Australia’s accession to the UN Convention on the Use of Electronic Communications in International Contracts 2005

Proposed amendments to Australia’s electronic transactions laws

consultation paper

November 2008

This paper is made available for public consultation. It does not necessarily represent the views of the Standing Committee of Attorneys-General or any individual Attorney-General. Officials of the Australian Government Attorney-General’s Department developed this paper in consultation with relevant State and Territory government officials.

MINISTER'S FOREWORD

I am pleased to release this consultation paper on the Australian Government's proposal to accede to the United Nations Convention on the Use of Electronic Communications in International Contracts.

The Rudd Government recognises the need to support business operations in the global economy. We want to maximise the potential of technology to promote international legal and business engagement. To do this, we need to remove possible legal obstacles and uncertainty.

Some years ago, the Commonwealth, States and Territories passed legislation to facilitate electronic transactions. These Electronic Transactions Acts were based on the 1996 Model Law on Electronic Commerce, developed by the UN Commission on International Trade Law. A decade later, the UN adopted the Convention on Electronic Communications. The Convention updates many of the concepts in the Model Law on Electronic Commerce, based on a greater understanding of Internet usage in electronic transactions.

I believe that Australia should be in a position to say to the world that our laws on e-commerce reflect up-to-date internationally recognised legal standards. However, before Australia can accede to the Convention, we would need to make changes to our domestic electronic transactions laws. The changes required are relatively straightforward and would serve to update and improve the laws.

My State and Territory colleagues and I would like to encourage those who have a view to make a submission on the proposed amendments to our laws as outlined in this consultation paper.

We look forward to progressing this important work.

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The Hon Robert McClelland MP
Attorney-General

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Background

The purpose of this consultation paper is to invite comment on proposed amendments to Commonwealth, State and Territory uniform electronic transactions legislation. The amendments arise out of a proposal to accede to the UN Convention on the Use of Electronic Communications in International Contracts.

The UN Commission on International Trade Law (UNCITRAL) finalised the Convention on electronic contracting in 2005. The Convention aims to enhance legal certainty and commercial predictability where electronic communications are used in relation to international contracts. It is the first UN Convention addressing legal issues arising from the digital economy.

The Convention was formally adopted by the UN on 23 November 2005 and was open for signature until 16 January 2008. Eighteen countries including China, Singapore and the Republic of Korea signed the Convention. The Australian Government, through the Standing Committee of Attorneys-General, is now considering whether to accede to the Convention.

This paper discusses the differences between Australia's domestic electronic transactions laws and the Convention. Most of the amendments required to update these laws to bring them into line with the Convention are not considered significant, but would ensure that our laws keep pace with developments in this rapidly evolving area of law.

The Convention updates many of the core provisions of the Model Law on Electronic Commerce which was developed by UNCITRAL in the early 1990s and finally adopted in 1996. The Commonwealth, State and Territories all have Electronic Transactions Acts based on this Model Law.

The Convention applies to international contracts. However, an issue which must be considered by governments when deciding whether to implement the Convention is whether to apply the Convention rules to domestic contracts to avoid having different regimes for domestic and international contracts.

Submissions are sought on the proposed amendments and issues raised in the paper. Submissions are requested by **30 January 2009**. Submissions should be e-mailed to ecommerce@ag.gov.au or sent to:

Ms Helen Daniels
Assistant Secretary
Copyright Law Branch
Attorney-General's Department
National Circuit
BARTON ACT 2600
Tel: 02 6250 6313

Because the outcome of the consultations affects State and Territory laws as well as those of the Commonwealth, copies of submissions received will be provided to relevant States and Territories officers.

Submissions may be made public on the Attorney-General Department’s website unless otherwise specified. Persons providing a submission should indicate whether any part of the content should not be disclosed to the public. Where confidentiality is requested, submitters are encouraged to provide a public version that can be made available.

The views provided in the submissions will be analysed carefully and used as a basis for further discussion within the Standing Committee of Attorneys-General to decide whether Australia should amend its uniform electronic transactions laws and accede to the Convention.

List of recommendations

Proposed changes to jurisdictional Electronic Transactions Acts (ETAs)

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 *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 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.

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 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'.

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.

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.

1. Introduction

1.1. The Convention on the Use of Electronic Communications in International Contracts was adopted by the UN General Assembly on 23 November 2005. The purpose of the Convention is to facilitate international trade by offering practical solutions for issues arising out of the use of electronic communications in the formation or performance of contracts between parties located in different countries (international contracts).

1.2. Full text and commentary of the Convention can be found at: <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html>.

1.3. The Australian Government is considering accession to the Convention. If Australia decides to accede to the Convention changes would need to be made to the uniform Commonwealth, State and Territory ETAs.

1.4. Although the Convention deals specifically with international contracts, there are some amendments which would serve to update the regime for all electronic transactions. Changes suggested by the Convention in the context of international contracts should ideally flow through to the general electronic transactions regime in order to avoid a duality of regimes for international and domestic contracts.

1.5. Except where amendments only have application or relevance to contracts, it is proposed that the amendments apply to 'transactions' in general to ensure that the laws keep pace with international legal developments.

Relationship of the Convention to the ETAs

1.6. The Convention is heavily based on the concepts of the 1996 UNCITRAL Model Law on Electronic Commerce (the Model Law), upon which the uniform ETAs are based. The ETAs implement three key outcomes which are reflected in the Convention.

(i) A general rule is established confirming the validity of electronic transactions. The Convention provides for similar legal recognition specifically in respect of contracts (article 8.1).

(ii) Legal requirements or permissions, generally required by statute, for transactions to be in writing or to be signed, or to produce, retain or to record information are met by electronic communications where certain minimum criteria are met. The criteria are directed to establishing functional equivalence between a requirement in traditional paper format and an electronic communication. The Convention establishes similar form requirements (article 9).

(iii) For the purposes of a law of each jurisdiction, rules are provided addressing attribution and the time and place of dispatch and receipt of electronic communications. Those rules apply in default when agreement has not otherwise been made by the originator and addressee of the communication. The Convention establishes similar rules addressing time and place of dispatch and receipt (article 10), but does not make provision for attribution.

1.7. The Convention contains additional rules directed at clarifying traditional rules on contract formation to accommodate the needs of electronic commerce. These rules include:

- the use of electronic communications to make invitations to treat (article 11),
- the use of automated message systems for contract formation (article 12), and
- a right of withdrawal where a person makes an input error in an electronic communication exchanged with an automated message system (article 14).

The Convention does not otherwise purport to vary or create contract law.

1.8. The Convention is only concerned with international business contracts. The ETAs are more broadly directed to removing impediments to the use of electronic communications in laws generally (whether in transactions with government, business or consumers). However, the ETAs can apply to private contracts, both in cases where statutes regulate the form of a contract (eg sale of goods legislation) and where a contract is governed by the common law of the States and Territories.

