

2000

**THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

ELECTRONIC TRANSACTIONS BILL 2000

EXPLANATORY MEMORANDUM

**Circulated by authority of
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Electronic Transactions Bill 2000

Explanatory Memorandum

Overview of Bill

This Bill complements the *Electronic Transactions Act 1999* of the Commonwealth and does so to ensure that the law of the Australian Capital Territory in relation to certain matters concerning electronic transactions is consistent with the law of the Commonwealth in relation to those matters.

Notes on provisions

Part 1 - Preliminary

Clause 1 explains that when the Bill becomes an Act, it will become known as the *Electronic Transactions Act 2000*.

Clause 2 explains that the Bill, once enacted, will commence when a notice of the enactment is published in the Gazette.

Clause 3 outlines the objectives of the proposed Act.

Clause 4 sets out a simplified outline of the proposed Act.

Clause 5 defines certain words and expressions used in the proposed Act.

Clause 6 explains that a note in the proposed Act is merely explanatory and not part of the proposed Act.

Part 2 - Application of Legal Requirements to Electronic Communications

Division 2.1 - General rule about validity of transactions for laws of this jurisdiction

Clause 7 outlines a general rule to the effect that for a law of the Territory, a transaction is not invalid because it took place wholly or partly by means of one or more electronic communications. The general rule is expressed to be subject to other provisions of the proposed Act that deal with the validity of transactions. The regulations under the proposed Act will be able to exclude the general rule in relation to stated transactions and stated laws of the Territory.

Division 2.2 - Requirements under laws of this jurisdiction

Clause 8 provides that a person who, under a law of the Territory, is required or permitted to give information in writing may instead give that information by means of an electronic communication. Generally speaking, for information given by means of an electronic communication to be acceptable:

- (a) it must be reasonable to expect that the information will continue to be accessible for future reference; and
- (b) the recipient of the information must consent to being given information by means of an electronic communication.

Readily accessible condition

The readily accessible condition imposed on the use of electronic communications by clause 8 ensures that others will be able to access and use the information contained in the electronic communication and that transactions are not subsequently vitiated by a lack of access to the information. Underpinning this requirement is the basic idea of information being reproduced or retrieved and read. The readily accessible requirement captures this concept and expresses it in terms of objective criterion.

The notion of readily accessible is intended to mean that information contained in the electronic communication should be readable and capable of being interpreted. Similarly, it is intended that software necessary to allow the information to be read should be retained. This may be the version of the software used to create the message or subsequent versions of the same or different software that is capable of rendering the information readable. The concept of useable is intended to cover use by both humans and machines. It is intended to deal with the useability of information, which is more than just the receipt of the electronic communication.

The requirement operates at the time the information was given. This time is taken to be the time that the information in the form of an electronic communication is given in compliance with the requirement or permission under a law of the Territory. This will be the time that the electronic communication is transmitted, rather than the time that it is composed or drafted prior to transmission.

The reasonableness element has been inserted to make clear that a person can fully comply with the law at the time of the electronic communication. A person should not be subject to any ongoing obligations in relation to the use of an electronic communication. This allows a person to satisfy the elements of this requirement immediately where it is reasonable to expect that the information would be readily accessible. There is no continuing requirement to ensure, for example, that the electronic communication is continually updated to take account of the latest changes in technology. Reasonableness in this context is not intended to be a subjective matter. It should be determined objectively having regard to all relevant factors, such as the technology available at the time of the electronic communication and the

appropriateness of the available technology for the purposes of the communication.

The concept of subsequent reference impliedly requires that electronic communications should be capable of retention. However, the use of this concept does not mean that electronic communications must be retained. It simply means that they must be capable of retention. Where a person chooses to retain an electronic communication pursuant to Territory law then the requirements that must be satisfied are set out in clause 11. The requirement must be satisfied regardless of whether the parties to the transaction have a continuing relationship or not.

