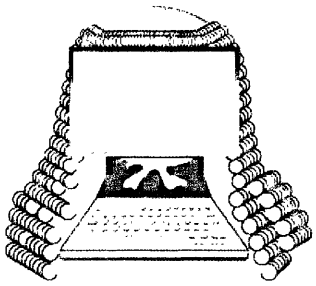
COMPUTERS & LAW

Journal for the Australian and New Zealand Societies for Computers and the Law



Editor: Martin Squires

ISSN 08117225

Number: 80

April 2011

Proposed reforms to Australia's electronic transactions law

By Daniel Thompson

Daniel Thompson *is a lawyer in the Intellectual Property and Technology practice group at Corrs Chambers Westgarth.*

The *Electronic Transactions Amendment Bill* 2011 (Cth) (**Bill**) was introduced to Parliament on 9 February 2011 to amend the *Electronic Transactions Act* 1999 (Cth) (**Act**), and was passed by the lower house on 24 March 2011. The proposed amendments complement the policy on which the Act was based that aimed to support the growth of e-commerce and electronic contracting domestically and internationally, promote technological neutrality and functional equivalence, and to bring Australia's electronic laws into line with the international standards (currently, these are contained in the *UN Convention on the Use of Electronic Communications in International Contracts* 2005 (**Convention**)).

The Bill seeks to give greater legal certainty to particular areas of electronic contract formation. In particular, the Bill seeks to provide greater clarity to: the appropriateness and validity of electronic signatures; the time and place of dispatch and receipt of electronic communications; the use of automated messaging systems in contract formation; and the circumstances where an internet offer will constitute an invitation to treat.

This article articulates the proposed changes and considers several points of continuing uncertainty in the law of electronic communication by reference to its history of implementation in the courts and administrative decision making in Australia's burgeoning digital society.

Electronic signatures

The Bill proposes to amend section 10 of the Act with respect to electronic signatures by broadening the test as to when an electronic signature will be legally effective.

In this issue

From the editors...

In this issue, we bring you articles regarding:

- changes to the Electronic Transactions Act, and some remaining areas of uncertainty in this field;
- risks that Australian businesses should consider which are associated with storing data in the U.S; and
- electronically searching documents in multiple languages when preparing for litigation, an issue that may arise when litigation is being run in one language and there are documents around the world in different countries in other languages.

Also, we publish an article submitted by Tyler Fox in the 2010 Student Essay Prize competition on the topic of offences involving online grooming. We thank all those who submitted essays in the 2010 competition, and remind all eligible students that the competition is being run again in 2011. Details of the competition are on page 7.

We also welcome submissions of articles from our members. Please contact the editors if you have an idea you wish to discuss or an article you would like published.

Finally, the New South Wales Society for Computers and the Law is very pleased to announce that it has recently launched a revamped web site. The web site is at www.nswscl.org.au. If you have not visited for awhile, check it out.

We hope you enjoy this issue.

Martin Squires and Vinod Sharma

Continued from Page 1

The current test requires that, having regard to all relevant circumstances at the time, the electronic signature was 'as reliable as appropriate for the purpose for which the electronic communication was generated or communicated'. The requirement for the signature to be as 'reliable as appropriate' gives significant flexibility for assessing the degree of legal security appropriate for a particular communication. The Explanatory Memorandum to the Bill explains that this should take into account:[1]

> 'a range of legal, technical and commercial factors, including the nature of the activity taking place, the frequency of activity between the parties, the value and importance of the information contained in the communication, and the availability and cost of using alternative methods of identification'.

This element of the test is maintained in proposed section 10(1)(b)(i).

Otherwise, the test is broadened in two respects. Firstly, in considering whether the signature is 'reliable as appropriate', the new test proposes to allow consideration of all the circumstances 'including any relevant agreement' – for instance, an agreement made between the parties specifying that an electronic signature will be effective. Secondly, the test will also be satisfied where it is proven that the electronic signature fulfilled the function of identifying the signatory and indicating the signatory's intention in respect of the information in the electronic communication – this is to ensure that a party cannot invoke the 'reliability test' to repudiate a signature where the identity and intentions of the party are not in contention.[2]

A further change to section 10 is that an electronic signature will indicate a signatory's '*intention in respect of* the electronic communication, rather than their '*approval*' of a document. This change recognises that written signatures do not necessarily indicate approval of a document; for instance, when a person merely witnesses a document.[3]