Nature of changes to the ETAs to implement the Convention

1.9. Implementation of the Convention would not require significant changes to the electronic transactions laws. In those areas overlapping with the Model Law, the Convention introduces some refinements in approach since the Model Law was finalised in 1996. Those differences are relatively minor and any consequential amendments would serve to update the ETA regime. The additional rules directed to clarifying traditional contracting rules would provide legal certainty on those matters.

1.10. In summary, and consistently with the object of the ETAs, implementation of the Convention would serve to:

- modernise Australia's law on e-commerce so that it reflects internationally recognised legal standards,
- enhance cross-border online commerce,
- increase certainty for international trade by electronic means and thereby encourage further growth of electronic contracting, and

- confirm Australia's commitment to facilitating electronic communications in international trade transactions as reflected in Free Trade Agreements.

Consequences of accession to the Convention

1.11. Accession to the Convention and the proposed amendments to the ETAs would have an impact on the following:

International business transactions – the Convention applies to the use of electronic communications in connection with the formation or performance of international business contracts. In order to enhance the application of the Convention it is not a requirement that all parties reside in a contracting State to the Convention.[1] The Convention applies when the law of a contracting State is part of the law governing the dealings between the parties (to a private international contract), which is determined by private international law rules if the parties have not validly chosen the law.

Domestic business transactions – currently the ETAs operate to ensure the validity of business transactions in electronic form. Changes to the ETAs may have an impact on the way domestic electronic business transactions are carried out. The proposed amendments are minor, aimed at clarifying and updating the concepts in the ETAs.

Transactions with government agencies – the ETAs operate to facilitate use of electronic communications in dealings with government agencies, at the Commonwealth, State and Territory level. Changes suggested by the Convention which apply to all transactions may have an impact on these dealings (eg the changes to the default rules on time and place of dispatch and receipt).

What will not change?

Party autonomy

1.12. Nothing in the Convention affects the principle that contracting parties should be free to agree on matters affecting the formation and performance of a contract between them.

1.13. A threshold issue for parties contracting in different countries is to agree on the law which is to apply to their dealings. The Convention only applies when the relevant law validly chosen by the parties or otherwise deemed to apply is that of a contracting State.

1.14. Article 3 of the Convention preserves the rights of parties to reach their own agreement on matters addressed in the Convention rules. The freedom for parties to choose the medium of communication in connection with the formation or

[1] Contracting States can make a declaration under article 19 that the Convention only applies to electronic communications exchanged between parties located in contracting States.

performance of a contract is preserved by article 8(2), which provides that nothing in the Convention requires a party to use or accept electronic communications, but a party's agreement to do so may be inferred from the party's conduct. This is consistent with the ETAs.

1.15. UNCITRAL acknowledges that, in practice, solutions to the legal difficulties raised by the use of electronic communications are often the subject of contractual terms. Article 3 reflects the view that party autonomy is vital in contractual negotiations and should be broadly recognised by the Convention.[2]

1.16. Derogations from the Convention need not be explicitly made and can be implied. For example, by parties agreeing to contractual terms that vary the Convention.[3] However, it is also intended that parties not be able to override any statutory requirements that impose, for example, particular methods of authentication. Nor does it mean parties could agree on a lower threshold for form requirements than those articulated in article 9 (ie the minimum criteria) in order to facilitate an electronic communication meeting a legal requirement for writing, signature or the production or retention of information.[4] This would be consistent with the ETAs. Other articles provide rules which apply in default when parties have not made other agreement, such as article 6 (location of the parties) and article 10 (time and place of dispatch and receipt of electronic communications).

1.17. As is presently the case in the ETAs, where parties intend to make alternative arrangements on matters addressed in particular provisions, that intention should be clearly expressed in their agreement.

Consent provisions

1.18. Article 8.1 restates the general principle of non-discriminatory treatment between electronic communications and paper documents. The first limb of article 8.2 makes it clear that the legal recognition of electronic communications does not impose an obligation on a party to use or accept electronic communications in connection with the formation or performance of a contract. That provision is consistent with the Convention's purpose to facilitate but not compel the use of electronic communications in contracting.

1.19. The second limb of article 8.2 makes it clear that a party's express agreement to using electronic communications in connection with the formation or performance of a contract is not necessary and that agreement may be inferred from conduct. The explanatory note to the Convention indicates that examples of conduct that may give rise to implied agreement include handing out business cards incorporating e-mail addresses, inviting a potential client to visit a website to place an order and advertising goods over the Internet or through e-mail.[5]

1.20. The Convention's approach is consistent with the approach taken in the ETAs. The ETAs do not compel a person to use electronic communications in transactions

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[2] Explanatory note to Convention para. [84], p.36.
[3] Explanatory note to Convention para. [89], p.37.
[4] Explanatory note to Convention para. [142], p.50.
[5] Explanatory note to Convention para. [132], p.48.

(including contracts). Under the ETAs, a person's consent is needed in order for an electronic communication to meet a legal requirement or permission

(i) to give information in writing
(ii) for signature, or
(iii) production of a document.

The definition of 'consent' in the ETAs includes consent that can reasonably be inferred from the conduct of the person concerned.

Exemptions

1.21. While UNCITRAL aimed to achieve wide application of the Convention, it also recognised that States exclude certain matters or types of transactions from legislation intended to facilitate the use of electronic communications. Regulations made under the ETAs exclude a range of transactions which vary between jurisdictions. Exemptions under the ETAs are not uniform, but commonly include form requirements in respect of transactions related to wills, powers of attorney or documents required to be delivered by personal service.

1.22. It is proposed that a declaration be made under article 19.2 to exclude application of the Convention to transactions that have been exempted by Australian jurisdictions from the operation of the ETAs.

What will change?

1.23. The main changes proposed are:

- minor amendments to the electronic signature provisions and other form requirements,
- new rules that recognise the use of automated message systems,
- a new rule about what is an invitation to treat in the electronic context,
- clarification of the location of parties rules, and
- minor amendments to the default rules for time and place of dispatch and receipt.

1.24. These changes are discussed in the sections following.

2. Electronic signatures and other form requirements

2.1. Article 9 reiterates the basic rules reflected in the ETAs. These rules are formulated on a functional equivalence approach, meaning that the functions or purposes of a paper requirement are analysed to determine how they could be met through electronic communications. The minimum criteria outlined for the specific rules addressing legal requirements for writing, signature and original form in the Convention are largely similar to the ETAs, although some amendment is proposed below.

