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Full Length Research Paper

Legal Effect Of Electronic Contracts In Australia

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The rapid and commercially driven evolution of internet has created legal lacuna. In spite of the global efforts made to facilitate electronic commerce, the technological developments are giving rise to novel issues. Although the internet is being used as a commercial medium for nearly a decade, the enforceability and legal effect of electronic contracts remains an unresolved issue (Wild, 2011). There are considerable legal risks associated with electronic contracts. Specifically, the uncertainties about when a contract is formed, which jurisdiction applies, is the transaction secure needs to be addressed. This research examines the issues associated with electronic contracts in Australia. The research also investigates the possible deficiencies by analyzing cases between 2003-2013.

Keywords: Legal system, Electronic, Contracts in Australia

INTRODUCTION / BACKGROUND

A contract is the primary legal mechanism through which businesses interact with each other and form binding relationship. An electronic contract can be defined as a contract formed in an electronic medium. Electronic signatures are used to authenticate online contracts (Wright, 1994).

The Electronic Transactions Act (ETA) 1999 (Cth) is part of the Government's strategic framework for the development of an information economy in Australia. The purpose of the Act is to lay a foundation for the creation of a national legislative frame work to facilitate electronic commerce. The Electronic Transactions Act 1999 (Cth) substantially adopts the United Nations Commission on International Trade Law (UNCITRAL) Model law on electronic commerce 1996 (Explanatory Memorandum, 1999). The purpose of the UNCITRAL Model Law was to provide an uniform set of rules with respect to electronic commerce which could be adopted as part of national

law. The Electronic Transactions (Cth) Amendment Act 2011 has become one of the significant pieces of legislation that deal with the latest electronic transactions. This Act was assented on 25 May 2011 (Electronic Transactions, 2011). The main purpose and intention of the Act is to amend the Electronic Transactions (Cth) Act 1999, which was introduced a decade ago. The Electronic Transactions (Cth) Amendment Act 2011 is expected to bring the current legislation into line with the international standards and to allow for greater certainty in electronic transactions through compliance with international legal standards and in particular with the United Nations Convention on the Use of Electronic Communications in International Contracts 2005. (Electronic Transactions, 2011). Electronic Transactions Act 1999 (Cth) is regarded as the principle Act. Electronic Transactions Act 1999 (Cth) and the Electronic Transactions (Cth)

Amendment Act 2011 are jointly referred as electronic transaction legislation of Australia in this Article (Electronic Transactions, 2011), Electronic Transactions, 1999).

Problem Statement

Various contractual uncertainties arise when electronic contracts are formed. Statistical reports also indicate that there is slow up take of electronic commerce in Australia than in other countries (Inforlet, 2012). The Electronic Transactions(Cth)Amendment Act 2011 is still new and it is not clear if it adequately addresses the legal issues. Uncertainties associated with the enforceability of electronic contracts and use of electronic signatures can be summarized as follows:

- 1) Though the Australian legislation facilitates electronic contracts on a national level, the international dimension of electronic contracts does not appear to be addressed. Hence, international businesses face the problem of identifying the appropriate jurisdiction in cross-border transactions (Sutton,2002)
- 2) The Australian Electronic Transaction legislation fail to specify the time of formation of electronic contracts (Christensen, 2001). Further, from an international perspective different national laws regarding time of contract formation will give rise to enforcement issues.
- 3) It is not certain if the legislation provides adequate protection to electronic transactions which are required to be in writing and signed by the parties (Christensen, 2003).In addition, differences in national laws provide scope for enforcement issues.

