

Adoption of the United Nations Convention on the Use of Electronic Communications in International Contracts: A Critique¹

Introduction

This paper discusses the practical implications of the adoption of the *United Nations Convention on the Use of Electronic Communications in International Contracts (UN Convention)*; and addresses the approach taken by Australia to the implementation of Electronic Commerce legislation. The paper will enumerate advantages and potential drawbacks in the adoption of the provisions of the *UN Convention*.

In Australia the discussion is complicated by the fact that uniform national legislation has not been adopted. Instead there are nine legislatures, each with its own *Electronic Transactions Act*: The Commonwealth legislature; six states, New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia; and two territories, Australian Capital Territory and the Northern Territory.

There was some excitement when in May 2010 Australia announced that it would accede to the *UN Convention*. Each of the nine Attorneys General of the Commonwealth, States and territories agreed to pass amending legislation with accession in mind. The excitement stemmed from that fact that Australia would become the third member nation to accede to the *UN Convention* in circumstances where the third accession would trigger, six months after that accession, the commencement of the *UN Convention*. However, only eight of the nine jurisdictions passed the amending legislation, with Queensland delaying with no explanation.²

In the mean time, on 2 August 2012, the Dominican Republic became the third accession, with the result that the *UN Convention* shall become operative on 1 March 2013. Honduras and Singapore had previously acceded to the *UN Convention* on 15 June 2010 and 7 July 2010 respectively.³

The *UN Convention* was adopted by the United Nations General Assembly on 23 November 2005. It builds on the *UN Model Law of Electronic Commerce 1996 (Model Law)*, with the purpose of facilitating international trade by offering practical solutions for issues arising out of the use of electronic communications in the formation or performance of contracts between parties located in different countries. It aims to enhance legal certainty and commercial

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² However in the interim there has been a change of government with a political and social agenda to address for Queensland constituents.

³ Upon ratification, Singapore declared: The Convention shall not apply to electronic communications relating to any contract for the sale or other disposition of immovable property, or any interest in such property. The Convention shall also not apply in respect of (i) the creation or execution of a will; or (ii) the creation, performance or enforcement of an indenture, declaration of trust or power of attorney, that may be contracted for in any contract governed by the Convention.

predictability but does not otherwise purport to vary or create contract law. The *UN Convention* updates the *Model Law* in light of the further knowledge and developments in electronic commerce, and provides for contracts, to give legal certainty in international trade, filling the gaps created since the *Model Law* was developed in 1996.

Ten advantages of the provisions of the UN Convention

1. Unification and Standardisation

As outlined in the preamble to the *UN Convention*; “the adoption of uniform rules to remove obstacles to the use of electronic communications in international contracts, including obstacles that might result from the operation of existing international trade law instruments, would enhance legal certainty and commercial predictability for international contracts and help States gain access to modern trade routes.”

2. Signature: Certainty in the signatures requirement (“proven”)

The 1996 *Model Law* was an excellent document for its time; however it reflects the understanding of the state of electronic commerce as it was in the early 1990s. The 1996 *Model Law* used the expression “as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances”. However, there are a number of circumstances where the simplest electronic signature should appropriately bind the sender. For example, typing a name at the end of an email should be sufficient to bind the sender where it amounts to an acceptance of an offer of contract, even one of considerable value and the sender acknowledges the signature and email. However, this provision allowed the potential defence that the “simple” signature was not appropriate given the circumstances of the value of the contract, even where the sender acknowledges that the signature is genuine. This is rectified with the *UN Convention* which adds as an alternative: “Proven in fact to have fulfilled the functions” of an electronic signature method.

3. Signature: “intended” replaces “approval”

The formulation where reference is made to an indication of the signatory’s “approval” of the information was appropriately improved by replacing this expression with that of the “intention” of the signatory.⁴

4. Extended definitions

⁴ See paragraph 160 Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts.

With the benefit of a decade's experience, new and improved definitions have been included.⁵

5. Time of dispatch

The original test that the time of dispatch when the electronic message “enters a single information system outside the control of the original” contained many flaws. Not least of these is the issue that with modern email systems the sender may very well retain the ability, and thus control, to recall sent emails, even from the recipient's inbox. The new formulation addresses these concerns by the use of the expression “leaves an information system under the control of the originator”.

6. Time of Receipt

The time of receipt was defined as when the electronic message enters the designated information system of the recipient. This formulation is problematic for a number of reasons, not least of which was that the designated information system was not defined. It could be the recipient's personal computer, or Internet Service Provider, or perhaps even where the recipient simply designates the internet. The new formulation simplifies this to when the electronic message is “capable of being retrieved”.

7. Place of dispatch and place of receipt

The provisions for the place of dispatch and place of receipt were uncontroversial; nevertheless, these provisions have been updated.

8. Automatic contracts

A new provision deals with the position where computers, appropriately programmed, enter into contracts automatically. However this provision lacks precision.

9. Input errors rectification

This new provision addresses the position when a natural person makes an input error in an electronic communication exchanged with the automated message system of another party and the automated message system does not provide the person with an opportunity to correct.

10. Expressed intention to apply to contractual circumstances.

The *UN Convention* expressly extends its coverage to contractual circumstances. This was the case under the 1996 *Model Law*, but only by implication under the meaning of the expression “transaction”.

⁵ See Article 4 UN Convention.

Global drawbacks

There exist at least four concerns regarding the use of the *UN Convention*. The first relates to the consent provision contained in paragraph 2 of Article 8. This provision was inserted at this insistence of the US delegation. The result is that the inclusion of a consent provision substantially thwarts functional equivalence.⁶

A second concern relates to the misunderstanding, operation and nature of electronic commerce. It was this lack of understanding that led several jurisdictions to include a consent provision. Similarly several jurisdictions and many organisations require a digital signature where an appropriate functionally equivalent electronic signature would suffice.

Exemptions to the legislation are often overused. The 1996 *Model Law* warns against blanket exemptions. For example in Australia, the Commonwealth Electronic Transactions regulation contains more than 160 exemptions. Some states broadly exempt any document which requires to be attested, authenticated, verified or witnessed.

