

---

---

# Formation of Contracts by Email – Is it Just the Same as the Post?

---

Sharon Christensen\*

## 1. Introduction

Changes in the way commerce is undertaken nationally and internationally has placed greater reliance on technology and increased the use of the Internet as an interactive medium. The nature of the Internet as “a decentralised, global medium of communication comprising a global web of linked networks and computers”<sup>1</sup> has created issues for the formation of common contracts, given rise to complex jurisdictional problems, ignited debate on privacy and defamation issues, created new intellectual property rights which require protection and created a variety of complex consumer protection issues which may not be covered by present legislation.

The purpose of this article is to evaluate the recent legislative developments and their possible impact in facilitating electronic contracts and to consider the continued operation of common law principles in the area of contract formation. The need for the community to have a clear understanding of the differences between a paper environment and an electronic environment in everyday transactions is highlighted by the increase in Internet shopping sites. Consequently, the topic of contract formation is chosen because of its fundamental importance to commerce and the community generally. The ability for a contract to be validly formed through the Internet will be crucial to continued consumer confidence and business success in the years to come.

A clear indication of the importance of the Internet to everyday transactions is found in the enactment by the Commonwealth Parliament of the *Electronic Transactions Act* 1999 (Cth). The purpose of this legislation is to lay a foundation for the creation of a national legislative framework for facilitating e-commerce. However, even with this legislative framework there will remain a need to rely on principles of contract law, primarily developed within the 19<sup>th</sup> century, in order to adjudicate upon a dispute. These principles will in some cases be capable of adapting to an electronic environment without legislative intervention but the Commonwealth and State governments have moved to end any perceived uncertainty about the application of contractual principles

---

\* LLB(Hons), LLM (QUT), Assistant Dean Teaching and Learning, Law Faculty, QUT, Member, Centre for Commercial and Property Law QUT.

<sup>1</sup> *ACLU v Reno* 929 Fsupp 824 (ED Pa 1996).

through the enactment of the *Electronic Transactions* legislation.<sup>2</sup> Consequently, any consideration of the operation of common law principles within an electronic environment must necessarily be seen in light of this new legislative framework.

## 2. National Legislative Framework for Electronic Transactions

The *Electronic Transactions Act* 1999 (Cth) “is part of the Commonwealth government’s strategic framework for the development of the information economy in Australia. The government has a commitment to ensuring that Australians enjoy the social and economic benefits offered by the growth of the information economy”.<sup>3</sup>

The *Electronic Transactions Act* 1999 (Cth) commenced on 15 March 2000 and is based on the United Nations Commission on International Trade Law’s *Model Law on Electronic Commerce (UNCITRAL)*. Adoption of similar principles to the UNCITRAL was recommended by the Electronic Commerce Expert Group established by the government to report of issues relating to e-commerce.<sup>4</sup>

The *UNCITRAL Model Law* is designed to offer national legislators a set of internationally acceptable rules designed to remove a number of legal obstacles to the use of electronic communications. Australia was closely involved in the development of the Model Law, and after consultation with the States and Territories, relied substantially on the Model Law in the development of a national framework. For the framework to work effectively, each State and Territory is required to enact complimentary legislation as part of a national uniform legislative scheme. While all States and Territories have given ‘in principle’ support, only New South Wales,<sup>5</sup> Victoria,<sup>6</sup> and the ACT<sup>7</sup> have passed complimentary legislation to date.<sup>8</sup> Even though a national uniform scheme is proposed, the Commonwealth legislation commenced immediately and is not affected by the State legislation.

The legislation takes a light-handed regulatory approach and is based on two principles: ‘functional equivalence’ and ‘technology neutrality’. Functional equivalence means that a paper based transaction and an electronic transaction should be treated equally by the

<sup>2</sup> *Electronic Transactions Act* 1999 (Cth); *Electronic Transactions Act* 2000 (NSW); *Electronic Transactions (Victoria) Act* 2000 (Vic); *Electronic Transactions (Queensland) Bill* (introduced 3 April 2001); *Electronic Transactions (Australian Capital Territory) Act* (ACT) passed on 15 February 2001 not yet in force; *Electronic Transactions Act* 2000 (SA) assented on 7 December 2000 not yet proclaimed into force; *Electronic Transactions Bill* (Tas) introduced in 2000 and not yet passed; *Electronic Transactions Bill* (WA) introduced in 2000 and not yet passed; *Electronic Transactions (Northern Territory) Bill* (NT) introduced in 2000 and not yet passed.

<sup>3</sup> Explanatory Memorandum *Electronic Transactions Bill* (Cth).

<sup>4</sup> The Electronic Commerce Expert Group was established by the Attorney General to consider the legal issues raised by electronic commerce and the appropriate form of regulation consistent with international developments.

<sup>5</sup> *Electronic Transactions Act* 2000 (NSW) assented 3 May 2000 not yet proclaimed into force.

<sup>6</sup> *Electronic Transactions (Victoria) Act* 2000 (Vic) commenced 1 September 2000.

<sup>7</sup> *Electronic Transactions (Australian Capital Territory) Act* (ACT) passed on 15 February 2001 not yet in force.

