



## Electronic Transactions Amendment Bill 2011

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### Contents

Purpose .....	2
Background .....	3
The United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 .....	3
Consultation by the Standing Committee of Attorneys-General (SCAG) .....	4
Electronic Transactions Act 1999 (Cth).....	5
Committee consideration .....	6
Financial implications.....	7
Key provisions .....	7
Time of dispatch: default rule.....	9
Time of receipt: default rule .....	10
Place of dispatch and place of receipt: default rule .....	11
Proposed Part 2A of the Electronic Transactions Act: applying the Convention rules to the formation and performance of domestic contracts.....	11

## Electronic Transactions Amendment Bill 2011

**Date introduced:** 9 February 2011

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** The formal provisions commence on Royal Assent, while Schedule 1 commences 28 days after Royal Assent

**Links:** The links to [the Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bills home page, or through <http://www.aph.gov.au/bills/>. When Bills have been passed and have received Royal Assent, they can be found at the ComLaw website, which is at <http://www.comlaw.gov.au/>.

### Purpose

The Bill amends the *Electronic Transactions Act 1999* (the Electronic Transactions Act) to allow Australia to accede (that is, become a signatory) to the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (the Convention).<sup>1</sup>

The Bill updates Australia's electronic transactions legislation to reflect the internationally recognised standards on electronic commerce (e-commerce) set out in the Convention, thereby giving greater certainty to international trade and commerce.<sup>2</sup> The Bill sets out model legislation that the Standing Committee of Attorneys-General (SCAG) has agreed each of the Australian states and territories will separately enact in their own parliaments.

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1. The text of the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 is available electronically at [http://www.uncitral.org/pdf/english/texts/electcom/ch\\_X\\_18.pdf](http://www.uncitral.org/pdf/english/texts/electcom/ch_X_18.pdf) (viewed 23 February 2011).
  2. SCAG, 'Communiqué', 7 May 2010, p. 5, viewed 23 February 2011, [http://www.scag.gov.au/lawlink/SCAG/ll\\_scag.nsf/vwFiles/SCAG\\_Communicu%C3%A9\\_7\\_May\\_2010v2.pdf/\\$file/SCAG\\_Communicu%C3%A9\\_7\\_May\\_2010v2.pdf](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Communicu%C3%A9_7_May_2010v2.pdf/$file/SCAG_Communicu%C3%A9_7_May_2010v2.pdf)

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

## Background

### The United Nations Convention on the Use of Electronic Communications in International Contracts, 2005

The United Nations Convention on the Use of Electronic Communications in International Contracts was adopted by the United Nations General Assembly in New York on 23 November 2005.<sup>3</sup> It is designed to enhance 'legal certainty and commercial predictability where electronic communications are used in relation to international contracts' by setting out default rules on a range of issues, including:

- how to determine a party's location in an electronic environment
- in what form a communication or contract should be made or evidenced (including setting out the criteria for establishing functional equivalence between electronic communications and paper documents where, for example, the law requires that a communication or contract shall be in writing and/or be signed by a party)
- how to determine the time and place of dispatch and receipt of electronic communications
- rules for the use of automated message systems for contract formation, and
- parties' rights when there is an input error in an electronic communication.<sup>4</sup>

The Convention sets out the default rules that apply if the parties to an international transaction have not otherwise agreed their own terms and conditions in relation to the use of electronic communications. Article 3 of the Convention deals with party autonomy, and states that the parties may exclude the application of the Convention 'or derogate from [that is, qualify or limit] or vary the effect of any of its provisions'. For example, the parties can agree about whether an electronic signature is acceptable or not. Article 8(2) states that a party is not required to use or accept electronic communications, but 'a party's agreement to do so may be inferred from the party's conduct'. For example, if a party has only ever communicated with the other party by e-mail, it may be implied that he or she consents to use or accept electronic communications.

The Convention was developed by the United Nations Commission on International Trade Law (UNCITRAL) to address the legal issues that had arisen since it published its Model Law on Electronic Commerce in 1996. Australia's current electronic transactions legislation is based on that 1996 model.

