

Electronic Transactions Act

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Next time you browse a copy of the *Income Tax Assessment Act*, why not take a look at the record-keeping provisions there? The *Act* requires an individual — in order to claim a tax deduction for an expenditure — to retain written evidence of that expenditure. Similarly, the next time you happen to be flicking through your collection of *Imperial Acts* from 1677, linger a while at Section 4 of the *Statute of Frauds*. Section 4 applies to charges upon, among other things, agreements upon consideration of marriage or upon sale of lands, tenements or hereditaments, and states that a person is not able to sue upon such contracts unless 'some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised'. Section 17 of that *Act* has similar provisions on the purchase of goods for £10 or over.

As we all well know, the *Statute of Frauds* was inherited as part of the local law by each colony (that is, state) in Australia upon settlement of the colony, and continues in force until modified by local legislation. You may be interested to know that the statute is actually still in force in Tasmania, Victoria and Western Australia, although it has been modified by legislation in Tasmania and Victoria and, in Western Australia, its interpretation has been modified. However, even in those states where the statute has been abolished, similar provisions have replaced it in an updated or modernised form. So, for example, in New South Wales,

Section 54A(1) of the *Conveyancing Act 1919* (NSW) provides that, to transfer an interest in land, the contract effecting that transfer must be written or evidenced by writing. In the Northern Territory, there are provisions requiring written evidence for the sale of goods for \$20 or more (and, before you ask — yes, \$20 is simply £10 x 2 with no allowance for 300 years of inflation).

Well, that may all be well and good, but why is this of the least interest to me — or to you, for that matter?


The importance of these provisions should become apparent when one considers the means by which business is, increasingly, transacted in the modern age. It is not at all unusual for enquiries and purchases to be made over the phone or by way of e-mail or facsimile. While it is clear that a fax will certainly fulfil the requirements of writing set out in the legislation, it is not so clear that an e-mail will (it would be asking too much to expect that a telephone call could qualify).

Libraries have always been at the forefront of collecting, cataloguing and communicating information about their holdings. Indeed, one of the great visions for the Australian library system is to have a fully-automated holdings and ordering database and, over the last few years, substantial strides have been taken towards that goal. Have libraries, by leading the field in this area, virtually overstepped the mark? Are the numerous transactions that they carry out every day legally valid?

One of the things that can give libraries some degree of comfort in this area is the recent passage of the *Electronic Transactions Act* through both houses of Parliament. The *Act* passed the lower house on 30 September 1999 and the Senate on 25 November 1999. At the time of writing, the *Act* had not received royal assent, but it is expected that this will occur relatively quickly. The *Act* provides specific protections to electronic communications for the purposes of Commonwealth laws. The *Act* has two key principles: functional equivalence, and technology neutrality. The first principle is to ensure that electronic communications have exactly the same status as they would have if embodied on paper. The second principle states that, where there are requirements relating to authentication or verification of the document or a signature, then those requirements should not be specific to any technology. For example, a requirement to use blue ink when signing a document would be technologically-biased because it presumes that a paper and pen would be needed in the process.

The *Act* achieves these aims through a number of components. It begins by stating that transactions are not invalid because they take place in whole or in part by means of one or more electronic communications. It then goes on to state that, where a Commonwealth law requires information to be in writing, that requirement can be met by the person giving the information in an electronic communication provided that four requirements are met. Those requirements are that:


- 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;
- b) If information is required to be given to a Commonwealth entity and the entity requires the information be given in accordance with particular information technology requirements then those requirements must have been met;
- c) If the information has to be given to a Commonwealth entity and the entity requires that particu-



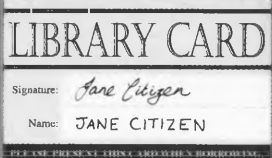
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lar actions be taken to verify receipt, then the entity's requirements have been met; and
d) The person to whom information is required to be given consents to the information being given by way of an electronic communication.

The law states that, where a Commonwealth law requires a signature, that requirement will be met by an electronic communication where:

- a) a method is used to identify the person and to indicate the person's approval of the information communicated;
- b) with regard to all the circumstances at the time the method was used, the method was as reliable as appropriate for the purposes for which the information was communicated;
- c) if the signature is required to be given to a Commonwealth entity then the method of giving that information is in accordance with the information technology requirements of that entity; and
- d) the person to whom the signature is required to be given consents to the signature being given in that way.

The law has specific provisions relating to the production of a document to a Commonwealth government body effectively allowing for a document to be produced where the method of generating the electronic form of a document provides a means of assuring the maintenance of the integrity of the information contained in the document and it was reasonable to expect that the information contained in the electronic form of the document would be readily accessible so as to be useful for subsequent reference.

The production requirement also has provisions for compliance with verification procedures and consents as the other provisions do. Where a document is required to be kept for the purposes of a Commonwealth law then it is sufficient to keep that document in an electronic form with similar restrictions as for the production of an electronic document. The Act also has specific provisions detailing the time and place of dispatch and receipt of electronic communications for the purposes of a law of the Commonwealth.

That is what the *Electronic Transactions Act* deals with. Now what does it fail to deal with? The Act does not deal at all with requirements under state law. So, in the example with which this article was opened, the *Income Tax Assessment Act*

provisions would be covered, but the *Statute of Frauds* provisions, being state laws, would not be covered. So, where a company is required to keep information for the purposes of both a state and a Commonwealth law (this could be for a purchase of \$20 or more), the *Electronic Transactions Act* does not help them overly. They will still be required to keep the physical document for the purposes of the state law despite the *Electronic Transactions Act*. In fact, the *Electronic Transactions Act* also does not apply to most Commonwealth laws prior to 1 July 2001. Before that time there is a means by which regulations can be passed to 'opt in' Commonwealth laws which are subject to the operation of the Act. Where an Act is not 'opted in' it will not be covered by the Act.

The Act also fails to apply to the practice and procedure of any court. This means that, while an electronic record may be valid for the purposes of complying with Commonwealth laws, it may be of absolutely no value in enforcing a person's rights under contract. In order to make such a use of a document, the document must be able to be admitted into evidence. Whether this can happen is determined by, among other things, the rules of practice and procedure of the court as well as the *Evidence Act* governing the specific jurisdiction in which the court operates. This means having to comply with requirements which may be antiquated or out-of-date and, therefore, which include latent technological biases — for example, requirements that evidence be in writing or, alternatively, requirements that specific records must have been kept in relation to the operation of the computer in order for data produced by that computer to be admitted into evidence.

In short, the *Electronic Transactions Act* is a necessary, but not sufficient, piece of legislation to give comfort to people wishing to transact business over the internet. It gives a level of comfort in relation to records which must be kept for the purposes of Commonwealth legislation, but does not provide any help in relation to requirements under state legislation. It also fails to address problems with the admissibility of electronic evidence in court proceedings. In short, the Act is a step in the right direction, but there is still a large part of the journey left to go.

Brendan Scott is a senior lawyer with law firm Gilbert & Tobin.

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