<sup>8</sup> As at 23 April 2001 the legislation remaining to be passed is: *Electronic Transactions (Queensland) Bill* was introduced on 3 April; *Electronic Transactions Act* 2000 (SA) assented on 7 December 2000 not yet proclaimed into force; *Electronic Transactions Bill* (Tas) introduced in 2000 and not yet passed; *Electronic Transactions Bill* (WA) introduced in 2000 and not yet passed; *Electronic Transactions (Northern Territory) Bill* (NT) introduced in 2000 and not yet passed.

law. Technology neutrality means that the law will not discriminate between different forms of technology. This is evident in the wide definition of electronic communication, which could include communication via fax, email, Electronic Data Interchange or some other form of data exchange. This article will focus on the effect of contracting via email.

### 3. Ambit of the National Legislation

The objects of the Commonwealth and State legislation are to provide a regulatory framework that:

- (i) recognises the importance of the information economy to the future economy and social prosperity of Australia;
- (ii) facilitates the use of electronic transactions;
- (iii) promotes business and community confidence in the use of electronic transactions; and
- (iv) enables business and the community to use electronic communication in their dealings with government.

The uniform legislation has two major benefits. First, it will allow individuals and corporations to deal with many State and Territory departments and agencies electronically - in much the same way that they are now able to deal with many Commonwealth departments and agencies. Secondly, it will supplement the common and statute law applying to contracts. The legislation contains provisions concerning requirements of writing and signature, production of documents, retention of documents, the time of dispatch and receipt of communications and attribution of communications in an electronic environment.

The Commonwealth legislation is limited in its application to “laws of the Commonwealth”. Before July 2001 “laws of the commonwealth” is defined to mean a law of the Commonwealth specified in the regulations.<sup>9</sup> The *Electronic Transactions Regulations* 2000 (Cth) list approximately 300 federal statutes. After July 2001 the legislation is intended to apply to all laws of the Commonwealth unless specifically exempted by the legislation. The Explanatory Memorandum to the Electronic Transactions Bill 1999 makes the following observation about the definition:

The term “Laws of the commonwealth” is intended to be read in its broadest sense as applying to all laws of the Commonwealth, whether they are made by or under a statute or derive from the common law and the rules of equity.

Despite the observations made in the Explanatory Memorandum, it is the writer’s view that any suggestion the “laws of the commonwealth” includes the common law and rules of equity should not be adopted. Such a phrase is not ordinarily interpreted as extending to the common law but is limited to laws passed by the Commonwealth Parliament together with any subordinate legislation.<sup>10</sup> This is consistent also with the

---

<sup>9</sup> *Electronic Transactions Act* 1999 (Cth), s 5(2).

<sup>10</sup> The prevailing view appears to be that there is no common law of the Commonwealth: *R v Kidman* (1915) 20 CLR 425 and *Jackson v Gamble* [1983] 1 VR 552 at 559 per Young CJ. There is also authority to suggested that the phrase “law of the Commonwealth” is limited to legislation passed by the Commonwealth Parliament: P H Lane, *The Australian Federal System*, 2<sup>nd</sup> edn Law Book

enactment of electronic transactions legislation by the State Parliaments that is stated to apply to “the law of the jurisdiction”<sup>11</sup> or the “law of the State”.<sup>12</sup> It is clear from the definitions in the State Acts that the legislation has application to principles of common law and equity and requirements imposed by legislation.<sup>13</sup> Therefore when considering issues of contract formation, which are largely governed by the common law, the State legislation will be the most applicable.

#### 4. Contract Formation in E-commerce

A contract is the primary mechanism for the transaction of business. A contract may be described as an agreement under which parties assume obligations to each other for valuable consideration.<sup>14</sup> A contract may be governed by the law of the jurisdiction agreed between the parties or by the law of the jurisdiction imposed by the court. Underlying the common law of contract is an assumption of freedom to contract with any person on any terms. While this assumption has been eroded over time through statutory reform<sup>15</sup> and equitable doctrine<sup>16</sup> the basic premise still applies in relation to contract formation. The law prescribes the general elements of a binding contract but it does not require a contract to be formed by any particular method or to be in any particular form. It is accepted that a contract can be formed by a variety of methods including:

- (i) an exchange of correspondence through the post, by telex or by facsimile;
- (ii) orally, either in person or by use of a telephone; or
- (iii) by completion of a formal document.

A contract is not generally required to take a particular form and may be oral, provided there is no specific statutory requirement for the contract to be in writing.<sup>17</sup>

The advent of the Internet as a means of facilitating contract formation does not, at first blush, present a situation different to that applicable to a facsimile or telex.

An electronic contract may be formed either through an exchange of email or by completion of a document on an Internet web-site which is submitted to another party electronically. There are three broad categories of subject matter for electronic contracts:

---

Company 1979 at 867; *The Commonwealth and the Central Wool Committee v Combing, Spinning and Weaving Company Ltd* (1922) 31 CLR 421 per Knox CJ and Duffy J; *Spratt v Hermes* (1965) 114 CLR 226 at 247 per Barwick CJ.

<sup>11</sup> Refer to the *Electronic Transactions Act* 2000 (NSW) and the *Electronic Transactions (Victoria) Act* 2000.

<sup>12</sup> Refer to the *Electronic Transactions (Queensland) Bill*.

<sup>13</sup> An example of legislative requirements would include the requirements of writing and signature imposed by the *Property Law Act* 1974 (Qld).

<sup>14</sup> See also J W Carter & D J Harland, *Contract Law in Australia*, 3<sup>rd</sup> edn Butterworths North Ryde 1996 at [101] defines a contract as “a legally binding promise or agreement”.