Freedom of form

2.2. Article 9.1 reflects the general principle of freedom of form requirements contained in article 11 of the UN Convention on Contracts for the International Sale of Goods (1980) (carried into effect by legislation in all States and Territories and referred to as the Vienna Convention).[6] Article 9.1 makes it clear that the Convention itself does not establish any particular form requirements.

> 9.1 Nothing in this Convention requires a communication or a contract to be made or evidenced in any particular form.

2.3. Article 9.1 is also consistent with the general position at common law that parties can agree to contractual form requirements. A valid contract need not be in writing and can be wholly oral and may also be inferred from conduct.

Requirement for writing

2.4. The ETAs and article 9.2 both impose a minimum criteria requirement that an electronic communication needs to be 'accessible so as to be usable for subsequent reference' if it is to meet a legal requirement for writing.

> 9.2 Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.

2.5. The ETAs additionally require that the person to whom the information is required to be given, consents to being given the information by means of electronic communication. Consent is defined in the ETAs to include consent that can reasonably be inferred from the conduct of the person concerned. The inclusion of consent, which was not in the Model Law, reflects a policy position that a person should not be compelled to use an electronic communication to conduct a transaction (ie use of electronic communications should be optional). The ETAs' provisions would still meet the facilitative objective of article 9.2, and express consent is not required (which is consistent with article 8.2). Therefore, amendment to remove the requirement for consent in relation to private contractual transactions is not proposed.

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[6] Uniformly entitled *Sale of Goods (Vienna Convention) Act* (enacted variously 1986 or 1987).

2.6. Article 9.2 only applies to requirements under a law to form a contract in writing. Australian laws can require certain contracts to be in writing. However, there is no common law requirement that a contract be in writing in order that it be enforceable. State and Territory sale of goods legislation generally reflects the common law through provision that, subject to other laws, a contract of sale may be made in writing (with or without seal), orally, partly in writing and partly oral, or implied from the conduct of parties.[7] (A variation exists in Tasmania and Western Australia.)[8]

2.7. Relevantly to international contracts, article 11 of the Vienna Convention provides that a contract of sale need not be concluded in writing, is not subject to any other requirement as to form, and may be proved by any means (including witnesses).

2.8. Some States have preserved the statutory requirement for contracts dealing with the disposition of land to be evidenced in writing by exempting those provisions under regulations made under the ETAs.[9]

2.9. The ETAs cover both requirements and permissions under a law *to give information in writing*, however reference is not made to forming a contract. The intention is that the term be broadly defined. As some jurisdictions have expressly excluded statutory requirements for contracts to be in writing from the ETAs' writing provisions, it appears a law requiring a person *to give information in writing* is intended to include a law requiring a contract to be in writing. Clarity on this point is desirable. As is the case now, jurisdictions would be able to exempt such a requirement from the operation of the ETAs.

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.

Requirement for signature

2.10. Under the common law, there is no requirement that a contract be signed to render a contract valid. However, as for writing, a form requirement for signature may be imposed by statute.[10] Like the ETAs, article 9.3 is based on the technology neutrality principle, and as such does not specify technological equivalents to particular functions of handwritten signatures. Rather, it establishes 'general conditions under which electronic communications would be regarded as

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[7] s.8 ACT *Sale of Goods Act 1954;* s.8 NSW *Sale of Goods Act 1923*; s.8 NT *Sale of Goods Act*; s.6 Qld *Sale of Goods Act* 1896; s.3 SA *Sale of Goods Act 1895*; s.8 Tas *Sale of Goods Act 1896*; s.3 WA *Sale of Goods Act 1895*.
[8] A contract for the sale of any goods at or above $20 is not enforceable unless one of three requirements is met which includes where a contract in writing is made and signed by the party: s.9(1) Tas *Sale of Goods Act 1986*, s.4(1) WA *Sale of Goods Act 1895* – repealed in other jurisdictions.
[9] Subregulation 5(1) SA *Electronic Transactions Regulations 2002*, subregulation 7(1) NSW *Electronic Transaction Regulation 2007* (excludes s.23C *Conveyancing Act 1919*).
[10] See eg s.12(1) Qld Consumer Credit Code, s.23C(1) NSW *Conveyancing Act 1919*.

authenticated with sufficient credibility and would be enforceable in the face of signature requirements'.[11]

> 9.3 Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:
>
> (*a*) A method is used to identify the party and to indicate that party's intention in respect of the information contained in the electronic communication; and
>
> (*b*) The method used is either:
>
> (i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
>
> (ii) Proven in fact to have fulfilled the functions described in subparagraph (*a*) above, by itself or together with further evidence.

2.11. The minimum requirements that need to be met for an electronic signature to meet a traditional signature are largely similar to the ETAs' provisions. Three main differences exist. First, like the requirement for writing, the ETAs also require the person to whom the signature is required to be given to consent to that requirement being met by a form of electronic identification. For the same reasons above in relation to the requirement for writing (namely that the ETA signature requirements still meet the facilitative object of article 9.3 and the ETAs do not require express consent), amendment to exclude the requirement for consent in relation to private contractual transactions is not proposed.

2.12. Second, where the Convention refers to using a method '… to identify the party and to indicate that party's *intention* in respect of the information contained in the electronic communication', the ETAs use *approval* instead of intention. The explanatory note to the Convention observes the reason for this distinction is that legal requirements for signature may only be directed to identifying the person (such as laws related to attestation by a commissioner for oaths), but not to their approval of the contents of the document.[12]

2.13. It seems likely a purpose of a statutory requirement to sign a contract is to ensure that the person endorses the contents of the contract, not just to verify their identity. Nevertheless, the use of the term 'approval' in the ETA context could be inconsistent with the purpose of some statutory requirements for signature, or at least call into question whether a requirement to sign is directed to that person approving contents or simply to identification. It is proposed that the ETAs be amended to change 'approval' to 'intention'. The reasons for this distinction could be made clear in the explanatory memorandum to any amendment.

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 *intention*' in respect of the information communicated.

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[11] Explanatory note to Convention para. [154], p.53.

[12] Explanatory note to Convention para. [160], p.55.

2.14. Third, the ETAs do not contain equivalent provision to article 9.3(b)(ii). The explanatory note to the Convention indicates that a party should not be allowed to invoke the 'reliability test' in bad faith to repudiate its signature.[13] A contract should not be able to be invalidated on the ground that the electronic signature was not appropriately reliable for the circumstances if there is no dispute in fact about the identity of the person signing or the fact of signing. Article 9.3(b)(ii) would validate a signature method – regardless of its objective reliability - whenever the method used is 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 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.

[13] Explanatory note to Convention para. [164], p.56.

