

eCommerce Law Recent Australian Developments

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Overview

- **Electronic Transactions Act 1999**
- **Impact of the 2011 amendments**
- ***GetUp v Electoral Commissioner***
- **ASIC endorses electronic proxies**
- **eConveyancing – an update (and a warning!)**

**Electronic Transactions
Act 1999 and
Electronic Transactions
Amendment Act 2011**

Key concepts

- “electronic communication” a communication of information in the form of data, text or images by means of guided and/or unguided electromagnetic energy, or ditto for speech if the speech is processed at its destination by an automated speech recognition system
 - radio, television, telephone (IVR), radar, electricity, light, WiFi, x-rays, infra-red, etc
 - anything which travels at 300,000 km/s!

Key concepts

Definitions

- “information”
 - information in the form of data, text, images or speech
 - does not include other sound (sonar, ultrasonics)
 - intention is to exclude person to person voice communication

Key concepts

- “**originator**” means the person that sent or generated the communication, even if the communication was transmitted by another person (eg the originator’s PA, employer or ISP)
- “**addressee**” means the person with whom the originator intends to communicate (as distinct from any intermediary involved in the communication; query any mis-addressee)

Key concepts

- “**transaction**” broadly defined to encompass a wide range of exchanges of information including dealings connected to the formation and performance of a contract
- “***automated message system***” means any means of automatically initiating or responding to a data message without human intervention

Key concepts

Structure of the Act

- rule of general validity - s 8
- requirement for “writing” - s 9
- requirement for “signature” - s 10
- requirement for “production” of documents - s 11
- requirement for record retention - s 12

General rule

- **Section 8 - A transaction is not invalid merely because it took place wholly or partly by means of one or more electronic communications**
- **Note new broad definition of “transaction”**
- **“Wholly or partly” needed to cover telephone and fax since they are partly non-electromagnetic**

Requirement/permission for information in writing

- **Section 9 - If a person is required to give information in writing, that requirement is taken to have been met if the person gives the information by means of an electronic communication**
- **Analogous enablement for any requirement to give “permission” in writing**

Signature

- **Section 10 - If the signature of a person is required, that requirement is to be taken to have been met in relation to an electronic communication if**
 - a method is used to identify the person and to indicate the person's intention in respect of the information communicated; and
 - the method was as reliable as appropriate for the purposes for which the information was communicated (or the method was provably effective); and
 - the person to whom the signature is required to be given consents to that requirement being met by way of the use of that method

Impact of using the Act

Signatures (section 10)

- digital signature is not just a digitised image of your signature!
- difference between a party's and a witness's signature on a document
- Role of signature not affected as long as the signer's intention is adequately captured and conveyed

Production of documents

- Section 11 –

If a person is required to produce a document that is in the form of paper, an article or other material, that requirement is taken to have been met if the person produces, by means of an electronic communication, an electronic form of the document

Integrity of information

- **Section 11(3) - the integrity of information contained in a document is maintained if and only if the information has remained complete and unaltered, apart from:**
 - the addition of any endorsement; or
 - any *immaterial* change**which arises in the normal course of communication, storage or display**

Issue

Loss of essential attributes

- **Example: depth of imprint of a signature on a cheque - this attribute is lost by two dimensional scanning = MATERIAL change!**
- **Integrity of essential attributes to be preserved at capture, storage and reproduction stages**

Record retention

Section 12(1):

- If a person is required to record information in writing, that requirement is taken to have been met if the person records the information in electronic form

Copyright exemptions

Sections 11(6) and 12(6):

- **The generation/production of an electronic form of a document for the purposes of this legislation does not constitute an infringement of copyright in a work or other subject matter embodied in the document**

Impact of Act

Retention/recording of information (clause 12)

- requirement for record in writing satisfied by electronic record
- readily accessible/useable for subsequent reference
- warning: longevity of storage medium is NOT the issue!

2011 Amendments

- Step through legislation

Impact of Act

Rules on time and place of sending and receipt (unless otherwise agreed between originator and addressee)

- Time of dispatch (new s.14)
 - first enters an information system outside control of originator OR is received by addressee (note new definitions)
 - 2nd limb important re gmail → gmail and the like

Impact of Act

Rules on time and place of sending and receipt

- **Time of receipt**
 - Capable of being retrieved by the addressee
 - when it reaches the addressee's electronic address

Impact of Act

Rules on time and place of sending and receipt

Place of sending/receipt

- place where originator/addressee has its place of business
- if more than one place of business, then whichever has the “closer relationship to the underlying transaction”
- if no place of business, then where the person ordinarily resides, or principal place of business

Attribution

- **Section 15 - unless otherwise agreed between the purported originator and the addressee of an electronic communication, the purported originator... is bound ... only if the communication was sent by the purported originator or with the authority of the purported originator**

Impact of Act

Attribution (unless otherwise agreed between purported originator and addressee)

- Purported originator bound only if communication sent by it or with its authority
- Doesn't affect existing rules relating to agency/authority
- See below re inconsistent attribution rule in s.12 of new [Electronic Conveyancing National Law](#)

Invitations to treat

- New s.15B clarifies that electronic communications containing a proposal to contract (ostensibly an 'offer') but addressed to no-one in particular (eg a webpage or a circular email) are invitations to treat.
- Applies even if orders can be placed through the system (order must be accepted before there's a contract)

Keying errors

- **New s.15D enables input errors to be renounced if the automated system receiving them does not give a human user the opportunity to check and verify what has been input.**

Digital signatures

- *GetUp v. Electoral Commissioner* [2010] FCA 869 was the first case in which the *Electronic Transactions Act* has been judicially considered. Perram J found that the Electoral Commissioner was not entitled to reject applications for electoral enrolment that had been signed by using the mousepad of a laptop as a signing tablet to create a signature which was then embodied in a fax electronically generated by GetUp's software.
- See Ben Wright's video signature: [Webcam Signature.wmv - YouTube.flv](#)

eConveyancing

- *Electronic Conveyancing National Law* enacted in NSW and to be mirrored in each other jurisdiction
- Serious defect in definition and use of “digital signature” – confuses it with a digital certificate
- So called “attribution rule” in s.12 of ECNL is inconsistent with s.15 of ETA and UNCITRAL Model Law - puts impossible burden on purported originator to prove how fraud occurred!

ASIC endorses use of electronic proxies

ASIC formally confirmed that a listed company may accept for general meetings proxy votes that are lodged by electronic means without amending its constitution to expressly permit that

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