<sup>15</sup> Note in particular consumer protection legislation such as the *Trade Practices Act* 1974 (Cth) or the *Consumer Credit Code*.

<sup>16</sup> Equitable doctrines assuming more importance in contract law include unconscionability, duress, undue influence. The application of these principles has been assisted by the enactment of s 51AC of the *Trade Practices Act* 1974 (Cth).

<sup>17</sup> See below.

- (i) sale of physical goods – goods are ordered over the Internet with payment via the Internet but delivery occurs in the usual way;
- (ii) sale of digitised products – goods such as software can be ordered, paid for and delivered on-line;
- (iii) supply of services – examples include electronic banking, sale of shares, financial advice,<sup>18</sup> or consumer advice.

While it may be possible to view these methods as presenting a modern dimension to the accepted methods of contract formation rather than requiring any particular changes to the law, the electronic medium presents some particular issues arising from their electronic form.

It is trite law that to prove a valid and binding contract at common law the following elements should be established:

- (i) a valid offer has been made by one party to another;
- (ii) the offer has been accepted by the other party or parties;
- (iii) there is an intention by all parties to create legal relations when they entered into the contract;
- (iv) the promises made within the contract are for valuable consideration;<sup>19</sup> and
- (v) the terms of the contract are certain.<sup>20</sup>

The common law elements that present particular issues for electronic commerce are those of offer and acceptance. Each will be considered separately.

## 5. Making an Offer Using Electronic Means

### 5.1 Established Position at Common Law

An offer has been described as an indication by one person to another of his or her willingness to enter into a contract.<sup>21</sup> Importantly, the terms of an offer must be sufficiently clear to allow a contract to be formed by acceptance without further negotiation and the intention of the offeror to be bound by those terms must be clear. An offer can be made to one person or to the world at large.<sup>22</sup> A purported offer that does not demonstrate these elements will be an invitation to treat.<sup>23</sup> An invitation to treat cannot become a binding contract through acceptance of its terms. An invitation to treat generally indicates a willingness to negotiate a contract.

<sup>18</sup> See for example Your Mortgage at <http://www.yourmortgage.com.au>

<sup>19</sup> An exception to this principle may arise where a contract is enforced through the principle of estoppel.

<sup>20</sup> The necessity for these elements is discussed in *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256.

<sup>21</sup> Refer to J W Carter & D J Harland, *supra* n 14 at 25. Offer has also been defined in Halsbury's Laws of Australia as "the expression of willingness to contract on terms stated: what is alleged to an offeree must have been intended to give rise, on its acceptance, to legal relations."

<sup>22</sup> See *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256.

<sup>23</sup> *Ibid* at 268.

## 5.2 Electronic Advertisements Compared to Paper

Commercial traders advertise or promote their products using a variety of mediums ranging from radio, television, newspaper, printed catalogues or, more recently, on an Internet web-site. As a general proposition most advertisements for the sale of goods are considered to be invitations to treat and not offers.<sup>24</sup> However, there may be circumstances where the advertiser has gone further and made an offer.<sup>25</sup> In a paper environment the ultimate conclusion will depend upon the language used. Will this principle apply equally to an advertisement in the newspaper or on the Internet? Is the only difference the increased circulation offered by the Internet or does the nature of electronic advertisements add a layer of complexity to the question?

A recent example of the increased exposure of the Internet is provided by the following facts. A television was displayed on a web-site owned by Argos Distributors for sale at a price of £2.99. Hundreds of customers in the UK and Europe ordered the television but the retailer refused to fill the orders on the ground that they had been incorrectly priced by mistake. The correct price was £299.<sup>26</sup>

If the same advertisement appeared in a newspaper or catalogue and merely provided information about goods for sale and their price it would generally have been considered to constitute an invitation to treat.<sup>27</sup> It is only once a member of the public makes an offer and it is accepted by the seller that a contract is formed.<sup>28</sup> This would suggest that Argos Distributors was within their rights to refuse to fulfil the orders.

Nevertheless, it has been argued that a display of goods or services on a website may more readily amount to an offer.<sup>29</sup> If the website is worded and arranged in such a way as to encourage the formation of a contract, the crucial question is whether the seller intended to be bound by any response or whether the seller wanted to decide whether to enter a contract and with whom. It is suggested that in addition to the language used on the website, the *type* of website may also be relevant. A website may be of two kinds – non-interactive or interactive.

### 5.2.1 Non-Interactive Sites

A site will be *non-interactive* where it only provides information and any contact with the seller is through other means such as confirmation of an order by phone or delivery of goods. There will be little difference between an advertisement on this type of site and a conventional advertisement. The website will convey through its non-interactive nature the implied intention on the part of the seller to negotiate the terms of any contract.

<sup>24</sup> *Grainger & Son v Gough* [1896] AC 325 at 333.

<sup>25</sup> See for example *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256; *Re Mount Tomah Blue Metals Ltd (in liq)* [1963] ALR 436.

<sup>26</sup> This dispute is yet to be litigated in the courts.

<sup>27</sup> *Partridge v Crittenden* [1968] 1 WLR 1204.

<sup>28</sup> Refer to *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) LD* [1953] 1 QB 401.

<sup>29</sup> O Hance, *Business and Law on the Internet*, McGraw Hill: Best of Editions 1996.

