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# Electronic Transactions Legislation: An Australian Perspective

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## I. Introduction

The projected level of electronic-commerce (e-commerce) transactions has, in the words of one writer, “been thrown around like confetti at a wedding.”<sup>1</sup> Estimates made in 2000 suggested that the level of transactions would be worth U.S.\$300 billion by 2002.<sup>2</sup> However, these estimates failed to predict the devastating impact of the demise in technology stocks in 2001 (“the tech wreck”) and the downturn in global economies post September 11, 2001. Security and privacy issues<sup>3</sup> with the use of the Internet have also hampered progress. Regardless of the accuracy of the estimates, advances in technology and the use of electronic communications have significantly changed the way in which governments, businesses, and consumers interact within Australia and globally.<sup>4</sup>

This article examines several of the difficulties in applying the traditional contract law principles to electronic communications, and it examines the extent to which the Electronic

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1. John Lambrick, *Managing Legal Risk in Web Contracting*, 52 TELECOMM. J. OF AUSTR. 45 (2002).

2. Parliamentary Debates, *Electronic Transactions (Victoria) Bill: Before the Legislative Council*, at 1029 (May 10, 2000) (statements of G.B. Ashman (Koonung) and S. M. Nguyen (Melbourne West)) [hereinafter Parliamentary Debates].

3. *Id.* at 1030, 1035 (statements of S. M. Nguyen (Melbourne West) and Jenny Mikakos (Jika Jika) respectively, discussing some of the issues impacting consumer confidence in relation to e-commerce); see *id.* at 1038–39 (statement of P. A. Katsambanis (Monash) identifying certain legislation required in this area to address these issues); Lambrick, *supra* note 1, at 45, 55; Andrew Field, *Electronic Commerce: Encouragement from Canberra*, 74 LAW INST. J. 54, 56–57 (2000) (discussing the recent legislation in relation to privacy); Niranjan Arasaratnam & Maree Flynn, *Combating Cybercrime*, 5 TELEMEDIA 30 (2001) (discussing the Cybercrime Act 2001 (Cth)).

4. Attorney-General, *An Australian Legal Framework for Electronic Commerce: Issues Paper* (Nov. 1998), available at [http://www.sociedaddigital.org/esp/publi/Marco\\_Legal/Marco\\_Legal\\_Asia\\_Oceania.htm](http://www.sociedaddigital.org/esp/publi/Marco_Legal/Marco_Legal_Asia_Oceania.htm). For a discussion of the significant impact e-commerce has had on the life and superannuation industries, see Natalie Gullifer, *Impact of Government E-commerce Initiatives on Superfund Trustees*, 12 AUSTR. SUPERANNUATION L. BULL. 65 (2001); Scott Charaneka & Ian Reid, *Life Insurance and Superannuation: ET is Coming*, 4 E. L. PRAC. 14 (2001); Niranjan Arasaratnam, *Cybertrading: Australian Regulatory Issues*, 19 COMM. L. BULL. 15 (2000).

Transactions (Victoria) Act 2000 (ETVA) addresses these issues and recommends several technical amendments.

## II. The ETVA

The laws of the Australian States and Territories govern contract law in Australia.<sup>5</sup> As such, a national approach requiring the States and Territories to enact uniform legislation was required.<sup>6</sup> On May 16, 2000, the Victorian Parliament enacted the ETVA, effective September 1, 2000.<sup>7</sup> The ETVA was based on the commonwealth Electronic Transactions Act 1999 (Cth) (ETA),<sup>8</sup> which in turn, was based on<sup>9</sup> the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce (Model Law).<sup>10</sup>

The ETVA is not intended to provide a comprehensive legal framework offering legal certainty in relation to all electronic transactions;<sup>11</sup> rather, it is intended to provide a minimalist,<sup>12</sup> "light-handed"<sup>13</sup> regulatory framework that:<sup>14</sup>

- (a) recognises the importance of the information economy to the future economic and social prosperity of Australia;
- (b) facilitates the use of electronic transactions;

5. Andrew Field, *Facilitating Electronic Commerce: The Electronic Transactions (Victoria) Act 2000*, 74 LAW. INST. J. 73 (2000). Given this, it was not possible, as recommended by the Expert Group in Recommendation 3 of the Expert Report, to only enact Commonwealth legislation.

6. On April 3, 2000, the Attorney-General announced that all States and Territories had endorsed the uniform Electronic Transactions Bill 2000. See Press Release, Darryl Williams, Attorney-General, *Agreement on a Uniform Approach to Electronic Transactions Laws* (Apr. 3, 2000), available at <http://www.ag.gov.au/www/attorneygeneralHome.nsf/Alldocs>. See Attorney-General, *Australia's Legal Framework for Electronic Commerce*, available at <http://www.ag.gov.au/agd/Department/Publications/publications/e-commerce/legal.html> (last visited June 30, 2003) (listing the status of the legislation in the States and Territories) [hereinafter *Legal Framework*].

