

2012

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

ELECTRONIC TRANSACTIONS AMENDMENT BILL 2012

EXPLANATORY STATEMENT

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Electronic Transactions Amendment Bill 2012

Overview of Bill

This Bill amends the *Electronic Transactions Act 2001*.

The Bill adopts model legislation agreed to by the Standing Committee of Attorneys-General (SCAG) in response to the United Nations Convention on the Use of Electronic Communications in International Contracts 2005 (the Convention).

In 2005, the United Nations adopted the Convention, which updates many of the concepts in the 1996 United Nations Commission on International Trade Law Model Law on Electronic Commerce. As a consequence, amendments have been developed to amend the uniform electronic transactions legislation in all States and Territories and the Commonwealth. All states and territories must implement the amendments for Australia to be able to accede to the Convention.

The Bill clarifies the traditional rules on contract formation to address the needs of electronic commerce, including the recognition of automated message systems, clarification of an invitation to treat, rules to determine the location of the parties, updating the electronic signature provisions and default rules for time and place of dispatch and receipt.

The Bill is based on model text endorsed by SCAG with some minor changes to reflect current drafting practice in the Territory. Those changes include the use of defined terms in the *Legislation Act 2001* (with the corresponding inclusion of notes to assist users) and the use of standardised sentence structures and alternatives for certain words.

The amendments are mechanical in nature and intentionally do not unduly disturb or affect settled contract law.

Personal, family or household contracts are excluded from the Convention rules. Due to legislative protection for consumers in Australia it is considered appropriate to depart from the Convention on this issue and encompass personal, family and household contracts within the scope of the Act.

The amendments modernise the territories laws on electronic commerce to reflect internationally-recognised legal standards and enhance cross-border online commerce.

Human Rights implications

The amendments to the Electronic Transactions Act do not engage rights under the *Human Rights Act 2004*. The main purpose of this Bill is to make minor amendments to the existing Act and to update the electronic transactions regime to reflect internationally recognised standards on electronic commerce. As such the Bill does not engage rights under the Act.

Clause Notes

Clause 1 Name of Act – states the title of the Act as the *Electronic Transactions Amendment Act 2012*.

Clause 2 Commencement – provides that the Act commences on a day fixed by the Minister by written notice.

Clause 3 Legislation amended - specifies that the Act amends the *Electronic Transactions Act 2001*.

Clause 4 Simplified outline new section 4 (2) – inserts at the end of section 4 a description of the provisions applying to the use of electronic communications in contracts in part 2A.

Clause 5 New section 6A– inserts new section 6A into the Act.

New section 6A provides that regulations may exempt specified transactions, requirements, permissions, communications or other stated matters, or specified ACT laws, from any or all of the provisions of the Principal Act.

Section 6A replaces the numerous, separate provisions in division 2 of part 2 of the Principal Act that provided individual powers to make regulations to exempt certain dealings from each specific section.

Clause 6 Validity of electronic transactions Section 7 (3) and (4) – omits sub sections 7 (3) and (4).

Subsections 7(3) and (4) are no longer necessary as they contain regulation making powers that are now captured in new section 6A.

Clause 7 Writing Section 8, note – omits the note at the end of section 8.

The note at the foot of section 8(5) of the principal act referring the reader to section 12 has been removed as section 12 of the principal act is omitted at clause 11. This amendment is made as a consequence of new section 6A.

Clause 8 Section 9 – substitutes section 9 of the Principal Act with new section 9.

Section 9(1)(a) makes clear that the notion of ‘signature’ does not necessarily imply a party’s approval of the entire content of the communication to which the signature is attached.

Section 9(1)(b) clarifies that whether or not a signature in an electronic communication is reliable should be decided in light of all the circumstances, including any relevant agreement, to prevent a party to a transaction from repudiating its signature in bad faith.

Section 9(1)(c) and 2(a) and (b) have not been changed and are rewritten simply for convenience of amendment.