3. Formation of contracts, invitations to treat and automated message systems

3.1. The definitions section in article 4 of the Convention introduces a definition of 'communication' meaning 'any statement, declaration, demand, notice or request, including an offer and the 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'. The ETAs contain no similar definition of 'communication', however, the term 'transaction' is broadly defined. Under the State and Territory ETAs, 'transaction' is defined to 'include any transaction in the nature of a contract, agreement or other arrangement, and also includes any transaction of a non-commercial nature'. The Commonwealth ETA simply defines transaction to 'include a transaction of a non-commercial nature.'[14]

3.2. The explanatory note to the Convention observes the definition of 'communication' is intended to make clear that the Convention applies to a '… wide range of exchanges of information between parties to a contract, whether at the stage of negotiations, during performance or after a contract has been performed'. Although 'transaction' in the ETAs is defined in a broad and inclusive manner, an expanded definition in the context of contracts would provide increased clarity on the scope of the ETAs (and in particular the application of the general rule on media neutrality).

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.

Invitations to treat

3.3. The purpose of article 11 is to clarify the extent to which parties offering goods or services through open, generally accessible communication systems, such as a website, are bound by advertisements made in this way. The article is consistent with article 14 of the Vienna Convention. Article 11 provides that a proposal for concluding a contract, other than a proposal addressed to one or more specific persons, is to be considered merely an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

> 11. A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such 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.

[14] The omission of reference to contract possibly reflects the position that common law contracts are generally understood to be governed by State and Territory law.

3.4. Article 11 reflects the distinction at common law between an offer (where the offeror has indicated a willingness to be bound) and invitations to treat (which is a statement or conduct that invites the making of an offer or entry into further negotiations).[15] While there is no rule of law that displays of goods in shops or promotional statements in advertising constitute an invitation to treat, there is a 'presumption which may be rebutted by reference to the objective test of contractual negotiation'.[16]

3.5. Article 11 confirms the application of the distinction at law between invitations to treat and offers to electronic contracting. That distinction turns on the intent of the trader in the absence of a clear indication by a trader to be bound by an offer made over the Internet. This would mean that a trader has not relinquished the right to refuse to sell to a customer (including, for example, where the trader has sold all goods). The trader would be bound if the price offered by the customer has been accepted by the trader. It is proposed that article 11 be incorporated into the ETAs.

3.6. In reaching a position on article 11, UNCITRAL considered the proposition that websites offering goods or services through interactive application[17] (as distinct from those that use non-interactive applications) should be treated as though a firm offer is being made. Upon ultimately dismissing that proposition, UNCITRAL gave the following reasons.[18]

> The final consensus was that the potentially unlimited reach of the Internet called for caution in establishing the legal value of these 'offers'. It was found that attaching a presumption of binding intention to the use of interactive applications would be detrimental for sellers holding a limited stock of certain goods, if the seller were to be liable to fulfil all purchase orders received from a potentially unlimited number of buyers. In order to avert that risk, companies offering goods or services through a website that uses interactive applications enabling negotiation and immediate processing of purchase orders for goods or services frequently indicate in their website that they are not bound by those offers. UNCITRAL felt that, if this was already the case in practice, the Convention should not reverse it.

3.7. Importantly article 11 recognises that in some cases, where a clear intention exists, a binding offer will be capable of being made. As is the case where transactions are undertaken outside the electronic domain, for the purposes of article 11, whether the necessary intention to make a binding offer exists will need to be assessed in light of all the circumstances. Factors which might affect that consideration would include the use of any disclaimers by vendors or the general terms and conditions of the auction platform.[19]

Recommendation 5
The ETAs should incorporate a provision that proposals to enter 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.

[15] *The Laws of Australia* [7.1.49].
[16] *The Laws of Australia* [7.1.50 - 51].
[17] An interactive application typically is a combination of software and hardware for conveying offers of goods and services in a manner that allows for the parties to exchange information in a structured form with a view to concluding a contract automatically – explanatory note to Convention para [205].
[18] Explanatory note to the Convention para [204], p.67.
[19] Explanatory note to the Convention para [206], p.68.

Use of automated message systems for contract formation

3.8. The ETAs do not contain a provision equivalent to article 12. Article 12 embodies a non-discrimination rule intended to make it clear that the absence of human intervention does not by itself preclude contract formation. The central rule in the article is that the validity of a contract does not require human review of each of the actions carried by the automated message system or resulting contract.

> 12. A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract.

3.9. The term 'automated message system' is defined in article 4 of the Convention as:

> 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.

UNCITRAL's explanatory note to the Convention elaborates on what this means by the following examples.[20]

> The critical element in this definition is the lack of a human actor on one or both sides of a transaction. For example, if a party orders goods through a website, the transaction would be an automated transaction because the vendor took and confirmed the order via its machine. Similarly, if a factory and its supplier do business through [Electronic Data Interchange], the factory's computer, upon receiving information within certain pre-programmed parameters, will send an electronic order to the supplier's computer. If the supplier's computer confirms the order and processes the shipment because the order falls within pre-programmed parameters in the supplier's computer, this would be a fully automated transaction. If, instead, the supplier relies on a human employee to review, accept, and process the factory's order, then only the factory's side of the transaction would be automated. In either case, the entire transaction falls within the definition.

3.10. The use of automated message systems forms part of present day business practices. In order to remove any doubt about the validity of contracts formed in this way, it is proposed that article 12 be incorporated into the ETAs. Article 4 of the Convention suggests a definition of 'automated message system' be adopted to complement article 12.

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'.

[20] Explanatory note to Convention para [104], p.40.

Correcting input errors in electronic communications

3.11. The meaning of automated message systems is discussed above. The ETAs do not contain provision addressing the effect of errors in electronic communications. No provision to this effect was included in the Model Law. UNCITRAL explains that errors in the context of automated message systems may be either the result of human actions or the consequence of malfunctioning of the message system used. Article 14 is directed towards the former and, in particular, with an 'input error' in transactions between a person and an automated message system when the system does not provide the person with the possibility to correct the error.

> 14.1 Where a natural person makes an input error in an electronic communication exchanged with the automated message system of another party and the automated message system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the portion of the electronic communication in which the input error was made if:
>
> (*a*) The person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication; and
>
> (*b*) The person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.
>
> 14.2. Nothing in this article affects the application of any rule of law that may govern the consequences of any error other than as provided for in paragraph 1.

