

TAX TALKS

Australia's Tax News Podcast - The Podcast for Australian Tax Professionals

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62 | Electronic Signatures

Electronic signatures save time. So it would make sense to give electronic signatures the red carpet treatment. Some cloud accounting softwares already allow the electronic signoff of tax returns. But it would be great if we could take this beyond just tax returns.

Electronic Signatures

The question isn't so much about whether to adopt electronic signatures. It's more about how to go about it while ensuring ongoing compliance with changing regional and industry regulations.

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Electronic v Digital Signatures

A signature – be it manual or electronic or something else – needs to show two things. It needs to show who signed and it needs to show that the signer actually signed. With the intention to be bound. Electronic and digital signatures both endeavour to do that – the official term is electronic authentication method. But digital signatures go beyond that.

Digital signatures use a certified-based digital ID to authenticate signer identity and demonstrate proof of signing by binding each signature to the document with encryption. A digital signature receives validation from a Certificate Authorities (CAs) or Trust Service Providers (TSPs).

So every digital signature is an electronic signature but not every electronic signature is a digital signature.

Examples of an electronic signature might be emails, passwords, phone PINs or scanned copies of a signature image.

Examples of a digital signature might be a digital certificate from a Trust Service Provider.

However, these are just general comments, not legal definitions. The Electronic Transactions Acts in Australia don't distinguish between digital and electronic signatures.

Electronic signature laws

Electronic signatures are legally binding in nearly every industrialized nation. But there are huge differences between countries and in some countries even between industries.

Australian and US law allows for a broad definition of electronic signatures and does not prescribe a specific technology. In contrast, the EU eIDAS regulation distinguishes between three types of electronic signature approaches and requires digital signatures for some types of documents.

Electronic Transactions Acts in Australia

In Australia, there is the Commonwealth Electronic Transactions Act 1999 and then there is also an Act for each state and territory – Electronic Transactions Act 1999 (Cth) (Commonwealth Electronic Transaction Act) – Electronic Transactions Act 2000 (NSW) – Electronic Transactions (Victoria) Act 2000; – Electronic Transactions (Queensland) Act 2001 – Electronic Transactions Act 2000 (SA) – Electronic Transactions Act 2011 (WA) – Electronic Transactions Act 2000 (ACT) – Electronic Transactions (Northern Territory) Act 2011 – Electronic Transactions Act 2000 (TAS)

When is an electronic signature legally valid?

In Australia, an electronically signed transaction is legally valid as long as the electronic signature meets all of the following 3 conditions and no exceptions apply. Here are the 3 conditions:

1 Effective Method

The method needs to identify the person signing. And the method also needs to indicate the person's intention to be bound by the transaction.

So the method must allow the signature to do what signatures are meant to do. Show who signed and show that they really signed.

2 Reliable Method

The method is as reliable as is appropriate for the purposes of the electronic communication.

The type of transaction, the sophistication of the communication system, the value and importance of the information in the electronic communication are all factors to take into account when determining the appropriateness of the method.

3 Agreed Method

The recipient consents to the method of the electronic communication. So the parties need to reach an agreement in advance regarding the use of the particular electronic communication.

However, even if an electronic signature meets all these three criteria, the transaction may still not be valid if an exception applies.

Exceptions

In each State and Territory different exceptions apply to the use and validity of electronic signatures, which makes the legislation in Australia very confusing. And limits the use and effectiveness of electronic transactions.

1 Documents requiring a witness

In New South Wales, Queensland, South Australia and Western Australia, an electronic signature can not execute documents requiring a witness. As most deeds executed by an individual are required to be witnessed, deeds should not be signed electronically in these States.

2 Power of Attorney

In Western Australia, Northern Territory and Tasmania powers of attorney don't achieve validity through an electronic signature. They need a manual signature to become valid. In addition, in New South Wales, Queensland and South Australia, enduring powers of attorney require a witness which brings them back into exception no. # 1.

3 Documents to be personally served

In all States and Territories, documents that are to be personally served cannot be executed by electronic signature.

4 Court documents

In New South Wales and Queensland court documents cannot be executed by electronic signature.

5 Wills

In Victoria, western Australia and Tasmania a will cannot be validly executed by electronic signature. There is no specific exception for wills in New South Wales, Queensland and South Australia. But since wills in these states require a witness, they fall back under exception no. # 1.

6 Corporations Act

The Corporations Act is exempt from the Commonwealth Electronic Transactions Act. The Corporations Act outlines how companies may execute documents without using a common seal under section 127(1) if signed by:

- two directors of the company
- a director and a secretary of the company; or
- for a propriety company that has a sole director which is also the sole company secretary – by that person.

When a party appears to have signed a document in accordance with section 127, the other party can rely on the statutory assumptions in section 129 of the Corporations Act. The assumption is that the document meets all relevant internal requirements of the company and that it is binding on the company.

If a party electronically signs a document in accordance with section 127, the counter party cannot rely on the section 129 assumptions because the entire Corporations Act is exempt from the application of the Commonwealth Electronic transactions Act. There are other execution options for companies and a counterparty to a transaction can investigate the authority of an individual to execute a document on behalf of a corporation. However, if a counterparty wants to rely on section 129 of the Corporations Act in relation to a corporation, the safest course of action is to obtain signatures of the directors and/or company secretary of the corporation using pen and paper.

Lack of Case Law

The legal framework in Australia for electronic signatures is vague because there is very little case law to refer to. There have been only a few cases in Australia about electronic signatures. The most commonly cited case is *Getup Ltd v Electoral Commissioner* [2010] FCA 869. In this case the court found that a signature provided by digital signature was valid on an electoral enrolment claim form.

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