

Electronic Transactions (Victoria) Bill

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EXPLANATORY MEMORANDUM

General

The Bill establishes a scheme to facilitate electronic transactions in the public and private sectors.

Clause Notes

PART 1—PRELIMINARY

- Clause 1 sets out the purposes of the Bill.
- Clause 2 provides that the Bill will come into operation on 1 September 2000.
- Clause 3 defines terms used in the Bill. As far as possible the definitions have been drafted in accordance with the basic principles of media neutrality and technology neutrality. The aim of using media neutral and technology neutral terms is to focus on the purpose of the legal requirement, rather than the form by which that requirement is satisfied. Applying these principles should also ensure that the Bill will not require constant amendment to deal with technological changes. The Bill does not, for example, refer to "digital signatures" (a term which is used to refer to a particular type of signature technology) when dealing with signature requirements in clause 9 but instead focuses on the basic requirements for a signature.

"Consent" includes consent that can reasonably be inferred from the conduct of the person concerned. This term is used in clauses 8, 9 and 10 in provisions that state that a person must consent to receiving information in the form of an electronic communication. While consent would clearly be demonstrated by a person's express statement of consent, the purpose of this definition is to ensure that express consent is not required in

every case and that consent can be inferred from, for example, a history of transactions or previous dealings. However, when determining whether consent can be inferred from a person's conduct it will be necessary to look at the circumstances of the electronic communication, including the express statements of the person. A person should not, by the operation of this definition, be deemed to have consented to the receipt of information in the form of an electronic communication merely because they have sent or previously used electronic communications. If a person sent an electronic communication containing a message in which the person explicitly stated that they did not want to receive any or all information in the form of an electronic communication, then that express withdrawal of consent must be accepted.

"Data" is intended to have a wide meaning and is used to extend the definition of "information" in this Bill. Data is one of the forms in which information may be expressed.

While data is generally used to refer to information that is operated upon by a computer program, it is defined here to also include the definition of computer program within the meaning of the Copyright Act 1968 of the Commonwealth. The Copyright Act 1968 of the Commonwealth states that "computer program" means—

an expression, in any language, code or notation, of a set of instructions (whether with or without related information) intended, either directly or after either or both of the following—

- (a) conversion to another language, code or notation;
- (b) reproduction in a different material form—
to cause a device having digital information processing capabilities to perform a particular function.

It follows from this definition that data will include any part of a computer program, including both object code and source code.

"Data storage device" is defined to mean any article or material from which information is capable of being reproduced with or without the aid of any other article or device. This definition is intended to include items such as computer disks and CD ROMs from which information can be accessed or retrieved with the aid

of appropriate devices. It is not intended to include items such as filing cabinets, books and newspapers. This definition should be interpreted in the context in which it is used—that is, as a law dealing with the electronic communication of information. This term is used in clauses 8,10 and 11.

"Electronic communication" is defined as a communication of information by means of guided and/or unguided electromagnetic energy. This term is used throughout the Bill. The definition is consistent with similar definitions of electromagnetic energy in the Commonwealth Telecommunications Act 1991 and Telecommunications Act 1997 and is intended to have the widest possible meaning. Communications by means of guided electromagnetic energy is intended to include the use of cables and wires, for example optic fibre cables and telephone lines. Communications by means of unguided electromagnetic energy is intended to include the use of radio waves, visible light, microwaves, infrared signals and other energy in the electromagnetic spectrum. The use of the term "unguided" is not intended to refer to the broadcasting of information, but instead means that the electronic magnetic energy is not restricted to a physical conduit, such as a cable or wire. The term "communication" should also be interpreted broadly. Information that is recorded, stored or retained in an electronic form but is not transmitted immediately after being created is intended to fall within the scope of an "electronic communication".

This definition should be read in conjunction with the definition of "information", which is defined to mean data, text, images or sound. However, as a limitation is applied on the use of sound, the definition of electronic communication is in two parts. Paragraph (a) states that, in relation to information in the form of data, text or images, the information can be communicated by means of guided or unguided electromagnetic energy. Paragraph (b) provides that information in the form of sound must be communicated by means of guided or unguided electromagnetic energy or both and must be processed at its destination by an automated voice recognition system. This is intended to allow information in the form of sound to be included in the scope of the Bill only where the information is provided by a person in a form that is analogous to writing.

