

1999

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

ELECTRONIC TRANSACTIONS BILL 1999

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Daryl Williams AM QC MP)

ELECTRONIC TRANSACTIONS BILL 1999

GENERAL OUTLINE

The Electronic Transactions Bill is part of the Government's strategic framework for the development of the information economy in Australia. The strategic framework reflects the Government's commitment to ensuring that Australians enjoy the social and economic benefits offered by the growth of the information economy.

The Electronic Transactions Bill creates a light handed regulatory regime for the use of electronic communications in transactions. The Bill facilitates the development of electronic commerce in Australia by broadly removing existing legal impediments that may prevent a person using electronic communications to satisfy obligations under Commonwealth law. The Bill generally gives business and the community the option of using electronic communications when dealing with Government agencies.

The Bill is based on the recommendations of the Electronic Commerce Expert Group, which reported to the Attorney-General in March 1998. The Expert Group was established by the Attorney-General to consider the legal issues raised by electronic commerce and the appropriate form of regulation, consistent with international developments, to deal with those issues. The Expert Group recommended that the Commonwealth should enact legislation based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce of 1996, with some modifications.

The purpose of the Model Law is to offer national legislators a set of internationally acceptable rules designed to remove a number of legal obstacles to the use of electronic communications for the communication of legally significant information, creating a more secure legal environment for electronic commerce. Australia was closely involved in the development of the Model Law.

The Bill is based on two principles: functional equivalence (also known as media neutrality) and technology neutrality. The term functional equivalence means that transactions conducted using paper documents and transactions conducted using electronic communications should be treated equally by the law and not given an advantage or disadvantage against each other. Technology neutrality means that the law should not discriminate between different forms of technology - for example, by specifying technical requirements for the use of electronic communications that are based upon an understanding of the operation of a particular form of electronic communication technology.

The Bill establishes the basic rule that a transaction is not invalid because it took place by means of an electronic communication. It contains specific provisions which state that a requirement or permission under a law of the Commonwealth for a person to provide information in writing, to sign a document, to produce a document or to retain

information or a document can be satisfied by an electronic communication, subject to certain minimum criteria being satisfied. The Bill also sets out rules, which apply in the absence of any contrary agreement, to determine the time and place of dispatch and receipt of electronic communications and the attribution of electronic communications. The Bill also contains provisions that specify certain exemptions or allow for exemptions to be made by regulation from the application of the Bill. It is important to note that the provisions in the Bill do not remove any legal obligations that may be imposed upon a person by other Commonwealth laws. The sole purpose of the Bill is to enable people to use electronic communications in the course of satisfying their legal obligations.

The Bill has a two-step implementation process. Prior to 1 July 2001 the Bill will only apply to laws of the Commonwealth specified in the regulations. After that date the Bill will apply to all laws of the Commonwealth unless they have been specifically excluded from the application of the Bill.

The Commonwealth is working in cooperation with State and Territory governments to ensure that Australia maximises its opportunities in the information age. The Commonwealth has developed a proposal for a national uniform legislative scheme to facilitate the use of electronic transactions. The scheme requires all governments to enact legislation within their jurisdiction to facilitate the removal of existing legal impediments to electronic commerce. All State and Territory governments have given their in-principle support to legislation based on the Electronic Transactions Bill. However, while it is part of a national uniform scheme, the Commonwealth's Bill will operate independently of any legislation in other jurisdictions and will take effect immediately from its commencement.

FINANCIAL IMPACT STATEMENT

It is not expected that the Bill will have a direct financial impact.

REGULATION IMPACT STATEMENT

INTRODUCTION

The development of electronic commerce is important for Australia's future. Encouraging Australians to embrace the Information Age will maximise the potential benefits and assist in ensuring their equitable distribution. In December 1997 the Prime Minister announced in his 'Investing for Growth' statement that the Government will encourage business and consumer confidence by setting in place a light-handed regulatory framework to support and encourage private sector led development of the information economy. The Electronic Transactions Bill assists in meeting this commitment. It also forms part of the legal and regulatory framework identified as a strategic priority in the Government's Strategic Framework for the Information Economy released in January 1999.

The Electronic Transactions Bill is based on the United Nations Commission on International Trade Law's Model Law on Electronic Commerce, as recommended by the Electronic Commerce Expert Group. The Expert Group was established by the Attorney-General in June 1997 to examine the legal issues raised by electronic commerce and report on what, if any, regulation was required to resolve them. In determining the best way to resolve the legal issues the Expert Group was required by its Terms of Reference to:

- ensure certainty in the marketplace, in contract dealings and other commercial transactions;
- minimise the regulatory burden on business and government; and
- keep litigation and costs to a minimum.

Legislation was only to be recommended if it would increase the overall efficiency of electronic commerce transactions. Any legislation was to be uniform and conform with existing international standards.

In identifying the legal issues and the relevant law in Australia in relation to those issues the Expert Group found that in some limited situations it was arguable that the law did provide for the use of electronic communications. However, they found that the full range of legal issues they identified was not clearly resolved in all circumstances by the law at present and that this uncertainty would impede the development of electronic commerce. For example, an enormous number of requirements exist in legislation for documents to be in writing, to be original, and/or to be signed. It is rarely clear that any of these requirements would be satisfied by the use of electronic means of communication.

Accordingly, the Expert Group recommended that:

- (a) the Commonwealth should enact comprehensive framework electronic commerce legislation, by which all other laws in Australia will be interpreted; and

(b) the content of the legislation should (with some exceptions) be based upon the Model Law on Electronic Commerce prepared by the United Nations Commission on International Trade Law.

The Government adopted the recommendations of the Expert Group in July 1998 with the exception of the recommendation about the form of the legislation. The Government has developed a uniform national legislative scheme for electronic commerce that has been developed in consultation with the States and Territories. The Commonwealth's Electronic Transactions Bill forms the centrepiece of this scheme. The Bill is the result of extensive consultation including a public exposure draft which was released in January 1999.

PROBLEM OR ISSUE IDENTIFICATION

A range of legal impediments to the development of electronic commerce has been identified. The problem is how these impediments, which exist in the law of all Australian jurisdictions, should be most appropriately removed.

SPECIFICATION OF THE DESIRED OBJECTIVES

To facilitate the national development of electronic commerce by removing existing legal impediments.

IDENTIFICATION OF OPTIONS

Two possible options to address the problem have been identified.

Option 1: Allow electronic commerce impediments to be removed by contractual arrangements or self regulation.

This would mean that there would be no legislation. This option would allow existing impediments to be removed by contractual arrangements, to the extent that this can occur. Self regulation may occur if industry and business associations prepare model contracts for the use of their members.

The Expert Group also identified another option of taking no action and leaving it to the courts to determine whether electronic communication technologies would satisfy existing legal requirements. However, for the purposes of this document this is treated as a consequence of allowing impediments to be removed by contractual arrangements rather than a separate option.

Option 2: Legislate to remove existing legal impediments to electronic commerce.

In compliance with the Government's clear policy directions, any regulation would be the minimum necessary to remove impediments while supporting and encouraging business and community acceptance and use of electronic communications technologies. Legislation would be based upon the principles of functional equivalence, which means that paper based commerce and electronic commerce

should be treated equally by the law, and technology neutrality, which means that the law should not discriminate between forms of technology.