### 5.2.2 Interactive Websites

An *interactive* website may be treated differently. Where a person is able to log into a website, chose an item for sale, enter payment details and conclude the agreement the display on the site may go beyond a mere invitation to treat. If by analogy the website is considered to be the same as a display of goods in a store window or on a shelf a court may be reluctant, depending on the terms placed on the website, to find the existence of an offer. One of the rationales for holding a display of goods to be an invitation to treat was that a shop owner should not be bound to an unforeseeable number of acceptances.<sup>30</sup> While this may equally apply to a seller of goods over the Internet, the application of this rationale becomes more difficult in relation to the sale of services or information. In each of those cases the seller may be able to supply an unlimited number. Alternatively, in the case of a sale of grocery items the site may provide for a substitute item to be provided. Interactive websites will also commonly display the terms of any agreement entered into on the website and the buyer indicates their acceptance of the terms at the time of ordering. This fact together with the design of the site may add further weight to the argument that the website forms an offer and not an invitation to treat. By providing the terms on the site (which in some cases limit the liability or obligations of the seller) the seller is indicating the terms upon which they will be immediately bound. The sites for most of the major retailers in Australia will fall into this category.<sup>31</sup> The whole transaction (including payment) can be completed on-line with only delivery occurring in the normal manner. It is likely that these types of sites may be interpreted as offers and not invitations to treat.

A website owner of an interactive site may have particular reasons for wanting to limit the number and type of persons they contract with due to the worldwide nature of the Internet. In particular, a website owner may wish to avoid contracting with persons in foreign jurisdictions due to the potential disputes as to the governing law (and thereby rendering enforcement of the contract uncertain).

### 5.2.3 Automated Interactive Sites

Drawing an analogy between a shop window display and an Internet site assumes some human interaction within the process. Some interactive sites exist that are operated totally by a computer. The buyer puts in their credit card details and requests certain information or software, which is then transmitted automatically over the Internet. In this type of case there may be a stronger argument for an analogy to be drawn with the offering of goods or a ticket in a vending machine. In *Thornton v Shoe Lane Parking Ltd*<sup>32</sup> the English Court of Appeal considered that generally for vending machines, “the offer is made when the proprietor of the machine holds it out as being ready to receive money”.<sup>33</sup> In some circumstances the vending machine will display goods with little or no terms displayed, except the price. A contract is formed when the consumer places

<sup>30</sup> *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) LD* [1953] 1 QB 401; *Grainger v Gough* [1896] AC 325 at 333-4; *Esso Petroleum Ltd v Commissioners of Customs & Excise* [1976] 1 All ER 117 at 126.

<sup>31</sup> Refer to the sites for David Jones (<http://www.davidjones.com.au>), Coles Myer (<http://www.colesmyer.com.au>), Woolworths (<http://www.woolworths.com.au>), Food Direct (<http://www.fooddirect.com.au>).

<sup>32</sup> [1971] 2 QB 163.

<sup>33</sup> *Ibid* at 169.

money into the slot and selects items. There is very little opportunity for the consumer to change their mind in the process. In other cases a substantial number of terms of purchase may appear on the machine and the consumer accepts those terms by purchase of a product or ticket. Again however, the consumer will have little opportunity for changing their mind or making another choice. Unlike a vending machine, a transaction conducted via an interactive website is more complex. The contract is likely to be governed by the terms on the website which the consumer will usually need to accept before being able to proceed with the transaction. In addition, the consumer will be required to place personal details and other information onto the site and make a choice prior to submitting the order. The consumer is able to make a different selection at any time prior to selecting the submit button. This differs from a vending machine where the money is usually paid prior to a selection being made. Due to the differences in types and complexities of websites it is unlikely that any general rule could be developed and each situation should be decided on a case by case basis.

### 5.3 Impact of Electronic Transactions Legislation

The *Electronic Transactions Act* 1999 (Cth) and its State analogues do not have any effect on the application of the common law to the making of an offer. Whether a website is interpreted as making an offer or an invitation to treat will be a question decided only by reference to the common law.

## 6. Acceptance of an Electronic Offer

### 6.1 Position at Common Law

The general principle is that a contract is formed at the time and place an acceptance is communicated to the offeror.<sup>34</sup> An acceptance must correspond to the offer and be unqualified in its terms. The law does not prescribe any particular method for acceptance of an offer. What will be an appropriate method of acceptance depends upon the facts of each situation. Offerees may find themselves faced with two types of situation.

First the terms of the offer may dictate the form and method of acceptance. For example, an offer may indicate that an acceptance should be sent by “return facsimile” by a certain date. In most cases an acceptance will only be valid if it complies with the terms set out in the offer. However, if a method of acceptance, which is more advantageous to the offeror is used and the acceptance is received by the date specified this might not be fatal.<sup>35</sup> This would require a conclusion that the method specified in the offer is not the only method that may be used or that the offeree could waive the method.<sup>36</sup>

<sup>34</sup> *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* (1957) 98 CLR 93. Provided the other requirements of consideration, intention and certainty are also met.

<sup>35</sup> *Tinn v Hoffman & Co* (1873) 29 LT 271 at 274. See also *Rolling v Willann Investments Ltd* (1989) 63 DLR 4<sup>th</sup> 760 where the Canadian Supreme Court considered that the use of communications which expedite transmission of documents should be encouraged.

