

So now, finally, you can
communicate and transact
with customers electronically!

An insurer's guide to the uniform Electronic Transactions Acts
December 2013



USE OF THIS GUIDE

The information in this Guide is intended as a general overview and discussion of the subjects dealt with and was accurate as at December 2013; however, the law may have changed since that date. This information is not intended to be and should not be used as a substitute for taking legal advice in any specific situation. Neither DLA Piper nor the author is responsible for any actions taken or not taken on the basis of this information.

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EXECUTIVE SUMMARY: HOW TO BEST IMPLEMENT ELECTRONIC TRANSACTIONS

The changes to electronic communication introduced into the Insurance Contracts Act 1984 (“ICA”)¹ by the Insurance Contracts Amendment Act 2013 (“ICAA”) mean that insurers are now² able to take advantage of the provisions of the Electronic Transactions Acts (Commonwealth and State) (“ETAs”) and use electronic communications in the course of all your communications and transactions with customers³.

To ensure you obtain maximum benefit from your electronic communications and transactions under the provisions of the ETAs you should:

1. Decide on the method(s) of electronic communication most appropriate for the type of information you will be communicating and your preferences for sending electronic communications (eg email, linking and/or SMS with or without URL linking).
2. Establish the rules for sending and receiving information by each means of electronic communication to be offered, including the time and place of dispatch and receipt and the attribution/authentication rules, as well as determining the mechanism by which customers can withdraw their consent or change their selected means of electronic communication and include these in your general Terms and Conditions (“T&Cs”) or have separate specific electronic transaction T&Cs.
3. Notify your existing customers about the options to receive information/interact with you electronically and consider how you might “encourage” them to go paperless (ie consent to electronic communications and accept the relevant T&Cs).
4. Build into your processes for new customers the mechanisms for electronic consent to communications and acceptance of the relevant T&Cs.
5. Consider how best to obtain the required consent of and acceptance of your T&Cs by your customers when dealing via brokers and authorised representatives.
6. Consider how best to facilitate and manage on-going electronic communications with your customers when dealing via an authorised representative or, in particular, a broker (eg is electronic communication to a broker on behalf of a customer satisfactory?)
7. Consider your data storage and back-up system capabilities to ensure that you meet both your day-to-day business requirements and the document retention requirements for each means of electronic communication to be offered.

¹ Schedule 2 – Electronic Communication of the Insurance Contracts Amendment Act 2013 (Act 75/2013).

² Once the changes in Schedule 2 commence, see discussion below at page 2, footnote 5.

³ Assuming the regulations under the ETA (the Commonwealth Electronic Transactions Regulations 2000) are changed to remove the current exemption of the Insurance Contracts Act 1984 (Cth) from the operation of the ETAs so that electronic communications under the ICA will be subject to the provision of the ETA.

SECTION I: OVERVIEW – ICA CHANGES AND PURPOSES

Prior to the ICAA (ie the current position until commencement of Schedule 2 of the ICAA) insurers are not permitted to use electronic forms for key communications with customers or obtain the benefit of the *Electronic Transactions Act 1997* (Cth) due to (i) the wording of the ICA (in particular section 77 of the current/pre-amended ICA) and (ii) the specific exclusion of the ICA from the operation of the ETA.⁴

In practice this limited the communication options available to insurers to meet the notice requirements in the ICA to ‘hard copy’ delivery methods. In addition, for notices which were typically contained within disclosure documents required by Chapter 7 of the *Corporations Act 2001* (Cth) (“**Corporations Act**”) (such as Product Disclosure Statements) an inconsistency existed in relation to the available methods of delivery for the same document.⁵

Impact of the electronic communication changes to the Insurance Contracts Act

The electronic communication changes to the ICA are, in essence, a technical adjustment to remove impediments to the use of electronic communication by insurers for statutory notices and documents. Subject only to other existing laws (eg the *Privacy Act* and *SPAM Act*), this change allows insurers to deliver notices, other documents and information to (and to transact with) customers (or their intermediaries) electronically.

The electronic communication changes to the ICA wrought by Schedule 2 of the ICAA (“**Changes**”) commence on 28 December 2013, being the day 6 months after the ICAA received Royal Assent (“**Commencement Date**”).⁶

Among other changes, the Changes delete section 77 of the ICA which limit the means by which a notice or other document under the ICA could be given (and did not provide for electronic communications) and implements a new section 72A which states in a note that:

“A notice or other document may also be given to a person by electronic communication in accordance with the *Electronic Transactions Act 1999* and any regulations made under that Act.”

The Changes apply in relation to a notice or other document or information given to a person under the ICA after the Commencement Date.

The purpose of the ETAs

The Commonwealth *Electronic Transactions Act* (“**ETA**”) was enacted in 1999. The States and Territories have all enacted mirror ETA legislation (collectively referred to as “**ETAs**”).⁷ The differences between the drafting of the Commonwealth and the States/Territories Acts are minor and do no impact on our comments below. The regulations and exclusions, however, do vary from State to State but are not relevant for the purposes of this Guide.

The ETAs govern the operation of communications,

⁴ Regulation 4 and Items 71 and 72 of Schedule 1 of the *Electronic Transactions Regulation 2000* (Cth).

⁵ The *Corporations Act* allows for electronic delivery of certain regulatory documents. See ASIC Regulatory Guide 221.

⁶ Section 2, Item 3 of the ICAA.

⁷ *Electronic Transactions Act 2001* (ACT); *Electronic Transactions Act 2000* (NSW); *Electronic Transactions Act 2000* (Qld); *Electronic Transactions Act 2000* (Vic); *Electronic Transactions Act 2000* (NT); *Electronic Transactions Act 2000* (SA); *Electronic Transactions Act 2000* (Tas); and *Electronic Transactions Act 2003* (WA).

transactions and formation of contracts by electronic means in Australia. The ETAs are based on the 1996 “Model Law of Electronic Commerce” developed by the United Nations Commission on International Trade Law (“**Model Law**”), which aimed to assist countries in framing legislation to facilitate electronic commerce and transactions, not by requiring the creation or implementation of a new framework for electronic transactions but by removing existing legislative impediments to communicating and transacting via electronic means.