Australia is not currently a signatory to the Convention—although 18 other countries are.<sup>5</sup> Australia will become eligible to accede to the treaty once it updates its electronic transactions legislation (at

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3. United Nations Commission on International Trade Law (UNCITRAL), '2005 - United Nations Convention on the Use of Electronic Communications in International Contracts', website, no date, viewed 23 February 2011, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2005Convention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html)

4. Ibid.

federal, state and territory levels) to mirror the current international standards on e-commerce that are embodied in the Convention. In his second reading speech for the Bill, Robert McClelland MP (Commonwealth Attorney-General) explained some of the benefits of acceding to the Convention as follows:

Implementation of the Convention will facilitate international trade by offering practical solutions for issues arising from the use of electronic communications in the formation or performance of contracts between parties located in different countries. It aims to [sic] commercial predictability when using electronic communications in international contracts, but does not otherwise purport to vary or create contract law.

Accession to the Convention will also improve the efficiency of commercial activities and promote economic development both domestically and internationally.<sup>6</sup>

## Consultation by the Standing Committee of Attorneys-General (SCAG)

In April 2007, SCAG agreed to consider updating Australia's model electronic transactions legislation so that it reflects the revisions to the 1996 model legislation contained in the 2005 Convention.<sup>7</sup> In 2008, the Commonwealth Attorney-General's Department prepared a consultation paper on the necessary changes and circulated it to SCAG officers for approval. In November 2008, the consultation paper was released to the general public for comment.<sup>8</sup>

After considering the nine submissions received from the public (which generally supported the proposal to accede to the Convention), SCAG agreed in April 2009 that drafting of the model legislation could commence.<sup>9</sup> At its meeting in May 2010, SCAG agreed to enact the model provisions to implement the Convention.<sup>10</sup> New South Wales and Tasmania have already passed the

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5. R McClelland MP (Commonwealth Attorney-General), 'Second reading speech: Electronic Transactions Amendment Bill 2011', House of Representatives, *Debates*, 9 February 2011, p. 135, viewed 28 February 2011, <http://www.aph.gov.au/hansard/reps/dailys/dr090211.pdf> See also Copyright and Classification Policy Branch, Civil Law Division, Attorney-General's Department (Commonwealth), *National Interest Analysis: United Nations Convention on the Use of Electronic Communications in International Contracts*, done at New York on 23 November 2005, [2010] ATNIF 33, viewed 28 February 2011, <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/nia/2010/33.html>
  6. R McClelland MP (Commonwealth Attorney-General), 'Second reading speech: Electronic Transactions Amendment Bill 2011', op. cit.
  7. Attorney-General's Department (Commonwealth), *National Interest Analysis*, op. cit., paragraph 30. See also SCAG, *Annual Report 2006-07*, viewed 28 February 2011, [http://www.scag.gov.au/lawlink/scag/ll\\_scag.nsf/pages/scag\\_annual\\_reports](http://www.scag.gov.au/lawlink/scag/ll_scag.nsf/pages/scag_annual_reports)
  8. Attorney-General's Department, *Australian e-commerce review—UN Convention on Electronic Communications*, departmental website, no date, viewed 28 February 2011, [http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright\\_Australiane-commercereview-UNconventiononelectroniccommunications](http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright_Australiane-commercereview-UNconventiononelectroniccommunications)
  9. SCAG, *SCAG Decisions: Meeting Outcomes*, SCAG website, April 2009, viewed 28 February 2011, [http://www.scag.gov.au/lawlink/SCAG/ll\\_scag.nsf/pages/scag\\_meetingoutcomes](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_meetingoutcomes)
  10. SCAG, 'Communiqué', 7 May 2010, op. cit.

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amendments.<sup>11</sup> When the Commonwealth and the other states and territories have passed their own legislation, Australia will become eligible to accede to the Convention.

