



**REPORT OF THE**

**STANDING COMMITTEE ON**  
**CONSTITUTIONAL AFFAIRS**

**IN RELATION TO THE**

***ELECTRONIC TRANSACTIONS BILL 2000***

Presented by Hon Murray Nixon JP, MLC (Chairman)

Report 58

## **STANDING COMMITTEE ON CONSTITUTIONAL AFFAIRS**

### **Date first appointed:**

December 21 1989

### **Terms of Reference:**

- 1 The functions of the committee are to inquire into and report on:
  - a) the constitutional law, customs and usages of Western Australia;
  - b) the constitutional or legal relationships between Western Australia and the Commonwealth, the States and Territories,  
and any related matter or issue;
  - c) a bill to which SO 230 (c) applies but subject to SO 230 (d);
  - d) any petition.
- 2 A petition stands referred after presentation. The committee may refer a petition to another standing committee where the subject matter of the petition is within the terms of reference of that standing committee. A standing committee to which a petition is referred shall report to the House as it thinks fit.

### **Members as at the time of this inquiry:**

Hon Murray Nixon JP, MLC (Chairman)

Hon Ray Halligan MLC

Hon Ken Travers MLC

### **Staff as at the time of this inquiry:**

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**REPORT OF THE STANDING COMMITTEE ON CONSTITUTIONAL AFFAIRS**

**IN RELATION TO THE**

***ELECTRONIC TRANSACTIONS BILL 2000***

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**1 REFERENCE AND PROCEDURE**

- 1.1 The *Electronic Transactions Bill 2000* (the Bill) was second read in the Legislative Council on September 6 2000 and became subject to Standing Order 230(d) on that day.
- 1.2 Due to the lapse of time between September 6 2000 and the date of actual receipt of the Bill by the Standing Committee on Constitutional Affairs (the Committee), the Legislative Council passed a motion on September 21 2000 to suspend standing orders and extend the time within which the Committee was to report the Bill to the House from October 6 to November 7 2000.

**2 BACKGROUND TO THE BILL**

- 2.1 The use of the Internet and other electronic communication technologies is being rapidly adopted worldwide. This growth in electronic commerce (e-commerce) is providing an array of opportunities and benefits for Western Australians. This is especially relevant to the business sector, where e-commerce is enabling Western Australians to take advantage of information and communication technologies to overcome Western Australia's physical isolation.
- 2.2 The definitions of e-commerce have shifted over the last few years in two respects:
- initially e-commerce was defined as financial transactions over electronic communication, but the trend now is to define e-commerce as any business communication such as the exchange of information by electronic communication; and
  - initially e-commerce was defined as the technical event of an electronic communication, but now the trend is to see e-commerce as an approach to business, with the technology as the enabler.<sup>1</sup>

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<sup>1</sup> *E-competent Australia: Report on the impact of e-commerce on the National Training Framework*, Australian National Training Authority, May 2000, p 6.

2.3 These two new trends are reflected in the recent definition of e-commerce provided by the National Office for the Information Economy. That definition states that:

*“In e-commerce, business is communicated and transacted over networks and through computer systems. The most restrictive definition limits e-commerce to buying and selling goods and services, and transferring funds through digital communications. However, e-commerce also may include all inter-company functions (such as marketing, finance, manufacturing, selling, and negotiation) that enable commerce and use electronic mail, EDI<sup>2</sup>, file transfer, facsimile, video-conferencing, workflow, or interaction with a remote computer. E-commerce also includes buying and selling over the World Wide Web and the Internet, transferring electronic funds, using smart cards and digital cash, and doing business over digital networks.<sup>3</sup>”*

2.4 E-commerce is likely to have a substantial impact on Australia’s economy, including the availability of an adequately trained workforce. E-commerce is already having an impact on a wide range of industries, from retailing to transport, media, entertainment and tourism, health, business services, communications, information technology, and banking and finance. E-commerce is expanding the scope of some occupations, and resulting in the creation of new occupations. In many cases, e-commerce will change the way business is conducted, particularly with an Internet-based supply chain.

2.5 Industry data indicate that the speed of adoption of e-commerce is rapid. Starting from practically nothing a few years ago, current estimates are for e-commerce to reach around US\$300 billion in the next year or so and, according to the reckoning of Forrester Research, eclipse the trillion dollar mark by 2003.<sup>4</sup>

2.6 The data that is available points to rapid growth in the use of e-commerce in Australia:

- At the end of 1998, there were 1.7 million Australians accessing the Internet at least once a week (regular users). This is projected to grow to 5.7 million by 2003. Adding email-only Internet users and casual users lifts the 2003 total to 10.9 million.
- Internet based commerce in Australia is predicted to grow from \$61 million in 1997 to \$1.3 billion in 2001.

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<sup>2</sup> Electronic data interchange.

<sup>3</sup> *E-Australia.com.au: Australia’s E-commerce report card*. National Office for the Information Economy. October 29 1999. p 60.