Throughout this Guide we generally refer to the ETAs collectively. Where we use the term “ETA” or refer to a specific provision it is, unless otherwise noted, a reference to the Commonwealth Act. For ease of reference, the main relevant legislative provisions of the Commonwealth ETA are reproduced in the Annexure to this Guide.

The ETAs do not create or implement a new or separate electronic transactions regime. The main aim of the ETAs, following the spirit of the Model Law, is to remove the impediments in existing Australian legislation which prevent consumers and businesses from (or do not permit/provide a framework for) using electronic communication in the course of their transactions. This is achieved by providing that any legislative requirement for “writing” can, subject to certain specific exemptions, exclusions and the requirements of the ETAs, be satisfied by an “electronic communication”.

“Transaction” is defined in the ETAs to include “a transaction of a non–commercial nature” and is intended to be read in its broadest sense of interacting with another, whether that be conducting or negotiating business, making or accepting an offer or simply providing information or a notice to the other party.

The ETAs are premised on two guiding principles:

- functional equivalence – an electronic transaction should be treated by the law in the same way as a paper–based transaction; and
- technology neutrality – there should be no differentiation or discrimination between different forms of technology and modes of transmission per se.

The ETAs also include provisions which aim to reduce the uncertainty regarding the legal effect (and timing) of communicating information by electronic means (ie when an electronic communication is sent and received).

The purpose of this Guide

This Guide examines how insurers may best use the provisions of the ETAs and sets out our suggested practical measures to assist you to interact with your customers by electronic means.

This Guide will be relevant, in particular, to those types of communications which are subject to specific legislative requirements (eg under the ICA) relating to:

- provision of information in writing;
- collection of signatures;
- production of documentation; and
- retention of information/documentation.

While there are also certain types of communications which may not be subject to the specific legislative requirements noted above, for simplicity you may choose to adopt a single electronic communications/transactions policy compliant with the ETAs for all of your electronic communications.⁸

In Section 2 the key provisions and principles of the ETAs are examined. It is these principles which support (and are the basis for) our suggested practical steps section out in Section 3 to assist you to start communicating and transacting with customers via electronic means. That is, Section 3 what you should do to take advantage of this change to the ICA and use the ETAs to interact with customers by electronic means.

⁸Of course, subject to any specific legislative provisions mandating specific additional or special requirements .

SECTION 2: KEY PRINCIPLES AND PROVISIONS OF THE ETA

The ETAs apply to all laws of the Commonwealth, States and Territories, except to the practices and procedures of courts and tribunals and to the laws or transactions exempted in the schedules to or regulations of the ETAs.

The ETAs provide for the giving of information in writing, providing a signature, producing documents and retaining documents and information by electronic means. As a general rule the ETAs provide that, where there is no restriction or conflicting requirement in the relevant underlying law regarding the giving of information, one is able to rely on the provisions of the ETAs in relation to providing information and conducting transactions electronically.⁹

The ETA provides that, for the purposes of a law of the Commonwealth, a transaction is not invalid because it took place wholly or partly by one or more electronic means.¹⁰ Government entities may limit transacting, but not refuse to transact, by electronic means. However the ETAs require that, for private persons/non-Government entities, electronic means can only be used to satisfy legal requirements for writing with the consent of the parties.

Electronic communication

The ETAs define “information” broadly to mean “information in the form of data, text, image or speech”.¹¹ The ETAs define “electronic communication” to mean the communication of information in the form of:

- data, text or images by means of guided and/or unguided electromagnetic energy; or
- speech by the same means “of guided and/or unguided electromagnetic energy, where the speech is processed at its destination by an automatic voice recognition system”.

“Guided electromagnetic energy” refers to the use of physical communication channels such as telephone lines and fibre optic cables (ie a cabled internet network). “Unguided electromagnetic energy” refers to the use of infrared signals, visible light, radio waves and microwave (ie a Wi fi/wireless internet network).

That is, the definition of “electronic communication” is sufficiently broad to encapsulate all forms of modern electronic communication: email, online forms and applications, file transfer protocols and SMS messages (no matter whether delivered by wire or wirelessly) are all considered “electronic communication” for the purpose of the ETAs.

“Giving information” for the purpose of the ETAs includes each of:

- making an application;
- making or lodging a claim;
- giving, sending or serving a notice;
- lodging a return;
- making a request;
- making a declaration;
- lodging or issuing a certificate;
- making, varying or cancelling an election;
- lodging an objection; and
- giving a statement of reasons.¹²

What is not an “electronic communication” under the ETAs

A telephone call between persons or a voice message left on an answering machine are not forms of “electronic communication” under the ETAs and will not satisfy the requirement of writing.

⁹ This rule is repeated for the provisions covering the different requirements in the ETAs, including ss 9(3), 10(2) and 11(4).

¹⁰ Section 8 of the Commonwealth Act.

¹¹ Section 5 of the Commonwealth Act.

¹² Section 9 of the Commonwealth Act.

However, “speech” processed by a “voice recognition system” where a computer program responds to a person’s voice and where the recorded voice information is automatically reproduced and stored in a written form is an electronic communication under the ETAs.

Consent

Nothing in the ETAs require or compel a private individual or non-Government entity (ie a company) to use, provide or accept information in electronic form. In order to transact or communicate by electronic means with a private individual or entity, the consent of that individual or entity must be first obtained.

Consent to receive information electronically can be inferred from a person’s conduct and the past dealings of the parties. For example, if a customer has used email to communicate with you this will generally be sufficient to allow you to assume the customer’s consent to receiving information from you by email to that email address. However, this “*inferred consent*” is subject to any express refusal by a customer to receive information via email (eg if a customer includes a statement in their email to you to the effect that they do not want to receive any information in email form).