<sup>36</sup> *Manchester Diocesan Council for Education v Commercial & General Investments Ltd* [1970] 1 WLR 241.



The second broad category is where there is no indication in the offer of an appropriate method of acceptance. A general rule, which may be followed by an offeree, is that acceptance may be given by the same or an equally expedient method as adopted for the making of the offer. For example, where an offer is made over the telephone an acceptance may occur by a return telephone call, by facsimile, by telex or in person.

It follows that until the acceptance is received by the offeror the offer may be revoked. In the late nineteenth century an exception to the general requirement for communication of an acceptance arose to avoid “the extraordinary and mischievous consequences which would follow if it were held that an offer might be revoked at any time until the letter accepting it had been actually received”.<sup>37</sup> This is referred to as the postal acceptance rule.

The rule as accepted in Australia is:

Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.<sup>38</sup>

The initial rationale for the rule was predicated on the fact that to require communication would promote an endless stream of letters between the parties confirming receipt of the letters and, therefore, no contract would be formed. The increases in efficiencies of the postal service<sup>39</sup> at this time were also important in this decision as a letter once posted was considered to be as good as delivered.

Case law also reveals two further possible reasons for the continuation of the rule in modern society. First the post office is considered to be an agent for both the sender and the proposed recipient of the letter.<sup>40</sup>

The second justification is based on the business convenience of the offeree. Implicit within this justification is the fact the offeror could make a stipulation to the contrary if it were not willing to take the risk of non-delivery.

Whether the justifications provided over time are acceptable in modern society have not been canvassed by the courts in recent times. Very few commercial transactions are conducted through the post, with business preferring faster means of communication such as facsimiles, telexes and email. This is one of the factors that has led to the relative lack of judicial pronouncements in this area over the last 20 years.

By far the greater preponderance of case law in this area centres on the formation of contract by modern means such as facsimile and telex. The courts have adjudicated

---

<sup>37</sup> *Re Imperial Land Co of Marseilles* (1872) LR 7 Ch App 587 at 594.

<sup>38</sup> *Henthorn v Fraser* [1892] 2 Ch 27 at 33.

<sup>39</sup> Including the development of the self adhesive postage stamp and letter boxes cut into the front of doors.

<sup>40</sup> *Household Fire and Carriage Accident Ins Co v Grant* (1879) LR 4 Ex D 216 at 221. This justification for the rule was demolished in *Henthorn v Fraser* where the court described the post office as the offeree’s agent for the purposes of delivery rather than the agent of the offeror for acceptance.

upon the point in time when a contract will be formed through methods such as facsimiles and telexes, but there has been no judicial statement in relation to contracts formed by email. The issue to be considered is whether acceptance by email can be placed in the same category as a facsimiles and telexes or whether a different rule should apply.

## 6.2 Acceptance in an Electronic Environment

It is appropriate to consider the current approach of the courts in relation to electronic methods of communication that are common in a commercial context before considering the possible interpretation which may be given to email communications. As with the existing forms of communication considered by the courts, the starting point should be the general rule that acceptance should be communicated and any departure needs to be justified by the particular circumstances. In the writer's view any departure from the general rule should be consistent with the approach of Lord Wilberforce in *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels-Gesellschaft mbH*:<sup>41</sup>

Since 1955 the use of telex communication has been greatly expanded and there are many variants on it. The senders and recipients may not be the principals to the contemplated contract. They may be servants or agents with limited authority. The message may not reach or be intended to reach, the designated recipient immediately: messages may be sent out of office hours, or at night, with the intention or upon the assumption, that they will be read at a later time. There may be some error or default at the recipient's end which prevents receipt at the time contemplated and believed in by the sender. The message may have been sent and/or received through machines operated by third parties. And many other variations may occur. *No universal rule can cover all such cases: they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie...* (emphasis added)

The acceptance of this approach is evident in several English and Australian decisions which consider whether there should be a departure from the general rule in a range of situations.<sup>42</sup> These precedents have created a classification of communication into either instantaneous or non-instantaneous, with the former requiring communication of an acceptance to be binding and the latter possibly being subject to the postal acceptance rule. This has generated some academic debate concerning the place of email as compared to telexes and facsimiles within such a classification and, secondly, the appropriate application of the postal acceptance rule to email communications.

### 6.2.1 Telex

The modern formulation of the rule concerning instantaneous communication can be found in *Entores Ltd v Miles Far East Corporation*<sup>43</sup> where Lord Denning held that a telex should be considered to be a form of instantaneous communication resulting in

<sup>41</sup> [1983] 2 AC 34 at 42.

<sup>42</sup> See *Entores LD v Miles Far East Corporation* [1955] 2 QB 327 at 337; *Bressan v Squires* [1974] 2 NSWLR 460, *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* (1956) 98 CLR 93 at 111-112 and *Nunin Holdings Pty Ltd v Tullamarine Estates Pty Ltd* [1994] 1 VR 74.