<sup>4</sup> *E-commerce beyond 2000*. National Office for the Information Economy. February 11 2000. p 3.

- The number of business websites in Australia doubled between 1996 and 1998.
  - There has been a doubling or better in annual revenues in recent years for several Australian companies that supply Internet systems or knowhow.<sup>5</sup>
- 2.7 Businesses are also rapidly taking up e-commerce in Australia, as highlighted by an article in the *Australian Financial Review* on April 1 1999. The article stated that:
- “The number of Australian companies active in e-commerce is set to explode in the next 15 months with a five-fold increase in active Internet trading sites to take the total to 40 000 by mid-2000.”*
- 2.8 Australian households appear to be continuing to increase their use of both the Internet and e-commerce. Over 12 months from August 1998 to August 1999, the proportion of households accessing the Internet rose by 27 per cent to nearly 1.6 million households, or 23 per cent of all Australian households. Meanwhile, household numbers using the Internet as a means for paying bills and transferring funds are rising at a rapid rate.<sup>6</sup>
- 2.9 The regions that benefit the most from changes brought by greater use of e-commerce include country regions. Most country regions will benefit from the effect e-commerce has in compressing distance and making goods and services more accessible.
- 2.10 Research has shown, however, that a major impediment to the uptake of e-commerce arises from concerns about security of information. These concerns include the capacity for parties to identify each other, to protect the confidentiality of their communications, and to maintain the accuracy and completeness of information.
- 2.11 A further information security objective is non-repudiation; that is, a way of preventing parties from denying that they sent or received particular information.
- 2.12 The Bill addresses these information security concerns by creating a stable legal environment for the conduct of e-commerce across Western Australia. These and other issues are considered in section 3 of this report.

### **3 CONTENTS AND PURPOSE OF THE *ELECTRONIC TRANSACTIONS BILL 2000***

- 3.1 The purposes of the Bill are to establish a regulatory framework for the use of electronic transactions in commerce and to remove legal barriers that may inhibit the use of electronic communications.

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<sup>5</sup> *Ibid.* p 4.

- 3.2 The Bill seeks to facilitate the development and use of e-commerce by:
- recognising that transactions effected electronically are not by that reason alone invalid;
  - providing for the meeting of certain legal requirements as to writing and signatures by electronic communication;
  - permitting documents to be produced to another person by electronic communication;
  - permitting the recording and retention of information and documents in electronic form;
  - providing for the determination of time and place of dispatch and receipt of electronic communications; and
  - stipulating when an electronic communication will bind its purported originator.
- 3.3 Because e-commerce has global dimensions, it is necessary for regulatory initiatives to be in accord with national and international best practice. The Bill has been developed through a national scheme to promote consistent and comprehensive legislation.
- 3.4 The Bill is modelled on the Commonwealth *Electronic Transactions Act 1999* (the Commonwealth Act) which in turn adopted most of the provisions of the United Nations Model Law on Electronic Commerce 1996. This model law has been endorsed by a number of international jurisdictions.
- 3.5 The Bill is part of a national uniform legislative scheme to facilitate the use of electronic transactions. The scheme requires all State and Territory governments to enact legislation within their jurisdiction to facilitate the removal of existing legal impediments to e-commerce. The Commonwealth 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 proposal and all State and Territory Governments have given their in-principle support to legislation based on the Commonwealth Act.
- 3.6 The enactment of national uniform legislation will facilitate international transactions and the international recognition and enforcement of those transactions. It will also increase business confidence in the effectiveness and reliability of electronic transactions and encourage their use by business. Further, it will minimise the need to

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<sup>6</sup> *Ibid.* p 5.

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resort to litigation to seek a determination on the legal effectiveness of the use of electronic communications technology.

- 3.7 The Bill is based on two principles: functional equivalence and technology neutrality.
- 3.8 The term functional equivalence, also known as media neutrality, 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.
- 3.9 The term 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 on an understanding of the operation of a particular form of electronic communication technology.
- 3.10 The Bill establishes the basic rule that a transaction is not invalid simply because it took place by means of one or more electronic communications. It contains specific provisions which state that a requirement or permission under a law of Western Australia for a person to provide information in writing, to sign a document, to produce a document, to record information or to retain a document can be satisfied by an electronic communication, subject to certain minimum criteria being satisfied.
- 3.11 Those criteria establish objective tests that are based on reliability and reasonableness.
- 3.12 The Bill also makes clear that the conduct of electronic transactions will require the prior consent of parties. That consent may be inferred from conduct or given subject to certain conditions.
- 3.13 The Bill gives legal effect to electronic signatures.
- 3.14 The Bill also sets out default 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 default rules take a commonsense approach to determining when and where an electronic communication was sent and received.
- 3.15 The Bill also contains provisions that allow for exemptions to be made by regulation from the application of the Bill.
- 3.16 The Committee notes that the provisions in the Bill do not remove any legal obligations that may be imposed upon a person by other Western Australian laws. The sole purpose of the Bill is to enable people to use electronic communications in the course of satisfying their legal obligations.