Consent to communicating/transacting by electronic means can also be withdrawn by a person at any time by providing notice.

The ETAs require a person’s consent *only* in relation to the means of communication of the information, not the type or content of that information. Thus, even with consent from a customer to transact by email, for example, this consent is not of and by itself consent to receiving electronic marketing material (ie SPAM). In this case the *SPAM Act* will need to be separately considered and complied with.

Technology neutrality

In line with remaining “technology neutral” the ETAs require that, at the time of the communication being sent, consideration be given to the relevant circumstances to determine if the means of electronic communications is appropriate in those circumstances. Thus, in addition to a general consent, the type of electronic communication to be used must be appropriate and reasonably accessible at that particular moment in time and for that particular purpose/type of information. For example, an insurer will need to carefully consider if it is appropriate that a lengthy PDS be delivered to a smart phone.

Requirement to give information in writing

The ETAs allow information required to be given in writing to be given to a person electronically if that person has consented to such.¹³ However this right is qualified by the

requirement that, at the time the information is given, it was “*reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference*”.

“*Readily accessible*” means that the recipient or addressee will be able to access and use the information contained in the electronic communication and the information can be retrieved, read and retained (either electronically or printed in hard-copy).

To avoid any doubt we suggest that, as part of the relevant e-terms and conditions, customers acknowledge that they have the technology to access the chosen means of electronic communication and that it is appropriate for them for the information to be provided by that or those means, especially where an SMS with URL linking is the means chosen.

Time, place and location of dispatch and receipt

Proving actual dispatch and receipt of an electronic communication can be difficult in practice. For this reason the ETAs provide formulas to determine both the time of dispatch and receipt of electronic communications. However, the ETAs only provide default assumptions about the time and place of dispatch and receipt of electronic communications and these can (and, we recommend, should) be replaced by express agreement between the parties.

ETAs time of dispatch and receipt: An electronic communication under the ETAs is deemed to be sent:

- at 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
- 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.¹⁴

Under the ETAs an electronic communication is deemed to be received:

- when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee; or
- at another electronic address of the addressee at the time when both:
 - the electronic communication has become capable of being retrieved by the addressee at that address; and
 - the addressee has become aware that the electronic communication has been sent to that address.¹⁵

¹³ Section 9 of the Commonwealth Act.

¹⁴ Section 14 of the Commonwealth Act.

¹⁵ Section 14A of the Commonwealth Act.

The ETAs define an “*information system*” as “*a system for generating, sending, receiving, storing or otherwise processing electronic communications*”. This includes the systems of an internet service provider (“**ISP**”).

Depending on the type of information system you have, in practice the formulas for dispatch and receipt under the ETAs can become complex and difficult to ascertain.

ETAs location of dispatch and receipt: Under the formulas in the ETAs an electronic communication is taken to have been dispatched, unless otherwise agreed between the parties, by the sender and received by the addressee at their respective places of business or residence (ie not the location of the information systems of the sender and addressee).

A company’s place of business is assumed to be the location indicated by it, unless another party demonstrates that the company making the indication does not have a place of business at that location. If a company (be it a sender or addressee) has not indicated a place of business and has only one place of business it is to be assumed that that place of business is where the electronic communication is dispatched and/or received. If a company has multiple offices and has not indicated its place of business for the purposes of electronic communications, the location which has the closest relationship to the relevant transaction is taken to be the company’s place of business. If no particular office can be identified as having the closest relationship to the underlying transaction then the company’s principal place of business is the relevant location.¹⁶

Given the practical difficulties in establishing the actual time of dispatch and receipt under the ETA formulas noted above, to avoid any ambiguity or confusion we suggest that the relevant terms and conditions include your own rules as to the deemed place and time of dispatch and receipt of the information/documents for the particular means of electronic communication, as we suggest in Section 3 of this Guide.

Invitation to treat regarding contracts

Insurers should be aware that, when conducting e-commerce (ie transacting electronically) under the ETAs a proposal to form a contract, other than a proposal addressed to specific person, is considered to only be an invitation to make offers (ie an “invitation to treat”), unless the contrary intention is clearly indicated by the person making the proposal.¹⁷

While it may seem that an email from a customer or by the customer clicking on an “I agree” button constitutes an acceptance of an offer by the insurer made on the website it is, under the ETAs, merely an offer by the customer to the insurer in response to the insurer’s invitation to treat. That is, it is the customer by clicking on an “I agree” button who is actually making the offer to the insurer.

While the law implies certain terms into every contract, it is dangerous not to stipulate the specific conditions for formation of an online contract in your relevant terms and conditions. As to which, please see other suggestions in Section 3 of this Guide.

Automated Message Systems & errors in electronic communications

Automated Message Systems (“**AMS**”) form an integral part of today’s electronic business practices. The ETAs confirm that a contract that is formed by the actions of an AMS is not invalid, void or unenforceable simply because no natural person reviewed the actions carried out by the AMS.¹⁸

AMS have enabled the quick and easy formation of contracts. However mistakes may still occur, such as the quantity of goods to be provided or the date a service is to be provided, and there is no opportunity to detect or correct an error.¹⁹

The ETAs enable the withdrawal from portions of a contract containing errors when the AMS does not give the opportunity to correct the error. However this safeguard applies only when the person notifies the other party of the error as soon as possible, providing that the person has not used or received any material benefit from the goods or services at that time.

Attribution of electronic communications

Unless otherwise agreed between the sender and addressee, the sender is only bound by an electronic communication if it was in fact sent by that person with his or her actual or apparent authority.²⁰ This provision is intended to protect a person from being held liable for transactions involving identify theft and fraud.

To overcome this risk, you should set out in your relevant terms and conditions with a customer when electronic communications are taken to have been sent by the sender (be it insurer or customer), including what steps need to be taken to secure any access password(s), email account(s) and/or customer’s hardware.

