

PRACTICE NOTE

NOTARIALLY CERTIFYING E-SIGNATURES AND E-SIGNED DOCUMENTS

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SYNOPSIS

After briefly discussing the different levels of electronic signature and the electronic signing of documents generally and by company officers and agents, this Practice Note considers the importance of clients ascertaining (in advance) whether e-signatures may be used to sign specific documents for production and use abroad. Finally, a solution is advanced to solve the problem of notarially certifying e-signatures and e-signed documents.

Disclaimer

The purpose of this Practice Note is to provide information to assist notaries when they are requested by clients to notarially certify e-signatures and e-signed documents.

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Introduction

Since the enactment of the *Electronic Transactions Act 1999* (Cth) (“**the Commonwealth ETA**”) and corresponding state and territory legislation,¹ subject to various legislated exemptions, in Australia electronic signatures have been the functional equivalents of handwritten signatures for many commercial purposes.²

The take-up and use of electronic signatures in government, legal and commercial circles has gathered pace since the onset of the Pandemic and the normalisation of “working from home”. Notably, the public at large has not yet embraced the technology and, as a rule, still relies on handwritten signatures for important documents.³

The three levels of electronic signature

Essentially, three levels of electronic signature are recognised and used differentially throughout the developed world. The levels are:

- Simple Electronic Signatures;
- Advanced Electronic Signatures; and
- Qualified Electronic Signatures.

¹ *Electronic Transactions Act 2001* (ACT)
Electronic Transactions Act 2000 (NSW)
Electronic Transactions (Northern Territory) Act 2000 (NT)
Electronic Transactions (Queensland) Act 2001 (Qld)
Electronic Transactions Act 2000 (SA)
Electronic Transactions Act 2000 (Tas)
Electronic Transactions (Victoria) Act 2000 (Vic)
Electronic Transactions Act 2003 (WA)

² Electronic signatures have not replaced handwritten signatures.

³ Most people would be surprised to know that when typing their names at the end of their emails or clicking an “Add to Cart” or “Buy Now” button when shopping online, they are in fact using forms of simple electronic signatures.

A detailed discussion of the use of electronic signature technology in the United Kingdom as an exemplar, may be found in the UK Industry Group Interim Report, *Electronic Execution of Documents*, published on 1 February 2022.⁴

Simple Electronic Signatures

The term “Simple Electronic Signature” (“**e-signature**”) presently covers several different forms, including:

- a clicked button such as a “Buy Now” or “Add to Cart” button when shopping online;
- a scrawled name or mark made by a stylus or other implement or finger on a tablet or similar device;
- a typed name at the foot of an email;
- an avatar placed in the signature panel of an email;
- a facsimile of a handwritten signature pasted into an electronic document; and
- a [commercially obtained] software generated signature.

Advanced and Qualified Electronic Signatures

Advanced and Qualified Electronic Signatures are secure electronic signatures based on asymmetric cryptographic Public Key Infrastructure (“**PKI**”) technology. They are colloquially conflated as “**Digital Signatures**”.

The term is reasonably known in legal, government and commercial circles, but it is thought that relatively few people in those circles actually understand or are familiar with PKI technology. Other than for transactions requiring a high level of secure, verifiable electronic communications, Digital Signatures are not commonly used within the public and private sectors on a day-to-day basis.

⁴ Found at <www.gov.uk/government/publications/industry-working-group-on-esignatures>
It is expected that the Final Report will be published later in 2022.

The focus of this Practice Note

Accordingly, this Practice Note is not directed towards Digital Signatures. The focus is on e-signatures and in particular on commonly used e-signatures generated by software created and sold by commercial providers such as Adobe, DocuSign, Eversign, Hellosign and Signrequest.⁵

As will be seen below, notarising e-signatures and certifying their legitimate use is no more difficult when notarial intervention is required for a top-tier public or private sector organisation or when the same service is provided for an organisation at the other end of the spectrum or for an individual signatory.

e-signatures affixed by persons other than the nominal signatories

Anecdotally, the e-signatures of officers and executive and managerial staff within a good many of Australia's public and private sector organisations (including top tier organisations in both sectors) are regularly affixed to documents by secretarial and administrative personnel. Apparently, it often happens without the specific consent of the nominal signatory; typically in circumstances where it is thought that the nominal signatory would readily have signed the particular document electronically had he or she been asked to do so.