3.17 The Bill contains 15 clauses in three parts:

**Part 1 – Preliminary**

**Part 2 – Application of legal requirements and authorisations to electronic communications**

**Part 3 – Miscellaneous**

3.18 The Committee has provided comment on selected clauses of the Bill in section 7 of this report.

**4 INQUIRY PROCEDURE**

4.1 As part of its review, the Committee placed an advertisement in *The West Australian* newspaper inviting submissions on the Bill. The Committee received one written submission as a result of its advertisement.

4.2 As a further part of its review, the Committee invited comment from a number of organisations and departments who it considered might wish to make a submission. Those organisations and departments were the:

- Australian Bankers' Association;
- Australian Stock Exchange Limited (the ASX);
- Chamber of Commerce and Industry of Western Australia (Inc);
- Internet Industry Association (the IIA);
- Law Society of Western Australia Inc (the Law Society); and
- Office of the Attorney General.

**5 SUBMISSIONS**

**Mr Allan Clarkson and Mr Bruce Dartnall**

5.1 The Committee received a written submission from Mr Allan Clarkson and Mr Bruce Dartnall, in response to its advertisement in *The West Australian* newspaper. They advised the Committee that they are business proprietors and represent a group of Christians who have concerns of conscience about the Bill.

5.2 Mr Clarkson and Mr Dartnall advised the Committee that:

*“As believers on the Lord Jesus Christ, on account of our conscience before God we do not involve ourselves with computers in either our private lives or our businesses.”*

5.3 Mr Clarkson and Mr Dartnall submitted that their concern was in relation to subclauses 8(3) and 10(4) of the Bill in that the word “requiring” appears to allow scope for another law to require an electronic transaction. They submitted that this would conflict with their conscience before God.

5.4 Mr Clarkson and Mr Dartnall submitted that a conscience provision should be inserted in the Bill. They submitted that:

*“Whilst there is no requirement for electronic transactions under this Act [sic], as an interpreting Act [sic], it sets the platform from which other subsequent legislation may permit or require electronic transactions.”*

5.5 Mr Clarkson and Mr Dartnall provided the Committee with a draft of a conscience provision that they submitted should be inserted in the Bill after subclause 8(3):

*“...provided that insofar as this Act or any other law of this jurisdiction requires information to be given or received electronically that requirement shall not apply to any person who holds a conscientious Christian belief that precludes him from possessing or using a computer for business or private purposes.”*

5.6 Mr Clarkson and Mr Dartnall suggested a similar provision be inserted after subclause 10(4).

5.7 Mr Clarkson and Mr Dartnall concluded their submission by advising the Committee that they were concerned that the current desire to promote electronic commerce may result in a situation being created where persons with a conscience before God are discriminated against in business or personal affairs.

**The Australian Stock Exchange Limited**

5.8 The Committee also received a written submission from the ASX dated October 11 2000. The ASX submitted that:

*“ASX strongly supports the development of electronic commerce and to this end supports the passage of this Bill through the Western Australian Parliament as it can only serve to encourage the development and use of electronic commerce.”*

5.9 The ASX submission also stated that:

*“Given that the purpose of this Bill is to implement uniform legislation to support the Commonwealth Electronic Transactions Act 1999, ASX also supports this Bill as it will assist in the implementation of a consistent national approach and legal framework with regards to electronic transactions in Australia.”*

**The Internet Industry Association**

5.10 The Committee received a submission via email from Mr Peter Coroneos, Executive Director, IIA, dated October 15 2000.

5.11 Mr Coroneos advised the Committee that the IIA is Australia’s national Internet industry organisation. Members include telecommunications carriers, content creators and publishers, web developers, e-commerce traders and solutions providers, and a range of other businesses providing professional and technical support services.

5.12 Mr Coroneos advised the Committee that the IIA has evaluated the Bill and believes that it will have significance for its members and the information economy generally. He submitted that:

*“In view of the fact that we have previously supported the Commonwealth legislation, and in view of the fact that complementary State and Territory legislation is necessary to provide consistent national coverage for businesses and individuals seeking to enter into electronic contracts, we believe that this Bill takes us one step closer to that end.”*

5.13 The Committee was also advised that the IIA concurs with the view of the Attorney General that the Bill will provide the basis of an environment that will support the growth of e-commerce in Western Australia. Mr Coroneos also submitted that the Bill is an important piece of legal ‘infrastructure’ in that it also provides greater confidence in those businesses based elsewhere who seek to transact with businesses and consumers based within Western Australia.

**The Law Society of Western Australia Inc.**

5.14 The Committee received a written submission from the Law Society dated October 10 2000. The Committee was advised that the Law Society had considered the Bill and had no substantial comment to make. The Law Society noted that the Bill is similar to the Commonwealth Act, with some minor exceptions, and covers no more and no less than that Act. The Law Society submitted that the Bill is an improvement on the Commonwealth Act.