"Automated voice recognition system" is intended to include information systems that capture information provided by voice in a way that enables it to be recorded or reproduced in written form, whether by demonstrating that the operation of a computer program occurred as a result of a person's voice activation of that program or in any other way. Synthesised speech is capable of being caught as "data". This provision is intended to maintain the existing distinction commonly made between oral communications and written communications. The intention is to prevent an electronic communication in the form of speech from satisfying a legal requirement for writing or production of information. For example, it is not intended to have the effect that a writing requirement can be satisfied by a mere telephone call, message left on an answering machine or message left on voicemail.

"Information" is defined to mean information that is in the form of data, text, images or sound. These terms should be interpreted broadly. These terms are not intended to be mutually exclusive and it is possible that information may be in more than one form. For example, information may be in the form of text in a paper document but is then converted to the form of data in an electronic document. The term "information" is used in the definition of electronic communication and is also used throughout the Bill.

"Information system" is defined to mean a system for generating, sending, receiving, storing or otherwise producing electronic communications, however that system may operate. For example, it would include all or part of a communications network, such as a system operated by a Victorian government department. This term is used in clause 13 of the Bill.

"Information technology requirements" is defined to include software requirements. The term should be read to include software that uses open standard systems and software based on proprietary systems. The term is intended to have a broad meaning and should be interpreted as extending to any information technology item, including items of hardware like computer disks or smartcards containing an electronic chip embedded within them. This term is used in clauses 8, 9 and 10. The purpose of this inclusive definition is to ensure that the

meaning of the term includes any references to software requirements in other Victorian laws.

"Law of this jurisdiction" is defined as any law (whether written or unwritten) in force in Victoria, except Commonwealth laws.

"Non-profit body" is defined as a body whose constitution prohibits it from making any distribution to its members. This term is used to extend the meaning of "place of business".

"Place of business" is defined to specifically deal with entities that would not ordinarily be considered to be carrying on a business. This term is used in clause 13.

"Transaction" is defined to include transactions of a non-commercial nature as well as commercial dealings. This term is intended to be read in its broadest sense of doing something, whether it be conducting or negotiating a business deal or simply providing information or a statement. It should not be read narrowly to confine it to contractual or commercial relationships. Nor is it limited to the actual transmission of the information. The purpose of this definition is to clearly include within the meaning of transactions any transactions with or by the government. For example, it includes activities of government agencies in their role as service providers and it includes instances where citizens furnish information to a government agency. This definition is intended to remove any doubt about the broad meaning of the word and is not intended to limit the existing breadth of the legal meaning of "transaction".

Other terms used in the Bill have their ordinary meaning or are defined in the **Interpretation of Legislation Act 1984**. In particular, the term "person" is used throughout the Bill and is defined broadly in section 38 of the **Interpretation of Legislation Act 1984** to include a body politic, body corporate or an individual. This definition would, for example, include office holders within the definition of "person" because they will always be natural persons.

The term "document" is also used throughout the Bill and is defined broadly in section 38 of the **Interpretation of Legislation Act 1984**. This Bill is not intended to limit that broad definition of document.

The term "by or under a law of this jurisdiction" is intended to be read in its broadest sense as applying to all Victorian laws, whether they are made by or under a statute or derive from the common law and the rules of equity.

- Clause 4 sets out the objects of the Bill.
- Clause 5 sets out an outline of the Bill.
- Clause 6 states that the Crown, in all its capacities, is intended to be bound by the Bill.

PART 2—APPLICATION OF LEGAL REQUIREMENTS TO ELECTRONIC COMMUNICATIONS

Division 1—General Rule about Validity of Transactions for the purposes of Laws of this Jurisdiction

- Clause 7 is an expression of the fundamental principle of media neutrality that underpins the Bill. This clause provides for the legal recognition of electronic communications and is based upon article 5 of the UNCITRAL Model Law.

Sub-clause (1) is intended to make clear that a transaction under a Victorian law will not be invalid simply because it was conducted by the use of electronic communications. It is intended to apply whether one or more electronic communications take place in a transaction. It will also apply to transactions that have been conducted by the use of both electronic communications and other forms of communications (such as paper communications).

