

Electronic communication: equal to paper-based transactions

By George Roussos*

Can you give a Notice of Decision under the Work Health Act by email? If the notice is readily accessible, and the recipient consents to the information been given by email, then yes.

The legal capability of giving and receiving notices has been in place since 13 June 2001. This is when The Electronic Transactions (Northern Territory) Act (ETA) commenced.

The ETA is modelled on the United Nations Commission on International Trade Law's Model Law on Electronic Commerce. It was developed as part of a national scheme "to facilitate the use of electronic commerce throughout Australia and to remove any legal obstacles that might inhibit the growth of electronic commerce."

The general scheme of the ETA is to allow delivery of information by electronic means to effect "transactions". Delivery by electronic means is permitted even where the relevant law requiring delivery of the information uses words such as "give", "send" or "serve". "Transaction" is defined very broadly to include a transaction in the nature of a contract, agreement or other arrangement and a transaction of a non-commercial nature.

The ETA's stated aims include to:

- * Facilitate the use of electronic transactions.
- * Promote business and community confidence in the use of electronic transactions.

The Act does not change existing laws such as contract and property law. It simply permits transactions that are currently undertaken in writing to be undertaken electronically.

Two main principles underpin the ETA - that:

- (a) Paper-based or electronic documents and transactions are regarded equally by the law.
- (b) All forms of technology are regarded equally by the law.

By its Regulations, the ETA does not apply to:

- * Wills.
- * Powers of attorney.
- * Laws that require a document to be delivered by personal service.



GIVING INFORMATION IN WRITING

Unless there is a specific requirement otherwise (eg personal service or a specified or particular type of communication), section 8 allows you to give information by electronic communication (such as by email or fax) where:

- (a) At the time the information was given, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference; and
- (b) The person to whom the information is required to be given consents to the information being given by means of an electronic communication (importantly, consent need not be express and can reasonably be inferred).

ELECTRONIC SIGNATURES

Section 9 deals with electronic signatures.

Subject to specific requirements in other laws, a signature can be provided by electronic communication if the method used can identify the person; indicates the person's approval of the information communicated; the method was reliable; and the person to whom the signature must be given consents to the method used.

PRODUCTION OF DOCUMENTS

Section 10 facilitates the production of documents.

If you are required to produce a document that is in the form of paper, an article or other material, you can do so in electronic form if:

- (a) The method of generating the electronic form of the document provided a reliable means of assuring the maintenance of the integrity of the information contained in the document;
- (b) At the time the communication was sent, it was reasonable to expect that the information contained in the electronic form of the document would be readily accessible so as to be useable for subsequent reference; and
- (c) The person to whom the document is required to be produced consents to the production, by

means of an electronic communication.

TIME AND PLACE

Section 13 deals with the time and place of dispatch and receipt of electronic communications.

Unless otherwise agreed between the originator and the addressee of the electronic communication:

- * The dispatch of the electronic communication occurs when it enters that information system.
- * If the addressee of an electronic communication has designated an information system for the purpose of receiving electronic communications, the time of receipt of the electronic communication is the time when the electronic communication enters that information system (if an information system has not been designated, then the time of receipt of the electronic communication is the time when the electronic communication comes to the attention of the addressee.)

APPLYING THE ETA

It all sounds good; but does it work?

Yes; electronic communication is capable of replacing paper-based transactions.

As long as you get a few basics right, such as designating an information system and clarifying consent, your paperless transactions will have equal status to paper-based transactions.

ARE THERE ANY ILLUSTRATIONS AS TO HOW THE ETA HAS BEEN APPLIED BY THE COURTS?

Yes, there are a few Australian decisions; and, as intended, these demonstrate the ETA is effective at facilitating e-commerce.

In *Faulks v Cameron* (decided 11 November 2004), Acting Master Young of the Northern Territory Supreme Court applied the ETA in a proceeding under the De Facto Relationships Act to find email correspondence constituted an agreement enforceable at common law.

Applying section 9, the Court was satisfied the printed signature on Mr Cameron's emails identified him and indicated his approval of the information communicated, the method was as reliable as was appropriate and Ms Faulks consented to the method.

In *Ford v La Forrest* [2001] QSC 261, Atkinson J of the Supreme Court of Queensland applied the Electronic Transactions Act (Cth) and determined an acceptance of an offer by email is capable of creating legal relations.

Other cases have confirmed the protective provisions of the legislation; such as those relating to designated information systems and consent.

In *SZAE v Minister for Immigration* [2003] FMCA

258, an applicant for a protection visa alleged he faxed important details relating to his change of address to the Refugee Review Tribunal. The RRT did not receive the fax. After reviewing the evidence, the Federal Magistrate found the applicant's electronic communication (ie fax) entered the Australia Post information system (when the fax was handed to an employee of Australia Post).

