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UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS 2005

In 2001 the United Nations Commission on International Trade Law (the Commission) decided to prepare an international instrument that dealt with issues of electronic contracting.[1] The result is the United Nations Convention on the Use of Electronic Communications in International Contracts 2005 (the Convention). All governments are called upon to consider becoming a party to it[2] and the Government is currently considering Australia's accession to the Convention. Commonwealth agencies that are engaged in electronic contracting activities need to consider the implications for their agency of the consequent changes to electronic contracting rules that are proposed.

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Outline and background

About the United Nations Commission on International Trade Law

The Commission was established by the United Nations General Assembly by Resolution 2205(XXI) of 17 December 1966. It is presently composed of 60 member States,[3] including Australia.[4] Due to the disparities that exist in national laws regarding international trade, the Commission has a general mandate to further the progressive harmonisation and unification of the law of international trade.[5,6]

About the United Nations Convention on the Use of Electronic Communications in International Contracts

The Convention was adopted by the United Nations General Assembly on 23 November 2005.[7] Its goal is to enhance legal certainty and commercial predictability where electronic communications are used in international contracts.[8] That is, its aim is to facilitate the use of electronic communication by offering practical solutions to issues that arise in the formation or performance of international business contracts between parties in different countries. Presently, 18 countries have signed but not ratified the Convention.[9]

What is Australia doing?

Facilitated by the Copyright Law Branch of the Attorney-General's Department (AGD), the Government is presently considering whether it should accede to the Convention.[10]

What would Australia have to do to accede to the Convention?

Australia's current uniform electronic transactions regime is found in Commonwealth, State and Territory Acts and is based on the 1996 Model Law on Electronic Commerce (the Model Law) as developed by the Commission. The Convention updates the Model Law, so, if Australia accedes to the Convention, its implementation in Australia requires the regime to be updated.[11]

Through AGD and acting in collaboration with the States and Territories, the Australian Government has released a consultation paper headed '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' (the Consultation Paper).

The Consultation Paper discusses the differences between the Convention and Australia's electronic transactions laws and makes 11 recommendations about amendments required to bring Australia's laws into line with new international standards (i.e. the Convention). The amendments are not considered to be significant.

The Consultation Paper ... makes 11 recommendations about amendments required to bring Australia's laws into line with new international standards.

This note outlines the 11 recommendations made by the Consultation Paper. The main changes proposed relate to:

— electronic signature and other form requirements

— new rules to 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

— amendments to the default rules for time and place of dispatch and receipt (Consultation Paper, para 1.23).

Outline of relevant Australian legislation

Australia's electronic transactions regime currently comprises (collectively the ETAs):

— *Electronic Transactions Act 1999* (Cth) (Cth ETA)

— *Electronic Transactions Act 2003* (WA) (WA ETA)

— *Electronic Transactions (Victoria) Act 2000* (VIC) (VIC ETA)

— *Electronic Transactions Act 2000* (TAS) (TAS ETA)

— *Electronic Transactions Act 2000* (SA) (SA ETA)

— *Electronic Transactions (Queensland) Act 2001* (QLD) (QLD ETA)

— *Electronic Transactions (Northern Territory) Act 2000* (NT) (NT ETA)

— *Electronic Transactions Act 2000* (NSW) (NSW ETA)

— *Electronic Transactions Act 2001* (ACT) (ACT ETA).

The object of the ETAs is to provide a regulatory framework that facilitates use of electronic transactions, promotes business and community confidence in the use of such transactions, and enables business and the community to use electronic communications when dealing with government.[12]

Recommendations made by Consultation Paper

Electronic signature and other form requirements

Article 9 of the Convention sets out the minimum criteria for the rules addressing legal requirements for writing, signature and original form. The article is largely similar to what the ETAs provide, although some amendment is proposed (Consultation Paper, para 2.1).

Article 9 of the Convention sets out the minimum criteria for the rules addressing legal requirements for writing, signature and original form.

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.