Consent provisions

Paragraphs 8(1)(c) and 2(b) specify that recipients of information must consent to the information being given to that person by way of an electronic communication. This provision is based on the general policy that a person should not be compelled to use an electronic communication to conduct a transaction in order to satisfy requirements or permissions to give information in writing under Territory law. The power only applies where a person is receiving an electronic communication. It is not necessary to state that a person must consent before providing information by way of an electronic communication because the provisions are clearly drafted to provide a person with the ability to choose whether or not to satisfy their legal obligations by using an electronic communication.

The recipient's consent is required only in relation to the medium by which the information is communicated where the medium is an electronic communication of some type. The provision is not intended to give the recipient the power to consent to the information contained within the electronic communication. It merely requires a person's consent to the use of electronic communications as an alternative means of compliance with Territory laws.

The definition of consent set out in clause 5 makes it clear that consent can be inferred from a person's conduct. This is intended to ensure that express consent is not required prior to every electronic communication. For example, the fact that a person has used electronic mail to communicate an offer to a business should generally be sufficient to allow the business to assume the person's consent to receiving an acceptance at that e-mail address. However, it is not intended that consent should be inferred from an electronic communication that contains an express refusal to deal via electronic means.

Other provisions

Subclause 8(3) makes it clear that the proposed Act does not affect the operation of any other Territory law that states the way in which electronic communications must be made. This is intended to include existing laws that state particular information technology requirements such as software requirements. In addition, the proposed Act is not intended to override other

specific Territory laws that require a person to use electronic communications, regardless of that person's consent.

Subclause 8(4) extends the meaning of giving information, as used in sub-clauses 8(1) and (2) to include the concepts of giving, sending or serving information, or any other like expression. In this context, the concept of service is intended to include administrative service requirements. For example, it would include serving a notice of rescission.

Subclause 8(5) extends the meaning of giving information to ensure that it applies to a wide range of situations. For example, it should be read to include within its meaning giving a statement of reasons. This list, while it contains many of the common terms used when a person is required or permitted to give information, is not intended to be comprehensive. It is a non-exhaustive list and is clearly expressed as not being limited to the examples given within the list.

Where necessary, clause 8 is intended to be read in conjunction with clause 9 which deals with signature requirements. Where a law of the jurisdiction requires or permits a person to provide information in writing and to sign that document, both elements must be satisfied. While a person could use an electronic communication to satisfy the writing requirement, they will not comply with the law unless they also sign the electronic communication. This can only be done by complying with the requirements of clause 9 which deals with signature. To comply with a Territory law that requires information to be in writing and to be signed, a person would need to use an electronic communication with an electronic signature that complies with both clause 8 and clause 9.

Clause 12 provides for exemptions from this clause.

Clause 9 provides that a person who, under a law of the Territory, is required to give a signature may instead use an alternative means of authenticating the person's identity in relation to an electronic communication of information. Generally speaking, for an alternative means of authentication to be acceptable:

- (a) those means must identify the person and indicate the person's approval of the information being communicated; and
- (b) those means must be as reliable as is appropriate for the purposes for which the information is communicated; and
- (c) the recipient of the information must consent to the use of those means.

The conditions contained in paragraph 9(1)(a) focus on two of the basic functions of a signature. The method a person chooses to use to satisfy the signature requirement must both identify the person and their approval of the contents of the electronic communication. In establishing the person's identity the signature method need not necessarily be a unique identifier. Rather, it must identify that person sufficiently for the purposes of that communication.

Some signature technologies, such as digital signatures, will, simply by the nature of the way they operate, also verify the integrity of the electronic communication. However, paragraph (a) only requires that the signature method allows a person to indicate their approval of the information contained in the communication. It does not require the signature method to verify the integrity of the communication. Where relevant, a person's approval of the information communicated will go towards demonstrating the person's intention to apply their signature to the information contained in the electronic communication.

There is no express requirement that the signature method must necessarily be contained in the electronic communication itself. However, the requirement that the signature must indicate the person's approval of the contents of the communication means the signature must be linked with the communication in some way. For example, a signature method may be applied to a communication but then transmitted as a packet of information separate to the communication. If the signature can be shown to indicate the person's approval of the information contained in the communication then the signature will satisfy the requirements in paragraph (a).

