

# **Electronic Transactions Act 2002: Plain Language Section by Section Explanation**

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## **Introduction**

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This document firstly provides some general information about the Electronic Transactions Act 2002 (ETA), the scope of its application and its general intent.

Secondly, it provides a plain language explanation of each section of the ETA in order.

The ETA provides for a certain number of specified transactions to be excluded. These are listed in the schedule.

## **The Genesis of the ETA**

The process of formulating the ETA has included two Law Commission reports, published in 1998 and 1999, a Ministry of Economic Development discussion paper published in May 2000 and the select committee process.

At each stage of the policy development process there has been opportunity for input from the public and many submissions were received from a wide range of interested parties including: the New Zealand Law Society; the Institute of Chartered Accountants; major law firms; and a number of major New Zealand companies.

Following the recommendation of the Law Commission, the ETA is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce and the Model Law on Electronic Signatures [see <http://www.uncitral.org/english/texts/electcom/ecommerceindex.htm>]. The Law Commission also recommended that the ETA closely follow the Australian Electronic Transactions Act 1999 in order to further the goal of co-ordination between the two legal regimes.

On substance the ETA adopts international norms and follows the UNCITRAL model closely. On a number of points of detail, consistency with the Australian law was pursued because, for companies subject to legal requirements under New Zealand legislation, the other legal regime that is most likely to apply (in relation to record keeping, provision of information etc) is the Australian regime.

Links to supporting documents including the Law Commission reports, the report of the Commerce Select Committee, the UNCITRAL Model Law on Electronic Commerce and Guide to Enactment, the Ministry of Economic Development Discussion Document and the Australia Electronic Transactions Act 1999 are available at <http://www.med.govt.nz/irdev/elcom/transactions/index.html>

## **Scope and Purpose of the ETA**

The ETA does three things in order to facilitate the use of electronic technology:

- it confirms that electronic methods of communication are legally effective (Part 2);
- it sets default rules for the time and place of dispatch and receipt of electronic communications (whether or not the communications are used to meet a legal requirement) (Part 2); and

- it provides that certain paper-based legal requirements may be met by using electronic technology that is functionally equivalent to those legal requirements (Part 3).

The provisions in Part 2, particularly the default rules for time and place of dispatch and receipt, apply to all electronic communications.

Most of the provisions in the ETA are, however, in Part 3.

It is important to understand that the provisions in Part 3 only apply to legal requirements for writing, signatures etc, that is, requirements set down in statute or regulation (“statutory requirements”). For most communications, for instance those relating to contract formation, these provisions are irrelevant because they are not made pursuant to a legal requirement. Only the default rules in Sections 10 to 13 apply to communications of this kind. (That is why, from a co-ordination perspective, it is overlapping statutory requirements that are significant, rather than volumes of transactional activity alone.)

It must also be borne in mind that there are a number of things that the ETA does not attempt to do. It does not seek to create certainty in the electronic context that does not exist in the hardcopy context. For instance, the ETA does not deal with attribution in regard to signatures; this will be dealt with under the common law, as is the case with hardcopy signatures.

## **General Comments on the Default Rules for the Time and Place of Dispatch and Receipt of Electronic Communications**

These rules apply to all electronic communications. There are two points to be made about them:

1. The rules are default rules, and do not apply if the parties agree otherwise.
2. The rules are the same rules as found in the Model Law on Electronic Commerce and have been implemented in a number of jurisdictions, including Australia. They are designed to be an international standard that can be implemented in a wide range of jurisdictions. As such they utilise more generalised language that is less specific than ideal. The benefit, though, is that New Zealand business will be subject to the same rules as apply in the jurisdictions of many of our trading partners, hence making it easier to transact electronically across borders.

## **Consumer Protection**

The rights of consumers are protected in several ways in the ETA.

Firstly, it is crucial to remember that, apart from the default rules on time and place of dispatch and receipt, the ETA only applies to statutory requirements. Transactions that are governed by common law rather than statute, such as the formation of contracts, will not be changed by the ETA.

Secondly, no person, solely by virtue of the ETA, will be required to use, provide, or accept information in electronic form without that person's consent.

Thirdly, selected legal requirements to communicate with consumers are excluded from the application of the ETA, e.g. parts of the Credit Repossession Act 1997 and the Door to Door Sales Act 1967. Those not excluded may be subject to regulations requiring that additional conditions be met before transactions may occur electronically, such as express consent in respect to certain provisions of the Credit Contracts Act 1999.

## **Electronic Transactions Act 2002**

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### **Section 1 - Title**

Section 1 sets out the title of the ETA.

### **Section 2 - Commencement**

Section 2 provides for the commencement of the legislation. The legislation comes into force on a date to be specified by Order in Council, with the exception of the regulation-making powers conferred by sections 14(3) and 35, which come into force on the day after the date on which the ETA receives the Royal assent.

## **Part 1: Preliminary**

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Part 1 (Sections 3 to 7) contains a number of general provisions.

### **Section 3 - Purpose**

Section 3 provides a brief statement of the purpose of the ETA. The goal is to facilitate the use of electronic technology, by reducing uncertainty in relation to use of electronic technology (Part 2) and permitting certain paper-based legal requirements to be met using functionally equivalent electronic technology (Part 3).

### **Section 4 - Overview**

Section 4 provides an overview of the structure and content of the ETA, to assist users of the legislation to identify and locate relevant provisions.