Article 9.2 of the Convention and the ETAs require an electronic communication be 'accessible so as to be useable for subsequent reference' if it is to meet a legal requirement that a contract be in writing.[13] The ETAs cover requirements and permissions under a law to give information in writing,[14] but reference is not made to the forming of a contract.

As some jurisdictions have expressly excluded statutory requirements for contracts to be in writing from the ETAs' writing provisions (e.g. contracts dealing with the disposition of land to be evidenced in writing), the Consultation Paper suggests a law requiring a person to give information in writing is intended to include a law requiring a contract to be in writing. On such a basis, the first recommendation is made to provide clarity.[15]

Recommendation 2 and Recommendation 3

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.
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.

The common law does not require a contract to be signed for it to be valid, but, as with the requirement regarding written form, statute may impose a form requirement for signature (Consultation Paper, para 2.10). To ensure that the Convention does not tie the legal framework created by the Convention to a given state of technical development,[16] article 9.3 of the Convention (like the ETAs) does not specify technological equivalents to particular functions of handwritten signatures (Consultation Paper, para 2.10). This article provides:

> Where the law requires that a communication or a contract should be signed by a party, ... 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.

Except for the following differences, the minimum requirements set out in article 9.3 that need to be met for an electronic signature to meet a traditional signature requirement are largely similar to the provisions of the ETAs:[17]

— The ETAs require the person to whom the signature is to be given to consent to that requirement being met by a form of electronic identification.[18]

— 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', whereas the ETAs describe the method to indicate that party's *approval* instead of intention.[19] The Consultation Paper suggests that the use of the term 'approval' in the ETAs could be inconsistent with the purpose of some statutory requirements for signature, or at least question whether a requirement to sign is directed to that person approving contents or simply to identification. For this reason it is proposed that reference in the ETAs to 'approval' be changed to 'intention' (Consultation Paper, para 2.13).

The Consultation Paper suggests that the use of the term 'approval' in the ETAs could be inconsistent with the purpose of some statutory requirements for signature ...

— The ETAs do not contain an equivalent provision to article 9.3(b)(ii) of the Convention. The Consultation Paper refers to the Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts (Explanatory Note) as indicating that a party should not be allowed to invoke the 'reliability test' in bad faith to repudiate its signature.[20]

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 (Consultation Paper, para 2,14). Article 9.3(b)(ii) validates 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 (Consultation Paper, para 2.14).

Formation of contracts, invitations to treat and automated message systems

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.

Article 4 of the Convention includes a new definition of 'communication' that means:

> ... 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 do not contain a similar definition, although the term 'transaction' is broadly defined.[21] The Explanatory Note explains that the definition of 'communication' is to make it 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' (Explanatory Note, para 91, p 38). The Consultation Paper suggests that, to provide increased clarity on the scope of the ETAs, the definitions of 'transaction' in the ETAs should be expanded in the context of contracts (Consultation Paper, para 3.2).

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.

Article 11 of the Convention provides:

> 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 ... , 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.

This article clarifies the extent to which parties offering goods and services through information systems that are 'generally accessible', such as a website, are bound by offers made in such a way (Consultation Paper, para 3.3). Offers made that are not addressed to one or more specific persons are to be considered merely as invitations to make offers unless the contrary is clearly indicated by the person making the offers.

Article 11 reflects what occurs in the paper-based environment—for example, advertisements in newspapers, which are regarded as invitations to treat because the intention to be bound is lacking (Explanatory Note, para 198, pp 65–66). The Commission's view is that what occurs in the paper-based environment should not be different from what occurs in the electronic environment and therefore goods and services advertised online should be considered in the same way as paper advertisements.

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Article 11 also reflects the distinction at common law between an 'offer', made by one who has indicated he or she is willing to be bound, and an 'invitation to treat', being a statement or conduct inviting the making of an offer or entry into negotiations.[22] Given article 11 confirms the distinction applies to electronic contracting (Consultation Paper, para 3.5), the Consultation Paper proposes that article 11 be incorporated into the ETAs.

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'.

Article 12 of the Convention provides:

> 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.