Last, most jurisdiction misunderstand the nature of the legislation and the operation of the common law (at least for the common law jurisdictions). Where the applicable legislation does not apply or is exempt, this does not equate to a provision that states that the electronic component will be invalid. It merely means that the legislation does not apply; resulting in the application of the common law, which has most stoically upheld electronic commerce principles. I predict that this will have serious repercussions, particularly at the Commonwealth level, where the exemptions are numerous.

The Australian Electronic Transactions Acts

Background to the legislation

The Commonwealth *Electronic Transactions Act 1999* (Cth) was based on the UNCITRAL *Model Law of Electronic Commerce 1996*. It applies to all Commonwealth laws except those specifically exempted by the regulations. In May 1999, the States and Territories agreed to enact parallel legislation based on the Commonwealth Bill. All States and Territories enacted such legislation.⁷ In 2005 the UN General Assembly adopted the *United Nations Convention on the Use of Electronic Communications in International Contracts*. In May 2010 the Standing Committee of Attorneys General agreed to amend the Electronic Transactions Acts

⁶ See Alan Davidson, *A Matter of Consent – How the Consent Requirement Thwarts Functional Equivalence In Electronic Transactions*, (2004) 24 *Proctor*, December, 23.

⁷ See *Electronic Transactions Act 2000* (NSW); *Electronic Transactions (Victoria) Act 2000* (Vic); *Electronic Transactions (Queensland) Act 2001* (Qld); *Electronic Transactions Act 2000* (SA); *Electronic Transactions Act 2011* (WA); *Electronic Transactions Act 2000* (Tas); *Electronic Transactions Act 2001* (ACT); *Electronic Transactions (Northern Territory) Act 2000* (NT).

in conformity with the *UN Convention* for the purpose of accession. The Commonwealth, all States and Territories enacted such amending legislation.⁸ The *UN Convention* facilitates international trade by removing possible legal obstacles or uncertainty in the use of electronic communications in the formation or performance of international contracts.⁹

The object of the legislation is to provide a regulatory framework that facilitates the use of electronic transactions, promotes business and community confidence in their use and enables business and the community to use electronic communications in their dealings with government.

For constitutional reasons the Commonwealth Act provides that the Act applies only “for the purposes of a law of the Commonwealth”: s 8. The corresponding State and Territory legislation has no need for such a restriction. The Acts bind the Crown.¹⁰

Main features of the Electronic Transactions Acts

Validity of electronic transactions

The Electronic Transaction Acts provide that a transaction is not invalid because it took place wholly or partly by means of one or more electronic communications.¹¹ The term “electronic communication is defined broadly to include emails, web-chatting, phone-texting and voice recognition systems. This general rule is subject to other provisions of the Act dealing with the validity of transactions. The regulations may also exclude the general rule in relation to specified transactions and specified laws. The central purpose of the legislation is to provide functional equivalence, that where the electronic version serves the same function as the traditional paper-based requirement, it should be treated equally before the law.

The parties can agree to exclude or modify these default rules. In line with the UNCITRAL principle of technological neutrality, generic expressions such as “electronic communications” are used, so that the Acts have a broader application to facsimiles, instant and SMS messages.

⁸ With the exception of Queensland, which has expressed its intention to do so, although to date it has not provided a timeline.

⁹ See the Explanatory note by the UNCITRAL secretariat on the Convention www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html.

¹⁰ *Electronic Transactions Act 1999* (Cth), s 6; *Electronic Transactions Act 2000* (NSW), s 6; *Electronic Transactions (Victoria) Act 2000* (Vic), s 6; *Electronic Transactions (Queensland) Act 2001* (Qld), s 7; *Electronic Transactions Act 2000* (SA), s 6; *Electronic Transactions Act 2011* (WA), s 6; *Electronic Transactions Act 2000* (Tas), s 4; *Electronic Transactions (Northern Territory) Act 2000* (NT), s 6.

¹¹ *Electronic Transactions Act 1999* (Cth), s 8; *Electronic Transactions Act 2000* (NSW), s 7; *Electronic Transactions (Victoria) Act 2000* (Vic), s 7; *Electronic Transactions (Queensland) Act 2001* (Qld), s 8; *Electronic Transactions Act 2000* (SA), s 7; *Electronic Transactions Act 2011* (WA), s 7; *Electronic Transactions Act 2000* (Tas), s 5; *Electronic Transactions Act 2001* (ACT), s 7; *Electronic Transactions (Northern Territory) Act 2000* (NT), s 7.

Comparative Table of the Electronic Transactions Acts

Jurisdiction	Cth	NSW	Vic	Qld	SA	WA	Tas	ACT	NT
Short Title	1	1		1	1	1	1	1	1
Commencement	2	2	2	2	2	2	2		2
Object	3	3	1&4	3	3	3		3	3
Simplified Outline	4	4	5	4-5	4	4		4	4
Definitions	5	5	3	6	5	5	3	5	5
Crown to be Bound	6	6	6	7	6	6	4		6
Exemptions	7A-7B	6A	6A		6A	7	4A	6A	6A
Validity of electronic transactions	8	7	7	8	7	8	5	7	7
Writing	9	8	8	9-13	8	9	6	8	8
Signature	10	9	9	14-15	9	10	7	9	9
Production of document	11	10	10	16-18	10	11	8	19	10
Retention	12	11	11	19-21	11	12	9	11	11
Time of Dispatch	14	13	13	23	13	13	11	13	13
Time of Receipt	14A	13A	13A	24	13A	14	11A	13A	13A
Place of Dispatch and Receipt	14B	13B	13B	25	13B	15	11B	13B	13B
Attribution of electronic communications	15	14	14	26	14	16	12	14	14
Additional provisions applying to contracts involving electronic communications	15A-15F	14A-14E	14A-14E		14A-14E	17-21	12A-12E	14A-14E	14A-14E
Regulations	16	15	15	27	15	22	13	15	15

Writing

Where a law permits or requires a person to give information in writing, that permission or requirement is taken to have been met if the person gives the information by means of an electronic communication.¹² Generally, for information given by means of an electronic communication to be acceptable, it must be reasonable to expect that the information will continue to be accessible for future reference, and the recipient of the information must consent to being given the information by means of an electronic communication.