7. Electronic Transactions (Victoria) Act 2000, Act No. 20/2000, § 2 (2000).

8. See Parliamentary Debates, *supra* note 2, at 1031 (statement of C. A. Furletti (Templestowe) noting that the ETVA mirrors the ETA almost verbatim). The enactment of the ETA, on March 15, 2000, was made subsequent to the recommendations of the Electronic Commerce Expert Group to the Attorney-General (Expert Group). Attorney-General, *Electronic Commerce: Building the Legal Framework* (Mar. 31, 1998), available at <http://law.gov.au/aghome/advisory/eceg/ecegreport.html> [hereinafter Expert Report]. The Expert Group's recommendations were based on two important principles: functional equivalence (or media neutrality), which means that the paper-based commerce and e-commerce should be treated equally by the law, and technology neutrality, which requires that the law should not discriminate between forms of technology. See *Legal Framework*, *supra* note 6; G.A. Res. 51/162, UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, 6th Ctee., U.N. Doc. A/51/628, ¶¶ 15–18 (1996), available at <http://www.uncitral.org/english/texts/electcom/ml-ecomm.html> (last visited June 30, 2003) (supporting a functional equivalent approach) [hereinafter Model Law]. See Attorney-General, *The Electronic Transactions Act 1999* (2002), at <http://law.gov.au/www/securitylawHome.nsf> (last visited June 30, 2003) (summarizing the ETA); see also Australian Government Solicitor, *The Electronic Transactions Act*, 59 LEGAL BRIEFING 1 (2001).

9. Attorney-General, *Frequently Asked Questions*, available at <http://law.gov.au/www/securitylawHome.nsf> (last visited July 8, 2002).

10. Model Law, *supra* note 8.

11. Matthew Hibbons, *Electronic Transactions—A Reality?* 52 KEEPING GOOD COMPANIES 564, 565 (2000).

12. *Frequently Asked Questions*, *supra* note 9. See Ian Briggs & Stephanie Brumpton, *Embrace E-construction with care!* 13 AUSTR. CONSTRUCTION L. BULL. 25 (2001).

13. *Legal Framework*, *supra* note 6. See Parliamentary Debates, *supra* note 2, at 1029 (statement of G.B. Ashman).

14. Electronic Transactions (Victoria) Act 2000, § 4.

- (c) promotes business and community confidence in the use of electronic transactions; and
- (d) enables business and the community to use electronic communications in their dealings with government.<sup>15</sup>

In addition, the ETVA is intended to address certain deficiencies<sup>16</sup> in Australia's legal system relating to electronic transactions, which are discussed below.

Given the similarities between the ETA, the ETVA, and the relevant legislation in other States and Territories,<sup>17</sup> certain comments made below in relation to the ETVA will be equally relevant to the ETA and other legislation.<sup>18</sup>

#### A. LEGAL IMPEDIMENTS

In Australia, the following elements are required for the formation of a valid contract:<sup>19</sup>

- (a) a meeting of the minds (known as *consensus ad idem*) as to the fundamental rights and obligations between the parties. This is often evidenced by:
  - (i) an offer;
  - (ii) an unequivocal acceptance of that offer with that acceptance being communicated to the party who made the offer;
- (b) consideration;
- (c) the intention of the parties to create legal relations;<sup>20</sup> and
- (d) all parties to the transaction having the legal capacity to effect the transaction.

It is suggested that the contract law issues raised by e-commerce are generally capable of being dealt with by existing contract law principles.<sup>21</sup> The Australian law recognizes contracts formed using facsimile, telex, and other similar technology and will likely recognize contracts formed by way of offer and/or acceptance communicated electronically, provided the requisite elements listed above are present.<sup>22</sup>

##### 1. *Validity of Electronic Transactions*

For the avoidance of doubt, section 7(1) of the ETVA<sup>23</sup> confirms that a transaction is not invalid simply because it took place in whole or in part by means of one or more electronic communications.<sup>24</sup>

15. *Id.* § 6 (stating that the provisions are binding on the Crown).

16. See Expert Report, *supra* note 8, § 2.

17. Field, *supra* note 5, at 75.

18. There will obviously be some differences. For example, from July 1, 2001, the ETA applies to all laws of the Commonwealth unless they have been specified in the Regulations. The Electronic Transactions Regulations 2000 contain reference to 101 laws of the Commonwealth that are excluded from the operation of the ETA. It has been suggested that this undermines the effectiveness of the ETA. See Catherine Dickson, *Electronic Transactions Update*, 20 COMM. L. BULL. 1, 2 (2001); see also Glenn Vassallo, *E-Commerce Concerns for Company Secretaries*, 21 PROCTOR 37 (2001).

19. Expert Report, *supra* note 8, § 2.11.9.

20. In Australia, if the parties are in a commercial relationship, the presumption is that the parties intended to create legal relations; whereas if the parties are in a domestic relationship, the presumption is that the parties did not intend to create legal relations.

21. *Frequently Asked Questions*, *supra* note 9, at 1-2.

