

CLAUSE NOTES

ELECTRONIC TRANSACTIONS AMENDMENT BILL 2010

Clause 1: Short Title

Clause 2: Commencement date

This clause provides for the commencement of this Act on a day or days to be proclaimed.

Clause 3: Principal Act – *Electronic Transactions Act 2000*

Clause 4: Section 3 amended (Interpretation)

Section 3 is amended to include additional definitions of the terms used in the amending provisions. These terms include:-

“addressee”

This new definition provides that an “addressee” is the person with whom the originator intends to communicate by transmitting the electronic communication, as opposed to any person that may receive, forward or copy the communication during the course of transmission. It should be interpreted to cover both natural persons and corporate bodies or other legal entities.

“automated message system”

This definition confirms that the absence of human intervention does not preclude contract formation, and whilst a number of reasons may otherwise render a contract invalid, the sole fact that automated message systems were used for the purposes of contract formation will not deprive the contract of legal effectiveness, validity or enforceability. The definition is intended to clarify that an automated message system differs from an information system in that its primary use is to facilitate exchanges leading to contract formation.

The critical element of the definition is the intention to cover transactions that lack human intervention on either one, or both, sides of the transaction. For example, if a party orders goods via a website, the order may be taken and confirmed by the vendor's automated message service.

“originator”

This definition is intended to clarify that the principal Act deals with the relationship between originator and addressee, but not the relationship concerning any intermediary such as servers or web hosts.

This definition provides that an “originator” is the person that generated the communication,

even if the communication was transmitted by another person. The intention is to eliminate the possibility that a recipient who merely stores a data message might be regarded as an originator. It should be interpreted to cover both natural persons and corporate bodies or other legal entities.

“performance”

This definition provides that performance of a contract also includes non-performance of the contract.

“place of business”

This definition updates the definition of *place of business* in the principal Act to include a place where a person maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location. Under the amendment, a party’s place of business is assumed to be the location indicated by the party, unless another party demonstrates that the party making the indication does not have a place of business at that location. If a party has not indicated a place of business and has multiple places of business, the place of business is that which has the closest relationship to the underlying transaction. A location is not a place of business merely because that is where the equipment and

technology supporting an information system used by a party are located.

“*transaction*”

This amendment extends the definition in the principal Act to include 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.

Clause 5: Section 4A inserted

This amendment extends the regulation-making powers in the principal Act so that regulations may be made to exempt certain transactions, electronic communications and other matters from all or specified provisions of the principal Act and to provide that all or specified provisions of the principal Act do not apply to specified laws of Tasmania.

Clause 6: Section 5 amended (Validity of electronic transactions)

Section 5 is amended by omitting regulation-making powers that are being transferred to section 4A.

Clause 7: Section 7 amended (Signatures)

Currently, the requirement for a signature of a person is met in an electronic communication if a method is used to identify the person and to indicate the person's approval of the information communicated.

This amendment provides that rather than indicating the person's *approval* of the information, it is sufficient that the signature in the electronic communication indicates the person's intention in respect of the information communicated.

The amendment is intended to clarify that whether or not a signature in an electronic communication is reliable should be decided in light of all the circumstances, including any relevant agreement, to prevent a party to a transaction from repudiating its signature in bad faith.

Clause 8: Section 10 is repealed

The regulation making powers have been transferred to section 4A

Clause 9: Section 11 substituted

This amendment takes into account a number of practical aspects of electronic communications, including that:

- they may be sent and received within one information system;
- an e-mail communication may be virtually instantaneous;

- it is possible for e-mails to be 'lost' or delayed; and
- that security measures such as firewalls and filters may also delay or even prevent delivery.

This amendment provides that an electronic communication 'is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address. It does not go so far as to say that that presumption equates to knowledge. The question of whether a communication has been 'communicated' to the offeror such as to give rise to binding relations would remain to be determined under the common law, depending on the particular facts.

In all cases the parties can agree to alternative arrangements.

Section 11A Time of receipt

Proposed subsection 11A(3) provides that the default rules for determining the time of receipt will apply even if the information system supporting the electronic address is located in a different from the place where the electronic communication is taken to have been received.

In all cases the parties can agree to alternative arrangements.

Section I I B Place of dispatch and place of receipt

This section is intended to provide that a party's place of business is presumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location.

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

This section is to clarify that the location of parties is to be determined by the place of business rather than the location of an information system - which may be in a different location or jurisdiction to the business.

Subsection 11B(3) provides that the location of an information system will not be the determinant element in deeming the place of business, which will be the place of receipt of an electronic communication, and often contract formation. The location of an information system can be one - but not necessarily the most significant factor to consider in determining the place of business. There must be some reasonable connection between the party, and what is deemed to be their place of business.

A cautious approach is required when considering peripheral information related to electronic messages such as Internet Protocol addresses, domain names or the geographic location of information systems in determining a place of business, as these elements provide little, if any, conclusive value for determining the physical location of the parties.

The location of equipment and technology supporting an information system, or the places from where the information system may be accessed by other parties, do not by themselves constitute a place of business. However, a court or arbitrator may take into account the assignment of a domain name as a possible element, among others, to determine a party's location where appropriate.

Clause 10: Section 12 amended (Attribution of electronic communications)

Section 12 is amended by omitting regulation-making powers that are now included in section 4A.

Clause 11: Part 2A is inserted

The following header to Part 2A is inserted:
PART 2A – ADDITIONAL PROVISIONS
APPLYING TO CONTRACTS INVOLVING
ELECTRONIC COMMUNICATIONS

Section 12A Application and operation of this Part

Section 12A provides that the provisions apply to contracts involving electronic communications where the proper law of the contract is the law of Tasmania, whether or not some or all of the parties are located in Australia or elsewhere and whether the contracts are for business, personal or other purposes.

Section 12B Invitation to treat regarding contracts

Section 12B provides that a proposal to form a contract made through an electronic communication that is not addressed to a specific party and is generally accessible to parties making use of information systems is to

be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

Section 12C Use of automated message systems for contract formation – non-intervention of natural person

Section 12C provides that a contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, is not invalid, void or unenforceable merely because automated message systems were used.

Section 12D Error in communications regarding contracts

Section 12D enables a natural person who makes an input error in an electronic communication exchanged with the automated message system of another party to withdraw the portion of the electronic communication in which the input error was made if the person notifies the other party of the error as soon as possible and if the person has not received any material benefit or value from any goods or services received from the other party.

Section 12E Application of Act in relation to contracts

Section 12E deals with the application of the principal Act to certain contracts.

Clause 12: Section 13A is inserted

Section 13A provides for the transitional operation of specified provisions of this amendment Act and defines the meaning of the term “commencement date” for the purpose of this section.

Clause 13: Repeal of this Act.