The use of automated message systems[23] forms part of present-day business practices; however, the ETAs do not contain an equivalent to article 12 (Consultation Paper, para 3.8) or the accompanying definition. To remove any doubt about the validity of contracts formed in this way, the Consultation Paper suggests that each be incorporated into the ETAs (Consultation Paper, para 3.10). This would clarify that the sole fact that an automated message system was used to form a contract will not deprive that contract of legal effectiveness, validity or enforceability.[24]

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.

Mistakes occur when using automated message systems as a result of either human actions or a malfunction of the automated message system (Explanatory Note, para 224, p 73). Article 14 of the Convention deals with errors that occur in transmissions between a natural person and an automated message system when that system does not provide the person with the possibility to correct the error.[25] Equivalent provisions to address errors in electronic communications do not appear in the ETAs (Consultation Paper, para 3.11).

Article 14 of the Convention deals with errors that occur in transmissions between a natural person and an automated message system when that system does not provide the person with the possibility to correct the error.

Article 14 provides:

1. Where a natural person makes an input error[26] 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.

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.

When one transacts with an automated message system, the opportunity to detect or correct errors is reduced, which makes it appropriate to withdraw the portion of the electronic communication related to the error.[27] It is not the Commission's intention that there be a right to withdraw anything more than that portion of the electronic communication in which the error was made[28] (i.e. the article does not give the right to rescind or terminate a contract[29]) or that the article (or its incorporation) would interfere with domestic laws addressing error in contract formation.[30]

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, the Commission considered it was appropriate that a party operating through an automated message system bear the risk of errors if they fail to provide an opportunity for correction (Consultation Paper, para 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.

Australian laws dealing with restitution and unjust enrichment deal with circumstances where a benefit has been received in circumstances where it is unjust for the receiver to retain such benefit.[31] The Consultation Paper states (at para 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 ... and the conditions for withdrawal provide equitable limitations.

The view expressed by the Consultation Paper is that the circumstances of withdrawal permitted by the article serve to limit abuses by parties who act in bad faith and provides a fair basis on which to exercise the right of withdrawal (Consultation Paper, para 3.19).

Application to consumer transactions

The Consultation Paper states that the ETAs apply to all transactions including consumer contracts and do not override the protections given by consumer protection laws. If the ETAs are amended to incorporate article 14 as per the Convention and apply to consumer contracts then they would supplement the already existing laws that offer protections to consumers in contracts (Consultation Paper, para 3.24). It is said that, given the protective policy behind article 14, there is good reason to apply such policy to household consumer contracts as well as business contracts (Consultation Paper, paras 3.25 and 6.3).

Location of parties

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'.

As changes and advances in technology make it difficult to determine a party's place of business, article 6 of the Convention contains rules that expand what is currently contained in the ETAs[32] to determine the place of dispatch and receipt of electronic communications.[33]

Article 6 of the Convention contains rules that expand what is currently contained in the ETAs to determine the place of dispatch and receipt of electronic communications.

Recommendation 8(a): Presumption of location indicated by party

Article 6 does not contain a positive duty for parties to a transaction to disclose their place of business. Instead, it creates a presumption in favour of a party's indication of its place of business, with conditions to rebut that indication and default rules that apply in the absence of any indication.[34] The Consultation Paper recommends that article 6.1 of the Convention (which recommendation 8(a) replicates) be incorporated into the ETAs.[35]

Recommendation 8(b) and Recommendation 8(e): Multiple places of business

Article 6.2 of the Convention is in the terms of recommendation 8(b) and is similar to what is contained in the ETAs.[36] Article 6.2, however, refers to 'the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract' to consider which place of business has the closer relationship to a contract where there are multiple places of business. The Consultation Paper proposes this clarification be incorporated into the ETAs (Consultation Paper, para 4.8).

The ETAs define 'place of business' for the purposes of a government, government authority or a non-profit body (Consultation Paper, para 4.9). The definition of 'place of business' in article 4 of the Convention, reflected in recommendation 8(e), includes private entities. The Consultation Paper proposes that this new definition directed to private entities be included (Consultation Paper, para 4.9).