### **Section 5 - Interpretation**

Section 5 sets out definitions of a number of terms used in the ETA. The terms defined are “data storage device”, “electronic”, “electronic communication”, “electronic signature”, “information”, “information system”, “legal requirement”, “Minister” and “transaction”.

The definition of “electronic” is deliberately broad, and extends to a number of technologies that might not otherwise be considered electronic, such as optical, biometric and photonic technologies. The goal is to avoid limiting the application of the ETA inappropriately.

The term “electronic signature” is given a wide meaning and the definition makes clear that it is the “method” and not the electronic signature itself that is used to signify the signatory, in line with the Australian Electronic Transactions Act 1999. The definition uses language from article 7 of the Model Law on Electronic Commerce that was subsequently used in the definition of “electronic signature” in the Model Law on Electronic Signatures.

As a matter of ordinary English, one method of signing is to use a mark-based signature. This is encompassed in the reference to “method” (and this is explained in the guide to enactment for the Model Law on Electronic Commerce).

Under the definition of “electronic signature” in the ETA, methods of recording oral assent or printing a name on the bottom of an email may in some cases be treated as a signature, if they are as reliable as is appropriate in the relevant context.

It is important to understand that there is a great deal of difference between the concepts of consent and signature. A click on a web page can be consent, but a click is unlikely ever to amount to a signature.

The term “information” is also broadly defined, and includes signatures and seals as well as the content of a document. Information in the form of images, sound or speech is also included. The definition extends to original versions of information, to ensure that a reference to an original in legislation falls within the scope of “information”.

The term “transaction” is also given a very broad and inclusive definition. It extends to transactions of a non-commercial nature, and to single communications, as well as to the outcome of multiple related communications (e.g. a contract).

## **Section 6 - Further Provision Relating to Interpretation**

Section 6 ensures that Courts are permitted (and encouraged) to refer to the UNCITRAL Model Law on Electronic Commerce (on which the ETA is based), and relevant UNCITRAL documents such as the Guide to Enactment, which contains a detailed commentary on the Model Law on Electronic Commerce. Section 6 is intended to assist New Zealand Courts to interpret the legislation, and also to promote international harmony in the interpretation and application of legislation based on the Model Law on Electronic Commerce.

## **Section 7 - Act Binds the Crown**

Section 7 provides that the legislation will bind the Crown.

## **Part 2: Improving Certainty in Relation to Electronic Information and Electronic Communications**

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Part 2 (Sections 8 to 13) contains provisions intended to reduce uncertainty in relation to the legal effect of information that is in electronic form, or that is communicated by electronic means, and to provide some default rules in relation to the time and place of dispatch and receipt of electronic communications.

### **Section 8 - Validity of Information**

Before the ETA there was some uncertainty under New Zealand law about the legal effect of certain types of communication if they take place by electronic means, and about information which is recorded in electronic form. One important example was that some lawyers were advising their clients that there was a small risk that a contract formed by an exchange of emails might not be legally effective. This was almost certainly not the position; but the uncertainty was damaging. Section 8 is intended to remove the uncertainty surrounding the use of electronic methods.

Section 8(a) does not of itself enable electronic communications or electronic information to satisfy any substantive legal requirement, or any legal requirement in relation to form (e.g. that it be in writing, or signed). All Section 8(a) does is ensure that, if there is no other impediment to giving effect to a communication or other information, the fact that it was in electronic form will not of itself prevent it being given legal effect.

Section 8(b) addresses the related issue of incorporation by reference. Just as use of electronic means is not of itself enough to make a communication etc legally ineffective, paragraph (b) ensures that incorporation by reference using electronic means (e.g. by a hypertext link) is not automatically invalid. However all other legal requirements, for example the need to bring unusual or unexpected terms in an offer to the attention of the offeree, continue to apply and are not affected in any way by Section 8.

Section 8 is based on Section 8 of the Australian Electronic Transactions Act 1999, and Articles 5 and 5 bis of the Model Law on Electronic Commerce.

### **Section 9 - When the Default Rules in Sections 10 to 13 Apply**

Section 9 makes it clear that Sections 10 to 13 set out default rules, which do not apply if the parties to a communication agree otherwise, or if an enactment provides otherwise. Thus parties to a contract can adopt their own rules in relation to when electronic communications are to be treated as sent or received. If an Act contains specific deeming provisions in relation to when or where a communication is to be treated as sent or received, those will prevail over the default rules in Sections 10 to 13.

The default rules in Sections 10 to 13 apply to all electronic communications (whether pursuant to a legal requirement or not) unless the parties agree otherwise, or an enactment provides otherwise.

Sections 10 to 13 address certain legal consequences where electronic communications are used: they do not provide that electronic techniques can be used in any or all circumstances.

The time at which a communication is sent or received, and the place where it is sent or received, may be important for various legal reasons. To give one example, New Zealand's High Court Rules permit proceedings in relation to a contract to be served outside New Zealand if the contract was made in New Zealand. A contract is normally formed at the time, and in the place, where the acceptance is received by the offerer. Sections 10 to 13 are intended to reduce current uncertainty, and avoid unnecessary costs, when applying such rules.