Signatures

Where a law requires a person to provide a signature, that requirement is taken to have been

¹² *Electronic Transactions Act 1999* (Cth), s 9; *Electronic Transactions Act 2000* (NSW), s 8; *Electronic Transactions (Victoria) Act 2000* (Vic), s 8; *Electronic Transactions (Queensland) Act 2001* (Qld), ss 9 – 13; *Electronic Transactions Act 2000* (SA), s 8; *Electronic Transactions Act 2011* (WA), s 8; *Electronic Transactions Act 2000* (Tas), s 6; *Electronic Transactions Act 2001* (ACT), s 8; *Electronic Transactions (Northern Territory) Act 2000* (NT), s 8.

met if a method is used to identify that person and to indicate the person's intention in respect of the information communicated.¹³ Additionally the method must be as reliable as is appropriate for the purposes for which the information is communicated, in the light of all the circumstances. This reliability test was included with a view to ensuring the correct interpretation of the principle of functional equivalence.¹⁴ However, an unintended consequence of this reliability test was that a party might repudiate its signature even where his or her identity was not in doubt. The reliability test "should not lead a court or trier of fact to invalidate the entire contract on the ground that the electronic signature was not appropriately reliable if there is no dispute about the identity of the person signing or the fact of signing."¹⁵ Hence the test is qualified with the proviso that where it is proved that the method fulfils its function, then the test is inapplicable. Finally the recipient must consent to the use of this method.

Production of documents

A person who is required or permitted by law to produce a document in hard copy may instead produce the document in electronic form.¹⁶ For an electronic document to be acceptable, the method of its generation must provide a reliable means of ensuring that the integrity of the information is maintained. It must also be reasonable to expect that the information contained in the electronic document will continue to be accessible for future reference. Additionally, the recipient must consent to the provision of an electronic document.

Consent

The inclusion of a consent provision for electronic writing, signature and production provisions, absent from the UNCITRAL *Model Law* on which the legislation is based, has been regarded as a serious weakness. Parties must reach an agreement in advance as to the use of the particular electronic communication. Consent includes consent that can reasonably be inferred from the conduct of the person concerned.

The Explanatory Memorandum to the Commonwealth Act states that the consent provision was based on the Government's "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 Commonwealth law". The consent provision remains even after the amendments to reflect, in part, the consent provision contained in the

¹³ *Electronic Transactions Act 1999* (Cth), s 10; *Electronic Transactions Act 2000* (NSW), s 9; *Electronic Transactions (Victoria) Act 2000* (Vic), s 9; *Electronic Transactions (Queensland) Act 2001* (Qld), ss 14 – 15; *Electronic Transactions Act 2000* (SA), s 9; *Electronic Transactions Act 2011* (WA), s 9; *Electronic Transactions Act 2000* (Tas), s 7; *Electronic Transactions Act 2001* (ACT), s 9; *Electronic Transactions (Northern Territory) Act 2000* (NT), s 9. Note that the Queensland legislation is in the process of amending its legislation to this standard. See generally, *Getup Ltd v Electoral Commissioner* [2010] FCA 869.

¹⁴ See Explanatory note to the United Nations Convention on the Use of Electronic Communications in International Contracts, paragraph 163.

¹⁵ *Ibid.*, 164.

¹⁶ *Electronic Transactions Act 1999* (Cth), s 11; *Electronic Transactions Act 2000* (NSW), s 10; *Electronic Transactions (Victoria) Act 2000* (Vic), s 10; *Electronic Transactions (Queensland) Act 2001* (Qld), ss 16 – 18; *Electronic Transactions Act 2000* (SA), s 10; *Electronic Transactions Act 2011* (WA), s 10; *Electronic Transactions Act 2000* (Tas), s 8; *Electronic Transactions Act 2001* (ACT), s 10; *Electronic Transactions (Northern Territory) Act 2000* (NT), s 10.

UN Convention. The Explanatory Note to the *UN Convention* states that the consent provision has been included in several national laws relating to electronic commerce to “highlight the principle of party autonomy and make it clear that the legal recognition of electronic communications does not require a party to use or accept them.”¹⁷

The fundamental principle underlying the *Model Law*, the *UN Convention* and the Electronic Transaction Acts is functional equivalence. However, the inclusion of the consent provisions weakens the functional equivalence principle and leads to unusual, if not incongruous, results.

Retention of information and documents

The requirement to record information in writing, to retain a document in hard copy or to retain information the subject of an electronic communication may be met by recording or retaining the information in electronic form.¹⁸ To be acceptable it must be reasonable to expect that the information will continue to be accessible for future reference and the method for storing the information must comply with any requirements of the regulations under the Act as to the kind of data storage device on which the information is to be stored. In the case of a document that is required to be retained, additional information as to the origin and destination of the communication, and as to the time that the electronic communication was sent and received, are to be retained and the method for retaining information must provide a reliable means of assuring that the integrity of the information is maintained.

Time of dispatch of electronic communications

An electronic communication is taken to have been *dispatched by the sender* when the electronic communication “leaves an information system under the control” of the sender. However, where the electronic communication has not left an information system under the control of the sender, the time of dispatch is when the electronic communication is received by the addressee. This second circumstance was included in the recent amendments to the Electronic Transactions Acts, and deals with the position where, in certain email systems, the sender retains the ability to recall an email from the recipient; hence it is dispatch when “received”.¹⁹

In *SZAEG v Minister for Immigration* [2003] FMCA 258, the court applied the Commonwealth Act to Australia Post's facsimile service, finding that the sender's document was dispatched when “handed” to an employee of Australia Post.

¹⁷ Explanatory Note to the United Nations Convention on the Use of Electronic Communications in International Contracts, para 131.