The provision does not automatically establish the validity of a transaction that has been conducted using electronic communications. It merely states that the electronic form of the transaction does not make it invalid (in this context validity is intended to include legal effect and enforceability). The transaction would still be required to satisfy all other existing legal requirements. The term "transaction" is defined in clause 3.

Sub-clause (2) makes clear that this provision is only intended to operate where another, more specific, provision in Part 2 of the Bill does not apply. That is, it will operate as a default provision,

providing a general rule that will have effect when the specific provisions in Part 2 do not operate. This is to ensure that this provision does not conflict with, or override, any of the specific requirements contained in the other provisions in Part 2.

Sub-clauses (3) and (4) allow exemptions to be made to this clause under the regulations in relation to specified transactions or classes of transactions or specified laws of the jurisdiction. These sub-clauses provide a facility to make regulations to add, remove or vary future exemptions as necessary.

Division 2—Requirements under Laws of this Jurisdiction

Clause 8 deals with providing information in writing and is based upon article 6 of UNCITRAL Model Law. Sub-clauses (1) and (2) allow a person to satisfy a requirement or permission to give information in writing under a Victorian law by providing that information by means of an electronic communication, subject to the general condition that, at the time the information was given, it was reasonable to expect that the information in the form of an electronic communication would be readily accessible so as to be useable for subsequent reference. In addition, the person to whom the information is given must consent to the information being given by means of an electronic communication.

Sub-clause (1) deals with requirements under Victorian law, while sub-clause (2) deals with permissions under Victorian law. These matters are dealt with in separate sub-clauses because the nature of the provisions are fundamentally different. A requirement is a legal obligation, while a permission simply allows someone to do something. While the articles of the UNCITRAL Model Law refer only to requirements, the meaning of the term "requirement" in the Model Law is generally extended by including both obligations and situations in which the law simply provides for certain consequences if something is not done. This has been interpreted as a mechanism for including situations in which the law permits something to be done. The concept of permission as it is used in the Bill is not limited to the relaxation of a prohibition. The term permission should be given the broadest possible meaning to include situations where a person is, for example, allowed to do something in whatever way they want. For example, a person

may be permitted to make an application for a particular form of government payment. The separation of provisions dealing with requirements and provisions dealing with permissions is maintained throughout the Bill.

Readily accessible condition

One of the central conditions imposed on the use of electronic communications by clause 8 (and which is also used in clauses 10 and 11) is that, at the time the information is given, it must be reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference. This requirement has a number of elements that will be considered in turn.

The readily accessible requirement deals with the concepts of accessibility and useability. It does not, however, deal with other issues such as the authenticity of an electronic communication (which is dealt with in particular in clause 8 in situations where a signature is required). The readily accessible requirement ensures that others will be able to access and use the information contained in the electronic communication and that transactions are not subsequently vitiated by a lack of access to the information. Underpinning this requirement is the basic idea of information being reproduced or retrieved and read. The readily accessible requirement captures this concept and expresses it in terms of objective criterion. The notion of readily accessible is intended to mean that information contained in the electronic communication should be readable and capable of being interpreted. Similarly, it is intended that software necessary to allow the information to be read should be retained. This may be the version of the software used to create the message or subsequent versions of the same or different software that is capable of rendering the information readable. The concept of useable is intended to cover use by both humans and machines. It is intended to deal with the useability of information, which is more than just the receipt of the electronic communication.

The requirement operates at the time the information was given. This time is taken to be the time that the information in the form of an electronic communication is given in compliance with the requirement or permission under a law of Victoria. This will be the time that the electronic communication is transmitted, rather

than the time that it is composed or drafted prior to transmission.

The reasonableness element has been inserted to make clear that a person can fully comply with the law at the time of the electronic communication. A person should not be subject to any ongoing obligations in relation to the use of an electronic communication. This allows a person to satisfy the elements of this requirement immediately where it is reasonable to expect that the information would be readily accessible. There is no continuing requirement to, for example, ensure that the electronic communication is continually updated to take account of the latest changes in technology. Reasonableness in this context is not intended to be a subjective matter. It should be determined objectively having regard to all relevant factors, such as the technology available at the time of the electronic communication and the appropriateness of the available technology for the purposes of the communication.

