

EXPLANATORY MEMORANDUM AND CLAUSE NOTES

ELECTRONIC TRANSACTIONS BILL 2010

EXPLANATORY MEMORANDUM

Entering contracts by way of electronic communications in Western Australia is presently regulated by the *Electronic Transactions Act 2003* (WA). The basis for that Act is the 1996 United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce. In 2009, the Standing Committee of Attorneys General agreed to the drafting of a model Bill to implement the rules that apply under the 2005 United Nations Convention on the Use of Electronic Communication in International Contracts in State and Territory legislation. The 2005 United Nations Convention reflects the view that party autonomy is vital in contractual negotiations. 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.

At the May 2010 meeting, Ministers agreed to update their uniform electronic transactions legislation to adopt the model Bill based on the 2005 UN Convention 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.

The amendments in this Bill will not significantly change Western Australia'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. 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. Where the Bill overlaps with the *Electronic Transactions Act 2003* (WA), the amendments are of an updating or refining nature.

The main changes proposed are:

1. new rules that recognise the use of automated message systems;
2. a new rule about what is an 'invitation to treat' in the electronic context;
3. minor amendments to the electronic signature provisions and other form requirements;
4. clarification of the location of parties' rules; and
5. 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 2003* (WA).

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. 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. 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.

CLAUSE NOTES

Part 1 - Preliminary

Clause 1. Short title

The short title of the Act will be the *Electronic Transactions Act 2010*.

Clause 2. Commencement

Proposed sections 1 and 2 of the Act will come into operation on assent. The commencement of section 26 is dependent on the commencement of operation of the *Criminal Code Amendment (Identity Crime) Act 2010*, section 5. If that Act commences on or before the day that section 24 of the Bill (which repeals the existing *Electronic Transactions Act 2003 (WA)*) then section 26 commences on the day that section 24 commences. Otherwise, section 26 commences when *Criminal Code Amendment (Identity Crime) Act 2010*, section 5, commences. The remainder of the Bill will come into operation on a day, or days, to be fixed by proclamation.

Clause 3. Objects

Clause 3 is identical to section 3 of the *Electronic Transactions Act 2003 (WA)* with the exception that the Notes that were formerly at the end of the section 3 are deleted. The Notes as effectively reproduced as clause 4 of the Bill. Clause 3 (as before) lists the four objects of the proposed Act and notes how these objects are to be achieved. The primary object of the proposed Act is to recognise the importance of the information economy to the future of Australia and to provide a regulatory framework. The proposed Act also facilitates the use of electronic communications, promotes business and consumer confidence in their use and enables business and the community to use electronic communications with the same confidence with which written communications are used.

Clause 4. Simplified outline

Clause 4(1) states that proposed section 4 contains a simplified outline of the proposed Act, intended as a guide to the general scheme and effect of the Act.

Clause 4(2) effectively reproduces the Notes that were at the end of section 3 of the *Electronic Transactions Act 2003 (WA)*. Clause 4(2) provides that with certain exceptions, a transaction is not invalid because it took place electronically. That is, subject to certain exclusions, an electronic communication has the same validity as a written communication. The things that can be done electronically with the same confidence as applies in written communications include giving information in writing, providing signatures, producing a document, recording information and retaining a document. The proposed Act also provides rules for determining the time and place of dispatch of electronic documents and the authority of the originator of the electronic communication.

Clause 4(3) advises readers that the proposed Act also contains provisions applying to electronic contracts including unaddressed proposals to form a contract.

Clause 5. Terms used and status of notes

Clause 5(1) sets out the definitions of terms used in the proposed Act as follows:

“**addressee**” is a new definition that was not in the *Electronic Transactions Act 2003* (WA). The term means a person who is intended by the originator to receive an electronic communication, but does not include an intermediary;

“**automated message system**” is another new definition that was not in the *Electronic Transactions Act 2003* (WA). It means a computer program or an electronic or automated means used to initiate an action or to respond to a message, without the intervention of a natural person;

“**consent**” is a definition used in the *Electronic Transactions Act 2003* (WA). It is defined to include consent which can reasonably be inferred from the conduct of the person. However, any consent which is given subject to conditions is excluded unless the conditions are complied with;

“**data**” is defined to include the whole or part of a computer program within the meaning of the *Copyright Act 1968* (Cth). The definition is also in the *Electronic Transactions Act 2003* (WA);

“**electronic communication**” is defined to mean a communication of information in the form of data, text or images by means of guided or unguided electromagnetic energy. The term also includes sound communications where the sound is processed at its destination by an automated voice recognition system;

“**information**” is defined to mean information in the form of data, text, images or sound. The definition is carried over from the *Electronic Transactions Act 2003* (WA);

“**information system**” is a system for generating, sending, receiving, storing or otherwise processing electronic communications. This definition is also carried over from the *Electronic Transactions Act 2003* (WA);

