

New Certainty For Electronic Transactions

Business conducted from your PC needs to be just as legally binding as business conducted by paper. The wording of a clause in a contract you have just approved should not be alterable; the signature of the party on the other side, electronically applied, must bind that party and stand up in court. In other words, you want certainty.

Without certainty in business transactions, the growth of e-commerce will be hampered. The need for certainty is recognised in the Federal Electronic Transactions Bill 1999. The Bill has recently had its first reading in the House of Representatives.

Paper v Computer Technology

The Bill provides that paper and electronic transactions be treated equally. This principle is known as "*media neutrality*" and is one of two fundamental principles forming the basis of the Bill.

Which Software?

While the Bill specifies the minimum requirements to be met when conducting business electronically, it does not specify any technical matters. It is deliberately non-specific as to the kinds of software and systems used. This "*technological neutrality*" forms the second fundamental principle of the Bill.

Document retention

The Bill does not change legal requirements in relation to retaining documents. However, if a document is required by law to be retained then the Bill provides that this can be done electronically provided the following two conditions are met:

- the information is readily accessible (i.e. the software will permit the information to be read at a later date);
- the information's integrity is preserved (i.e. you must be able to show that the information is complete and unamended).

The information can be compressed, encrypted, converted or have necessary indexing or routing data added, provided that the original information can be verifiably reproduced.

Electronic Signatures

Section 10 of the Bill provides that the legal requirements relating to signatures will be met as long as the method used:

- identifies the person;
- indicates the person's approval of the information;
- is as reliable as appropriate in the circumstances.

This last criteria is intended to take into consideration the rapid changes in electronic signature technology.

It covers the situation where a particular signature technology used, appropriate at the time, has become superseded and would no longer be appropriate. Provided that the method used was suitable at the time it was used the signature will be valid.

One disadvantage of not prescribing the technology method is that users must assess the suitability of authentication technologies. The Government was initially considering the prescription of the Public Key Authentication Framework ("PKAF") technology and may adopt that technology for its own authentication processes. However, the Bill now adopts a more flexible and market oriented approach.

Sending and Receiving

Equally as important as the validity of a signature are the rules governing the time of sending and receiving communications. This is dealt with in Section 14 of the Bill which provides:

- an electronic communication is dispatched as soon as it reaches an information system outside the control of the sender;
- an electronic communication is deemed received as soon as it enters the designated information system of the recipient; or
- if no system has been designated, as soon as the communication comes to the attention of the recipient.

The draft recognises that a communication may travel through several intermediate systems before entering the recipient's system. The Bill also includes provisions in relation to where a communication is dispatched and received. This may be critical in terms of where the contract is concluded.

The Future

The Commonwealth Government's intention is to create uniform national legislation creating certainty for e-commerce transactions.

All State and Territory governments have expressed "*in principle*" support for the Commonwealth legislative proposal. The Commonwealth Government anticipates that State and Territory legislation will mirror the Bill. However, while the Commonwealth legislation is intended to form part of a national scheme, it will operate independently in relation to Commonwealth laws. The Commonwealth anticipates the implementation of the Bill will occur in two stages:

- in the period between the proclamation of the Bill and 1 July 2001, it will only apply to Commonwealth laws specified in the regulations;
- after 1 July 2001, it will apply to all Commonwealth laws unless they have been specifically excluded.

There is an immediate need for clarity and certainty in e-commerce. In the future, an increasing number of business transactions and dealings with Government departments will be conducted electronically. The Bill provides an important step in providing an appropriate legal framework for those transactions.

- Anderson Legal's Intellectual Property & Technology Services Newsletter.