Paragraph 9(1)(b) sets out a further requirement that the signature method must be as reliable as appropriate for the purposes for which the information was communicated. This must be determined having regard to all the relevant circumstances at the time the signature method was used to sign the electronic communication. Technological advances may mean that signature technology becomes unsuitable even though it was considered suitable for a particular transaction at an earlier time. Linking this requirement to the time that the signature method is used, is intended to ensure that a signature method that was appropriate at the time it was used is not later rendered invalid. Setting out the basic requirements for a signature method is consistent with the principle of technology neutrality and enables signature methods to meet the appropriate objective standards at the time they are used.

In determining the appropriateness of a signature method a number of legal and technical factors may be taken into account. These factors could include: the function of signature requirements in the relevant statutory environment; the type of transaction; the capability and sophistication of the relevant communication systems; and the value and importance of the information in the electronic communication. This requirement also recognises that different degrees of security are needed for different transactions. It allows a signature method to be chosen that provides the level of security appropriate for the transaction.

This clause does not establish a method for the approval, specification or recognition of particular signature technology. By not endorsing particular electronic signature technologies, the proposed Act does not need to be revised to take account of technological changes. In general, it is inappropriate for legislation to prescribe the use of, or give legislative advantages to, specific types of signature methods such as digital signatures.

It is more appropriate for the market to assess appropriate signature products for their particular purposes rather than have legislation specify acceptable technologies.

Paragraph 9(1)(c) states that recipients of an electronic signature must consent to the use of the electronic signature method. This provision is intended to have a similar purpose and operation to paragraph 8(1)(c).

Subclause 9(2) makes it clear that the proposed Act does not affect the operation of any other Territory law that specifies the use of any electronic signature method, however described. This provision is intended to have a similar purpose and operation to subclause 8(3). The use of different language in paragraphs (a) and (b) to describe the signature method is intended to capture any existing laws that use these terms as well as laws that generally comply with paragraph (c).

Clause 12 provides for exemptions from this clause.

Clause 10 provides that a person who, under a law of the Territory is required or permitted to produce a document in hard copy may instead produce the document in electronic form. Generally speaking, for an electronic document to be acceptable:

- (a) the method of generating an electronic document must provide a reliable means of assuring that the integrity of the information contained in the document is maintained; and
- (b) it must be reasonable to expect that the information contained in the electronic document will continue to be accessible for future reference; and
- (c) the recipient of the document must consent to being given an electronic document.

This provision is intended to cover requirements for original paper documents. Where a law requires the production of information, but does not require the information to be in the form of a paper document, clause 8 would apply and the information can be given by way of an electronic communication.

Due to the ease with which electronic messages can be altered, it is important to determine that the information contained in an electronic communication accurately maintains the integrity of the information that is contained in the paper document. Paragraphs 10(1)(b) and (2)(a) set out the integrity requirement that must be satisfied.

This requirement is intended to ensure that the information in the document has remained complete and unaltered from when it was in the form of a paper document through its translation into the form of an electronic communication. The integrity requirement applies to the method of generating the electronic form of the document. It is not intended to apply to the means by which the document is communicated. The integrity requirement is further explained in subclause 10(3).

The measure of what is a reliable means of assuring the maintenance of the information's integrity should take into account factors such as: the methodical recording of the information; assurance that the information was captured without any omissions; and the protection of the information against alteration. Satisfaction of the integrity requirement is to be assessed in light of all the relevant circumstances at the time the information was communicated. This test is not intended to require a person to retain the document in its original paper form in order to ascertain whether the "reliable assurance" requirement is met.

Paragraphs 10(1)(c) and (2)(b) set out the readily accessible requirement in relation to the production of documents. This test is intended to have the same purpose and operation as the readily accessible test set out in paragraph 8(1)(b).

Paragraphs 10(1)(d) and (2)(c) ensure that a person to whom a document is required or permitted to be produced consents to the production of that document by means of an electronic communication. This provision is intended to have a similar purpose and operation as paragraph 8(1)(c).