Literature Review

A significant body of literature has emerged which examined various issues related to the formation of electronic contracts. The formation of contract through emails and the application of the postal rule to electronic transactions were discussed byGardiner (1994), Hill (2001)and Christensen (2001). Françoise(1994) explained the problems associated with electronic contracts formed through electronic data interchange. Clark (1995) extended the traditional contractual principles to EDI transactions and explored associated issues. Sneddon (1997) explored issues associated with jurisdiction in electronic banking transactions. Mccullagh, Little and Caelli(1998) discussed the implications of electronic signatures in electronic commerce transactions. Zwart (1998) discovered that though electronic commerce is replacing traditional commercial activities in both business to business and business to consumer transactions, some Australian businesses have been slow to adopt the opportunities offered by electronic contracts and electronic commerce.

Bread (2000) and Gregory (2003) examined the UNCITRAL Model Law to map out the future of electronic contracts. Problems associated with electronic records and electronic signatures were discussed by Murray (2000). Stern (2001) discussed issues related to the authentication of electronic transactions and examined which party should bear the risk of financial loss when issues related to authenticity arise. Studies have also been carried out on electronic mistakes (Karoline,2009).

In conclusion, prior research undertaken on electronic contracts and electronic signatures provides useful information relating to the applicability of traditional contractual principles to electronic contracts. Most researchers agreed that the formation of electronic contracts gives rise to various contractual uncertainties(Clark,1995), (Christensen,2001), (Mccullagh, Little,. and Caelli, 1998). They found that the current legal system cannot handle the legal issues associated with the formation of electronic contracts. However, only a few researchers argue that the traditional common law principals are flexible and can be applied to new technologies (Gardiner,1994). Data was collected and analysed from the primary and secondary sources of law in these studies.

Inadequacies of Prior Research

Although considerable research has been done on the formation of electronic contracts and use of electronic signatures, insufficient research has been done on determining the effect of the Electronic Transactions (Vic) Amendment Act 2011 and how issues are being addressed by the courts. Further, though some researchers have started to examine the inadequacies in depth analysis of case laws have not been carried out. In order to fill this gaps in the literature, this research will examine the amended electronic transaction legislation of Victoria and will carry out an in depth analysis of cases between 2003-2013.

RESEARCH METHOD AND METHODOLOGY

Doctrinal legal research method was employed and document analysis was carried out. Doctrinal legal research is regarded as one of the most accepted legal research paradigm(Pearce, Campbell and Harding, 1987), (Burns and Hutchinson,2009) and (Macconville and Chui, 2007). Doctrinal research is also known as pure theoretical research(Adilahet,2009), (Macconville and Chui, 2007) It deals with examination of legal rules, explanation of areas of difficulty and prediction of future developments (Pearce, Campbell and Harding, 1987), (Burns and Hutchinson,2009). Document analysis(Collis, and Hussey, 2003), (Neuman, 1997)was undertaken to research the formation of electronic contracts and to

analyse cases between 2003- 2013.

The Aim of Research And Research Question

The aim of this research is to evaluate the role of Electronic Transactions (Vic) Amendment Act 2011 in establishing an appropriate legal framework for electronic contracts. Further, the research will highlight the challenges which electronic contracts pose when the traditional law is extended to electronic contracts. Special attention will also be devoted to contract formation by means of mobile hand held devices. Finally, the research will examine the impact of electronic contracts in Australia in order to evaluate the possibility of Australia adopting new concepts and laws for the purpose of reform.

The main objective of the proposed research is to address the following research question:

1. What issues arise when traditional contract principles are applied to electronic contracts? Has the Electronic Transaction Legislation of Australia resolved issues left unresolved under traditional law?

Research Rational and Significance of Research

The research is significant as electronic contracts are an important aspect of further business development (Zwart, 1998). Contractual certainty is very important for businesses engaged in electronic commerce. The increasing costs of dealing with the contractual issues may offset any reduction in costs achieved through the use of electronic commerce and may hinder companies and business entities from conducting commercial transactions electronically.

Effective formation of electronic contracts has the potential to boost the efficiency of Australian firms. This research is timely as the Australian government is trying to promote and accelerate electronic business tools to improve the productivity of the Australian economy. The Australian Government is working with the businesses and community to make the online environment secure, to help businesses make better use of information communication technologies and to ensure that Australia is at the forefront of international developments (Wheeler, 2012) and (Attorney General's, 2012).

