

Western Australia

Electronic Transactions Act 2011

As at 25 Oct 2011

No. 46 of 2011

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Electronic Transactions Act 2011

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Defined Terms

Western Australia

Electronic Transactions Act 2011

No. 46 of 2011

An Act to facilitate electronic transactions, to repeal the *Electronic Transactions Act 2003* and in consequence amend other Acts and for other purposes.

[Assented to 25 October 2011]

The Parliament of Western Australia enacts as follows:

Part 1 — Preliminary

1. Short title

This is the *Electronic Transactions Act 2011*.

2. Commencement

This Act comes into operation as follows —

- (a) sections 1 and 2 — on the day on which this Act receives the Royal Assent;
- (b) section 26 —
 - (i) if the *Criminal Code Amendment (Identity Crime) Act 2010* section 5 (**section 5**) comes into operation on or before the day on which section 24 comes into operation — when section 24 comes into operation; or
 - (ii) otherwise — when section 5 comes into operation;
- (c) the provisions of the Act other than sections 1, 2 and 26 — on a day fixed by proclamation, and different days may be fixed for different provisions.

3. Object

The object of this Act is to provide a regulatory framework that —

- (a) recognises the importance of the electronic communication of information to the future economic and social prosperity of Western Australia; and
- (b) facilitates the use of electronic communication as a way of entering into transactions; and
- (c) promotes business and community confidence in the use of electronic communication as a way of entering into transactions; and

- (d) enables business and the community to use electronic communication in their dealings with government.

4. Simplified outline

- (1) This section contains a simplified outline of this Act, intended as a guide to the general scheme and effect of the Act.
- (2) This Act provides —
 - (a) that, with certain exceptions, a transaction is not invalid for the purposes of a law of the State because it took place by electronic communication;
 - (b) that things that can or have to be done under a law of the State in relation to any of the following matters can generally be done by electronic communication —
 - (i) giving information in writing;
 - (ii) providing a signature;
 - (iii) producing a document;
 - (iv) recording information;
 - (v) retaining a document;
 - (c) for determining the time and place of the dispatch and receipt of an electronic communication for the purposes of a law of the State;
 - (d) that the purported originator of an electronic communication is bound by it for the purposes of a law of the State only if the communication was sent by the purported originator or with the authority of the purported originator.
- (3) This Act also contains provisions applying to contracts involving electronic communications, including provisions (relating to the internet in particular) for the following —
 - (a) an unaddressed proposal to form a contract is to be regarded as an invitation to make offers, rather than as an offer that if accepted would result in a contract;

- (b) a contract formed automatically is not invalid, void or unenforceable because there was no human review or intervention;
- (c) a portion of an electronic communication containing an input error can be withdrawn in certain circumstances;
- (d) the application of certain provisions of Part 2 to the extent they do not apply of their own force.

5. Terms used and status of notes

- (1) In this Act —

addressee of an electronic communication means a person who is intended by the originator to receive the electronic communication, but does not include a person acting as an intermediary with respect to the electronic communication;

automated message system means a computer program or an electronic or other automated means used to initiate an action or respond to data messages in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system;

consent includes consent that can reasonably be inferred from the conduct of the person concerned, but does not include consent given subject to conditions unless the conditions are complied with;

data includes the whole or part of a computer program within the meaning of the *Copyright Act 1968* (Commonwealth);

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

electronic communication means —

- (a) a communication of information in the form of data, text or images by means of guided or unguided electromagnetic energy, or both; or
- (b) a communication of information in the form of sound by means of guided or unguided electromagnetic energy, or

both, where the sound is processed at its destination by an automated voice recognition system;

information means information in the form of data, text, images or sound;

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

information technology requirements includes software requirements;

law of this jurisdiction means any law in force in this jurisdiction, whether written or unwritten, but does not include a law of the Commonwealth;

non-profit body means a body that is not carried on for the purposes of profit or gain to its individual members and is, by the terms of the body's constitution, prohibited from making any distribution, whether in money, property or otherwise, to its members;

originator of an electronic communication means a person by whom, or on whose behalf, the electronic communication has been sent or generated before storage, if any, but does not include a person acting as an intermediary with respect to the electronic communication;

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

place of business means —

- (a) in relation to a person, other than an entity referred to in paragraph (b), a place where the person maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location; or
- (b) in relation to a government, an authority of a government or a non-profit body, a place where any operations or activities are carried out by that government, authority or body;

this jurisdiction means Western Australia;

transaction includes —

- (a) any transaction in the nature of a contract, agreement or other arrangement; and
 - (b) any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract, agreement or other arrangement; and
 - (c) any transaction of a non-commercial nature.
- (2) Notes in this Act are provided to assist understanding and do not form part of the Act.