## Electronic Transactions Act 1999 (Cth)

The Commonwealth Attorney-General's Department describes the Electronic Transactions Act as a 'major step towards supporting and encouraging the development of electronic commerce in Australia'.<sup>12</sup> The Act provides a regulatory framework that:

- recognises the importance of the information economy to Australia's future
- facilitates the use of electronic transactions
- promotes business and community confidence in the use of those transactions, and
- enables business and the community to use electronic communications in their dealings with government.<sup>13</sup>

It provides that a transaction is not invalid because it took place by electronic communications.<sup>14</sup> More specifically, it provides that the following requirements under a Commonwealth law can be met in electronic form:

- information is to be given in writing
- a signature is to be provided
- a document is to be produced
- information is to be recorded, and/or
- a document is to be retained.<sup>15</sup>

However, the Electronic Transactions Act does not apply to any Commonwealth law that is specified in the Electronic Transactions Regulations 2000 (Cth).<sup>16</sup> For example, it does not apply to

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11. See the *Electronic Transactions Amendment Act 2010* (NSW) at [http://www.austlii.edu.au/au/legis/nsw/num\\_act/etaa2010n68363.pdf](http://www.austlii.edu.au/au/legis/nsw/num_act/etaa2010n68363.pdf) (viewed 1 March 2011) and the *Electronic Transactions Amendment Act 2010* (Tas) at [http://www.austlii.edu.au/au/legis/tas/num\\_act/etaa201029o2010382/](http://www.austlii.edu.au/au/legis/tas/num_act/etaa201029o2010382/) (viewed 1 March 2010).
  12. Attorney-General's Department (Commonwealth), *Australia's legal framework on electronic commerce*, departmental website, 26 November 2009, viewed 23 February 2011, [http://www.ag.gov.au/www/agd/agd.nsf/Page/e-commerce\\_Australiaslegalframeworkforelectroniccommerce](http://www.ag.gov.au/www/agd/agd.nsf/Page/e-commerce_Australiaslegalframeworkforelectroniccommerce) For further details, see M Tapley, *Electronic Transactions Bill 1999, Bills Digest*, no. 64, 1999–2000, Parliamentary Library, Canberra, 22 September 1999, viewed 1 March 2011, <http://www.aph.gov.au/library/pubs/bd/1999-2000/2000bd064.htm>
  13. Section 3 of the Electronic Transactions Act.
  14. Note that the Electronic Transactions Act only validates the *form* of the electronic communication—not the content. If the communication omits essential content, 'the communication will remain unenforceable regardless of electronic transactions legislation validating the form of the communication': see B Schatz, 'Forged email: Lessons from the OzCar Scandal', *Law Society Journal*, September 2009, p. 58, viewed 1 March 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fjrnart%2FWENU6%22>
  15. Sections 4 and 9–12 of the Electronic Transactions Act.

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subsections 13(1) and 62(1) of the *Banking Act 1959* and the whole of the *Insurance Contracts Act 1984*.<sup>17</sup>

## Committee consideration

Following the tabling of the Convention in Parliament on 15 June 2010, the Joint Standing Committee on Treaties (JSCOT) heard evidence from officials from the Commonwealth Attorney-General's Department on 7 February 2011.<sup>18</sup>

Committee member, Michelle Rowland MP (ALP Member for Greenway, NSW), asked about the 'practical problems' and greater 'certainty' that acceding to the Convention is said to bring to Australia. However, the officials from the Attorney-General's Department said that they were not aware of any practical problems arising from the operation of the Electronic Transactions legislation or the 1996 model law, adding that the relevant caselaw does not deal with business 'at this point'. Helen Daniels (Assistant Secretary, Business Law Branch, Attorney-General's Department) also said that '[m]oving to this convention will confirm what a lot of businesses, especially big business, are doing anyway—because they are really default rules'.<sup>19</sup>

Another committee member, Sharon Grierson MP (ALP Member for Newcastle, NSW), asked about enforceability of contracts under the Convention:

Does it strengthen the case for litigation if a contract is breached in some way between two parties internationally? Does this strengthen the chance of enforcement or redress, or is that still up to different laws?<sup>20</sup>