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**6 COMMITTEE HEARING**

6.1 The Committee conducted a hearing into the Bill on Wednesday, October 11 2000. The witnesses before the Committee were:

- Hon Peter Foss QC, MLC, Attorney General;
- Mr Peter Richards, Policy Officer, Ministry of Justice;
- Mr Allan Clarkson, business proprietor and representative of a group of Christians who have concerns of conscience about the Bill; and
- Mr Bruce Dartnall, business proprietor and representative of a group of Christians who have concerns of conscience about the Bill.

6.2 Concerns raised by Mr Clarkson and Mr Dartnall are discussed in paragraphs 5.1 to 5.7 of this report.

6.3 In his opening remarks to the Committee, Hon Peter Foss QC made some general comments about the Bill.

6.4 He advised the Committee that the Bill differs markedly from the federal legislation in that it is not an administrative Bill but is concerned purely with law reform. The Bill does not contain any provisions of an administrative nature.

6.5 Hon Peter Foss QC informed the Committee that the Commonwealth Act is different because specific provisions requiring federal departments to do certain things to accept electronic transactions are tacked onto the strict legal reform provisions. He advised the Committee that although only small parts of the legislation differ, the character of the State Bill is very different because it is purely a law reform Bill.

6.6 The Committee was advised that the Bill is intended to lay to rest any legal queries that might arise from the expanded use of electronic commerce transactions. He submitted that many of the provisions may not be needed, however it is not a matter that should be dealt with by the gradual accrual of legal cases.

6.7 Hon Peter Foss QC re-iterated that the Bill states that electronic transactions are valid and explains how they should work. It does not require anyone to do anything but is purely a general statement of the law. This Bill is not prescriptive and it does not try to predict the technology of the future. Instead, it tries to outline what will be the legal consequences of using technology. The technology is unspecified.

6.8 The Committee identified that the Bill does not deal with criminal sanctions for those people who improperly access computer systems. The Committee was concerned that for the legislation to be effective in allowing people to conduct electronic transactions and in having electronic signatures recognised, there should be certainty that anyone

who improperly accesses computer systems or uses the electronic signatures of others will be effectively dealt with. The Committee queried whether including criminal sanctions in the Bill would help create the level of certainty the Bill purports to achieve and further encourage people to embrace the technology.

- 6.9 In answer to the Committee's concerns, Hon Peter Foss QC advised that the Bill is a law reform Bill that facilitates the application of the general law to this new area of electronic transactions. There are already provisions in *The Criminal Code* relating to the improper use of computers. Those provisions were included in 1991, and they have been updated since then. Hon Peter Foss QC advised the Committee that a complete update of that area of the law is in progress.
- 6.10 In response to the concerns raised by Mr Clarkson and Mr Dartnall, Hon Peter Foss QC advised the Committee that it would be inappropriate to include the provisions they had suggested as the Bill has been drafted only to enable courts to interpret how to deal with e-commerce transactions. He submitted that it is not a 'do this, do that' law.
- 6.11 Hon Peter Foss QC told the Committee that any provision relating to conscience should be included in the law – if there ever is one – that deals with the question of requiring someone to do something. He submitted that a conscience provision misunderstands the nature of, and would totally change the character of, the Bill.
- 6.12 The Committee was advised that concerns about civil rights matters should be dealt with in a civil rights Bill and not in this Bill.
- 6.13 Hon Peter Foss QC told the Committee that he doubted whether legislation would ever be passed making electronic transactions obligatory. He told the Committee that he was not aware of even the slightest suggestion that there was any intention to introduce legislation that required the use of electronic transactions. He submitted that he would not support it and he could not understand why anyone would want it.
- 6.14 Hon Peter Foss QC expressed his belief that the real threat is the gradual withdrawal of services from people who do not have computer access. He submitted that it is an inevitability of life and has nothing to do with the law. The pressure will not come from the law but will come from the lack of service for people who do not have a computer attached to the Internet, and the increased service for people who do have a computer attached to the Internet.
- 6.15 Hon Peter Foss QC also submitted that:

*“In any case, there is no point including it in this legislation because a subsequent law that imposed requirements would override it.”*

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**7 SELECTED CLAUSES OF THE *ELECTRONIC TRANSACTIONS BILL 2000*****7.1 Clause 3 – Object**

- 7.1.1 This clause lists the four objects of the Bill and notes how these objects are to be achieved. These objects are achieved by providing that, subject to certain exceptions, a transaction is not invalid because it took place electronically. That is, subject to certain exceptions, an electronic communication has the same validity as a written communication.
- 7.1.2 The things that can be done electronically with the same confidence as applies in written communications include giving information in writing, providing a signature, producing a document, recording information and retaining a document.
- 7.1.3 The Bill also provides rules for determining the time and place of the dispatch and receipt of electronic documents and the authority of the originator of the electronic communication.

**7.2 Clause 5 – Definitions**

- 7.2.1 The definitions in the Bill have been drafted in accordance with the basic principles of media neutrality and technology neutrality, as discussed in paragraphs 3.7 to 3.9 of this report. 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.
- 7.2.2 Applying these principles should also ensure that the Bill will not require constant amendment to deal with technological changes.