The concept of subsequent reference impliedly requires that electronic communications should be capable of retention. However, the use of this concept does not mean that electronic communications must be retained—it simply means that they must be capable of retention. Where a person chooses to retain an electronic communication pursuant to Victorian law then the requirements that must be satisfied are set out in clause 11.

The requirement must be satisfied regardless of whether the parties to the transaction have a continuing relationship or not.

Consent provisions

Paragraph (b) in sub-clauses (1) and (2) specifies that recipients of information must consent to the information being given to that person by way of an electronic communication. This provision is based on the general policy that a person should not be compelled to use an electronic communication to conduct a transaction in order to satisfy requirements or permissions to give information in writing under Victorian law. The power only applies where a person is receiving an electronic communication. It is not necessary to state that a person must consent before providing information by way of an electronic communication because the provisions are clearly drafted to provide a person with the ability to choose whether or not to

satisfy their legal obligations by using an electronic communication.

The recipient's consent is required only in relation to the medium by which the information is communicated where the medium is an electronic communication of some type. The provision is not intended to give the recipient the power to consent to the information contained within the electronic communication. It merely requires a person's consent to the use of electronic communications as an alternative means of compliance with Victorian laws.

The definition of consent set out in clause 3 makes it clear that consent can be inferred from a person's conduct. This is intended to ensure that express consent is not required prior to every electronic communication. For example, the fact that a person has used electronic mail to communicate an offer to a business should generally be sufficient to allow the business to assume the person's consent to receiving an acceptance at that email address. However, it is not intended that consent should be inferred from an electronic communication that contains an express refusal to deal via electronic means. If a person sent an electronic communication containing a message in which the person explicitly stated that they did not want to receive any or all information in the form of an electronic communication, then that express withdrawal of consent must be accepted.

Other provisions

Sub-clause (3) makes it clear that this Bill does not affect the operation of any other Victorian law that specifies the way in which electronic communications must be made. This is intended to include existing laws that specify particular information technology requirements such as software requirements. In addition, the Bill is not intended to override other specific Victorian laws that require a person to use electronic communications, regardless of that person's consent.

Sub-clause (4) extends the meaning of giving information, as used in sub-clauses (1) and (2), to include the concepts of giving, sending or serving information, or any other like expression. In this context, the concept of service is intended to include administrative service requirements. For example, it would include serving of a notice of rescission.

Sub-clause (5) extends the meaning of giving information to ensure that it applies to a wide range of situations. For example, it should be read to include within its meaning giving a statement of reasons. This list, while it contains many of the common terms used when a person is required or permitted to give information, is not intended to be comprehensive. It is a non-exhaustive list and is clearly expressed as not being limited to the examples given within the list.

Where necessary clause 8 is intended to be read in conjunction with clause 9, which deals with signature requirements. Where a law of the jurisdiction requires or permits a person to provide information in writing and to sign that document, both elements must be satisfied. While a person could use an electronic communication to satisfy the writing requirement, they will not comply with the law unless they also sign the electronic communication. This can only be done by complying with the requirements of clause 9 which deals with signature. To comply with a Victorian law that requires information to be in writing and to be signed, a person would need to use an electronic communication with an electronic signature that complies with both clause 8 and clause 9.

Clause 12 provides for exemptions from this clause.

Clause 9 allows a person to satisfy a legal requirement for a manual signature by using an electronic communication that contains a method that identifies the person and indicates their approval of the information communicated. This method by which a person is identified electronically is commonly called an "electronic signature".

However, the choice of a particular method must be as reliable as is appropriate in the circumstances. In addition, the person to whom the signature is to be provided must consent to the use of that signature method. Clause 9 is based upon article 7 of the UNCITRAL Model Law.

The conditions contained in paragraph (a) of sub-clause (1) focus on two of the basic functions of a signature. The method a person chooses to use to satisfy the signature requirement must both identify the person and their approval of the contents of the electronic communication. In establishing the person's identity the signature method need not necessarily be a unique identifier.