Ms Daniels replied that while each country has its own laws, the outcome would depend on whether both parties to a disputed contract are from countries that are party to the Convention. She said that 'it is a step forward, but it is not a massive change' in terms of offering consumer protection for

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16. Section 13 of the Electronic Transactions Act. Schedule 1 to the Electronic Transactions Regulations 2000 contains a list of the Commonwealth laws to which certain provisions of the Electronic Transactions Act do not apply: see [http://www.austlii.edu.au/au/legis/cth/consol\\_reg/etr2000365/sch1.html](http://www.austlii.edu.au/au/legis/cth/consol_reg/etr2000365/sch1.html) (viewed 1 March 2011).

17. Subsection 13(1) of the *Banking Act 1959* states that the Australian Prudential Regulation Authority (APRA) 'may, by notice in writing to an [authorised deposit-taking institution (ADI)], require the ADI to supply it, within the time specified in the notice, with such information relating to the ADI's financial stability as is specified in the notice. The requirement to supply information may include a requirement to supply books, accounts or documents'. Similarly, subsection 62(1) of that Act deals with the supply of information by certain bodies to APRA. Because the Electronic Transactions Act does not apply to these provisions, the written notice and other documents cannot be supplied in electronic form.

18. JSCOT, 'Reference: Treaties tabled on 28 October 2010 and referred to the committee on 16 November 2010', *Hansard*, 7 February 2011, pp. 17–21, viewed 1 March 2011, <http://www.aph.gov.au/hansard/joint/commtee/J13585.pdf>

19. *Ibid.*, p. 18.

20. *Ibid.*, p. 19.

online transactions.<sup>21</sup> Ms Daniels also said it was a matter of adapting the ‘rules that we all live with in the hard copy environment’ for the electronic environment, and acknowledged that the Convention does not deal with the issue of unequal bargaining power or shrink-wrap licences.<sup>22</sup> In this regard, Ms Daniels said:

[The Convention] really is for dealing business to business, I suppose, where one would hope there is a slightly more even environment [than individuals dealing with businesses]. It is not really even about the terms of the contract. It is really for when things go wrong in contracts.<sup>23</sup>

On 9 February 2011, the Selection Committee (House of Representatives) determined that the Bill should not be referred to a committee.<sup>24</sup>

## Financial implications

The Explanatory Memorandum states that there is ‘no direct financial impact on Government revenue from this Bill’.<sup>25</sup>

## Key provisions

**Items 2 to 7 of Schedule 1** to the Bill insert (or repeal and substitute) definitions for various terms used in the Electronic Transactions Act, including ‘*automated message system*’ and ‘*performance*’ (of a contract).

**Item 6** expands the definition of the term ‘*place of business*’ in subsection 5(1) of the Electronic Transactions Act so that it refers not only to the place of business of a government, government authority or non-profit body, but also to the place of business of an individual.

**Item 7** expands the definition of the term ‘*transaction*’ in subsection 5(1) of the Electronic Transactions Act so that it includes not only transactions of a non-commercial nature but also:

- transactions in the nature of a contract, agreement or other arrangement, and

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21. Ibid., p. 20.

22. The term ‘shrink-wrap licence’ usually refers to a software licence (often open source software) where the purchaser does not usually see the terms and conditions of purchase until after the transaction is completed and he or she breaks the seal (or opens the shrink wrap) on the item. However, the seller usually advises the purchaser (via a notice on the wrapper) that by breaking the seal or opening the wrapper, the user agrees to the terms and conditions. See, for example, B Gravatt, ‘The dangers of online licensing’, Findlaw Australia website, no date, viewed 1 March 2011, <http://www.findlaw.com.au/articles/1177/the-dangers-of-online-licensing.aspx>

23. JSCOT, ‘Reference: Treaties tabled on 28 October 2010 and referred to the committee on 16 November 2010’, op. cit., p. 20.