¹⁸ *Electronic Transactions Act 1999* (Cth), s 12; *Electronic Transactions Act 2000* (NSW), s 11; *Electronic Transactions (Victoria) Act 2000* (Vic), s 11; *Electronic Transactions (Queensland) Act 2001* (Qld), ss 19 – 21; *Electronic Transactions Act 2000* (SA), s 11; *Electronic Transactions Act 2011* (WA), s 11; *Electronic Transactions Act 2000* (Tas), s 9; *Electronic Transactions Act 2001* (ACT), s 11; *Electronic Transactions (Northern Territory) Act 2000* (NT), s 11

¹⁹ *Electronic Transactions Act 1999* (Cth), s 13; *Electronic Transactions Act 2000* (NSW), s 12; *Electronic Transactions (Victoria) Act 2000* (Vic), s 12; *Electronic Transactions Act 2000* (SA), s 13; *Electronic Transactions Act 2011* (WA), s 13; *Electronic Transactions Act 2000* (Tas), s 11; *Electronic Transactions Act 2001* (ACT), s 13; *Electronic Transactions (Northern Territory) Act 2000* (NT), s 13. Note that the *Electronic Transactions (Queensland) Act 2001* (Qld), s 23 provides that an electronic communication is taken to have been *dispatched by the sender* when it first enters an information system outside the control of the originator. See Explanatory Note to the *UN Convention*, paras 177-178.

Time of receipt of electronic communications

An electronic communication is taken to have been *received by the* addressee when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. Where the addressee has not designated an electronic address the time of receipt is when the electronic communication has become capable of being retrieved by the addressee and the addressee has become aware that the electronic communication has been sent to that address.²⁰ This is presumed to be when the electronic communication reaches the addressee's electronic address,²¹ and overcomes the difficulty of the former provision dealing with the designation on an information system.²² Nevertheless, evidence of the precise time of receipt by servers can be determined from email logs and can affect contract formation and effective service of notices.²³ If the electronic communication has not left an information system under the control of the originator, it is deemed dispatched when the electronic communication is received by the addressee.

In *Reed v Eire* [2009] NSWSC 678, MacReady AJ held that an email address is “an active information system”, and discussed the meaning of received within the meaning of the *Electronic Transactions Act 2000* (NSW). His Honour said evidence of “some kind of email exchange log” is required to determine the time an email was received by the server. Pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW) the plaintiff had 10 business days to provide a payment schedule after being “served” with the payment claim. The payment claim was an attachment to an email sent at 3.06 pm on 6 November 2008 and an email read-receipt recorded the email as read at 5.30 am on 7 November 2008. If served on 6 November, the payment schedule, sent on 21 November, was delivered outside of the 10 business day limit. If served on 7 November, it was delivered within the 10 business day limit. In the absence of such evidence as to when it was received by the server, the court held receipt to be at the time of the read-receipt.

This principle is a partial application of the postal acceptance rule. This rule is an exception to the general rule that there is no contract until the acceptance has been communicated to the offeror. Where the post is the contemplated mode for communication, acceptance of an offer occurs when the letter of acceptance is placed in the postal system: *Henthorn v Fraser* [1892] 2 Ch 77, based on *Adams v Lindsell* (1818) 1 B & Ald 681; 106 ER 250. This is so whether the letter is delivered, delayed or even lost. The postal acceptance rule does not apply to instantaneous communications. However, this 19th century rule has found favour with

²⁰ *Electronic Transactions Act 1999* (Cth), s 13A; *Electronic Transactions Act 2000* (NSW), s 12A; *Electronic Transactions (Victoria) Act 2000* (Vic), s 12A; *Electronic Transactions Act 2000* (SA), s 13; *Electronic Transactions Act 2011* (WA), s 13; *Electronic Transactions Act 2000* (Tas), s 11; *Electronic Transactions Act 2001* (ACT), s 13; *Electronic Transactions (Northern Territory) Act 2000* (NT), s 13. Note that the *Electronic Transactions (Queensland) Act 2001* (Qld), s 24; Queensland Act provides that an electronic communication is deemed received when it enters the designated information system of the addressee.

²¹ See Explanatory Note to the *UN Convention*, para 179.

²² See *Reed v Eire* [2009] NSWSC 678 at [31].

²³ *Reed v Eire* [2009] NSWSC 678 at [31]. See also *Austar Finance v Campbell* (2007) 215 FLR 464 at [18].

21st century electronic commerce depending on how the technology is utilised.

Place of dispatch and receipt of electronic communications

An electronic communication is taken to have been dispatched at the place where the originator has its place of business and to have been received at the place where the addressee has its place of business.²⁴

Attribution of electronic communications

A person is not bound by an electronic communication unless the communication was sent by, or with the authority of, that person.²⁵ Such authority may be given expressly, ostensibly or impliedly in accordance with agency principles. Importantly, the parties may agree to exclude this provision in advance.

This provision of the Acts differs from the UNCITRAL *Model Law* which contains a rebuttable presumption that the purported originator is in fact the originator. The Acts provide that the purported originator is only bound by a communication if the communication was sent by them or with their authority.

The Electronic Commerce Expert Group argued that the UNCITRAL proposal favoured electronic commerce over paper-based communication. It noted that the use of signatures on paper for commerce at a distance (by mail or facsimile) involves the risk of forged or unauthorised signatures but there is no general legislative rule that entitles the addressee to presume that the signature is genuine. If the UNCITRAL proposal was accepted, addressees of electronically signed data messages would be better placed than those that received manually signed paper-based messages.

As with receipt and dispatch, a contrary agreement between the parties can supplant this presumption under the Act. However, the law of agency is preserved.²⁶

²⁴ *Electronic Transactions Act 1999* (Cth), s 13; *Electronic Transactions Act 2000* (NSW), s 12; *Electronic Transactions (Victoria) Act 2000* (Vic), s 12; *Electronic Transactions (Queensland) Act 2001* (Qld), s 25; *Electronic Transactions Act 2000* (SA), s 13; *Electronic Transactions Act 2003* (WA), s 13; *Electronic Transactions Act 2000* (Tas), s 11; *Electronic Transactions Act 2001* (ACT), s 13; *Electronic Transactions (Northern Territory) Act 2000* (NT), s 13.

²⁵ *Electronic Transactions Act 1999* (Cth), s 15; *Electronic Transactions Act 2000* (NSW), s 14; *Electronic Transactions (Victoria) Act 2000* (Vic), s 14; *Electronic Transactions (Queensland) Act 2001* (Qld), s 26; *Electronic Transactions Act 2000* (SA), s 14; *Electronic Transactions Act 2011* (WA), s 14; *Electronic Transactions Act 2000* (Tas), s 12; *Electronic Transactions Act 2001* (ACT), s 14; *Electronic Transactions (Northern Territory) Act 2000* (NT), s 14.

