



# Signatures *on electronic documents*

Placing your name at the end of an email or electronic document has a number of implications that we should all be aware of . . .



by Alan Davidson

**T**yping your name at the end of a paper document has been held to be a signature. So, should typing your name at the end of an email be similarly regarded as a signature with all the corresponding legal ramifications?

We all know that the contents of an email can be as legally binding as the most structured language on the firm's letterhead. However, email is fast and cost-efficient.

To maintain a formal and structured approach, many firms have adopted the practice of creating formal replies in the usual way, but dispatching the entire file as an attachment to an email. The body of such an email may simply state, 'Formal correspondence is attached', while the 'subject' states the matter as usual.

There are a number of advantages and pitfalls associated with such a practice.

## The attachment

The attachment is typically a text file, perhaps using Microsoft Word or an equivalent. The firm's letterhead and design can be incorporated into the file. Two significant matters must be considered. First, the possibility of alteration and second the signature. Last month I considered a number of approaches to ensure documents attached to emails were authentic. This month I consider the status of a typed signature at the close of an email and on an attachment file.

## Signatures

The status of a standard signature is often taken for granted. However, we all know that it is the intention behind the signature that is paramount. A signature may appear on a docu-

ment, but the signor may not be bound because he or she lacked the requisite underlying intention, raising defences such as duress, undue influence, non est factum, unconscionability etc. Two signatures may appear side by side on a contract, but one may intend to be bound contractually while the other is a witness.

The 'signature' may be an 'X' or some other mark indicating execution. Cases such as *R v Moore; Ex Parte Myers* (1884) 10 VLR 322 permit a printed name of a party to be sufficient. Higginbotham J stated that a "signature is only a mark" and may "be impressed upon the document by a stamp engraved with a facsimile of the ordinary signature of the person signing".

The term electronic signature does not mean a digitised signature nor a digital signature.

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A digitised signature refers to graphic representation in digital form of a person's handwriting signature. An electronic signature also includes any letters, characters, numbers or other symbols in digital form attached to or logically associated with an electronic record such as an email or attachment to an email. This could be as simple as typing your name at the end of an email. A digital signature is a specific type of secure electronic signature, sometimes referred to as a digital certificate.

In *R v Frolchenko* (1998) QCA 43 Williams J in the Queensland Court of Appeal stated that such a electronic document could be authenticated by looking at other factors such as whether the name appears in typescript at the end of the document. In the US case *Doherty v Registry of Motor Vehicles* (1998) Agnes J held that a police report made "by means of e-mail or some other electronic method" is regarded as signed, subjecting the reporting officer to possible perjury charges.

In *McGuren v Simpson* [2004] NSWSC 35 (18 February 2004) the court quoted this passage from Cheshire and Fifoot's 'Law of Contract' 7th edition:

"The word 'signature' has been very loosely interpreted . . . A printed slip may suffice if it contains the name of the defendant. This relaxation of the statutory language is well established one hundred years ago and offers a striking instance of the way in which legislation may be overlaid by judicial precedent."

Statements to a similar effect are to be found



in 'The Laws of Australia' 7.2 Contract 'Vitiating Factors' Chapter 2 Pt C Div 5 and in 'Halsbury's Laws of Australia' 110 Contract 'Formation of Contract' [110-1030].

In *McGuren v Simpson* the document was a hardcopy printout of an electronic communication from the plaintiff. The court referred to *Lockheed-Arabia v Owen* [1993] 3 All ER 641 in which Mann LJ held that a photocopy constituted 'writing', adding "an ongoing statute ought to be read to accommodate technological change".

Similarly in *Wilkins v Iowa Insurance Commissioner* (1990) 457 NW 2d 1 (US), the court held that a requirement to maintain a written record of an insurance contract was satisfied by the insurer storing written records on its computer system.

The Law Commission for England and Wales in its paper entitled 'Electronic Commerce: Formal requirements in Commercial Transactions – Advice from the Law Commission' expressed the same view.

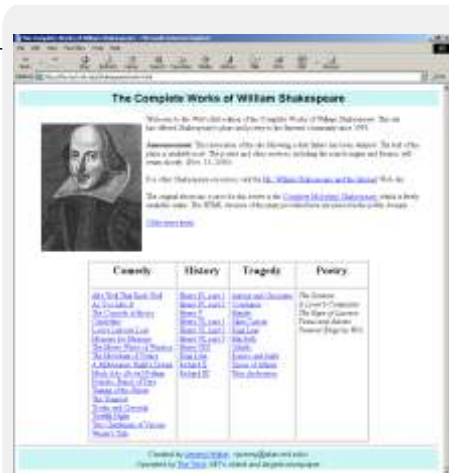
Indeed the use of words by a party without any other form of signature can be regarded alone as the writer's signature. This has been described as the 'authenticated signature fiction' as discussed by the High Court in *Pirie v Saunders* (1961) 104 CLR 149. On this issue in 'Halsbury's Laws of Australia' 110 Contract at [110-1030], it is said:

"Where the name of the party to be charged appears on the alleged note or memorandum, for example, because it has been typed in by the other party, the so-called 'authenticated signature fiction' will apply where the party to be charged expressly or impliedly acknowledges the writing as an authenticated expression of the contract so that the typed words will be deemed to be his or her signature."

In *McGuren v Simpson* the court commented that as McGuren's name appeared in the email and she expressly acknowledged in the email an authenticated expression of a prior agreement, the email was "recognisable as a note of a concluded agreement". The court concluded that both the signature alone and in conjunction with the writing could be regarded as a signature in law.

### Legislation

Section 10 of the *Commonwealth Electronic Transactions Act 1999* and section 14 of the *Queensland ETA* give legal effect to the elec-



### Time Out

The complete works of William Shakespeare  
<http://the-tech.mit.edu/Shakespeare/works.html>  
[www.it.usyd.edu.au/~matty/Shakespeare/](http://www.it.usyd.edu.au/~matty/Shakespeare/)

tronic signature only after regard is given "to all the relevant circumstances when the (electronic signature) was used" and that "the method was as reliable as was appropriate for the purposes for which the information was communicated". Unfortunately this formulation leaves open a number of possible arguments. Courts are yet to consider both the circumstances and the meaning of "as reliable appropriate".

Nevertheless the underlying intention of parliament is to ensure functional equivalence, by providing for validation of electronic signatures. One approach in practice can be to include a note in electronic documents that the electronic signature is intended to act as a signature as contemplated by the federal and state Acts.

### Practice

Various practices have developed to deal with the effect of the 'signature' typed at the end of an electronic message such as an email or attachment to an email.

One practice is to including a detailed paragraph in the body of the message explaining the writer's intention. Another practice is to place that paragraph at the end of the email with other disclaimers.

Perhaps the simplest and most direct approach is to place at the end of the electronic message words such as:

- Signature appended pursuant to the federal and state *Electronic Transactions Acts*
- Such words would indicate the writer's intention that the typed electronic signature was intended to operate as a signature as contemplated by the *Electronic Transaction Acts*. ■

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