

e-COMMERCE COMMITTEE
BUSINESS LAW SECTION
LAW COUNCIL OF AUSTRALIA

**AUSTRALIA'S ACCESSION TO THE 2005 UN CONVENTION ON THE USE
OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS**

1. SUMMARY OF SUBMISSION

The e-Commerce Committee of the Business Law Section of the Law Council of Australia (**'the Committee'**) generally supports the majority of the proposals outlined in the Attorney-General's Consultation Paper on *Proposed Amendments To Australia's Electronic Transactions Laws* ("**Consultation Paper**"), but does have concerns relating to a number of key proposals in the Consultation Paper (as outlined below).

The Committee notes that a key issue, namely, the lack of uniformity across State and Federal variants of the Commonwealth's Electronic Transactions Act 1999 ("**ETAs**") needs to be addressed as part of the proposed amendments if the benefits of global uniformity are to be realised. In particular, the lack of harmony in the way regulations under the current regime have been implemented both in principle and in specific instances remains of concern.

2. RESPONSE TO RECOMMENDATIONS

a) The Committee **agrees** with the following Recommendations in the Discussion Paper.

Recommendation 1

The ETAs should be amended to make clear that the provisions dealing with requirements to give information in writing include a requirement for a contract to be in writing.

Recommendation 2

The ETAs should be amended to change the wording in the signature provisions from 'indicate the person's *approval*' to 'indicate the party's [**sic**] *intention*' in respect of the information communicated.

Recommendation 3

There should be an additional provision to the signature provisions as a safeguard to prevent parties from arguing that a signature fails the objective reliability test. This is where the method can be proven *in fact* to have

identified the signatory and indicated the signatory's intention in respect of the information contained in the electronic communication.

Recommendation 5

The ETAs should incorporate a provision that proposals to enter into a contract made by electronic means to the world at large are to be treated as an invitation to make offers, unless there is a clear indication by the trader of an intention to be bound.

Recommendation 8

The ETAs should incorporate provisions that clarify rules for determining a party's place of business so that:

- a) A party's place of business is presumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location,
- b) If a party has not indicated a place of business, and has more than one place of business, then the place of business is that which has the closest relationship to the relevant contract, *having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract*,
- c) A location is not a place of business merely because that is:
 - (i) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or
 - (ii) where the information system may be accessed by other parties,
- d) The sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country, and
- e) A definition be incorporated to define 'place of business' for a private entity as 'any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location'.

Recommendation 9

- a) The default rules in the ETAs for timing of dispatch should be amended so that:
 - i) the formula for determining time of dispatch ('when it enters an information system outside the control of the originator') reflect instead the Convention's formula ('when it leaves an information system under the control of the originator'), and
 - ii) if the electronic communication has not left an information system under the control of the originator (eg where the parties exchange communications through the same information system or network) the time when the electronic communication is received.
- b) The default rules in the ETAs for timing of receipt should be amended so that:
 - i) the time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic

address designated by the addressee (an electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address), and
ii) the time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address.

c) The rules in the ETAs for time and place of dispatch and receipt make it clear that:

(i) the fact that an information system of an addressee is located in a jurisdiction other than that in which the addressee itself is located does not alter the application of the rules in articles 10.2 (time) and 10.3 (place) of the Convention.

Recommendation 10

The ETAs make provision to exclude specific financial transactions and negotiable instruments, documents of title and similar documents when the subject of an international contract.

Recommendation 11

The ETAs be amended to incorporate the definitions of 'originator' and 'addressee' for clarity and for consistency with the Convention.

b) In relation to the following Recommendations, the Committee offers additional comments:

Recommendation 4

The definition of 'transaction' in the ETAs should be amended to make it clear that, for the purposes of a transaction in the nature of a contract, a 'transaction' includes dealings in connection with the formation and performance of a contract consistent with the definition of 'communication' in article 4 of the Convention.

The Committee thinks care needs to be taken in relation to the meaning of "transaction". At the time the ETAs were proposed the 1996 *UNCITRAL Model Law on Electronic Commerce* from which they were derived contemplated that a "transaction" was essentially any interchange, which could be an interchange in connection with a conventional "transaction" but could also be a non-commercial interchange in the form of a message or other data communications. As written *Recommendation 4* is fine but we would be concerned if any explanatory or supplemental material were to be circulated that inadvertently confined the intended breadth of the word "transaction".

Recommendation 6

a) The ETAs should incorporate a provision to clarify the validity of contracts resulting from the use of automated message systems, and

b) The ETAs should incorporate a definition of 'automated message system' meaning 'a computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system'.

The Committee thinks the words "or performances" in Recommendation 6(b) need clarifying, despite the presence of those words in Article 4 of the subject Convention. It is conduct or actions of *the party other than the responding party* that would seem to us to be the concept sought to be conveyed. The Committee's suggestion is that the words "or performances" be omitted from any Australian legislative embodiment of the subject Convention.

Recommendation 7

- a) The ETAs should incorporate article 14 of the Convention offering the right to withdraw the portion of the electronic communication in which an input error was made if the automated message system does not provide the person making the input, or the party on whose behalf that person was acting, with an opportunity to correct the error, and
- b) Such a provision should not be limited to business to business contracts but apply to transactions in general, including transactions with consumers.

The Committee has made a submission to ASIC (copy available on request) in relation to its review of the EFT Code of Conduct in respect of, *inter alia*, mistaken payments in the Internet Banking context. Whilst most systems offer a confirmation screen, and would therefore not be covered by any withdrawal right contemplated by Recommendation 7, the Committee suggests that any legislative embodiment of Recommendation 7 defer to the EFT Code of Conduct where it has applied and its mistaken payments requirements have been met. Similarly, the BPay system has rules that govern input and similar errors made in the use of its system. The Committee recommends that any legislative change defer to or exempt regimes that currently have satisfactory provision for dealing with input errors. If necessary the onus can be cast on anyone seeking the benefit of the exemption to demonstrate that the alternative approach adopted was fair in all the circumstances compared to the outcome that would have resulted from the withdrawal right being availed of.

c) Additional comments

Given that the benefit of acceding to the subject Convention is to achieve international harmony in relation to electronic transactions, it would be ironic if the opportunity were not taken to also achieve better harmony on the domestic side at the same time. The Committee therefore strongly recommends that a review be undertaken of the discrepancies between State variants of the Commonwealth's ETA and the regulations made thereunder. The Committee believes that the extent of the variations is beyond what is appropriate in an Internet context where State boundaries ought to be irrelevant. Indeed in the Committee's view the provisions of section 109 of the Constitution ought to be invoked to confine State legislation to

transactions (if any) not within Commonwealth legislative power (which includes regulation of transactions effected by means of any technology within the posts and telegraphs power).

eCommerce Committee

13 February 2009