

ELECTRONIC TRANSACTIONS BILL 2001

Explanatory Notes

Part 1 Preliminary

Clause 1. Short title

Short title of the Act.

Clause 2. Commencement

The proposed Act will come into operation on a day, or days, to be fixed by proclamation. Comparable legislation is being enacted in all other States and Territories and it is likely that a common date of commencement will be used.

Clause 3. Objects

Clause 3 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.

These objects are achieved by providing that, except 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. Status of notes

Clause 4 confirms that notes in the proposed Act are provided to assist understanding and do not form a substantive part of the proposed Act.

Clause 5. Interpretation

Clause 5 sets out the definitions of terms used in the proposed Act. The term “consent” is used in several places in the proposed Act. “Consent” 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.

An “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.

Clause 5 also defines “information” as information in the form of data, text images or sound.

The word “transaction” is defined to include any transaction in the nature of a contract, agreement or other arrangement, including a transaction of a non-commercial nature.

Clause 6. Crown to be bound

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

Part 2 *Application of legal requirements and authorisations to electronic communications*

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

Clause 7. Validity of electronic transactions

Clause 7(1) provides that a transaction is not invalid because it took place wholly or partly by electronic communications. Subclause (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 8 to 14, inclusive).

Subclauses (3) and (4) provide that regulations may be made excluding a specified transaction or class of transaction, or a specified law of Western Australia. The Commonwealth has excluded immigration and citizenship matters from the equivalent Commonwealth law. It is anticipated that matters such as wills, trusts and powers of attorney will be excluded from the operation of the proposed Act.

Division 2 Things done under laws of this jurisdiction

Clause 8. Writing

Clause 8 is the first of the five specific statutory exclusions from clause 7(1).

Subclauses 8(1) and (2) provide 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 (or permitted) to be given, consents to the information being given electronically;

Then, in those circumstances, any requirement (or permission) for giving information in writing is taken to be met if the person gives the information in an electronic communication.

The term “giving information” 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.

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.

Clause 9. Signatures

Subclause 9(1) 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.

Subclause (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 10. Production of document

Subclauses 10(1) and (2) 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 (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 (4) provides that proposed clause 10 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 11. Retention of information and documents

Clause 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.

Clause 12. Exemptions from this Division

Clause 12 provides that regulations may provide that this Division or a specified part of the Division in the proposed Act does not apply to a specified requirement, permission or law of Western Australia.

The intention of clause 12 is that regulations may be made excluding certain matters from the proposed Act. It is envisaged that things such as wills and codicils, trust documents and powers of attorney will be excluded at the commencement of the legislation. The list is not settled and agencies may seek other exemptions. This may change in due course and such documents eventually included.

Division 3 Other provisions relating to laws of this jurisdiction

Clause 13. Time and place of dispatch and receipt of electronic communications

Clause 13 provides rules governing when an electronic communication is considered to be dispatched or received. Under subclause (1) an electronic communication is dispatched when it enters an information system outside the control of the originator, unless otherwise agreed by the parties. If there is more than one information system outside the control of the originator involved, then subclause (2) provides that the communication is considered to be dispatched when it enters the first of those systems.

Subclause (3) deals with the situation where the addressee of the communication has designated the system to be used for the communication. In such a case the addressee receives the communication when it enters that person's information system. If the addressee has not specified the information system to be used then under subclause (4) the communication is received when it comes to the attention of the addressee.

Under subclause (5) 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, unless otherwise agreed between the originator and the addressee.

Subclause (6) provides that if either the originator or the addressee have more than one place of business an electronic communication is assumed to have been sent from, or received at, whichever place of business has the closer relationship to the transaction or the principal place of business. If there is no place of business, then it is assumed that the place of business is the place where the person ordinarily resides.

Under subclauses (7) and (8) regulations may be made specifying that proposed clause 13 does not apply to specified communications or laws of Western Australia.

Clause 14. Attribution of electronic communications

Clause 14(1) 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.

Subclauses (3) and (4) provide that regulations may be made specifying that proposed clause 14 does not apply to specified communications or laws of Western Australia.

Subclause (5) provides that the proposed Act applies, with any necessary modifications, to conduct referred to in proposed subclause (2).

Part 3 Miscellaneous

Clause 15. Regulations

Clause 15 provides that regulations may be made under the proposed Act.