It is important to understand that these provisions do not determine whether or when a communication has legal effect. Whether a document is properly addressed is irrelevant to when it is sent (a letter with an incorrect address is still sent when it is put in the post box). Whether the letter is properly addressed is, however, likely to be relevant to its legal effect (i.e., an improperly addressed letter is unlikely to be legally effective, while a letter sent to the last known address, even though the intended recipient may no longer reside there, probably will be).

The default rules in Sections 10 to 13 are the same as those found in the Australian Electronic Transactions Act 1999, and are based on Article 15 of the Model Law on Electronic Commerce.

## **Section 10 - Time of Dispatch**

Section 10 provides that an electronic communication is treated as being dispatched at the time it first enters an information system outside the control of the originator. That is, as soon as the originator ceases to have control of the communication (and so ceases to be able to prevent it being transmitted), it is dispatched. A person using a PC with dial-up access to the Internet would, under this rule, send an email at the time the "send" button is clicked and the email leaves the PC. Where a computer is attached to a corporate network, communications are dispatched when the email leaves the relevant network – typically when it is sent from the corporate mail server to an ISP's server.

Section 10(2) defines the term "information system" very broadly for the purposes of Sections 10 and 11. It can cover a single PC, a palm pilot, or an entire corporate network. A purposive approach that pays attention to the context of the rule will be required. International precedents are likely to emerge over time.

## **Section 11 - Time of Receipt**

Section 11 provides a default rule in relation to the time of receipt of an electronic communication. An electronic communication is taken to be received at the time the electronic communication enters an information system designated by the addressee for that purpose or, if no particular information system has been so designated, at the time the electronic communication comes to the attention of the addressee.

Merely providing an email address on a letterhead will not amount to designation of an information system for the purpose of receiving electronic communications. An explicit request to send electronic communications to a specified email address (e.g. please email your acceptance to [jsmith@brown.co.nz](mailto:jsmith@brown.co.nz)) would probably suffice. What is sufficient in each case will depend on the nature of the communication, and the way in which the addressee has asked that such communications be delivered.

The language is somewhat general and open textured, but follows an international model that is likely to become clearer in its application over time. Meanwhile, it seems likely that in many cases involving Internet communication by email, paragraph (b) will apply and a communication will be taken as received at the time it comes to the attention of the addressee.

## **Section 12 - Place of Dispatch**

Section 12 sets out default rules in relation to the place from which an electronic communication is taken to be dispatched. Where an originator does not have a place of business, the communication is treated as dispatched from the originator's ordinary place of residence. Where the originator does have a place of business, the electronic communication is treated as dispatched from that place of business or, if there is more than one, the place of business that has the closest relationship with the underlying transaction. If there is no one place of business that has a closest relationship with the underlying transaction, the communication is treated as dispatched from the originator's principal place of business.

This rule is particularly important because the place of dispatch (where it has been sent from) is usually not apparent from an electronic communication. An employee of a company may well send emails from a range of places, in a number of countries, in the course of travelling for work purposes. They will all appear to come from the company's mail system. The actual physical location of the employee will generally be irrelevant to the parties, as well as (often) being uncertain. Thus the most sensible default rule is for all such communications to be treated as coming from the company's place of business.

## **Section 13 - Place of Receipt**

Section 13 provides a corresponding rule in relation to the deemed place of receipt of electronic communications. An addressee who does not have a place of business is treated as receiving electronic communications at that addressee's ordinary place of residence. Where the addressee does have a place of business, the communication is treated as being received at that place of business. Where the addressee has more than one place of business, the place of receipt is treated as being the place of business that has the closest connection with the underlying transaction or, if there is no one such place of business, the addressee's principal place of business.

## **Part 3: Application of Legal Requirements to Electronic Transactions**

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Part 3 (Sections 14 to 38) of the ETA contains provisions that enable a range of legal requirements in New Zealand statutes and regulations to be satisfied using electronic technology that is functionally equivalent to the paper-based technology contemplated by those laws.

Subpart 1 (Sections 14 to 17) contains a number of preliminary provisions.

Subpart 2 (Sections 18 to 32) indicates the way in which certain legal requirements (e.g. for writing, or a signature) can be met by electronic means.

Subpart 3 (Sections 33 to 38) contains a number of general provisions that ensure that Subpart 2 will achieve its intended effect.

### **Subpart 1 – Preliminary**

#### **Section 14 – When Part Applies**

Section 14(1) provides that Part 3 of the ETA is over-arching legislation, which applies to every enactment (i.e. statutes and regulations) passed either before or after the ETA comes into force.

Section 14(2) sets out a number of exclusions from Part 3.

The main exclusions are:

- Enactments which require use of particular electronic technology, or a particular kind of data storage device, or a particular kind of electronic communication. The ETA is not intended to override legislation which specifies how electronic technology may be used to meet its requirements.
- Certain enactments relating to electoral matters, specified in Part 1 of the Schedule to the ETA.
- Specific provisions of existing Acts which have been identified as specifying paper-based requirements that should not be permitted to be met by electronic means, as this could prejudice the policy objectives of those provisions. These are listed in Part 2 of the Schedule.
- Legal requirements in relation to certain types of notice or information or document, where there is no functional equivalent for the paper-based requirement in the statute, or where the policy objectives of legislation in relation to those notices/documents would be prejudiced if electronic technology were used, at least given the current state of technology. These are listed in Part 3 of the Schedule.
- Provisions of legislation relating to certain courts and tribunals specified in Part 4 of the Schedule, except to the extent that the use of electronic technology is permitted under rules made by the court or guidelines issued with the authority of the court or

tribunal. This exclusion ensures that courts and tribunals can manage the application of the ETA to proceedings before them, including specifying in their rules/guidelines any additional safeguards required to protect the interests of parties or other persons affected by the proceedings. The ETA thus empowers courts and tribunals to make rules or issue guidelines in relation to use of electronic technology, which will then be effective for the purposes of enactments that apply to their practice or procedure.