22. Expert Report, *supra* note 8, § 2.11.11.

23. Model Law, *supra* note 8, art. 5.

24. ETVA § 7(1) is subject to the operation of a more specific provision in the ETVA, which impacts the validity of the transaction and the exclusion of the transaction or specified law in the ETVA Regulations. See Electronic Transactions (Victoria) Act 2000, §§ 7(2), 7(3); see also Sheridan Nicholas & Mark Rigotti, *Contract*

Despite the ability of the Australian contract laws to deal with e-commerce, certain idiosyncratic issues arise that result in a potential increase in the complexity of the contractual issues.<sup>25</sup> For example, by facilitating increased global transactions without the need for physical presence, the location of contract formation may be difficult to discern. A Web site can be structured as either an invitation-to-treat or as an offer. If the rule that states the contract is formed in the jurisdiction where the acceptance is received applies, then it may be in the interests of the merchant (but possibly not of the site visitor who may have no idea where the merchant is located) to treat the Web site as an offer in order to ensure that a particular country's laws apply.<sup>26</sup> This is obviously a complex area of law. International attempts to agree on how the jurisdiction of an Internet transaction should be determined have failed.<sup>27</sup>

The Explanatory Memorandum (EM) correctly points out that section 7(1) of the ETVA does not "automatically establish the validity of a transaction."<sup>28</sup> The ETVA provides no guidance on the complex underlying issues of contract formation. For instance, in relation to the example above, the ETVA provides no guidance on the question of when the material on a Web site will constitute an offer as opposed to an invitation-to-treat.<sup>29</sup> The justification for not addressing the complex issue of the validity of a contract in an e-commerce environment appears to be based on the position that the issue is ultimately one of fact.<sup>30</sup> However, this argument would be inconsistent with many of the other provisions, such as section 13 of the ETVA, that deal with questions of fact.

After taking the first step, albeit a small one, towards providing greater certainty in this area, it is suggested that the Victorian and Federal Governments should now undertake the more complex issues of contract formation in an e-commerce environment.

## 2. Writing

At common law there is no general requirement for writing under the law of contracts.<sup>31</sup> However, there is legislation that requires certain contractual and non-contractual transactions to be in writing, signed, to be both in writing and signed,<sup>32</sup> or to be in a prescribed

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*Formation and Electronic Signatures under the Electronic Transactions Act*, 12 J. OF BANKING & FIN. L. & PRAC. 47, 49 (2001) (noting that it is unclear whether these provisions are intended to override the fundamental rule in contract law that a party making an offer can stipulate the mode and manner of acceptance. For example, where acceptance is required in writing, will that requirement be satisfied where acceptance takes place via an electronic communication? However, they proceed to conclude that section 7 should not operate in this way as the legal requirements of a contract have not been satisfied.).

25. For a detailed discussion of the issues involved in contract formation in an e-commerce environment, see Simone Hill, *Formation of contracts via email—when and where?* 16 COM. L. Q. 3 (2002).

26. Expert Report, *supra* note 8, § 2.11.12 (suggesting that the simplest way to avoid difficulties in determining the appropriate legislative jurisdiction is for commercial parties to choose the proper law of contract which will apply in the event of a dispute); *id.* § 2.27.1–13.

27. See State Library of NSW, Law Foundation of NSW and Legal Information Access Center, *What is E-Law?* 32 HOT TOPICS 1, 8 (2001).

28. Explanatory Memorandum to the Electronic Transactions (Victoria) Bill 2000 (Vic), at 6 [hereinafter Explanatory Memorandum].

29. For a discussion of this issue, including a consideration of three U.S. cases on point, see Field, *supra* note 5, 74–75.

30. Expert Report, *supra* note 8, § 2.11.12.

31. *Id.* § 2.6.16.

32. *Id.* § 2.6.16–17 (noting certain requirements concerning the transfer of interests in land, wills and affidavits, and consumer protection laws).

paper-based form.<sup>33</sup> In Australia, what constitutes writing varies between jurisdictions.<sup>34</sup> Although the law prior to the enactment of the ETVA, on occasion, used broad definitions that would enable "writings" to be something more than paper-based, there was no law that held that an electronic record could satisfy this requirement.<sup>35</sup>

Section 8 of the ETVA<sup>36</sup> addresses this by providing that where a person is either required or permitted<sup>37</sup> to give information<sup>38</sup> in writing, that requirement is satisfied if the person gives the information by means of an electronic communication, where at the time the information was given, it was reasonable to expect that the information would be readily accessible and the person to whom the information is required or permitted to be given consents to the information being given by means of an electronic communication.<sup>39</sup>

Given that contract law is predominantly common-law based and that, as stated above, there is no general requirement for writing in common law, section 8 of the ETVA will have limited application. For example, section 8 does not address issues of contract formation or acceptance<sup>40</sup> and merely deals with the supply of information electronically.

### 3. Signatures

The Australian courts have interpreted what constitutes "signed" and "signature" very broadly and in some cases has not required the party's actual signature.<sup>41</sup> Section 9(1) of the ETVA provides confirmation that where the signature of a person is *required*, that requirement will be satisfied where:

- (a) a method is used to identify the person and to indicate the person's approval of the information communicated; and
- (b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated; and
- (c) the person to whom the signature is required to be given consents to that requirement being met by way of the use of the method mentioned in paragraph (a).<sup>42</sup>

33. *Id.* (identifying the following types of transactions at Expert Report, § 2.6.18: "hire purchase contracts, bills of exchange, cheques, promissory notes, contracts of marine insurance, mortgages, undertakings to pay another person's debt, assignments of copyright and patents, contracts for the sale of goods above a certain minimum value and transfers of interests in land.").

