



WHEN CAN YOU FORM A CONTRACT ELECTRONICALLY?

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Our firm has an IT client who burned all of his printers and resists having to put pen to paper when he needs to sign a contract. That might seem extreme to some, but when you consider that most offices punch out enough paper to depopulate a redwood forest, getting rid of “old” technology might not be a bad idea. But does the law allow for a paperless business world? The short answer is yes in most cases. As far back as 1999 the *Electronic Transactions Act* (“ETA”) was passed, which confirmed that when it comes to forming legal agreements in a digital age, a physical signature on paper is not the only way of doing a deal.

YOU’VE GOT MAIL – OR AN AGREEMENT?

So you’ve been communicating with someone via email, and you’ve agreed to a few things in the back-and-forth. If you think you haven’t potentially made a legal contract by clicking the “send” button on your email, you could be wrong. Gone is the time when there was doubt around whether email exchanges could form a valid binding agreement, as the keystone provision of the ETA states

that a transaction is not *invalid* merely because of its technological origins. This means that the normal rules of contract apply, and you might just be implying your intention to be bound by shooting off a message from your laptop.

The ETA doesn’t set specific guidelines for when an electronic communication or document will be valid, but it does make a few things clear. One principle which runs through the ETA is that parties must have shown consent to communicate electronically. This may not be difficult to imply however, and can be indicated by previous correspondence and surrounding circumstances.

The time of acceptance of an agreement by electronic communication would normally take place when the communication is received. This could be the case even where the message sneaks its way into your spam folder, so it may be worth fishing through there if you are waiting on a game-changing reply. Once a contract has been formed, parties can generally set their own terms for the time of receipt for further notices if they wish.

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SIGNATURES – IS THE PIXEL AS MIGHTY AS THE PEN?

Signatures are required on forms and a range of documents, not just legal documents. Even if you are sunbaking in St. Tropez, you may still be able to validly sign off documents through a screen. The ETA validates electronic signatures, granted that the following requirements are met – that is, that the method used:

- Identifies the person “signing”;
- Indicates their approval of the transaction;
- Is as reliable as is appropriate for that transaction; and
- Demonstrates that the recipient has consented to receive the signature in this form.

Because the Act is silent as to what the method need be, this could cover anything from a template email footer with your name in it to using biometric technology like a fingerprint scanner. But it seems that new-age innovations may not be able to solve age-old problems, as the ETA has no answer to reliability problems like verifying the identity of someone putting down a signature. While in the *Getup* case¹ the Court found that electronic signatures are no more susceptible to tampering than those forged with a trusty pen, it is likely easier for a fraudster to send off an email from a colleague’s computer than to convincingly replicate someone else’s unique mark.

Digital signatures could be a partial answer to this. As opposed to simply electronically ‘signing’ a document, digital signature products are designed to guarantee authentication via encryption methods. This means technology can be used to verify the identity of the

sender, and even mark the time at which documents are signed.

EXCEPTIONS

Digital natives beware – some documents are not allowed to be signed electronically. Here, the law puts its archaic foot down, requiring a good-old-fashioned John Hancock for vital documents such as Wills, Oaths, and court forms.

Companies should be aware that while directors can theoretically sign electronically on behalf of an organisation, they may run into issues dealing with the presumptions laid down by the Corporations Act (which is exempt from the ETA). Similarly, ambiguity abounds as to whether Deeds can be executed electronically, and if a document can be witnessed through the computer screen.

But who knows – with technology constantly evolving, maybe one day you’ll be able to sign anything at the tap of a finger.

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¹ *Getup Ltd v Electoral Commissioner* [2010] 268 ALR 797.