Section 9(2)(c) is amended by omitting 'approval' and substituting 'intention in relation'. This amendment provides that rather than indicating the person's approval of the information, it is sufficient that the signature in the electronic communication indicates the person's intention in respect of the information communicated.

A new section 9(3) is inserted. This amendment will provide that a reference in section 9(1) to a law that requires a signature includes a reference to a law that provides consequences for the absence of a signature.

Clause 9 Production of document Section 10, note - omits the note at the end of section 10.

The note at the foot of section 10 of the Principal Act is omitted as a consequence of new section 6A.

Clause 10 Retention of information and documents Section 11, note - omits the note at the end of section 11.

The note at the foot of section 11 of the Principal Act is omitted as a consequence of new section 6A.

Clause 11 Exemptions from this division Section 12 – repeals section 12.

Clause 11 repeals section 12 of the Principal Act which is one of the regulation-making powers contained in the Principal Act. New section 6A replaces the current regulation making provisions to provide a simplified structure for making exemptions to the application of the Principal Act.

Clause 12 Section 13- substitutes section 13 of the Principal Act and inserts new sections 13A and 13B into the Principal Act.

Clause 12 omits section 13 in accordance with the Model Bill. The amendment repeals the whole section and inserts new sections 13, 13A and 13B. These amendments concern the time of dispatch and receipt of electronic communications to make minor refinements to the current provisions to accord with the Convention.

In relation to the time of dispatch, new section 13 generally provides that the time of dispatch of the electronic communication is the time when the electronic communication leaves an information system under the control of the originator or of the party who sent it on behalf of the originator. If the electronic communication has not left an information system under the control of the originator, the time of dispatch is generally the time when the electronic communication is received by the addressee.

New subsection 13A(1) provides that the time of receipt of an electronic communication is the time when it becomes "capable of being retrieved" by the addressee at a designated electronic address, or when sent to another electronic

address, the time of receipt is the time when the electronic communication is both "capable of being retrieved", and the addressee has become aware that the electronic communication has been sent to that electronic address.

Section 13A (2) clarifies that an electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.

Section 13A provides that the default rules for determining the time of receipt will apply even if the information system supporting the electronic address is located in a different place from the place where the electronic communication is taken to have been received.

New section 13B provides rules regarding the place of dispatch and the place of receipt. The section provides that unless otherwise agreed between the originator and the addressee of an electronic communication:

- the electronic communication is taken to have been dispatched at the place where the originator has its place of business; and
- the electronic communication is taken to have been received at the place where the addressee has its place of business.

Section 13B also provides that a party's place of business is presumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location.

Where there are multiple places of business, for the purposes of determining the jurisdiction governing the transaction and contract formation, the place of business will be deemed to be the place that has a closer relationship to the underlying transaction. When determining the place of business that has the closer relationship to a transaction, consideration is to be given to the circumstances known, or contemplated by the parties at any time before, or at the conclusion of the contract.

Subsection 13B(3) provides that the location is not a place of business merely because it is where equipment and technology supporting an information system used by a party are located, or where the information system may be accessed by other parties. The location of an information system can be one, but not necessarily the most significant factor to consider in determining the place of business.

Clause 13 Attribution of electronic communications Section 14(3) and (4) - omits section 14(3) and (4).

Clause 13 omits subsections 14(3) and (4), as these regulation-making powers are captured in new section 6A.

Clause 14 New part 2A – inserts new part 2A into the Principal Act.

The intention is that new part 2A is applicable to both domestic contracts and contracts with an international aspect.

Clause 12 inserts a new part 2A after section 14. Part 2A inserts new sections 14A, 14B, 14C, 14D and 14E. These amendments provide additional provisions to apply to contracts involving electronic communications.

New section 14A provides that the provisions in part 2A apply to contracts involving electronic communications where the proper law of the contract is the law of the ACT, whether or not some or all of the parties are located in Australia or elsewhere and whether the contracts are for business, personal or other purposes.