²⁶ *Electronic Transactions Act 1999* (Cth), s 15(2); *Electronic Transactions Act 2000* (NSW), s 14(2); *Electronic Transactions (Victoria) Act 2000* (Vic), s 14(2); *Electronic Transactions (Queensland) Act 2001* (Qld), s 26(2); *Electronic Transactions Act 2000* (SA), s 14(2); *Electronic Transactions Act 2011* (WA), s 14(2); *Electronic Transactions Act 2000* (Tas), s 12(2); *Electronic Transactions Act 2001* (ACT), s 14(2); *Electronic Transactions (Northern Territory) Act 2000* (NT), s 14(2).

Supplementary Notes to the Paper

Notes 1

Links to relevant materials

- [UNCITRAL Model Law on Electronic Commerce](#)
- http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf
- [Electronic Transactions Act 2001](#) (Qld)
- <http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/E/ElectronTrQA01.pdf>
- the [NSW Electronic Transactions Act 2000](#)
- http://www.austlii.edu.au/au/legis/nsw/consol_act/eta2000256/
- the [Victorian Electronic Transactions Act 2000](#)
- <http://www.legislation.vic.gov.au/>
- [Electronic Transactions Act 2000](#) (Tas)
- <http://www.thelaw.tas.gov.au/>
- http://www.austlii.edu.au/au/legis/tas/consol_act/eta2000256/
- [Electronic Transactions Act 2000](#) (SA)
- http://www.austlii.edu.au/au/legis/sa/consol_act/eta2000256/
- [Electronic Transactions Act 2011](#) (WA)
- http://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_12857_homepage.html
- [Electronic Transactions Act 2000](#) (NT)
- http://corrigan.austlii.edu.au/au/legis/nt/consol_act/etta499/

Notes 2

Commencement of Australian Legislation

Cth, 1st stage - 24 March 2000 – 2nd stage 1 July 2001;
Vic - 1 September 2000;
Tas - 1 June 2001;
NT - 13 June 2001;
ACT - 1 July 2001;
NSW - 7 December 2001;
Qld - 1 November 2002;
SA - 7 December 2002;
WA – 2011 Act, 24 October 2011 (2003 Act, 2 May 2003)

Only Queensland is yet to pass amending legislation to otherwise conform to Australia's commitment to adopt the *United Nations Convention on the Use of Electronic Communications in International Contracts*. This was particularly significant internationally, because the Convention only comes into operation when adopted by three member nations; and Australia would have been the third such nation.

Notes 3

Australian cases on legislation to date

Contracting

Ford v La Forrest [2001] QSC 261 (First Queensland case on the *Electronic Transactions Act*) - "Further an acceptance by e-mail is capable of creating legal relations." Affirmed in *Ford v. La Forrest* [2001] QCA 455

Peter Smythe v Vincent Thomas [2007] NSWSC 844 - The courts have had little difficulty in recognising contract formation by electronic means - eBay

L'Estrange v Graucob [1934] 2 KB 394

Reese Bros Plastics Ltd v Hamon-Sobelco Aust Pty Ltd (1988) 5 BPR 11,106

Databank Systems Ltd v Commissioner of Inland Revenue [1990] 3 NZLR 385

Common law

McGuren v Simpson [2004] NSWSC 35 (Does this case state that the law would be the same without the ETA?)

Hume Computers Pty Ltd v Exact International (2007) FCA 478

Wilkens v Iowa Insurance Commissioner (1990) 457 NW 2d

SM Integrated Transware v Schenker Singapore Ltd [2005] 2 SLR 651

Lockheed-Arabia v Owen [1993] 3 WLR 468

Islamic Council of South Australia Inc v Australian Federation of Islamic Councils Inc [2009] NSWSC 211

Signature

J Pereira Fernandes SA v Mehta [2006] EWHC 813

Faulks v Cameron [2004] NTSC 61; (2004) 32 Fam LR 417

Mayne v Robbins [2009] SADC 58 (27 May 2009)

Islamic Council of South Australia Inc v Australian Federation of Islamic Councils Inc [2009] NSWSC 211 (*and Common Law*)

Legal Services Board v Forster [2010] VSC 102 (31 March 2010)

Getup Ltd v Electoral Commissioner [2010] FCA 869 - using a signature tool and submitting the claim form through the website was held to be a reliable tool subject to section 10(1)(b) - The Court identified that section 10(1)(b) does not specify whether the reliability and appropriate method of communication should be relied on the opinion of the sender, the recipient or both. This should be ascertained and applied by the Court.

Grand Pacific Resort [2010] QBCCMCmr 255 (9 June 2010)

The Corporation of the City of Adelaide v Corneloup [2011] SASFC 84 (10 August 2011)

(the provision of the electronic certificate from the Microsoft Outlook email box of the legal practitioner together with the statement of his name, sufficiently identified him - an attachment to an email is a signature)

Luxottica Retail Australia Pty Ltd v 136 Queen Street Pty Ltd [2011] QSC 162 (9 June 2011)

Brown Bros Cabinetworks Pty Ltd v Graham (Civil Claims) [2012] VCAT 70 (20 January 2012) ("giving" – writing – signature – consent)

Consent

Ilich and Baystar Corp Pty Ltd [2004] WASTR 25

Kim v Minister for Immigration [2006] FMCA 1591 (11 October 2006) Question of consent.

Getup Ltd v Electoral Commissioner (2010) FCA 869 – Consent provision does not apply to a Commonwealth entity

Brown Bros Cabinetworks Pty Ltd v Graham (Civil Claims) [2012] VCAT 70 (20 January 2012) (“giving” – writing – signature – consent)

Writing

Lockheed-Arabia v Owen [1993] 3 All ER 641, Mann LJ held that a photocopy constituted “writing” for the purposes of the Acts Interpretation Act 1978 (UK). Importantly at [814] Mann LJ stated that in reaching this finding “an ongoing statute ought to be read to accommodate technological change”.

