

## The Legal Issues of Electronic Contracts in Australia

\*F. Tasneem

\* Department of Business and Law, Royal Melbourne Institute of Technology (RMIT), Melbourne, Australia

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**ABSTRACT:** The internet has transformed the manner of conducting commercial transactions and has created regulatory gaps. These regulatory gaps may impact the effective development of electronic commerce. Attempts are being made to regulate electronic contracts both at the national and international level. The present research analyses these attempts, in particular the Electronic Transaction Legislation of Australia and the proposed new amendments. It also examines the role of international developments in assisting countries in their regulatory attempts. The research highlights the extent to which gaps are being filled and also examines the inadequacies of the Electronic Transactions Legislation of Australia.

**Keywords:** Electronic commerce law, Electronic business, Internet law, International legal developments

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### INTRODUCTION

Expansion of internet and electronic commerce has increased world wide formation of electronic contracts (Arias, 2007). Electronic contracts are contracts that are in a digital form (Rahukar, 2010). It can be defined as an agreement which is created in a digital form without using paper and pen (Cornwilaw, 2006). Online shopfronts, electronic market places, online auction sites, business to business and business to consumer infrastructures are different ways of forming electronic contracts (Morciniec et al., 2001). New laws are being developed to accommodate electronic contracts at both national and international levels. Despite development of new legal frameworks to accommodate electronic contracts uncertainties still exist in relation to the formation of electronic contracts (Arias, 2007).

### Literature Review

Model law on electronic commerce was introduced by United Nations Commission on International Trade Law (UNCITRAL) in 1996. UNCITRAL model law provides criteria dealing with writing requirements, signatures, time of receipt, time of dispatch of messages and place of business (UNCITRAL 1996; Gatt, 1998; Thurlow, 2001). Laws dealing with electronic contracts and electronic signatures have been adopted by different countries based on the Model law on

electronic commerce (Thurlow, 2001). UNCITRAL also introduced United Nations Convention on the use of electronic communications in international contracts in 2005 which further facilitates electronic contracts (United Nations Convention, 2005). Australia's legal framework dealing with electronic contracts is also based on model law on electronic commerce (Attorney General's Department, 2009). Like the Model law on electronic commerce *Electronic Transactions Act 1999* provides criteria dealing with writing requirements, signatures, time of receipt, time of dispatch of messages and place of business. Australia is also closely following the international developments. Australia has introduced *Electronic Transactions Amendment Bill 2011* which amends the *Electronic Transactions Act 1999* and allows Australia to ratify United Nations Convention on the use of electronic communications in international contracts 2005 (Electronic Transactions, 2011). However, neither the current *Electronic Transactions Act 1999* nor the proposed amendments deal with issues associated with capacity of contracts and privity of contracts.

### RESEARCH METHOD

Doctrinal legal research method was employed and document analysis was carried out. Doctrinal research primarily examines the law on a particular issue. It deals

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\*Corresponding Author, Email: [jarisaif04@yahoo.com](mailto:jarisaif04@yahoo.com)

with the analysis of legal doctrines and how those doctrines are applied to an issue. Doctrinal research is also known as pure theoretical research (Macconville and Chui, 2007; Adilahet, 2009). A Law may be known but is not predictable all the time. Doctrinal legal research involves selection and weighing of material by taking into account authority and hierarchy as well as understanding social context and interpretation (Macconville and Chui, 2007). It deals with examination of legal rules, explanation of areas of difficulty and prediction of future developments (Pearce D, Campbell E and Harding D, 1987; Burns and Hutchinson, 2009).

In order to carry out doctrinal research data was collected from various sources such as legal web sites, newspapers, mail correspondence, primary material of law, secondary material of law, various law libraries of Australia and different legal departments. Material such as case laws, legislation, legal principles, precedent and international legal developments were critically analysed and interpreted. After collection and interpretation of data legal risks, implications and associated issues were assessed.

#### **Capacity of Contract and Issues**

In a legally binding contract, all parties must have legal capacity to enter into a contract. This principle regarding the capacity of the parties to contract applies not only to the conventional or traditional or paper-based contracts but also to the electronic contracts. When a party to a contract does not have a capacity to contract then the contract becomes unenforceable. Thus, a contract with a minor is unenforceable unless the contract is made for the supply of necessities to a minor. In an electronic contract where the parties are not dealing with one another face-to-face, it will be difficult to determine the capacity of the parties. To overcome this situation, identity certification and statement regarding the capacity of a person to contract is essential (Martin and Jaques, 2001). Such a risk may be minimised because most electronic contracts require immediate payment and if payment is not received then the contract does not proceed (Ferrera et al., 2004, Optus; Forder and Svantesson, 2008). However, it only provides a provisional and partial solution.