34. Expert Report, *supra* note 8, § 2.6.20.

35. *Id.* § 4.1.7.

36. Based on article 6 of the Model Law. Model Law, *supra* note 8, art. 6.

37. Explanatory Memorandum, *supra* note 28, at 7 (stating that a "requirement" is a legal obligation, whereas "permission" simply allows someone to do something).

38. "Giving information" is defined in section 8(5) of the ETVA to include: "(a) making an application; (b) making or lodging a claim; (c) giving, sending or serving a notification; (d) lodging a return; (e) making a request; (f) making a declaration; (g) lodging or issuing a certificate; (h) making, varying, or canceling an election; (i) lodging an objection; (j) giving a statement of reasons."

39. Electronic Transactions (Victoria) Act 2000, §§ 8(1), 8(2). Section 8(3) of the ETVA states that section 8 does not impact any other Victorian law that requires or permits the information to be provided on a particular kind of data storage device or by means of a particular kind of electronic communication.

40. Nicholas & Rigotti, *supra* note 24, at 48–49.

41. See, e.g., Expert Report, *supra* note 8, § 2.7.32 (citing *Torrac Inv. Pty Ltd. v. Australian Nat'l Airline Comm'n*, ANZ Conv. R. 82, 85 (1985)). The court, in *Torrac*, accepted that a printed name on a telex was sufficient.

42. Electronic Transactions (Victoria) Act 2000, § 9(2) (stating that section 9 does not affect the operation of any other law in relation to electronic signatures or the like).

43. Model Law, *supra* note 8, § 7.

Section 9<sup>43</sup> only operates where a signature is “required.”<sup>44</sup> Traditionally a signature has been used in contract law to evidence the intention of the parties. Despite this, there is no specific signature requirement under contract law.<sup>45</sup> As such, section 9 will have a very limited application.<sup>46</sup> Why such a restrictive approach was adopted in the drafting of this provision remains unclear.

It is recommended that, at a minimum, the potential application of section 9 of the ETVA be amended so as to capture all contractual situations under common law.

#### a. Electronic Signature Technology

The ETVA adopts a broad approach that not only covers digital signatures, but all “electronic signatures” by focusing on the functionality of the signature.<sup>47</sup> The EM makes it clear that the provisions have been drafted in “technology neutral” terms<sup>48</sup> so as to ensure the Act does not need to be revised to take into account technological advancements.<sup>49</sup> It has also been suggested that such an approach would promote the development of new technologies in this area<sup>50</sup> whereas the identification of a particular technology would discourage future development of electronic signature technologies.<sup>51</sup>

Despite the above concerns, several countries have enacted specific “digital signature” legislation.<sup>52</sup> The American Bar Association developed a set of Digital Signature Guidelines (ABA Guidelines) in 1995, which were relied upon by the U.S. State of Utah to enact the Utah Digital Signature Act (Utah Act) in May 1995.<sup>53</sup> Several other U.S. states and other countries have since modeled their laws on the ABA Guidelines and the Utah Act.<sup>54</sup> For example, the German Digital Signature Law (passed in 1997),<sup>55</sup> the Malaysian Digital Signature Act (passed in 1997), the Singaporean Electronic Transactions Bill (passed in 1998), the Hong Kong Electronic Transactions Ordinance (passed in 2000),<sup>56</sup> and the United Kingdom Electronic Transactions Act of 2000 all support the use of an asymmetric cryptosystem<sup>57</sup> technology.

44. It is unclear why the word “permitted”, as used in Sections 8 and 10 of the ETVA, was not used in section 9.

45. Nicholas & Rigotti, *supra* note 24, at 48. See Dickson, *supra* note 18, at 3–4.

46. *Id.*

47. See Model Law, *supra* note 8, ¶¶ 53–61 (providing a further discussion on the functional approach). The Australian position is also consistent with the European Union Directive on Digital Signatures. Richard Wu, *Electronic Transactions Ordinance—Building a Legal Framework for E-commerce in Hong Kong*, 1 THE J. OF INFO., L. AND TECH. 66, 68, n.10 (2000).

48. Explanatory Memorandum, *supra* note 28, at 1.

49. *Id.* at 13.

50. Parliamentary Debates, *supra* note 2, at 1043 (statement of G. W. Jennings (Melbourne)).

51. *Legal Framework*, *supra* note 4, at 3.

52. *Id.*

53. Expert Report, *supra* note 8, § 3.2.6.

54. *Id.*

55. See *id.* §§ 3.2.20–3.2.27 (discussing the German Law).

56. Wu, *supra* note 47, at 67.

57. An ‘asymmetric cryptosystem’ involves an information system that uses a ‘key pair’ to encrypt and decrypt a message. A ‘key pair’ is a private key with a mathematically related public key, where the public key can verify a digital signature the private key generates. The system requires the establishment of a Public Key Infrastructure (PKI) and registration system for the entities issuing keys (known as Certification Authorities (CAs) or Recognized Certification Authorities (RCAs)). See Wu, *supra* note 47, at 69–70; see also Expert Report, *supra* note 8, § 3 (providing a detailed description of this system).