Time and place of dispatch and receipt of electronic communications

Further clarity is given to time and place of dispatch and receipt of communications under section 14 of the Act. The Bill proposes to repeal section 14 and replace it with the following sections:

Time of dispatch (new section 14)

Whereas section 14(1-2) of the Act currently specifies that the time of dispatch of an electronic communication is at the time when the electronic communication enters an information system outside the control of the originator, the Bill proposes new section 14(1) to take the time of dispatch to be either:

(a) when the electronic communication leaves an information system under the control of the

originator or the party who sent it on behalf of the originator; or

(b) if the electronic communication has not left an information system under the control of the originator, the time when the electronic communication is received by the addressee,

unless otherwise agreed between the originator and the addressee. Also, this applies regardless of whether the information system is located at a *different place* from where the electronic communication is taken to have been dispatched under proposed section 14B (generally, the originator's place of business).

Section 14(1)(b) applies where an electronic communication is sent and received on the same information system or network, so that the communication never enters a system under the control of another party, then dispatch and receipt is taken to coincide.

Information System under the Control of the Originator

What constitutes an 'information system' and when an information system is 'under the control of the originator' are questions of concern. *Information system* is broadly defined in the Act as '*a system for generating, sending, receiving, storing or otherwise processing electronic information*'. The courts have had difficulty construing this term for the purpose of the current section 14. For instance, in *American Express Australia Ltd v Michaels* [2010] FMCA 103, Federal Magistrate Smith commented (at [27]):

> There is uncertainty in my mind ... about the underlying technology of internet email communications, as to the identification of the relevant "system" which is "designated" and "entered" for the purposes of s 14(3). I can conceive of at least three significantly different approaches in relation to emailed documents: (i) the software and hardware systems for sending or receiving emails used by the sender, or by its mail server provider; or (ii) the systems used by the intended recipient, or by its mail server provider; or (iii) the entire electronic mail system governing the dispatch and receipt of emails over the internet using recognised protocols for electronic "handshakes" between email servers.

In that case, Smith FM determined that 'information system' comprised the entire internet mailing system (including the system of the sender and receiver) – analogous to the global postal system and the postal acceptance rule – and that, as a result, once an email is irretrievably sent by the sender there is a presumption of instantaneous delivery. Alternatively, in *Reed Constructions Pty Ltd v Eire Contractors Pty Ltd* [2009] NSWSC, Macready AsJ was unwilling to make such a presumption, stating the reasons that (at [35]):

> ... if a sending mail server can locate a domain it is trying to contact but cannot for some reasons dispatch the communication to the designated user account, it may hold onto the communication for some time in order to try again. Alternatively a destination mail server may be off-line for some reason. Therefore, in the absence of evidence to assist me, I would be reluctant to infer that the recipient server received the email on the same day that it was sent.

The variety of interpretation is somewhat unsurprising given the breadth of the statutory definition of an *information system* and the general lack of semantic clarity inhering in the concept of a 'system'. The Bill does little to alleviate this.

The notion of a communication leaving the *control* of the originator appears closely analogous to placing a letter in the post-box. At first glance, the difference between the current definition of dispatch as requiring the communication to *enter* an information system outside the *control* of the originator, as opposed to *leaving* an information system under the control of the originator, may appear inconsequential. Indeed, the Explanatory Memorandum to the Bill notes that there may be little difference in practice; one example however, is that the amendment will preclude the time of dispatch being construed as at the time an originator hands a document to a third party to send via electronic means (as it was in *SZAEG v Minister for Immigration* [2003] FMCA 258).

One potential matter of interpretation that warrants mention is how the rules of dispatch apply to Software as a Service (SAAS), or cloud based *information systems*. The explanatory memorandum to the Bill states that new section 14(1):

> ... does not make a distinction between an information system that is, or is not, under the *control of the user* as where the parties are using web-based e-mail or SAAS models.

(The use of the term 'control' in this passage is unfortunate, to say the least, due to the centrality of the distinction of whether an information system is under the 'control' of an originator to the time of dispatch). For instance, if the originator is using Google's 'gmail', the originator's computer or device from which the electronic communication is typed or inputted could potentially constitute the relevant 'information system under the control of the originator'. Alternatively, 'gmail' could constitute the relevant information system, in which case the service provider (Google in this instance) may constitute 'the party who sent [the electronic communication] on behalf of the originator'. But, then again, Google may be construed as simply an 'intermediary', rather than an originator (the definition of which is explained below in part 5).