Recommendation 8(c) and Recommendation 8(d): Location of information system

The Commission wishes to avoid rules that would result in a party being considered as having its place of business in one country when contracting electronically and in another country when contracting by more traditional means (Explanatory Note, para 116, p 43).

Articles 6.4 and 6.5 of the Convention are in the same terms as recommendations 8(c) and 8(d). The ETAs do not contain equivalent provisions (Consultation Paper, para 4.11) and it is proposed that articles 6.4 and 6.5 be incorporated into the ETAs (Consultation Paper, para 4.14). Such incorporation would confirm that the location of parties is to be determined by the place of business rather than the location of an information system which may be in a different location to the business (Consultation Paper, para 4.12).

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Article 6.5 was included in the Convention because, due to the ways in which domain names are assigned in some countries, the connection between a domain name and a country is often insufficient to conclude that a genuine and permanent link between the two exists (Explanatory Note, para 119, p 44). In some countries, however, it may be appropriate to rely in part on domain names for the purposes of article 6. Therefore the Explanatory Note (replicated in the Consultation Paper) indicates (at para 120, p 44) that:

> ... paragraph 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 in this paragraph 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.

Time and place of dispatch and receipt

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.

In contract law, time of dispatch and receipt is important to the issue of acceptance. In general, unless an offer stipulates a particular mode of acceptance, a contract is concluded when the acceptance to the offer is communicated to the offeror.[37] Although the general rule of acceptance in relation to email communications has not been settled under case law, it would seem that it would apply, rebuttable by particular circumstances.[38] The provisions in the Convention and the ETAs dealing with time and place of dispatch and receipt apply as default provisions if parties have not agreed to these matters.[39]

The provisions in the Convention and the ETAs dealing with time and place of dispatch and receipt apply as default provisions if parties have not agreed to these matters.

Recommendation 9(a): Time of dispatch

Article 10.1 provides:

> 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.

In 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' (Consultation Paper, para 5.8).

The Convention differs from the ETAs by providing:

(1) Under the Convention, time of dispatch is when the communication 'leaves' an information system under the control of the originator; under the ETAs, it is when the communication 'enters' an information system outside the control of the originator;[40]

(2) Under the Convention, if a communication has not left the originator's information system, the time of dispatch is deemed to be when the communication is received, whereas the ETAs do not anticipate electronic communications being sent and received within one information system.[41]

Although the time of dispatch in both the Convention and the ETAs involves the notion that dispatch occurs when a communication leaves an information system, the view expressed in the Consultation Paper is that that Convention 'formula' may be more coherent and that the ETAs should reflect article 10.1 (Consultation Paper, para 5.14). This will also give certainty for parties transacting within the same information system because this is not dealt with by the ETAs (Consultation Paper, para 5.15).

Recommendation 9(b): Time of receipt

Article 10.2 of the Convention is paraphrased in recommendation 9(b)(i) and (ii). The Consultation Paper outlines the differences between the Convention's and the ETAs' formulations on time of receipt of an electronic communication:

— 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. (Consultation Paper, para 5.19.)

— 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 addressee becomes aware that the electronic communication has been sent to that address. (Consultation Paper, para 5.20.)

Further, the ETAs use the concept of 'information system' while the Convention introduces the concept of an 'electronic address' (Consultation Paper, para 5.21).

The Consultation Paper states that the Convention rules offer a clearer definition to determine receipt and would not override a common law rule but provide for the common law to be applied as appropriate[42] (the common law being that parties reach agreement when the offeror knows that an offer has been accepted[43]). Accordingly, it is proposed that the ETAs be amended to reflect article 10.2 of the Convention (Consultation Paper, para 5.28).

The Convention rules offer a clearer definition to determine receipt and would not override a common law rule but provide for the common law to be applied as appropriate.

Consumer transactions

The Consultation Papers states that 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. Accordingly, 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 (Consultation Paper, para 5.26).