These countries have adopted this approach because this type of digital signature technology is considered the only mature technology that provides a level of security that would ensure user authenticity, data integrity, confidentiality, and protection against the repudiation<sup>58</sup> of transactions.<sup>59</sup> Perhaps the approach of these countries, including a mandatory<sup>60</sup> registration system on all Certification Authorities and Recognised Certification Authorities together with the utilization of our Public Key Infrastructure (PKI),<sup>61</sup> known as the 'Gatekeeper',<sup>62</sup> should be supported in Australia. In order to address the need to promote technological advances and the potential obsolescence of technologies, it is recommended that, as in the UK,<sup>63</sup> the definition be linked to minimum acceptable standards, such as those in the ETVA Regulations. The ETVA adopts this approach with the definition of a data storage device, so as to enable easy amendment.

The Expert Group suggests that, given the pace of technological advancement, the market should determine the acceptable levels of security and reliability for electronic signatures.<sup>64</sup> However, this suggestion assumes that all businesses and consumers possess the requisite resources to be able to determine acceptable levels. Also suggested is that the Government determines what is appropriate, as the Government is more likely to have the resources to be able to continually monitor the progress of technology.

#### b. Reliability

Section 9(b) of the ETVA requires that the method used must be "reliable." The difficulty this causes is that technological advancements may make a certain signature technology obsolete, thereby placing an onus on the signatory to keep up to date with those technological advancements. The difficulties caused by this requirement are to some extent alleviated by the fact that the signature method used must be appropriate only at the time it was used.<sup>65</sup>

The EM suggests that the appropriateness of a signature method will depend on a number of legal and technical factors, including:<sup>66</sup>

- the function of signature requirements in the relevant statutory environment;
- the type of transaction;

58. Electronic Transactions (Victoria) Act 2000, § 14(1) (providing that the originator of the electronic communication is bound by that communication only "if the communication was sent by the purported originator or with the authority of the purported originator.").

59. Wu, *supra* note 47, at 69.

60. Not all Asian countries have a mandatory registration system. See Wu, *supra* note 47, at 70.

61. A person applies and pays for the issue of a 'key pair' by a CA or RCA. Broadly, in a PKI system, the CA will issue the applicant a certificate confirming his identity and place a copy of this on the PKI so it can be viewed by anyone to whom the subscriber may send a digitally signed message. This enables independent identification of the parties. See Wu, *supra* note 47, at 72-73; Simon Grant & Steve Mathews, *Trust Me: Public Key Infrastructure*, E. L. PRAC. 48, 48-51 (2002); Lambrick, *supra* note 1, at 50-53 (providing a further description). Expert Report, *supra* note 8, § 3.3.8 (recommending the establishment of a Public Key Authentication Framework in Australia).

62. See Kate Boyle, *An Introduction to Gatekeeper: the Government's public key infrastructure*, 11 J. OF L. AND INFO. SCI. 38-54 (2001); see also Gatekeeper Web site, available at <http://www.gatekeeper.gov.au>.

63. The UK Act stipulates encryption will be sufficient, but not necessary. See Steve Keall, *E-Transactions Bill*, NEW ZEALAND L.J. 451, 452 (2000); see also Catherine Dickson, *Overcoming the Legal Barriers to E-Business*, 19 COMM. L. BULL. 11 (2000).

64. Expert Report, *supra* note 8, § 2.

65. Explanatory Memorandum, *supra* note 28, at 12.

66. *Id.*



- the capability and sophistication of the relevant communication systems;
- the value and importance of the information in the electronic communication; and
- the level of security required for the transaction.

Applying an extremely broad interpretation to the above leads to the conclusion that no form of electronic signature technology is sufficiently reliable.<sup>67</sup> By not endorsing a particular technology, as has been the preferred option in other countries mentioned above, the ETVA creates greater uncertainty. Parties may encounter difficulties in trying to assess, on a transaction-by-transaction basis, the appropriate technology that should be used. More importantly, by failing to endorse a particular technology, consumer protection is compromised. For example, the ETVA does not provide or endorse the use of any mechanism to verify the identity of the parties contracting in cyberspace.<sup>68</sup>

## B. PRODUCTION OF AN ORIGINAL DOCUMENT

In Australia, an original document is generally required for one of the following reasons:<sup>69</sup>

- to provide the best available evidence of a document;<sup>70</sup>
- to evidence a right or title, such as with negotiable instruments where originality is required because of the uniqueness of the document;<sup>71</sup> or
- to provide the earliest record in time of the document.

Although there are certain legislative provisions that treat copies as originals and accept electronic equivalents of certain unique documents, no law prior to the enactment of the ETA held that an electronic record could satisfy the requirements for an original document.<sup>72</sup>

Section 10 of the ETVA,<sup>73</sup> which is intended to cover requirements for original documents,<sup>74</sup> provides that where a person is required or permitted to produce a document that is in the form of paper, an article or other material, that requirement is satisfied if the person produces an electronic form of the document, where:

- (a) having regard to all the relevant circumstances at the time the communication was sent, the method of generating the electronic form of the document provided a reliable<sup>75</sup>

67. Adrian Lawrence, *Fundamental Issues for Electronic Transactions: the Value of 'Authentication'*, 3 INTERNET L. BULL. 85, 89-90 (2000).

