

Electronic Transactions Act Regulations

Discussion Paper

April 2003

ISBN 0-478-26329-5

© Crown copyright

First published April 2003 by the
Industry and Regional Development Branch
Ministry of Economic Development
PO Box 1473, Wellington
New Zealand

<http://www.med.govt.nz>

Permission to reproduce: The copyright owner authorises reproduction of this work, in whole or in part, so long as no charge is made for the supply of copies, and the integrity and attribution of the work as a publication of the Ministry of Economic Development is not interfered with in any way.

Information for Respondents

The Government intends to make regulations to complete the regime for electronic transactions implemented by the Electronic Transactions Act 2002 (ETA), and enable it to be brought into force.

The Ministry of Economic Development has developed this discussion document and draft regulations to:

- seek feedback from interested parties on the scope and effect of proposed regulations to be made under section 36: and
- seek comment on whether the draft regulations will achieve the objectives outlined in this discussion document.

To make a submission please do so in writing to:

Andrew McCallum
IT Policy Group
Ministry of Economic Development
PO Box 1473
Wellington

Or by email to: andrew.mccallum@med.govt.nz

Please note that to be considered, submissions must be received by 5.00pm on Thursday 1 May 2003. Where possible, early submissions would be appreciated. An early submission does not preclude parties from making later submissions covering additional areas of concern. This discussion document is also available on:

<http://www.med.govt.nz/irdev/elcom/transactions/index.html>

Please note that this is a departmental draft of the regulations prepared by the Ministry of Economic Development, and has not been reviewed by the Parliamentary Counsel Office. As such the final wording of the regulations as enacted may differ from those attached.

Introduction

Background: Electronic Transactions Act 2002

The process of enacting 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 legislative 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. 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 Australia's.

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 paper and the Australian Electronic Transactions Act 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 of the ETA);
- 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 statutory requirements) (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, including the default rules for time and place of dispatch and receipt, apply to all electronic communications.

It is important to understand that most of the provisions in the ETA are found in Part 3, and 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")(See sections 14 and 15). For most communications, for instance those relating to contract formation,

these provisions are irrelevant because they are not made pursuant to a legal requirement as defined in the ETA. 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.)

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.

In addition, the ETA is technology neutral. It provides that you can use electronic methods to meet paper-based requirements and includes rules that must be complied with in order to meet the test of functional equivalence. It does not, however, specify particular technologies that might be used to meet certain legal requirements.

Regulation and Form Making Powers and Prescribed Forms

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

- (a) the provisions in Subpart 2 (Sections 18–32) must be satisfied;
- (b) in addition, any conditions prescribed by applicable regulations made under section 36 (e.g. in relation to the technology to be used, or in relation to format of a communication) must be satisfied.

For certain legal requirements, extra conditions may need to be prescribed in order for these requirements to be met using electronic methods. Section 36 permits regulations to be made that prescribe such extra conditions.

The reason for providing for extra conditions to be prescribed is that 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 to verify information 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 36 specifies other purposes for which regulations can be made, e.g. to address such issues as deemed time of receipt and prescribing electronic forms.

Section 37 makes it clear that a person who is authorised to prescribe paper-based forms also has the power to prescribe electronic forms.

Proposed Regulations

Regulations on the following four topics are proposed to complete the regime for electronic transactions implemented by the ETA:

- Credit Contracts Act: Choice of methods
- Credit Contracts Act: Time of Receipt
- National Parks Act 1980: sections 56G(2)(b)(ii) and 62(3)(a)
Conservation Act 1986: section 26ZZM(2)(b)(ii)
- Tax Records

Credit Contracts Act: Choice of methods

The issue

Provisions in Part 2 of the Credit Contracts Act 1981 impose certain disclosure requirements that trigger a right to cancel a credit contract. The disclosures can be made by giving the documents to the debtor or by posting them to the debtor. The ETA will permit these disclosure requirements to be met using electronic methods, e.g. email.

There was some concern expressed that consumers could inadvertently sign a consent to receiving such notices electronically, e.g. because the consent was buried in the fine print of a lengthy form. If this was not in fact an effective method of communicating with consumers then protections provided by the Credit Contracts Act could be undermined.

Proposed Solution

To address this concern it is proposed that, as recommended by the Select Committee, a regulation be made under section 36 that stipulates that recipients of disclosure notices under the Credit Contracts Act:

- must have been given a clear choice between receiving such notices by post or electronically; and
- must have expressly consented to receiving the notices electronically.