**“Consent”**

- 7.2.3 “Consent” includes consent that can reasonably be inferred from the conduct of the person concerned. However, any consent which is given subject to conditions is excluded unless the conditions are complied with.
- 7.2.4 The term “consent” is used in clauses 8, 9, and 10 in provisions that state a person must consent to receiving information in the form of an electronic communication.
- 7.2.5 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 prior to every electronic communication and that consent can be inferred from, for example, a history of transactions or previous dealings.

- 7.2.6 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.

**“Data storage device”**

- 7.2.7 The definition of “data storage device” 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 term is used in clauses 8, 10 and 11.

**“Electronic communication”**

- 7.2.8 “Electronic communication” is defined as a communication of information in the form of data, text or images by means of guided or unguided electromagnetic energy. The term also includes sound communications where the sound is processed at its destination by an automated voice recognition system.
- 7.2.9 This definition allows information in the form of sound 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 the computer program occurred as a result of a person's voice activation of that program or in any other way.
- 7.2.10 This provision is intended to maintain the existing distinction commonly made between oral and written communications. The intention is to prevent an electronic communication in the form of sound 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 telephone call, a message left on an answering machine or a message left on voicemail.
- 7.2.11 Communications by means of guided electromagnetic energy is intended to include the use of radio waves, visible light, microwaves, infra-red signals and other energy in the electromagnetic spectrum.
- 7.2.12 The word “unguided” in this context means that the electromagnetic energy is not restricted to a physical conduit, such as a cable or wire.

**“Transaction”**

7.2.13 “Transaction” is defined to include any transaction in the nature of a contract, agreement or other arrangement, including a transaction of a non-commercial nature. This term should 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.

**7.3 Clause 7 – Validity of electronic transactions**

7.3.1 Clause 7 is an expression of the fundamental principle of media neutrality that underpins the Bill. This clause provides for the legal recognition of electronic communications.

7.3.2 Subclause 7(1) is intended to make it clear that a transaction under a law of Western Australia is not 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.

7.3.3 The Committee notes that this 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. The transaction would still be required to satisfy all other existing legal requirements.

7.3.4 Subclause 7(2) provides that the general rule set out in subclause 7(1) does not apply in cases where more specific provision is made in another, more specific provision of Part 2.

7.3.5 Subclauses 7(3) and 7(4) allow exemptions to be made to this clause under the regulations in relation to a specified transaction or class of transaction, or a specified law of Western Australia. The Committee was advised by Hon Peter Foss QC that it is anticipated that matters such as wills, trusts and powers of attorney will be excluded from the operation of the proposed Act.

7.3.6 Hon Peter Foss QC submitted that wills, trusts and powers of attorney are single deeds, or deeds poll, as distinct from deeds made between two or more people. Deeds poll are made by one person and later acted on by another person.



- 7.3.7 Hon Peter Foss QC submitted that the legal system is not ready to handle wills electronically. They do not come into contention until after somebody has died, and there are specific extra formalities that relate to wills (such as the need for the presence of two witnesses to the execution of the will and rules regarding the relationship of the witnesses to the person making the will) that do not fit within this general law. Hon Peter Foss QC submitted that:

*“It will be very hard to shoehorn wills into this area of law.”*

- 7.3.8 The Committee was advised by Hon Peter Foss QC that trusts and powers of attorney do not have quite the same rules as wills, however the nature of such instruments to allow people to deal with other people’s property makes it difficult to imagine the scheme working in such situations.

- 7.3.9 Hon Peter Foss QC submitted that the Bill is mainly to assist commercial transactions between parties and that in his opinion wills, trusts and powers of attorney do not quite fit into that area. The Attorney General expressed his belief that:

*“I do not think the demand for wills, declarations of trust and powers of attorney to be done electronically will arise; if it did, a method by which to do that will hopefully by then have been worked out, and legislation could be passed. There is no demand, and I do not see why there would be demand.”*

#### 7.4 **Clause 8 – Writing**

- 7.4.1 This clause deals with providing information in writing. Subclauses 8(1) and 8(2) allow a person to satisfy a requirement or permission to give information in writing under a law of Western Australia 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 then and for subsequent reference.
- 7.4.2 In addition, the person to whom the information is required or permitted to be given must consent to the information being given by means of an electronic communication.
- 7.4.3 Subclause 8(1) deals with requirements under Western Australian law while subclause 8(2) deals with permissions under Western Australian 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.