<sup>43</sup> [1955] 2 QB 327.

acceptance by telex being effective only once it was received by the offeror. Despite the fact a telex may not be completely instantaneous the court considered that the parties were to be regarded for all intents and purposes as being in each other's presence.<sup>44</sup>

### 6.2.2 Facsimile

Also it has been decided that an acceptance communicated by facsimile will be effective at the time it is communicated.<sup>45</sup> The courts have recognised an ability to create a contract by an exchange of signed facsimiles provided an intention can be shown that the parties intended to be bound immediately.<sup>46</sup> However, there may be circumstances where the postal acceptance rule may be appropriate such as where the facsimile machine is operated by a third party.<sup>47</sup>

### 6.2.3 Acceptance by Email

The point in time at which an email acceptance will be effective is yet to be considered by the Australian courts. Several commentators have expressed the view that email should be treated as another form of instantaneous communication requiring acceptance to be communicated to be effective.<sup>48</sup> It is the writer's view that to consider a classification of email as either instantaneous or non-instantaneous may lead to the application of the postal acceptance rule in inappropriate situations. A more appropriate approach is to start with the general rule followed by a consideration of whether the general rule is displaced by reference to the intentions of the parties, by sound business practice or a consideration of where the risks should lie. Consequently, no one formulation may be applicable to all situations due to the large number of permutations and, in any event, any formulation may need to be revised in light of changes to technology.

### 6.2.4 Technology - How is an Email Transmitted?

Unlike facsimiles and telexes, email transmitted via the Internet cannot be classified strictly as a form of instantaneous communication. To send an email a person will create the message on their computer and then press the send button, which will transmit it to their Internet service provider (ISP). From the ISP the email will enter the Internet where it may bounce from a minimum of one computer to an infinite number before reaching the ISP of the receiver. The message will then be retrieved by the recipient by logging into their ISP and downloading the message. While travelling the Internet the message may travel across the world even though the person receiving the message is in

<sup>44</sup> See *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels-Gesellschaft mbH* [1983] 2 AC 34.

<sup>45</sup> *Reese Bros Plastics Ltd v Hamon-Sobelco Australia Pty Ltd* (1988) 5 BPR [97325]; *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327, *Egis Consulting Australia Pty Ltd v First Dynasty Mines Ltd (A company incorporated in Canada)* [2001] WASC 22.

<sup>46</sup> *Molodyski v Vema Australia Pty Ltd* (1989) NSW Conv R 55-446; *Twynam Pastoral Co Pty Ltd v Anburn Pty Ltd* unreported SC NSW 15 Aug 1989.

<sup>47</sup> See *Leach Nominees Pty Ltd v Walter Wright Pty Ltd* [1968] WAR 244 where acceptance was held to be effective once dictated to a public telex operator as the offeror knew the acceptance would be sent via a third party.

<sup>48</sup> See E S Perdue, 'Creating Contracts Online' in T J Smedinghoff (ed), *Online Law, the SPA's legal guide to doing business on the Internet*, Addison-Wesley Redding Mass 1996 at 8; O'Shea & Skeahan, 'Acceptance of Offers by E-mail – How Far Should the Postal Acceptance Rule Extend?' (1997) 13 *QUTLJ* 247.

the next building. A message can also be transmitted through another form of communication called electronic data interchange (EDI). Unlike the Internet, EDI is a virtually instantaneous form of communication. Generally this system is used by large corporations for the conduct of a continuing business arrangement. A system is established with a direct link between the corporations. The system can be used for negotiation and performance of a contract and will usually be governed by an overarching agreement between the parties dealing with issues such as the effective time of contract formation and the governing law.

### 6.2.5 Application of Existing Common Law to Email

If the general principle is applied, an acceptance sent by email will be effective at the time it is communicated. Communication<sup>49</sup> in the type of system described above could occur at the time the message is received by the recipient's ISP or at the time the message is downloaded to the recipient's computer or at the time the message is read by the recipient. Does this mean that because no definite time of communication can be readily identified that a different rule, such as the postal acceptance rule, should be applied? The postal acceptance rule has not been applied to other forms of modern communication such as facsimiles and telexes.

Some commentators suggest that email should be treated in the same way as telexes.<sup>50</sup> While this has some appeal from a commercial perspective it cannot be justified by reference to the equality of the technology. Telexes were viewed as not being strictly instantaneous, but there was a consensus that they "should be treated as if it were an instantaneous communication between principles, like a telephone conversation".<sup>51</sup> A parallel may be drawn between the use of a telex and the use of EDI. As EDI creates a direct link between the parties it may be viewed as a virtually instantaneous form of communication. An EDI system could be compared to the sending of a facsimile direct from one facsimile machine to another. In this particular instance it is submitted that the general rule should apply and acceptance should be effective at the time it is received by the other party. However, an email sent over the Internet does not travel directly from one computer to another but rather through a number of third party computers.

#### *Arguments in Favour of the Postal Acceptance Rule*

Several arguments arise for considering email to be non-instantaneous and therefore subject to the application of the postal acceptance rule (or another appropriate rule):

1. Email may be described as an electronic version of the postal system. An email message is entrusted to service and network providers whose computers receive and send the data. An email will often be stored in a service provider's mailbox from where it is retrieved by the addressee. This has a synergy with letters sent by the post or telegrams.
2. Difficulties with the transmission of email, delays, failure of networks, hacking by third parties or incorrect addresses may delay or prevent the delivery of an email. These factors may suggest that the risk of non-delivery of the email, as with the

<sup>49</sup> Communication is used in this context to refer to the time of receipt of an email.

<sup>50</sup> E S Perdue, *supra* n 48 at 83; and J Angel, 'Legal risks of providing services on the Internet', 1995 11 *CL&P* 150 at 152.