Three possible options have been identified for legislation:

Option 2(a): all jurisdictions to amend all legislation that may impede electronic commerce

This option would require the amendment of all legislation at Commonwealth, State and Territory level to ensure that the use of electronic communications technologies was specifically considered in satisfying legal requirements.

Option 2(b): enactment of uniform model legislation by all jurisdictions

This option means the development of model legislation that generally removed existing legal impediments to electronic commerce would be of uniform national application through enactment by the Commonwealth, States and Territories.

Option 2(c): enactment of comprehensive Commonwealth legislation of national application

The enactment of comprehensive Commonwealth legislation would establish a legal framework for electronic commerce of national application.

IMPACT ANALYSIS

Impact group identification

The same groups would be affected by both suggested options. The groups that would be affected include: any Commonwealth, State or Territory agency administering legislation containing provisions that may impede the use of electronic commerce technologies by others to satisfy legal requirements ('government'); businesses seeking to develop and use electronic commerce technologies ('business'); and consumers of government and business goods and services who want to enter transactions electronically ('community'). The following analysis looks at the impact in terms of costs and benefits for the identified groups in respect of both options. Quantitative data is not available for this analysis but a qualitative assessment is provided.

Option 1: Allow electronic commerce impediments to be removed by contractual arrangements or self regulation

Costs

Government

- There would be no direct costs to the government for this option. However, the indirect effects of this option would be that the government could be seen as not

meeting expectations that it will facilitate the take up of electronic commerce by removing legal impediments. In addition, the Government has committed itself to the development of the information economy. If this option was of limited effectiveness there may be a potential cost to the national economy in terms of lack of international competitiveness, loss of job opportunities and markets (although no attempt has been made to quantify that cost).

Business

- The principal cost to business would be continued uncertainty about the legal effectiveness of electronic commerce. It is likely that business would not be able to satisfactorily resolve all the legal impediments faced by electronic commerce, leading contracting parties to resort to the courts to determine these legal issues. Determination by the courts would not necessarily increase certainty, as cases would only be determined on the facts on a case by case basis. Many legal issues would remain unresolved until parties were required to devote resources to litigation to have the issues determined.
- Relying on contract to resolve legal uncertainties means that all electronic transactions would be required to occur in a clear, negotiated, contractual context to ensure the legal effect of the transaction. However, not all transactions will be contractual.
- There may be substantial costs in the development of model contracts by industry and business associations. It is likely that a range of contracts would have to be developed for each jurisdiction to deal with the varying legal requirements of the different Australian jurisdictions.
- Legal uncertainty would reduce the incentive to adopt electronic communications technologies. This would lead to a reduction in the ability of business to reap the apparent benefits to be gained from the use of electronic communications technologies (for example, by streamlining processes).

Community

- The reliance on contractual means to resolve legal impediments may disadvantage those who are in a weaker bargaining position in the contract negotiation process. Consumers are generally seen as having limited power to bargain in entering contractual arrangements.
- Consumer protection and enforcement mechanisms may be of limited effectiveness, particularly if it is not clear whether existing statutory mechanisms apply to electronic transactions.
- Uncertainty about the security and reliability of electronic transactions would continue, while sufficient trust in electronic transactions may not be generated if all legal issues are to be resolved by contract or the courts.

Benefits

Government

- This option would not provide any direct benefit to the government.
- Reliance on this option would allow the market to determine whether the benefits of electronic commerce are outweighed by the potential costs, to the extent that the legal impediments can be resolved by contractual arrangements. This option would also allow the clear identification of the legal impediments to electronic commerce that cannot readily be resolved by contract and should be removed by some form of regulation.

Business

- This option would allow business to negotiate appropriate contractual arrangements for each transaction, to the extent that such arrangements can remove any relevant legal impediments.
- The costs to business of compliance with legal requirements would be reduced by the use of electronic transactions, although the need to negotiate contracts to provide for the use of electronic transactions would limit the benefit that may be gained.
- The development of model contracts by industry and business associations would reduce the cost to business of preparing contracts.

Community

- There would be no apparent benefit to the community.

Option 2: legislate to remove existing legal impediments to electronic commerce

Costs

Government

- Government would incur costs in developing legislation. Depending on the way that legislation were developed and implemented, these time and resource costs may be significant.
- Any significant delays in developing and implementing legislation would add to the uncertainty in business and the community about the legal effectiveness of electronic commerce.

Business

- Legislation may, if not based upon a principled approach, reduce opportunities for business to determine what electronic communications technologies are appropriate for their particular needs.
- Legislation which is not uniform and of national application may limit the degree of certainty that can be gained from the legislative action.

Community

- There would be no apparent cost to the community.

Benefits

Government

- Legislative action would facilitate the development and usage of electronic commerce. Removing clear legal impediments by legislative action would encourage business and the community to adopt and use electronic communication technologies by enhancing business and community confidence and trust in the effectiveness and reliability of electronic commerce.
- Legislation would provide a vehicle for harmonising the laws governing electronic commerce across Australia.
- Legislation would facilitate the international recognition and enforcement of Australian electronic transactions, including electronic signatures.
- Clearly permitting the use of electronic communication technologies to satisfy legal requirements of government should streamline regulatory processes and reduce administrative burdens.

Business

- The enactment of legislation that clearly removes existing legal impediments to electronic commerce would extend the range of transaction types that could be completed electronically. Legislation that provides for the electronic lodgement and storage of information required by government should enable business to reduce their compliance costs.
- The enactment of uniform legislation of national application would facilitate international transactions and the international recognition and enforcement of those transactions. It would also increase business confidence in the effectiveness and reliability of electronic transactions and encourage their use by business.

- Clear legislation would minimise the need to resort to litigation to seek a determination on the legal effectiveness of the use of electronic communications technology. It would also reduce the costs of preparing contractual arrangements to deal with impediments, where possible.
- The removal of legal impediments by legislation would increase the ability of business to compete nationally and internationally through the use of electronic commerce technologies.

Community

- Legislation would provide a certain and secure framework for electronic transactions between members of the community and government, business and others and increase community confidence in the effectiveness and reliability of such transactions, encouraging the use of such transactions.
- Legislation would facilitate the international recognition and enforcement of electronic transactions, which would assist in protecting the rights and interests of consumers who engage in international transactions.
- Legislation which increases business and community confidence in electronic transactions may increase community access to electronic information about a wider range of goods and services. The ability to enter legal arrangements electronically may allow consumers to choose between a wider range of domestic and international suppliers of goods and services, particularly if more businesses provide information about their goods and services electronically.

Option 2(a): all jurisdictions to amend all legislation that may impede electronic commerce

Costs

Government

- The direct costs to government for this option would depend on the way it is implemented. If government chose to identify all legislative provisions which impede electronic commerce and amended each of those provisions, the resource and time burden would be very significant.
- If government chose to enact general legislation by which all other legislation in that jurisdiction would be interpreted, there is still the likelihood that this could result in inconsistent approaches being taken between jurisdictions, increasing business and community uncertainty.

Business

- Business would be faced with continued uncertainty about the legal effectiveness of electronic commerce technologies by legislation in this form. There may be delays in the implementation of the necessary legislative changes by all jurisdictions and the ad hoc nature of national change, with limited possibility that change would lead to a uniform result, will also reduce business certainty and confidence.
- An ad hoc regulatory regime for electronic commerce does not assist the international recognition and enforcement of electronic transactions, disadvantaging business.