68. Parliamentary Debates, *supra* note 2, at 1041 (statement of P. A. Katsambanis (Monash)).

69. Expert Report, *supra* note 8, § 2.8.21.

70. *Id.* § 2.8.23. Noting that although the Australian courts have held that a fax can be "treated as the original document" in situations where the machine in effect takes "a photocopy of the document, the law has not considered the situation in relation to computer facsimiles that transmit information about the make up of the document rather than an image of it." *Id.*

71. *Id.* § 2.8.28 (noting that given the requirement for the document to be unique, this represents the greatest difficulty in accepting electronic equivalents).

72. *Id.* § 4.1.7.

73. Model Law, *supra* note 8.

74. Explanatory Memorandum, *supra* note 28, at 11.

75. *Id.* at 11 (suggesting the following factors should be considered in determining the reliability of the information's integrity, namely, the methodical recording of the information; assurance that the information was captured without any omissions; and the protection of the information against alteration). The Explanatory

means of assuring the maintenance of the integrity of the information contained in the document;<sup>76</sup> and

- (b) at the time the communication was sent, it was reasonable to expect that the information contained in the electronic form of the document would be readily accessible so as to be useable for subsequent reference;<sup>77</sup> and
- (c) the person to whom the document is required to be produced consents to the production, by means of an electronic communication, of an electronic form of the document.<sup>78</sup>

Section 10(3) of the ETVA states that "the integrity of information contained in a document is maintained if, and only if, the information has remained complete and unaltered, apart from: (a) the addition of any endorsement;<sup>79</sup> or (b) any immaterial change which arises in the normal course of communication, storage or display."<sup>80</sup>

Again, by adopting a technology neutral approach, the ETVA creates uncertainty as to the bounds of acceptable technology that may be used.

### C. RETENTION OF INFORMATION AND DOCUMENTS

In Australia, requirements to retain records are generally imposed by statute rather than by the common law<sup>81</sup> and are aimed at ensuring that records can "be produced upon demand . . . to demonstrate compliance with statutory requirements or to justify claims for certain entitlements."<sup>82</sup> "Although a number of laws have attempted to deal with the issue of retention of electronic records,"<sup>83</sup> and "the admissibility and evidential weight of electronic [records], these provisions . . . are not uniform."<sup>84</sup>

Section 11 of the ETVA<sup>85</sup> provides that where a person is required to record information or retain a document or information in writing, that requirement is satisfied where:

- at the time of the recording or retention of the information, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference; and<sup>86</sup>

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Memorandum further suggests that "this test is not intended to require a person to retain the document in its original paper form." *Id.* However, it is obviously going to be easier to assess compliance with the above factors by having recourse to the original paper form.

76. Electronic Transactions (Victoria) Act 2000, §§ 10(1)(a), 10(2)(a).

77. *Id.* §§ 10(1)(b), 10(2)(b).

78. *Id.* §§ 10(1)(c), 10(2)(c). *Id.* § 10(4) (stating that section 10 does not impact any other Victorian law that requires or permits the information to be provided "on a particular kind of data storage device or by means of a particular kind of electronic communication.").

79. The term "endorsement" is intended to have a very narrow meaning. It is not intended to include additions to the information contained in the document itself. See Explanatory Memorandum, *supra* note 28, at 11.

80. Electronic Transactions (Victoria) Act 2000, § 10(3).

81. See David Zimmerman, *Evidence in the Digital Age*, 76 LAW INST. J. 77, 79 (2002) (noting that, at common law, an electronic record constitutes hearsay and will be inadmissible).

82. Expert Report, *supra* note 8, § 2.10.13.

83. *Id.* § 4.5.56.

84. See Zimmerman, *supra* note 81, at 79; see also Dickson, *supra* note 18, at 4; Expert Report, *supra* note 8, §§ 2.9.17, 4.1.10, 4.5.56.

85. Model Law, *supra* note 8, arts. 8, 10.

86. Electronic Transactions (Victoria) Act 2000, §§ 11(1)(a), 11(2)(b), 11(4)(a), 11(4)(d).

- in relation to the retention of information, the method of generating the electronic form of the document or information retention provided a reliable means of assuring the maintenance of the integrity of the information<sup>87</sup> contained in the document;<sup>88</sup> and
- if the regulations require that the information be recorded or retained on a particular kind of data storage device, that requirement has been met.<sup>89</sup>

Regarding the retention of information, a person is also required to retain, in electronic form, such additional information as is sufficient to enable the identification of the following:<sup>90</sup>

- (i) the origin of the electronic communication;
- (ii) the destination of the electronic communication;
- (iii) the time when the electronic communication was sent; and
- (iv) the time when the electronic communication was received.<sup>91</sup>

The ETVA, by attempting to maintain technological neutrality,<sup>92</sup> fails to provide any guidance on what will be required for the communication's integrity to be assured.<sup>93</sup>

#### D. CONSENT

Consent is required in sections 8, 9, and 10 of the ETVA. Consent is defined to include:<sup>94</sup> that which can be reasonably inferred from the conduct of the person concerned, but does not include consent given subject to conditions unless the conditions are complied with.