“**information technology requirements**” is defined to include software requirements. The definition is carried over from the *Electronic Transactions Act 2003* (WA);

“**law of this jurisdiction**” is defined to mean any law in force in Western Australia, whether written or unwritten but does not include a law of the Commonwealth. The definition is carried over from the *Electronic Transactions Act 2003* (WA);

“**non-profit body**” means a body that is not carried on for profit for its members and is prohibited by its constitution from making any distribution to those members. The definition is carried over from the *Electronic Transactions Act 2003* (WA);

“**originator**” is a new definition that was not in the *Electronic Transactions Act 2003* (WA). The definition provides that the originator is the person by whom, or on whose behalf, the electronic communication has been sent;

“**performance**” is a new definition that was not in the *Electronic Transactions Act 2003* (WA). The definition makes it clear that performance of a contract includes non-performance;

“**place of business**” was defined in the *Electronic Transactions Act 2003* (WA), however, the definition has now been revised and expanded. A “place of business” is defined to mean a place

where the person maintains an establishment or, in relation to a government or non-profit body, a place where the activities of that government or body are carried out;

“*this jurisdiction*” means Western Australia;

“*transaction*” was also defined in the *Electronic Transactions Act 2003* (WA), however, the definition has now been revised and expanded to include transactions in the nature of a contract, statements related to the making of a contract and transactions of a non-commercial nature.

Clause 5(2) provides that the Notes to the proposed Act are provided to assist understanding and do not form part of the Act. This was previously provided in section 4 of the *Electronic Transactions Act 2003* (WA).

Clause 6. Crown to be bound

Clause 6 provides that the Crown in the right of the State is bound by the proposed Act.

Clause 7. Exemptions

Clause 7 provides that regulations may provide that all or specified provisions in the proposed Act do not apply to a specified requirement, permission or law of Western Australia. The clause was previously section 12 of the *Electronic Transactions Act 2003* (WA).

At present the Electronic Transactions Regulations 2003 (WA) exclude things such as wills and codicils, trust documents and powers of attorney from the legislation. Transactions that must be effected by personal service are also excluded.

Part 2 Application of legal requirements and authorisations to electronic communications

With a few minor exceptions and a re-numbering of sections Part 2 of the Bill is the same as Part 2 of the *Electronic Transactions Act 2003* (WA) which is repealed by this Bill. Possibly, the main change is in relation to Division 3. The Division is re-written to make it clearer but has the same general intention of setting out what is intended in relation to time of dispatch and receipt of electronic communications. The other change is that section 12 – Exemptions from this Division – has now been moved to Part 1 of the Bill and is now proposed section 7 and provides for exemptions from the proposed Act as a whole rather than just Part 2.

Division 1 General rule about validity of transactions for the purposes of laws of this jurisdiction

Clause 8. Validity of electronic transactions

Clause 8(1) (*Electronic Transactions Act 2003* (WA), section 7(1)) provides that a transaction is not invalid because it took place wholly or partly by means of one or more electronic communications.

Clause 8(2) (*Electronic Transactions Act 2003* (WA), section 7(2)) provides that the general rule set out in subclause (1) does not apply in cases where more specific provision is made in another, more specific, provision of Part 2. The specific provisions referred to in subclause (2) are set out in Divisions 2 and 3 of the proposed Act (clauses 9 to 16, inclusive).

Subsections 7(3) and 7(4) of the Act are deleted. They previously provided that regulations may be made excluding a specified transaction or class of transaction, or a specified law of Western Australia. In future regulations will be made under clause 22. Matters such as wills, codicils, powers of attorney and matters requiring personal service are excluded from the operation of the proposed Act.

Division 2 Things done under laws of this jurisdiction

Clause 9. Writing

Clause 9 (*Electronic Transactions Act 2003* (WA), section 8) is the first of the five specific statutory exclusions from clause 8(1).

Subclause 9(1) provides that where at the time the information was given, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference; and the person to whom the information is required to be given, consents to the information being given electronically then, in those circumstances, any requirement for giving information in writing is taken to be met if the person gives the information in an electronic communication.

Subclause 9(2) provides that where at the time the information was given, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference; and the person to whom the information is permitted to be given, consents to the information being given electronically then, in those circumstances, any permission for giving information in writing is taken to be met if the person gives the information in an electronic communication.

Subclause (3) provides that the proposed clause does not override another law that makes provision for information to be given in accordance with a particular information technology requirement. That is, another law requiring information to be provided in another electronic format may override the proposed Act. Subclause (4) provides that the proposed clause applies even if words such as “give”, “send” or “serve” (or similar expressions) are used.

