

**National Interest Analysis [2010] ATNIA 33**

**with attachment on consultation**

**United Nations Convention  
on the Use of Electronic Communications in International Contracts,  
done at New York on 23 November 2005**

**[2010] ATNIF 33**



## NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

### SUMMARY PAGE

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on the Use of Electronic Communications in International Contracts,  
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#### **Nature and timing of proposed treaty action**

1. The proposed treaty action is for Australia to accede to the United Nations *Convention on the Use of Electronic Communications in International Contracts*, done at New York on 23 November 2005 (the Convention).
2. Article 16(3) provides that the Convention is open to accession by all States that have not signed the Convention between 16 January 2006 and 16 January 2008. Australia is not a signatory to the Convention.
3. Accession will occur as soon as practicable after the enactment of domestic legislative amendments. Subject to the Joint Standing Committee on Treaties' (JSCOT) recommendation, it is expected that Australia's instrument of accession will be lodged after corresponding legislation in the States and Territories has been enacted.
4. The Convention will enter into force for Australia on the first day of the month following the expiration of six months after the date of deposit of its instrument of accession (Article 23(2)).

#### **Overview and national interest summary**

5. The Convention establishes uniform rules regarding the use of electronic communications in connection with the formation or performance of a contract between Parties whose places of business are in different States. Accession to the Convention will enhance legal certainty and commercial predictability where electronic communications are used in relation to international contracts. It will also facilitate international trade and commerce by offering practical solutions for issues arising out of the use of electronic communications.
6. Accession will also facilitate the use of electronic communications in international commerce as reflected in Free Trade Agreements.

## **Reasons for Australia to take the proposed treaty action**

7. The Convention is the first United Nations Convention that addresses legal issues arising from the digital economy. It was developed by the United Nations Commission on International Trade Law (UNCITRAL) and updates many of the core provisions of the Model Law on Electronic Commerce 1996 (the 1996 Model Law), also developed by UNCITRAL. Australia is currently a member of UNCITRAL and was re-elected by the United Nations General Assembly last year for a term of six years.

8. The Commonwealth, States and Territories all have Electronic Transactions Acts based on the 1996 Model Law. The Convention updates and introduces some refinements in approach since the 1996 Model Law was developed, taking into account the greater use and knowledge of the electronic environment. It also expands on the 1996 Model Law to address apparent gaps which create obstacles to international trade. Accession to the Convention will ensure that Australia continues to remain up-to-date with international rules governing paperless communication in international commerce.

9. Acceding to the Convention requires harmonisation of Australia's domestic legislation with internationally recognised standards. Harmonisation of Australia's laws regarding electronic contracts will strengthen legal certainty in international electronic communications. A more certain legal environment will enable increased confidence in participation in electronic commerce.

10. Accession to the Convention will also improve the efficiency of commercial activities, promote trade and economic development both domestically and internationally and promote relations between Australia and other countries.

## **Obligations**

11. The Convention requires Contracting States to bring their domestic legislation in line with the Convention. The Convention is based on the principles of 'functional equivalence' and 'technological neutrality'. 'Functional equivalence' refers to the establishment of international standards for the recognition of electronic communications as the legal equivalent of paper-based documentation. The principle of 'technological neutrality' refers to the accommodation of technological developments in the field of e-commerce by incorporating flexibility into the methods of recognised electronic communication. Obligations primarily refer to how Contracting States in their domestic legislation define and regulate the use of electronic communication with regards to commercial contracts between Parties to which the Convention applies.

12. Article 3 of the Convention preserves Parties' contractual autonomy to exclude or vary the effect of the provisions of the Convention. Accordingly, Parties to a commercial contract can expressly derogate from this Convention if they so agree.

13. Article 6 provides a set of presumptions and default rules to assist in the determination of the place of business of a Party to a contract. Article 8 states that a communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication. However, the Convention does not require a Party to use or accept electronic communications and does not purport to vary existing contract law.

14. Article 9 establishes minimum standards to meet form requirements for contracts but only applies in so far as laws in the Contracting State exist to regulate such requirements of a contract. If

laws do exist, a Contracting State will be obliged to ensure that a contract, or communications surrounding a contract, are recognised if they are made in electronic form.

15. Article 10 provides default rules to determine the time of dispatch and receipt of an electronic communication in circumstances where Parties are exchanging communications through the same information system. Article 10 also recognises the effect on the receipt of an electronic communication arising from increasing use of security filters (such as spam filters) and other technologies restricting the receipt of unwanted or potentially harmful communications (such as communications suspected of containing computer viruses).

16. Article 11 clarifies the extent to which Parties offering goods or services through open, generally accessible communication systems, such as a website, are bound by advertisements made by providing rules about what is an invitation to treat in the electronic context.

17. Article 12 concerns the use of automated message systems and recognises that the absence of human intervention does not by itself preclude the conclusion of a valid contract.

18. Article 14 creates a right of withdrawal for an 'input error' made in a transaction between a person and an automated message system where the system does not provide the person with the possibility to correct the error.