3.12. The term 'input error' is not defined, but is intended to cover errors relating to inputting wrong data such as unintentional keystroke errors. Examples of errors might include entering the wrong quantity of goods on an order form, incorrectly selecting an item or unintentionally checking an 'I agree' button and sending a message not intended to be sent.[21]

3.13. The rationale for including article 14 is that, unlike transactions involving human intervention, upon transacting with an automated message system the opportunity to detect or correct an error is reduced. As a higher risk of error arises in online transactions made through automated message systems, UNCITRAL considered a narrowly defined rule to allow for error notification and withdrawal was appropriate. To that extent, article 14 is an exception to UNCITRAL's general approach of achieving media neutrality. Legislative provision covering the effect of errors upon transacting with automated message systems exists in other countries.[22]

3.14. The explanatory note confirms the intention is not to interfere with domestic laws addressing error in contract formation:

> The underlying purpose of article 14 is to provide a specific remedy in respect of input errors that occur under particular circumstances and not to interfere with the general doctrine on error under domestic laws. If the conditions set forth in paragraph 1 of article 14 are not met (that is, if the error is not an "input" error made by a natural person, or if the automated message system did in fact provide the person with an opportunity to correct the

[21] Explanatory note to Convention para [234], p.76.

[22] See in particular section 10 of the *Uniform Electronic Transaction Act*, developed by the US National Conference of Commissioners on Uniform State Laws which has been adopted in 48 US jurisdictions - text available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/ueta99.htm>.

error), the consequences of the error would be as provided for by other laws, including the law on error, and by any agreement between the parties.[23]

3.15. The allocation of risk in article 14 can be described as fair and sensible, noting that:

(i) the electronic communication can only be withdrawn if the automated message system did not provide the originator with an opportunity to correct the error before sending the electronic communication, and

(ii) if no system is in place, the party on whose behalf the automated message system operates bears the risk of error that may occur.

3.16. The right provided by article 14 is a right to *withdraw the portion of the electronic communication in which the input error was made* – it is not a right to rescind or terminate a contract as such. However, the effect of withdrawal may nevertheless be akin to rescission in whole or part if the error affected portion is fundamental to the contract. To this end, UNCITRAL observes that if the withdrawn portion of the communication contains the reference to the nature of the goods being ordered, or to their price or quantity, the electronic communication would not be 'sufficiently definite' for the purposes of contract formation under article 14.1 of the Vienna Convention.

3.17. Additionally, article 14 does not provide a right to, or obligation on, the originator to 'correct' an error once exposed and notified to the supplier (or contracting party). UNCITRAL rejected incorporating a 'right' of correction principally on grounds it '… would have introduced additional costs for system providers and would leave given remedies with no parallel in the paper world.'[24] However, article 14 does not prevent parties from otherwise reaching agreement as to any correction once an error is discovered.

3.18. The intention of article 14 is to encourage parties who transact by way of automated message systems to build in an opportunity for a party with whom they are transacting to correct input errors – for example, a 'confirmation screen' which provides the originator with an opportunity to correct information before it is sent. While the intention is not to give opportunity to parties to repudiate disadvantageous contracts or to avoid what would otherwise be valid legal commitments freely accepted, UNCITRAL considered it was appropriate that a party operating through an automated message system bear the risk of errors if they failed to provide an opportunity for correction.

3.19. The conditions for withdrawal expressed in paragraphs 1(a) and (b) of article 14 serve to limit abuses by parties acting in bad faith and provide a fair basis for the exercise of the right of withdrawal. Under paragraph 1(a) the right of withdrawal will not be available if the originator has unreasonably delayed giving notice which in any event must not be later than the time when the originator has used or obtained any benefit from the goods or services if they have been received.

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[23] Explanatory note to Convention para [250], p.80.
[24] Explanatory note to Convention para [239] p.77.

3.20. The condition for withdrawal in paragraph 1(b) is concerned with the notion of unjust enrichment. Australian laws on restitution and unjust enrichment provide remedy in circumstances where a benefit has been received at the expense of the plaintiff and it is unjust for the defendant to retain the benefit (eg where a contract is void on grounds of uncertainty).[25] UNCITRAL observes that the instantaneous nature of some electronic transactions may produce immediate value or benefit for the purchasing party preventing complete restitution, for example, where the consideration to the originator is information which has been received. In such cases, paragraph 1(b) would preclude reliance on the right to withdrawal.

3.21. To the extent article 14 may alter the general law by giving a right to withdraw an affected portion of an electronic communication, the article has narrow application (applying only to input errors by a natural person communicating with an automated message system) and the conditions for withdrawal provide equitable limitations.

Application to consumer transactions

3.22. Along with certain specific financial transactions and negotiable instruments, documents of title and similar documents, consumer contracts for personal, family or household purposes have been excluded from the scope of the Convention. It was considered that a number of rules in the Convention would not be appropriate in their context.

3.23. Article 14 was one rule identified as potentially inappropriate for application to household consumer contracts (the other is article 10.2 – see below). The explanatory note observes that the Convention does not address the types of matters ordinarily covered in laws designed to provide protection for consumers in certain contracts (eg by specifying conditions under which a consumer will be presumed to have agreed to terms and conditions). In Australia, laws that may be described as providing protection for consumers who are parties to contracts include, trade practices legislation[26] (applicable to contracts for sale of goods and services to a 'consumer' and concerned with unfair conduct), consumer credit legislation[27] (providing relief from certain unjust contracts, mortgages or guarantees in respect of the provision of consumer credit) and financial services legislation.[28] Other laws such as insurance contracts legislation include provisions which may have a protective effect for consumers, but also provide for enforcement of terms and conditions against consumers.[29]

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[25] Carter, Peden, Tolhurst, *Contract Law in Australia*, 5th Ed, [38-02] restitution, [38-09] unjust enrichment.

[26] Commonwealth *Trade Practices Act 1974*, NSW *Fair Trading Act 1987*, NT *Consumer Affairs and Fair Trading Act* 1990, VIC *Fair Trading Act 1999*, WA *Fair Trading Act 1987*, SA *Consumer Transactions Act 1972* – see also NSW *Contracts Review Act 1980* which provides relief for unjust contracts.

[27] ACT *Consumer Credit (ACT) Act 1995*, *Consumer Credit (NSW) Act 1995*, *Consumer Credit (NT) Act 1995*, *Consumer Credit (Queensland) Act 1994*, *Consumer Credit (Vic) Act 1995*, *Consumer Credit (SA) Act 1995*, *Consumer Credit (Tas) Act 1996*, *Consumer Credit (WA) Act 1996.*

[28] The Commonwealth *Australian Securities and Investment Commission Act 2001* (Part 2, Division 2, Subdivision D regulates consumer protection in financial services).

[29] See eg s.13 Commonwealth *Insurance Contract Act 1984* (duty to act in good faith imposed on all parties to the contract – ie insured and insurer) – see also obligations of disclosure imposed on insured.

3.24. The ETAs currently apply to all transactions, including consumer, and do not override the protection provided by other consumer protection laws. Should the ETAs be amended to implement the Convention and apply to household consumer contracts, the provisions of the ETAs would supplement other existing laws offering protection to consumers in contracts.

3.25. Given the protective policy underlying article 14, there is good reason to afford the right to household consumer contracts as well as business contracts.

