

Electronic Transactions Update

Catherine Dickson revisits the Federal Government's Electronic Transactions Act, 1999 in light of its 1 July 2001 "changeover" date and also looks at the response of the States and Territories in the two years since the Act's commencement.

It has been eighteen months since the Federal Government enacted the *Electronic Transactions Act (ETA)* as its foundation for a framework for developing the information economy in Australia. This article looks at the certainty of the Australian legislative environment for e-business.

BACKGROUND

ETA was enacted by the Australian Federal Government in 1999 following an examination by the Electronic Commerce Expert Group (ECEG) of the suitability of Australian law to encourage and facilitate electronic commerce in Australia. Areas where the ECEG saw Australian law as being unclear or not facilitating electronic transactions were:

- uncertainty as to whether information, records and signatures in an electronic form should be given legal effect;
- a number of different form provisions requiring a document to be in writing where it was unlikely that an electronic document or signature would satisfy these requirements;
- no general provision allowing a data message to satisfy requirements of an original;
- no uniformity as to the admissibility and evidential weight of electronic documents;

- no uniform approach to retention and management of electronic documents; and
- uncertainty concerning the use and validity of data messages in contract formation.

The role of the ETA is largely to provide a framework for certainty and to ensure that electronic transactions have the functional equivalence of paper transactions.

PURPOSE OF THE LEGISLATION

ETA was enacted by the Federal Government as part of its strategic framework for developing the information economy in Australia. ETA creates a light handed regulatory regime for using electronic communications in transactions. It attempts to remove existing legal

impediments that may prevent a person using electronic communications to satisfy legal obligations under Commonwealth law. The simplified outline of ETA¹ provides that for the purposes of a law of the Commonwealth a transaction is not invalid because it took place by means of one or more electronic communications. It also provides that the following requirements imposed under a law of the Commonwealth can be met by using electronic form:

- the requirement to give information in writing;
- the requirement to provide a signature;
- the requirement to produce a document;
- the requirement to record information; and

INSIDE THIS ISSUE

Electronic Transactions Update

Combating Cybercrime

Cybersquatters and the Domain Name Game

The Interactive Gambling Act 2001 - Is It Needed, Will It Work?

Pandora's Box Opened: Inquiry Into the Adequacy of Radio Services in Regional and Rural Australia

ACIF Code Compliance - Measuring Up

CONTENTS

Electronic Transactions Update

Catherine Dickson revisits the Federal Government's Transactions Act, 1999 in Light of its 1 July 2001 "changeover" date and also looks at the response of the states and territories in the two years since the Act's commencement.

Combating Cybercrime

The Federal Government has introduced new legislation to combat the problems of cybercrime, Niranjana Arasaratnam and Maree Flynn explain.

Cybersquatters and the Domain Name Game

Tracey Harrip, Lorien Beazley and Dominic van der Toorn urge trademark owners to act swiftly to prevent cybersquatters registering protected trademarks as domain names.

The Interactive Gambling Act 2001 - Is It Needed, Will It Work?

Lisa Vanderwal revisits her earlier article on this contentious Act in light of recent Federal Government concessions regarding interactive gambling.

Pandora's Box Opened: Inquiry Into the Adequacy of Radio Services in Regional and Rural Australia

Carolyn Lidgerwood examines the activities of a bi-partisan parliamentary committee which has provided a lively forum for debate about the state and direction of the radio industry in regional and rural Australia.

ACIF Code Compliance - Measuring Up

Brenton Yates and Liam Buckley examine the ACIF regime for telecommunications industry self regulation.

- the requirement to retain a document.

For the purpose of a law of the Commonwealth, ETA provides criteria for determining the time and place of the dispatch and receipt of an electronic communication. It also provides that the purported originator of an electronic communication is bound by it for the purposes of a law of the Commonwealth only if the communication was sent by the purported originator or with the authority of the purported originator.

IMPLEMENTATION OF COMMONWEALTH LEGISLATION

ETA has a two-stage implementation. Before 1 July 2001 it will only apply to Commonwealth laws specified in the regulations. After 1 July 2001 it will apply to all Commonwealth laws unless they have been specifically exempted from application by the regulations. The *Electronic*

Transactions Amendment Regulations 2001 (No. 2) sets out the extent to which ETA will not apply to particular Commonwealth Acts as from 1 July 2001.