Section 14(3) permits an Order in Council to be made amending the Schedule or repealing and replacing the Schedule. This is intended to accommodate:

- Developments in technology over time, which may mean that specified provisions need no longer be excluded from the scope of the ETA;
- The possibility that it will be discovered that provisions of enactments that should have been excluded from the ETA were overlooked. Although an exhaustive review was carried out of all legislation by responsible departments, the sheer scale and complexity of the task means that it is possible that some provisions that ought to have been excluded have been overlooked. Most countries that have enacted legislation based on the Model Law on Electronic Commerce have included a provision along these lines, to enable additional exclusions to be added by secondary legislation.

Section 14(4) and (5) make clear the effect of the Governor-General amending the Schedule. Additions made to the Schedule need to be confirmed by Parliament. If they are not confirmed they expire at a specified time and expiry does not effect the validity of acts done prior to expiry.

## **Section 15 – When Legal Requirement Can Be Met by Electronic Means**

Section 15(1) states that the basic requirements that must be met in order to use electronic technology to meet legal requirements are that:

- a. the provisions in Subpart 2 (Sections 18 to 32) must be satisfied; and
- b. in addition, any conditions prescribed by applicable regulations made under section 35 (e.g. in relation to the technology to be used, or in relation to format of a communication) must be satisfied.

Section 15(2) defines the term “legal requirement” broadly for the purposes of the ETA.

- The ETA applies to any requirement in an enactment to which Part 3 applies (i.e. any enactment other than those excluded under Section 14);
- The ETA also applies to a provision in an enactment to which Part 3 applies that imposes an obligation on some person, or where certain legal consequences follow depending on whether or not the provision is complied with. In other words, the concept of “requirement” has been broadened to include any provision under which failure to comply with a relevant requirement has a legal consequence. Thus where a statute permits an application for a licence to be made in writing to some agency, and the agency is only required to consider valid applications, the requirement that

the application be in writing is a “legal requirement” for the purposes of the ETA. A “provision” in means a statutory provision - it does not mean provisions in contracts.

## **Section 16 – Consent to Use of Electronic Technology**

Section 16(1) is intended to make it clear that nothing in Part 3 of the ETA requires any person to use, provide, or accept information in an electronic form without that person’s consent. The ETA is intended to make it possible for people to use electronic technology, but not to compel them to do so. This is probably implicit in the other provisions of the ETA, but SubSection (1) has been included to put the matter beyond doubt.

Section 16(2)(a) makes it clear that where the ETA requires a person to consent to the use or provision of information in electronic form, that consent may be conditional on use of particular technology, or format, or other similar requirements. This is implicit in the consent requirement, but is set out in paragraph (a) to avoid any doubt on the matter.

Section 16(2)(b) makes it clear that consent to receipt of electronic information may be inferred, and need not be express in every case. A simple example would be where a Government agency provides a website through which an application may be made – for example, for a licence of some kind - which a statute requires to be made in writing. No express consent to that person applying electronically is required - making the electronic means to make the application available on the Internet would constitute implied consent.

Many Government departments and other recipients of statutory communications are likely to issue guidelines in relation to when they will or will not accept electronic communications. In the case where there has been an explicit statement of this kind, it is most unlikely that consent to use of electronic technology in a manner inconsistent with those guidelines could be inferred from conduct.

## **Section 17 – When Integrity of Information Maintained**

A number of provisions of Subpart 2 permit the use of electronic technology only if the integrity of information is maintained. Section 17 specifies that for the purposes of Part 3, the integrity of information is maintained only if the information has remained complete and unaltered, other than the addition of any endorsement, or any immaterial change, that arises in the normal course of communication, storage or display. In other words, if particular information is required to be retained under a statute, Subpart 2 does not permit electronic storage of that information in a way that loses some of the required information, or alters some of that information in any material way.

The term “integrity” is used in the Model Law on Electronic Commerce (article 8), the Australian Electronic Transactions Act 1999 (sections 11 and 12) and legislation in Canada, including the Ontario Electronic Commerce Act 2000 (section 8). Integrity is a broader concept than accuracy.

The term “normal course” is used in the Australian Electronic Transactions Act 1999 (sections 11 and 12) and the Model Law on Electronic Commerce (article 8). This term is used because in the cases of electronic information it is the process that has to be relied upon to guarantee the integrity/accuracy of the information. If the normal course is not followed then the final result cannot be relied upon. If this causes people to be careful then this is a beneficial result. The interpretation of Section 17 as technology evolves should not

be problematic, as the interpretation of “normal course” can easily change to reflect changes in technology.

## **Subpart 2 - Legal Requirements**

### **Writing**

Sections 18 to 21 are concerned with legal requirements in relation to written information. They address requirements for information to be in writing (Section 18), to be recorded in writing (Section 19), and to be given in writing (Section 20). They are based on Section 9 of the Australian Electronic Transactions Act 1999, and Article 6 of the Model Law on Electronic Commerce.