Wilkins v Iowa Insurance Commissioner (1990) 457 NW 2d 1 (US), “a requirement to keep a written record of an insurance contract was satisfied by an insurer keeping written records on its computer system.”

Grand Pacific Resort [2010] QBCCMCmr 255 (9 June 2010) “The body corporate acknowledges that the applicant submitted his committee nomination form on Friday 31 July 2009 but argues that the applicant did not comply with the requirements for electronic communications contained in the *Electronic Transactions (Queensland) Act 2001* because at the time of sending the email the method of generating the electronic version of the form did not provide a reliable way of maintaining the integrity of the information contained in the document. However, the applicant states that the failure to print out the complete form was attributable to the printer settings on the body corporate manager’s computer and that the complete form printed out after Mr Jewell altered the print settings to “document showing markup” in *Microsoft Office*. On balance I believe it is probable that the nomination form was properly completed but the print version was deficient owing to the body corporate manager’s computer settings.”

Islamic Council of South Australia Inc v Australian Federation of Islamic Councils Inc [2009]

NSWSC 211 “20 The purpose of requiring that notices and the like be in writing is usually at least twofold. One is to ensure that there is a formal act, so that doubt does not attend the intent of the party giving the notice. A second is often to avoid later disputation by ensuring that there is a permanent record of the notice. That said, the concept of “writing” is concerned with the form in which words are used, and not the surface on which they are written. The fundamental distinction is between the written word and the spoken word. While “writing” often contemplates writing on paper, it is nonetheless writing and not speech, if written in invisible ink. It is nonetheless writing, if written in the sky by an aircraft engaging in skywriting. To my mind, it is nonetheless writing, if it appears on a computer screen, as a result of the entry of data into a computer.”

Austar Finance v Campbell [2007] NSWSC 1493 (see Receipt)

Reed v Eire [2009] NSWSC 678 (see Receipt)

Brown Bros Cabinetworks Pty Ltd v Graham (Civil Claims) [2012] VCAT 70 (20 January 2012) (“giving” – writing – signature – consent)

Time of Receipt

Szaeg v Minister for Immigration [2003] FMCA 258

Austar Finance v Campbell [2007] NSWSC 1493 (21 December 2007)

University of New South Wales v Sheikholeslami [2008] FMCA 1323 (24 September 2008)

Reed v Eire [2009] NSWSC 678 (22 July 2009)

Sainju v Minister for Immigration [2009] FMCA 1206 (17 December 2009)

Sainju v Minister for Immigration and Citizenship [2010] FCA 461 (13 May 2010)

American Express Australia Limited v Michaels [2010] FMCA 103 (9 February 2010) – Service of Bankruptcy Notice – Bankruptcy Rules and Time of Receipt provisions

Spiral Tube Makers Pty Ltd v PIHA Pty Ltd [2010] APO 16 (27 August 2010)

Westpac Banking Corporation v Dixon [2011] FMCA 211 (17 June 2011)

Tay v Minister for Immigration & Citizenship [2010] FCAFC 23 – Immigration Rules - Explanatory Memorandum refers to the new sections as providing for “certainty of dispatch and receipt where the Minister gives documents”. The EM, at paragraphs 162 and 163, also makes reference to the new provisions displacing the deemed receipt provisions of the *Electronic Transactions Act 1999* (Cth) because they provide more certainty.

Miscellaneous

Finlayson and Migration Agents Registration Authority [2005] AATA 1127 (16 November 2005) Member - RG Kenny "The application form foreshadowed that the information concerning the CPD points would be provided by 16 May 2005. They were so provided by electronic means and this was acknowledged by MARA. Sections 8 and 9 of the **Electronic Transactions Act 1999** (Cth) make provision for notification by those means." (Para 19)

Ryan and Secretary, Department of Employment and Workplace Relations [2006] AATA 494 (7 June 2006) - the applicant spuriously claimed that s9 *Electronic Transactions Act 1999* permits him to request that all communication, including the issuing of notices, be conducted by email only

Tugun Cobaki Alliance Inc v Minister for Planning and RTA [2006] NSWLEC 396 (14 July 2006) Where the Minister "may be inferred to have indicated that electronic delivery will suffice, then sending a document by email attachment and perhaps placing it on a website and notifying the Minister, is "giving" within the Electronic Transactions Act 2000 (NSW) (s 8 and the definitions of "consent" and "electronic communication" in s 5(1)). Para 111.

SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd [2005] SGHC 58.

Rock Solid Surfaces Pty Ltd v Biesse Group (Australia) Pty Ltd [2011] FCA 42 (Place of business for receipt of email)

Lucke v Cleary [2011] SASCFC 118 (26 October 2011) (Exemptions, mentioned)

Notes 4

Changes to conform to the UN Convention

Electronic Transactions Act 1999 (Cth) - 2011

4 Simplified outline

The following is a simplified outline of this Act:

- 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.
- The following requirements imposed under a law of the Commonwealth can be met in electronic form:
 - (a) a requirement to give information in writing;
 - (b) a requirement to provide a signature;
 - (c) a requirement to produce a document;
 - (d) a requirement to record information;

- (e) a requirement to retain a document.
- For the purposes of a law of the Commonwealth, provision is made for determining the time and place of the dispatch and receipt of an electronic communication.
- 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.
- Part 2A contains provisions applying to contracts involving electronic communications, including provisions (relating to the internet in particular) for the following:
 - (a) an unaddressed proposal to form a contract is to be regarded as an invitation to make offers, rather than as an offer that if accepted would result in a contract;
 - (b) a contract formed automatically is not invalid, void or unenforceable because there was no human review or intervention;
 - (c) a portion of an electronic communication containing an input error can be withdrawn in certain circumstances;
 - (d) the application of certain provisions of Part 2 to the extent they do not apply of their own force.

5 Definitions

- (1) In this Act, unless the contrary intention appears:

addressee of an electronic communication means a 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.

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

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.

place of business means:

(a) in relation to a person, other than an entity referred to in paragraph (b)—a place where the 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; or

(b) in relation to a government, an authority of a government or a non-profit body—a place where any operations or activities are carried out by that government, authority or body.

transaction includes:

(a) any transaction in the nature of a contract, agreement or other arrangement; and

(b) 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

(c) any transaction of a non-commercial nature.