Community

- The community would also face problems raised by the likelihood of uncertainty about the effectiveness of electronic transactions in different jurisdictions. The possible lack of international recognition and enforcement of electronic transactions would also disadvantage the community.

Benefits

Government

- Government may benefit from a comprehensive examination of all laws that may impede electronic commerce. The opportunity could be used to rationalise and update all laws and make them operate in a technology neutral way, providing a principled basis for regulation that allows for the possibility of future technological developments.

Business

- Business may be able to take advantage of competing regulatory regimes. Business may be able to influence the development of legislation in each jurisdiction. Businesses that wanted to focus on electronic commerce could also consider the legislative regimes that were proposed and set up business in the jurisdiction that best suited its purposes. It is likely that the costs to business of complying with legal requirements would be reduced in such circumstances.
- If all Australian jurisdictions reviewed their laws then business may benefit from the increased certainty about the ability to use electronic communication technologies in each jurisdiction.

Community

- If business could reduce its costs by taking advantage of competing regulatory regimes these savings may flow through to consumers.

Option 2(b): enactment of uniform model legislation by all States, Territories and the Commonwealth

Costs

Government

- There would be no major cost to government, other than the resources required to negotiate and implement uniform legislation. However, the aim of government is to increase certainty and encourage business and community confidence in electronic transactions. This aim may be hindered by a number of factors. Uniform legislation can be time consuming to negotiate and enact, which means that existing uncertainty will continue during that process. In addition, there is the possibility that some or all of the jurisdictions may choose not to be involved in the negotiation of the legislation or not to enact the agreed uniform legislation if it is perceived as not suiting their particular interests. Alternatively, jurisdictions may alter the uniform law, either in the course of enactment or subsequently, possibly by adding on provisions that deal with matters not covered by the uniform law. Any of these results would undermine the goal of national uniformity that such legislation should achieve.

Business

- Business would face continued uncertainty while the legislation is negotiated and implemented.
- The creation of a non-uniform system by jurisdictions amending the uniform legislation would cause uncertainty about the international recognition and enforcement of electronic commerce transactions, as well as raising the possibility of different requirements in different jurisdictions.

Community

- There is no apparent cost to the community.

Benefits

Government

- There is clear constitutional authority for each jurisdiction to enact legislation within that jurisdiction dealing with electronic commerce. The exercise of this power to enact uniform legislation of national application with clear constitutional authority would achieve the Government's objectives of encouraging business and community use of, and trust in, electronic commerce.
- Uniform legislation negotiated by the Commonwealth, State and Territory governments should ensure that the interests of all governments are satisfied,

minimising the chance of subsequent alteration or additional regulation by any individual jurisdiction.

- Uniform legislation would harmonise the laws governing electronic commerce across Australia.
- Uniform legislation would facilitate the international recognition and enforcement of Australian electronic transactions, including electronic signatures.

Business

- The enactment of legislation that clearly removes existing legal impediments to electronic commerce would provide a certain and secure framework for electronic transactions. It will also increase business confidence in the effectiveness and reliability of electronic transactions and encourage their use by business.
- Uniform legislation would facilitate international transactions and the international recognition and enforcement of those transactions.

Community

- Legislation would provide a certain and secure framework for electronic transactions between members of the community and government, business and others and increase community confidence in the effectiveness and reliability of such transactions, encouraging the use of such transactions.
- Legislation would facilitate the international recognition and enforcement of electronic transactions, which would assist in protecting the rights and interests of consumers who engage in international transactions.

Option 2(c): enactment of comprehensive Commonwealth legislation of national application

Costs

Government

- The principal problem for government with this option would be that the extent of the Commonwealth's constitutional powers to enact comprehensive laws of national application for electronic commerce is uncertain. This uncertainty would require the dedication of resources to its resolution. It is possible that overcoming the constitutional difficulties may require the Commonwealth to establish certain regulatory regimes that paralleled existing regulations of the States.

Business

- Uncertainty about the constitutional validity of legislation would not benefit business, which may need to resort to the cost of litigation to clarify the effectiveness of the legislation. Depending on the form the legislation took, it may increase the regulatory burden on business by requiring compliance with a new set of laws dealing solely with the use of electronic communications.

Community

- There is no apparent cost to the community.

Benefits

Government

- Legislation of national and uniform application would satisfy the government's aims of encouraging the national use of electronic commerce by removing legal impediments.

Business

- The clear removal of existing legal impediments to electronic commerce would provide a certain and secure framework for electronic transactions. It would also increase business confidence in the effectiveness and reliability of electronic transactions and encourage their use by business.
- Legislation of national application would facilitate international transactions and the international recognition and enforcement of those transactions.

Community

- Legislation would provide a certain and secure framework for electronic transactions between members of the community and government, business and others and increase community confidence in the effectiveness and reliability of such transactions, encouraging the use of such transactions.
- Legislation will facilitate the international recognition and enforcement of electronic transactions, which will assist in protecting the rights and interests of consumers who engage in international transactions.

Restriction on competition

The enactment of legislation would be unlikely to restrict competition. Legislation would be intended to allow business to compete effectively in domestic and international markets and comply with regulatory requirements in an efficient manner.

CONSULTATION

The Electronic Transactions Bill is the result of extensive consultation throughout the policy development process, beginning with the Electronic Commerce Expert Group. The Expert Group was composed of ten selected experts on electronic commerce from industry associations, business, academia, the legal profession and government.

The Expert Group published an Issues Paper which set out the issues and their Terms of Reference. The Expert Group advertised nationally seeking public comment and the Issues Paper was made available on the Internet. Comments were received and considered by the Expert Group in the preparation of their Report. The Expert Group submitted its Report to the Attorney-General on 31 March 1998.

On 2 April 1998 the Attorney-General launched the Expert Group's Report for public comment until the end of May 1998. The Report was also made available on the Internet. Considerable interest was expressed in the Report. Submissions from a range of government, industry and professional organisations were received. All submissions supported the recommendation of the Expert Group for legislation to resolve the legal issues and most submissions supported the recommendations on the form and content of that legislation.

The Government adopted all the Expert Group's recommendations with the exception of the recommendation on the form of the legislation. The Expert Group recommended that the Commonwealth use the full extent of its constitutional powers to enact legislation that applied to the States and Territories. However, there are doubts about the extent of the Commonwealth's constitutional powers in this area. In addition, the Government considered it more appropriate to act in cooperation with the States and Territories. The Government put forward a proposal for a national uniform legislative scheme dealing with electronic transactions to the Standing Committee of Attorneys-General in October 1998. All Attorneys-General agreed to the Government's proposal. The Government released an Issues Paper in November 1998 to explain the background to, and content of, the uniform national legislative scheme. The Issues Paper was available on the Attorney-General's Department's e-Commerce Homepage (<http://www.law.gov.au>).

An exposure draft of the Bill was released for public comment in January 1999. Copies of the draft Bill and an accompanying explanatory paper were available on the e-Commerce Homepage. More than 70 submissions were received from industry, business, government and professional organisations. The submissions generally supported the draft Bill's content and approach. Some minor changes to the legislation were made to deal with the issues raised during this period. The Attorney-General's Department also held two public seminars in Sydney and Melbourne during the consultation period to provide a further opportunity for input into the Bill's development.