The Court also accepted the RRT designated an information system when it published a single facsimile number for all correspondence. The Court accepted evidence that the RRT did not receive the fax through that designated information system. Presumably, the applicant sent his fax to the wrong number.

The finding there was no notification of the applicant's change of address because the fax did not enter the designated RRT information system, illustrates the protection you have under the Act.

Another protective mechanism is the issue of consent. This can easily be managed.

For example, by Practice Direction titled "Email correspondence" and dated 25 July 2005, the Civil Registry of the Magistrates Court in Darwin has designated an information system by publishing its email address and a procedure to communicate via that address. The notice specifically states that the address is not to be used for the lodgement of documents unless prior arrangements have been made.

There are other Practice Directions relating to electronic communication; see Supreme Court Practice Direction 2 of 2002 (Guidelines for the use of information technology, including the Supreme Court Information Technology Check list); Federal Court Practice Note 17 (Information Technology).

In *Ilich v Baystar Corporation Pty Ltd* [2004] WASTR 25, the manager of a Strata Title corporation sent members a proxy form with a note that it be returned "to our office as soon as possible via the reply paid envelope enclosed." The Strata Titles Referee accepted that expression was clear and there was no consent to receiving proxies by email.

APPLYING THE ETA TO THE WORK HEALTH ACT (WHA)

To illustrate the ETA in action, let's apply it to the giving of notices in a statutory scheme such as the WHA.

Section 69 directs that an amount of compensation shall not be cancelled or reduced unless the worker to whom it is payable has been given notice of the intention to cancel or reduce the compensation.

Section 85 requires an employer to notify the person

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making a claim of the employer's decision within 10 working days.

In either case, personal service of the notice is not required.

Is the decision "information" under the ETA? Yes, since that word is very broadly defined to mean information in the form of data, text, images or sound.

The WHA's requirement to notify is clearly within the ambit of the ETA.

Provided the notice is in a form which is readily accessible, the only real issue is that of consent. If there has been a course of correspondence between the parties by email on the topic of the compensation or the claim, consent would be reasonably inferred. It may even be inferred where the course of correspondence was on a different topic, if email was the sole or principal means of communicating between the parties.

Proof of receipt of the notice may be more problematical than where the notice has been delivered personally. Section 13 of the ETA provides that the information is received by the recipient when it enters that person's information system. Proving that event would probably require production of the recipient's electronic records, on subpoena if not consensually.

CONCLUSION

You can adopt the approach of Civil Registry of the Magistrates Court and clarify your information system and policy regarding consent in relation to:

- * Giving or receiving information, including notices, in writing.
- * Providing a signature.
- * Producing a document.
- * Recording information.
- * Retaining a document.

Although there are some important matters that need to be satisfied (such as consent and the reliability and integrity of the communication form selected), the ETA renders the electronic form as legal as the traditional paper-based form of communication.

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FACES BEHIND THE LAW

Celia Kemp, ODPP (Darwin) cont...

high frequency of people leaving.

If you had the power to change one thing in the world, what would it be? Increase the amount of truth spoken.

What is your greatest achievement? Close relationships with family and friends.

What are you hobbies? Reading, church, theology (which I am studying at the moment), poetry, walking, skiing, listening to Radio National, talking to people!

Describe your perfect weekend: Listening to a brilliant speaker talk about theology or politics or law then having a fired up discussion about it with a group of close friends.

What are you most passionate about? God.

What was the last book you read? Birchwood by John Banville.

What is your favourite movie? Fried Green Tomatoes at the Whistlestop Cafe.

What was the last CD you bought? Foggy Highway, Paul Kelly and the Stormwater Boys.

What is your favourite holiday destination? Somewhere I haven't been before which is edgy and exciting and where I can learn lots of new things.

Describe your perfect meal: Anything cooked by someone else.

After a long week at work it is finally Friday, you walk up to the bar and order a... lemon, lime and bitters.

Three words that describe you... quirky, book-y, gregarious.

MAGISTRATE COURT MEETINGS

The following meetings are held for all practitioners at the Magistrates Court four times per year.

If you would like to attend these meetings please email your details to sally.glass@nt.gov.au to be added to the mailing list. This is your opportunity to become involved in the working of the court and make suggestions to improve court processes.

Civil Court User Group Meetings

21 March 2006; 20 June 2006; 19 September 2006; 19 December 2006

Criminal Court User Group

14 March 2006; 13 June 2006; 12 September 2006; 12 December 2006.