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 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.

4. Location of parties

4.1. The ETAs contain provision to determine the place of dispatch and receipt of electronic communications.[30] Unless otherwise agreed, the place of dispatch is deemed to be where the originator has its place of business and the place of receipt is where the addressee has its place of business (the same as article 10.3). The ETAs contain further provisions directed to determining the place of business which are largely similar to the rules in article 6 of the Convention. Article 6 contains some rules which would expand upon the provisions in the ETAs.

4.2. The difficulty that can arise in determining a place of business as a result of business practices adapting to technological advancements is illustrated in the following extract from a decision in the Australian Industrial Relations Commission[31]

4.3. … changes in technology, even since 1989 mean that sales may be transacted in a variety of ways and places apart from shops. Telemarketers, or telesales people may even operate from their own homes. How then do you define the place of business? An order is placed from a person's home or perhaps their own place of work, the order is received by a telesales person who may potentially be located anywhere, the goods are located in yet another place and if the transaction involves direct debit from a credit card, the payment may be affected in yet another location.

4.4. No duty is imposed on parties to disclose their place(s) of business. Rather, article 6 establishes a set of rebuttable presumptions in favour of a party's indication of its place of business, and the rules apply in default in the absence of any indication. The purpose of article 6 '… is to offer elements that allow the parties to ascertain the location of the places of business of their counterparts, thus facilitating a determination, among other elements, as to the international or domestic character of a transaction and the place of contract formation'.[32]

Presumption of location indicated by party

4.5. The provisions in the ETAs on place of dispatch and receipt contemplate that parties may make alternative agreement *on the place* where an electronic communication is taken to have been dispatched or received. The ETAs do not make presumptions in respect of determining a party's place of business. Article 6.1 is premised on the principle of party autonomy.

> 6.1. For the purposes of this Convention, 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.

4.6. It is proposed that article 6.1 be incorporated into the ETAs.

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[30] See eg s 14(5) Commonwealth ETA, s 13(5) NSW ETA.

[31] *Franklin Mint Pty Ltd, Re* [1999] IRCommA 1351 (29 November 1999).

[32] Explanatory note to Convention para [108], 42.

Multiple places of business

4.7. Article 6.2 is similar to provisions in the ETAs.[33]

> 6.2 If a party has not indicated a place of business and has more than one place of business, then the place of business for the purposes of this Convention 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.

4.8. One difference is that article 6.2 adds that for the purposes of considering which place of business has the closer relationship to a contract, reference be made to '… the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract'. It is proposed that that clarification be incorporated into the ETAs.

4.9. Article 4 also adds a definition of 'place of business' for private entities 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'. The ETAs only define 'place of business' for the purposes of a government, government authority or a non-profit body. It is proposed that the new definition directed to private entities be included.

4.10. It is also useful to note that, with one exception, article 6.2 is the same rule that is embodied in article 10, subparagraph (a), of the Vienna Convention. The difference is that the Vienna Convention refers to the 'closest relationship to the contract *and its performance* ...', whereas article 6.2 does not include 'performance'. In omitting the reference, UNCITRAL indicated the cumulative reference has given rise to uncertainty since it is possible for large businesses to have one place of business connected with the contract and another with its performance. This departure was considered 'minor' and would not 'generate an undesirable duality of regimes in view of the limited scope of the Electronic Communications Convention.'[34]

Location of information system

4.11. The ETAs do not contain equivalent provisions to articles 6.4 and 6.5.

> 6.4 A location is not a place of business merely because that is: (*a*) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or (*b*) where the information system may be accessed by other parties.
>
> 6.5 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.

4.12. However, incorporation of those articles into the ETAs would confirm the intention that the location of parties is to be determined by the place of business rather

[33] See eg s.14(6)(a) Commonwealth ETA, s.13(6)(a) Victorian ETA.
[34] Explanatory note to the Convention, para [113] at p.43.

than the location of an information system which may be in a different location or jurisdiction to the business.[35]

4.13. Article 6.5 '… only prevents a court or arbitrator from inferring the location of a party from the sole fact that the party uses a given domain name or address [nothing prevents] … a court or arbitrator from taking into account the assignment of a domain name as a possible element, among others, to determine a party's location where appropriate.'[36]

4.14. It is proposed that the additional guidance provided by articles 6.4 and 6.5 be incorporated into the ETAs.

Recommendation 8

The ETAs should incorporate provisions that clarify rules for determining the 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'.

[35] Explanatory note to the Convention further observes that peripheral information related to electronic communications ' such as Internet Protocol addresses, domain names or the geographic location of information systems, despite their apparent objectivity have little, if any, conclusive value for determining the physical location of parties' at para [117], p.44.

[36] Explanatory note to the Convention, para [120], p.44.

5. Time and place of dispatch and receipt

5.1. Like the ETAs, the rules in the Convention on time and place of dispatch and receipt apply as default positions when the parties have not agreed on these matters. Article 3 preserves party autonomy in respect of these matters.

5.2. For the purposes of contract law, time of dispatch and receipt bears importance on the issue of acceptance. The general rule is that, unless an offer stipulates a particular mode of acceptance, a contract is concluded when the fact of acceptance is communicated to the offeror.[37] The time an acceptance is made can be important, for example, if an offer is open for a certain period. An exception to the general acceptance rule is the postal acceptance rule, where acceptance is effective immediately after properly pre-paid and addressed letter is posted.[38] The application of the postal acceptance rule to electronic communications may be confined to situations where it can be inferred an offeror intended acceptance could be communicated upon dispatch of an electronic communication.

5.3. While the general rule of acceptance upon communication to the offeror has been applied to instantaneous communications such as telex and facsimiles, the position in relation to e-mail communications has not been settled under case law. However, it seems the general rule would apply, which may be rebutted by particular circumstances.[39]

5.4. Like the ETAs, the Convention (and particularly article 10) does not provide a rule on the time of contract formation when using electronic communications. Clarification of when a communication is ‘dispatched’ or ‘received’ allows for application of both the above common law rules, depending on the circumstances. This is a demonstration of how the Convention achieves its objective of facilitating the use of electronic communications in contracts without purporting to change substantive domestic law on contract.

5.5. Another important function of the ETAs is to facilitate electronic dealings with government. The default rules for time of dispatch and receipt can be important in determining whether a particular form has been lodged in time (eg an electoral enrolment form).