Satisfying Writing Requirements

Written and signed contracts enhance the enforceability of the transaction and provide additional assurance to the other party regarding the acceptance of the terms of the contract. They indicate that the parties have agreed to the terms of the contract. Therefore, prevent fraudulent transactions (McCullagh, Little, and Caelli, 1998).

Under s 8 of ETA (Victoria) where a person is required to give information in writing, then that requirement is satisfied, if the person gives the information through electronic communication (Electronic Transactions, 2000) Unlike the Model Law, the ETA contains an additional requirement of consent for satisfying the requirement of electronic writing. Under this provision the person to whom information is required to be given must consent for the requirement to be satisfied electronically (Davidson, 2004).

Under the ETA (Victoria) consent is defined to include what can be reasonably inferred from the conduct of the concerned person but consent does not include the consent given subject to conditions unless those conditions are complied with. Sections 8, 9 and 10 of the ETA (Victoria) requires 'consent' in an electronic transaction. However, difficulties may arise in determining whether the conduct of a person amounts to a consent. Though express consent is not required, it is difficult to determine consent in an electronic transaction. The Explanatory Memorandum is also inconsistent in determining consent because, it suggests that, 'consent can be inferred from a history of transactions (Explanatory Memorandum, 2000). Analysis of cases discussed below dealing with the requirement of 'consent' highlight the issue clearly. Cases discussed below indicate how varying approaches are being adopted by courts in relation to obtaining consent under the ETA.

Under Electronic Transactions Act, transactions can be conducted electronically only if the parties consent to transact through electronic means. In *Terumo Corporation v B Braun Melsungen* (2009) it was held for the application of Electronic Transactions Act, if the parties do not specifically object to the mode of communication then implied conduct can be inferred from their conduct. Similarly, in *Aristocrat Technologies Inc v IGT* (2008) it was established that implied consent can be inferred from the conduct of the parties if there is long history of communication through electronic means. On similar lines, in *Tugum Cobaki Alliance Inc v Minister for planning and RTA* (2006). It was held that making a document available through electronic link also satisfies the requirement of writing under the electronic transactions Act. While, *Department of Health and Human Services v H* (2011) appears to indicate that consent can be determined only if there is evidence to prove it. Likewise, *KM Ravich v King Island Council and BH Hassing* (2007) it was held that the writing requirements were not satisfied as there was lack of clear consent. Similar view was also expressed in *Ilich & Anor and Baystar Corporation Pty Ltd* (2004). On the other hand, *Kim v Minister for immigration* (2009) on 23 August 2005 indicates that the Electronic Transactions Act does not apply to the practice and procedures of the court. Similarly, in *Re Ryan and Secretary, Department of Employment and Workplace Relations* (2005) it was held that Electronic Transactions Regulation 2000 (Cth)

Specifically Exempts applicability of Administrative Appeals Tribunal Act 1975.

Additionally, examination of issue in relation to electronic contracts formed through mobile phones illustrate further difficulties. Data stored in a mobile phone in the form of a text SMS or in the memory of a SIM card (subscriber Identity Module) can also amount to writing under the broad criteria provided under the ETA. Mobile phones can be stolen easily thereby making data tampering relatively easy and also leading to easy data loss. Mobile phones can be easily stolen as seen in *Hayek v R*(2010),*Johnson v R* (2010)*Director of Public Prosecutions (DPP) v Malikovaski* (2010),*Joyce v Gee*(2010),*Nanai v R*(2010),*Dolan v R*(2010),*Devine v R*(2009),*Director of Public Prosecutions (DPP) v Kuru* (2009),*R v Mann*(2009) and *R v Harris*(2009). Thus, data can be more easily tampered, destroyed and lost in case of mobile phones. Hence, all the above shortcomings do not assure enforceability of electronic contracts in the same way as paper-based contracts do. Moreover, in case of electronic contracts formed through mobile phones, evidence of text message from a mobile phone and memory of a SIM card appears to be acceptable as evidence only if the data is accurate as seen in *Bevan v The State of western* (2010). Clearly, this can add another layer of issue in the context of electronic writing by creating evidentiary issues.