It should be noted therefore that in an electronic contract where the parties are not dealing with one another face-to-face, it may be difficult to determine the capacity of the parties as electronic transactions

can be easily conducted anonymously and remotely (Martin and Jaques, 2001). In this respect, lack of presence in person makes online transactions more problematic. That is to say, lack of material presence of a person coupled with inability of the internet in reflecting attributes of a person makes it a relevant issue. Hence, sellers are subjected to an enhanced risk in relation to unenforceability of contracts. Traditional contract law merely provides principles in relation to capacity of parties, rather than providing principles in relation to capacity of parties from the perspective of remote transactions. In addition, the anonymous nature of internet provides different opportunities for fraudulent parties to hide their identities and conduct transaction as minors or people with incapacity. The anonymous nature of internet enhances security risks (US Department of Justice). It can hinder business from opting internet as a medium for forming electronic contracts and can have a detrimental effect on electronic commerce. Overall, it appears clear that the traditional principles in relation to capacity of parties are clearly displaced in an online scenario.

Similar concerns regarding this issue are reflected in the Australian Guidelines for Electronic Commerce. It advises businesses to take necessary steps and verify the age of the transacting parties. The Australian Guidelines for Electronic Commerce states this as follows (Australian Government, 2006):

- 1- Businesses should take special care in advertising or marketing that is targeted at children.
- 2- Since Children (under the age of 16 years) may not have the legal capacity to enter into a binding contract, it is important that businesses implement procedures for verifying the age of parties to any transaction.

It is clear from the foregoing that electronic contracts expose transacting parties to more risks in an online scenario. Concerns expressed by the Australian Guidelines for Electronic Commerce seems correct (Australian Government, 2006). Traditional law cannot adequately cope with electronic contracts, which have broader implications. Traditional contract law merely provides principles in relation to capacity of parties, rather than providing principles in relation to capacity of parties from the perspective of remote transactions.

Consideration of technical aspects demonstrates additional dimensions of the issue. Both capacity as well as intention of the parties is essential elements required for the formation of a valid contract (Starke, Seddon and Ellinghaus, 1992; Carter and Harland, 1993).

Automated online transaction enable vendors to control the content of the web site as well as pre programme information which is to be made available to the users (Benkler, 2000). Consequently, users' inputs are limited and restricted. Capacity as well as intention freely co exist when a contract is formed in an offline transaction. While in an online transaction vendors can control the actions of users as a result intention is not freely manifested and expressed. Therefore, online transactions enable vendors to dominate the manner of contract formation as well as provide more scope to exploit people without contractual capacity. This can lead to concerns in relation to electronic contracts especially because businesses can easily mislead and deceive customer with regards to electronic contracts as seen in *Australian Competition and Consumer Commission v Allphones Retail Pty Ltd* (2009), *Australian Communication and Media Authority v Mobiligated Ltd a company Incorporated in Hong Kong and Others* (2009), *Australian Competition and Consumer v Clarion Marketing Pty Ltd* (2009), *ACCC v Jetplace Pty Ltd* (2010), *Australian Competition and Consumer Commission (ACCC) v Boost Tel Pty Ltd* (2010).

Similarly, different software and artificial intelligence software provide additional means to exploit people without contractual capacity (Wein, 1992). Furthermore, online sites can also identify users from their earlier visits and display contents which interests them, which also enables vendors to exploit the behaviour of users who do not have contractual capacity (Benkler, 2000). As a practical matter, there is also a genuine correlation between technical control and scope for manipulation; the greater the technical sophistication, the more is the manipulation scope.

Statistical information indicates that online goods and products are being purchased by minors. Further, it indicates that age restricted goods and products are also easily being purchased by minors (Zhi, 2010; Business services, Swati).

Many online sites rely on circumstantial criteria to determine if a customer is an adult and require a customer to provide employment address and details of a credit card. If the payment becomes invalid because the minor used a parent's credit card without authority, then the minor will be guilty of fraud and the online merchant will be entitled to recover the goods or services. Most online merchants chose to insert a statement stating 'I am over 18' in the standard

terms of an offer thus imposing a condition precedent that the parties are adult or have an adult contract for them (Ferrera, 2004; Graw, 2005; Forder and Svantesson, 2008). Use of such statements also provides only a provisional and partial solution.

Further, if minor uses a credit card without parents' authority, then minor will be guilty of fraud and vendor can recover money (Earl, 1762; Stocks, 1913; Ferrera, 2004; Graw, 2005; Forder and Svantesson, 2008). However, it is important to note that the actions of a minor can account to fraud only if minors falsely represent themselves to be of full age. In such instances, equity requires a minor to restore the goods so obtained (R Leslie, 1914; Earl 1762; Stocks, 1913). In effect, such an exposure to fraud can discourage consumers and minors from conducting online transactions effectively. In addition, due to the technical difficulties explained above such an exposure to fraud is believed to be unfair to minors. Further, due to 'special disadvantage' and special disability of minors, the conduct of including one sided terms by the seller can also amount to unconscionable conduct under common law, rendering the contract unenforceable (Commercial Bank, 1983). Hence, the traditional rule of capacity is clearly displaced in an electronic medium due to lack of material, physical presence of a person, exposing both sellers and consumers to risks. Also, the approach of disclaimers is not appropriate. It can be seen; therefore, that electronic contracts pose unique difficulties.