¹⁶ Section 14B of the Commonwealth Act.

¹⁷ Section 15B of the Commonwealth Act.

¹⁸ Section 15C of the Commonwealth Act.

¹⁹ Section 15D of the Commonwealth Act.

²⁰ Section 15 of the Commonwealth Act.

Dealing via intermediaries

For the purposes of the ETAs, the use of an intermediary (in the general sense of the word) with respect to an electronic communication is permissible and does not alter the “addressee” or “originator” of the communication. Whether the electronic communication goes through a third party’s delivery infrastructure or an insurance intermediary (eg an insurance broker or authorised representative) the originator and intended addressee of the electronic communication are not altered/changed by such process. That is, delivery of an electronic communication via an intermediary is both permissible under the ETAs and does not per se change the character of, the person who originated or the addressee of the electronic communication.

Requirements for signature

If a person is required by law to provide a signature, that requirement is taken to have been met by an electronic method if:

- **Identity** – that method identifies the person and indicates the person’s intention in respect of the information communicated;
- **Reliability** – the method used is as reliable as appropriate for the purpose for which the electronic information was communicated; and
- **Consent** – the person (or body) requiring the signature has consented to the signature being provided by that method.²¹

If relevant, a “signature” method can be agreed by the parties. The ETAs provide a flexible approach to the requirements of a valid electronic signature by providing that the method used should be as reliable as is appropriate for the purposes for which the information is communicated. This enables a range of legal, technical and commercial factors to be considered when determining whether the method used is appropriate, including the nature of the activity taking place, the frequency of activity between the parties, the value and importance of the transaction/information contained in the communication and the availability and cost of using alternative methods of identification.

Some common types of electronic signatures/means of authentication in use today include:

- providing credit card details and the verification code;
- entering passwords – user generated or system generated;
- email verification – sending a link to the user’s nominated email account and requiring the user to click on the link to confirm or complete the transaction;

- combination authentication process – this may require an online password in addition to certified copies of identification documents being provided; and
- digital signatures and PKIs – encrypted security measures.

Retaining electronic records

A requirement under a law for:

- information to be recorded in writing;
- a document to be retained for a period of time; or
- information contained in an electronic communication to be retained for a specified period of time,

may be satisfied by recording and retaining the information in electronic form.²²

However, the ETAs require that the electronic version of the document is accessible, can be used for subsequent reference and that it contains additional information about the origin and destination of the communication and the time of dispatch and receipt. In particular, the integrity of the information and processes to copy/capture the information must be maintained and documented. This means that the method of generating and storing the electronic form of the document must be a reliable means of maintaining the integrity of the information contained in the document and such must be provable.

²¹ Section 10 of the Commonwealth Act.

²² Section 12 of the Commonwealth Act

SECTION 3: PRACTICAL STEPS FOR COMMUNICATING/TRANSACTING BY ELECTRONIC MEANS UNDER THE ETA

We recommend that insurers prepare an electronic communication/transaction policy and customer facing terms and conditions to ensure you get the most out of the opportunities available under the ETAs, now that the ICA has been amended to allow insurers to communicate and transact with their customers electronically. Sensibly, these terms and conditions will also need to operate to take into account the provisions of the Corporations Act that allow for disclosure documents to be given electronically.

Insurers should make sure that these terms and conditions with customers set out clear and prescriptive rules in respect of the chosen method(s) of electronic communicating/transacting, including when an electronic communication is deemed to be sent and received and what constitutes a signature/attribution, will guarantee a smooth transition for insurers to transacting/communicating electronically.

Before going electronic: initial considerations

Before you send any notices or other information to or transact with customers electronically under the ETAs,²³ there are a number of initial considerations for all insurers:

- Decide on the method(s) of electronic communication most appropriate for the type of information to be sent and/or your preferences for sending electronic communications (eg email, linking and/or SMS with or without URL linking).

- Establish your rules for sending and receiving information by each means of electronic communication to be offered, including the time and place of dispatch and receipt and the appropriate attribution/authentication rules.
- Technically, how will you retain and retrieve the electronic communications?
- How will you encourage customers to sign up to receive information electronically – what incentives (and/or competition) will be offered to encourage adoption?

The method(s) of electronic communication to be offered:

The means of electronic communication to be used must be generally “accessible”, retainable for subsequent reference and regard must be had to “all the relevant circumstances” at the time of the electronic communication to ensure that it is an appropriate method/means for the information to be communicated.

You will need to determine which method(s) of electronic communication you wish to offer and if these are appropriate for your customers. In this regard, you should consider:

- for each means of electronic communication you wish to offer, your technical capacity for sending, authenticating and retention/retrieval of that form of electronic communication;
- the common and popular forms of electronic communication available to the general public and those most accessible to your customer base; and
- the level of authentication which you require (and can provide) for each means of electronic transaction/communication to be offered.

Establish the rules: Ensure that there is clarity in the electronic transaction/communication processes to avoid the various ambiguities in the formulas of the ETAs. You should determine the specific terms and conditions (ie the “rules”) for both new customers and existing customers who elect to start receiving information electronically, for each method or means of electronic transaction/communication being offered.

²³ This is based on the assumption that the necessary amendments will be made to the ETA/Electronic Transactions Regulations 2000 (Cth) to enable the 2013 amendments to the Insurance Contracts Act 1984 (Cth).

For example, in respect of email communication, the following might be included in your relevant terms and conditions for such communications:

- **Time of dispatch of the email** is deemed to be 30 minutes after the email is sent from the sender's computer.²⁴
- **Time of receipt of the email** is deemed to be 60 minutes after the email was sent from the sender's computer, unless the sender has received an error notification within that time stating that the email has not been delivered to the intended email address.²⁵
- **Location of dispatch of the email** is deemed to be your head office/a specified address.
- **Location of receipt of the email** is the location of the customer's usual residential address or a specified address, irrespective of the actual location of the customer when they view the content of the email.
- **Initial authentication and signature verification** will be done by an automated email sent to the customer's nominated email address which contains a link to a designated confirmation webpage which will require policy details, for example, to be entered in order to verify the customer's email address and the customer's approval of communication by email.