6. Crown to be bound

This Act binds the Crown in right of Western Australia and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

7. Exemptions

- (1) The regulations may provide that all or specified provisions of this Act do not apply —
- (a) to transactions, requirements, permissions, electronic communications or other matters specified, or of classes specified, in the regulations for the purposes of this section; or
 - (b) in circumstances specified, or of classes specified, in the regulations for the purposes of this section.
- (2) The regulations may provide that all or specified provisions of this Act do not apply to specified laws of this jurisdiction.

Part 2 — Application of legal requirements and authorisations to electronic communications

Division 1 — General rule about validity of transactions for the purposes of laws of this jurisdiction

8. Validity of electronic transactions

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

Division 2 — Things done under laws of this jurisdiction

9. Writing

- (1) If, under a law of this jurisdiction, a person is required to give information in writing, that requirement is taken to have been met if the person gives the information by means of an electronic communication, where —
 - (a) at the time the information was given, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference; and
 - (b) the person to whom the information is required to be given consents to the information being given by means of an electronic communication.
- (2) If, under a law of this jurisdiction, a person is permitted to give information in writing, the person may give the information by means of an electronic communication, where —
 - (a) at the time the information was given, it was reasonable to expect that the information would be readily

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- accessible so as to be useable for subsequent reference;
and
- (b) the person to whom the information is permitted to be given consents to the information being given by means of an electronic communication.
- (3) This section does not affect the operation of any other law of this jurisdiction that makes provision for or in relation to requiring or permitting information to be given, in accordance with particular information technology requirements —
- (a) on a particular kind of data storage device; or
- (b) by means of a particular kind of electronic communication.
- (4) This section applies to a requirement or permission to give information, whether the expression *give*, *send* or *serve*, or any other expression, is used.
- (5) For the purposes of this section, *giving information* includes, but is not limited to, the following —
- (a) making an application;
- (b) making or lodging a claim;
- (c) giving, sending or serving a notification;
- (d) lodging a return;
- (e) making a request;
- (f) making a declaration;
- (g) lodging or issuing a certificate;
- (h) making, varying or cancelling an election;
- (i) lodging an objection;
- (j) giving a statement of reasons.

10. Signatures

- (1) If, under a law of this jurisdiction, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication if —
- (a) a method is used to identify the person and to indicate the person's intention in respect of the information communicated; and
 - (b) the method used was either —
 - (i) as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
 - (ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence;
- and
- (c) the person to whom the signature is required to be given consents to that requirement being met by the use of the method mentioned in paragraph (a).
- (2) This section does not affect the operation of any other law of this jurisdiction that makes provision for or in relation to requiring —
- (a) an electronic communication to contain an electronic signature (however described); or
 - (b) an electronic communication to contain a unique identification in an electronic form; or
 - (c) a particular method to be used in relation to an electronic communication to identify the originator of the communication and to indicate the originator's intention in respect of the information communicated.

- (3) The reference in subsection (1) to a law that requires a signature includes a reference to a law that provides consequences for the absence of a signature.

11. Production of document

- (1) If, under a law of this jurisdiction, a person is required to produce a document that is in the form of paper, an article or other material, that requirement is taken to have been met if the person produces, by means of an electronic communication, an electronic form of the document, where —
- (a) having regard to all the relevant circumstances at the time the communication was sent, the method of generating the electronic form of the document provided a reliable means of assuring the maintenance of the integrity of the information contained in the document; and
 - (b) at the time the communication was sent, it was reasonable to expect that the information contained in the electronic form of the document would be readily accessible so as to be useable for subsequent reference; and
 - (c) the person to whom the document is required to be produced consents to the production, by means of an electronic communication, of an electronic form of the document.
- (2) If, under a law of this jurisdiction, a person is permitted to produce a document that is in the form of paper, an article or other material, then, instead of producing the document in that form, the person may produce, by means of an electronic communication, an electronic form of the document, where —
- (a) having regard to all the relevant circumstances at the time the communication was sent, the method of generating the electronic form of the document provided a reliable means of assuring the maintenance of the

integrity of the information contained in the document;
and

(b) at the time the communication was sent, it was
reasonable to expect that the information contained in
the electronic form of the document would be readily
accessible so as to be useable for subsequent reference;
and