- 7.4.4 One of the central conditions imposed on the use of electronic communications by clause 8 (and which is also used in clauses 10 and 11) is that, at the time the information is given, it must be reasonable to expect that the information would be readily accessible then and for subsequent reference. This requirement is imposed by paragraphs 8(1)(a) and 8(2)(a) of the Bill and has a number of elements that will be considered in turn.
- 7.4.5 The readily accessible requirement deals with the concepts of accessibility and useability. The requirement ensures that others will be able to access and use the information contained in the electronic communication and that transactions are not subsequently invalidated by a lack of access to the information.
- 7.4.6 Underpinning this requirement is the basic idea of information being reproduced or retrieved and read. The notion of information being readily accessible is intended to mean that information contained in an electronic communication should be readable and capable of being interpreted.
- 7.4.7 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 Western Australia. This will be the time that the electronic communication is transmitted, rather than the time that it is composed or drafted prior to transmittal.
- 7.4.8 The element of reasonableness makes it 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.
- 7.4.9 Whether an expectation is reasonable for the purposes of this clause will 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.

- 7.4.10 The concept of subsequent reference impliedly requires that electronic communications should be capable of retention. The Committee notes that the use of this concept does not mean that electronic communications must be retained; it simply means that they must be capable of retention.
- 7.4.11 Paragraphs 8(1)(b) and 8(2)(b) of the Bill specify that persons to whom information is required or permitted to be given must consent to the information being given to them by way of an electronic communication. This requirement means that a person can 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 Western Australian law.
- 7.4.12 The definition of “consent” is set out in clause 5 of the Bill and is discussed at paragraphs 7.2.3 to 7.2.6 of this report.
- 7.4.13 Subclause 8(3) makes it clear that the Bill does not affect the operation of any other Western Australian legislation that specifies the way in which electronic communications must be made. This means that existing Western Australian laws that specify particular information technology requirements, such as software requirements, may override the Bill.
- 7.4.14 Subclause 8(4) extends the meaning of giving information, as used in subclauses 8(1) and 8(2), to include the concepts of giving, sending or serving information, or any other like expression.
- 7.4.15 Subclause 8(5) extends the meaning of giving information to ensure that it applies to a wide range of situations. Although the list contains many of the common terms used when a person is required or permitted to give information, it is not intended to be comprehensive. It is a non-exhaustive list and is expressed as not being limited to the examples given within the list.

## 7.5 **Clause 9 – Signatures**

- 7.5.1 The intention of this clause is to allow a person to satisfy a legal requirement for a manual signature by using an electronic signature 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’. It may be a password, an identification number or a registered identification that can be applied to documents.

- 7.5.2 The choice of a particular method must be as reliable as appropriate in the circumstances.
- 7.5.3 In addition, the person to whom the signature is required to be given must consent to the use of that signature method.
- 7.5.4 The conditions contained in paragraph 9(1)(a) of the Bill 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 indicate their approval of the contents of the electronic communication.
- 7.5.5 Paragraph 9(1)(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. This would include factors such as the type of transaction and the function of the signature requirement in the relevant statutory environment.
- 7.5.6 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 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.
- 7.5.7 This is consistent with the principle of technology neutrality and enables signature methods to meet the appropriate objective standards at the time they are used.
- 7.5.8 Paragraph 9(1)(c) specifies that recipients of an electronic signature must consent to the use of the electronic signature method.
- 7.5.9 Subclause 9(2) makes it clear that the Bill does not affect the operation of any other Western Australian law that specifies the use of any electronic signature method. This provision is intended to have a similar purpose and operation to subclause 8(3).
- 7.5.10 The Committee accepts that electronic signatures are central to electronic transactions and that this clause provides the framework to recognise electronic signatures and give them legal standing. However the Committee believes that people entering into electronic transactions require a level of security that they are dealing with a trusted source and that an electronic signature has not been tampered with.

- 7.5.11 The Committee sought clarification of this issue from Hon Peter Foss QC at its hearing on October 11 2000. Hon Peter Foss QC advised the Committee that to some extent the law is vague on signatures in ordinary transactions. One is not required to personally sign one's own signature but may adopt the process of having someone else sign on one's behalf.
- 7.5.12 Hon Peter Foss QC noted that it is always possible to forge signatures and that it is up to individuals to choose their acceptable form of signature. It is for individuals to insist upon a form of signature that guarantees their protection.
- 7.5.13 The Committee was advised that with respect to clause 9 of the Bill, the person who uses a signature makes his own decision about how secure he wants the signature to be. The person who receives the signature has to be satisfied in his own mind that it is the signature of the person with whom he is dealing. If people do not want to accept it, they do not have to.
- 7.5.14 Hon Peter Foss QC informed the Committee that the Bill is not trying to establish a set of mores for electronic transactions different from those that currently apply.

## **7.6 Clause 10 – Production of document**

- 7.6.1 Clause 10 allows a person to satisfy a requirement or permission to produce a document that is in the form of paper, an article or other material by using an electronic communication that complies with a number of requirements.
- 7.6.2 Those requirements are that there must be a reliable assurance as to the integrity of the information in the message, the information must be readily accessible then and for subsequent reference and the person to whom the information is required or permitted to be produced consents to the information being produced electronically.
- 7.6.3 The Committee notes that clause 10 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 8 would apply and the information can be given by way of an electronic communication.
- 7.6.4 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 10(1)(a) and 10(2)(a) of the Bill 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.

