



Electronic Transactions Act 1999 (Cth)

Legislation which permits an electronic means of authentication was passed by Federal Parliament on 25 November 1999. Mark Sneddon, of Clayton Utz examines the key issues related to the Act

The Electronic Transactions Act 1999 (Cth) (the "Act") is intended to remove obstacles in federal law to the use of electronic transactions, communications, signatures and record-keeping. It permits businesses to keep electronic records instead of paper records and to convert existing paper records into equivalent electronic records for the purposes of federal record keeping and document production requirements (such as the requirement to keep tax records).

Applies to Communications and Transactions Under Federal Laws

For constitutional reasons, the Act applies only to federal laws which contain a requirement or permission to give information in writing or produce a document, or a requirement to give a signature, to record information in writing or to retain information. Most businesses are subject to both federal and State/Territory requirements of this nature. The States and Territories have promised to enact parallel legislation and drafting is underway but the time frame is not certain. Until the parallel State/Territory legislation is operational, in practice this federal Act will only facilitate the use of electronic transactions:

- with federal government agencies; and
- between businesses and counterparties where those transactions are currently required by federal law to be in writing or to use manual signatures (eg. Customs requirements and contracts regulated under the Insurance Contracts Act).

Phased-In Operation

The Act has a phased-in operation. Up to 1 July 2001, it will only apply to those federal laws prescribed by regulation. On and from that date, it will apply to all federal laws unless they are exempted by the Act or by regulation. The intention is to give federal government agencies and businesses time to get systems ready for handling electronic transactions and communications.

Conditions on Use of Electronic Communications

Federal government agencies are compelled by the Act to accept electronic communications and electronic transactions. These agencies may specify particular information technology requirements or types of electronic communications they will accept (eg. word processing system, e-mail attachment formats, return receipt requirements). Where a federal law requires writing or signature for a communication to a federal agency, persons communicating with the federal agency can still use writing and manual signatures if they wish. But if they send the information by electronic communication, they must comply with the agency's requirements.

Businesses and individuals are not compelled to accept electronic communications - they must consent to do so. But their consent may be inferred from conduct (eg. sending an e-mail to a federal agency or a counterparty probably implies consent to receive communications from the agency or counterparty in the same electronic form unless consent is explicitly withheld).

It is a matter for regret that businesses required or permitted by federal law to receive documents in writing were not given the same power as government agencies to specify IT and other requirements as to the form of electronic communications they would accept in lieu of written communication. However,

the same result may be achieved by businesses making their consent to receive electronic communications conditional on particular IT requirements.

Accordingly, businesses are strongly advised that, where they are required or permitted to receive communications in writing under federal law (potentially a very wide range of circumstances) they should include in their web sites and contracts a clear denial of consent to receive electronic communications in any form other than that specified by the business.

Time and Place of Receiving and Sending Electronic Communications

The Act creates default rules as to when and where an electronic communication is sent or received. For example, for the purposes of a federal law, an electronic communication is taken to be sent at the sender's place of business and received at the addressee's place of business (regardless of where they actually send or receive it). The rules can be varied by agreement. At least when the parallel State and Territory laws come into effect, these rules will have an effect on the common law rules as to the time and place a contract is formed. They will also be relevant in deciding whether statutory notices have been given at the time and place required and when such notices take effect.

Conclusion

Now that the federal Act is in place, each organisation needs to determine to what extent it is affected by the Act in its dealings with federal government agencies and in any transactions with counterparties which are regulated under federal law. The costs and benefits of converting to electronic record keeping should be assessed and consideration should be given to specifying conditions on any consent the organisation gives to receive electronic communications. <

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