



New South Wales

Electronic Transactions Amendment Bill 2010

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Electronic Transactions Act 2000* to enact the model provisions developed and agreed to by the Standing Committee of Attorneys-General on 7 May 2010. The proposed amendments update the law on electronic transactions to reflect internationally recognised standards in accordance with the United Nations Convention on the Use of Electronic Communications in International Contracts.

The Bill also makes consequential amendments to related legislation.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Electronic Transactions Act 2000 No 8

Contracts involving electronic communications

Schedule 1 [18] inserts additional provisions (proposed Part 2A, sections 14A–14E) into the *Electronic Transactions Act 2000* (the *principal Act*) that apply to contracts involving electronic communications.

Proposed section 14A provides that the provisions apply to contracts involving electronic communications where the proper law of the contract is the law of New South Wales, whether or not some or all of the parties are located in Australia or elsewhere and whether the contracts are for business, personal or other purposes.

Proposed section 14B provides that a proposal to form a contract made through an electronic communication that is not addressed to a specific party and is generally accessible to parties making use of information systems is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

Proposed section 14C provides that a contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, is not invalid, void or unenforceable merely because automated message systems were used. **Schedule 1 [2]** inserts a definition of *automated message system*.

Proposed section 14D enables a natural person who makes an input error in an electronic communication exchanged with the automated message system of another party to withdraw the portion of the electronic communication in which the input error was made if the person notifies the other party of the error as soon as possible and if the person has not received any material benefit or value from any goods or services received from the other party.

Proposed section 14E deals with the application of the principal Act to certain contracts.

Schedule 1 [1] inserts a summary of these new provisions into the simplified outline of the principal Act.

Schedule 1 [17] is a consequential amendment that transfers provisions relating to courts and electronic case management systems to a new Schedule 1 so that the new provisions for contracts involving electronic communications can be numbered consistently with the equivalent legislation of the Commonwealth and other States and Territories.

Time and place of dispatch and receipt of electronic communications

Schedule 1 [15] amends the provisions relating to the time and place of dispatch and receipt of electronic communications and provides the following default rules:

- (a) the time of dispatch of an electronic communication is the time when the electronic communication leaves an information system,

- (b) the time of receipt of an electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee,
- (c) an electronic communication is taken to have been dispatched at the place where the originator has its place of business,
- (d) an electronic communication is taken to have been received at the place where the addressee has its place of business.

Schedule 1 [3] updates the definition of *place of business* for the purposes of these provisions to include a place where a person maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location. Under the amendments, a party's place of business is assumed to be the location indicated by the party, unless another party demonstrates that the party making the indication does not have a place of business at that location. If a party has not indicated a place of business and has multiple places of business, the place of business is that which has the closest relationship to the underlying transaction. A location is not a place of business merely because that is where the equipment and technology supporting an information system used by a party are located.

Schedule 1 [2] inserts definitions of *addressee* and *originator* for the purposes of these provisions.

Other amendments

Currently, the requirement for a signature of a person is met in an electronic communication if a method is used to identify the person and to indicate the person's approval of the information communicated. **Schedule 1 [7] and [9]** provide that rather than indicating the person's approval of the information, it is sufficient that the signature in the electronic communication indicates the person's intention in respect of the information communicated. **Schedule 1 [10]** is a related amendment.

Schedule 1 [8] makes it clear that whether or not a signature in an electronic communication is reliable should be decided in light of all the circumstances, including any relevant agreement, to prevent a party to a transaction from repudiating its signature in bad faith.

Schedule 1 [3] extends the definition of *transaction* to include any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract, agreement or other arrangement.

Schedule 1 [4] extends the regulation-making powers in the principal Act so that regulations may be made to exempt certain transactions, electronic communications and other matters from all or specified provisions of the principal Act and to provide that all or specified provisions of the principal Act do not apply to specified laws of

New South Wales. **Schedule 1 [5], [14] and [16]** omit regulation-making powers that are now included in this new provision. **Schedule 1 [6] and [11]–[13]** are consequential amendments.

Schedule 1 [19] contains transitional provisions.

Schedule 2 Consequential amendments to other legislation

Schedule 2.1 and 2.2 update cross-references to the principal Act in the *Electronic Transactions Regulation 2007* and the *Electronic Transactions (ECM Courts) Order 2005* as a consequence of Schedule 1 [17], which transfers existing Part 2A to new Schedule 1.