24. Selection Committee (House of Representatives), *Report No. 12*, 9 February 2011, p. 3, viewed 28 February 2011, [http://www.aph.gov.au/house/committee/selc/reports/43rd\\_parliament/report\\_12.pdf](http://www.aph.gov.au/house/committee/selc/reports/43rd_parliament/report_12.pdf)

25. Explanatory Memorandum, Electronic Transactions Amendment Bill 2011, p. 4.

- any 'statement, declaration, demand, notice or request, including an offer and 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'.

**Item 8** inserts **proposed section 7A** into the Electronic Transactions Act. It recognises that certain types of transactions and electronic communications need to be excluded from the operation of the Electronic Transactions Act because they are otherwise subject to specific regulation or contractual terms.<sup>26</sup>

**Proposed subsection 7A(1)** states that the regulations may provide that all or specified provisions of the Act do not apply:

- (a) to transactions, requirements, permissions, electronic communications or other matters specified, or of classes specified, in the regulations for the purposes of this section; or
- (b) in circumstances specified, or of classes specified, in the regulations for the purposes of this section.

**Proposed subsection 7A(2)** states that the regulations may provide that all or specified provisions of the Act do not apply to specified Commonwealth laws.<sup>27</sup>

**Item 8** also inserts **proposed section 7B** into the Electronic Transactions Act. It provides that Part 2A and Division 2 of Part 2 of that Act do not apply to the practice and procedure of a court or tribunal, and do not affect the operation of the *Evidence Act 1995* (Cth) or its state/territory equivalents.<sup>28</sup> Further, it provides that Part 2A and Division 2 of Part 2 of the Electronic Transactions Act do not affect a state or territory law, or any common law rule, that 'makes provision for the way in which evidence is given in proceedings in a court' (which includes actions taken in preparation for litigation that never actually commences).<sup>29</sup>

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26. See Article 2(1)(b) of the Convention which states that the Convention does not apply to transactions on a regulated exchange; foreign exchange transactions; inter-bank payment systems and agreements (etc); or the transfer of security rights 'in sale, loan or holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary'. See also Article 2(2) of the Convention which states that the Convention does not apply to bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or 'any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money'.

27. The regulations will need to be tabled in each House of the Federal Parliament, and may be subject to the parliamentary scrutiny and disallowance procedures set out in Part 5 of the *Legislative Instruments Act 2003* (Cth). The latest consolidation of that Act is available electronically at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/lia2003292.txt](http://www.austlii.edu.au/au/legis/cth/consol_act/lia2003292.txt) (viewed 2 March 2011).

28. Part 2A of the Electronic Transactions Act does not currently exist. It is to be inserted by **item 21** of **Schedule 1** to the Bill and contains additional provisions applying to contracts involving electronic communications. Division 2 of Part 2 to the Electronic Transactions Act deals with requirements under Commonwealth laws (such as a requirement to give information in writing).

29. Explanatory Memorandum, p. 8.



The exemptions in **proposed sections 7A and 7B** simplify a range of existing exemptions in the Electronic Transactions Act. The current provisions are repealed by **items 9–10, 15–18 and 20** of **Schedule 1** to the Bill.<sup>30</sup> The Explanatory Memorandum explains the continuing need for exemptions from the Act as follows:

In general, appropriate exemptions are made where the purpose or intention of a requirement, permission or Commonwealth law cannot be satisfied by the use of electronic communications. For example, exemptions are made in circumstances where there is a high risk of document fraud (visas, cheques), where a government agency does not have the technology or procedures in place to ensure the secure transmission of information, or where it is important to ensure that there is only one, paper-based document (passports).<sup>31</sup>

**Item 19** of **Schedule 1** to the Bill repeals existing section 14 and substitutes **proposed sections 14, 14A and 14B** in its place. Currently section 14 sets out the default rules in relation to the time and place of dispatch and receipt of electronic communications that apply in the absence of any alternative agreement between the parties. The Bill updates this provision in line with the Convention. **Proposed sections 14, 14A and 14B** deal separately with the three main aspects of this issue: time of dispatch, time of receipt, and place of dispatch/place of receipt. Apart from some minor cosmetic changes, there are several key differences between section 14 and **proposed sections 14, 14A and 14B**, as follows.