Article 10.1 Time of dispatch

5.6. It follows from above that determining the time an electronic communication has been dispatched will be important if it can be inferred the offeror intended that an acceptance be made upon dispatch of an electronic communication. While in practice an e-mail communication may in many cases be virtually instantaneous, it is possible for e-mails to be ‘lost’ or delayed. Security measures such as firewalls and filters may also delay or even prevent delivery. Accordingly, if the postal acceptance rule applies

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[37] *George Hudson Holdings Ltd v Rudder* (1973) 128 CLR 387, at 395. Also, Carter, Peden, Tolhurst, *Contract Law in Australia*, 5th Ed, [3-26].
[38] See Carter, Peden, Tolhurst, *ibid*, [3-30].
[39] See *Laws of Australia*, 8.9.10, relying on *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels* [1983] 2 AC 34 at 42 per Lord Wilberforce.

a binding contract may be formed notwithstanding that the offeror receives acceptance after a period for acceptance has closed.

5.7. Article 10.1 of the Convention provides:

> 10.1 The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received.

5.8. Under the ETAs the rule is: 'if an electronic communication enters a single information system outside the control of the originator, then, unless otherwise agreed between the originator and the addressee of the electronic communication, the dispatch of the electronic communication occurs when it enters that information system'. That provision is consistent with article 15.1 of the Model Law. However, the ETAs include further provision to clarify that if an electronic communication enters successively two or more information systems outside the control of the originator, the dispatch occurs when it enters the first of those information systems.

5.9. Both rules use the concept of 'information system' which is similarly defined in the ETAs and the Convention. The Convention article differs from the ETAs in two respects.

5.10. Under the Convention, time of dispatch occurs when the communication 'leaves' an information system under the control of the originator or agent. Under the ETAs the time of dispatch occurs when the communication 'enters' a single information system outside the control of the originator.

5.11. Under the Convention, if a communication has not left the information system of the originator, the time of dispatch is deemed to be when the communication is received. The ETAs do not anticipate electronic communications being sent and received within one information system.

5.12. UNCITRAL does not consider the Convention formulation of 'leaving' rather than 'entering' would give rise to any practical difference to the Model Law (on which the ETAs are based):

> 5.13. …In practice, the result should be the same as under article 15, paragraph 1, of the UNCITRAL Model Law on Electronic Commerce, since the most easily accessible evidence to prove that a communication has left an information system under the control of the originator is the indication, in the relevant transmission protocol, of the time when the communication was delivered to the destination information system or to intermediary transmission systems.[40]

5.14. Both the formula in the ETAs ('when it enters an information system outside the control of the originator') and the Convention's formula ('when it leaves an information system under the control of the originator') involve the notion that dispatch occurs when a communication leaves the control of the originator's information system. While there may be no practical difference arising between these

[40] Explanatory note to Convention para [177] p.60.

formulas, the Convention formula may be more coherent as it clearly aligns dispatch with the notion of an electronic communication 'leaving' an information system of the originator. It is proposed the ETAs be amended to reflect the language in article 10.1.

5.15. The second limb of article 10.1 addresses a circumstance which is not contemplated under the ETAs, namely that parties may exchange communications through the same information system. The UNCITRAL explanatory note says that in these cases dispatch and receipt of the electronic communication coincide. It is for that reason, the rule deems the time of dispatch to occur when the communication is received. As this circumstance is not addressed in the ETAs, its inclusion would provide certainty when parties transact within the same information system.

Article 10.2 Time of receipt

5.16. The time of receipt of an electronic communication will have application in the context of contracts to consideration of when a contract is formed. The general rule under common law is that a contract is formed upon communication of the acceptance to the offeror.[41] (As discussed above, a variation to that rule would be where the circumstances of a case revealed the postal acceptance rule was intended to apply with the result that acceptance would be complete upon dispatch of an electronic communication.)

5.17. Article 10.2 of the Convention reads:

> 10.2 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. 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. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.

5.18. Differences exist between the ETAs and Convention formulations on time of receipt of an electronic communication.

5.19. Where the addressee *has* designated an information system, the time of receipt is:

- ETAs – the time when the electronic communication enters that information system
- Convention – when it becomes capable of being retrieved by the addressee (ie when it reaches the addressee's electronic address).

5.20. Where the addressee *has not* designated an information system, the time of receipt is:

- ETAs – the time when the electronic communication comes to the attention of the addressee
- Convention – when (a) it becomes capable of being retrieved by the addressee at that address (by reaching an electronic address of the addressee), and (b) the

[41] Carter, Peden, Tolhurst, *Contract Law in Australia*, 5th Ed, para [3-18], p.52.

addressee becomes aware that the electronic communication has been sent to that address.

5.21. Further, the ETAs use the concept of 'information system' while the Convention introduces the concept of an 'electronic address'.

5.22. In all cases the parties can agree to alternative arrangements.

5.23. The UNCITRAL explanatory note makes the following observation on the differences between the Model Law (on which the ETAs are based) and the Convention:

> Despite the different wording used, the effect of the rules on receipt of electronic communications in the Electronic Communications Convention is consistent with article 15 of the UNCITRAL Model Law on Electronic Commerce. As is the case under article 15 of the Model Law, the Convention retains the objective test of entry of a communication into an information system to determine when an electronic communication is presumed to be 'capable of being retrieved' and therefore 'received'. The requirement that an electronic communication should be capable of being retrieved, which is presumed to occur when the communication reaches the addressee's electronic address, should not be seen as adding an extraneous subjective element to the rule contained in article 15 of the Model Law. In fact 'entry' in an information system is understood under article 15 of the Model Law as the time when an electronic communication 'becomes available for processing within that information system' which is arguably also the time when the communication becomes 'capable of being retrieved' by the addressee.
>
> Whether or not an electronic communication is indeed 'capable of being retrieved' is a factual matter outside the Convention. UNCITRAL took note of the increasing use of security filters (such as spam filters) and other technologies restricting the receipt of unwanted or potentially harmful communications (such as communications suspected of containing computer viruses). The presumption that an electronic communication becomes capable of being retrieved by the addressee when it reaches the addressee's electronic address may be rebutted by evidence showing that the addressee had in fact no means of retrieving the communication'.[42]

5.24. Article 10.2, like the ETAs, does not address the issue of whether or not a communication is readable once it is received.

5.25. Under the common law, it is normally only when the offeror knows that an offer has been accepted that the parties have reached agreement.[43] The Convention rule that an electronic communication 'is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address' does not go so far as to say that that presumption equates to knowledge. Indeed, the second sentence of article 10.2 contemplates knowledge to be a separate element. The question of whether a communication has been 'communicated' to the offeror such as to give rise to binding relations would remain to be determined under the common law, depending on the particular facts. Factors which might affect the outcome may be the particular conduct of the offeror (eg if the offeror knew the communication had been received but did not open it to read the contents and sought to revoke the offer) or the

[42] Paragraphs 183-184, pp.61-62, the UNCITRAL explanatory note.
[43] Carter, Peden, Tolhurst, *ibid*, [3-26].

intentions of parties.[44] While the Convention rules and the Model Law are said to be similar in their application, the Convention rules offer a clearer definition to determine receipt (particularly, in clarifying what is meant by entry into an information system). Like the ETAs the rules would not override a common law rule, but would provide for the common law to be applied as appropriate to the circumstances.