Provisions in the ETAs deal with the time and place of dispatch and receipt of electronic communications, applying when parties have not otherwise made agreement on those matters. 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 (Consultation Paper, paras 5.27 and 6.3).

Recommendation 9(c): Information system in different location to place of business

Article 10.4 recognises that often an addressee's information system will be located in a different jurisdiction to that in which the addressee is located, but that this situation does not alter the rules in article 10.2 or article 10.3. Accordingly, it is proposed it be incorporated into the ETAs (Consultation Paper, para 5.31).

Other matters

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.

Article 2.2 of the Convention provides it 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.

The reason for the exclusion is that the Commission considers their complexity requires specific rules applying to each type of instrument.[44] Further, the issues raised by such documents go beyond ensuring the equivalence between paper and electronic forms, which is the main aim of the Convention (Explanatory Note, para 81, p 35). Therefore, it is recommended that the ETAs also exclude specific financial transactions and negotiable instruments, documents of title and similar documents when the subject of an international contract.

It is recommended that the ETAs also 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.

In article 4 of the Convention 'originator' and 'addressee' are defined as follows:

> (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;

These terms are not separately defined in the ETAs. 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 that the Convention deals with the relationship between originator and addressee only, not with the relationship between either the originator or addressee and any intermediary such as servers or web hosts (Consultation Paper, paras 6.6 and 6.7).

What you should do now

— If you are engaged in electronic contracting activities, review the Consultation Paper and consider its practical implications for those activities.

— See www.ag.gov.au/ecommerce for regular updates.

— Identify someone in your organisation to keep track of developments in this area.

— Plan to make any necessary changes to your internal practices ahead of the new legislation being implemented: AGS can assist with this process.

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Notes

1 United Nations Resolution 60/21 of 23 November 2005.

2 United Nations Resolution 60/21 of 23 November 2005.

3 See <http://www.uncitral.org/uncitral/en/about/origin_faq.html#members> (accessed 11 January 2009).

4 Australia's membership is to expire in 2010.

5 See Commission website, http://www.uncitral.org/uncitral/en/about/origin.html

6 Press Release L/T/4396 of 6 July 2006 entitled 'China, Singapore, Sri Lanka Sign UN Convention on Use of Electronic Communications in International Contracts'.

7 United Nations Resolution 60/21 of 23 November 2005.

8 See Commission website at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html (accessed 11 January 2009).

9 See Commission website at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html (accessed 11 January 2009). A copy of the Convention can be found by accessing: http://www.uncitral.org/pdf/english/texts/electcom/ch_X_18.pdf.

10 The Australian Government consulted with the States and Territories and took submissions from interested parties. For more information please see the Attorney-General's website at http://www.ag.gov.au/ecommerce

11 Consultation Paper released by the Australian Government headed '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', Minister's Foreword, p 2.

12 See s 3 of the Cth ETA reflected in the ETAs.

13 Consultation Paper at para 2.4. See article 9.2 of the Convention.

14 Section 9 of Cth ETA; s 8 of WA ETA; s 8 of VIC ETA; s 6 of TAS ETA; s 8 of SA ETA; s 11 of QLD ETA; s 8 of NT ETA; s 8 NSW ETA; and s 8 of ACT ETA.

15 Consultation Paper at para 2.9. The differing jurisdictions would still be able to exempt such a requirement from the operation of the ETAs.

16 Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts (Explanatory Note) at paras 153 and 154, p 53.

17 Section 10 of Cth ETA; s 9 of WA ETA; s 9 of VIC ETA; s 7 of TAS ETA; s 9 of SA ETA; s 14 of QLD ETA; s 9 of NT ETA; s 9 NSW ETA; and s 9 of ACT ETA. See Consultation Paper at para 2.11.

18 Consultation Paper at para 2.11. Amendment to exclude the requirement for consent in relation to private contractual transactions is not proposed.

19 Consultation Paper at para 2.12. The Explanatory Note to the Convention observes that 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: Consultation Paper at para 2.12 citing 'Explanatory note to Convention para. [160], p.55)'.