In the absence of an express indication of choice, such notices will have to be physically delivered or sent by ordinary post.

Although the regulation will require a clear choice of methods and express consent, it will not preclude the ability to form credit contracts online, nor preclude an online facility for existing customers to expressly consent to receiving electronic notices.

Credit Contracts Act: Time of Receipt

The Issue

Under the Credit Contracts Act disclosures must be made no later than 15 working days after entering into a credit contract, or a variation of a credit contract. Where a disclosure

notice is sent by post, disclosure is deemed to have been made four working days after the documents were posted. This enables lenders who post the disclosure documents to be certain of complying with their legal obligations, provided the notice is posted in time. This addresses the following concern: if the relevant time was actual receipt by the debtor, creditors would never be able to be certain of compliance using the option of sending the documents by post, and would be exposed to the risk of debtors claiming that the documents had not arrived on time, with no possibility of establishing the contrary.

Precisely the same issues arise if such notices are sent electronically. The deeming provision in the Credit Contracts Act clearly only applies to posted documents, and would not apply to electronic communications. Under the default rules in the ETA, electronic communications to debtors would in many cases be treated as received only when they come to the attention of the addressee (unless the parties agree otherwise) and this is not a fact that the sender can ascertain. So the risk associated with sending disclosures electronically would mean that this was not a viable option for lenders, even where borrowers agreed to receive the notices electronically.

Proposed Solution

The Select Committee recommended that in order to address this significant practical issue, and to avoid having two different rules with respect to time of receipt (i.e. one for paper notices and one for electronic notices), there should be a further regulation made under section 36. This will state that Credit Contracts Act disclosure notices sent electronically will be deemed to be received four working days after being sent. This makes sense for both ease of administration and for clarity.

National Parks Act 1980: sections 56G(2)(b)(ii) and 62(3)(a) Conservation Act 1986: section 26ZZM(2)(b)(ii)

The Issue

Section 56G(2)(b)(ii) of the National Parks Act 1980 deals with notices to owners in respect of a dog that has been found in a National Park and seized. The dog may be destroyed or otherwise disposed of unless the dog is claimed and any charges paid within 7 days of the receipt of the notice.

Section 62(3)(a) deals with the same issue with respect to any trespassing animal.

Section 26ZZM(2)(b)(ii) of the Conservation Act 1986 deals with the same issue with respect to dogs found in a controlled dog area as defined by the Act.

Concern has been expressed that because of the sensitivity associated with the destruction of animals that are personal pets, extra care needs to be taken when using electronic methods to meet the requirement of notice.

Proposed Solution

In line with the recommendation of the Select Committee, it is proposed that regulations made under section 36 stipulate that recipients:

- be given a clear choice between receiving such notices by post or electronically; and

- must have expressly consented to receive the notice electronically.

In the absence of an expressed indication of choice, there will be a presumption that such notices will have to be physically delivered or sent by ordinary post.

Tax Records

The Issue

Section 25 of the ETA permits information from source paper documents to be kept electronically, and the paper version destroyed.

The ETA requirements relate to information, rather than documents, so effectively the ETA allows for information to be retained in a different format, so long as the integrity of the information is maintained and the information is readily accessible so as to be usable for subsequent reference.

Section 17 provides that 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. The key point here is that these provisions relate to information contained in paper documents, not necessarily the documents themselves.

The Tax Administration Act 1994 (TAA) requires the keeping of sufficient records in English to enable the Commissioner of Inland Revenue (the Commissioner) to readily ascertain the amount of tax properly payable by that person. The Goods and Services Tax Act 1985 contains similar record keeping requirements.

It is not certain that retaining non-electronic information in electronic form will in every case meet the requirement of keeping sufficient records in English to enable the Commissioner to readily ascertain the amounts of tax properly payable by that person. The retention of the document itself may be necessary to meet this requirement in some cases.

Proposed Solution

The proposed solution is to provide a standard by regulation that will ensure that if non-electronic records are kept in an electronic form that meets that specified standard, then the requirement to keep those records is met.

The downside of specifying such a standard is that it is possible that in some cases the standard may be higher than might be necessary to meet the requirements of the TAA. This imposes a compliance cost. The cost is offset by taxpayers having certainty that they are meeting their record keeping obligations, and by being able to provide the Commissioner with adequate records if requested.

It is therefore proposed that a regulation be made under section 36 of the ETA to provide extra conditions that apply to electronic retention of paper-based records for the purposes of keeping records as required by the TAA.