- 7.6.5 The measure of what is a reliable means of assuring the maintenance of the integrity of information 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.
- 7.6.6 Paragraphs 10(1)(b) and 10(2)(b) set out the 'readily accessible' requirement in relation to the production of documents. This requirement is intended to have the same purpose and operation as the 'readily accessible' requirement set out in paragraph 8(1)(a) of the Bill which is discussed at paragraphs 7.4.4 to 7.4.10 of this report.
- 7.6.7 Paragraphs 10(1)(c) and 10(2)(c) provide that recipients of a document must consent to the production of an electronic form of the document. This provision is intended to have a similar purpose and operation as paragraphs 8(1)(b) and 8(2)(b) of the Bill which are discussed at paragraphs 7.4.11 and 7.4.12 of this report.
- 7.6.8 Subclause 10(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.
- 7.6.9 The Committee notes that 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 integrity of the electronic document.

- 7.6.10 The term “endorsement” is not intended to include additions to the information contained in the document itself, such as annotations, signatures or initials.
- 7.6.11 The term “immaterial change” would generally allow formatting changes to occur to the information contained in the document. The Committee notes that it is not intended to allow formatting changes to be made where the format is an important element of the document itself.
- 7.6.12 Subclause 10(4) makes it clear that this clause does not affect the operation of any other Western Australian law dealing with the production of electronic forms of documents. This provision is intended to have a similar purpose and operation as subclause 8(3) discussed at paragraph 7.4.13 of this report.

## **7.7 Clause 11 – Retention of information and documents**

- 7.7.1 This clause provides that requirements for the recording of information in writing, the retention of documents that are in the form of paper, an article or other material and the retention of electronic communications can be satisfied by information in electronic form, subject to certain specified requirements being satisfied.
- 7.7.2 Paragraphs 11(1)(a), 11(2)(b), 11(4)(a) and 11(4)(d) use the objective requirement that the information retained must be reasonably readily accessible for subsequent reference. This requirement must be satisfied at the time the information is either recorded or retained, depending on the relevant subclause. This requirement is intended to have the same purpose and operation as the ‘readily accessible’ requirement set out in paragraph 8(1)(a) of the Bill which is discussed at paragraphs 7.4.4 to 7.4.10 of this report.
- 7.7.3 Paragraphs 11(1)(b), 11(2)(c) and 11(4)(e) of the Bill each contain 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 or retained on a particular kind of data storage device. A person must comply with any such requirements. The purpose of this provision is to 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 than another storage device. “Data storage device” is defined in clause 5 of the Bill and is discussed at paragraph 7.2.7 of this report.
- 7.7.4 Paragraph 11(1)(a) provides that an electronic form of information can satisfy a requirement under a Western Australian 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 for subsequent reference.

- 7.7.5 As discussed above, paragraph 11(1)(b) of the Bill provides that the regulations may require the use of a particular data storage device.
- 7.7.6 Paragraphs 11(2)(a) and 11(2)(b) provide that an electronic version of a document can satisfy a requirement under a Western Australian law to retain a document in the form of paper, an article or other 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 10(1)(a) of the Bill which is discussed at paragraphs 7.6.4 and 7.6.5 of this report.
- 7.7.7 As discussed above, paragraph 11(2)(c) of the Bill provides that the regulations may require the use of a particular data storage device.
- 7.7.8 The integrity requirement is set out in subclause 11(3). It is intended to have a similar purpose and operation as subclause 10(3) discussed at paragraphs 7.6.8 to 7.6.11 of this report. This 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.
- 7.7.9 Subclause 11(4) sets out the requirements that must be met to establish the validity of information that was the subject of an electronic communication that has been retained electronically over time. An example of such information is an electronic mail message.
- 7.7.10 The person retaining the information must satisfy the integrity and 'readily accessible' requirements as set out in paragraphs 11(4)(a) and 11(4)(b) of the Bill. The Committee notes that the integrity requirement is further set out in subclause 11(5) which has a similar purpose and operation as subclause 10(3) discussed at paragraphs 7.6.8 to 7.6.11 of this report.
- 7.7.11 In addition, paragraph 11(4)(c) requires the person retaining the information to also retain additional information that will identify the origin and destination of the electronic communication and the time when the electronic communication was sent and received.
- 7.7.12 Paragraph 11(4)(d) provides that this additional information must be retained in a way that satisfies the 'readily accessible' requirement.



7.7.13 Paragraph 11(4)(e) provides that the regulations may require the use of particular data storage devices.

## **7.8 Clause 12 – Exemptions from this Division**

7.8.1 Clause 12 deals with exemptions from Division 2 of the Bill by providing that regulations may be made to exempt specified requirements or specified class of requirements, specified permissions or specified class of permissions or specified Western Australian laws from any or all of the provisions of Division 2.

7.8.2 In general, appropriate exemptions will be made where the purpose or intention of a requirement, permission or Western Australian law cannot be satisfied by the use of electronic communications.