The legislation is the result of extensive consultation within the Commonwealth Government. The Commonwealth is continuing to consult with the States and

Territories on the development of the uniform State and Territory legislation through the Standing Committee of Attorneys-General.

CONCLUSION AND RECOMMENDED OPTION

The reliance on contract to remove legal impediments, as set out in option 1, is unrealistic. Many impediments arise from the clear words of legislation, so contractual terms or litigation is unlikely to remove those impediments.

Considering the costs and benefits set out above it is recommended that the Government endorse option 2, the enactment of legislation. Of the three options available of legislation, it is recommended that the Government endorse option 2(b).

Of the three options for legislation, option 2(a) is the least effective. It is likely that the path chosen by each jurisdiction to remove legal impediments would vary. This option does not clearly achieve the goal of a national solution.

Option 2(b) is recommended because it offers the benefits of a national solution that should be supported by all governments. Constitutional difficulties will not arise. However, if negotiation of a uniform model law through the Standing Committee of Attorneys-General significantly delayed its development, this would not prevent the Commonwealth from moving to enact its own legislation.

Option 2(c) faces constitutional difficulties. While these difficulties are not insurmountable, they may impede the development and acceptance of the legislation.

IMPLEMENTATION AND REVIEW

Implementation should occur by enactment of the Electronic Transactions Bill. The Commonwealth legislation will have a phased implementation. The Bill will apply to specified laws of the Commonwealth until 1 July 2001; after that date the Bill will apply to all laws of the Commonwealth unless specifically exempted. This will allow agencies time to put in place the requisite information systems to communicate electronically with their clients in line with the Prime Minister's commitment that all appropriate services will be delivered electronically by 2001. Ongoing consultations will be undertaken within the Commonwealth Government to enable agencies to "opt in" to the scheme as soon as possible. The Attorney-General's Department will also develop a training program to facilitate the implementation of the Bill.

The compliance cost to business should be minimal as the legislation facilitates but does not compel business to deal electronically with Government. Paper burden costs for business should be reduced by the use of electronic transactions.

Uniform State and Territory legislation is currently being developed through the Standing Committee of Attorneys-General. The Commonwealth is represented on SCAG by the Attorney-General. Implementation of the uniform legislation in each jurisdiction would be reviewed through SCAG.

NOTES ON CLAUSES

Part 1 - Introduction

Clause 1: Short Title

This clause is a formal item that provides for the Act to be cited as the Electronic Transactions Act 1999.

Clause 2: Commencement

This clause provides that the Bill will come into operation on a day to be fixed by Proclamation. Subclause (2) provides a default commencement date. If the Bill has not commenced within 6 months of the date that it receives the Royal Assent, it will commence on the first day after that period under subclause (2).

This Bill is intended to be the Commonwealth's part of a national uniform legislative scheme. However, commencement of the Bill is independent of the commencement of the equivalent State and Territory legislation under the national uniform legislative scheme.

Clause 3: Object

This clause sets out the object of the Bill.

Clause 4: Simplified outline

This clause sets out a simplified outline of the Bill. Its purpose is to give readers an overview of the Bill and assist readers understand the contents of the Bill.

Clause 5: Definitions

This clause defines a number of terms used in the Bill. As far as possible the definitions have been drafted in accordance with the basic principles of media neutrality and technology neutrality. The aim of using media neutral and technology neutral terms is to focus on the purpose of the legal requirement, rather than the form by which that requirement is satisfied. Applying these principles should also ensure that the Bill will not require constant amendment to deal with technological changes. The Bill does not, for example, refer to 'digital signatures' (a term which is used to refer to a particular type of signature technology) when dealing with signature requirements in clause 10 but instead focuses on the basic requirements for a signature.

The defined terms are expressed as having the meaning set out in this clause unless the contrary intention appears in the Bill. This is an expression of a standard principle of interpretation and means that the terms must be read in the context of the provisions within which they appear. This may require a narrower reading of the meaning of the terms for particular purposes.

“Commonwealth entity” is defined broadly to mean a Minister, Commonwealth officer or employee, Commonwealth office holder, Commonwealth authority or an employee of a Commonwealth authority. The term is used as a shorthand way to refer to the Commonwealth government. Commonwealth entities are given powers in clauses 9, 10 and 11 to issue requirements in relation to certain matters that must be satisfied when dealing with them. A Commonwealth entity is given the power to specify: particular information technology requirements for electronic communications with the Commonwealth entity (including an electronic communication that comprises a signature method); and procedures that a person must follow to verify the receipt of information given to that Commonwealth entity. The term Commonwealth entity is also used in the consent provisions in clauses 9, 10 and 11 to limit the category of persons who have consent powers.

“Consent” includes consent that can reasonably be inferred from the conduct of the person concerned. This term is used in clauses 9, 10 and 11 in provisions that state a person must consent to receiving information in the form of an electronic communication. While consent would clearly be demonstrated by a person’s express statement of consent, the purpose of this definition is to ensure that express consent is not required in every case and that consent can be inferred from, for example, a history of transactions or previous dealings. However, when determining whether consent can be inferred from a person’s conduct it will be necessary to look at the circumstances of the electronic communication, including the express statements of the person. A person should not, by the operation of this definition, be deemed to have consented to the receipt of information in the form of an electronic communication merely because they have sent or previously used electronic communications. If a person sent an electronic communication containing a message in which the person explicitly stated that they did not want to receive any or all information in the form of an electronic communication, then that express withdrawal of consent must be accepted.

“Data” is intended to have a wide meaning and is used to extend the definition of “information” in this Bill. Data is one of the forms in which information may be expressed. While data is generally used to refer to information that is operated upon by a computer program, it is defined here to also include the definition of computer program within the meaning of the *Copyright Act 1968*. The *Copyright Act 1968* states that “computer program” means:

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

- (a) conversion to another language, code or notation;
- (b) reproduction in a different material form;

to cause a device having digital information processing capabilities to perform a particular function.

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

“Data storage device” is defined to mean any article or material from which information is capable of being reproduced with or without the aid of any other article or device. This definition is intended to include items such as computer disks and CD ROMs from which information can be accessed or retrieved with the aid of appropriate devices. It is not intended to include items such as filing cabinets, books and newspapers. This definition should be interpreted in the context in which it is used - that is, as a law dealing with the electronic communication of information. This term is used in clauses 9,11 and 12.

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

This definition should be read in conjunction with the definition of “information”, which is defined to mean data, text, images or speech. However, as a limitation is applied on the use of speech the definition of electronic communication is in two parts. Paragraph (a) states that, in relation to information in the form of data, text or images, the information can be communicated by means of guided and/or unguided electromagnetic energy. Paragraph (b) provides that information in the form of speech must be communicated by means of guided and/or unguided electromagnetic energy and must be processed at its destination by an automated voice recognition system. This is intended to allow information in the form of speech to be included in the scope of the Bill only where the information is provided by a person in a form that is analogous to writing. “Automated voice recognition system” is intended to include information systems that capture information provided by voice in a way that enables it to be recorded or reproduced in written form, whether by demonstrating that the operation of computer program occurred as a result of a person’s voice activation of that program or in any other way. This provision is intended to maintain the existing distinction commonly made between oral communications and written communications. The intention is to prevent an electronic communication in the form of speech from satisfying a legal requirement for writing or production of information. For example, it is not intended to have the effect that a writing requirement can be

satisfied by a mere telephone call, message left on an answering machine or message left on voicemail.