#### **Section 18 - Legal Requirement That Information Be in Writing**

Many statutes require certain information to be in writing. Section 18 permits information to be in electronic form, rather than on paper, if the information is “readily accessible so as to be usable for subsequent reference.” This requirement lies at the core of the Model Law on Electronic Commerce, and the statutes in many countries implementing the Model Law.

The conclusion reached at UNCITRAL was that the function of having information in writing, or communicating it in writing, was to ensure that it was readily accessible so as to be usable for subsequent reference. This can be seen as a “functional” description of what the statutes require. In effect, writing is one means of ensuring information is “readily accessible so as to be usable for subsequent reference.” The ETA effectively substitutes for a statutory requirement to use this one means by allowing the use of electronic means so long as they achieve the same end.

#### **Section 19 - Legal Requirement to Record Information in Writing**

Section 19 provides that a legal requirement to record information in writing can be met by recording the information in electronic form if the Model Law on Electronic Commerce’s “functional equivalent” test is met, i.e. if the information is readily accessible so as to be usable for subsequent reference.

#### **Section 20 - Legal Requirement to Give Information in Writing**

Many statutes require information to be given in writing. These requirements are expressed in a range of forms. Section 20(4) makes it clear that when the Section speaks of legal requirements to give information in writing, it includes requirements that writing be used to make an application, make or lodge a claim, make a request, and so forth. The idea is that any statutory provision which contemplates the use of writing to convey information will be caught by Section 20.

Section 20(1) permits the use of electronic means to give information that is legally required to be given in writing if two requirements are met:

- first, the information must meet the functional equivalence test, i.e. must be readily accessible so as to be usable for subsequent reference; and

- second, the person to whom the information is required to be given must consent to the information being given in electronic form and (where applicable) by means of an electronic communication. (It is possible for information to be provided in electronic form but not by means of an electronic communication – consider, for example, providing data on a floppy disk which is hand delivered or couriered to the recipient.)

Section 20(2) makes it clear that statutes (particularly older statutes) that require the provision of multiple copies of the same information in writing (e.g. requirements to make an application in duplicate, or triplicate) can be complied with by providing a single electronic version of the information. There is no point providing the same (infinitely reproducible or copyable) electronic file more than once.

Some statutes not only require that information be provided in writing, but also specify that that information should be “filed” or “sent” or “posted”, or delivered by some other specified manner. SubSection (3) makes it clear that Section 20 applies to a legal requirement to give information even where the information is required to be given in a specified manner. [Note however the exclusions in Part 3 of the Schedule to the ETA in relation to information required to be given in person, or by registered post (para (b)), and notices that are required to be attached to any thing or left or displayed in any place (para (c))].

### **Section 21 - Legal Requirements Relating to Layout and Format of Certain Information and Writing Materials**

Some statutes contain additional requirements in relation to the form or layout of written information. Indeed some of these go so far as to specify that information must be written in ink, or on a particular quality of paper, or with particular margins. Section 21 makes it clear, for the avoidance of doubt, that where information is recorded or provided electronically in accordance with Sections 18 to 20, form and layout requirements of this kind need not be complied with, hence removing an obstacle to the use of electronic technology. This prevents any argument that, because electronic information is not written “in ink”, the ETA does not apply to such requirements.

### **Signatures**

Sections 22 to 24 are concerned with legal requirements for a signature, and specify the circumstances in which such requirements can be met using an electronic signature.

The term “electronic signature” could cover anything from an electronic facsimile of a hand-written signature through to an electronic signature provided by a certification authority using encryption technology, or a biometric method of confirming identity. The intention is that the concept should be a very broad one, with any information that is intended to be used as a signature being acceptable provided it meets the functional equivalence requirements in Sections 22-24. (This mirrors the common law approach to what amounts to a signature - it has always been the position at common law, for example, that a mark made by someone who cannot write their name, with the intention of signing, amounts to a signature.)

Sections 22 to 24 are based on Section 10 of the Australian Electronic Transactions Act 1999, and Article 7 of the Model Law on Electronic Commerce.

## **Section 22 - Legal Requirement for Signature**

Section 22 provides that a legal requirement for a signature other than the signature of a witness can be met using an electronic signature if three requirements are met:

- the electronic signature must adequately identify the signatory and adequately indicate the signatory's approval of information to which the signature relates;
- the signature must be as reliable as appropriate given the purpose for which, and the circumstances in which, the signature is required; and
- where information which must be given to a person is required to be signed, the recipient must have consented to receiving the electronic signature, rather than a traditional paper-based signature.

The first two requirements are drawn from the Model Law on Electronic Commerce (see Article 7). The third is simply a statement of the consent requirement that underpins the ETA.

The question of whether an electronic signature is as reliable as is appropriate given the purpose for which, and the circumstances in which, it is required, is one that may be difficult to answer in the early years of operation of the ETA, and in relation to novel technologies. A very general test of this kind is inevitable, if specification of particular technologies is to be avoided. This technology-neutral approach lies at the heart of the Model Law on Electronic Commerce, but does result in open-textured tests of this kind. Section 24 (discussed below) provides some guidance in applying this test.

Note that the ETA deliberately does not deal with attribution, that is left to the same common law rules that apply to paper based signatures.

See also discussion under Section 5 above.