(c) the person to whom the document is permitted to be
produced consents to the production, by means of an
electronic communication, of an electronic form of the
document.

(3) For the purposes of this section, the integrity of information
contained in a document is maintained if, and only if, the
information has remained complete and unaltered, apart from —

(a) the addition of any endorsement; or

(b) any immaterial change,

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

(4) This section does not affect the operation of any other law of
this jurisdiction that makes provision for or in relation to
requiring or permitting electronic forms of documents to be
produced, in accordance with particular information technology
requirements —

(a) on a particular kind of data storage device; or

(b) by means of a particular kind of electronic
communication.

12. Retention of information and documents

(1) If, under a law of this jurisdiction, a person is required to record
information in writing, that requirement is taken to have been
met if the person records the information in electronic form,
where —

(a) at the time of the recording of the information, it was
reasonable to expect that the information would be

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readily accessible so as to be useable for subsequent
reference; and

- (b) if the regulations require that the information be
recorded on a particular kind of data storage device, that
requirement has been met.

- (2) If, under a law of this jurisdiction, a person is required to retain,
for a particular period, a document that is in the form of paper,
an article or other material, that requirement is taken to have
been met if the person retains, or causes another person to
retain, an electronic form of the document throughout that
period, where —

- (a) having regard to all the relevant circumstances at the
time of the generation of the electronic form of the
document, the method of generating the electronic form
of the document provided a reliable means of assuring
the maintenance of the integrity of the information
contained in the document; and
- (b) at the time of the generation of the electronic form of the
document, it was reasonable to expect that the
information contained in the electronic form of the
document would be readily accessible so as to be
useable for subsequent reference; and
- (c) if the regulations require that the electronic form of the
document be retained on a particular kind of data
storage device, that requirement has been met
throughout that period.

- (3) For the purposes of subsection (2), the integrity of information
contained in a document is maintained if, and only if, the
information has remained complete and unaltered, apart from —

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

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

- (4) If, under a law of this jurisdiction, a person (the *first person*) is required to retain, for a particular period, information that was the subject of an electronic communication, that requirement is taken to have been met if the first person retains, or causes another person to retain, in electronic form, the information throughout that period, where —
- (a) at the time of commencement of the retention of the information, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference; and
 - (b) having regard to all the relevant circumstances at the time of commencement of the retention of the information, the method of retaining the information in electronic form provided a reliable means of assuring the maintenance of the integrity of the information contained in the electronic communication; and
 - (c) throughout that period, the first person also retains, or causes the other person to retain, in electronic form, such additional information obtained by the first person as is sufficient to enable the identification of the following —
 - (i) the origin of the electronic communication;
 - (ii) the destination of the electronic communication;
 - (iii) the time when the electronic communication was sent;
 - (iv) the time when the electronic communication was received;and
 - (d) at the time of commencement of the retention of the additional information covered by paragraph (c), it was reasonable to expect that the additional information would be readily accessible so as to be useable for subsequent reference; and

- (e) if the regulations require that the information be retained on a particular kind of data storage device, that requirement has been met throughout that period.
- (5) For the purposes of subsection (4), the integrity of information that was the subject of an electronic communication is maintained if, and only if, the information has remained complete and unaltered, apart from —
 - (a) the addition of any endorsement; or
 - (b) any immaterial change,which arises in the normal course of communication, storage or display.

Division 3 — Other provisions relating to laws of this jurisdiction

13. Time of dispatch

- (1) For the purposes of a law of this jurisdiction, unless otherwise agreed between the originator and the addressee of an electronic communication, the time of dispatch of the electronic communication is —
 - (a) the time when the electronic communication leaves an information system under the control of the originator or of the party who sent it on behalf of the originator; or
 - (b) if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received by the addressee.