Under the *Electronics Regulations 2001 (No. 2)* there is a list of 157 Commonwealth Acts and subordinated legislation that have been excluded (in whole or in part) from the operation of ETA from 1 July 2001. The list is more extensive than expected and includes legislation such as the *Corporations Law* (now known as *Corporations Act 2001*), *Evidence Act 1995*, superannuation legislation and insurance legislation. The extent of the list is disappointing given the Federal Government's objective of bringing all appropriate department and agency services online via the internet by 2001.

CONSENT

Commonwealth entities subject to ETA are required to accept electronic

communications as long as it is reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference. However Commonwealth entities are entitled to impose conditions. Permissible conditions include those in relation to particular information technology requirements (including any particular electronic signature technology) that must be used, also any action a person must take to verify receipt of information. Under the Uniform Scheme, state entities will only be required to accept electronic communications if they have consented to such communications.

REQUIREMENT FOR A UNIFORM SCHEME

The Federal Government only has the constitutional power to legislate in specific areas, with the States and Territories having power to legislate in all other areas. To ensure that the principles contained in ETA apply to

all areas of Australian law, the Australian States and Territories have publicly committed to enacting uniform legislation Australia-wide modelled on ETA (Uniform Scheme).

As of June 2001, Queensland, Victoria and Tasmania have electronic transactions acts and the other States and Territories are in the process of legislating. The *Electronic Transactions Act* (NSW) was assented to on 3 May 2000 but has yet to be proclaimed. Until all States and Territories have legislated to give electronic communications functional equivalence to paper documents it will remain unclear as to whether and to what extent Australian law will enforce electronic contracts.

Even with the Uniform Scheme in place it looks like there will continue to be uncertainty under Australian law with respect to electronic contracts. Ascertaining the time and place of a communication is particularly important when the communication is the acceptance of an offer. The general principle is that acceptance of an offer must be communicated to the offeror for there to be a binding contract between the parties. However this is not the case where the postal acceptance rule applies.

Where the means of communication between the offeror and the offeree is instantaneous, such as in the case of telephone or facsimile communications, the formation of a contract is governed by the general rule that a contract is concluded at the time when, and the place where, acceptance of the offer is received by the offeror. However where acceptance by post is contemplated by the parties, acceptance is completed as soon as the letter of acceptance is properly posted.² There has been some discussion as to whether an internet communication is more closely aligned to an instantaneous means of communication or to a letter that is put in the postal system.

ETA and the Uniform Scheme deal with the uncertainty surrounding time and place of receipt of electronic information by providing that if an

information system has been designated for the purpose of receiving electronic communications then the time of receipt is the time when the electronic communication enters that information system.³ If there has been no designation of an information system then communication is taken to have been received when the electronic communication comes to the attention of the addressee.⁴ Unless otherwise agreed, the place of receipt of an electronic communication is the place where the addressee has its place of business.⁵ These provisions still leave uncertainty regarding electronic communications. They do not:

- deal with the uncertainty surrounding the application of the postal acceptance rule to the formation of online contracts. Having said this it is likely (although not yet determined by the Courts) that the postal acceptance rule would probably not be applied to data messages;⁶
 - say anything regarding allocation of liability for the risk of non-delivery by an electronic system. If an information system is designated as a means of communication the sender/offeree takes the responsibility for non-delivery of the communications system up until the information enters a recipient's communication system;
- or
- entirely create certainty regarding receipt issues. If an information system is not designated by the parties then it remains unclear whether the words "comes to the attention of the addressee" means when the addressee has read the communication or has received a notification of mail.

ELECTRONIC SIGNATURES

The Government's legislative framework for e-business has not addressed the continuing uncertainty

as to what will suffice as an electronic means of authentication for online contracts. The Federal Government and the ECEG for reasons such as flexibility, neutrality and avoiding enshrining in legislation what may prove to be incorrect guesses about best technology and business practices, made a decision to take a minimalist approach in giving legislative direction. However this light touch approach has resulted in uncertainty, particularly in relation to electronic signatures, that is not helpful to organisations doing e-business or looking to do e-business in Australia.