## **Section 23 - Legal Requirement that Signature or Seal Be Witnessed**

A significant number of statutes require a signature or a corporate seal to be witnessed. Section 23 makes provision for witnesses to witness a document using an electronic signature, if:

- where a signature is being witnessed, that signature is also an electronic signature; and
- the electronic signature of the witness meets requirements that correspond to those for a primary signature in Section 22, i.e. the electronic signature adequately identifies the witness and adequately indicates that the signature or seal has been witnessed; is as reliable as is appropriate given the purpose for which, and the circumstances in which, the signature of the witness is required; and, in the case of a witness's signature on information required to be given to a person, the recipient of the information has consented to the use of an electronic signature rather than a traditional paper-based signature.

## **Section 24 - Presumption about Reliability of Electronic Signatures**

This Section establishes a rebuttable presumption that certain electronic signatures are reliable. This Section is modelled on Article 6 of the Model Law on Electronic Signatures, a document developed after the Model Law on Electronic Commerce and after the United States Uniform Electronic Transactions Act (UETA), Canadian and Australian legislation (and for this reason not incorporated into that legislation).

The point of this Section is to provide certainty in the use of certain electronic signatures that have proved to be reliable. Section 24 is not limited to public key infrastructure (PKI) technologies and can be satisfied by other forms of electronic signature, e.g. using biometric techniques.

Section 24(1) creates a rebuttable presumption that an electronic signature is as reliable as appropriate (and thus satisfies that requirement in Sections 22 and 23) if four requirements are satisfied:

- the means of creating the electronic signature must be linked to the signatory and to no other person (e.g. an authorisation code known only to the signatory, or a biometric authorisation mechanism);
- the means of creating the electronic signature must be under the control of the signatory and of no other person (e.g. where a private key is required to create an encrypted electronic signature: that private key must be under the control of the signatory alone);
- any alteration to the electronic signature made after the time of signing must be detectable (this is the case for most electronic signature technologies administered by certification authorities);
- where the purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing must be detectable. Not every signature is required to provide assurance as to the integrity of information, but this is one common function of a signature. This requirement ensures that where that is the purpose for which the law requires a signature, there will be a presumption that the electronic signature is as reliable as appropriate only if the technology used to create the electronic signature would reveal any post-signing alteration to that information. Once again, most currently available electronic signature systems administered by certification authorities meet this requirement.

Section 24(2) makes it clear that the presumption in Section 24(1) can be rebutted, and also that even if the requirements in Section 24(1) are not met, it is still open to a person to show that an electronic signature was as reliable as appropriate for the purposes of Section 22 or Section 23.

## **Retention**

Sections 25 to 27 are concerned with the many legal requirements found in New Zealand legislation to retain information for various purposes.

Section 25 permits legal requirements to retain information that is in paper or other non-electronic form to be met by retaining an electronic copy in certain circumstances.

Section 26 is intended to clarify how legal requirements to retain information can be met where that information is initially in electronic form.

Section 27 sets out some additional requirements where the information that must be retained is contained in an electronic communication.

Sections 25-27 are based on Section 12 of the Australian Electronic Transactions Act 1999, and Articles 8 and 10 of the Model Law on Electronic Commerce.

### **Section 25 - Legal Requirement to Retain Document or Information That Is in Paper or Other Non-Electronic Form**

Section 25 addresses legal requirements to retain information that is initially in paper or some other non-electronic form. Such requirements can be met by retaining an electronic form of the information instead of the paper/non-electronic form if two requirements are met:

- the electronic form must provide a reliable means of assuring the maintenance of the integrity of the information (see Section 17); and
- the information must be readily accessible so as to be usable for subsequent reference.

Section 25(3) makes it clear that where information is retained in electronic form in a manner that complies with Section 25(1), the paper or other non-electronic form need not also be retained. This ensures that, where the requirements of Section 25 are met, significant cost savings can be achieved by storing records in electronic form, and disposing of the hard copy versions.

Disposal of hard-copy records can however raise significant archival issues. To ensure that the policy objectives of the Archives Act 1957 are not compromised by transferring public sector records from paper to electronic form, Section 25(2) provides that public records within the meaning of that Act can be stored electronically, instead of retaining the originals, only if the Chief Archivist has approved the retention of that information in electronic form. It is anticipated that general guidelines will be issued by the Chief Archivist to Government Departments, as well as consent being sought in specific cases that fall outside the guidelines in place for the time being.

Section 25 is the one section of the ETA where the ultimate recipient of information will not necessarily have consented to the use of electronic means in place of paper-based means, at least so far as storage of that information is concerned. The consent requirement arises only at the time where the information must be provided or produced, or when access to it must be provided. In most cases this is not expected to cause any difficulty.

Where there is a real risk that the person/entity for whose benefit information must be retained (usually a regulator) will be prejudiced if the information is retained in electronic form, even if the core requirements in Section 25 are met, Section 35 permits additional requirements to be specified in regulations.

Where it is simply impossible for information to be retained using electronic means in a way which meets the policy objectives of the legislation imposing the retention obligation if electronic means are used, those requirements should be excluded from the ETA under Section 14. No such requirements have been identified to date.

### **Section 26 - Legal Requirement to Retain Information That Is in Electronic Form**

There is at present some uncertainty about what must be done to comply with legislation that requires information to be retained, where that information is initially in electronic form. In particular, there is uncertainty about:

- whether the form of the information can be altered (e.g. where data is migrated from one system to another); and
- the extent of obligations to retain a facility to access data which must be retained by law, where for example it was created using a computer system or data storage technology that is no longer used by the person subject to the retention obligation.

