



18 March 2011

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The Honourable John Rau MP
Attorney-General
DX 336
ADELAIDE SA

Dear Mr Attorney

Electronic Transactions (Miscellaneous) Amendment Bill 2011

We refer to the above Bill, which was provided to the Society on 9 March 2011 by Officers of your Department. Thank you for providing the Society with the opportunity to consider this Bill.

Due to the short time available to consider the Bill we have not been able to obtain responses from some of the Society's Committees who would have an interest in this legislation, such as the Society's Commerce, Corporate and Tax Committee and its Civil Litigation Committee.

The *Electronic Transactions Act 2000* (the ETA) generally provides that transactions effected electronically are not invalid for that reason alone (section 7(1)). It also permits acts required under law to be carried out using traditional means (such as, giving information in writing, retaining and producing documents and signing documents) to be carried out electronically (Part 2 Division 2). It further provides for the determination of the time and place of dispatch and receipt of electronic communications and it stipulates when an electronic communication will bind purported originator.

We provide the following comments from the perspective of the effect of provisions of the Bill on the *Legal Practitioners Act 1981* and on legislation and regulation relating to property transactions.

Legal Practitioners Act 1981

The Society has taken the view that the ETA does not apply to communications under the LPA and its Regulations, given that the original intention of the ETA was to make clear that electronic communications can be used to create valid contracts and to provide that the associated legal requirements can be complied with electronically.

Section 7(1) seeks to preserve a transaction by validating "electronic communication" which makes up the transaction. Under the *Electronic Transactions (Miscellaneous) Amendment Bill 2011* (the Bill) a 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.*

The transactions which would be captured by the ETA are those in connection with the formation or performance of a contract and all other transactions would be captured under sub-section (c).

Although subsection (c) appears to broaden the application of the ETA, it is not clear how it would affect the operation of the LPA and its Regulations. Aspects of this legislation specifically relate to the obligations and duties of a legal practitioner and are of a personal nature. Therefore we do not believe that the provisions under the LPA and its Regulations can be regarded as of a "non-commercial nature". However the deletion of subsections (3) and (4) of Section 7 means that there is less clarity on the position. We suggest that this needs some more careful consideration.

In respect of the new Part 2A of the Bill the provisions contained therein apply specifically to contracts involving electronic communication and therefore may also not have any effect on the operation of the LPA or Regulations.

Property transactions

In view of the numerous requirements of the *Law of Property Act* and the *Land and Business (Sale and Conveyancing) Act* in relation to documentation relating to the creation and dealing with interests in land, it is currently inappropriate for those interests to be created or dealt with by means of wholly electronic transactions.

This is recognised by the *Electronic Transactions Regulations 2001* which currently exclude land transactions from the operation of the relevant portions of the *Electronic Transactions Act*, namely Section 7(1) and Division 2 of part 2.

However, the *Electronic Transactions (Miscellaneous) Amendment Bill 2011* inserts a new Part 2A in the Act. In the absence of new Regulations specifically excluding land transactions from the operation of the provisions of Part 2A of the Act, those provisions will apply to land transactions.

It is therefore essential that appropriate new Regulations incorporating those exclusions are in force at the time of commencement of the proposed amendments to the Act.

I trust these comments are of assistance. Please do not hesitate to contact me, should you require any further information.

Yours sincerely



Ralph Bönig
PRESIDENT