### Time of dispatch: default rule

Currently, the default rule is that the **dispatch** of an electronic communication occurs when it *enters* an information system that is outside the control of the originator of the communication.<sup>32</sup> However **proposed paragraph 14(1)(a)** revises this rule in line with the Convention and provides that the time of dispatch is the time when the electronic communication *leaves* an information system under the control of the originator or the party who sent it on behalf of the originator. In reality, an e-mail may leave one system and enter another system at almost precisely the same time. However, the revised provision allows for delay that may be caused, for example, by security measures such as firewalls and filters.<sup>33</sup> **Proposed paragraph 14(1)(b)** provides that where the parties use the same information system, the time of dispatch is the time when the electronic communication is received by the addressee.

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30. The provisions dealing with exemptions that are to be repealed by the Bill are subsections 8(3) and (4); the notes to sections 9–12; section 13 and subsections 15(3) and (4).

31. Explanatory Memorandum, p. 7.

32. Existing subsection 14(1) of the Electronic Transactions Act.

33. Explanatory Memorandum, p. 12.

## Time of receipt: default rule

Currently, the default rule is that the time of receipt of an electronic communication is the time when the electronic communication 'comes to the attention of the addressee'.<sup>34</sup> However, **proposed paragraph 14A(1)(a)** provides that the time of receipt of the electronic communication is the time when the electronic communication 'becomes capable of being retrieved' by the addressee at his or her designated electronic address. Alternatively, **proposed paragraph 14A(1)(b)** provides that the time of receipt of the electronic communication at another electronic address is the time when both:

- the electronic communication has become capable of being retrieved by the address at that address, and
- the addressee has become aware that the electronic communication has been sent to that address.

**Proposed subsection 14A(2)** explains that, 'unless otherwise agreed' between the parties, it is to be assumed that an electronic communication is 'capable of being retrieved' by the addressee when it reaches the addressee's designated electronic address.<sup>35</sup> However, this assumption can be rebutted by objective evidence (such as a record of notice or an automatic delivery message), as the Explanatory Memorandum makes clear: 'The question of whether an electronic communication has been "communicated" would remain to be determined under the common law, depending on the particular facts'.<sup>36</sup>

The Explanatory Memorandum also explains that the rule about the receipt of electronic communications is one of the reasons why personal, family and household contracts are excluded from the operation of the Convention:

Receipt of an electronic communication often communicates acceptance for the purpose of contract formation, and the rationale for exclusion in this context is that it requires private individuals to conform to the same standards of diligence as entities or persons engaged in commercial activities. Consumers may not regularly check their e-mail, or could be unable to distinguish readily between legitimate commercial messages and unsolicited mail or spam and as such, the Convention states that the rule is not appropriate for personal, family or household contracts.<sup>37</sup>

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34. Existing subsection 14(3) of the Electronic Transactions Act.

35. The same explanation is given in Article 10 of the Convention (which deals with the time and place of dispatch and receipt of electronic communications).

36. Explanatory Memorandum, p. 13.

37. *Ibid.* See also Article 2(1)(a) of the Convention which states unequivocally that the Convention does not apply to electronic communications relating to contracts 'concluded for personal, family or household purposes'. Note, however, that Australia intends that **proposed Part 2A** of the Electronic Transactions Act (see **item 21** to **Schedule 1** to the Bill) will apply to personal and household contracts.