- (2) Before 1 July 2001, in this Act (other than this section):

law of the Commonwealth means a law of the Commonwealth specified in the regulations.

6 Crown to be bound

7 External Territories

7A Exemptions under the regulations

- (1) The regulations may provide that all or specified provisions of this Act do not apply:
- (a) to transactions, requirements, permissions, electronic communications or other matters specified, or of classes specified, in the regulations for the purposes of this section; or
 - (b) in circumstances specified, or of classes specified, in the regulations for the purposes of this section.
- (2) The regulations may provide that all or specified provisions of this Act do not apply to specified laws of the Commonwealth.

7B Other exemptions

Exemptions for courts and tribunals

- (1) Part 2A and Division 2 of Part 2 do not apply to the practice and procedure of a court or tribunal. For this purpose, practice and procedure includes all matters in relation to which rules of court may be made.

Evidence Act 1995 etc. not affected

- (2) Part 2A and Division 2 of Part 2 do not affect the operation of:
- (a) the *Evidence Act 1995*; or
 - (b) a law of a State or Territory that corresponds to the *Evidence Act 1995*; or
 - (c) a law of a State or Territory, or a rule of common law, that makes provision for the way in which evidence is given in proceedings in a court.

Part 2—Application of legal requirements to electronic communications

Division 1—General rule about validity of transactions for the purposes of laws of the Commonwealth

8 Validity of electronic transactions [no change]

Division 2—Requirements under laws of the Commonwealth

9 Writing [no change]

10 Signature

Requirement for signature

- (1) If, under a law of the Commonwealth, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication if:
- (a) in all cases—a method is used to identify the person and to indicate the person's approval intention in respect of the information communicated; and
 - ~~(b) in all cases—having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated; and~~
 - (b) in all cases—the method used was either:
 - (i) as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
 - (ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence; and
 - (c) if the signature is required to be given to a Commonwealth entity, or to a person acting on behalf of a Commonwealth entity, and the entity requires that the method used as mentioned in paragraph (a) be in accordance with particular information technology requirements—the entity's requirement has been met; and
 - (d) if the signature is required to be given to a person who is neither a Commonwealth entity nor a person acting on behalf of a Commonwealth entity—the person to whom the signature is required to be given consents to that requirement being met by way of the use of the method mentioned in paragraph (a).

Certain other laws not affected

- (2) This section does not affect the operation of any other law of the Commonwealth that makes provision for or in relation to requiring:
- (a) an electronic communication to contain an electronic signature (however described); or
 - (b) an electronic communication to contain a unique identification in an electronic form; or
 - (c) a particular method to be used in relation to an electronic communication to identify the originator of the communication and to indicate the originator's approval intention in respect of the information communicated.
- (3) The reference in subsection (1) to a law that requires a signature includes a reference to a law that provides consequences for the absence of a signature.

11 Production of document [no change]

12 Retention [no change]

Division 3—Other provisions relating to laws of the Commonwealth

14 Time of dispatch

- (1) For the purposes of a law of the Commonwealth, unless otherwise agreed between the originator and the addressee of an electronic communication, the time of dispatch of the electronic communication is:
 - (a) 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; or
 - (b) if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator—the time when the electronic communication is received by the addressee.

Note: Paragraph (b) would apply to a case where the parties exchange electronic communications through the same information system.

- (2) Subsection (1) applies even though the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is taken to have been dispatched under section 14B.

The former provision provided that when the electronic communication “enters a single information system outside the control of the originator ... the dispatch of the electronic communication occurs when it enters that information system” or “if an electronic communication enters successively 2 or more information systems outside the control of the originator, then, ... the dispatch of the electronic communication occurs when it enters the first of those information systems.”

14A Time of receipt

- (1) For the purposes of a law of the Commonwealth, unless otherwise agreed between the originator and the addressee of an electronic communication:
 - (a) the time of receipt of the electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee; or
 - (b) the time of receipt of the electronic communication at another electronic address of the addressee is the time when both:
 - (i) the electronic communication has become capable of being retrieved by the addressee at that address; and
 - (ii) the addressee has become aware that the electronic communication has been sent to that address.
- (2) For the purposes of subsection (1), unless otherwise agreed between the originator and the addressee of the electronic communication, it is to be assumed that the electronic communication is capable of being retrieved by the addressee when it reaches the addressee’s electronic address.
- (3) Subsection (1) applies even though the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is taken to have been received under section 14B.

The former provision provided “... if the addressee of an electronic communication has designated an information system for the purpose of receiving electronic communications, then ... the time of receipt of the electronic communication is the time when the electronic communication enters that information system” or “, if the addressee of an electronic communication has not designated an information system for the purpose of receiving electronic communications, then ... the time of receipt of the electronic communication is the time when the electronic communication comes to the attention of the addressee.”

14B Place of dispatch and place of receipt

- (1) For the purposes of a law of the Commonwealth, unless otherwise agreed between the originator and the addressee of an electronic communication:
 - (a) the electronic communication is taken to have been dispatched at the place where the originator has its place of business; and
 - (b) the electronic communication is taken to have been received at the place where the addressee has its place of business.

(2) For the purposes of the application of subsection (1) to an electronic communication:

- (a) a party’s place of business is assumed 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; and
- (b) if a party has not indicated a place of business and has only one place of business, it is to be assumed that that place is the party’s place of business; and
- (c) if a party has not indicated a place of business and has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the transaction; and
- (d) if a party has not indicated a place of business and has more than one place of business, but paragraph (c) does not

apply—it is to be assumed that the party’s principal place of business is the party’s only place of business; and
(e) if a party is a natural person and does not have a place of business—it is to be assumed that the party’s place of business is the place of the party’s habitual residence.

(3) A location is not a place of business merely because that is:

- (a) where equipment and technology supporting an information system used by a party are located; or
- (b) where the information system may be accessed by other parties.

(4) The sole fact that a party makes use of a domain name or email address connected to a specific country does not create a presumption that its place of business is located in that country.