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

- (2) Subsection (1) applies even though the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is taken to have been dispatched under section 15.

14. Time of receipt

- (1) For the purposes of a law of this jurisdiction, unless otherwise agreed between the originator and the addressee of an electronic communication —
 - (a) the time of receipt of the electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee; or
 - (b) the time of receipt of the electronic communication at another electronic address of the addressee is the time when both —
 - (i) the electronic communication has become capable of being retrieved by the addressee at that address; and
 - (ii) the addressee has become aware that the electronic communication has been sent to that address.
- (2) For the purposes of subsection (1), unless otherwise agreed between the originator and the addressee of the electronic communication, it is to be assumed that the electronic communication is capable of being retrieved by the addressee when it reaches the addressee's electronic address.
- (3) Subsection (1) applies even though the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is taken to have been received under section 15.

15. Place of dispatch and place of receipt

- (1) For the purposes of a law of this jurisdiction, unless otherwise agreed between the originator and the addressee of an electronic communication —
 - (a) the electronic communication is taken to have been dispatched at the place where the originator has its place of business; and

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- (b) the electronic communication is taken to have been received at the place where the addressee has its place of business.
- (2) For the purposes of the application of subsection (1) to an electronic communication —
 - (a) a party's place of business is assumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location; and
 - (b) if a party has not indicated a place of business and has only one place of business, it is to be assumed that that place is the party's place of business; and
 - (c) if a party has not indicated a place of business and has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the transaction; and
 - (d) if a party has not indicated a place of business and has more than one place of business, but paragraph (c) does not apply, it is to be assumed that the party's principal place of business is the party's only place of business; and
 - (e) if a party is a natural person and does not have a place of business, it is to be assumed that the party's place of business is the place of the party's habitual residence.
- (3) A location is not a place of business merely because that is —
 - (a) where equipment and technology supporting an information system used by a party are located; or
 - (b) where the information system may be accessed by other parties.
- (4) The sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not

create a presumption that its place of business is located in that country.

16. Attribution of electronic communications

- (1) For the purposes of a law of this jurisdiction, unless otherwise agreed between the purported originator and the addressee of an electronic communication, the purported originator of the electronic communication is bound by that communication only if the communication was sent by the purported originator or with the authority of the purported originator.
- (2) Subsection (1) does not affect the operation of a law of this jurisdiction that makes provision for —
 - (a) conduct engaged in by a person within the scope of the person's actual or apparent authority to be attributed to another person; or
 - (b) a person to be bound by conduct engaged in by another person within the scope of the other person's actual or apparent authority.

Part 3 — Additional provisions applying to contracts involving electronic communications

17. Application and operation of this Part

This Part applies to the use of electronic communications in connection with the formation or performance of a contract between parties where the proper law of the contract is (or would on its formation be) the law of this jurisdiction, and so applies —

- (a) whether some or all of the parties are located within Australia or elsewhere; and
- (b) whether the contract is for business purposes, for personal, family or household purposes, or for other purposes.

18. Invitation to treat regarding contracts

- (1) A proposal to form a contract made through one or more electronic communications that —
 - (a) is not addressed to one or more specific parties; and
 - (b) is generally accessible to parties making use of information systems,

is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

- (2) Subsection (1) extends to proposals that make use of interactive applications for the placement of orders through information systems.

19. Use of automated message systems for contract formation — non-intervention of natural person

A contract formed by —

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

(b) the interaction of automated message systems,

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

20. Error in electronic communications regarding contracts

(1) This section applies in relation to a statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract.

(2) If —

(a) a natural person makes an input error in an electronic communication exchanged with the automated message system of another party; and

(b) the automated message system does not provide the person with an opportunity to correct the error,

the person, or the party on whose behalf the person was acting, has the right to withdraw the portion of the electronic communication in which the input error was made if —

(c) the person, or the party on whose behalf the person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication; and

(d) the person, or the party on whose behalf the person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.

(3) The right of withdrawal of a portion of an electronic communication under this section is not of itself a right to rescind or otherwise terminate a contract.