First print



New South Wales

Electronic Transactions Amendment Bill 2010

Contents

	Page
1 Name of Act	2
2 Commencement	2
Schedule 1 Amendment of Electronic Transactions Act 2000 No 8	3
Schedule 2 Consequential amendments to other legislation	12



New South Wales

Electronic Transactions Amendment Bill 2010

No. , 2010

A Bill for

An Act to amend the *Electronic Transactions Act 2000* and related legislation to make further provision in respect of electronic transactions.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Electronic Transactions Amendment Act 2010</i> .	3
2 Commencement	4
This Act commences on a day or days to be appointed by proclamation.	5

Schedule 1	Amendment of Electronic Transactions Act 2000 No 8	1
		2
[1] Section 4 Simplified outline		3
Insert at the end of section 4:		4
(2)	This Act also contains provisions applying to contracts involving electronic communications, including provisions (relating to the internet in particular) for the following:	5
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	(a) an unaddressed proposal to form a contract is to be regarded as an invitation to make offers, rather than as an offer that if accepted would result in a contract,	8
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	(b) a contract formed automatically is not invalid, void or unenforceable because there was no human review or intervention,	11
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	(c) a portion of an electronic communication containing an input error can be withdrawn in certain circumstances,	14
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	(d) the application of certain provisions of Part 2 to the extent they do not apply of their own force.	16
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[2] Section 5 Interpretation		18
Insert in alphabetical order in section 5 (1):		19
	<i>addressee</i> of an electronic communication means a person who is intended by the originator to receive the electronic communication, but does not include a person acting as an intermediary with respect to the electronic communication.	20
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	<i>automated message system</i> means a computer program or an electronic or other automated means used to initiate an action or respond to data messages in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system.	24
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	<i>originator</i> of an electronic communication means a person by whom, or on whose behalf, the electronic communication has been sent or generated before storage, if any, but does not include a person acting as an intermediary with respect to the electronic communication.	29
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	<i>performance</i> of a contract includes non-performance of the contract.	34
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[3] Section 5 (1)	1
Omit the definitions of <i>place of business</i> and <i>transaction</i> .	2
Insert instead in alphabetical order:	3
<i>place of business</i> means:	4
(a) in relation to a person, other than an entity referred to in paragraph (b)—a place where the person maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location, or	5 6 7 8 9
(b) in relation to a government, an authority of a government or a non-profit body—a place where any operations or activities are carried out by that government, authority or body.	10 11 12 13
<i>transaction</i> includes:	14
(a) any transaction in the nature of a contract, agreement or other arrangement, and	15 16
(b) any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract, agreement or other arrangement, and	17 18 19 20 21
(c) any transaction of a non-commercial nature.	22
[4] Section 6A	23
Insert after section 6:	24
6A Exemptions	25
(1) The regulations may provide that all or specified provisions of this Act do not apply:	26 27
(a) to transactions, requirements, permissions, electronic communications or other matters specified, or of classes specified, in the regulations for the purposes of this section, or	28 29 30 31
(b) in circumstances specified, or of classes specified, in the regulations for the purposes of this section.	32 33
(2) The regulations may provide that all or specified provisions of this Act do not apply to specified laws of this jurisdiction.	34 35
[5] Section 7 Validity of electronic transactions	36
Omit section 7 (3) and (4).	37

[6] Section 8 Writing	1
Omit the note at the end of the section.	2
[7] Section 9 Signatures	3
Omit “approval of” from section 9 (1) (a).	4
Insert instead “intention in respect of”.	5
[8] Section 9 (1) (b)	6
Omit the paragraph. Insert instead:	7
(b) the method used was either:	8
(i) as reliable as appropriate for the purpose for which	9
the electronic communication was generated or	10
communicated, in the light of all the circumstances,	11
including any relevant agreement, or	12
(ii) proven in fact to have fulfilled the functions	13
described in paragraph (a), by itself or together with	14
further evidence, and	15
[9] Section 9 (2) (c)	16
Omit “approval of”. Insert instead “intention in respect of”.	17
[10] Section 9 (3)	18
Insert after section 9 (2):	19
(3) The reference in subsection (1) to a law that requires a signature	20
includes a reference to a law that provides consequences for the	21
absence of a signature.	22
[11] Section 9, note	23
Omit the note at the end of the section.	24
[12] Section 10 Production of document	25
Omit the note at the end of the section.	26
[13] Section 11 Retention of information and documents	27
Omit the note at the end of the section.	28
[14] Section 12 Exemptions from this Division	29
Omit the section.	30