Despite the number of occasions on which e-signatures are thought to be affixed to documents by persons other than the nominal signatories, there are remarkably few reported Australian cases arising out of the practice.

The leading case is *Williams Group Australia Pty Ltd v Crocker* [2016] NSWCA 265 (22 September 2016) where the NSW Court of Appeal unanimously upheld the trial judge's decision to set aside a director's personal guarantee when the director's e-signature had been affixed to a credit application and guarantee without his knowledge or authority.

⁵ DocuSign is thought to be the current market leader, claiming to have over 200 million customers worldwide.

In its unanimous judgement, the Court observed, obiter [at para #137], that:

There is some authority that would support the conclusion that the placement of a “genuine” electronic signature on a document without authority could amount to forgery at common law.

Signing company documents electronically

There were more than 1.7 million companies registered in Australia as at July 2000⁶ when the *Electronic Transactions Regulations 2000* (Cth) (“**the Original Regulations**”) came into operation. For reasons best known to themselves, the politicians and public servants involved in the making of the Original Regulations decided that it was not appropriate to allow Australian companies to provide information, documents or signatures electronically. Therefore, the Original Regulations exempted the then Corporations legislation from the ambit of the Commonwealth ETA.

Some twenty years later on 29 July 2020, at a time when there were more than 2.7 million companies registered in Australia,⁷ the *Electronic Transactions Regulations 2020* (Cth) (“**the 2020 Regulations**”) replaced the Original Regulations and in doing so, provided an updated list of Commonwealth laws that were exempt from the provisions of the Commonwealth ETA. That list included the *Corporations Act 2001* (Cth) (“**the Corporations Act**”), thereby, among other things, continuing the rather curious previous decision to bar company officers from signing corporate documents electronically.

However, following several temporary measures hurriedly put in place during the Pandemic by the Federal Government to assist Australian corporations by allowing their officers to sign documents electronically, **with effect from 23 February 2022 by virtue of** the *Corporations Amendment (Meetings and Documents) Act 2022* (Cth) (“**the Amendment Act**”), **the Corporations Act now** [permanently] **allows a range of company documents** (including contracts, minutes and deeds) **to be signed electronically by company officers and authorised agents.**⁸

⁶ ASIC Company Registration Statistics

⁷ Ibid

⁸ The Amendment Act inserted a new **Part 1.2AA – Signing Documents** into the Corporations Act which, among other things, deals with technology neutral signing of documents [as defined by s.9 of the Act], including documents to be signed under sections 126 and 127 of the Act.

The critical question – are e-signatures acceptable abroad?

The critically important issue relating to the use of e-signatures is whether or not they are an acceptable means of signing personal or commercial documents to be used in particular jurisdictions abroad.

Despite the increasing adoption and use of digital signatures and e-signatures throughout the world, many jurisdictions insist that handwritten signatures be used for a variety of purposes.

For example, (but not exhaustively in any case)

- in **Argentina**, most government agencies do not accept e-signed documents and only handwritten wet-ink signatures may be used to sign family law and inheritance documents;
- government entities in **Brazil** have their own individual rules and are not obliged by law to accept e-signed documents;
- most documents may be signed electronically for use in **China** provided that the electronic signature is considered “reliable”, that is provided that it is certified by an Electronic Certificate Service Provider approved by the PRC regulatory authorities; with the result that e-signatures are not acceptable for any purpose;
- in the **Dubai International Finance Centre** e-signatures are not acceptable on documents creating or enforcing local or foreign powers of attorney (including Board Minutes authorising the grant of a power of attorney) or for the signing of documents pursuant to a power of attorney, with the result that handwritten wet-ink signatures must be used to sign all these documents;
- the use of e-signatures in **Indonesia** depends on the policy of individual government departments and public sector institutions but e-signatures are not allowed for notarial deeds or documents relating to real estate transactions which all require handwritten wet-ink signatures; and
- the almost inviolable rule **throughout the world's national intellectual property offices** is that all documents creating or affecting intellectual property rights must be signed with handwritten wet-ink signatures in order to be registered.

Obtaining advice from correspondent(s) abroad

Even though on occasion, an experienced notary is able to assist an existing or prospective client as to the acceptability of e-signatures for specific purposes in particular jurisdictions, **ultimately it is for the client to obtain advice in advance of signing documents** directly from the client's own correspondent(s) abroad in relation to the acceptability of e-signatures as a means of signing the specific documents to be produced and used in the destination jurisdiction.