Rather, it must identify that person sufficiently for the purposes of that communication. Some signature technologies, such as digital signatures, will, simply by the nature of the way they operate, also verify the integrity of the electronic communication. However, paragraph (a) only requires that the signature method allows a person to indicate their approval of the information contained in the communication—it does not require the signature method to verify the integrity of the communication. Where relevant, a person's approval of the information communicated will go towards demonstrating the person's intention to apply their signature to the information contained in the electronic communication.

There is no express requirement that the signature method must necessarily be contained in the electronic communication itself. However, the requirement that the signature must indicate the person's approval of the contents of the communication means the signature must be linked with the communication in some way. For example, a signature method may be applied to a communication but then transmitted as a packet of information separate to the communication. If the signature can be shown to indicate the person's approval of the information contained in the communication then the signature will satisfy the requirements in paragraph (a).

Paragraph (b) of sub-clause (1) sets out a further requirement that the signature method must be as reliable as appropriate for the purposes for which the information was communicated. This must be determined having regard to all the relevant circumstances at the time the signature method was used to sign the electronic communication. Technological advances may mean that signature technology becomes unsuitable even though it was considered suitable for a particular transaction at an earlier time. Linking this requirement to the time that the signature method is used is intended to ensure that a signature method that was appropriate at the time it was used is not later rendered invalid. Setting out the basic requirements for a signature method, rather than specifying detailed standards for particular types of signature methods, is consistent with the principle of technology neutrality and enables signature methods to meet the appropriate objective standards at the time they are used.

In determining the appropriateness of a signature method a number of legal and technical factors may be taken into account. These factors could include: the function of signature requirements in the relevant statutory environment; the type of transaction; the capability and sophistication of the relevant communication systems; and the value and importance of the information in the electronic communication. This requirement also recognises that different degrees of security are needed for different transactions. It allows a signature method to be chosen that provides the level of security appropriate for the transaction.

This clause does not establish a method for the approval, specification or recognition of particular signature technology. By not endorsing particular electronic signature technologies the Bill does not need to be revised to take account of technological changes. In general, it is inappropriate for legislation to prescribe the use of, or give legislative advantages to, specific types of signature methods such as digital signatures. It is more appropriate for the market to assess appropriate signature products for their particular purposes rather than have legislation specify acceptable technologies.

Paragraph (c) of sub-clause (1) specifies that recipients of an electronic signature must consent to the use of the electronic signature method. This provision is intended to have a similar purpose and operation to clause 8(1)(b).

Sub-clause (2) makes it clear that this Bill does not affect the operation of any other Victorian law that specifies the use of any electronic signature method, however described. This provision is intended to have a similar purpose and operation to clause 8(3). The use of different language in paragraphs (a) and (b) to describe the signature method is intended to capture any existing laws that use these terms as well as laws that generally comply with paragraph (c).

Clause 12 provides for exemptions from this clause.

Clause 10 allows a person to satisfy a requirement or permission to produce a document that is in the form of paper by using an electronic communication that complies with a number of requirements. The first two requirements, which are of general application, are that there must be a reliable assurance as to the integrity of the information in the message and the information must be readily

accessible so as to be useable for subsequent reference. The person to whom the document is required or permitted to be produced must consent to the document being given by means of an electronic communication.

This provision is intended to cover requirements for original paper documents. Where a law requires the production of information, but does not require the information to be in the form of a paper document, clause 8 would apply and the information can be given by way of an electronic communication.

Due to the ease with which electronic messages can be altered, it is important to determine that the information contained in an electronic communication accurately maintains the integrity of the information that is contained in the paper document. Paragraph (a) of sub-clauses (1) and (2) sets out the integrity requirement that must be satisfied.

This requirement is intended to ensure that the information in the document has remained complete and unaltered from when it was in the form of a paper document through its translation into the form of an electronic communication. The integrity requirement applies to the method of generating the electronic form of the document. It is not intended to apply to the means by which the document is communicated. The integrity requirement is further explained in sub-clause (3).

The measure of what is a reliable means of assuring the maintenance of the information's integrity should take into account factors such as: the methodical recording of the information; assurance that the information was captured without any omissions; and the protection of the information against alteration. Satisfaction of the integrity requirement is to be assessed in light of all the relevant circumstances at the time the information was communicated. This test is not intended to require a person to retain the document in its original paper form in order to ascertain whether the "reliable assurance" requirement is met.

