



Tips and traps for apps

COMPUTERS ARE QUICKLY CHANGING THE WAY PRACTITIONERS GO ABOUT THEIR WORK, ESPECIALLY IN THE WORLD OF DRAFTING, NEGOTIATION AND EXECUTION OF CONTRACTS. **BY PETER MORAN**

Never before has technology potentially offered so much for lawyers, particularly those involved in the drafting, negotiation and execution of contracts. There is a growing number of online tools which promise to make the task of lawyering quicker and easier. In reality, such technologies give rise to new challenges and risks and don't necessarily deliver on the promises.

This article is in two parts. The first outlines some broad categories of offerings and lists some examples of products. It is neither a comprehensive summary nor does it aim to provide critiques. Instead, it aims to provide a starting point from which practitioners can do what they do best: make their own inquiries and form their own conclusions. The second part is a series of traps and practical tips for legal practitioners to be aware of when adopting a technology to help with contract processes.

Category 1: Electronic Contract Signing and Exchange Offerings

Electronic contract service offerings is the technology category most likely to become

mainstream in legal practice in the next few years. There are now discrete offerings that enable lawyers to upload, circulate and procure execution and exchange without the contract having to be printed. Most services enable the signee to review and sign the contract from portable devices such as smart phones and tablets. Most providers offer their software as a cloud service, meaning security and confidentiality are generally better and more controlled than with circulation via email.

The main offerings in Australia would appear to be www.docuSign.com.au, www.sertifi.net, www.skysignature.com, acrobat.adobe.com/us/en/sign, rightsignatures.com, www.pandadoc.com and www.signority.com.

It is likely that in time such service offerings will become part of most practice management systems. It is also highly likely that at some point Microsoft will incorporate such functionality as an inherent part of Microsoft Office. In the meantime, the existing discrete systems are (relatively) cheap, easy to use and are becoming more ubiquitous in the commercial world. If lawyers don't adapt and insert themselves into the process of such technologies, clients may well simply adopt the technology

SNAPSHOT

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- The extent to which template contracts can be tailored as part of the offering and the level of sophistication of the agreements vary greatly.
- In reality, such technologies give rise to new challenges and risks and don't necessarily deliver on the promises.



directly and leave their lawyers out of it.

Category 2: Contract automation

This category overlaps with category 1, but goes one step further in generating template documents that can be used as the basis of the contract. The extent to which these contracts can be tailored as part of the offering and the level of sophistication of the agreements vary greatly. There are those pitched at the basic end of the market, such as Shake (www.shakelaw.com), which is pitched at non-lawyers and the sorts of transactions that previously might not have had formal legal documentation. There is also Thompson Reuter's Contract Express (www.contractexpress.co), which has been endorsed by the likes of Linklaters, and www.contractroom.com, which claims to streamline the entire contract process from drafting and negotiating through to execution and exchange. LexisNexis has its own range of "smart" precedent offerings including Lexis Smart Forms, Lexis Draft and Lexis Draft Pro.

Such offerings aim to streamline the

drafting process by automating a range of functions that before now were completed manually by lawyers: for example, providing hyperlinks directly through to legislation and case law; advanced proof-reading and legal editing functions; simplifying collaborative editing processes etc. However, the current offerings are probably less a disruptive Uber type innovation for contract drafting and more a natural extension of the traditional precedent offerings that have been available for some time (think Leap's Smokeball or LexisNexis' *Encyclopedia of Forms & Precedents*).

The innovation that may well have a much more significant impact on the industry is the notion of "smart contracts" that incorporate blockchain or "distributed ledger technology" or some other form of peer-to-peer technology. By using the integrity and robustness of the interconnected internet, computers may go beyond just assisting the drafting process to, upon execution, automatically performing the elements of the contract itself. This could revolutionise many industries, such as banking and insurance. Blockchain enables

such processes to occur by providing a purportedly very robust way for computers, without human intervention, to interact automatically with one another. Inevitably, such technologies will overlap with other new concepts such as the "internet of things" and the semantic web.

Category 3: Automated intelligence – contract review technology

Finally, an area perhaps less relevant to contract lawyers specifically, but still significant for lawyers more generally, is the increasing sophistication of automated intelligence analysis software. The ability to cut down the time required to undertake due diligence or discovery by applying a filter or analysis to large numbers of documents is not a new idea. What is new is the ability of the algorithm to learn, over the course of the analysis, and to thereby become more sophisticated in its processes the more it completes the task. This can mean the system might ultimately produce an

outcome not only much more quickly, but far more accurately than even a large team of humans could.