Difficulties may arise in determining whether the conduct of a person represents "consent." Although it is clear that express consent will not be required, determining whether there has been consent may be difficult. Even the EM appears to be somewhat inconsistent on what exactly this means. On the one hand, the EM suggests that "consent can be inferred from, for example, a history of transactions or previous dealings," suggesting that prior correspondence via electronic communications may infer consent.<sup>95</sup> However, the EM later suggests that "[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."<sup>96</sup>

87. Equivalent provisions to section 10(3) of the ETVA in relation to the maintenance of the integrity of the information (discussed above) also exist in section 11. See *Electronic Transactions (Victoria) Act 2000*, §§ 11(3), 11(5).

88. *Id.* §§ 11(2)(a), 11(4)(b).

89. *Id.* §§ 11(1)(b), 11(2)(c).

90. *Id.* § 11(4)(c).

91. Explanatory Memorandum, *supra* note 28, at 18 (noting this poses a higher degree of responsibility than that which existed in relation to paper documents).

92. Despite the stated objective of "technology neutrality," section 11 of the ETVA reserves the right to specify, via the regulations, the use of certain storage devices. See Explanatory Memorandum, *supra* note 28, at 16.

93. See Zimmerman, *supra* note 81, at 79; see also Parliamentary Debates, *supra* note 2, at 1032 (statement of C. A. Furletti). For a further discussion on the issues in relation to record-keeping, see Steve Stuckey & Anne Liddell, *Electronic Business Transactions and Recordkeeping: Serious Concerns—Realistic Responses*, 28 ARCHIVES AND MANUSCRIPTS 92 (2000).

94. *Electronic Transactions (Victoria) Act 2000*, § 3.

95. Explanatory Memorandum, *supra* note 28, at 2.

96. *Id.*

Later again, the EM states, 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 via electronic means.<sup>97</sup>

Further legislative clarification of the meaning of this important term is required.

#### E. READILY ACCESSIBLE

Sections 8, 10, and 11 of the ETVA require that, at the time the information was given, it was reasonable<sup>98</sup> to expect that the information would be readily accessible so as to be useful for subsequent reference. This requirement merely entails that the information "be readable and capable of being interpreted" by both humans and machines.<sup>99</sup> It does not deal with the critical aspect of the authenticity of the electronic communication.<sup>100</sup>

#### F. ELECTRONIC COMMUNICATIONS

The ETVA applies to "electronic communications." This term is broadly defined to include, "a communication in the form of sound . . . where the sound is processed at its destination by an automated voice recognition system."<sup>101</sup> The EM suggests that this is intended to "capture information provided by voice in a way that enables it to be recorded in written form."<sup>102</sup> This may result in speech, appropriately converted to writing by an automated voice recognition system, satisfying, for example, the legal requirement of writing.

It is suggested that this unusually expansive definition may have unintended consequences. Perhaps this is why the Model Law uses the narrower term "data message"<sup>103</sup> as opposed to "electronic communication."

#### G. TIME AND PLACE OF DISPATCH AND RECEIPT OF ELECTRONIC COMMUNICATIONS

Prior to the enactment of the ETA, Australia had no legal rules that specifically addressed the electronic transaction issues dealing with attribution (i.e., ensuring the addressee can assume the message has been sent by the originator),<sup>104</sup> message integrity (i.e., ensuring the data received is the same as that sent),<sup>105</sup> and the time and place of dispatch and receipt.<sup>106</sup>

Section 13 of the ETVA<sup>107</sup> provides that where an electronic communication enters a single information system outside the control of the originator, then, unless otherwise

97. *Id.*

98. It is intended that "reasonableness" be assessed on an objective basis having regard to all the 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. *See id.*

99. *Id.*

100. *Id.*

101. Electronic Transactions (Victoria) Act 2000, § 3.

102. Explanatory Memorandum, *supra* note 28, at 4.

103. Model Law, *supra* note 8, art. 2 (defining a "data message" to mean "information generated, sent, received, or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.").

104. Expert Report, *supra* note 8, §§ 2.3.16–20, 4.5.63–79.

105. *Id.* §§ 2.14.10, 4.5.63–79.

106. *Id.* § 2.15.13. It is recognized that *Entores Ltd.* established that the postal rule will not apply to instantaneous communications and instead the contract will only be complete when the acceptance has been received by the offeror. *Entores Ltd v. Miles Far East Corp.*, 2 QB 327 (1955). *See* Simone Hill, *Flogging a Dead Horse—The Postal Acceptance Rule and Email*, 17 J. OF CONT. L. 151 (2001) (discussing further the postal rule).