[15] Sections 13–13B	1
Omit section 13. Insert instead:	2
13 Time of dispatch	3
(1) For the purposes of a law of this jurisdiction, unless otherwise agreed between the originator and the addressee of an electronic communication, the time of dispatch of the electronic communication is:	4
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(a) the time when the electronic communication leaves an information system under the control of the originator or of the party who sent it on behalf of the originator, or	8
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(b) if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator—the time when the electronic communication is received by the addressee.	11
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Note. Paragraph (b) would apply to a case where the parties exchange electronic communications through the same information system.	15
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(2) Subsection (1) applies even though the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is taken to have been dispatched under section 13B.	17
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13A Time of receipt	22
(1) For the purposes of a law of this jurisdiction, unless otherwise agreed between the originator and the addressee of an electronic communication:	23
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(a) the time of receipt of the electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee, or	26
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(b) the time of receipt of the electronic communication at another electronic address of the addressee is the time when both:	30
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	32
(i) the electronic communication has become capable of being retrieved by the addressee at that address, and	33
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(ii) the addressee has become aware that the electronic communication has been sent to that address.	36
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(2) For the purposes of subsection (1), unless otherwise agreed between the originator and the addressee of the electronic communication, it is to be assumed that the electronic	38
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communication is capable of being retrieved by the addressee when it reaches the addressee's electronic address.	1 2
(3) Subsection (1) applies even though the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is taken to have been received under section 13B.	3 4 5 6
13B Place of dispatch and place of receipt	7
(1) For the purposes of a law of this jurisdiction, unless otherwise agreed between the originator and the addressee of an electronic communication:	8 9 10
(a) the electronic communication is taken to have been dispatched at the place where the originator has its place of business, and	11 12 13
(b) the electronic communication is taken to have been received at the place where the addressee has its place of business.	14 15 16
(2) For the purposes of the application of subsection (1) to an electronic communication:	17 18
(a) a party's place of business is assumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location, and	19 20 21 22
(b) if a party has not indicated a place of business and has only one place of business, it is to be assumed that that place is the party's place of business, and	23 24 25
(c) if a party has not indicated a place of business and has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the transaction, and	26 27 28 29 30 31
(d) if a party has not indicated a place of business and has more than one place of business, but paragraph (c) does not apply—it is to be assumed that the party's principal place of business is the party's only place of business, and	32 33 34 35
(e) if a party is a natural person and does not have a place of business—it is to be assumed that the party's place of business is the place of the party's habitual residence.	36 37 38

(3)	A location is not a place of business merely because that is:	1
(a)	where equipment and technology supporting an information system used by a party are located, or	2
(b)	where the information system may be accessed by other parties.	3
(4)	The sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country.	4
[16]	Section 14 Attribution of electronic communications	5
	Omit section 14 (3) and (4).	6
[17]	Part 2A	7
	Transfer Part 2A to the end of Part 3 and rename it as Schedule 1 with the heading “Courts—electronic case management systems”. Renumber sections 14A–14R as consecutive clauses starting from clause 1, amend any cross-references in the Schedule accordingly and amend any references to “Part”, “section” or “subsection” in that Schedule consequentially.	8
[18]	Part 2A	9
	Insert after Part 2:	10
	Part 2A Additional provisions applying to contracts involving electronic communications	11
	14A Application and operation of this Part	12
	This Part applies to the use of electronic communications in connection with the formation or performance of a contract between parties where the proper law of the contract is (or would on its formation be) the law of this jurisdiction, and so applies:	13
	(a) whether some or all of the parties are located within Australia or elsewhere, and	14
	(b) whether the contract is for business purposes, for personal, family or household purposes, or for other purposes.	15
	14B Invitation to treat regarding contracts	16
	(1) A proposal to form a contract made through one or more electronic communications that:	17
	(a) is not addressed to one or more specific parties, and	18