20 Consultation Paper at para 2.14 citing 'Explanatory note to Convention para. [164], p.56'.

21 Consultation Paper at para 3.1. The ETAs, save for the ACT ETA and the Cth ETA, define 'transaction' as including 'any transaction in the nature of a contract, agreement or other arrangement, and also includes any transaction of a non-commercial nature'. The Cth ETA defines 'transaction' as including 'a transaction of a non-commercial nature' and the ACT ETA defines it as including 'any contract, agreement or other arrangement, whether or not of a commercial kind'.

22 Consultation Paper at para 3.4, citing '*The Laws of Australia* [7.1.49]'.

23 Article 4 of the Convention defines 'automated message system' 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'.

24 Explanatory Note at para 210, p 69. The Commission considers that the person on whose behalf a computer is programmed should be the one ultimately responsible for any message that the computer generates: Explanatory Note at para 212, page 70. It is irrelevant whether the message system involved is fully automated or semi-automated, as long as one action taken does not need human 'review or intervention': Explanatory Note at para 215, p 70. See also para 104 at p 40.

25 Explanatory Note at para 228, p 74. Article 14 does not oblige the party on whose behalf the automated message system operates to make available procedures for detecting and correcting errors in electronic contract negotiations: see Explanatory Note at para 231, p 75.

26 'Input error' is not defined in the Convention, but it is intended to cover the input of wrong data. For examples of errors, see para 234 at p 76 of the Explanatory Note.

27 Consultation Paper at para 3.13. The Consultation Paper also states that the article's intention is to encourage parties who transact by way of automated message systems to build in opportunities for the party with whom they are transacting to correct input errors: see Consultation Paper at para 3.18.

28 Explanatory Note at para 239, p 77.

29 It may be, however, that the effect of withdrawing the portion of the communication in which the error was made is akin to rescission if the portion to which the error relates is fundamental to the contract: Consultation Paper at para 3.16; Explanatory Note at para 241, p 78.

30 Consultation Paper at para 3.14 quoting the Explanatory Note at para 250, p 80.

31 Consultation Paper at para 3.20, citing 'Carter, Peden, Tolhurst, Contract Law in Australia, 5th Ed, [38–02] and [38–09]'.

32 Section 14 of Cth ETA; s 13 of WA ETA; s 13 of VIC ETA; s 11 of TAS ETA; s 13 of SA ETA; s 25 of QLD ETA; s 13 of NT ETA; s 13 NSW ETA; and s 13 of ACT ETA.

33 The purpose of article 6 is to allow parties to ascertain the location of the places of business of their counterparts, which facilitates a determination as to the international or domestic character of the transaction and the place of contract formation: Explanatory Note at para 108, p 42.

34 Explanatory Note at para 111, p 42; Consultation Paper at para 4.4.

35 Consultation Paper at para 4.6. Parties to a transaction may make alternative agreements on the place where an electronic transaction is taken to have been dispatched or received: Consultation Paper at para 4.5.

36 Section 14(6) of Cth ETA; s 13(6) of WA ETA; s 13(6) of VIC ETA; s 11(6) of TAS ETA; s 13(6) of SA ETA; s 25(2) of QLD ETA; s 13(6) of NT ETA; s 13(6) NSW ETA; and s 13(6) of ACT ETA. The application of article 6.2 would be triggered by the absence of a valid indication of a place of business: Explanatory Note at para 115, p 43.

37 Consultation Paper at para 5.2 quoting '*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 Consultation Paper at para 5.3 quoting 'Laws of Australia, 8.9.10, relying on *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels* [1983] 2 AC 34 at 42 per Lord Wilberforce'.

39 Consultation Paper at para 5.1 and article 3 of the Convention.

40 Consultation Paper at para 5.10.

41 Consultation Paper at para 5.11.

42 Consultation Paper at para 5.25.

43 Consultation Paper at para 5.25 quoting 'Carter, Peden, Tolhurst, ibid, [3–26]'.

44 Explanatory Note at para 80, p 35; Consultation Paper at para 6.5.

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