ETA and the Uniform Scheme provide that *if a signature of a person is required*, that requirement is taken to have been met in relation to an electronic communication if:

- (a) *a method is used to identify the person and to indicate the person's approval of the information communicated;*
and
- (b) *having regard to all the relevant circumstances when the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated;*
and
- (c) *the person to whom the signature is required to be given consents to the requirement being met by using the method mentioned in paragraph (a)*⁷

It is likely that this provision does not extend to electronic signatures in electronic contracts as it is limited to where a signature is "required". The use of signatures for private transactions is a standard business practice to ensure that at the time of affixing the mark, the signatory has the necessary intention to be bound by the contents of the document. There is no legal requirement that a signature be affixed to a simple contract. In fact, oral contracts are enforceable. The purpose of a signature in a simple

contract goes more to the objective intention of the parties to be bound by a contract's terms and the integrity of the document. An original signature together with original initialled amendments demonstrates that the document has not been changed without obtaining the parties' express approval.

ENFORCEABILITY OF ELECTRONIC CONTRACTS

The integrity of a document is essential for it to be given weight as evidence by the Australian Courts. ETA and the Uniform Scheme do not directly deal with the enforceability of electronic contracts. The ECEG in its report to the Attorney General, considered that the Commonwealth and NSW Evidence Acts satisfy basic requirements for admissibility and the evidential weight of electronic documents as evidence. They considered that further law reform to deal with perceived problems with the admission of data messages was not the appropriate solution.⁸ They recommended instead that the NSW and Commonwealth Evidence Acts be used as a model for a uniform approach to evidence in Australia.

It has been 3 years since the ECEG's recommendations were released and there is still no uniform approach to the admissibility of electronic evidence as evidence in Australia. The perceived problems listed by the ECEG in their report regarding electronic evidence⁹ have not been uniformly addressed. Consequently, it does not appear that electronic transactions will have the functional equivalence of paper transactions at least for evidentiary purposes. One of the fundamental purposes of recording contractual arrangements and affixing signatures to such records is to ensure that such agreements are enforceable. So in this fundamental respect the validity of electronic signatures and consequently the legislative framework for enforceability of electronic contracts remains unsatisfactorily vague.

Nevertheless, under ETA there is a requirement for electronic documents that are produced (whether they are

required to be produced or permitted to be produced) to have a level of integrity.¹⁰ This raises the question of how the laws as to admissibility and evidential weight contained in Federal and State and Territory legislation will be read in conjunction with ETA and the Uniform Scheme. It would seem possible that if a document is admissible by a Court in paper form, then it may be produced by means of electronic communication if it complies with the production requirements in the Uniform Scheme. This raises the question whether production to a court is possible under the Uniform Scheme even if not permitted under the relevant Evidence Act.

Despite ETA, the announcement of the Uniform Scheme and the ground work the Federal Government has done in establishing a framework for electronic business, there are still uncertainties surrounding the enforceability of electronic transactions under Australian law. However, these are not necessarily insurmountable. Conducting business by digital means, and particularly over open systems such as the internet, affects some of the fundamental assumptions on which business has been traditionally based. These assumptions and the changes affecting them have to be analysed thoroughly and procedures have to be put into place to manage new risks before Australian businesses and consumers can rely with any certainty on electronic means as a way of conducting business.

1 s.4 Electronic Transactions Act 1999 (Cth)

2 *Mendelson - Zeller Co Inc v T & C Providores Pty Ltd* [1981] INSWLR 366

3 Section 14(3) Electronic Transactions Act 1999 (Cth)

4 Section 14(4)

5 Section 14(5)(b) *Ibid*

6 p63 *Electronic Commerce: Building the Legal Framework Report of the Electronic Commerce Expert Group to the Attorney General*, 31 March 1998

7 s.14 *Electronic Transactions (Queensland) Act 2001*

8 p39 Chapter 2 "Electronic Commerce: Building the Legal Framework Report of the Electronic Commerce Group to the Attorney General" 31 March 1998

9 see p35 ff *Ibid*

10 Section 11 *Electronic Transactions Act (Cth)*

The views expressed in this article are those of the author and not necessarily those of the firm or its clients.

Catherine Dickson is a Counsel in the Information Technology and Telecommunications practice at the Sydney Office of PricewaterhouseCoopers Legal.