Retention of electronic communications: You will need to consider data storage and backup systems to ensure that you can meet your document retention needs for each means of electronic communication to be offered.

Getting customers to consent: You cannot simply start communicating/transacting business with customers (especially existing customers) electronically without their consent to do so.

You may consider offering existing customers some form of incentive for signing up to receive information electronically (ie to "go paperless"). For example, you could conduct a competition providing that all customers that sign up before a specified date will automatically be entered into a draw to win a prize. However, in such a case, you will need to comply with relevant State and Territory laws and obtain a "trade promotion lottery permit" in each relevant State/Territory.

Alternatively, for existing (and new) customers you may consider passing on some of the cost savings of transacting by electronic means (ie a slightly cheaper policy) if a customer elects to transact/interact with you solely by means of electronic communication.

Going electronic: Implementation

Once you have determined the above, you will then need to:

- Finalise the terms for acceptance for electronic communication (ie your preferred rules) both for your existing customers to switch to electronic communication and for your new customers.
- Notify existing customers of the available options to receive information and notices and transact electronically (notice to be sent by current usual/non-electronic means, but registration could be electronic via the website).
- Get consent from new and existing customers to receive information/transact electronically and as to the specific form of electronic means they want (if you provide alternative options).
- Determine the mechanism by which customers can withdraw their consent to or change their selected means of electronic communication/transacting.

Notifying existing customers: You will need to provide existing customers with notification by existing permitted means (ie non-electronic) in relation to the options to receive information/interact with you electronically. That is, you cannot transact with a customer by any electronic means until that customer has consented to that or those means of electronic communication.

However, the letter/notice posted to the customer could direct the customer to a designated webpage to sign up to receive information electronically. If this method is used the webpage could ask the customer to provide their personal details such as customer number (if any), policy number and/or date of birth to adequately enable identification (ie authentication). The webpage could have check-boxes for customers to indicate whether they consent to start receiving information electronically and to select by which means (if various options are to be offered).

If the customer checks the box to indicate that they consent to receiving information by a specific electronic means, a new text box with the terms and conditions for this specific means of electronic communication could pop up which will need to be accepted (ie by click-through) before the customer can proceed. The terms and conditions should set out the rules for that means of electronic communication, including the procedures for a customer to withdraw their consent to receive/transact via electronic communications.

²⁴ If it is not necessary for you to be able to determine and later show when an electronic communication is sent by you (ie you are only concerned with the time of receipt of electronic communications), this "time of dispatch of email" rule may not be required.

²⁵ In practice the period of time is often longer (sometimes up to 24 hours) to allow for "bounce-back"/error messages but there is no legal requirement as to the length of time. Ultimately, the length of time you allow is a commercial decision.

Where SMS messaging with URL linking is offered, for example, we suggest that the terms include an acknowledgement by the customer that he/she has the technical capability to access the nominated means of electronic communication (eg that they have a mobile phone with access to the internet and which is capable of displaying the linked webpage) and that such is appropriate for the type of information to be provided.

New customers: For new customers the above consents/ acceptance of terms can be incorporated into the initial customer application/contract formation process.

Dealing via intermediaries: In addition to the ETAs contemplating electronic communication via an intermediary,²⁶ the ICA specifically provides that the giving of any notice or other document or information referred to in the ICA to an agent of the insured (eg a broker) will be deemed to be the giving of such to the insured.²⁷ However, delivery to the insured is not deemed in the case of delivery to any other insurance intermediary (eg an authorised representative).

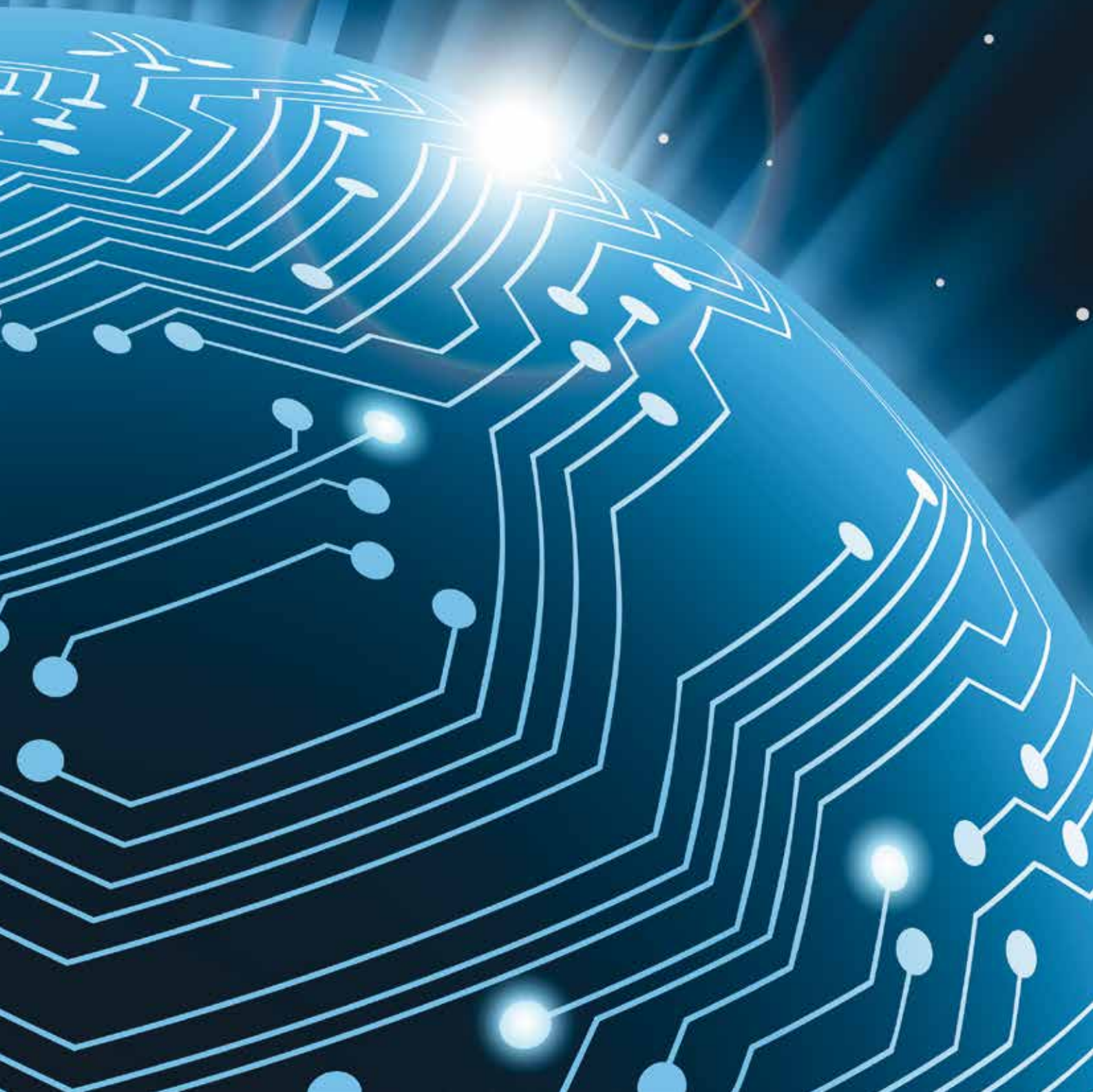
For those insurers who operate via intermediaries (eg brokers and authorised representatives) care must be taken to ensure the benefits of both the ETAs and ICA are maximised. In addition, do you wish to simply continue to rely on the broker to pass on the information or, with electronic communication now possible, provide for direct electronic communication with the insured?