The term “*giving information*” used in subclauses (1) and (2) is widely defined in subsection (5), to include things such as making an application, lodging a claim, making a request or declaration and lodging an objection. Accordingly, if consent is given to the use of electronic communications, then matters such as lodging a prospector’s claim and applying for a job may validly be made by electronic means.

Clause 10. Signatures

Clause 10(1) (*Electronic Transactions Act 2003* (WA), section 9) provides that if the signature of a person is required, then that requirement is taken to have been met if a reliable method is used to identify the person sending the signature, that person’s approval is indicated, and the person receiving the signature has consented to the use of electronic means of communication.

Clause 10(2) provides that proposed subclause (1) does not override any other law that makes provision for information to be given in accordance with a particular information technology requirement. That is, another law requiring information to be provided in a particular electronic format may override the proposed Act.

Clause 11. Production of document

Subclauses 11(1) and (2) (*Electronic Transactions Act 2003* (WA), section 10) apply to the situation where a person is required, or permitted, to produce a document that is in the form of paper, an article or other material. The subclauses provide that the document may be produced electronically where:

- the method of generating the electronic form of the document is reliable having regard to all the relevant circumstances;
- at the time the information was given, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference; and
- the person to whom the information is required (or permitted) to be given, consents to the information being given electronically.

Subclause 11(3) provides that the integrity of the information contained in a document is maintained only if the information remains unaltered, apart from the addition of any endorsement or other immaterial change which arises in the normal course of communication, storage or display.

Subclause 11(4) provides that proposed section 11 does not override another law that makes provision for information to be given in accordance with a particular information technology requirement. That is, another law requiring information to be provided in another electronic format may override the proposed Act.

Clause 12. Retention of information and documents

Clause 12 (*Electronic Transactions Act 2003* (WA), section 11) provides rules for both the electronic retention of information (subclause (1)) and the electronic retention of documents (subclause (2)) that are in the form of paper or some other material.

Subclause (1) allows for the retention of information in an electronic form where, at the time of electronic recording, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference, and where the regulations setting out the requirements for such retention are met.

Subclause (2) allows for the retention of a document in an electronic format if;

- the method of generating the electronic form of the document is reliable having regard to all the relevant circumstances;
- at the time the electronic form of the document was generated, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference; and
- the regulations setting out the requirements for retention have been met.

Subclause (3) provides that the integrity of the information contained in a document as per subclause (2) is maintained only if the information remains unaltered, apart from the addition of any endorsement or other immaterial change which arises in the normal course of communication, storage or display.

Subclause (4) sets out requirements which must be met to establish the validity of a document which has been retained electronically over time. The person retaining the document will satisfy these requirements as to electronic retention where:

- at the commencement of the retention it was reasonable to expect that the information would be readily accessible for future reference;
- the method of retention, having regard to all the circumstances, was considered to be a reliable means of maintaining the integrity of the information in the document;
- throughout the period additional information is retained to enable identification of the origin and destination of the electronic communication, and the times when the communication was both sent and received;
- at the commencement of the retention of the additional information it was reasonable to expect that such additional information would be readily accessible for future reference; and
- all regulations setting out requirements for retention of the document have been met throughout the period of retention.

Subclause (5) provides that the integrity of the information contained in a document as per subclause (4) is maintained only if the information remains unaltered, apart from the addition of any endorsement or other immaterial change which arises in the normal course of communication, storage or display.

Division 3 Other provisions relating to laws of this jurisdiction

Clause 13. Time of dispatch

Clause 13(1) (*Electronic Transactions Act 2003* (WA), subsections 13(1) and (2)) provides rules governing when an electronic communication is considered to be dispatched. Subclause (1) provides that, unless otherwise agreed between the parties, an electronic communication is dispatched when it leaves an information system outside the control of the originator or when it is received by the addressee.

Subclause (2) provides that proposed subsection (1) applies even if the place where the electronic address is located is different from where the communication is taken to have been dispatched under the default rules proposed in section 15.

Clause 14. Time of receipt

Clause 14(1) (*Electronic Transactions Act 2003* (WA), sections 13(3) and (4)) provides rules governing when an electronic communication is considered to be received. Subclause (1) provides that, unless otherwise agreed between the parties, an electronic communication is received when it is retrieved by the addressee at an electronic address designated by the addressee.

Subclause (2) provides that the electronic communication in subsection (1) is assumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.

Subclause (3) provides that proposed subsection (1) applies even if the place where the electronic address is located is different from where the communication is taken to have been received under the default rules proposed in section 15

Clause 15. Place of dispatch and place of receipt

Clause 15(1) (*Electronic Transactions Act 2003* (WA), sections 13(5) and (6)) provides that, unless otherwise agreed by the parties, an electronic communication is taken to have been dispatched from the originator's place of business and received at the addressee's place of business.