<sup>51</sup> *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels-Gesellschaft mbH* [1983] 2 AC 34.

ordinary post, should lie with the offeror where email is used at the method of communication.

3. The difficulty in prescribing with certainty the time an email will be “communicated” to another party. Various choices including the time of receipt by the addressee’s ISP, address’s computer or the time the address reads the email indicate the difficulties.
4. The necessary placement of risk on the offeree through the application of the general rule. Although an offeree may be able to request confirmation of delivery or reading of an email, this will only work if the receiving party’s system is capable of responding and may take a significant period of time. This will leave the offeree not knowing whether the email has been received.

### ***Arguments Against the Postal Acceptance Rule***

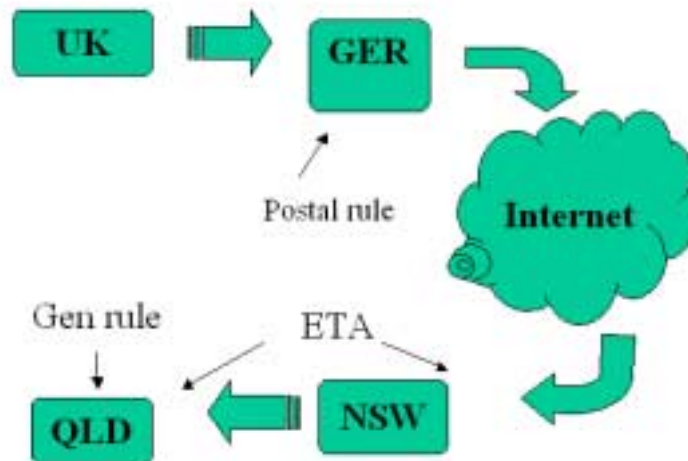
Balancing these arguments are several reasons why the postal acceptance rule should not apply to email communication via the Internet:

1. A wider application of the postal acceptance rule to methods of communication other than the post was not contemplated at the time of its formulation. The rule itself refers to a situation when the “post” is the contemplated method of acceptance. The rule was developed to provide certainty to business in an environment where communication via the post could take several weeks. In contrast, an email although not instantaneous is an expeditious method of communication where it is possible to know within a short period of time whether the message is received by the other party. It is submitted that to apply the postal acceptance rule to email communication would not create business and contractual certainty.
2. Similar issues of delay that were identified in relation to telexes<sup>52</sup> apply to email. These possibilities were not sufficient to persuade the court to find that the general rule of communication should be displaced. Likewise with email, the mere possibility of delays, incorrect addresses or technological failures may not be sufficient to create a universal rule that an email acceptance is effective at a time other than communication.
3. An application of the postal acceptance rule may cause difficulties in determining the applicable law. For example, a United Kingdom company accepts an offer from an Australian company in Queensland. The ISP for the UK company is in Germany and the ISP for the Queensland company has its place of business in New South Wales. If the postal rule were to apply, the contract would be formed in Germany where the message was received for transmission to Australia. This may result in the contract being subject to German law. If the general rule requiring communication of an acceptance were applied, the contract will be formed in Australia. The choice of law will then be either Australian law or United Kingdom law. The diagram below demonstrates the different points in

---

<sup>52</sup> Refer to statement by Lord Wilberforce in *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels-Gesellschaft mbH* [1983] 2 AC 34.

time provided for the postal acceptance rule and the general rule.



4. Common business practice should also be taken into account both within Australia and internationally. Would it be sound business practice for a commercial trader to be bound to deliver goods where the order was never received? This is consistent with the position under the *Vienna Sales Convention*<sup>53</sup> where both offers and acceptances are affected when they reach the intended recipient.<sup>54</sup> Article 24 of the *Vienna Sales Convention* provides:

For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention “reaches” the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address to his habitual residence.

This would suggest that an email will “reach” the recipient at the time it enters the person’s mailbox and is ready to be read although there is no case law to support or contradict this.

<sup>53</sup> This convention entered into force in Australia on April 1, 1989. **ACT:** *Sale of Goods (Vienna Convention) Act 1987*; **NSW:** *Sale of Goods (Vienna Convention) Act 1986*; **NT:** *Sale of Goods (Vienna Convention) Act 1987*; **QLD:** *Sale of Goods (Vienna Convention) Act 1986*; **SA:** *Sale of Goods (Vienna Convention) Act 1986*; **TAS:** *Sale of Goods (Vienna Convention) Act 1986*; **VIC:** *Sale of Goods (Vienna Convention) Act 1987*; **WA:** *Sale of Goods (Vienna Convention) Act 1986*.

<sup>54</sup> *Sale of Goods (United Nations Convention) Act 1994* schedule, articles 15(1) and 18(2).

## 6.4 Impact of Legislation

### 6.4.1 International Developments

Other legislation, international conventions or rules should also be considered. Of relevance internationally is the *UNCITRAL Model Law on Electronic Commerce* to which Australia was a participant. The Model Law provides in article 15:

- (ii) Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:
  - (a) if the addressee has designated an information system for the purpose of receiving data messages receipt occurs:
    - (i) at the time when the data message enters the designated information system; or
    - (ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;
  - (b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.