In light of this, further clarity on the circumstances in which an information system will be under the control of the originator is desirable.

Time of receipt (section 14A)

The Bill proposes to replace section 14(3-4) of the Act with proposed section 14A, which will change the time of receipt of an electronic communication from the time when it enters an addressee's designated information system, to the time:

(a) when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee; or

(b) if the electronic communication is received at another electronic address of the addressee, when the electronic communication has become capable of being retrieved by the addressee at that address, and *when the addressee has become aware that the electronic communication has been sent to that address.*

This rule applies regardless of whether the information system supporting the electronic address is at a different location to the addressee's place of business. A communication is presumed to be capable of being retrieved when it reaches the addressee's electronic address – however, this can be refuted depending on the particular facts (for instance, where firewalls or filters have prevented the addressee from retrieving the communication). In addition to entities or persons engaged in commercial activities, the new section 14A applies to personal, family or household consumer dealings (the Bill deviates from the Convention in this respect).

When an Address is Designated

In setting a rebuttable presumption as to when a communication is 'capable of being retrieved', rather than a concrete rule on the receipt of electronic communications, the risk of the recipient being incapable of retrieving the communication (for instance, due to filters, firewalls or other security measures) is balanced against the originator's need for a degree of certainty as to when a communication has been received.

Although the Act does not attempt to define 'designated', or what will constitute a designated electronic address, the intention expressed in the Convention was that the test of a 'designated address' was to be flexible and approached through a logical apportioning of the risks and responsibilities of parties exchanging electronic communications. That is: on the one hand, a party with numerous electronic addresses should reasonably be expected to designate a specific address for the purpose of communications with the other party; and on the other hand, a party sending a communication should be expected to take care to ascertain that the address is the most appropriate to reach the addressee in relation to the subject or nature of the communication.[4]

Clarity with respect to the notion of a 'designated' address is desirable as it has been subject to opposing constructions by courts and administrative bodies. Macready AsJ in *Reed Constructions* appears to have presumed that *any* electronic address constitutes a designated address. His Honour listed examples of where an electronic communication sent to an addressee without a designated electronic address as (at [33]):

> an electronic communication that is put onto a computer readable storage medium, such as a USB drive or a CD ROM; sent over a private network; sent through some other kind of router that does not require a specific destination...; or published on the internet.

Alternatively, in a decision by the Delegate of the Commissioner of Patents, the Delegate construed 'designated' as requiring 'specific' or 'express' designation by an addressee, and not merely an indication of an electronic address,[5] citing the *United Nations Commission of International Trade Law Model Law on Electronic Commerce* (**Model Law**) (which has since been superseded by the Convention).[6]

The Convention's more flexible approach to assessing when an address is 'designated', so far as it is used to interpret the amendments to the Act, may provide a stronger basis for an argument that, where an addressee has a single electronic address, or where an electronic address has been used in frequent correspondence with a sender of a communication, this address may be a 'designated' address.

Place of dispatch and receipt (section 14B)

The Bill proposes to change the rules relating to the place an electronic communication is sent and received. As with the current section 14(5), this place is taken to be a party's place of business. The presumptions as to where a party's place of business is in section 14(6)(a-c) are retained (now proposed section 14B(2)(c-e)), but proposed section 14B subordinates these presumptions to the default presumptions that:

(a) a party's place of business is assumed 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; and

(b) if a party has not indicated a place of business and has only one place of business, it is to be assumed that that place is the party's place of business.

Caution is needed where using peripheral information to determine the location of a party's place of business. Proposed section 14B(3) states that a location is not a place of business merely because:

(a) it is where the equipment and technology supporting an information system used by a party is located; or

(b) it is where the information system may be accessed by other parties.

Further, proposed section 14B(4) states that the fact that a party makes use of a domain name or email address connected to a specific country does not create a presumption that its place of business is located in that country.

The need to distinguish the deemed location of receipt as opposed to the physical location receiving an electronic communication is evident from the globalised circumstances of the digital environment and the consequence that the location of infrastructure supporting information systems is immaterial to the location and jurisdiction of the parties (being factors pertinent to rules on the formation of contract and conflict of laws).

