



Roundtable : eSignatures whilst remote-working – are they always legally sound?

DATE: 2nd June 2020 (14 pax rego, 11 attended)

Expert presenter : *Scott Alden is a Partner at Holding Redlich who specialises in procurement, contract, government, construction, project and administrative law and has a long history supporting PASA procurement events in the past <https://www.linkedin.com/in/scott-alden-5884432b/?msgConversationId=6552687708580470784&msgOverlay=true> www.holdingredlich.com*

NOTHING IN THESE NOTES CONSTITUTES WRITTEN LEGAL ADVICE – ONLY GENERAL AWARENESS OF THE ISSUES AROUND CONTRACT SIGNATURES AND E TRANSACTIONS

Suddenly, with paper-based procurement processes compromised as we all work from home, managers are increasingly turning to eSignatures like ‘Doc-U-sign’ and even “print, sign, scan n send” to authorise contracts.

Indeed, mailing contracts around the country, initialling every page, getting witnesses and mailing stuff back now seems archaic [see [Peter Macfarlane’s rant on Linked IN recently](#)] but is this the correct way to execute contracts?

In fact, are e-mail agreements legal? Can you now scan and sign? Can you use digital signatures? Are faxes still the only legal e vehicle still? Is Doc-U-Sign truly legal? To what extent can the circumstances of the Covid-19 crisis allow some flexibility?

Two Australian Govt Attorney General’s office FACT SHEETS (numbers 37 and 38) address this topic in some detail: https://www.ags.gov.au/publications/fact-sheets/Fact_sheet_No_38.pdf

Both these handouts were referred to during the PASA CONNECT Roundtable: another **useful source** not mentioned was <https://www.lawyersweekly.com.au/biglaw/22559-electronic-signatures-a-guide-for-lawyers>

Also, up to 20 questions were pre-submitted by potential attendees and these were all addressed during the roundtable:

The principal point made by Scott, was that, actually, **valid contracts do not even need signatures** to be legally binding. In fact, they only need to satisfy the **EIGHT essentials of a valid contract** – principally the “INTENTION to create legal relations” as well as the holy trinity of OFFER, ACCEPTANCE & CONSIDERATION; adding CAPACITY, TERMS, NO DURESS, CERTAINTY to make the eight. <https://accountlearning.com/essential-elements-of-a-valid-contract/>

Thus, the question of signatures becomes less compelling than it might initially appear. Yet the **ELECTRONIC TRANSACTION ACTS 1999** (Various states), <https://www.legislation.gov.au/Series/C2004A00553> does allow e signatures, email and fax consummation of legal agreements. Including, now, Doc-U-sign and Adobe sign and like products. Therefore, generally, contracts e signed are legal.

Moreover, **s.127 of the Corporations Act** also provides for Director's or Secretary of a company being required to sign documents on their company's behalf – or delegating to others to do so on behalf of the Board.

One exception to e signatures legality can be the complex area of **DEEDS versus CONTRACTS**. Documents like NDAs or bank guarantees or POAs or wills (and lots of one party signed agreements) which are often used by procurement depts can sometimes require different forms of formal signatures. This is a complex area best advised specifically by a lawyer. Different jurisdictions (particularly the states) can also have different rules and requirements.

It is also important to note **that different jurisdictions, agencies, departments, companies and others all can have different policies** they insist upon.

Also, the **Coivid-19 temporary adjustments** to some rules by the federal government are also relevant – including the Corporations Act. Trading whilst insolvent, statutory debt enforcement and delayed insolvency claims (as well as some landlord & tenancy laws) have temporary six month adjustments to help with the crisis.

Witnesses to CONTRACTS are generally not required. But they add validity and veracity to contractual agreements, especially where stakes are high (high dollar values, long lead times). **Risk based approaches to large agreements** are always recommended. No signatures, no witnesses can add to the risk of disputes downstream.

Agreements signed by mixed methods are also still valid (one party wet signs, another by fax for example).

It is not necessary to **initial every page of an agreement**. Yet, on occasion you risk a contract being invalidated by only signing and passing around the signature page and not a full agreement. For instance, it is easier to argue after the event that you only ever saw a signature page not the full agreement.

Initialling hand-changes to typed contracts in the margin is advisable generally speaking.

Contract versions (like on WORD) are also a risk. Possibly signing an old (not final) version (if caught very quickly) could invalidate the contract perhaps. Not so much if it is acted upon for any length of time by the parties. Using **PDF lockdown** final versions of contracts is recommended.

The **UK group called "The Walrus Committee"** has a global reputation for considering this area of the law in detail (UK law is a widespread basis of law in many countries)

Executives of major organisations often have "**ostensible authority**" to act and sign on behalf of an organisation and its board – given obvious CAPACITY ... even if operating outside their internally delegated limits. This is not a 'black and white rule' though, and reasonableness and time limits might apply.

Procurement wise, it is worth pointing out that during the crisis procurement has often worked with alacrity – much welcomed by stakeholders. Slowing down this responsiveness in future for lengthy process like 9 month *go-to-market* tenders, or even waiting 2-3 weeks for wet signed copies of paper contracts to arrive might not be considered helpful by busy stakeholders.

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