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

“Information system” is defined to mean a system for generating, sending, receiving, storing or otherwise producing electronic communications, however that system may operate. For example, it would include all or part of a communications network, such as a system operated by a Commonwealth Department. This term is used in clause 14 of the Bill.

“Information technology requirements” is defined to include software requirements. The term should be read to include software that uses open standard systems and software based on proprietary systems. The term is intended to have a broad meaning and should be interpreted as extending to any information technology item, including items of hardware like computer disks or smartcards containing an electronic chip embedded within them. This term is used in clauses 9, 10 and 11. The purpose of this inclusive definition is to ensure that the meaning of the term includes any references to software requirements in other laws of the Commonwealth.

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

“Place of business” is defined to specifically deal with entities that would not ordinarily be considered to be carrying on a business. This term is used in clause 14.

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

Other terms used in the Bill have their ordinary meaning or are defined in the *Acts Interpretation Act 1901*. In particular, the term “person” is used throughout the Bill and is defined broadly in paragraph 22(1)(a) of the *Acts Interpretation Act 1901* to

include a body politic, body corporate or an individual. This definition would, for example, include office holders within the definition of “person” because they will always be natural persons.

The term “document” is also used throughout the Bill and is defined broadly in section 25 of the *Acts Interpretation Act 1901*. This Bill is not intended to limit that broad definition of document.

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

Subclause 5(2) only operates prior to 1 July 2001. Before that date the term “law of the Commonwealth” has a limited definition so that the Bill will only apply to those laws of the Commonwealth that are prescribed by regulation. After 1 July 2001 the limited definition of “law of the Commonwealth” will cease to operate and the Bill will apply to all laws of the Commonwealth except any which are specifically exempted pursuant to the relevant provisions of the Bill.

The Government has announced its commitment to deliver all appropriate services electronically by 2001. This provision achieves two purposes. It will allow those Commonwealth Departments and agencies that are not currently capable of dealing with the community electronically time to put the necessary systems in place in the context of meeting the Government’s electronic service delivery commitment. It also allows the States and Territories a period of time to enact the necessary laws as part of their commitment to the national uniform legislative scheme for electronic transactions. However, the provision is not intended to delay the commencement of the Bill beyond the period specified in clause 2. The provision allows the Bill to apply to specified Commonwealth laws as appropriate and it is intended that regulations will be prepared specifying certain Commonwealth laws that the Bill will apply to from the commencement of the Bill.

Clause 6: Crown to be bound

This clause states that the Crown, in all its capacities, is intended to be bound by the Bill.

Clause 7: External Territories

The Bill is intended to apply to all of Australia’s external territories including Norfolk Island and the Territories of Christmas Island and Cocos (Keeling) Islands.

Part 2 - Application of legal requirements to electronic communications

Division 1 - General rule about validity of transactions for the purposes of laws of the Commonwealth

Clause 8: Validity of electronic transactions

Clause 8 is an expression of the fundamental principle of media neutrality that underpins the Bill. This clause provides for the legal recognition of electronic communications and is based upon article 5 of the UNCITRAL Model Law.

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

The provision does not automatically establish the validity of a transaction that has been conducted using electronic communications. It merely states that the electronic form of the transaction does not make it invalid (in this context validity is intended to include legal effect and enforceability). The transaction would still be required to satisfy all other existing legal requirements. The term “transaction” is defined in clause 5.

Subclause (2) makes clear that this provision is only intended to operate where another, more specific, provision in Part 2 of the Bill does not apply. That is, it will operate as a default provision, providing a general rule that will have effect when the specific provisions in Part 2 do not operate. This is to ensure that this provision does not conflict with, or override, any of the specific requirements contained in the other provisions in Part 2.

Subclauses (3) and (4) allow exemptions to be made to this clause under the regulations in relation to specified transactions or specified laws of the Commonwealth. While no exemptions are currently envisaged these subclauses provide a facility to make regulations to provide for future exemptions as necessary.

Division 2 - Requirements under laws of the Commonwealth

Clause 9: Writing

This clause deals with providing information in writing and is based upon article 6 of UNCITRAL Model Law. Subclauses (1) and (2) allow a person to satisfy a requirement or permission to give information in writing under a law of the Commonwealth by providing that information by means of an electronic communication, subject to the general condition that, at the time the information was given, it was reasonable to expect that the information in the form of an electronic communication would be readily accessible so as to be useable for subsequent

reference. In addition, where a person must provide the information to a Commonwealth entity the person must comply with any information technology requirements in relation to the particular type of electronic communication to be used and any requirements relating to the verification of the receipt of the information. Finally, where the information is required or permitted to be given to a person who is not a Commonwealth entity, that person must consent to the information being given by means of an electronic communication.

Subclause (1) deals with requirements under Commonwealth law, while subclause (2) deals with permissions under Commonwealth law. These matters are dealt with in separate subsections because the nature of the provisions are fundamentally different. A requirement is a legal obligation, while a permission simply allows someone to do something. While the articles of the UNCITRAL Model Law refer only to requirements, the meaning of the term “requirement” in the Model Law is generally extended by including both obligations and situations in which the law simply provides for certain consequences if something is not done. This has been interpreted as a mechanism for including situations in which the law permits something to be done. The concept of permission as it is used in the Bill is not limited to the relaxation of a prohibition. The term permission should be given the broadest possible meaning to include situations where a person is, for example, allowed to do something in whatever way they want. For example, a person may be permitted to make an application for a particular form of Government payment. The separation of provisions dealing with requirements and provisions dealing with permissions is maintained throughout the Bill.

Readily accessible condition

One of the central conditions imposed on the use of electronic communications by clause 9 (and which is also used in clauses 11 and 12) is that, at the time the information is given, it must be reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference. This requirement has a number of elements that will be considered in turn.

The readily accessible requirement deals with the concepts of accessibility and useability. It does not, however, deal with other issues such as the authenticity of an electronic communication (which is dealt with in particular in clause 10 in situations where a signature is required). The readily accessible requirement ensures that others will be able to access and use the information contained in the electronic communication and that transactions are not subsequently vitiated by a lack of access to the information. Underpinning this requirement is the basic idea of information being reproduced or retrieved and read. The readily accessible requirement captures this concept and expresses it in terms of objective criterion. The notion of readily accessible is intended to mean that information contained in the electronic communication should be readable and capable of being interpreted. Similarly, it is intended that software necessary to allow the information to be read should be retained. This may be the version of the software used to create the message or subsequent versions of the same or different software that is capable of rendering the

information readable. The concept of useable is intended to cover use by both humans and machines. It is intended to deal with the useability of information, which is more than just the receipt of the electronic communication.

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

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

This clause must be read subject to any other laws that deal with the access to information. For example, a government entity that is required to give information in writing and chooses to do so by means of an electronic communication must comply with the terms of the *Disability Discrimination Act 1992*.

