

ELECTRONIC TRANSACTIONS BILL 2011

First Reading

Bill read a first time, on motion by **Mr C.C. Porter (Attorney General)**.

Explanatory memorandum presented by the Treasurer.

Second Reading

MR C.C. PORTER (Bateman — Attorney General) [12.16 pm]: I move —

That the bill be now read a second time.

The purpose of the Electronic Transactions Bill 2011 is to ensure that electronic legislation in Western Australia reflects internationally recognised legal standards. 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 bill will also repeal the existing Electronic Transactions Act 2003. The basis of this current electronic transactions regime is the 1996 United Nations Commission on International Trade Law—UNCITRAL—the Model Law on Electronic Commerce. The commonwealth and all other states and territories have had, until recently, electronic transactions acts based on this 1996 model law. 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.

The Electronic Transactions Act 2003 adopts for Western Australia the 1996 UNCITRAL model law and the bill adopts for Western Australia the new 2005 UN convention. As with the 1996 model law, the United Nations 2005 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 2005 convention. The paper discussed the differences between Australia's domestic electronic transaction 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 2005 convention. The paper specifically sought comments on whether the convention rules should apply also 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, and none addressed the issue of applying the convention's rules to domestic contracts. Subsequently, in 2009, the standing committee's ministers agreed to the drafting of a model bill to implement obligations under the United Nations convention. 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 2005 convention when legislation based on the model bill is enacted in each jurisdiction. Appropriate legislation has already passed the Parliaments of New South Wales and Tasmania but has not yet been proclaimed.

The present bill does not significantly change Western Australia's electronic transactions regime. However, the bill 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 the Electronic Transactions Act 2003, 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 bill do not unduly disturb settled contract law or domestic practice since the enactment in 2003 of the present legislation. 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 existing electronic transactions regime. The 2005 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 2005 United Nations convention is concerned only with international business contracts, the 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. Part 2, “Application of legal requirements and authorisations to electronic communications”, is the same as part 2 of the existing act, subject to several minor differences. New definitions are included for “addressee”, “automated message system”, “originator” and “performance”. The amendments made 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 existing definitions of “place of business” and “transaction” are amended. The amendments clarify the use of these terms in the context of contract formation and execution across an electronic medium. In addition, the existing exemptions provision in section 12 is amended and moved so that it is in part 1 of the bill and therefore allows exemptions from the legislation to be made to the act rather than just part 2. There are also several minor drafting changes. For example, in clause 10, “Signatures”, the words “approval of” are deleted and the words “intention in respect of” are inserted in their place.

The major amendment to part 2 is in relation to the existing division 3, “Other provisions relating to laws of this jurisdiction”. Division 3 presently has two clauses—clause 13, “Time and place of dispatch and receipt of electronic communications”, and clause 14, “Attribution of electronic communication”. The proposed division has four clauses which make a more rational separation of the four matters covered by the division. Clause 13 deals with time of dispatch; clause 14 with time of receipt; clause 15 with place of dispatch and place of receipt; and clause 16 with attribution of electronic communications. These are essentially default rules dealing with electronic communications, and the changes that have been made are only minor.

Part 3 of the bill is the new legislation applicable to electronic contracts when Western Australia contract law applies and when 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.

Clause 18 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 has therefore inserted the definition of “automated message system” in clause 5 of the bill. The critical element of the definition is that it covers transactions that lack human intervention on one or both sides of the transaction. Clause 19 confirms that the absence of human intervention does not preclude contract formation.

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. However, if no confirmation screen exists, the customer does not have an opportunity to detect and rectify the mistake. Clause 20 introduces a certain level of protection for consumers if a website does not provide an opportunity for correction, as it enables a person who makes an input error, which has been dealt with by an automated message system, to withdraw the portion of the electronic communication in certain circumstances. However, 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. The clause also clearly sets out that the right of withdrawal of a portion of an

electronic communication under this section does not, in itself, confer a right to rescind or otherwise terminate a contract.

The bill proposes 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, notarisation, attestation by commissioner of oaths and witnessing of documents. Clause 10 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. However, 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.

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 Western Australia's e-commerce laws reflect up-to-date and internationally recognised legal standards. The government is committed to ensuring that Western Australia's laws meet the challenges of existing, new and emerging technology.

I commend the bill to the house.

Debate adjourned, on motion by **Mr D.A. Templeman**.