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electronic documentation

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implications for security of payment

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Electronic Transactions



There is now a substantial body of Australian and overseas case law which supports the use of electronic communication in both statutory and contractual contexts. Most of those cases relate to the use of e-mails – see for example *Kation v Lamru* [2012] NSWSC 356, [30]-[32] **(1)**; *Kavia v Suntrack* [2011] NSWSC 716, [33] **(2)**.

In one case, *Islamic Council v Federation of Islamic Council* [2009] NSWSC 211 at [20] **(3)** a judge said about an e-mail “ To my mind, it is nonetheless writing if it appears on a computer screen”.

There is a clear recognition in case law that “writing” can exist in a non-tangible digital format and that a person can “sign” such a writing by entering appropriate identifying details into a computer.

However, to remove any doubt, the Parliaments of every Australian state and territory as well as the Commonwealth have passed uniform legislation designed to facilitate electronic commerce.

That legislation is modelled on the United Nations 'Commission on International Trade Law's Model Law on Electronic Commerce' which provides a framework for contracts to be transacted electronically.

In Australia, the expressed objectives of the Electronic Transactions Acts are:

- 1.** to recognise the importance of the information economy to the future economic and social prosperity of Australia;
- 2.** to facilitate the use of electronic transactions;
- 3.** to promote business and community confidence in the use of electronic transactions; and
- 4.** to enable business and the community to use electronic communications in dealings with governments.

The legislation preserves all the usual legal rules about formation, interpretation, performance and enforcement of contracts. It simply allows electronic documents to be substituted for paper documents and clarifies how they can be signed, authenticated and transmitted.

Electronic Communications



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The term “electronic communications” is used throughout the Electronic Transactions Acts. It is defined very broadly to include

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

That covers a wide range of communications protocols including document sharing platforms and e-mails.

Electronic Communications and SOPA



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At a fundamental level, the legislation clarifies that transactions may be documented in electronic communications, rather than written on paper. Many laws require information to be provided in writing, for example; when making applications, lodging claims, sending notifications, lodging returns, making requests, making declarations or lodging objections.

The requirement for written documents under security of payment laws varies between jurisdictions. For example, in Qld, the supporting statement must be written but not so in other States. In all of those cases, the information may be validly provided by way of electronic communication.

In each case, the sender must have reason to expect that the electronic communication will be in a form that is “readily accessible for subsequent reference”. That will generally be where the file is provided in a common file format that can be saved to a computer storage device, such as HTML, PDF, doc, docx, rtf, xls, xlsx, txt, csv, pps, eml, msg, jpeg, png, dwg, dxf and many others. Illegible copies scanned from paper documents do not meet that criteria.

In the past, some courts have adopted the view that the electronic file is not downloaded and stored within the addressee’s own device unless and until the e-mail or message is opened and downloaded.

Until then, the addressee does not receive any attachments in readable form that is readily accessible for subsequent reference - *Austar Finance Group Pty Ltd v Campbell* (2007] NSWSC 1493 (4); *Parkview Constructions Pty Limited v Total Lifestyle Windows Pty Ltd* [2017] NSWSC 194 (5).

In the same way, a link in an e-mail or message to a document stored in a cloud server cannot be said to be given to the addressee until the addressee opens that link and downloads the document to the addressee's own device. Again, any complaint in that behalf can be overcome by appropriate contractual provisions being made in advance.

Jurisdictional Differences

- The NSW and WA legislation allows notices required by the legislation to be served by e-mail.
- The Victorian and Tasmanian Acts requires it to be served by hand-delivery, post or fax or as permitted in the contract.
- In Queensland, it must be hand delivered or sent “by post, telex, facsimile or similar facility”. A Court has doubted that email or document sharing platforms are a “similar facility”. *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd and Anor* (6).

Service of Electronic Documents



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Importantly, the person to whom the information is required to be given must have consented to the information being given by way of an electronic communication. That consent might be explicitly contained in any contract between the parties. Not all contracts contain such a clause. For example the common AS4902-2000 requires notices to be delivered, faxed or posted, but does not permit them to be e-mailed.

Otherwise, consent may be inferred in the circumstances from the conduct of the recipient. For example, the conventional acceptance of other electronic communications in the course of contract administration might form a basis for such an inference.

In any case, the conduct must be clear and unambiguous that the recipient is content to receive documents electronically.

Time

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The electronic transactions statutes make rules about when and where electronic communications are taken to be sent and received. The internet is highly dispersed and extremely interconnected. When data is transmitted, it is routed in packets via many computing devices. For commercial purposes, the data may be treated as 'sent' when it first enters an information system outside the control of the originator. Conversely, the legislation allows us to treat data as 'received' when it first enters the information system designated by the addressee or when it first comes to the attention of the addressee.

The security of payment legislation mandates tight timeframes for service of payment claims and payment schedules. A document cannot be said to be "served" within the meaning of those statutes unless and until it is received by the addressee's own device or network server or it "comes to the attention of the addressee".

About the Authors



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Kreisson is a specialist construction and engineering firm with vast experienced with security of payment claims and adjudications. If you need help with preparing or administering a contract or dealing with disputes about quality, time or cost in any Australian State, phone us on **(02) 8239 6500**.

Case References

- (1) *Kation v Lamru* [2012] NSWSC 356
- (2) *Kavia v Suntrack* [2011] NSWSC 716
- (3) *Islamic Council v Federation of Islamic Council* [2009] NSWSC 211
- (4) *Austar Finance Group Pty Ltd v Campbell* (2007] NSWSC 1493
- (5) *Parkview Constructions Pty Limited v Total Lifestyle Windows Pty Ltd* [2017] NSWSC 194
- (6) *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd and Anor* [2014] QSC 30

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