The concept of subsequent reference impliedly requires that electronic communications should be capable of retention. However, the use of this concept does not mean that electronic communications must be retained - it simply means that they must be capable of retention. Where a person chooses to retain an electronic communication pursuant to Commonwealth law then the requirements that must be satisfied are set out in clause 12.

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

Conditions imposed by Commonwealth entities

Paragraphs (1)(b) and (2)(b) allow Commonwealth entities, as defined in clause 5, to specify any particular information technology requirements in relation to the particular type of electronic communication the Commonwealth entity will accept when people wish to use electronic communications to satisfy requirements or permissions under Commonwealth law. This is intended to enable Commonwealth entities to receive information in a form that is most appropriate to the type of transaction or for which the entity has the relevant technology to enable it to receive the communication. Where a Commonwealth entity specifies software requirements, it is intended that the requirement will specify relevant general or open standards that an electronic

communication must comply with or be compatible with, rather than, for example, a particular proprietary brand of software that must be used (although there may be instances in which a requirement to use proprietary software will be justified in the context of the type of information that is being transmitted). Where an entity has specified information technology requirements under these paragraphs, a requirement or permission to provide information in writing will not be satisfied unless those information technology requirements have been met. Commonwealth entities will not be required to accept information in another format if they have specified particular information technology requirements or a kind of electronic communication under paragraphs (1)(b) or (2)(b).

Paragraphs (1)(c) and (2)(c) are intended to allow Commonwealth entities to specify procedures that a person must comply with to verify the receipt of particular electronic communications that are required or permitted to be given to the entity under Commonwealth law. This procedure is limited to the verification of receipt of information via electronic communications. It is not intended to include verification of the truth or otherwise of the contents of the electronic communication (although a person may be under an obligation to do this pursuant to other Commonwealth laws). Where a Commonwealth entity specifies a verification procedure, a requirement or permission to provide information in writing will not be met unless the verification procedure has been complied with and completed. For example, a Commonwealth entity could specify a verification procedure that requires a person to request a 'return receipt' where an electronic mail message is used as the form of electronic communication.

It is not intended that any information technology requirements or verification requirements must be promulgated by way of an instrument or regulation, nor is it envisaged that they should be personally provided to every person with which the Commonwealth entity may deal. However, a Commonwealth entity must provide adequate notice and publicity of any requirements they make under these provisions. For example, if a Commonwealth entity has an interactive Internet web page that enables individuals to deal electronically with the agency, then the web page should contain explicit information about the format of communications. This information could include, for example, a requirement for communications to be compatible with either a particular software package or specified open standards for electronic communications and that a person must also request a 'return receipt' when the information is transmitted. Similarly, where a Commonwealth entity provides contact information for clients that information could also tell people how to obtain further information about dealing with the entity using electronic communications, or set out the requirements. Directories of Commonwealth departments and agencies, for example, could include any relevant requirements for particular agencies, or the requirements could be listed as part of the contact information on correspondence to clients.

It is envisaged that these provisions may be used by Commonwealth entities to establish pilot schemes to, for example, test the operation of electronic communication systems. In these situations the requirements imposed by Commonwealth entities

under these provisions may be limited in some way - for example, they may relate only to particular types of information, particular legal requirements, or selected categories of people providing information electronically. While it is intended in most cases that systems will be established to allow any person to communicate electronically with a Commonwealth entity, it is important for the effective operation of the relevant systems that the provisions of the Bill be interpreted to allow Commonwealth entities to test the systems, particularly in the period prior to 1 July 2001 when the application of the Bill to Commonwealth laws is restricted to those laws specified in regulations.

Consent provisions

Paragraphs 1(d) and 2(d) specify that recipients of information must consent to the information being given to that person by way of an electronic communication, where the information is required or permitted to be given to a person who is not a Commonwealth entity. This provision is based on the Government's general policy that a person should not be compelled to use an electronic communication to conduct a transaction in order to satisfy requirements or permissions to give information in writing under Commonwealth law. The power to consent to electronic communications is not extended to Commonwealth entities, and the provision makes clear that the consent of Commonwealth entities or a person acting on behalf of a Commonwealth entity is not required before a person chooses to satisfy a requirement or permission to give information in writing by means of an electronic communication. The power only applies where a person is receiving an electronic communication. It is not necessary to state that a person must consent before providing information by way of an electronic communication because the provisions are clearly drafted to provide a person with the ability to choose whether or not to satisfy their legal obligations by using an electronic communication.

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

The definition of consent set out in clause 5 makes clear that consent can be inferred from a person's conduct. This is intended to ensure that express consent is not required prior to every electronic communication. For example, the fact that a person has used electronic mail to communicate with a Commonwealth entity should generally be sufficient to allow the Commonwealth entity to assume the person's consent to receiving further information at that email address. However, it is not intended that consent should be inferred from an electronic communication that contains an express refusal not to deal via electronic means. If a person sent an electronic communication containing a message in which the person explicitly stated that they did not want to receive any or all information in the form of an electronic communication, then that express withdrawal of consent must be accepted.

Other provisions

Subclause (3) makes it clear that this Bill does not affect the operation of any other Commonwealth legislation that specifies the way in which electronic communications must be made. This is intended to include existing laws that specify particular information technology requirements such as software requirements. For example, clause 8 is not intended to affect the operation of section 264B(2) of the *Income Tax Assessment Act 1936* that deals with the electronic lodgement of a tax return. In addition, the Bill is not intended to override other specific Commonwealth laws that require a person to use electronic communications, regardless of that person's consent. The phrase 'for or in relation to' is used to ensure that where another law sets out requirements about the provision of information electronically, those requirements may be either specifically set out by that other law or they may be set out by a person or Commonwealth entity in the exercise of their powers under that other law.

Subclause (4) extends the meaning of giving information, as used in subclauses (1) and (2), to include the concepts of giving, sending or serving information, or any other like expression. In this context, the concept of service is intended to include administrative service requirements. For example, it would include serving of a notice of change in entitlements. However, it is not intended to include the service of documents as part of proceedings before a court or tribunal. The practice and procedure of courts and tribunals is expressly excluded from the application of this Bill under subclause 13(4).

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

Where necessary clause 9 is intended to be read in conjunction with clause 10, which deals with signature requirements. Where a law of the Commonwealth requires or permits a person to provide information in writing and to sign that document, both elements must be satisfied. While a person could use an electronic communication to satisfy the writing requirement, they will not comply with the law unless they also sign the electronic communication. This can only be done by complying with the requirements of clause 10 which deals with signature. To comply with a Commonwealth law that requires information to be in writing and to be signed, a person would need to use an electronic communication with an electronic signature that complies with both clause 9 and clause 10.

Clause 13 provides for exemptions from this clause.

Clause 10: Signature

The intention of clause 10 is to allow a person to satisfy a legal requirement for a manual signature by using an electronic communication that contains a method that

identifies the person and indicates their approval of the information communicated. This method by which a person is identified electronically is commonly called an 'electronic signature'. However, the choice of a particular method must be as reliable as appropriate in the circumstances. In addition, where a person must provide a signature to a Commonwealth entity the person must comply with any information technology requirements in relation to the signature method. Finally, where the signature is required to be given to a person who is not a Commonwealth entity, that person must consent to the use of that signature method. Clause 10 is based upon article 7 of the UNCITRAL Model Law.