²⁶ See our discussion under the heading “Dealing via intermediaries” on page 10.

²⁷ Section 71(2) of the ICA.

ANNEXURE

EXTRACT OF KEY RELEVANT PROVISIONS
OF THE ELECTRONIC TRANSACTIONS ACT
1999 (CTH) (AS AMENDED)



5 Definitions

(1) In this Act, unless the contrary intention appears:

addressee 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.

automated message system 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.

...

consent includes consent that can reasonably be inferred from the conduct of the person concerned.

data includes the whole or part of a computer program within the meaning of the Copyright Act 1968.

data storage device means any article or material (for example, a disk) from which information is capable of being reproduced, with or without the aid of any other article or device.

electronic communication means:

- (a) a communication of information in the form of data, text or images by means of guided and/or unguided electromagnetic energy; or
- (b) a communication of information in the form of speech by means of guided and/or unguided electromagnetic energy, where the speech is processed at its destination by an automated voice recognition system.

information means information in the form of data, text, images or speech.

information system means a system for generating, sending, receiving, storing or otherwise processing electronic communications.

information technology requirements includes software requirements.

...

originator 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.

performance of a contract includes non-performance of the contract.

place of business means:

- (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
- (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.

transaction includes:

- (a) any transaction in the nature of a contract, agreement or other arrangement; and
- (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
- (c) any transaction of a non-commercial nature.

8 Validity of electronic transactions

- (1) For the purposes of a law of the Commonwealth, a transaction is not invalid because it took place wholly or partly by means of one or more electronic communications.
- (2) The general rule in subsection (1) does not apply in relation to the validity of a transaction to the extent to which another, more specific provision of this Part deals with the validity of the transaction.

9 Writing

Requirement to give information in writing

- (1) If, under a law of the Commonwealth, a person is required to give information in writing, that requirement is taken to have been met if the person gives the information by means of an electronic communication, where:
 - (a) in all cases—at the time the information was given, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference; and

- (b) if the information is required to be given to a Commonwealth entity, or to a person acting on behalf of a Commonwealth entity, and the entity requires that the information be given, in accordance with particular information technology requirements, by means of a particular kind of electronic communication—the entity’s requirement has been met; and
- (c) if the information is required to be given to a Commonwealth entity, or to a person acting on behalf of a Commonwealth entity, and the entity requires that particular action be taken by way of verifying the receipt of the information—the entity’s requirement has been met; and
- (d) if the information is required to be given to a person who is neither a Commonwealth entity nor a person acting on behalf of a Commonwealth entity—the person to whom the information is required to be given consents to the information being given by way of electronic communication.

Permission to give information in writing

- (2) If, under a law of the Commonwealth, a person is permitted to give information in writing, the person may give the information by means of an electronic communication, where:
 - (a) in all cases—at the time the information was given, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference; and
 - (b) if the information is permitted to be given to a Commonwealth entity, or to a person acting on behalf of a Commonwealth entity, and the entity requires that the information be given, in accordance with particular information technology requirements, by means of a particular kind of electronic communication—the entity’s requirement has been met; and
 - (c) if the information is permitted to be given to a Commonwealth entity, or to a person acting on behalf of a Commonwealth entity, and the entity requires that particular action be taken by way of verifying the receipt of the information—the entity’s requirement has been met; and
 - (d) if the information is permitted to be given to a person who is neither a Commonwealth entity nor a person acting on behalf of a Commonwealth entity—the person to whom the information is permitted to be given consents to the information being given by way of electronic communication.

Certain other laws not affected

- (3) This section does not affect the operation of any other law of the Commonwealth that makes provision for or in relation to requiring or permitting information to be given, in accordance with particular information technology requirements:
 - (a) on a particular kind of data storage device; or
 - (b) by means of a particular kind of electronic communication.

Giving information

- (4) This section applies to a requirement or permission to give information, whether the expression *give*, *send* or *serve*, or any other expression, is used.
- (5) For the purposes of this section, ***giving information*** includes, but is not limited to, the following:
 - (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 cancelling an election;
 - (i) lodging an objection;
 - (j) giving a statement of reasons.