15 Attribution of electronic communications

Part 2A—Additional provisions applying to contracts involving electronic communications

15A Application and operation of this Part

- (1) Subject to subsection (2), this Part applies to the use of electronic communications in connection with the formation or performance of a contract between parties, and so applies:
 - (a) whether some or all of the parties are located within Australia or elsewhere; and
 - (b) whether the contract is for business purposes, for personal, family or household purposes, or for other purposes.
- (2) This Part applies to or in relation to a contract only if:
 - (a) the proper law of the contract is (or would on its formation be) the law of a State or Territory; and
 - (b) at the time the contract is formed, there is no law of that State or Territory in terms substantially the same as this Part.

15B Invitation to treat regarding contracts

- (1) A proposal to form a contract made through one or more electronic communications that:
 - (a) is not addressed to one or more specific parties; and
 - (b) 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.
- (2) Subsection (1) extends to proposals that make use of interactive applications for the placement of orders through information systems.

15C Use of automated message systems for contract formation—non-intervention of natural person

A contract formed by:

- (a) the interaction of an automated message system and a natural person; or
- (b) the interaction of automated message systems;

is not invalid, void or unenforceable on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract.

15D Error in electronic communications regarding contracts

- (1) This section applies in relation to a 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.
- (2) If:
 - (a) a natural person makes an input error in an electronic communication exchanged with the automated message system of another party; and
 - (b) the automated message system does not provide the person with an opportunity to correct the error; the person, or the party on whose behalf the person was acting, has the right to withdraw the portion of the electronic communication in which the input error was made if:
 - (c) the person, or the party on whose behalf the person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication; and
 - (d) the person, or the party on whose behalf the person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.

- (3) The right of withdrawal of a portion of an electronic communication under this section is not of itself a right to rescind or otherwise terminate a contract.
- (4) The consequences (if any) of the exercise of the right of withdrawal of a portion of an electronic communication under this section are to be determined in accordance with any applicable rule of law.

Note: In some circumstances the withdrawal of a portion of an electronic communication may invalidate the entire communication or render it ineffective for the purposes of contract formation (see paragraph 241 of the UNCITRAL explanatory note for the United Nations Convention on the Use of Electronic Communications in International Contracts, done at New York on 23 November 2005).

15E Application of Act in relation to contracts

- (1) Subject to subsection (2), the provisions of sections 8 and 14 to 14B apply to:
 - (a) a transaction constituted by or relating to a contract; or
 - (b) an electronic communication relating to the formation or performance of a contract;in the same way as they apply to a transaction or electronic communication referred to in those sections, and so apply as if the words “For the purposes of a law of the Commonwealth” and “under a law of the Commonwealth” were omitted.
- (2) However, this Part (including subsection (1)) does not apply to or in relation to a contract to the extent that:
 - (a) Part 2 would of its own force have the same effect as this Part if this Part applied; or
 - (b) a law of a State or Territory (that is in substantially the same terms as Part 2) would of its own force have the same effect as this Part if this Part applied.

Note: This section applies provisions of Part 2 to contracts or proposed contracts to the extent (if any) that those provisions do not apply merely because they are expressed to apply in relation to “a law of the Commonwealth”. This section also disapplies the provisions of Part 2A to the extent that Part 2 would apply of its own force. An example where Part 2 may not apply of its own force is where a contract is being negotiated in a State or Territory from a supplier located overseas.

15F No interference with powers and functions of another jurisdiction

- (1) If:
 - (a) apart from this subsection, this Part would operate so as to prevent or interfere with the exercise of the powers, or the performance of the functions or duties, of the government of a State; and
 - (b) that operation would be invalid because of the Constitution;this Part does not so operate.
- (2) If:
 - (a) apart from this subsection, this Part would operate so as to prevent or interfere with the exercise of the powers, or the performance of the functions or duties, of the government of the Australian Capital Territory or the Northern Territory; and
 - (b) that operation would be invalid because of the Constitution if it were assumed that the Territory were a State;this Part does not so operate.

Part 3—Miscellaneous

16 Regulations

17 Transitional provisions—*Electronic Transactions Amendment Act 2011*

- (1) Regulations made under this Act before the commencement of section 7A and in force immediately before that commencement continue in force as if that section had been in force when they were made.
- (2) Subject to subsection (3):
 - (a) section 15B extends to proposals made before the commencement date; and
 - (b) section 15C extends to actions carried out before the commencement date; and
 - (c) section 15D extends to statements, declarations, demands, notices or requests, including offers and the acceptance of offers, made or given before the commencement date.
- (3) Subsection (2) and Part 2A do not apply in relation to contracts formed before the commencement date.
- (4) In subsections (2) and (3), *commencement date* means the date of commencement of Part 2A.

Notes 5

Consent Provision Considered

Ilich v Baystar Corporation Pty Ltd [2004] WASTR 25

Submission to Referee - "Consent" includes consent that can be reasonably inferred from the conduct of the person concerned. Section 8(1) ETA is not definitive in relation to when consent must exist. Paragraph 8(1)(a) ETA specifically refers to 'at the time the information was given' in relation to the expectation the communication was reasonably accessible but this would appear not to qualify paragraph 8(1)(b) ETA. However, both the 'giving' of the information and the 'consent' are expressed in the present tense, which may well indicate a legislative intention that, at the time the information was given, consent must exist. In other words, subsequent words or conduct are, strictly, irrelevant." (para 52)

Referee stated: "However, in the present case, other than a subsequent submission that Baystar did consent to the by-law, there is **no evidence whatever** in the Minutes of the 2004 EGM or in any of the other papers provided to me **that such prior consent was given**. On that basis, the resolution was of no effect. The Respondent has made much of the technical requirements that the Applicants should have complied with in serving on the Strata Company their written notice of their dissenting vote. If there is any validity in those submissions, the same tests must be applied in relation to the **"consent in writing" required from Baystar before** the s 42(8) by-law was voted on." (Para 60)(Emphasis added)

Comments - the Referee should have held that in the absence of consent, the ETA did not apply. He should then apply common law considerations. The ETA does not provide that in the absence of consent it shall not be "writing", merely that if there is consent the ATA will apply and that it will be acceptable.

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