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- (4) The consequences (if any) of the exercise of the right of withdrawal of a portion of an electronic communication under this section are to be determined in accordance with any applicable rule of law.

Note: In some circumstances the withdrawal of a portion of an electronic communication may invalidate the entire communication or render it ineffective for the purposes of contract formation (see paragraph 241 of the UNCITRAL explanatory note for the United Nations Convention on the Use of Electronic Communications in International Contracts).

21. Application of Act in relation to contracts

- (1) Subject to subsection (2), the provisions of sections 8 and 13 to 15 apply to —
- (a) a transaction constituted by or relating to a contract; or
 - (b) an electronic communication relating to the formation or performance of a contract,

in the same way as they apply to a transaction or electronic communication referred to in those sections, and so apply as if the words “For the purposes of a law of this jurisdiction” were omitted.

- (2) However, this Part (including subsection (1)) does not apply to or in relation to a contract to the extent that —
- (a) Part 2 would of its own force have the same effect as this Part if this Part applied; or
 - (b) a law of another State or Territory (that is in substantially the same terms as Part 2) would of its own force have the same effect as this Part if this Part applied.

Note: This section applies provisions of Part 2 to contracts or proposed contracts to the extent (if any) that those provisions do not apply merely because they are expressed to apply in relation to a law of this jurisdiction. This section also disapplies the provisions of Part 3 to the extent that Part 2 would apply of its own force. An example where Part 2 may not apply of its own force is where a contract is being negotiated in a State or Territory from a supplier located overseas.

Part 4 — Miscellaneous

22. Regulations

The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.

23. Transitional provisions

- (1) Subject to subsection (2) —
 - (a) section 18 extends to proposals made before the commencement day; and
 - (b) section 19 extends to actions carried out before the commencement day; and
 - (c) section 20 extends to statements, declarations, demands, notices or requests, including offers and the acceptance of offers, made or given before the commencement day.
- (2) Subsection (1) and Part 3 do not apply in relation to contracts formed before the commencement day.
- (3) In subsections (1) and (2) —
commencement day means the day of commencement of Part 3.

24. *Electronic Transactions Act 2003* repealed

The *Electronic Transactions Act 2003* is repealed.

25. Acts amended

- (1) This section amends the Acts listed in the Table.
- (2) Amend the provisions listed in the Table as set out in the Table.

Table

Provision	Delete	Insert
1. <i>Bail Act 1982</i>		
s. 3(1) def. of <i>electronic communication</i>	<i>Electronic Transactions Act 2003</i> section 5	<i>Electronic Transactions Act 2011</i> section 5(1)
s. 3A(2)	<i>Electronic Transactions Act 2003</i> section 5	<i>Electronic Transactions Act 2011</i> section 5(1)
2. <i>The Criminal Code</i>		
s. 204B(1) def. of <i>electronic communication</i>	section 5 of the <i>Electronic Transactions Act 2003</i>	the <i>Electronic Transactions Act 2011</i> section 5(1)
3. <i>Legal Profession Act 2008</i>		
s. 290(6)(d)	<i>Electronic Transactions Act 2003</i> section 9	<i>Electronic Transactions Act 2011</i> section 10

26. *The Criminal Code* amended

- (1) This section amends *The Criminal Code* (as amended by the *Criminal Code Amendment (Identity Crime) Act 2010* section 5).

- (2) In section 489 in the definition of ***electronic communication*** delete “*Electronic Transactions Act 2003* section 5;” and insert:

Electronic Transactions Act 2011 section 5(1);

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Defined Terms

Defined Terms

*[This is a list of terms defined and the provisions where they are defined.
The list is not part of the law.]*

Defined Term	Provision(s)
addressee	5(1)
automated message system	5(1)
commencement day	23(3)
consent	5(1)
data.....	5(1)
data storage device.....	5(1)
electronic communication.....	5(1)
first person	12(4)
give	9(4)
giving information	9(5)
information.....	5(1)
information system	5(1)
information technology requirements	5(1)
law of this jurisdiction	5(1)
non-profit body	5(1)
originator.....	5(1)
performance	5(1)
place of business	5(1)
section 5	2
send	9(4)
serve	9(4)
this jurisdiction	5(1)
transaction.....	5(1)