10 Signature

Requirement for signature

- (1) If, under a law of the Commonwealth, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication if:
 - (a) in all cases—a method is used to identify the person and to indicate the person’s intention in respect of the information communicated; and
 - (b) in all cases—the method used was either:
 - (i) as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

- (ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence; and
- (c) if the signature is required to be given to a Commonwealth entity, or to a person acting on behalf of a Commonwealth entity, and the entity requires that the method used as mentioned in paragraph (a) be in accordance with particular information technology requirements—the entity’s requirement has been met; and
- (d) if the signature is required to be given to a person who is neither a Commonwealth entity nor a person acting on behalf of a Commonwealth entity—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).

Certain other laws not affected

- (2) This section does not affect the operation of any other law of the Commonwealth that makes provision for or in relation to requiring:
 - (a) an electronic communication to contain an electronic signature (however described); or
 - (b) an electronic communication to contain a unique identification in an electronic form; or
 - (c) a particular method to be used in relation to an electronic communication to identify the originator of the communication and to indicate the originator’s intention in respect of the information communicated.
- (3) The reference in subsection (1) to a law that requires a signature includes a reference to a law that provides consequences for the absence of a signature.

11 Production of document

Requirement to produce a document

- (1) If, under a law of the Commonwealth, a person is required to produce a document that is in the form of paper, an article or other material, that requirement is taken to have been met if the person produces, by means of an electronic communication, an electronic form of the document, where:
 - (a) in all cases—having regard to all the relevant circumstances at the time of the communication, the method of generating the electronic form of the document provided a reliable means of assuring the maintenance of the integrity of the information contained in the document; and

- (b) in all cases—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; and
- (c) if the document is required to be produced to a Commonwealth entity, or to a person acting on behalf of a Commonwealth entity, and the entity requires that an electronic form of the document be produced, in accordance with particular information technology requirements, by means of a particular kind of electronic communication—the entity’s requirement has been met; and
- (d) if the document is required to be produced to a Commonwealth entity, or to a person acting on behalf of a Commonwealth entity, and the entity requires that particular action be taken by way of verifying the receipt of the document—the entity’s requirement has been met; and
- (e) if the document is required to be produced to a person who is neither a Commonwealth entity nor a person acting on behalf of a Commonwealth entity—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.

Permission to produce a document

- (2) If, under a law of the Commonwealth, a person is permitted to produce a document that is in the form of paper, an article or other material, then, instead of producing the document in that form, the person may produce, by means of an electronic communication, an electronic form of the document, where:
 - (a) in all cases—having regard to all the relevant circumstances at the time of the communication, the method of generating the electronic form of the document provided a reliable means of assuring the maintenance of the integrity of the information contained in the document; and
 - (b) in all cases—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; and

- (c) if the document is permitted to be produced to a Commonwealth entity, or to a person acting on behalf of a Commonwealth entity, and the entity requires that an electronic form of the document be produced, in accordance with particular information technology requirements, by means of a particular kind of electronic communication—the entity’s requirement has been met; and
- (d) if the document is permitted to be produced to a Commonwealth entity, or to a person acting on behalf of a Commonwealth entity, and the entity requires that particular action be taken by way of verifying the receipt of the document—the entity’s requirement has been met; and
- (e) if the document is permitted to be produced to a person who is neither a Commonwealth entity nor a person acting on behalf of a Commonwealth entity—the person to whom the document is permitted to be produced consents to the production, by means of an electronic communication, of an electronic form of the document.

Integrity of information

- (3) For the purposes of this section, 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; or
 - (b) any immaterial change;

which arises in the normal course of communication, storage or display.

Certain other laws not affected

- (4) This section does not affect the operation of any other law of the Commonwealth that makes provision for or in relation to requiring or permitting electronic forms of documents to be produced, in accordance with particular information technology requirements:
 - (a) on a particular kind of data storage device; or
 - (b) by means of a particular kind of electronic communication.

...

12 Retention

Recording of information

- (1) If, under a law of the Commonwealth, a person is required to record information in writing, that requirement is taken to have been met if the person

records the information in electronic form, where:

- (a) in all cases—at the time of the recording of the information, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference; and
- (b) if the regulations require that the information be recorded, in electronic form, on a particular kind of data storage device—that requirement has been met.

Retention of written document

- (2) If, under a law of the Commonwealth, a person is required to retain, for a particular period, a document that is in the form of paper, an article or other material, that requirement is taken to have been met if the person retains an electronic form of the document throughout that period, where:
 - (a) in all cases—having regard to all the relevant circumstances at the time of the generation of the electronic form of the document, the method of generating the electronic form of the document provided a reliable means of assuring the maintenance of the integrity of the information contained in the document; and
 - (b) in all cases—at the time of the generation of the electronic form of the document, 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; and
 - (c) if the regulations require that the electronic form of the document be retained on a particular kind of data storage device—that requirement has been met.

- (3) For the purposes of subsection (2), 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; or
 - (b) any immaterial change;

which arises in the normal course of communication, storage or display.

Retention of electronic communications

- (4) If, under a law of the Commonwealth, a person (the ***first person***) is required to retain, for a particular period, information that was the subject of an electronic communication, that requirement is taken to be met if the first person retains, or causes another person to retain, in electronic form, the information throughout that period, where:

- (a) in all cases—at the time of commencement of the 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
- (b) in all cases—having regard to all the relevant circumstances at the time of commencement of the retention of the information, the method of retaining the information in electronic form provided a reliable means of assuring the maintenance of the integrity of the information contained in the electronic communication; and
- (c) in all cases—throughout that period, the first person also retains, or causes the other person to retain, in electronic form, such additional information obtained by the first person as is sufficient to enable the identification of the following:
 - (i) the origin of the electronic communication;
 - (ii) the destination of the electronic communication;
 - (iii) the time when the electronic communication was sent;
 - (iv) the time when the electronic communication was received; and
- (d) in all cases—at the time of commencement of the retention of the additional information covered by paragraph (c), it was reasonable to expect that the additional information would be readily accessible so as to be useable for subsequent reference; and
- (e) if the regulations require that the information be retained, in electronic form, on a particular kind of data storage device—that requirement is met throughout that period.