Section 26 is intended to remove some of this uncertainty, by specifying that information in electronic form can be retained for the purposes of a legal requirement by retaining it:

- in paper or other non-electronic form, if that form provides a reliable means of assuring the maintenance of the integrity of the information (Thus, for example, if a particular computer system is being disposed of, data stored on it can be printed out and kept in paper form provided that this provides a reliable means of assuring the maintenance of the integrity of the information that must, by law, be retained.); or
- in electronic form, if that form provides a reliable means of assuring the maintenance of the integrity of the information, and the information is readily accessible so as to be usable for subsequent reference. (Information would not be readily accessible so as to be usable for subsequent reference if there was no readily available means of accessing the data, either using equipment held by the person with the obligation to retain the information, or using equipment that could reasonably promptly and easily be obtained from a third party.)

Where the information that must be retained is information contained in an electronic communication, additional conditions are specified in Section 27.

### **Section 27 - Extra Conditions for Electronic Communications**

Section 27 applies where there is a legal requirement to retain information that is contained in an electronic communication. The person required to retain that information must also retain, in a form which is readily accessible so as to be usable for subsequent reference, information in relation to the communication which that person has obtained (they may not in all cases have this information) which enables the identification of:

- the origin of the electronic communication;
- the destination of the electronic communication; and
- the time when the electronic communication was sent and the time when it was received.

Section 27 ensures that legal requirements to retain information in an electronic communication can only be met where available information in relation to the origin, destination, and time of the communication is retained in an accessible form.

## **Provision and Production of, and Access to, Information**

Legal requirements to retain information are usually coupled with legal obligations to provide or produce that information to some other person, either periodically or on request, and/or requirements to permit some third party to have access to that information.

Sections 28 to 31 are intended to ensure that where information has been retained electronically in accordance with the ETA, obligations to provide or produce that information, or permit access to it, can also be met in an appropriate way. They also remove some uncertainty surrounding how obligations to provide or produce information in an electronic form can be met at present, and what it means to provide access to information stored in electronic form.

Sections 28 to 31 are based on section 11 of the Australian Electronic Transactions Act 1999.

### **Section 28 - Legal Requirement to Provide or Produce Information That Is in Paper or Other Non-Electronic Form**

Section 28 is concerned with the situation where a person holds information in paper or other non-electronic form, and is legally required to provide or produce that information. Section 28 permits that information to be provided or produced in electronic form, whether by means of an electronic communication (e.g. by email) or otherwise (e.g. on a disk) if three conditions are met:

- the form and means of providing/producing the information must reliably assure the maintenance of the integrity of the information, given the purpose for which, and the circumstances in which, the information is required to be provided or produced; and
- the information must be readily accessible so as to be usable for subsequent reference; and
- the person to whom the information must be provided/produced must have consented to the information being provided or produced in electronic form, and if applicable, by means of an electronic communication.

Some statutes impose an obligation to provide or produce an original document. Because “information” is defined in Section 5 to include information in its original form, obligations to provide or produce an original can be met using electronic means under Section 28, if the three requirements of Section 28 are satisfied.

### **Section 29 - Legal Requirement to Provide or Produce Information That Is in Electronic Form**

Section 29 specifies how a legal requirement to provide or produce information can be met where that information is in electronic form in the hands of the person under the legal obligation. (It may be in electronic form either because it was initially in electronic form, or

because it was in paper form but has been translated into electronic form in accordance with Section 25.)

Section 29 sets out two options for providing/producing information that is in electronic form - it can be provided in electronic form (paragraph (b)) or in paper or other non-electronic form (paragraph (a)).

One option, where a person has information in electronic form, is to provide or produce it in paper or other non-electronic form. This can be done without the consent of the recipient.

However, where information in electronic form is provided in paper or other non-electronic form, there is a risk that the integrity of the information may not be able to be assured. Some types of data cannot adequately be printed out on paper, in a way that captures all the stored information. Where the maintenance of the integrity of information cannot be assured if it is provided in non-electronic form, the person required to provide or produce it must notify the recipient of this fact, and if requested to do so, must provide the information in electronic form in accordance with Section 29(b).

Information held in electronic form can be provided or produced in electronic form, whether by means of an electronic communication or otherwise, if three requirements are met:

- the form and means of providing or producing the information must reliably assure the maintenance of the integrity of the information, given the purpose for which, and the circumstances in which, the information is required to be provided or produced; and
- the information must be readily accessible so as to be usable for subsequent reference; and
- the person to whom the information is required to be provided/produced must consent to the provision/production of the information in an electronic form and, if applicable, by means of an electronic communication.

### **Section 30 - Legal Requirement to Provide Access to Information That Is in Paper or Other Non-Electronic Form**

Section 30 ensures that where information is held in paper or other non-electronic form, and there is a legal requirement to provide access to it, access can be provided in electronic form if:

- the recipient consents to being given access in this way; and
- the form and means of access reliably ensures the maintenance of the integrity of the information, given the purpose for which, and the circumstances in which, access to the information is required to be provided.

Section 30 is concerned with, for example, statutory obligations to permit an inspector to have access to certain records, e.g. records of fish caught, or stocks of certain items held pursuant to a statutory licence.

