v Electoral Commissioner* [2010] FCA 869.

³ *The Corporation Of The City of Adelaide v Corneloup & Ors* [2011] SASCFC 84, where a legal practitioner had sent an email attaching the unsigned document, stating in the email, "please find attached document, regards". The Supreme Court found that the email sufficiently identified the signor, and showed that he subscribed to the view of the document.