107. Model Law, *supra* note 8, art. 15.

agreed between the originator and the addressee, the dispatch of the electronic communication occurs when it enters that information system.<sup>108</sup> Alternatively, if an electronic communication enters two or more information systems successively, the dispatch of the electronic communication is deemed to occur when it enters the first of those information systems.<sup>109</sup>

In terms of receipt, section 13 of the ETVA provides that where the addressee:

- has designated an information system for the purpose of receiving electronic communications, then, unless otherwise agreed between the originator and the addressee of the electronic communication, the *time* of receipt of the electronic communication is the time when the electronic communication enters<sup>110</sup> that information system;<sup>111</sup>
- has not designated an information system, then, unless otherwise agreed between the originator and the addressee of the electronic communication, the time of receipt of the electronic communication is the *time* when the electronic communication comes to the attention of the addressee.<sup>112</sup>

These rules appear to assume that 'receipt' means the same thing as 'acceptance' for the purposes of contract law.<sup>113</sup> Obviously this is not the case. Similarly, it is unclear whether the phrase "comes to the attention of the addressee" refers to the receipt of the communication by the system or coming to the attention of the recipient.<sup>114</sup>

### 1. *Time*

Given the global nature of e-commerce transactions, the "time" of dispatch or receipt may be difficult to determine as the provisions do not require that the time be expressed in Greenwich Mean Time.

### 2. *Place of Receipt*

Regarding the place of receipt, section 13 provides the electronic communication is:<sup>115</sup>

- (a) deemed to have been dispatched from the originator's place of business; and
- (b) deemed to have been received at the addressee's place of business.

Where the originator or addressee have more than one place of business, the place of business is deemed to be the place that has a "closer relationship" to the underlying transaction,<sup>116</sup> or if this does not apply, the originator's or addressee's "principal place of busi-

108. Electronic Transactions (Victoria) Act 2000, § 13(1).

109. *Id.* § 13(2).

110. "Entry" into the information system requires more than merely reaching the addressee's system without entering it. See Explanatory Memorandum, *supra* note 28, at 20.

111. Electronic Transactions (Victoria) Act 2000, § 13(3).

112. Electronic Transactions (Victoria) Act 2000, § 13(4). Explanatory Memorandum, *supra* note 28, at 20 (stating that 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.").

113. Hill, *supra* note 25, at 8.

114. Dickson, *supra* note 18, at 3. See also Duncan Giles, *You've Got Mail: Or have You?* 3 INHOUSE COUNSEL 37 (2000).

115. Electronic Transactions (Victoria) Act 2000, § 13(5).

116. *Id.* § 13(6)(a). The term "underlying transaction" is intended to include contemplated transactions. See Explanatory Memorandum, *supra* note 28, at 21.

ness."<sup>117</sup> Where the originator or addressee does not have a place of business, the place of business is deemed to be where the originator or addressee "ordinarily resides."<sup>118</sup>

Traditionally, the place and time of contract formation occurred simultaneously.<sup>119</sup> The deeming provisions make it possible for the timing of a transaction to occur in one jurisdiction with the place of receipt being in another.<sup>120</sup> The impact, if any, this will have on contract law is unclear.

The default rules more correctly reflect the underlying nature of the transaction. Without these rules, the contract would be formed at the location of the information system.<sup>121</sup> The location of the information system may have no relevance to the transaction and could be easily manipulated. Therefore, in this respect, the rules provide greater certainty and the legislature should be commended on implementing such rules.

#### H. EXEMPTIONS FROM THE ETVA

Section 12 of the ETVA provides that the regulations<sup>122</sup> may exempt from the operation of the ETVA provisions certain specified class of requirements,<sup>123</sup> permissions,<sup>124</sup> or laws.<sup>125</sup> The Electronic Transactions (Victoria) Regulations 2000 exempt from the operation of the ETVA:

- any transaction whereby a will, a codicil, or any other testamentary instrument is created, executed, or revoked,<sup>126</sup> and
- any transaction (being the delivery of information or a document) required to be effected only by personal service.<sup>127</sup>

It is unclear whether the exemption for testamentary instruments applies only to those testamentary documents that must be in writing or to all testamentary documents.<sup>128</sup>

### III. Conclusion

The legal challenges posed by e-commerce need to be addressed globally.<sup>129</sup> To attempt to deal with the issues locally obviously has its limitations.<sup>130</sup> By enacting the ETA and ETVA, which conforms to the Model Law, Australia has taken a step, albeit a small one, in the right direction. However, the time has come for Australia, in line with other overseas countries, to address the deficiencies in the existing legislation and undertake the complex contract formation issues in an e-commerce environment so as to provide greater legal certainty in this area.

117. Electronic Transactions (Victoria) Act 2000, § 13(6)(b).

118. *Id.* § 13(6)(c).

119. Hill, *supra* note 25, at 9–10.

120. *Id.*

121. Explanatory Memorandum, *supra* note 28, at 21.

122. Electronic Transactions (Victoria) Act 2000, § 15 (providing the Governor in Council the power to make relevant regulations).

123. *Id.* § 12(1).

124. *Id.* § 12(2).

125. *Id.* § 12(3).

126. Electronic Transactions (Victoria) Act 2000, § 5.

127. *Id.* § 6. See Parliamentary Debates, *supra* note 2, at 1035 (statement of Jenny Mikakos) (hoping that the exemption in relation to court documents will only be temporary).

128. See Parliamentary Debates, *supra* note 2, at 1040 (statement of P. A. Katsambanis (Monash)).

129. Electronic Transactions (Victoria) Act 2000, § 4.5.92. See also Dickson, *supra* note 63.

130. Wu, *supra* note 47, at 66, 74.

