

Electronic execution of contracts for the sale of a new or used vehicle

During the COVID pandemic it has become increasingly common for contracts for the sale and purchase of motor vehicles to be executed electronically (or remotely). VACC has sought guidance from HWL Ebsworth, with regards to how those contracts of sale of motor vehicles should be executed.

NB : The content of this bulletin does not constitute legal advice, rather it sets out tips and considerations in response to themes raised in questions posed by Members. To the extent Members have questions or seek to implement processes to use digital or electronic contracting methods in their businesses, we recommend you seek legal advice to ensure compliance with all relevant laws, regulations, rules and standards.

Can contracts for the purchase or sale of motor cars by Members be executed electronically, and how should contracts be signed?

Contracts for the purchase or sale of motor cars can be executed electronically and be enforceable. There is no one 'correct' way to electronically sign a document. There are a number of methods to provide an electronic signature that could be used, including:

- pasting a copy of a signature into an electronic document;
- signing a PDF on a tablet, smartphone or laptop using a stylus or finger;
- physically or 'wet' signing a hardcopy document then scanning the document and sending via email; or
- confirming agreement by electronically selecting an option (e.g., ticking a box or clicking on 'agree') to indicate agreement to identified terms of a contract.

Digital platforms, such as DocuSign or Eversign, can also be used to electronically execute documents, and may provide additional assurance and convenience to Members regarding the identity and intention of the parties executing the relevant contract.

What are the requirements when executing documents electronically?

When executing documents electronically, Members should satisfy three key elements:

- Identification and intention** - you must be able to identify the customer (or counterparty) signing and be able to confirm the person signing intends to be bound by the agreement.
- Reliability** - the method used for electronic signing must be reliable; and
- Consent** - the counterparty must consent to documents being signed electronically.

We discuss these elements further below.

Identity of customers

Members should conduct appropriate due diligence to verify and authenticate the identity of the person they are dealing with and confirm that such person is the same person they communicate with electronically (whether by email or other means).

In practice, members could follow up with customer or counterparty whose identity has been verified with a phone call to ensure that the customer has received the relevant electronic materials that are to be signed and keep a record of that phone conversation.

Intention and consent

Members should consider implementing the following processes to ensure that intent and consent requirements are satisfied:

- ensure that all the required contractual documentation is attached in the electronic communication (e.g., email).
- ensure that such contractual documentation is in a form that cannot be altered (aside application of signatures and date of execution).
- expressly state that the customer's or counterparty's acceptance of the terms set out in the contract constitutes the customer's or counterparty's:
 - i. consent to receive and execute the contract electronically;
 - ii. acknowledgement that the customer or counterparty can access, and has read the contract; and
 - iii. agreement to the terms and conditions set out in the contract.

Reliability

The method used to sign must be reliable, which is objectively determined by considering all the relevant circumstances and the purpose for which the signature is required. For example, it may be sufficiently reliable to send electronic communications to an email account that has been verified as the customer's personal email, and not a generic email address.

Electronic platforms, such as DocuSign, can help businesses satisfy the elements of identification, intention, consent and reliability, and may be a convenient solution for Members.

Record keeping

While it is not necessary to establish an enforceable agreement, members should consider implementing the following processes:

- ensure that the customer or counterparty provides an electronic copy to the Member of the contract with the customer's or counterparty's signature on that document; and
- where there is 'split execution' or counterparts, keep records of each signed copy of the contract.

These processes help reduce the likelihood of a customer or counterparty later arguing that the terms and conditions that you are seeking to enforce are different to those that the customer or counterparty agreed to.

Note that the information in this article relates to contracts of sale for motor vehicles. Other documents, such as deeds, may have different requirements and may not be validly executed electronically depending on the circumstances. We recommend that members seek legal advice in relation to their particular circumstances.

Interaction with other areas of the *Motor Car Traders Act 1986 (Vic)* and *Motor Car Traders Regulations 2018 (Vic)*

LMCTs are reminded that other documents prescribed under the *Motor Car Traders Act 1986 (Vic)* and *Motor Car Traders Regulations 2018 (Vic)* requiring a purchaser signature, (e.g. Used Car Price Data Sheet s 52 of the Act and Schedule I of the Regs) require purchaser signatures using the guidelines as stated above.

Michael McKenna MBA
Industry Policy Advisor

Industry Divisions

VACC

Level 1 | 464 St Kilda Road | Melbourne Vic 3004

P: 03 9829 1280 | **M:** 0418 822 939 | **F:** 03 9867 1795 | **W:** vacc.com.au