## Place of dispatch and place of receipt: default rule

Currently, the default rule is that an electronic communication is taken to have been *dispatched* at the place where the originator (of the communication) has its place of business, and to have been *received* at the place where the addressee has its place of business.<sup>38</sup> The rule is simply remade as **proposed subsection 14B(1)**—although new details and assumptions about how to ascertain the location of the other party’s ‘place of business’ are contained in **proposed subsection 14B(2)**. For example:

- a party’s place of business is assumed to be the location indicated by that party (the first-named party)—unless another party demonstrates that the first-named party does not have a place of business at that location<sup>39</sup>
- if a party has not indicated a place of business but has more than one place of business, the place of business for the purposes of proposed section 14B is ‘that which has the closest relationship to the underlying transaction, having regard to the circumstances known to or contemplated by the parties at any time before or after the conclusion of the transaction’,<sup>40</sup> and
- if a party is a natural person (that is, not a business) and does not have a place of business, it is assumed to be the party’s habitual residence.<sup>41</sup>

**Proposed subsection 14B(3)** makes it clear that a location is not a place of business merely because the equipment and technology supporting an information system used by either party are located there, or because that is where the information system may be accessed by other parties.

Additionally, **proposed subsection 14B(4)** states that the sole fact that a party uses a domain name or email address connected to a specific country does not create a presumption that its place of business is located in that country. For example the fact that a party uses the following email address: [david.citizen@emailaddress.com.au](mailto:david.citizen@emailaddress.com.au) does not create a presumption that his place of business is in Australia.

## Proposed Part 2A of the Electronic Transactions Act: applying the Convention rules to the formation and performance of domestic contracts

**Item 21** inserts **proposed Part 2A** into the Electronic Transactions Act. It contains additional provisions that will apply to the use of electronic communications in connection with the formation or performance of a contract between parties regardless of whether:

- some or all of the parties are located in Australia or elsewhere, and
- the contract is for business, personal, family, household or other purposes.<sup>42</sup>

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38. Existing subsection 14(5) of the Electronic Transactions Act.

39. **Proposed paragraph 14B(2)(a)** of the Electronic Transactions Act.

40. **Proposed paragraph 14B(2)(c)** of the Electronic Transactions Act.

41. **Proposed paragraph 14B(2)(e)** of the Electronic Transactions Act.

However, **proposed Part 2A** only applies if the law that applies to the contract is (or would on its formation be) a state or territory law (rather than a Commonwealth law), and at the time the contract is formed there is no relevant state or territory law ‘in terms substantially the same as this Part’.<sup>43</sup> **Proposed Part 2A** makes it very clear that the Commonwealth is not intending to legislate to ‘cover the field’—and in fact the Commonwealth intends to preserve the validity of any equivalent provision in any relevant state or territory legislation. This is because section 109 of the *Australian Constitution* provides that when a state law is inconsistent with a Commonwealth law, the Commonwealth law will prevail over the state law, and the state law will be invalid to the extent of the inconsistency. As mentioned already in this Digest, the Convention (and thus the Electronic Transactions Act when amended by the Bill) really only sets out the default rules that apply in the absence of any agreement between the parties—and the Commonwealth Government is simply extending those rules to transactions that would otherwise be governed by state/territory legislation (but for the fact that the legislation does not actually exist) so as to create as much uniformity as possible in the way electronic communications are treated in Australia. In this regard, the Explanatory Memorandum states:

[**Proposed subsection 15A(2)**] preserves the co-operative nature of the electronic transactions scheme, but does enable the Commonwealth provisions to apply to a contract where the proper law of the contract is (or on formation would be) the law of a State or Territory, and that State or Territory does not have a law in conformity with the Commonwealth provisions. [**Proposed subsection 15A(2)**] ensures Australia’s compliance with the Convention in circumstances where a State or Territory either has not enacted the new provisions, or for some reason amends them in an inconsistent manner in the future.<sup>44</sup>

The intention is that **proposed Part 2A** will apply to ‘both domestic contracts and contracts with an international aspect’, while Part 2 will continue to apply to international transactions undertaken under a Commonwealth law.<sup>45</sup> Extending the Convention rules to cover Australian (domestic) contracts will avoid ‘having different regimes under the domestic law’.<sup>46</sup>