New section 14B provides that a proposal to form a contract made through an electronic communication that is not addressed to a specific party and is generally accessible to parties making use of information systems is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

New section 14C provides that a contract formed by the intention of an automated message system and an individual, or by the interaction of automated message systems, is not invalid, void or unenforceable merely because automated message systems were used.

New section 14D enables an individual who makes an input error in an electronic communication exchanged with the automated message system of another party to withdraw the portion of the electronic communication in which the input error was made if the person notifies the other party of the error as soon as possible and if the person has not received any material benefit or value from any goods or services received from the other party.

New section 14E deals with the application of the Act to certain contracts, for example where a contract is being negotiated in a state or territory from a supplier located overseas.

Clause 15 New part 10 – inserts new part 10 into the Principal Act.

This is a transitional provision to support the move to new provisions and expires on the day it commences

Clause 16 Dictionary, note 2 – amends dictionary, note 2.

Clause 16 includes ‘home address’, ‘individual’ and ‘territory law’ as words defined in particular, in the *Legislation Act 2001*, dictionary, part 1.

Clause 17 Dictionary, new definitions – inserts definitions of ‘addressee’ and ‘automated message system’ into the dictionary.

This new definition provides that an ‘*addressee*’ of an electronic communication means the person who is intended by the originator to receive the electronic communication, but does not include a person acting as an intermediary with respect to the electronic communication.

The new definition makes clear that the addressee is the person with whom the

originator intends to communicate, rather than any person who may receive, forward or copy the communication during the course of transmission.

‘Automated message system’ is defined as a computer program or electronic or other automated means used to initiate an action or respond to data messages in whole or part, without review or intervention by an individual each time an action is initiated or a response is generated by the system.

This definition confirms that the absence of human intervention does not preclude contract formation. Automated message systems used for the purposes of contract formation will not deprive the contract of legal effectiveness, validity or enforceability.

This definition covers transactions that lack human intervention on either one, or both, sides of the transaction.

Clause 18 Dictionary, definition of law of this jurisdiction- omits definition of *‘law of this jurisdiction from the dictionary’*

This omission reflects current drafting practice.

Clause 19 Dictionary, new definitions- inserts definitions of *‘originator’* and *‘performance’* into the dictionary.

An *‘originator’* of an electronic communication means a person by whom, or on whose behalf, the electronic communication has been sent or generated before storage, if any, but does not include a person acting as an intermediary with respect to the electronic communication.

This definition provides that an originator is the person that generated the communication, even if the communication was transmitted by another person. Therefore, a recipient who merely stores a data message cannot be regarded as an originator.

The definition provides that *‘performance’* of a contract also includes non-performance of the contract.

Clause 20 Dictionary, definition of place of business - omits the definition of *‘place of business’* and substitutes a new definition.

This definition updates the definition of *‘place of business’* in the Act, in relation to a person. The definition includes a place where a person maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location.

The new definition also defines the place of business in relation to a government, an authority of a government or non-profit body. The place of business for these organisations is defined as a place where any operations or activities are carried out by that government, authority or body.

Clause 21 Dictionary, definition of transaction - substitutes 'transaction' with a new definition.

The new definition of 'transaction' extends the definition in the Act to include:
any transaction in the nature of a contract, agreement or other arrangement; and
- any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract, agreement or other arrangement; and
- any transaction of a non-commercial nature.

Clause 22 Further amendments, mentions of law of this jurisdiction

To reflect the Territory's current drafting style 'law of this jurisdiction' is omitted in section 4, sections 7 to 11 and section 14 and substituted for 'territory law'.

Clause 23 Further amendments, mentions of laws of this jurisdiction

To reflect the Territory's current drafting style 'laws of this jurisdiction' is omitted in division 2.1 heading, division 2.2 heading and division 2.3 heading and substituted for 'territory laws'.