

SECOND READING SPEECH

ELECTRONIC TRANSACTIONS AMENDMENT BILL 2010

Mr Speaker, the purpose of the *Electronic Transactions Amendment Bill 2010* is to incorporate internationally recognised legal standards into the *Electronic Transactions Act 2000*.

The Bill aims to increase certainty for international and domestic transactions conducted by an electronic medium and encourage the growth of electronic commerce, such as online retailing.

The Bill strengthens our existing regime by recognising the use of automated message systems in contract formation and clarifying the rules in relation to invitations to treat, the determination of a party's location in an electronic environment, the time and place of dispatch and receipt of electronic communications, and electronic signatures.

The basis of Tasmania's current electronic transactions regime is the 1996 UNCITRAL Model Law on Electronic Commerce, which was developed by the United Nations Commission on International Trade Law.

The Commonwealth and all other States and Territories have electronic transactions Acts based on that Model Law. Tasmania passed its version in 2000.

The United Nations Convention on the Use of Electronic Communication in International Contracts, which was adopted

by the United Nations in 2005, updates many of the concepts in the 1996 Model Law.

These updates primarily are a result of a better understanding of the use of the internet in electronic transactions in the intervening decade.

It is the first United Nations Convention addressing legal issues arising from the digital economy.

As with the 1996 Model Law, the United Nations Convention's primary aim is to facilitate international trade by enhancing legal certainty and commercial predictability when electronic communications are used in relation to international contracts.

Its purpose is to facilitate international trade by removing possible legal obstacles or uncertainty in the use of electronic communications in the formation or performance of contracts between parties located in different countries.

In 2008, the Standing Committee of Attorneys-General agreed to the development of a public consultation paper on the Australian Government's proposal to accede to the Convention.

The paper discussed the differences between Australia's domestic electronic transactions laws and the United Nations Convention, and the amendments that would be required to update Australia's laws to bring them into line with the Convention.

The paper specifically sought comments on whether the Convention rules should also apply to domestic contracts to avoid having different regimes for domestic and international contracts. Nine submissions were received.

All submissions were generally supportive of Australia's accession to the United Nations Convention.

Subsequently, in 2009, the Standing Committee agreed to the drafting of a model Bill to implement the rules that apply under the United Nations Convention in State and Territory legislation.

At the May 2010 meeting, Ministers agreed to update their uniform electronic transactions legislation to adopt the model Bill within 12 months.

It is proposed that Australia will accede to the Convention when legislation based on the model Bill is enacted in each jurisdiction.

I am delighted to inform the House that Tasmania is the second jurisdiction to introduce such legislation.

The amendments in this Bill do not significantly change Tasmania's electronic transactions regime however, they will ensure that our laws keep pace with developments in this rapidly evolving area of law.

The amendments will enhance cross-border online commerce and increase certainty for international trade by electronic

means, thereby encouraging further growth of electronic contracting.

Where the Bill overlaps with our current regime, the amendments are of an updating or refining nature.

The additional rules proposed in the Bill clarify traditional rules on contract formation to address the needs of electronic commerce and will provide legal certainty on those matters.

The main changes proposed are
firstly, new rules that recognise the use of automated message systems;
secondly, a new rule about what is an 'invitation to treat' in the electronic context;
thirdly, minor amendments to the electronic signature provisions and other form requirements;
fourthly, clarification of the location of parties' rules; and
fifthly, minor amendments to the default rules for time and place of dispatch and receipt.

A careful assessment has been undertaken to ensure that the effects of the proposed amendments do not unduly disturb settled contract law or domestic practice since the enactment of the *Electronic Transactions Act* in 2000.

The Bill does not purport to vary or create contract law. Rather, it includes a range of measures directed at improving the general operation of the current electronic transactions regime.

The United Nations Convention reflects the view that party autonomy is vital in contractual negotiations.

Nothing in this Bill affects the principle that contracting parties should be free to agree on matters affecting the formation and performance of a contract between them.

Although the United Nations Convention is concerned only with international business contracts, the proposed amendments in this Bill will apply to contracts concluded for personal, family or household purposes.

This will ensure commonality of rules between domestic and international contracts involving electronic communications, and therefore will avoid problems that may arise if there were two different regimes.

In the domestic sphere, these proposed provisions will supplement existing law by offering protection to consumers who are parties to contracts.

I now turn to key elements of the Bill.

The Bill amends the current default rules of time and place of dispatch and receipt of electronic communications.