Subclause 10(3) specifies that the integrity of information contained in a document can only be maintained if the information remains complete and unaltered, subject to the addition of any endorsement or any immaterial change both of which arise in the normal course of communication, storage or display. The term "endorsement" is intended to have a narrow meaning. It is intended to cover, for example, data that is automatically added by information systems to the beginning and end of communications in order to transmit them (such as routing information on an electronic mail message and other "metadata").

It is also intended to refer to situations where, for example, an electronic certificate is added to the electronic form of the document in the course of its communication to attest to the electronic document's integrity. "Endorsement" is not intended to include additions to the information contained in the document itself, such as annotations, signatures or initials. While the term "immaterial change" would generally allow formatting changes to occur to the information contained in the document, it is not intended to allow formatting changes to be made where the format is an important element of the document itself. For example, if a Territory law required a notice to appear above a person's signature, the electronic form of the document must ensure that the notice appears in the appropriate location.

Subclause 10(4) makes it clear that this clause does not affect the operation of any other Territory legislation dealing with the production of electronic forms of documents. This provision is intended to have a similar purpose and operation as subclause 8(3).

Clause 10 is based upon article 8 of the UNCITRAL Model Law. This article refers to the concepts of both original documents and the production of

original documents. Article 8 of the Model Law is also expressed to apply to certain requirements to retain documents. However, these elements have been dealt with in clause 11.

Clause 12 provides for exemptions from this clause.

Clause 11 provides that requirements for the recording of information, the retention of paper documents and the retention of electronic communications can be satisfied by information in electronic form, subject to certain stated requirements being satisfied. Clause 11 is based upon elements of articles 8 and 10 of the UNCITRAL Model Law.

This provision is not intended to alter any obligations imposed on a person by Territory law in relation to retaining information or documents, including the period of retention. A person must satisfy any and all such obligations.

Readily accessible

Each subclause uses the objective requirement that the information retained must be reasonably readily accessible so as to be useable for subsequent reference. This requirement must be satisfied at the time the information is either recorded, generated in electronic form or retained (depending on the relevant subclause). This requirement is intended to have a similar purpose and operation to the readily accessible test in clause 8.

Regulations specifying the form of data storage device

Each subclause contains a provision that allows regulations to be made in relation to the use of data storage devices. The regulations may specify any requirements for information to be recorded in electronic form on a particular kind of data storage device. A person must comply with any such requirements. The purpose of this provision is to ensure that people can be directed to retain information on certain types of storage devices, such as computer disks or CD ROMs, which may be of higher quality or durability. "Data storage device" is defined in clause 5.

Recording of information

Paragraph 11(1)(b) provides that an electronic form of information can satisfy a requirement under a Territory law to record information in writing if, at the time the information was recorded, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference. Paragraph 11(1)(c) provides that the regulations may require the use of particular data storage devices.

Retention of written document

Paragraphs 11(2)(b) and (c) provide that an electronic version of a document can satisfy a requirement under a Territory law to retain a document in a particular form, article or material where integrity requirements are satisfied

and the readily accessible requirement is satisfied. The readily accessible provision is intended to have a similar purpose and operation to that of paragraph 8(1)(b). Paragraph 11(2)(d) provides that the regulations may require the use of particular data storage devices.

The integrity requirement is set out in subclause 11(3). It is intended to have a similar purpose and operation as subclause 10(3). The provision is intended to allow for the addition of information that is a necessary consequence of the retention process but which does not affect the integrity of the information. This may include, for example, information added to the electronic communication that is necessary in order to identify the message for storage purposes. This provision does not require the retention of this information. Although in many cases the information will not be communicated when it is retained, there may be situations in which a person communicates the information to, for example, a data storage device (such as a server) that is kept at a location remote from the person.