#### **Privity of Contract and Issues**

Applicability of doctrine of privacy of contracts in relation to electronic contracts appears to be problematic. According to the doctrine of privacy of contract, only parties to a contract are legally bound by the contract and are also entitled to enforce such contracts (Carter and Harland, 2002) Electronic contracts also face difficulties in relation to privacy of contract. The online vendor must be able to establish the identity of the party with whom the online vendor is dealing in order to assure that the contract is enforceable and for any enforcement action. For instance, in a click-wrap agreement, the user must click on a button to accept the terms of a contract. In such situations, doubts may arise regarding the parties to the contract. Thereby, the privacy of contract and also the identity of the person who clicked the 'I accept' icon on the customer or user's computer is affected.

(Forder and Svantesson, 2008; Graw, 2005). The remote way of conducting transaction enhances security risks and fraud (US Department of Justice). It appears clear that the online environment poses more risks in relation to privacy of contracts than traditional offline transactions. It can be seen that while traditional contract law provides principles in relation to privacy of contract, it does not adequately deal with the issue of privacy of contract from the perspective of remote transactions, which has broader implications.

Further, the OECD is of the opinion that internet and electronic commerce have taken security risks to a new level due to lack of face to face communication (OECD, 2010; OECD 2008). This can also have an impact on the applicability of privacy of contract thereby adding a new dimension to the issue.

When electronic transactions are conducted both buyer and seller enter into a contract remotely (Wang, 2008). Parties can easily hide their identities in an online environment (Perry, 2002). The difficulty in identifying the person from whom or the place from which, an order originated will be a concern in electronic transactions. Suppliers or traders in any form of transaction should be able to rely upon or at least be able to verify the claimed identity of the party trying to conduct business transaction with them (Lloyd, 2003-2004). If a website provides an 'I accept' button to conduct a transaction it may be difficult to identify the person who has accepted the contract by clicking the 'I agree' button. The online merchant may have to prove that the person who appears to have entered into a contract is in fact, the same person who did enter into the contract. Difficulties arise when a computer that belongs to a party is accessed by the other person and whose identity cannot be easily established (Graw, 2005).

Observation of the position of third parties portrays additional problems associated with the issue. Third parties to the contract cannot be sued under the doctrine of privity of contracts (Dunlop, 1915; Graw, 2005). Therefore, if a fraudulent business establishes a web site by adopting the name of a genuine company defrauds consumers and later disappears, then the genuine business will not be liable for the breach of the contract. Furthermore, similar domain names can be easily obtained by fraudulent businesses (Toys, 1996; Hasbro, 1996; Panavision, 1997), which can as well confuse consumers and give an impression of some association with the genuine business. Due these loopholes it is questionable whether consumers require additional protection in this regard.

Examination of agent and principle relationship illustrates additional aspects of the problem. Under the doctrine of privity of contracts principles can be sued for the acts of the agent. An agent who is employed to carry out a certain business will be deemed to possess authority to carry out duties 'usually incidental to a business transaction' of the type assigned (Sutton, 1839; Dingle 1859; Starke, Seddon and Ellinghaus, 1992; Carter and Harland, 1998). It can be seen that this provides a very broad authority to the agent. Specifically, due to the global reach of internet, principle of a business will be exposed to the risk of exuberated liabilities as consequence of the acts of the agent. Therefore, under the liberal approach adopted by the traditional law, an online business will be liable for all the acts of the agent which are incidental to the business. While the principle appears to be fair it is too wide for an online business due to the global and world wide reach of internet and may turn out to be injurious for online businesses.

Thus ultimately, under the doctrine of privity of contract vendors are exposed to risks due to two sets of issues- first, due to non enforceability of contracts, as a result of remoteness of the transaction as mentioned above; second, due to the extended liability for the acts of the agents as mentioned earlier. These risks which are inherent in electronic contracts do not have conventional equivalents. The risks faced are beyond the risks faced in traditional transactions. Traditional law alone does not provide adequate commercial security to businesses in relation to electronic contracts. By acknowledging the difficulties of electronic contracts it can be argued that the simplified and liberal approach provided under the traditional laws does not seem appropriate.