Paragraph (b) of sub-clauses (1) and (2) sets out the readily accessible requirement in relation to the production of documents. This test is intended to have the same purpose and operation as the readily accessible test set out in clause 8(1)(a).

Paragraph (c) of sub-clauses (1) and (2) ensures that a person to whom a document is required or permitted to be produced consents to the production of that document by means of an electronic communication. This provision is intended to have a similar purpose and operation as clause 7(1)(d).

Sub-clause (3) specifies that the integrity of information contained in a document can only be maintained if the information remains complete and unaltered, subject to the addition of any endorsement or any immaterial change both of which arise in the normal course of communication, storage or display. The term "endorsement" is intended to have a narrow meaning. It is intended to cover, for example, data that is automatically added by information systems to the beginning and end of communications in order to transmit them (such as routing information on an electronic mail message and other "metadata"). It is also intended to refer to situations where, for example, an electronic certificate is added to the electronic form of the document in the course of its communication to attest to the electronic document's integrity. "Endorsement" is not intended to include additions to the information contained in the document itself, such as annotations, signatures or initials. While the term "immaterial change" would generally allow formatting changes to occur to the information contained in the document, it is not intended to allow formatting changes to be made where the format is an important element of the document itself. For example, if a Victorian law required a notice to appear above a person's signature, the electronic form of the document must ensure that the notice appears in the appropriate location.

Sub-clause (4) makes it clear that this clause does not affect the operation of any other Victorian law dealing with the production of electronic forms of documents. This provision is intended to have a similar purpose and operation as clause 8(3).

Clause 10 is based upon article 8 of the UNCITRAL Model Law. This article refers to the concepts of both original documents and the production of original documents. Article 8 of the Model Law is also expressed to apply to certain requirements to retain documents. However, these elements have been dealt with in clause 11.

Clause 12 provides for exemptions from this clause.

Clause 11 provides that requirements for the recording of information, the retention of paper documents and the retention of electronic communications can be satisfied by information in electronic form, subject to certain specified requirements being satisfied. Clause 11 is based upon elements of articles 8 and 10 of the UNCITRAL Model Law.

This provision is not intended to alter any obligations imposed on a person by Victorian law in relation to retaining information or documents, including the period of retention. A person must satisfy any and all such obligations.

Readily accessible

Each sub-clause uses the objective requirement that the information retained must be reasonably readily accessible so as to be useable for subsequent reference. This requirement must be satisfied at the time the information is either recorded, generated in electronic form or retained (depending on the relevant sub-clause). This requirement is intended to have a similar purpose and operation to the readily accessible test in clause 8.

Regulations specifying the form of data storage device

Each sub-clause contains a provision that allows regulations to be made in relation to the use of data storage devices. The regulations may specify any requirements for information to be recorded in electronic form on a particular kind of data storage device. A person must comply with any such requirements. The purpose of this provision is ensure that people can be directed to retain information on certain types of storage devices, such as computer disks or CD ROMs, which may be of higher quality or durability. "Data storage device" is defined in clause 3.

Recording of information

Paragraph (a) of sub-clause (1) provides that an electronic form of information can satisfy a requirement under a Victorian law to record information in writing if, at the time the information was recorded, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference. Paragraph (b) provides that the regulations may require the use of particular data storage devices.

Retention of written document

Paragraphs (a) and (b) of sub-clause (2) provide that an electronic version of a document can satisfy a requirement under a Victorian law to retain a document in a particular form, article or material where integrity requirements are satisfied and the "readily accessible" requirement is satisfied. The integrity provision is intended to have a similar purpose and operation to clause 8(1)(a). Paragraph (c) of sub-clause (2) provides that the regulations may require the use of particular data storage devices.

The integrity requirement is set out in sub-clause (3). It is intended to have a similar purpose and operation as clause 10(3). The provision is intended to allow for the addition of information that is a necessary consequence of the retention process but which does not affect the integrity of the information. This may include, for example, information added to the electronic communication that is necessary in order to identify the message for storage purposes. This provision does not require the retention of this information. Although in many cases the information will not be communicated when it is retained, there may be situations in which a person communicates the information to, for example, a data storage device (such as a server) that is kept at a location remote from the person.