(b) is generally accessible to parties making use of information systems,	1 2
is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.	3 4 5
(2) Subsection (1) extends to proposals that make use of interactive applications for the placement of orders through information systems.	6 7 8
14C Use of automated message systems for contract formation— non-intervention of natural person	9 10
A contract formed by:	11
(a) the interaction of an automated message system and a natural person, or	12 13
(b) the interaction of automated message systems,	14
is not invalid, void or unenforceable on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract.	15 16 17 18
14D Error in electronic communications regarding contracts	19
(1) This section applies in relation to a statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract.	20 21 22 23 24
(2) If:	25
(a) a natural person makes an input error in an electronic communication exchanged with the automated message system of another party, and	26 27 28
(b) the automated message system does not provide the person with an opportunity to correct the error,	29 30
the person, or the party on whose behalf the person was acting, has the right to withdraw the portion of the electronic communication in which the input error was made if:	31 32 33
(c) the person, or the party on whose behalf the person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication, and	34 35 36 37 38

(d)	the person, or the party on whose behalf the person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.	1 2 3 4
(3)	The right of withdrawal of a portion of an electronic communication under this section is not of itself a right to rescind or otherwise terminate a contract.	5 6 7
(4)	The consequences (if any) of the exercise of the right of withdrawal of a portion of an electronic communication under this section are to be determined in accordance with any applicable rule of law.	8 9 10 11
	Note. In some circumstances the withdrawal of a portion of an electronic communication may invalidate the entire communication or render it ineffective for the purposes of contract formation (see paragraph 241 of the UNCITRAL explanatory note for the United Nations Convention on the Use of Electronic Communications in International Contracts).	12 13 14 15 16
14E	Application of Act in relation to contracts	17
(1)	Subject to subsection (2), the provisions of sections 7 and 13–13B apply to:	18 19
(a)	a transaction constituted by or relating to a contract, or	20
(b)	an electronic communication relating to the formation or performance of a contract,	21 22
	in the same way as they apply to a transaction or electronic communication referred to in those sections, and so apply as if the words “For the purposes of a law of this jurisdiction” were omitted.	23 24 25 26
(2)	However, this Part (including subsection (1)) does not apply to or in relation to a contract to the extent that:	27 28
(a)	Part 2 would of its own force have the same effect as this Part if this Part applied, or	29 30
(b)	a law of another State or Territory (that is in substantially the same terms as Part 2) would of its own force have the same effect as this Part if this Part applied.	31 32 33
	Note. This section applies provisions of Part 2 to contracts or proposed contracts to the extent (if any) that those provisions do not apply merely because they are expressed to apply in relation to a law of this jurisdiction. This section also disapplies the provisions of Part 2A to the extent that Part 2 would apply of its own force. An example where Part 2 may not apply of its own force is where a contract is being negotiated in a State or Territory from a supplier located overseas.	34 35 36 37 38 39 40

[19] Section 16	1
Insert after section 15:	2
16 Transitional provisions—Electronic Transactions Amendment Act 2010	3
	4
(1) Regulations made under this Act before the commencement of section 6A and in force immediately before that commencement have effect as if that section had been in force when they were made.	5
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(2) Subject to subsection (3):	9
(a) section 14B extends to proposals made before the commencement date, and	10
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(b) section 14C extends to actions carried out before the commencement date, and	12
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(c) section 14D extends to statements, declarations, demands, notices or requests, including offers and the acceptance of offers, made or given before the commencement date.	14
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(3) Subsection (2) and Part 2A do not apply in relation to contracts formed before the commencement date.	17
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(4) In subsections (2) and (3), <i>commencement date</i> means the date of commencement of Part 2A, as inserted by the <i>Electronic Transactions Amendment Act 2010</i> .	19
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Schedule 2	Consequential amendments to other legislation	1
		2
2.1	Electronic Transactions Regulation 2007	3
	Clause 8 Definition of “court” for purposes of Schedule 1 to the Act	4
	Omit “Part 2A of” wherever occurring in clause 8 (1) and (2).	5
	Insert instead “Schedule 1 to”.	6
2.2	Electronic Transactions (ECM Courts) Order 2005	7
[1]	Clause 3 Definitions	8
	Omit “section 14B of” wherever occurring in clause 3 (1).	9
	Insert instead “clause 2 of Schedule 1 to”.	10
[2]	Clauses 4–6	11
	Omit “section 14C of” wherever occurring.	12
	Insert instead “clause 3 of Schedule 1 to”.	13