The conditions contained in paragraph (a) focus on two of the basic functions of a signature. The method a person chooses to use to satisfy the signature requirement must both identify the person and their approval of the contents of the electronic communication. In establishing the person's identity the signature method need not necessarily be a unique identifier. Rather, it must identify that person sufficiently for the purposes of that communication. Some signature technologies, such as digital signatures, will, simply by the nature of the way they operate, also verify the integrity of the electronic communication. However, paragraph (a) only requires that the signature method allows a person to indicate their approval of the information contained in the communication - it does not require the signature method to verify the integrity of the communication. A person's approval of the information communicated will go towards demonstrating the person's intention to apply their signature to the information contained in the electronic communication.

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

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

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

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

Paragraph (c) allows Commonwealth entities, as defined in clause 5, to specify any information technology requirements in relation to the signature method that they will accept when people wish to use an electronic communication to satisfy signature requirements under Commonwealth law. This provision has a similar purpose and operation to the Commonwealth entity powers discussed above in relation to clause 9. This provision is intended to allow Commonwealth entities to require the use of a particular type of signature method - for example, a signature method that complies with the government's 'Gatekeeper' system.

Paragraph (d) specifies that recipients of an electronic signature have the power to consent to the use of the electronic signature method, where the signature is required to be given to a person who is not a Commonwealth entity. This provision is intended to have a similar purpose and operation to subclause 9(1)(d).

Subclause (2) makes it clear that this Bill does not affect the operation of any other Commonwealth legislation that specifies the use of any electronic signature method, however described. This provision is intended to have a similar purpose and operation to subclause 9(3). The use of different language in paragraphs (a) and (b) to describe the signature method is intended to capture any existing laws that use these terms as well as laws that generally comply with paragraph (c).

Clause 13 provides for exemptions from this clause.

Clause 11: Production of document

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

useable for subsequent reference. Where a person must produce the document to a Commonwealth entity the person must comply with any information technology requirements in relation to the particular type of electronic communication to be used and any requirements relating to the verification of the receipt of the document. Finally, where the document is required or permitted to be produced to a person who is not a Commonwealth entity, that person must consent to the document being given by means of an electronic communication.

This provision only applies to requirements or permissions to produce paper documents. Where a law requires the production of information, but does not require the information to be in the form of a paper document, clause 9 would apply and the information can be given by way of an electronic communication.

Due to the ease with which electronic messages can be altered, it is important to determine that the information contained in an electronic communication accurately maintains the integrity of the information that is contained in the paper document. Paragraphs (1)(a) and (2)(a) set out the integrity requirement that must be satisfied. This requirement is intended to ensure that the information in the document has remained complete and unaltered from when it was in the form of a paper document through its translation into the form of an electronic communication. The integrity requirement applies to the method of generating the electronic form of the document. It is not intended to apply to the means by which the document is communicated. The integrity requirement is further explained in subclause (3).

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

Paragraphs (1)(b) and (2)(b) set out the readily accessible requirement in relation to the production of documents. This test is intended to have the same purpose and operation as the readily accessible test set out in subclause 9(1)(a).

Paragraphs (1)(c) and (2)(c) establish that Commonwealth entities may specify information technology and form requirements for the production of documents. This provision is intended to have a similar purpose and operation as expressed above in relation to subclauses 9(1)(b) and 9(2)(b). Similarly, paragraphs (1)(d) and (2)(d), which establish that Commonwealth entities may specify verification procedures, are intended to have a similar purpose and operation as subclauses 9(1)(c) and 9(2)(c).

Paragraphs (1)(e) and (2)(e) provide that recipients of a document must consent to the production of that document by means of an electronic communication, where the information is required or permitted to be given to a person who is not a

Commonwealth entity. This provision is intended to have a similar purpose and operation as subclause 9(1)(d).

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

Subclause (4) makes it clear that this clause does not affect the operation of any other Commonwealth legislation dealing with the production of electronic forms of documents. This provision is intended to have a similar purpose and operation as subclause 9(3).

Subclause (5) provides that clause 11 does not apply to a document required or permitted to be produced to a Commonwealth entity in connection with an application for the grant of a permission, certificate or similar thing, where the permission, certificate or thing is of a kind that is not capable of being granted to an Australian citizen. This subclause would apply, for example, to applications made under the *Migration Act 1958* or the *Australian Citizenship Act 1948*.

Subclause (6) provides that the generation of an electronic form of a document or the production of an electronic form of a document for the purposes of clause 11 does not constitute an infringement of copyright in the document. The purpose of this provision is to reflect the policy set out in section 183 of the *Copyright Act 1968*, which states that copyright is not infringed where the Commonwealth or a State, or a person authorised in writing by the Commonwealth or a State, does an act for the services of the Commonwealth or a State.

Subparagraphs (a)(ii) and (b)(ii) are intended to cover laws of the States or Territories that will be developed as part of the national uniform legislative scheme for electronic transactions to be based on this Bill.

Clause 11 is based upon article 8 of the UNCITRAL Model Law. This article refers to the concepts of both original documents and the production of original documents.

The concept of an original document is generally not used in Commonwealth laws. Instead, clause 11 refers to the production of documents which is a more appropriate term. Article 8 of the Model Law is also expressed to apply to certain requirements to retain documents. However, these elements have been dealt with in clause 12.

Clause 13 provides for exemptions from this clause.

Clause 12: Retention

This clause provides that requirements for the recording of information, the retention of paper documents and the retention of electronic communications can be satisfied by information in electronic form, subject to certain specified requirements being satisfied. Clause 12 is based upon elements of articles 8 and 10 of the UNCITRAL Model Law.

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

Readily accessible

Each subclause uses the objective requirement that the information retained must be reasonably readily accessible so as to be useable for subsequent reference. This requirement must be satisfied at the time the information is either recorded, generated in electronic form or retained (depending on the relevant subclause). This requirement is intended to have a similar purpose and operation to the readily accessible test in clause 9.

Regulations specifying the form of data storage device

Each subclause contains a provision that allows regulations to be made in relation to the use of data storage devices. The regulations may specify any requirements for information to be recorded in electronic form on a particular kind of data storage device. A person must comply with any such requirements. The purpose of this provision is ensure that people can be directed to retain information on certain types of storage devices, such as computer disks or CD ROMs, which may be of higher quality or durability. “Data storage device” is defined in clause 5.

Recording of information

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

Retention of written document

Paragraphs (2)(a) and (b) provide that an electronic version of a document can satisfy a requirement under a Commonwealth law to retain a document in a particular form, article or material where integrity requirements are satisfied and the “readily accessible” requirement is satisfied. The integrity provision is intended to have a similar purpose and operation to paragraph 11(1)(a). Paragraph (2)(c) provides that the regulations may require the use of particular data storage devices.

The integrity requirement is set out in subclause (3). It is intended to have a similar purpose and operation as subclause 11(3). The provision is intended to allow for the addition of information that is a necessary consequence of the retention process but which does not affect the integrity of the information. This may include, for example, information added to the electronic communication that is necessary in order to identify the message for storage purposes. This provision does not require the retention of this information. Although in many cases the information will not be communicated when it is retained, there may be situations in which a person communicates the information to, for example, a data storage device (such as a server) that is kept at a location remote from the person.