Retention of electronic communications

Sub-clause (4) provides that an electronic communication can satisfy a requirement under a Victorian law to retain information that was the subject of the communication. An electronic communication (such as an electronic mail message) can only meet or satisfy such a requirement where integrity requirements and the "readily accessible" requirement are satisfied, as set out in paragraphs (a) and (b). The integrity requirement is further set out in sub-clause (5), which has a similar purpose and operation to clause 10(3).

In addition, paragraphs (c) and (d) of sub-clause (4) require information to be retained that will identify the origin and destination of the electronic communication and the time of the electronic communication's dispatch or receipt. This information must be retained in a way that satisfies the "readily accessible"

requirement. Requiring the retention of this information, where it is available, may be seen as imposing a higher standard than currently exists for the retention of paper documents. However, the purpose of retaining this information is to assist in the identification of the message. This requirement recognises that, unlike paper communications, identifying information may be separate from the message contained within the electronic communication.

Paragraph (e) of sub-clause (4) provides that the regulations may require the use of particular data storage devices.

Clause 12 provides for exemptions from this clause.

Clause 12 deals with exemptions from Division 2 of Part 2 of the Bill. Sub-clauses (1), (2) and (3) provide that regulations may be made to exempt specified requirements or classes of requirements, specified permissions or classes of permissions, or specified Victorian laws from any or all of the provisions of Division 2.

In general, appropriate exemptions will be made where the purpose or intention of a requirement, permission or Victorian law cannot be satisfied by the use of electronic communications. It is intended that any exemptions will be listed in regulations. The regulation-making powers would be used to add, remove or vary exemptions as necessary.

Division 3—Other Provisions relating to Laws of this Jurisdiction

Clause 13 recognises that it is important to determine the time and place of dispatch and receipt of information for many existing rules of law. Consequently, this clause provides default rules to determine when, and from where, an electronic communication is sent and when and where it is received. The provision is intended to provide certainty for rules applying to dispatch and receipt of electronic communications.

This clause sets out default rules that apply depending on whether the parties to the communication have agreed otherwise and whether the parties have designated a particular information system for the communication. Parties may agree to vary these rules to determine the time and place of dispatch and receipt in their dealings with each other. Agreement to vary these default

rules could occur in, for example, closed systems such as virtual private networks or in relation to particular communications by prior agreement between the parties. These provisions are intended to apply to situations where technology allows the use of third parties to provide time and date stamping services.

The terms "originator" and "addressee" are used throughout clause 13. These terms are intended to have their ordinary meanings. An originator is someone who causes an electronic communication to be sent, while an addressee is someone who the originator intends to receive the electronic communication.

The receipt provisions only address the issue of whether an electronic communication is received, and not whether it is intelligible or useable by the addressee. Clause 13 is largely based upon article 15 of the UNCITRAL Model Law.

Time of dispatch and receipt

Sub-clauses (1) and (2) establish basic rules for the time of dispatch of an electronic communication. An electronic communication is dispatched when it enters an information system outside the control of the originator. The term "information system" is defined broadly in clause 3. These provisions deal separately with situations where an electronic communication enters a single information system or multiple information systems outside of the control of the originator when it is transmitted, but the basic rule is identical in both provisions. The time when an electronic communication is dispatched is the time when the beginning of the transmission of the electronic communication occurs. It is intended that a commonsense approach be taken in this area.

It is necessary to deal with the situation where an electronic communication enters more than one information system because most communications across the Internet, for example, are routed through multiple information systems. In this situation, dispatch is deemed to occur when the communication enters the first information system outside of the control of the originator. For example, a message sent by the originator may leave his or her system and enter his or her Internet service provider's system from which it is sent, possibly via other systems, to the addressee's information system. In this situation,

the time of dispatch is deemed to occur when the communication enters the originator's Internet service provider's system.