Retention of electronic communications

Subclause 11(4) provides that an electronic communication can satisfy a requirement under a Territory law to retain information that was the subject of the communication. An electronic communication (such as an electronic mail message) can only meet or satisfy such a requirement where the readily accessible requirement and the integrity requirements are satisfied, as set out in paragraphs 11(4)(b) and (c). The integrity requirement is further set out in subclause 11(5), which has a similar purpose and operation to subclause 10(3).

In addition, paragraphs 11(4)(d) and (e) require information to be retained that will identify the origin and destination of the electronic communication and the time of the electronic communication's dispatch or receipt. This information must be retained in a way that satisfies the "readily accessible" requirement. Requiring the retention of this information, where it is available, may be seen as imposing a higher standard than currently exists for the retention of paper documents. However, the purpose of retaining this information is to assist in the identification of the message. This requirement recognises that, unlike paper communications, identifying information may be separate from the message contained within the electronic communication.

Paragraph 11(4)(f) provides that the regulations may require the use of particular data storage devices.

Clause 12 provides for exemptions from this clause.

Clause 12 deals with exemptions from Division 2.2 of Part 2 of the Bill. Subclauses 12(1), (2) and (3) provide that regulations may be made to exempt stated requirements, stated permissions, or stated Territory laws from any or all of the provisions of Division 2.2.

In general, appropriate exemptions will be made where the purpose or intention of a requirement, permission or Territory law cannot be satisfied by the use of electronic communications. It is intended that any exemptions will be listed in regulations. The regulation making powers would be used to add, remove or vary exemptions as necessary.

Division 2.3 - Other provisions relating to laws of the Jurisdiction

Clause 13 recognises that it is important to determine the time and place of dispatch and receipt of information for many existing rules of law. Consequently, this clause provides default rules to determine when, and from where, an electronic communication is sent and when and where it is received. The provision is intended to provide certainty for rules applying to dispatch and receipt of electronic communications.

This clause sets out default rules that apply depending on whether the parties to the communication have agreed otherwise and whether the parties have designated a particular information system for the communication. Parties may agree to vary these rules to determine the time and place of dispatch and receipt in their dealings with each other. Agreement to vary these default rules could occur in, for example, closed systems such as virtual private networks or in relation to particular communications by prior agreement between the parties. These provisions are intended to apply to situations where technology allows the use of third parties to provide time and date-stamping services.

The terms "originator" and "addressee" are used throughout clause 13. These terms are intended to have their ordinary meanings. An originator is someone who causes an electronic communication to be sent, while an addressee is someone who the originator intends to receive the electronic communication.

The receipt provisions only address the issue of whether an electronic communication is received, and not whether it is intelligible or useable by the addressee. Clause 13 is largely based upon article 15 of the UNCITRAL Model Law.

Time of dispatch and receipt

Subclauses 13(1) and (2) establish basic rules for the time of dispatch of an electronic communication. An electronic communication is dispatched when it enters an information system outside the control of the originator. The term "information system" is defined broadly in clause 5. These provisions deal separately with situations where an electronic communication enters a single information system or multiple information systems outside of the control of the originator when it is transmitted, but the basic rule is identical in both provisions. The time when an electronic communication is dispatched is the time when the beginning of the transmission of the electronic communication occurs. It is intended that a commonsense approach be taken in this area.

It is necessary to deal with the situation where an electronic communication enters more than one information system because most communications across the Internet, for example, are routed through multiple information systems. In this situation, dispatch is deemed to occur when the communication enters the first information system outside of the control of the originator. For example, a message sent by the originator may leave his or her system and enter his or her Internet service provider's system from which it is sent, possibly via other systems, to the addressee's information system. In this situation, the time of dispatch is deemed to occur when the communication enters the originator's Internet service provider's system.