Retention of electronic communications

Subclause (4) provides that an electronic communication can satisfy a requirement under a Commonwealth law to retain information that was the subject of the communication. An electronic communication (such as an electronic mail message) can only meet or satisfy such a requirement where integrity requirements and the “readily accessible” requirement are satisfied, as set out in paragraphs (a) and (b). The integrity requirement is further set out in subclause (5), which has a similar purpose and operation to subclause 11(3).

In addition, paragraphs (c) and (d) require information to be retained that will identify the origin and destination of the electronic communication and the time of the electronic communication’s dispatch. This information must be retained in a way that satisfies the “readily accessible” requirement. Requiring the retention of this information, where it is available, may be seen as imposing a higher standard than currently exists for the retention of paper documents. However, the purpose of retaining this information is to assist in the identification of the message. This requirement recognises that, unlike paper communications, identifying information may be separate from the message contained within the electronic communication.

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

Subclause (6) which provides that the generation of an electronic form of a document will not infringe any copyright embodied in the document, has a similar purpose and operation as subclause 11(6).

Clause 13 provides for exemptions from this clause.

Clause 13: Exemptions from this Division

Clause 13 deals with exemptions from Division 2 of the Bill. Subclauses (1), (2) and (3) provide that regulations may be made to exempt specified requirements, specified permissions, or specified Commonwealth laws from any or all of the provisions of Division 2.

In general, appropriate exemptions will be made where the purpose or intention of a requirement, permission or Commonwealth law cannot be satisfied by the use of electronic communications. It is intended that any exemptions will be on the face of the Bill (and inserted by amendment to the Bill). The regulation making powers would be used to deal with unforeseen or urgent exemptions as necessary.

Subclause (4) exempts the practice and procedure of a court or tribunal from the operation of the provisions in Division 2 of the Bill. The purpose of this exemption is to exclude the conduct of litigation in the courts from the operation of the provisions in Division 2 because of the consequences that the rules in the Bill may have for the jurisdiction of courts and for parties in court proceedings.

This exemption is not intended to apply to rules of substantive law that a court or tribunal is considering when determining a matter, nor should it be read as undermining the other provisions in Division 2 of the Bill. The exemption is intended to make clear that the provisions in Division 2 cannot be relied upon to allow a person to use electronic communications to satisfy any requirements or permissions solely in relation to the practice and procedure of courts and tribunals. It is more appropriate to determine elsewhere, such as within the rules of court, whether electronic communications can be used as part of the practice and procedure of a court or tribunal.

The phrase “practice and procedure” has been defined for the purposes of this provision to include all matters in relation to which rules of court may be made. The intention of this definition is to cover actions taken in preparation for litigation in a court, even though litigation may never actually be commenced.

The exemption in subclause 13(5) for evidence laws is general in nature and follows from the policy of not affecting the operation of litigation in courts and tribunals. The intention of this provision is to ensure that the way in which evidence is given in a court is not affected by the provisions in Division 2. However, it is intended that a person can use the laws of evidence, including the *Evidence Act 1995*, to show that information or a document was provided electronically in accordance with the other provisions of Division 2.

It is important to note that these exemptions for the practice and procedure of courts and tribunals and the laws of evidence do not mean that a person is compelled to use paper documents if he or she will need to evidence matters in court at some future time. These exemptions are only in relation to the way a person complies requirements in relation to litigation in courts or tribunals.

Division 3 - Other provisions relating to laws of the Commonwealth

Clause 14: Time and place of dispatch and receipt of electronic communications

Clause 14 recognises that it is important to determine the time and place of dispatch and receipt of information for many existing rules of law. Consequently, this clause provides default rules to determine when, and from where, an electronic communication is sent and when and where it is received. The provision is intended to provide certainty for rules applying to dispatch and receipt of electronic communications.

This clause sets out default rules that apply depending on whether the parties to the communication have agreed otherwise and whether the parties have designated a particular information system for the communication. Parties may agree to vary these rules to determine the time and place of dispatch and receipt in their dealings with each other. Agreement to vary these default rules could occur in, for example, closed systems such as virtual private networks or in relation to particular communications by prior agreement between the parties. These provisions are intended to apply to situations where technology allows the use of third parties to provide time and date stamping services.

The terms “originator” and “addressee” are used throughout clause 14. These terms are intended to have their ordinary meanings. An originator is someone who causes an electronic communication to be sent, while an addressee is someone who the originator intends to receive the electronic communication.

The receipt provisions only address the issue of whether an electronic communication is received, and not whether it is intelligible or useable by the addressee. Clause 14 is largely based upon article 15 of the UNCITRAL Model Law.

Time of dispatch and receipt

Subclauses (1) and (2) establish basic rules for the time of dispatch of an electronic communication. An electronic communication is dispatched when it enters an information system outside the control of the originator. The term “information system” is defined in clause 5. These provisions deal separately with situations where an electronic communication enters a single information system or multiple information systems outside of the control of the originator when it is transmitted, but the basic rule is identical in both provisions. The time when an electronic communication is dispatched is the time when the beginning of the transmission of the electronic communication occurs.

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

system from which it is sent, possibly via other systems, to the addressee's information system. In this situation, the time of dispatch is deemed to occur when the communication enters the originator's Internet service provider's system.

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

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

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

Place of dispatch and receipt

Subclauses (5) and (6) provide default rules, subject to contrary agreement, for the place of dispatch and receipt of electronic communications. These rules are intended to reflect the reality that the physical location of information systems is often irrelevant to the use and purpose of the electronic communication. The nature of electronic communications is such that the information system can be in a different jurisdiction to where the originator and/or the addressee are located. This provision does not use the location of the information system to determine where the communication was dispatched and received, but instead establishes an objective criterion of place of business (or, where there is no place of business, of residence) of the parties to the communication. The rules are intended to provide a more

meaningful connection between the originator and addressee and the place of dispatch and receipt instead of allowing the physical location of the information system to be the deciding factor. Further, addressees and originators of electronic communications can use publicly available information to more readily determine a person's place of business or residence, while it may be difficult or impossible to determine the location of an information system.

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

Exemptions

Subclauses (7) and (8) allow specified electronic communications and specified laws of the Commonwealth to be exempted from the application of this clause by regulations.

Clause 15: Attribution of electronic communications

Clause 15 restates the existing common law in relation to the attribution of communications. Subclause (1) provides that a person purporting to be the originator of an electronic communication will only be bound by the electronic communication if in fact the electronic communication was sent by that person or with their authority. However, parties to an electronic communication may agree to vary these attribution rules. Clause 15 operates as a default rule where there is no agreement to the contrary. Subclause (1) is not intended to be a codification of the common law.

Subclause (2) is intended to ensure that the existing law of agency is not affected by the rule set out in subclause (1). Instead, the operation of the laws of agency, including the doctrines of apparent and actual authority, are preserved. As recommended by the Electronic Commerce Expert Group, clause 15 does not adopt the relevant article on attribution from the UNCITRAL Model Law.

Subclauses (3) and (4) allow specified electronic communications and specified laws of the Commonwealth to be exempted from the application of this clause by regulations.

The exemption in subclause 15(5) is intended to ensure that the restatement of the existing law on attribution cannot be read as affecting the operation of an aspect of the laws of evidence relating to admissions.

Part 3 - Miscellaneous

Clause 16: Regulations

This provision sets out a general regulation making power for the Bill.