(5) For the purposes of subsection (4), the integrity of information that was the subject of an electronic communication is maintained if, and only if, the information has remained complete and unaltered, apart from:

- (a) the addition of any endorsement; or
- (b) any immaterial change;

which arises in the normal course of communication, storage or display.

...

I 4 Time and place of dispatch

(1) For the purposes of a law of the Commonwealth,

unless otherwise agreed between the originator and the addressee of an electronic communication, the time of dispatch of the electronic communication is:

- (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
- (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.

Note: Paragraph (b) would apply to a case where the parties exchange electronic communications through the same information system.

(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 14B.

I 4A Time of receipt

(1) For the purposes of a law of the Commonwealth, unless otherwise agreed between the originator and the addressee of an electronic communication:

- (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
- (b) the time of receipt of the electronic communication at another electronic address of the addressee is the time when both:
 - (i) the electronic communication has become capable of being retrieved by the addressee at that address; and
 - (ii) the addressee has become aware that the electronic communication has been sent to that address.

(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 communication is capable of being retrieved by the addressee when it reaches the addressee's electronic address.

(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 14B.

14B Place of dispatch and place of receipt

- (1) For the purposes of a law of the Commonwealth, unless otherwise agreed between the originator and the addressee of an electronic communication:
 - (a) the electronic communication is taken to have been dispatched at the place where the originator has its place of business; and
 - (b) the electronic communication is taken to have been received at the place where the addressee has its place of business.
- (2) For the purposes of the application of subsection (1) to an electronic communication:
 - (a) a party's place of business is assumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location; and
 - (b) if a party has not indicated a place of business and has only one place of business, it is to be assumed that that place is the party's place of business; and
 - (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
 - (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
 - (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.
- (3) A location is not a place of business merely because that is:
 - (a) where equipment and technology supporting an information system used by a party are located; or
 - (b) where the information system may be accessed by other parties.
- (4) The sole fact that a party makes use of a domain name or email address connected to a specific country does not create a presumption that its place of business is located in that country.

15 Attribution of electronic communications

- (1) For the purposes of a law of the Commonwealth, unless otherwise agreed between the purported originator and the addressee of an electronic communication, the purported 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.
- (2) Subsection (1) is not intended to affect the operation of a law (whether written or unwritten) that makes provision for:
 - (a) conduct engaged in by a person within the scope of the person's actual or apparent authority to be attributed to another person; or
 - (b) a person to be bound by conduct engaged in by another person within the scope of the other person's actual or apparent authority.

Certain provisions of the Evidence Act 1995 etc. not affected

- (5) This section does not affect the operation of:
 - (a) section 87 or 88 of the *Evidence Act 1995*; or
 - (b) a law of a State or Territory that corresponds to section 87 or 88 of the *Evidence Act 1995*; or
 - (c) a law of a State or Territory, or a rule of common law, that provides for a statement made by a person to be treated as an admission made by a party to a proceeding in a court.

15A Application and operation of this Part

- (1) Subject to subsection (2), this Part²⁸ applies to the use of electronic communications in connection with the formation or performance of a contract between parties, and so applies:
 - (a) whether some or all of the parties are located within Australia or elsewhere; and
 - (b) whether the contract is for business purposes, for personal, family or household purposes, or for other purposes.
- (2) This Part applies to or in relation to a contract only if:
 - (a) the proper law of the contract is (or would on its formation be) the law of a State or Territory; and
 - (b) at the time the contract is formed, there is no law of that State or Territory in terms substantially the same as this Part.²⁹

Contracts, done at New York on 23 November 2005.

²⁸ Part 2A (sections 15A to 15F) of the ETA.

15B Invitation to treat regarding contracts

- (1) A proposal to form a contract made through one or more electronic communications that:
 - (a) is not addressed to one or more specific parties; and
 - (b) 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.
- (2) Subsection (1) extends to proposals that make use of interactive applications for the placement of orders through information systems.

15C Use of automated message systems for contract formation—non-intervention of natural person

A contract formed by:

- (a) the interaction of an automated message system and a natural person; or
- (b) the interaction of automated message systems;

is not invalid, void or unenforceable on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract.

15D Error in electronic communications regarding contracts

- (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.
- (2) If:
 - (a) a natural person makes an input error in an electronic communication exchanged with the automated message system of another party; and
 - (b) the automated message system does not provide the person with an opportunity to correct the error;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:
 - (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

- (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.
- (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.
- (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.

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 Model Law explanatory note for the United Nations Convention on the Use of Electronic Communications in International Contracts, done at New York on 23 November 2005).

15E Application of Act in relation to contracts

- (1) Subject to subsection (2), the provisions of sections 8 and 14 to 14B apply to:
 - (a) a transaction constituted by or relating to a contract; or
 - (b) an electronic communication relating to the formation or performance of a contract;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 the Commonwealth” and “under a law of the Commonwealth” were omitted.
- (2) However, this Part³⁰ (including subsection (1)) does not apply to or in relation to a contract to the extent that:
 - (a) Part 2³¹ would of its own force have the same effect as this Part if this Part applied; or
 - (b) a law of a State or Territory (that is in substantially the same terms as Part 2³²) would of its own force have the same effect as this Part if this Part applied.

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 the Commonwealth”. 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.

²⁹ Part 2A (sections 15A to 15F) of the ETA.

³⁰ Part 2A (sections 15A to 15F) of the ETA.

³¹ Sections 8 to 15 of the ETA.

³² Sections 8 to 15 of the ETA.

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