19. Article 20(1) provides a list of other conventions to which the Convention (in so far as it is relevant) applies. A Contracting State is only bound by this Article if it is Party to or becomes Party to a listed convention. The Convention also applies to other international treaties, conventions and agreements not listed in Article 20(1), unless the Contracting State declares otherwise.

20. The Convention enables Contracting States to make a declaration at any time in relation to the following:

- modify or withdraw a declaration (Article 21(4));
- as to when the Convention will apply, or when it will be excluded from application (Article 19); and
- when a State will or will not apply the Convention to the use of electronic communications in connection another international convention, treaty or agreement to which the State is a Party (Article 20).

21. Declarations are to be made in writing and formally notified to the depositary (Article 21(2)). A declaration made following entry into force of the Convention will take effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary (Article 21(3)).

22. Article 22 states that no reservations may be made under the Convention.

## **Implementation**

23. Accession to the Convention will require amendments to the relevant Commonwealth, State and Territory Electronic Transactions Acts. The amendments required are minor and serve to

update the national electronic transactions regime to accommodate the needs of electronic commerce and reflect international standards.

24. Model provisions to amend the uniform Electronic Transactions Acts have been drafted and approved by the Standing Committee of Attorneys-General (SCAG).

### **Costs**

25. The only costs arising from acceding to the Convention are those relating to the introduction of amending legislation in each jurisdiction. For the Commonwealth, these costs will be met from within existing resources.

26. There is no contribution payable by Australia under the Convention.

### **Regulation impact statement**

27. The Attorney-General's Department has assessed the implementation of the Treaty against criteria in *The Best Practice Regulation Handbook*. This regulatory option has no/low impact on business and individuals or on the economy and a Regulation Impact Statement or Business Cost Calculator report is not required.

### **Future treaty action**

28. The Convention does not provide for future treaty action or a formal process for modification of the Convention. In the absence of specific procedures, the Parties may amend the Convention by mutual consent at any time, pursuant to Article 39 of the *Vienna Convention on the Law of Treaties 1969*. Any such amendment would be subject to Australia's domestic treaty-making process, including tabling and consideration by the JSCOT.

### **Withdrawal or denunciation**

29. Article 25 of the Convention provides that a Contracting State can denounce the Convention at any time, by written notification to the Secretary-General of the United Nations. The denunciation will take effect on the first day of the month following the expiration of 12 months after the notification is received by the Secretary-General. A longer period for denunciation may be specified in the notification.

### **Contact details**

Copyright and Classification Policy Branch  
Civil Law Division  
Attorney-General's Department.

## **ATTACHMENT ON CONSULTATION**

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#### **CONSULTATION**

##### **State and Territory Governments**

30. At the April 2007 Standing Committee of Attorneys-General (SCAG) meeting, Ministers agreed to consider updating the model Commonwealth, State and Territory electronic transactions legislation in light of the proposal to accede to the Convention.

31. The Commonwealth prepared a consultation paper on changes that would be required to the uniform electronic transactions regime for SCAG Officers to consider. The Consultation Paper contained an article by article analysis of the Convention, the differences between it and Australia's electronic transactions regime and proposed amendments to the current regime. The draft Consultation Paper was circulated to the State and Territory SCAG Officers.

32. At the November 2008 SCAG meeting, Ministers noted that the Commonwealth, in consultation with States and Territories, had developed and released the consultation paper on proposed amendments to the electronic transactions regime needed to accede to the Convention.

33. The comments received during public consultation were discussed and noted at the SCAG Officers' meeting on 5-6 March 2009. At the 16-17 April 2009 SCAG meeting, Ministers agreed that drafting of model provisions could commence and would be done by the Parliamentary Counsels' Committee.

34. At the SCAG meeting on 7 May 2010, Ministers agreed to enact the model provisions to implement the Convention.

##### **Commonwealth departments and agencies**

35. In March 2008, the draft consultation paper was circulated to:

- Department of Broadband, Communications and the Digital Economy;
- The Treasury;
- Department of Innovation, Industry, Science and Research; and
- Department of Foreign Affairs and Trade.

##### **Public consultation**

36. On 10 November 2008, the Commonwealth Attorney-General issued a media release and launched the consultation paper on the Department's website, seeking comments on the proposal to accede to the Convention. The Attorney-General's Department also wrote directly to peak business groups and law societies seeking submissions. The consultation paper appeared on the

Government's small business consultation website, the SCAG website and the Attorney-General's Department's webpage.

37. Submissions were received from:

- the Insurance Council of Australia;
- the National Measurement Institute, Department of Innovation, Industry, Science and Research;
- the Australian Government Information Management Office, Department of Finance and Deregulation;
- the Department of Resources, Energy and Tourism;
- the Australian Information Industry Association;
- the Australian Taxation Office;
- the Department of Broadband, Communications and the Digital Economy;
- the Law Council's E-Commerce Committee; and
- Mr Aashish Srivastava.

38. All submissions were positive and supported Australia's accession to the Convention.