For example, Luminance (www.luminance.com) is a new document analysis software (heavily backed by Slaughter & May) which focuses on clause identification, data visualisation and anomaly detection. According to its website:

"Luminance is able to detect anomalous and potentially concerning clauses, even by their absence, far more quickly and accurately than the human brain can. Users can prioritise their review by focusing on the details that really matter. It has been trained by legal experts to accurately identify and label documents, clauses, people, places and language. By pairing machine learning algorithms and advanced mathematical techniques with deep domain expertise, Luminance finds the clauses and documents within the data room that deviate from the norm. This allows lawyers to instantly see what needs attention."

Beagle, an offering from Canada, purports to provide a similar service (see www.beagle.ai).

Much is also being made of ROSS (see www.rossintelligence.com), an "artificially intelligent lawyer" based on IBM's Watson computer. It purports to provide a form of electronic assistant to lawyers by providing direct access into (albeit US based) legal databases, thereby providing time savings for research and other tasks. The key to this technology is that it purports to learn from and refine its processes the more it is used.

Trap 1: Don't forget ordinary contract law principles

While technology may be a useful tool for improving contracting processes, it is important not to lose sight of the wood for the trees. Ordinary contract law principles continue to need to be applied: offer, acceptance, consideration etc. A fundamental question contract lawyers need to keep asking throughout using

a technology process is: does the process provide clear evidence of the parties' intention to be bound by clear contractual terms? Linking the contractual terms to the acceptance of those terms is important in a technological context where the acceptance process might be separated out from the presentation of the terms and conditions (such as with a browser-wrap type agreement).¹ Maintaining the integrity of the record is also an important consideration. For example, with standard terms that might get updated from time to time, will it always be possible to prove what the exact terms were at the time of the relevant acceptance, notwithstanding that the terms may have since changed?

Lawyers should also be mindful of the point at which the exchange of offer and acceptance actually occurred: what *Cheshire & Fifoot's Law of Contract* describes as the "last act rule".² This is something that is not always evident in a technological process, such as those which allow an accepting party several opportunities to "accept" the terms.

Although the *Electronic Transactions Act*³ (ETA) regimes allow a broad scope for a variety of different sorts of electronic processes to be viable for contracting, practitioners should be mindful that, if an offeror stipulates a method of communicating acceptance, the offeree then using an alternative method to accept the offer could mean that there is no binding contract (e.g. see *Eliason v Henshaw* 4 *Wheaton* 225 (1819) where the offeror stipulated that the offeree needed to send their answer by the same wagon, but instead chose to send their answer by mail, so it was held that the offer had not been validly accepted).

Tips for practitioners

Consider adding a boilerplate provision which states that if the parties sign and exchange contracts electronically, the parties consent to the contract being produced, signed and retained solely in an electronic form (provided that production, signing and retention otherwise complies with the relevant

requirements of the ETA). If there is no such boilerplate, it is sensible to ensure that there is a record (such as an email exchange) of the parties agreeing explicitly to the method of execution and exchange being used.

Trap 2: Be careful with deeds

Seddon on Deeds states that "...until there is legislative change, it would seem that an original version of a deed must be a signed and attested paper document".⁴

This is by virtue of the common law requirement that a deed must be on parchment, paper or vellum.

Notwithstanding this, some support for the use of electronic deeds might be found in the ETA regime, for example in s11 of the ETA (and s10 of the Victorian ETA): "a requirement to produce a document that is in the form of paper...is taken to have been met...by...an electronic form of the document."

Arguably, the common law requirement for a paper deed can be satisfied by s11, even where the deed is produced only in an electronic form.⁵

However, until a judgment is made in Australia that confirms the application of the ETA regime in this way or legislative reform is effected, there is a risk that an electronic deed may be held to be invalid merely by virtue of its being electronic.

Tips for practitioners

When dealing with electronic contracts, it is preferable to avoid deeds. However, if a deed must be used in an electronic context, the deed should include a clause that says the parties agree that, if for any reason the deed is found to be defective, the document is to be treated as a contract. The drafting lawyer needs to then turn their mind to the consequences of that occurring and whether any further drafting is required to negate the consequences of the contract not being held to be a deed.

Trap 3: Where is the data?

In using an electronic contracts process, a practitioner needs to be mindful of where the data is held. Data in this sense means not just the terms of the contract itself, but all the “meta-data” associated with the contract, such as who accessed it, when and from where.

The notion of cloud services and data being stored by third parties rather than in the onsite servers of the senders and recipients of emails has increased the need to focus attention on where the data resides. In using a technology service, practitioners need to consider two important things. Where is the data being stored and what control do you have over that data?