Communication with persons abroad

Ordinarily, discussion and decisions about the acceptability of e-signed documents should be between the client and the client's correspondent(s) abroad, and not between the notary and the correspondent(s).

It is for the client to then confirm to the notary whether for the purposes of the document(s) to be signed e-signatures may be used, and if so whether particular forms of e-signature, such as DocuSign signatures, are acceptable.

The problem for notaries

Witnessing and then certifying the signing of documents by identified signatories using their handwritten wet-ink signatures is a commonplace notarial service. However, currently e-signatures are almost never affixed to documents by identified signatories in the presence of notaries either in person or online. Accordingly, the circumstances in which a notary is able to personally certify the genuine nature of an e-signature or who actually affixed it to a document are few and far between.

The solution to the problem

Therefore, now when the occasion demands, notaries must resort to an alternative means to allow them to certify the veracity of an e-signature or an e-signed document (or a copy or printout of the document); a means long since employed by notaries internationally in their interventions.

Taking and recording declarations by identified individuals as to facts, matters and things continues to be good notarial practice in all civil law and common law jurisdictions.

For example:

- in France, a notarial act of notoriety is a public instrument prepared and issued by a notary at the request of an interested party that records the declarations of [usually] at least two Appearers who testify to the truth of facts concerning matters such as proving kinship for inheritance purposes and correcting errors in official documents;⁹
- notaries in all the world's littoral states traditionally have prepared and recorded notes of protest by ships' masters in relation to incidents at sea; a protest being the master's personal declaration as to the events alleged to have occurred;¹⁰ and
- a notarial act of honour made pursuant to Australia's *Bills of Exchange Act 1909* (Cth) s73 is founded upon a declaration made to a notary by or on behalf of a "payer for honour" as to his or her intention to pay the dishonoured bill of exchange for the honour of a particular person.¹¹

⁹ NP Ready, *Brooke's Notary* (Sweet & Maxwell, 14th ed, 2013) 241.

¹⁰ When an extended protest is prepared, Australian and English notarial practice is to have the facts set out in the instrument verified by a statutory declaration made by the ship's master and senior officers which is appended to or forms part of the instrument.

¹¹ The Australian provision is in the same terms as the *Bills of Exchange Act 1882* (UK) s68. The UK Act codified the then existing common law and practice on the subject in the United Kingdom.

A similar provision may be found in the legislation of most former British dominions and colonies
See e.g.

Bills of Exchange Act 1985 (Canada) s153;
Negotiable Instruments Act 1881 (India) s113;
Bills of Exchange Act 1893 (Jamaica) s68;
Bills of Exchange Act 1908 (New Zealand) s68;
Bills of Exchange Act 1949 (Singapore) s68; and
Bills of Exchange Act 1964 (South Africa) s66.

Declarations as a proper basis for notarisation

Therefore, when requested to “notarise” an e-signature or an e-signed document, a notary may properly do so on the basis of a declaration by an identified individual (who may reasonably be expected to make a truthful declaration) concerning the facts to be certified by the notary.

To assist recipients abroad, notarial certificates should also include brief statements as to the relevant aspects of Australia’s electronic transactions legislation (and where applicable) of the Corporations Act that allow the use of e-signatures in documents that are notarised.¹²

The notary’s simple duty

For the purposes of a notarial act in either public or private form, a notary’s simple duty is to take a declaration orally or in writing and record its making in the Act. **Australian notaries do not have any investigative or quasi-judicial function and are not obliged to go behind a declaration or comment upon its veracity.** They should not do so even if asked by a recipient abroad of the notarial act after it has been received or if the proposed overseas recipient has sent a “suggested” certificate requiring special comments about the veracity of declarants by the notary.¹³

It is well established in all civil law and common law jurisdictions that notaries bear no responsibility if declarants are mistaken or less than truthful in their declarations.

¹² See appended precedent private form notarial acts.

¹³ The general rule is that Australian notaries must prepare their own certificates (notarial acts) in English and in an acceptable Australian form.

If courts or interested persons abroad wish to pursue the veracity of declarations recorded in a notarial Act, they are at liberty to contact and deal directly with the declarants and signatories and, where applicable, to make arrangements to receive and view e-signature audit trails. If a declarant or signatory prevaricates or declines to assist, then an appropriate conclusion doubtless will be drawn as to the reason why that occurred.

Precedents

Two indicative precedents are appended.

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