## **Section 31 - Legal Requirement to Provide Access to Information That Is in Electronic Form**

Section 31 deals with obligations to provide access to information that is held in electronic form.

Section 31 parallels Section 29 in relation to obligations to provide or produce information in electronic form. It permits use of paper or other non-electronic forms to provide access – e.g. by providing a printout of electronically stored data – subject to an obligation to advise the person obtaining access if the maintenance of the integrity of the information cannot be assured.

Alternatively, access can be provided in electronic form – for example, by permitting the person to query an electronic database using a terminal – if the person to whom access must be given agrees to access the information in this way, and if the form and means of access to the information reliably assures the maintenance of its integrity, given the purpose for which, and the circumstances in which, access must be provided.

## **Originals**

### **Section 32 - Originals**

A small number of statutes require copies of documents to be compared with an original – for example, for the purpose of preparing a certified copy of the original document.

If the original document has been stored electronically in accordance with Section 25 (and the original hard-copy document has been destroyed), difficulties might arise in carrying out this comparison.

To avoid any uncertainty about whether such provisions still apply, Section 32 makes it clear that where there is a legal requirement to compare a document with an original, that requirement can be satisfied by comparing the document with an electronic form of the original if the original form reliably assures the maintenance of the integrity of the document.

## **Subpart 3 - Miscellaneous**

### **Section 33 - Legal Requirement Relating to Content of Information**

Section 33 makes it clear that nothing in Part 3 of the ETA affects any legal requirement that relates to the content of information. The ETA permits the same information to be provided in electronic form – it does not permit any information that must be retained or provided etc. to be omitted or altered, where electronic technology is used.

### **Section 34 - Copyright**

The records that a business is required to retain or produce under New Zealand law may, in some cases, be the subject of copyright held by some other person. (One example might be a form provided by a third party, or other information generated by a third party.)

Section 34 provides that copyright in any work is not infringed where an electronic form of a document is generated, or information is produced by means of an electronic communication, if this is done for the purposes of meeting a legal requirement by electronic means. Very importantly, the scope of the protection conferred is limited to that necessary to enable electronic technology to be used to meet some legal requirement.

This provision is modelled on Section 11(6) and Section 12(6) of the Australian Electronic Transactions Act 1999.

### **Section 34A – Review of Enactments and Provisions Excluded from Part 3**

Section 34A requires that within two years after the commencement of the ETA the Ministry of Economic Development must report to the Minister regarding the exclusions in the Schedule. The Ministry must report whether those enactments and provisions should continue to be excluded from Part 3 and if so whether any regulations are necessary under section 35.

### **Section 35 – Regulations**

Section 35 permits regulations to be made which prescribe conditions that must be complied with – for example conditions in relation to the technology to be used, or particular formats that must be used – if legal requirements in legislation identified in those regulations are to be met using electronic means.

The need for this provision was touched on in the discussion of Section 14 above. There may well be situations where the policy goals of other legislation require a higher, or more prescriptive, standard to be met in relation to use of electronic technology. For example, where particular records are required to be retained for forensic purposes, it may be appropriate to keep them in electronic form only if the electronic form is an image file of the paper document, rather than simply being an electronic transcription of the content of the paper document.

Section 35 specifies purposes for which regulations can be made, e.g. such issues as time of receipt.

Section 35A makes it clear that a person who is authorised to prescribe paper-based forms also has the power to prescribe electronic forms.

### **Section 36 – Related Amendment to Interpretation Act 1999**

Section 29 of the Interpretation Act 1999 currently defines “writing” to include “representing or reproducing words, figures, or symbols –

- a. in a visible and tangible form by any means and in any medium;
- b. in a visible form in any medium by electronic means that enables them to be stored in permanent form and be retrieved and read”.

On the face of this definition, any statutory requirement to provide information in writing, or to retain information in writing, could be met by electronic means if the requirement in

paragraph (b) is satisfied. However, section 4 of the Interpretation Act 1999 provides that the definition in section 29 will not apply if an enactment provides otherwise, or the context of the enactment requires a different interpretation.

Leaving section 29 unchanged would be unsatisfactory for two reasons:

- It is likely that in many cases the courts would conclude that the context of a particular writing requirement precluded the use of electronic means. The application of paragraph (b) is thus very uncertain. If the issue of when electronic means can be used as a substitute for writing has been expressly addressed in ETA, it is undesirable to have a different (and uncertain) provision permitting use of electronic means in another Act.
- Where paragraph (b) does apply to permit the use of electronic means to satisfy a requirement to provide information in writing, there is no consent requirement, as under the Act. Thus it is possible that section 29 would permit the use of electronic means of communication without the recipient's consent. This is inconsistent with the policy reflected in the ETA.

To avoid overlapping but different provisions for use of electronic means as a substitute for "writing" requirements, and to ensure that the consent requirement in the ETA is not circumvented, Section 36 modifies the definition of writing in section 29 of the Interpretation Act, and limits it to writing in a visible and tangible form and medium. Thus it is only by virtue of the ETA that electronic means can be used to satisfy a statutory writing requirement – and the safeguards in the ETA thus apply to the use of electronic means.

## **Schedule – Enactments and Provisions Excluded from Part 3**

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The Schedule sets out the enactments and provisions to which Part 3 of the ETA does not apply, by virtue of Section 14. The general scope of the Schedule was described above, in the analysis of Section 14.