The United States *Uniform Computer Information Transactions Act* 1999, § 215 provides for electronic messages to be effect at the time of receipt, regardless of whether any individual is aware of receipt. Receipt is defined as:

In the case of an electronic notice... coming into existence in an information processing system or at an address in that system in a form capable of being processed by or perceived from a system of that type by a recipient, if the recipient uses, or otherwise has designated or holds out, that place or system for receipt of notices of the kind to be given and the sender does not know that the notice cannot be accessed from that place.<sup>55</sup>

The purpose of §215 is to adopt a time of receipt rule and avoids the uncertainty of the Australian equivalent of the postal acceptance rule.

These International rules and legislation are consistent with the view that acceptance by email is effective at the time of receipt by the other party rather than at the time of sending the email.

### 6.4.2 Electronic Transactions Act

The Australian Electronic Commerce Export Group accepted the rules on the timing of messages set out in the *UNCITRAL Model Law* but preferred to define receipt as occurring when the recipient is able to retrieve and read the message in a form which his or her system can process or as a default at the time the message came to the attention of the addressee. Accordingly, in the *Electronic Transactions Act* 1999 (Cth)<sup>56</sup> the receipt of a message is stated to occur:

<sup>55</sup> Refer to § 102 *Uniform Computer Information Transactions Act* 1999.

<sup>56</sup> A similar definition of receipt appears in each of the State *Electronic Transactions Acts*, *supra* n 2.

**S 14 Time of receipt**

(3) For the purposes of a law of the Commonwealth, if the addressee of an electronic communication has designated an information system for the purpose of receiving electronic communications, then, unless otherwise agreed between the originator and the addressee of the electronic communication, the time of receipt of the electronic communication is the time when the electronic communication enters that information system.

(4) For the purposes of a law of the Commonwealth, if the addressee of an electronic communication has not designated an information system for the purpose of receiving electronic communications, then, unless otherwise agreed between the originator and the addressee of the electronic communication, the time of receipt of the electronic communication is the time when the electronic communication comes to the attention of the addressee.

**Place of dispatch and receipt**

(5) For the purposes of a law of the Commonwealth, unless otherwise agreed between the originator and the addressee of an electronic communication:

- (a) the electronic communication is taken to have been dispatched at the place where the originator has its place of business; and
- (b) the electronic communication is taken to have been received at the place where the addressee has its place of business.

The effect of these provisions is that if the parties do not specify an information system for receipt, the communication will be received at “the time when it comes to the attention of the addressee”. This would usually be at the time the addressee receives the communication into the mailbox on their computer. The mailbox would indicate whom the message was from and the subject line. Where an individual is aware that a message may be communicated in this way the acceptance will come to their attention at that time. However, where the message is not expected it may be arguable that the acceptance was not communicated to the person until they read the message.

If the addressee designates an information system to receive the communication then it is received once it enters the information system. The addressee would be deemed to have read the message at the time it enters the system. One issue that arises in the interpretation of the section is what an addressee has to do to designate an information system. An information system is defined to mean “a system for generating, sending, receiving, storing or otherwise processing electronic communications”. The definition means that an information system may vary depending upon the individual situation.

- (i) An individual with a home computer: in that case the computer would be the information system.
- (ii) A large company with a networked system: in that case the information system may be the network or the individual computers on each person’s desk.
- (iii) A large institution with their own server: in that case the information system may be not only the network but also the server maintained by the institution, or just the network for the particular area or the individual computers.



The clear intention of this section is to provide for the time an email or other type of electronic communication is received. This may be interpreted by a court as a clear indication that the general rule for acceptance upon communication should be retained. Alternatively, a court may view the legislation as providing a time of receipt for an email, but the question of when an acceptance is effective should still be decided using common law principles. One practical difficulty of applying the postal acceptance rule is that the legislation would provide for an email to be received at the time it comes to the person's attention but the acceptance according to the rule would be effective at an earlier time when the email was sent. It is submitted that this would lead to a commercially unsatisfactory and impractical situation that should be avoided.

While the arguments advanced do not clearly point to either retention of the general rule or an adoption of the postal acceptance rule it is the writer's view that in any given case consideration should be given to:

1. The technology being used to transmit the email. Is the email being sent over the Internet or using EDI?
2. The business practice of the particular industry on both a national and where relevant international basis.
3. The intention of the parties as evidenced by the documents and their conduct.
4. The existence of legislative or model rules aimed at facilitating electronic commerce.

In the writer's view when these issues are considered together with the latest developments in legislation internationally and nationally, the general principle of acceptance upon communication should be applied in the first instance and only where the parties have provided otherwise should another time of acceptance be adopted.

## **7. Effectiveness of Legislative Solution**

The enactment of the *Electronic Transactions Act* 1999 (Cth) signalled a commitment by the Commonwealth government to ensuring widespread adoption of electronic communication for business and consumer transactions. Despite this intention the focus of the Commonwealth legislation is on dealings with government and compliance with requirements of Commonwealth legislation. Only the sections of the Act concerning the receipt and dispatch of electronic communications can clearly apply to the formation of a contract. While the sections provide times for receipt and dispatch there is no clear indication of the time at which a contract is formed. This leaves the courts to rely upon contractual principles specifically developed and applied within a paper environment. The lack of judicial pronouncement in the area also adds to the uncertainty for commerce and consumers. In conclusion while the legislation is effect to nominate a time of receipt for the purposes of some legislation it does not clearly assist with a determination of when a contract was formed. This will still be a question of choice for the courts between formation upon communication and formation upon sending of an email (postal acceptance rule).