Electronic Transaction Legislation and Signatures

The requirement for signature under ETA focuses on the basic function of a signature such as to identify the person and to indicate the person's intention .According to the explanatory memorandum to the Victoria bill, the signature method is not required to uniquely identify a person(Electronic Transactions, 2000).An analysis of signature cases indicates how doctrines are being developed to recognise electronic signatures and how they suffer from limitations (1884).

An analysis of cases discussed below indicate that electronic signatures are being authenticated with the help of facts and circumstances of the case, as seen in *R v Frolchenko*(1998), In *R v Frolchenko*(1998) Williams J recognised that modern means of communications may not contain a personal signature and stressed the importance of authenticating such communications based on facts of the case*R v Frolchenko* (1998). This approach has limitations, as this can only apply if there are adequate offline surrounding circumstances associated with the identity of the signatory.

In *McGuren v Simpson* (2004) electronic signature was provided validity under traditional law and a signatory was authenticated on the basis of authentication fiction doctrine. Under this doctrine 'where the party to be charged expressly or impliedly acknowledges the writing as an authenticated expression of the contract, typed

words will be deemed to be his or her signature' *McGuren v Simpson* (2004). However, this doctrine also has limitations as it can only apply when the party expressly or impliedly acknowledge the writing as an authenticated expression of the contact. It cannot apply in situations when a person denies a signature and makes a claim of fraud.

Electronic signatures are also recognised under the electronic transaction legislation as established in *Faulks v Cameron*(2004). However, electronic transaction legislation was not intended to deal with evidentiary aspects of signature such as the important functions of traditional signatures, which include cautionary function, protective function, challenging function and record keeping function and it also lacks specific identification requirement .Hence, it suffers from limitations. *Corneloup v Adelaide City Council*(2010)appear to indicate that the requirement of signature will not be satisfied if there is lack of consent to receive the signature electronically, if the signature method is not reliable and appropriate and if there is only a moderate inference in the document identifying the signature. While, in *Asher v Seabrook*(2010) vague requirements of signature provided under the Electronic Transactions Act were highlighted. On the other hand, emails address can also be regarded as a signature under the electronic transaction legislation of Australia. *Points North*(2006) highlights the difficulties which can arise from such a liberal view.

Electronic signatures are insecure and raise concerns regarding impersonation of signatures as seen in *CSX Transportation, Inc. v Recovery Express, Inc*(2006) , *Macquarie Group Ltd, Macquarie Bank Ltd and Macquarie Holdings (USA) Inc v Peter Martenson*(2008).Thus, a lack of appropriate consideration of evidentiary aspects of signatures under the electronic transaction legislation coupled with enhanced possibility of impersonation of signatures expose contracting parties to considerable risk.

In the light of recent judicial decisions and the increased risk of identity theft in an electronic environment the legal protection available to electronic signatures still have gaps. Thus, if an electronic signature is impersonated it can only be recognised on the basis of surrounding facts and circumstances. Electronic signatures cannot create evidence *per se* as traditional signatures can, as it can be tampered with easily. This is a major flaw of electronic signatures. Hence, on its own, it cannot protect transacting parties in the way that traditional handwritten signatures can.