Inland Revenue has identified the required standard as:

Where a source paper document is transferred into an electronic storage medium, the electronic document, when produced visually, must be in a format identical in all respects to

the source paper document. Indexing references may also be present but must not obscure the image of the source paper document.

The ETA permits information from source paper documents to be kept electronically, and the paper version destroyed. The regulation will require that, in the case of information that is a record required to be kept for tax purposes, the document must be imaged so that an electronic image of the document is retained. In other words, the regulation will impose a requirement on taxpayers to preserve the original look and feel of the document as well as the information it contained.

The scope of the proposed regulation is as follows:

1. The regulation will only apply to legal requirements to keep records for tax purposes.
2. Under the TAA business tax-payers have an obligation to determine what records to keep - i.e. the set of business records required to be kept to enable the Commissioner to readily ascertain the amounts of tax properly payable. The regulation will apply to a subset of those records, which is the set of non-electronic source records where the taxpayer wishes to retain that information electronically and dispose of the non-electronic version. In other words, it only applies to records where the original is in non-electronic (paper) form.
3. The regulation will specify that where a document originates in electronic form but is translated into paper form for a recipient (i.e. a printout is made), retention of the paper form by the originator of the document is not required - retention of the electronic form is sufficient.
4. The regulation will specify that where information is received in paper form, but the same information is received in electronic form (e.g. bank statements might be sent in hard copy, but electronic copies might also be sent subsequently or concurrently) then so long as the electronic form is retained the hard copy form need not be retained.

DRAFT

Schedule

Regs 4, 5

Part 1

Provisions subject to conditions

1 Interpretation

In this schedule, unless the context otherwise requires,--

express consent means a positive indication of consent; and includes, checking a box to select the option of receiving the information in electronic form and by means of an electronic communication, if applicable, rather than checking another box which refers to the option of receiving the information in non-electronic form by post; but does not include, entering into an agreement the terms of which provide for, among other matters, for the information to be provided in electronic form

2 Conditions

Enactment

Provisions

Credit Contracts Act 1981

Sections 16, 16A, 17 and 18

A legal requirement to make initial disclosure, guarantee disclosure, modification disclosure or continuous disclosure may be met by giving the required information in electronic form, whether by means of an electronic communication or otherwise, only if the person to whom the disclosure is required to be made—

- a. has been given the option of receiving the disclosure in either electronic or non-electronic form; and
- b. has expressly consented to the disclosure being made in electronic form and by means of an electronic communication, if applicable.

**National Parks Act 1980
Conservation Act 1987**

Sections 56G(2)(b)(ii) and 62(3)(a)
Section 26ZZM(2)(b)(ii)

A legal requirement to give written notice may be met by giving the required information in electronic form, whether by means of an electronic communication or otherwise, only if the person to whom the notice is required to be given—

- a. has been given the option of receiving the notice in either electronic or non-electronic form; and
- b. has expressly consented to the notice being given in electronic form and by means of an electronic communication, if applicable.

DRAFT

Inland Revenue Acts (as defined in section 3 of the Tax Administration Act 1994)

Legal requirements to retain information

1. A legal requirement to retain information that is in paper or other non-electronic form is met by retaining an electronic form of the information only if—
 - a. the information is readily able to be reproduced in paper form; and
 - b. that paper form is a duplicate image of the original paper or other non-electronic form.
2. Despite paragraph 1, annotations, indexing references or other additional information may be included with information retained in electronic form if they—
 - a. do not obscure any of the original information; and
 - b. are distinguishable as additions to the original information.
3. Despite paragraph 1, a legal requirement to retain information that is generated in electronic form and is provided to another person in paper or other non-electronic form (for example, an invoice generated electronically and printed for sending to a customer), may be met by retaining the information in that electronic form only.
4. Despite paragraph 1, if information is received from a person in both paper or other non-electronic form and in electronic form (for example, a bank statement sent by a bank in paper form, and also provided in electronic form), a legal requirement to retain the information may be met by retaining only the information in electronic form that was received from that person.

Part 2
Timing provisions

2 Time legal requirements treated as met

Enactment

Provisions

Credit Contracts Act 1981

Sections 22, 24, 24A, and 25 to 28

1. For the purposes of sections 22, 24 and 24A, when disclosure is made by sending the disclosure documents to a person by means of an electronic communication, the disclosure is to be treated as having been made to the person on the fourth working day after the day on which the documents are sent.
2. For the purposes of sections 25 to 28, when disclosure is made by sending the disclosure documents to a person by means of an electronic communication, the disclosure is to be treated as having been made to the person on the day on which the documents are sent.