Use of automated message systems for contract formation

Section 15C of the Bill provides that:

> "A contract formed by:
>
> (a) The interaction of an automated message system and a natural person; or
>
> (b) The interaction of automated message systems;
>
> is not invalid, void or unenforceable 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 Bill defines *automated message system* (**AMS**) as:

> *"a computer program or electronic or other automated means used to initiate an action or respond to data messages in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system".*

The amendment recognises that AMSs are a part of modern e-commerce practices and that the absence of human intervention should not preclude contract formation or effectiveness. Typical examples of AMS are for issuing purchase orders or processing purchase applications.
However, section 15D(2) provides an exception in situations where a natural person makes an input error in communicating with an AMS and where the AMS does not provide the person with an opportunity to correct the error. In such circumstances, the person can correct the error (but not rescind or otherwise terminate the contract), so long as they:

(a) notify the other party as soon as possible after having learned of it; and

(b) have not used or received any material benefit or value from the goods or services, if any, received from the other party.

When an offer is an invitation to treat

The Bill inserts section 15B, which makes clear that a proposal to form a contract, other than a proposal addressed to one or more specific persons, will only be an invitation to make offers unless there is a clear intention by the person making the proposal to be bound.

Section 15B extends to interactive applications for the placement of orders, despite that such applications can often convey the sense that a binding agreement is being concluded. The rationale for treating such applications as merely an offer to treat is based on the general principle that offers of goods or services that are open to the world at large are not intended to be binding, and the difficulties for sellers with limited stock should they be liable to fulfil purchase orders from a virtually limitless number of purchasers. This section will likely not affect sales by online auction such as occur on ebay, among other websites, as a seller in such circumstances generally manifests a clear intention to be bound (as is generally required in the terms and conditions of such websites).[7]

Other matters

Other matters addressed by the Bill include:

(a) Definitions of originator and addressee clarifies that, in the course of making an electronic communication, any intermediaries such as servers or web-hosts do not fall within the consideration of the Act nor affect the relationship between originator and addressee.

(b) Definition of place of business has been revised to include business entities, government, government authorities and non-profit bodies.

(c) Definition of transaction has been broadened from "transactions of a non-commercial nature" (as appears in the current Act), to

(i) any transaction in the nature of a contract, agreement or other arrangement; and

(ii) 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, agreement or other arrangement; and

(iii) any transaction of a non-commercial nature.

Conclusion

The creation of uniform rules – domestically and internationally – for electronic communications and transactions is necessary for the efficiency of many spheres of digital interaction. When the Act was first adopted, it was based on a policy of:

(a) adopting a 'light' regulatory framework, allowing for flexibility sufficient to encourage the market to enter into and lead the development of e-commerce practice;

(b) advancing the principles of technological neutrality and functional equivalence (meaning that the law should not discriminate between forms of technology, for instance, paper or electronic documentation); and

(c) adopting internationally consistent rules.

The Bill remains true to this policy; and primarily seeks to clear up particular uncertainties surrounding electronic contract formation. However, as discussed above, questions concerning the time of dispatch and receipt of an electronic communication remain unresolved.

Interpretation of key concepts in the Act in courts and administrative decision making have differed – a fact that indicates that more legislative guidance may be needed on matters such as what comprises an 'information system', when a sender is in 'control' of an information system, and what measures or circumstances can go towards showing that an electronic address is the 'designated' address of a recipient.

---

[1] Paragraph 34 of the Explanatory Memorandum to the Bill.

[2] *Ibid*, paragraph 35-37.

[3] *Ibid*, paragraph 31.

[4] See the Explanatory Note to the Convention, at page 63.

[5] *Aristocrat Technologies Inc v IGT* (2008) 80 IPR 413 at [24-34]; see also, *PIHA Pty Ltd v Spiral Tube Makers Pty Ltd* (2010) 88 IPR 439 at [8-9].

[6] (UNCITRAL) Model Law on Electronic Commerce (1996) available at http://www.uncitral.org .

[7] See *Smythe v Thomas* [2007] NSWSC 844, in which the NSW Supreme Court found that a seller on eBay was bound to sell to the winning bidder after the close of the online auction, and that online auctions constituted a valid 'species of auction' for the purposes of the *Sale of Goods Act 1923* (NSW).