The amendments reflect the Convention's formula, and provide that the time of dispatch of an electronic communication is the time when the electronic communication leaves an information system, and the time of receipt of an 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.

The Bill also updates the definition of both "place of business" and "transaction" so as to clarify the use of these terms in the context of contract formation and execution across an electronic medium.

The Bill makes minor amendments to the electronic signature provisions and other form requirements.

The current regime provides that an electronic signature must be capable of identifying the signatory and indicating the signatory's approval of the information contained in the electronic communication.

However, there are instances in which the law requires a signature, but that signature does not have the function of indicating the signing party's approval of the information contained in the electronic communication, for example, notarisaton, attestation by commissioner of oaths and witnessing of documents.

New section 7 therefore provides that an electronic signature must be capable of identifying the signatory and indicating the signatory's intention in respect of the information contained in the electronic communication.

It removes the notion that a signature implies a party's approval of the entire content of the communication to which the signature is attached.

The Bill also provides legal recognition of electronic signatures irrespective of the technology used.

A new Part 2A is inserted into the principal Act to clarify aspects of the current law pertaining to the formation of contracts involving electronic communications.

A new section 12A provides that the new part 2A is applicable to electronic contracts, where Tasmanian contract law applies and where some or all of the parties reside in Australia.

The contract may be for business, personal or other purposes.

It has become commonplace for consumers to order goods through websites, email messages, online order forms and virtual shopping carts. The Bill transposes the accepted notion of offer into an electronic environment.

Therefore, a vendor that advertises its goods or services on the internet or through other open networks should be considered merely to be inviting those who access the site to make offers.

Thus an offer of goods and services made through the internet will not prima facie constitute a binding offer.

This means that a vendor has not relinquished the right to refuse to sell to a customer including, for example, where the trader has already sold all the goods.

A new section 12B confirms that a proposal to enter into a contract made by electronic means to the world at large is to be treated as an invitation to make an offer, unless there is a clear indication by the trader of an intention to be bound.

The purchase of goods through a website is often automated and therefore handled by a computer program, rather than the vendor themselves.

This Bill recognises this growing practice and inserts a definition of "automated message system".

The critical element of the definition is that it covers transactions that lack human intervention on one or both sides of the transaction.

A new section 12C confirms that the absence of human intervention does not preclude the formation of a contract.

Unlike face-to-face transactions, the opportunity to detect or correct a mistake made during an online transaction is limited because of the automated nature of the transaction.

A customer making an online purchase may enter the wrong quantity of goods or incorrectly select an item. In most websites the customer has an opportunity to detect and rectify the mistake through a confirmation notice before the transaction is complete.

A new section 12D introduces a certain level of protection for consumers if a website does not provide an opportunity for

correction. It enables a person who makes an input error, which has been dealt with by an automated message system, to withdraw portion of the electronic communication in certain circumstances.

To take advantage of the provisions the person must notify the other party of the error as soon as possible, and must not have received any material benefit or value from any goods or services received from the other party.

New section 12D also clearly sets out that the right to withdraw portion of an electronic communication under this section does not, in itself, confer a right to rescind or otherwise terminate a contract.

Convention

The Government recognises the need to support business operations in the global economy and the importance of maximising technology to promote international legal and business engagement.

The Bill will remove possible legal obstacles and uncertainty, and ensure that Tasmania's e-commerce laws reflect up-to-date, internationally recognised legal standards.

The Government is committed to ensuring that Tasmania's laws meet the challenges of existing, new and emerging technology.

I commend the Bill to the House.

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 14A Time of receipt

Proposed subsection 14A(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 14B 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 14B(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.

FACT SHEET

ELECTRONIC TRANSACTIONS AMENDMENT BILL 2010

This Bill makes various amendments to the *Electronic Transactions Act 2000* to:

- (i) take account of the existence of an ISP intermediary in the process of contractual formation on the internet, which has potential to confuse the issues of when information is sent or received and evidence of those actions
- (ii) determine that an unaddressed proposal to form a contract is to be regarded as an invitation to make an offer rather than an offer which if accepted would form a binding contract
- (iii) determine that a contract formed automatically is not invalid, void or unenforceable because there was no human review or intervention involved
- (iv) ensure that an input error can be withdrawn in certain circumstances
- (v) deal with circumstances where errors occur in electronic communications regarding contract formation, including in the giving of notices, requests and demands.

The Bill updates Tasmanian law to take account of what has been learned over the last decade of using the internet in electronic transactions. Its amendments support Tasmanian businesses participating in e-commerce by adopting up-to-date, internationally recognised legal standards.