Subclause (2) provides rules about where a place of business is assumed to be. For example, under paragraph (a) the place of business is where it was indicated to be by the party, unless another person has demonstrated that it is elsewhere. Under paragraph (e) if a party does not have a place of business it is assumed to be their place of habitual residence.

Subclause (3) provides that a location is not a place of business merely because that is where the equipment and technology supporting the information system is located.

Subclause (4) provides that the use of a country in a domain name does not create the assumption that the place of business is located in that country.

Clause 16. Attribution of electronic communications

Clause 16(1) (*Electronic Transactions Act 2003* (WA), section 14) provides that the purported originator of an electronic communication is only bound if the communication was sent by the purported originator or with his or her authority, unless otherwise agreed between the originator and the addressee. Subclause (2) provides that subclause (1) does not override any other law relating to the scope of any person's actual or apparent authority.

Subsections (3) and (4) of the *Electronic Transactions Act 2003* (WA) are deleted from the Bill. They provided that regulations could be made specifying that proposed section 14 does not apply to specified communications or laws of Western Australia.

Subsection (5) of the *Electronic Transactions Act 2003* (WA) is also deleted. The section provided that the proposed Act applied, with any necessary modifications, to conduct referred to in proposed subclause (2).

Part 3 Additional provisions applying to contracts involving electronic communications

Clause 17. Application and operation of this Part

Clause 17 provides that the provisions of part 3 apply to contracts involving electronic communications where the proper law of the contract is the law of Western Australia, 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.

Clause 18. Invitation to treat regarding contracts

Clause 18 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.

Clause 19. Use of automated message systems for contract formation – non-intervention of natural person

Clause 19 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.

Clause 20. Error in communications regarding contracts

Clause 20 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.

Clause 21. Application of Act in relation to contracts

Clause 21(1) provides that the provisions of proposed sections 8 and 13 to 15 apply to transactions constituted or an electronic communication relating to the formation of the contract in the same way as they apply to other communications referred to in those sections.

Clause 21(2) provides that Part 3 does not apply in relation to contracts where Part 2 or the law of another State or territory has force.

Part 4 - Miscellaneous

Clause 22: Regulations

Clause 22 (*Electronic Transactions Act 2003* (WA), section 15) provides that the Governor may make regulations prescribing all matters that are required or permitted by the Act to be prescribed for the purposes of giving effect to the purposes of the Act.

Clause 23. Transitional provisions

Clause 23(1) is a transitional provision making it clear that proposed sections 18 (Invitation to treat regarding contracts), 19 (Use of automated message systems for contract formation – non-intervention of natural person) and 20 (Error in electronic communications regarding contracts) apply to matters that occur before the day that Part 3 of the Bill commences.

Subclause (1) is stated to be subject to subclause (2) which provides that subclause (1) does not apply where contracts have been formed before the commencement day.

Subclause (3) provides that for the purposes of proposed section 23 the “*commencement day*” is the day that Part 3 commences.

Clause 24. *Electronic Transactions Act 2003* repealed

Clause 24 provides that the *Electronic Transactions Act 2003* (WA) is repealed.

Clause 25. Acts amended

Clause 25(1) provides that the Acts listed in the Table to subclause (2) of the proposed section are amended.

Clause 25(2) provides that the following Acts are amended:

1. *Bail Act 1982*

In the definition of “*electronic communication*” in section 3(1) of the *Bail Act 1982* the reference to the “*Electronic Transactions Act 2003 section 5*” is deleted and a reference to the new equivalent “*Electronic Transactions Act 2003* (WA) section 5(1)” is inserted.

In section 3A(2) of the *Bail Act 1982* the reference to the “*Electronic Transactions Act 2003 section 5*” is deleted and a reference to the new equivalent “*Electronic Transactions Act 2003* (WA) section 5(1)” is inserted.

2. *The Criminal Code*

In the definition of “*electronic communication*” in section 204B(1) of *The Criminal Code* the reference to “section 5 of the *Electronic Transactions Act 2003*” is deleted and a reference to the new equivalent “the *Electronic Transactions Act 2003* (WA) section 5(1)” is inserted.

3. *Legal Profession Act 2008*

In section 290(6)(d) of the *Legal Profession Act 2008* the reference to the “*Electronic Transactions Act 2003* section 9” is deleted and a reference to the new equivalent “*Electronic Transactions Act 2003* (WA) section 10” is inserted.

Clause 26. *The Criminal Code* amended

Clause 26(1) provides that the proposed section amends *The Criminal Code* (as amended by the *Criminal Code Amendment (Identity Crime) Act 2010* section 5).

Clause 26(2) provides that the words “*Electronic Transactions Act 2003* section 5” in the definition of “*electronic communication*” in section 489 of the *Code* are deleted and the words *Electronic Transactions Act 2010* section 5(1)” are inserted in their place.