Examination of issue in relation to mobile phones highlight additional difficulties. Name of a person in a text Short Message Service (SMS) of a mobile phone can also amount to a signature under the electronic transaction legislation of Australia. False mobile phone accounts and mobile phones can be obtained fraudulently as seen in *Zoran Markovic v R*(2010) and *R*

TABLE BELOW SUMMARISES THE GAPS FOUND IN THIS ARTICLE

ETA	Gaps
Writing requirements provided under section 8 of ETA (Victoria)	ETA applies only if it is not specifically exempted by a statute as seen in <i>Kim v Minister for immigration Re Ryan and Secretary, Department of Employment and Workplace Relations</i>
	There is lack of concrete 'consent criteria as seen in <i>Terumo Corporation v B Braun Melsungen, Aristocrat Technologies Inc v IGT, TugumCobaki Alliance Inc v Minister for planning and RTA, Department of Health and Human Services v HKM Ravich v King Island Council and BH Hassing</i>
	ETA does not adequately deal with the issues associated with mobile phones as seen in <i>Hayek v R, Johnson v R, Director of Public Prosecutions (DPP) v Malikovaski, Joyce v Gee, Nanai v R, Dolan v R, Devine v R, Director of Public Prosecutions (DPP) v Kuru, R v Mannand R v Harris.</i>
Signature requirements provided under section 9 of ETA (Victoria)	ETA is being interpreted liberally as seen in <i>eBay International AG v Creative Festival Entertainment Pty Limited</i>
	Electronic signatures are provided validity only if evidentiary issues are not raised as seen in <i>Faulks v Cameron and Getup Ltd v Electoral Commissioner.</i>
	ETA does not adequately deal with the issues associated with mobile phones as seen in in <i>Zoran Markovic v Rand R v Kelly-Anne Theresa Haugland</i>
	ETA is being interpreted liberally as seen in <i>Corporation of the City of Adelaide v Corneloup and Ors</i>

v Kelly-Anne Theresa Haugland(2009) This can also lead to impersonation of electronic signatures and raise further concerns.

RESULTS AND DISCUSSION

Analysis of criteria dealing with writing requirement and signature requirement revealed the deficiencies of the legislation. In sum, the electronic transaction legislation of Australia has fallen short of its intended aim of facilitating electronic commerce as well as building business and community confidence in electronic commerce.

The observation of the analysis is reflected in specific deficiencies noted. For example, the examination of the criteria provided for writing reveal that the Australian electronic transaction legislation only provides minimum standard to be met by an electronic document in relation to the writing requirements. Traditional paper-based writing provides a permanent record of terms and

conditions agreed between the contracting parties. Permanent retaining of the record is not the prerequisite of the Act. It merely requires 'accessibility' and 'usability' falling short of permanent retention. It is broad enough to encompass any storage device that is cable of retaining the information and permits usability of information. These broad requirements provide less threshold than paper-based contracts and leave more scope for disagreement regarding what terms and conditions were agreed between the parties. Additional factors such as technological developments or alterations can have an impact on agreed terms and lead to disagreement. Non-assurance of agreed terms and condition of a contract can discourage contracting parties from effectively using electronic media for contract formation. All these shortcomings do not assure enforceability of contracts in the same way as paper-based contacts do. Although the legislation intends to facility effective formation of electronic contracts, it cannot be regarded as an adequate facilitator.

Similarly, the analysis of both signature criteria under the legislation and the analysis of recent signature cases indicate that the legal protection available to electronic signatures still have gaps. Under the legislation and legal doctrines developed by the courts, if an electronic signature is impersonated, it can only be recognised on the basis of surrounding facts and circumstances. Hence, they suffer from limitations. Finally, it can be pointed out that the legislation is concerned primarily with providing general recognition to electronic transaction.

CONCLUSION

This research has advance the knowledge base by examining the formation of electronic contracts under the Electronic Transactions (Vic) Amendment Act 2011 and by carrying out an in depth analysis of cases between 2003-2013. The research will help in finding answers as to how the Australian electronic transaction legislation may be made more effective in relation to electronic contracts and electronic business. The major finding of the research indicates that the both traditional contract law and electronic transaction legislation of Australia cannot adequately deal with the issues associated with signature and writing requirements.

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