Sub-clauses (3) and (4) establish basic rules for the time of receipt of an electronic communication. These rules depend on whether the addressee has told the originator to transmit the electronic communication to a particular information system or not. Where the addressee has given specific directions and the electronic communication is transmitted in accordance with those directions, sub-clause (3) says that the communication is received when it enters the designated information system. As it is expected that a person who has designated an information system will regularly check that information system for messages, the provision effectively deems the communication to have come to the attention of the addressee as soon as it enters the designated system. In all other cases sub-clause (4) operates to state that the electronic communication will be received when it comes to the attention of the addressee. The term "comes to the attention of the addressee" is not intended to mean that a communication must be read by the addressee before it is considered to be received. An addressee who actually knows, or should reasonably know in the circumstances, of the existence of the communication should be considered to have received the communication. For example, an addressee who is aware that the communication is in their electronic mail "box" but who refuses to read it should be considered to have received the communication.

References to time in sub-clauses (1) to (4) should be read as necessarily including the date. The provisions do not require the time of dispatch or receipt to be expressed in Greenwich Mean Time, but in practice many information systems, for example, take account of differing time zones by referring to Greenwich Mean Time (or Universal Time).

The concept of "entry" into an information system is used in relation to both time of dispatch and receipt. It is intended to refer to the time that an electronic communication becomes available for processing within the information system that it has entered. An electronic communication is not intended to meet the receipt requirement if it has merely reached the addressee's system but failed to enter it.

Place of dispatch and receipt

Sub-clauses (5) and (6) provide default rules, subject to contrary agreement, for the place of dispatch and receipt of electronic communications. These rules are intended to reflect the reality that the physical location of information systems is often irrelevant to the use and purpose of the electronic communication. The nature of electronic communications is such that the information system can be in a different jurisdiction to where the originator and/or the addressee are located. This provision does not use the location of the information system to determine where the communication was dispatched and received, but instead establishes an objective criterion of place of business (or, where there is no place of business, of residence) of the parties to the communication. The rules are intended to provide a more meaningful connection between the originator and addressee and the place of dispatch and receipt instead of allowing the physical location of the information system to be the deciding factor. Further, addressees and originators of electronic communications can use publicly available information to more readily determine a person's place of business or residence, while it may be difficult or impossible to determine the location of an information system.

Sub-clause (5) establishes that the dispatch of an electronic communication is deemed to occur from the originator's place of business and receipt of an electronic communication is deemed to occur at the addressee's place of business. Sub-clause (6) makes provision for circumstances where the originator or addressee have more than one place of business. In such a situation a distinction is drawn on the basis of whether there is a place of business that has a closer relationship to the underlying transaction of which the electronic communication forms a part. If there is no place of business that has a closer relationship to the underlying transaction, then the place of dispatch or receipt is deemed to be the principal place of business. The concept of "underlying transaction" is intended to include a transaction that is either actual or contemplated. If the originator or the addressee have no place of business then paragraph (c) of sub-clause (6) provides that the message is deemed to be sent or received, as appropriate, at the place where the originator or

addressee ordinarily resides. The term "place of business" is defined in clause 3.

Exemptions

Sub-clauses (7) and (8) allow specified electronic communications or classes of electronic communications and specified laws of the jurisdiction to be exempted from the application of this clause by regulations.

Clause 14 restates the existing common law in relation to the attribution of communications. Sub-clause (1) provides that a person purporting to be the originator of an electronic communication will only be bound by the electronic communication if in fact the electronic communication was sent by that person or with their authority. However, parties to an electronic communication may agree to vary these attribution rules. Clause 13 operates as a default rule where there is no agreement to the contrary. Sub-clause (1) is not intended to be a codification of the common law.

Sub-clause (2) is intended to ensure that the existing law of agency is not affected by the rule set out in sub-clause (1). Instead, the operation of the laws of agency, including the doctrines of apparent and actual authority, are preserved. As recommended by the Electronic Commerce Expert Group, clause 13 does not adopt the relevant article on attribution from the UNCITRAL Model Law.

Sub-clauses (3) and (4) allow specified electronic communications or classes of electronic communications and specified laws of the jurisdiction to be exempted from the application of this clause by regulations.

PART 3—MISCELLANEOUS

Clause 15 provides that the Governor in Council may make regulations to assist in giving effect to the Bill. Where the regulations contain exemptions, it is intended that the basic principles of media—and technology-neutrality underlying the Bill are not affected.