7.8.3 The Committee was advised by Hon Peter Foss QC that it is the Government's intention that things such as wills and codicils, trust documents and powers of attorney will be excluded at the commencement of the legislation. This is discussed further at paragraphs 7.3.5 to 7.3.9 of this report.

## **7.9 Clause 13 – Time and place of dispatch and receipt of electronic communications**

7.9.1 For many existing laws it is important to determine the time and place of dispatch and receipt of information. The Committee notes that clause 13 recognises this by providing 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.

7.9.2 Clause 13 sets out the 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.

7.9.3 Subclauses 13(1) and 13(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.

7.9.4 Subclauses 13(1) and 13(2) deal separately with situations where an electronic communication enters a single information system or multiple information systems outside the control of the originator when it is transmitted, however 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.

- 7.9.5 It is necessary to deal with the situation where an electronic communication enters more than one electronic system because most communications across the Internet, for example, are routed through multiple information systems. In this situation, subclause 13(2) applies and dispatch is deemed to occur when the communication enters the first information system outside the control of the originator.
- 7.9.6 Subclauses 13(3) and 13(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.
- 7.9.7 Where the addressee has given specific directions and the electronic communication is transmitted in accordance with those directions, subclause 13(3) provides 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.
- 7.9.8 In all other cases subclause 13(4) operates to provide 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. An example is where an addressee is aware that a communication is in their electronic mail ‘box’ but refuses to read it. In that case the addressee should be considered to have received the communication.
- 7.9.9 Subclauses 13(5) and 13(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.
- 7.9.10 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.

- 7.9.11 Subclause 13(5) establishes that the dispatch of an electronic communication is deemed to occur from the originator's place of business and the receipt of an electronic communication is deemed to occur at the addressee's place of business.
- 7.9.12 Paragraphs 13(6)(a) and 13(6)(b) of the Bill make provision for circumstances where the originator or addressee have more than one place of business. Where there is a place of business that has a closer relationship to the underlying transaction of which the electronic communication forms a part, then the place of dispatch or receipt is deemed to be that place of business. 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.
- 7.9.13 If the originator or the addressee has no place of business then paragraph 13(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.
- 7.9.14 Subclauses 13(7) and 13(8) allow specified electronic communications, specified classes of electronic communications and specified laws of Western Australia to be exempted from the application of clause 13 by regulations.

#### **7.10 Clause 14 – Attribution of electronic communications**

- 7.10.1 Subclause 14(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. The Committee notes that 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.
- 7.10.2 Subclause 14(2) is intended to ensure that the existing law of agency is not affected by the rule set out in subclause 14(1). Instead, the operation of the laws of agency, including the doctrines of apparent and actual authority, are preserved.

7.10.3 Subclauses 14(3) and 14(4) allow specified electronic communications, specified classes of electronic communications and specified laws of Western Australia to be exempted from the application of clause 14 by regulations.

7.10.4 Subclause 14(5) provides that the proposed Act applies, with any necessary modifications, to conduct referred to in proposed subclause 14(2).

#### 7.11 **Clause 15 – Regulations**

7.11.1 Clause 15 provides that regulations may be made under the proposed Act.

### **8 CONCLUSIONS**

8.1 The Committee believes that the use of electronic transactions will continue to increase at a rapid rate as the use of the Internet and other electronic communication technologies continue to be adopted worldwide.

8.2 The Bill is an enabling piece of legislation that deals only with law reform. It is intended to clarify any legal queries that might arise from the expanded use of e-commerce transactions.

8.3 All major stakeholders contacted by the Committee expressed their support for the Bill.

8.4 The Committee identified that the Bill does not deal with criminal sanctions for those people who improperly access computer systems. The Committee notes that there are currently provisions in *The Criminal Code* which relate to the improper access of computer systems and the improper use of electronic signatures. Therefore the Committee concludes that it is not appropriate to include similar provisions in the Bill.

8.5 The Committee notes the concerns of conscience expressed by two of the witnesses at its hearing into the Bill. The Committee concludes that it would not be appropriate to include conscience provisions in the Bill as it is a law reform Bill and has been drafted to enable courts to interpret how to deal with e-commerce transactions. The Committee also notes that, in any event, any subsequent law that imposed a requirement to conduct a transaction electronically would override a conscience provision.

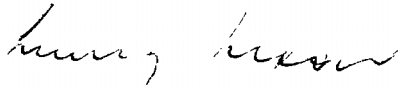
8.6 The Committee concludes that it appears appropriate that any future legislation that seeks to require the use of electronic transactions should include a provision relating to conscientious objection.

8.7 The Committee also concludes that concerns about civil rights matters such as conscientious objection could only be dealt with in a Bill of Civil Rights.

**9 RECOMMENDATIONS**

**Recommendation 1:** The Committee recommends that when considering any future legislation that imposes a requirement to conduct a transaction electronically, the Legislative Council should consider including a provision for conscientious objection.

**Recommendation 2:** The Committee recommends that all clauses of the *Electronic Transactions Bill 2000* be passed.



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**Hon Murray Nixon JP, MLC**

**Chairman**

**Date: 06/11/00**