As regards the first issue, the Australian Signals Director has recommended to all government agencies that they “choose either a locally-owned vendor or a foreign-owned vendor that is located in Australia and stores, processes and manages sensitive data only within Australian borders. Note that foreign-owned vendors operating in Australia may be subject to foreign laws such as a foreign government’s lawful access to data held by the vendor.”⁶

As regards the second issue, it is a matter of reading the user terms. DocuSign, as an example, provides in its user terms that “2.2 (ii) Between DocuSign and Subscriber, Subscriber has exclusive control over and responsibility for the content, quality, and format of any eContract. All eContracts stored by DocuSign are maintained in an encrypted form, and DocuSign has no control of or access to their contents”.

Tips for practitioners

Know when you are using a cloud service (ie your data is being held somewhere other than on your own server), such as with a “Software-as-a-Service” or a web-based offering.⁷ Ask your cloud services provider where their data is stored and what level of control you have over that data. Read the terms and conditions of your technology provider to ensure you retain ownership and control over the data you upload to their system. In terms of file records, practitioners also

need to be mindful of their obligations to retain records for seven years and ensure contingencies are in place if the cloud provider is not in existence that long.⁸

Trap 4: Has the data been disclosed or used?

One reason for assessing the location and control of data used in a technology process is to ensure satisfaction of a party’s privacy obligations, particularly as regards the Australian Privacy Principles (APP).

For example:

- APP 11: an APP entity⁹ must take reasonable steps to protect personal information from misuse, interference and loss from unauthorised access, modification or disclosure.
- APP 12: an APP entity must provide access to a person’s personal information upon request of that person.
- APP 8: if disclosed to an overseas organisation, an APP entity can be responsible for the use of the information by the organisation.

The APP Guidelines say that an APP entity discloses personal information when it makes it accessible to others outside the entity and releases the subsequent handling of the personal information from its effective control (B.64).¹⁰ Whether or not someone does that in using a technology service will most likely depend upon the terms and conditions of the technology service provider.

Disclosure is to be contrasted with “use”. Section 8.14 of the APP Guidelines specifically refers to the example of cloud services providers and when providing personal information to them for the purpose of merely storing that information is “use” rather than a “disclosure”.

Tips for practitioners

When contracting with cloud services providers who will have your data disclosed to them to store and use your data within their services, ensure that:

- there is a binding contract between the parties for the information to be handled only for the limited purpose of storing your data;

- the contract requires subcontractors to agree to the same obligations; and
- the contract gives you effective control of how the information is handled.

Conclusions

There is much speculation and even fear among practitioners about how computers are going to change the way they practise. The most extreme views talk of certain types of lawyers and legal tasks becoming redundant. There is no doubt that, as with the manufacturing industry a century ago, computers will enable certain manual legal tasks to be undertaken via automated processes with considerably more efficiency and accuracy than humans ever could.

However, the subtlety, complexity and unpredictability of both human nature and the practice of law will mean that trained lawyers will always retain a place in such processes. The trick for lawyers will be knowing about and adapting to the new tools that become available and ensuring that they learn and develop the new skills and understandings necessary to use such tools skilfully and expertly. ■

Peter Moran is a commercial and disputes lawyer with a particular interest in technology and is the co-chair of the LIV Technology and the Law Committee.

1. A browser-wrap (or browse-wrap) agreement is the description for the types of online terms and conditions frequently entered into by all of us when using various websites and downloadable software. Unlike a click-wrap agreement which requires a party to click on something (such as an “I agree” box) to manifest assent, browser-wrap agreements are entered into merely by the use (or browsing) of the website or app/software.

2. Seddon N, Bigwood R & Ellinghaus M, *Cheshire & Fifoot’s Law of Contract*, 2012, p147.

3. *Electronic Transactions Act 1999* (Cth), *Electronic Transactions (Victoria) Act 2000* (Vic).

4. *Seddon on Deeds* [2.28] p98.

5. Section 9(3)(b) of the Electronic Conveyancing National Law re registry instruments may also be of use in the context of conveyancing deeds.

6. “Cloud Computing Security Considerations” ASD Discussion Paper, www.asd.gov.au/publications/protect/cloud_computing_security_considerations.htm.

7. For more information, see the LIV’s Law Tech Essentials on Cloud Services.

8. For more information, see the LIV’s File Ownership, Retention and Destruction Guidelines.

9. APP Entities are defined in s6 of the *Privacy Act 1988* (Cth) and, in general terms, comprise federal government agencies and organisations with an annual turnover of more than \$3 million.

10. APP Guidelines at B.64.