Subclauses 13(3) and (4) establish basic rules for the time of receipt of an electronic communication. These rules depend on whether the addressee has told the originator to transmit the electronic communication to a particular information system or not. Where the addressee has given specific directions and the electronic communication is transmitted in accordance with those directions, subclause 13(3) says that the communication is received when it enters the designated information system. As it is expected that a person who has designated an information system will regularly check that information system for messages, the provision effectively deems the communication to have come to the attention of the addressee as soon as it enters the designated system. In all other cases, subclause 13(4) operates to state that the electronic communication will be received when it comes to the attention of the addressee. The term "comes to the attention of the addressee" does not mean that a communication must be read by the addressee before it is considered to be received. An addressee who actually knows, or should reasonably know in the circumstances, of the existence of the communication should be considered to have received the communication. For example, an addressee who is aware that the communication is in their electronic mail 'box' but who refuses to read it, should be considered to have received the communication.

References to time in subclauses 13(1) to (4) should be read as necessarily including the date. The provisions do not require the time of dispatch or receipt to be expressed in Greenwich Mean Time, but in practice, many information systems, for example, take account of differing time zones by referring to Greenwich Mean Time (or Universal Time).

The concept of "entry" into an information system is used in relation to both time of dispatch and receipt. It is intended to refer to the time that an electronic communication becomes available for processing within the information system that it has entered. An electronic communication is not intended to meet the receipt requirement if it has merely reached the addressee's system but failed to enter it.

Place of dispatch and receipt

Subclauses 13(5) and (6) provide default rules, subject to contrary agreement, for the place of dispatch and receipt of electronic communications. These rules are intended to reflect the reality that the physical location of information

systems is often irrelevant to the use and purpose of the electronic communication. The nature of electronic communications is such that the information system can be in a different jurisdiction to where the originator and/or the addressee are located.

This provision does not use the location of the information system to determine where the communication was dispatched from and received, but instead establishes an objective criterion of place of business (or, where there is no place of business, of residence) of the parties to the communication. The rules are intended to provide a more meaningful connection between the originator and addressee and the place of dispatch and receipt instead of allowing the physical location of the information system to be the deciding factor. Further, addressees and originators of electronic communications can use publicly available information to more readily determine a person's place of business or residence, while it may be difficult or impossible to determine the location of an information system.

Subclause 13(5) establishes that the dispatch of an electronic communication is deemed to occur from the originator's place of business and receipt of an electronic communication is deemed to occur at the addressee's place of business.

Subclause 13(6) makes provision for circumstances where the originator or addressee have more than one place of business. In such a situation, a distinction is drawn on the basis of whether there is a place of business that has a closer relationship to the underlying transaction of which the electronic communication forms a part. If there is no place of business that has a closer relationship to the underlying transaction, then the place of dispatch or receipt is deemed to be the principal place of business. The concept of "underlying transaction" is intended to include a transaction that is either actual or contemplated. If the originator or the addressee have no place of business, then paragraph 13(6)(c) provides that the message is deemed to be sent or received, as appropriate, at the place where the originator or addressee ordinarily resides. The term "place of business" is defined in clause 5.

Exemptions

Subclauses 13(7) and (8) allow stated electronic communications and stated laws of the jurisdiction to be exempted from the application of this clause by regulations.

Clause 14 restates the existing common law in relation to the attribution of communications. Subclause 14(1) provides that a person purporting to be the originator of an electronic communication will only be bound by the electronic communication if in fact the electronic communication was sent by that person or with their authority. However, parties to an electronic communication may agree to vary these attribution rules. Clause 13 operates as a default rule where there is no agreement to the contrary. Subclause 14(1) is not intended to be a codification of the common law.

Subclause 14(2) is intended to ensure that the existing law of agency is not affected by the rule set out in subclause 14(1). Instead, the operation of the laws of agency, including the doctrines of apparent and actual authority, is preserved. As recommended by the Electronic Commerce Expert Group, clause 13 does not adopt the relevant article on attribution from the UNCITRAL Model Law.

Subclauses 14(3) and (4) allow stated electronic communications and stated laws of the Commonwealth to be exempted from the application of this clause by regulations.

Division 2.4 - MISCELLANEOUS

Clause 15 provides that the Executive may make regulations to assist in giving effect to the Act. Where the regulations contain exemptions, it is intended that the basic principles of media and technology neutrality underlying the Act are not affected.