Application to consumer transactions

5.26. It was considered the presumption in article 10.2 (that receipt of an electronic communication occurs when the communication becomes capable of being retrieved by the addressee) might not be appropriate in the context of consumers as they may not regularly check their e-mail nor be able to distinguish readily between legitimate commercial messages and unsolicited mail or spam. As such, it was considered that individuals acting for personal, family or household purposes should not be held to the same standards of diligence as entities or persons engaged in commercial activities.

5.27. Like article 10, the ETAs currently contain provisions dealing with the time and place of dispatch and receipt of electronic communications.[45] The provisions in the ETAs apply in default when parties have not otherwise made agreement on those matters. For the purposes of contract law, time of dispatch and receipt can be relevant to the issue of contractual acceptance. The rules of contractual acceptance are not currently excluded by any general exemption to consumer contracts for 'personal, family or household purposes' in the ETAs. The exclusion of those rules from consumer contracts would leave open the question of how those matters are to be determined in the event of any dispute. That omission would seem significant as consumers are increasingly undertaking transactions online over the Internet.

5.28. It is proposed that the ETAs be amended to reflect the language in article 10.2 of the Convention.

Article 10.3 Place of dispatch and receipt

5.29. Electronic communications are presumed to be dispatched and received at the parties' places of business. This is the same position taken in the ETAs. No change is required to the ETAs.

Article 10.4 Information system in different location to place of business

5.30. This article recognises that often an information system of an addressee will be located in a jurisdiction other than that in which the addressee itself is located.

> 10.4 Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the

[44] Upon considering the different facts that may affect the receipt of a telex, in *Brinkibon Ltd v Stahag Stahl* [1983] 2 AC 34, Lord Wilberforce said 'No universal rule can cover all such cases: they must be resolved by reference to the intentions of the parties, by sound business practice and in some case by a judgment where the risks should lie' (at 42).
[45] see eg s.14 Commonwealth ETA, s.13 Victorian ETA.

place where the electronic communication is deemed to be received under paragraph 3 of this article.

5.31. It serves to confirm that this situation does not alter the application of the rules in articles 10.2 (time) and 10.3 (place). It is proposed this clarification be incorporated into the ETAs.

Recommendation 9

a) The default rules in the ETAs for timing of dispatch should be amended so that:

i) the ETAs' 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 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.

6. Other matters

Exclusions

6.1. The Convention excludes a number of specific areas from its scope.

> 2.1. This Convention does not apply to electronic communications relating to any of the following:
>
> (a) contracts concluded for personal, family or household purposes;
>
> (b) (i) transactions on a regulated exchange; (ii) foreign exchange transactions; (iii) inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments; (iv) 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.
>
> 2.2. This 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.

Consumer transactions

6.2. Consumer contracts for personal, family or household purposes have been excluded from the scope of the Convention as it was considered that a number of rules in the Convention would not be appropriate in their context. Two examples given were article 14 (right to withdraw an electronic communication if an 'input error' is made in a transaction with an automated message system) and article 10.2 (time of receipt of an electronic communication).

6.3. As discussed above, the ETAs currently apply to all transactions, including consumer, and do not override the protection provided by other consumer protection laws. Should the ETA regime, as amended to implement the Convention, continue to apply to household consumer contracts, the provisions of the ETAs would supplement other existing laws offering protection to consumers in contracts. Therefore, it is recommended that both articles 14 and 10.2 apply to consumer transactions.

Specific financial transactions

6.4. The primary reason for excluding transactions of the type in article 2 is that rules on the use of electronic communications in respect of settling these transactions are considered to be sufficiently settled. UNCITRAL observed:

> The transactions in paragraph 1(b) relate essentially to certain financial service markets governed by well-defined regulatory and contractual rules that already address issues relating to electronic commerce in a manner that allows for their effective worldwide functioning. Given the inherently cross-border nature of those markets, UNCITRAL considered that this exclusion should not be left for country-based declarations under article 19.
>
> It should be noted that this provision does not contemplate a broad exclusion of financial services per se, but rather specific transactions such as payment systems, negotiable instruments, derivatives, swaps, repurchase agreements, foreign exchange and bond

> markets. The criterion for the exclusion in paragraph 1(b) is not the type of the asset being traded but the method of settlement used … [46]

Negotiable instruments, documents of title and similar documents

6.5. These transactions have been excluded as UNCITRAL considered their complexity warranted rules of specific application. In the explanatory note to the Convention, UNCITRAL observes:

> Paragraph 2 of article 2 excludes negotiable instruments and similar documents because the potential consequences of unauthorized duplication of documents of title and negotiable instruments – and generally any transferable instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money – make it necessary to develop mechanisms to ensure the singularity of those instruments.
>
> The issues raised by negotiable instruments and similar documents, in particular the need for ensuring their uniqueness, go beyond simply ensuring the equivalence between paper and electronic forms, which is the main aim of the Electronic Communications Convention and justifies the exclusion provided in paragraph 2 of the article. UNCITRAL was of the view that finding a solution for this problem required a combination of legal, technological and business solutions, which had not yet been fully developed and tested.[47]

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.

Definition of 'originator' and 'addressee'

Article 4 - Definitions

…

(*d*) "Originator" of an electronic communication means a party by whom, or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as an intermediary with respect to that electronic communication;

(*e*) "Addressee" of an electronic communication means a party who is intended by the originator to receive the electronic communication, but does not include a party acting as an intermediary with respect to that electronic communication;

6.6. The terms 'originator' and 'addressee' are not separately defined in the ETAs, although they are terms that are used in several provisions.[48] The Convention definitions are essentially the same as the definitions in the Model Law. The presumption is that under the ETAs, the terms are to be defined according to their ordinary meaning.

6.7. The qualification used in both definitions to exclude '…a party acting as an intermediary with respect to that electronic communication', is intended to make clear

[46] Explanatory note to Convention para. [78], p.34.
[47] Explanatory note to Convention paras [80-81], p.35.
[48] See eg Victorian ETA: for 'originator' - s.5(1)(d) (outline), s.9(2)(c) (signature), s.13 (time and place of dispatch) and s.14 (attribution); for 'addresee' – ss 13 and 14.

that the Convention deals with the relationship between originator and addressee but not with the relationship between either the originator or addressee and any intermediary such as servers or web hosts.

Recommendation 11
The ETAs be amended to incorporate the definitions of 'originator' and 'addressee' for clarity and for consistency with the Convention.