**Proposed section 15B** states that a proposal to form a contract that is not addressed to a specific party (or parties) is to be considered as an ‘invitation to make offers’, rather than an offer that is capable of being accepted. However, if the party making the proposal clearly indicates an intention to be bound by an acceptance of the proposal, then the proposal is treated as an offer. Similarly, a proposal that makes use of interactive applications for the placement of orders through information systems (for example, online stores or marketplaces) is also treated as invitation rather than an

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42. **Proposed subsection 15A(1)** of the Electronic Transactions Act. Note that the Explanatory Memorandum (p. 16) states that it is not intended to extend the provision ‘so far as to purport to cover contracts involving all parties being outside Australia and having no connection to Australia’—however, that is not clear on the face of the Bill.
43. **Proposed subsection 15A(2)** of the Electronic Transactions Act. Note that the Commonwealth already gives legislative protection to consumers—see, for example, the *Competition and Consumer Act 2010* (Cth), which essentially rewrites the *Trade Practices Act 1974* (Cth).
44. Explanatory Memorandum, p. 16.
45. *Ibid.*, p. 15.
46. *Ibid.*, p. 16.

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offer, because it would be impossible for a supplier to provide a finite number of goods to the unlimited number of people who may respond to the advertisement:

Although interactive applications appear to provide for contracts to be concluded almost instantaneously, an advertisement or proposal to the world at large does not indicate the invitor's intention to be bound, given the unlikelihood of fulfilling purchase orders received by an unlimited amount of people.<sup>47</sup>

A contract that is 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 solely because no natural person reviewed or intervened in any of the actions carried out by the automated message system or the resulting contract.<sup>48</sup>

If a natural person makes an input error in an electronic communication exchanged with an automated message system of another party, and the automated message system does not give the person an opportunity to correct the error, then the person (or the party on whose behalf the person was acting) has a right to withdraw the portion of the electronic communication in which the error was made if the person (or the party on whose behalf the person was acting):

- notifies the other party of the error as soon as possible after learning about the error and indicates that he or she made an error, and
- has not used or received any material benefit or value from the goods or services (if any) received from the other party.<sup>49</sup>

This right of withdrawal is not of itself a right to rescind or otherwise terminate a contract.<sup>50</sup>

However, in some circumstances, the withdrawal of a portion of an electronic communication may invalidate the whole communication or 'render it ineffective for the purposes of contract formation'.<sup>51</sup> The consequences (if any) of exercising the right of withdrawal are to be determined according to any applicable rule of law.<sup>52</sup>

**Proposed section 15E** of the Electronic Transactions Act makes it clear that Part 2 of that Act does not apply to electronic communications related to contracts and proposed contracts that are formed (or proposed to be formed) under state or territory law. Similarly, these communications will not be governed by **proposed Part 2A**, even if the relevant state or territory has not enacted provisions similar to **proposed Part 2A**. If the state or territory has legislation (or common law) in place in terms that are similar to Part 2 of the Electronic Transactions Act, then the state/territory law is the proper law of the contract. The Explanatory Memorandum explains that the Commonwealth does

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47. **Proposed subsection 15B(2)** of the Electronic Transactions Act. See also Explanatory Memorandum, p. 17.

48. **Proposed section 15C** of the Electronic Transactions Act.

49. **Proposed section 15D** of the Electronic Transactions Act.

50. **Proposed subsection 15D(3)** of the Electronic Transactions Act.

51. Note to **proposed section 15D** of the Electronic Transactions Act, referring to paragraph 241 of the UNCITRAL explanatory note for the Convention.

52. **Proposed subsection 15D(4)** of the Electronic Transactions Act.

not intend to override the state's legislation, saying: 'The intention is to preserve the co-operative nature of the electronic transactions scheme'.<sup>53</sup>

**Proposed Part 2A** does not apply to the extent that it would prevent or interfere with the exercise of powers (or the performance of functions or duties) by a state or territory, and the operation would otherwise be invalid because of the Australian Constitution.<sup>54</sup>

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53. Explanatory Memorandum, p. 19.

54. **Proposed section 15F** of the Electronic Transactions Act.

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