Analysis of issue in case of electronic contracts formed through mobile phones shed further light on the issue. Impersonated SMS messages can be sent as seen in *Australian Communication and Media Authority v Mobiligated Ltd a company Incorporated in Hong Kong and Others* (2009), *R v Kelly-Anne Theresa Haugland* (2009) and *Zoran Markovic v R* (2010). This can create another layer of issue with regards to privity of contracts in relation to electronic contracts formed through mobile phones.

Further, an electronic contract can be easily multiplied or reproduced using technology by making a large number of similar or identical copies of the contract, whereas, paper based contract cannot be

multiplied easily. Instant and quick reproduction/multiplication of electronic contract resulting in identical copies of contract has led to several problems because; it is difficult to differentiate between original contract and copies of contract. Such an easy reproduction of electronic contract exposes the contract to uncertainty and fraud thereby, effecting privacy of contract because, it is difficult to know if the original party or party to the contract has reproduced these contracts legally or the person reproducing electronic contract may not even be a party to the contract. Hence, the very purpose of privacy of contract in an electronic contract may be defeated due to the above reasons.

If the reproduction or multiplication of electronic contract is done by an unauthorised person then, how would one ensure that only parties to a contract are legally bound? That is because, in such circumstances, unknown to the other party, unauthorized person who reproduced the electronic contract will try to take advantage of the electronic contract. Such a situation does not arise in paper based contract because, the parties appear in person and make face to face contract. These parties are the only parties to a contract; thereby, no effort is required to further establish that they are the genuine parties to a contract. Hence, how could traditional law of contract which does not cover the issues raised by electronic contract regarding privacy of contract, be extended to electronic contract?

If the reproduction or multiplication of electronic contract is done by an unauthorised person then, how would one ensure that, only parties to a contract are entitled to enforce such contracts? That is because, in such circumstances, unknown to the other party, unauthorized person who reproduced the electronic contract may try to enforce the electronic contract and may take advantage of the weakness of electronic contract due to absence of face to face contract. Such a situation does not arise in paper based contract because, the parties appear in person and make face to face contract. Hence, how could traditional law of contract which does not cover the issues raised by electronic contract regarding privacy of contract and is unable to establish the identity of parties in an electronic contract, be extended to electronic contract? Therefore, electronic contract or reproduction of electronic contract using internet raises questions regarding the legality or application of privacy of contract and extension of traditional doctrine of privacy of contract to electronic contract. Under the doctrine

of privacy of contract, only parties to a contract are legally bound by the contract and are also entitled to enforce such contracts. However, electronic contract or reproduction of electronic contract raises doubts regarding parties to a contract who may be legally bound by the contract and their entitlement to enforce such contracts which are made on the internet in the absence of face to face contracts. Under the above circumstances, is it justified to extend the doctrine of privacy of contract under the traditional law of contract to electronic contracts?

## **RESULTS AND DISCUSSION**

Traditional contract principles dealing with capacity of contract cannot be adequately applied to electronic contracts. In relation to this, the remote way of conducting transactions has enhanced uncertainties in determining capacity of parties. The lack of material and physical presence of a person coupled with inability of internet in reflecting attributes of a person makes it a relevant issue. This issue has the potential to subject vendors to a greater risk in relation to unenforceability of electronic contracts. This in turn can have a detrimental effect on the development of electronic commerce. However, in the context of the principle of capacity of parties, the actions of a minor can amount to fraud only if minors falsely represent themselves to be of full age. In such instances, equity requires a minor to restore the goods so obtained. Such an exposure to fraud can also discourage consumers from conducting online transactions effectively. Hence, the traditional rule of capacity is displaced in an electronic medium due to lack of material and physical presence of a person. Traditional law cannot adequately cope with electronic contracts that have broader implications. Generally, Traditional contract law merely provides principles in relation to capacity of parties, rather than providing principles in relation to capacity of parties from the perspective of remote transactions. Practical analysis of the problem also indicated that the approach of using disclaimers to resolve the issue can place minors in a disadvantageous position. In addition, neither the *Electronic Transactions Act 1999* (Cth) nor the proposed amendments to the Act deal with the issue of capacity. Therefore, Issues seen in *Australian Competition and Consumer Commission v Allphones Retail Pty Ltd* (2009), *Australian Communication and Media Authority v Mobiligated Ltd a company Incorporated in Hong Kong and*

*Others* (2009), *Australian Competition and Consumer v Clarion Marketing Pty Ltd*, (2009), *ACCC v Jetplace Pty Ltd* (2010), *Australian Competition and Consumer Commission (ACCC) v Boost Tel Pty Ltd* (2010) can arise in relation to capacity of contracts.

In short, it was also established that the remote way of formation of electronic contracts create problems in determining identity of parties in relation to privity of contract. These shortcomings subject vendors to more risk in relation to unenforceability of electronic contracts. Overall, under the doctrine of privacy of contract vendors are exposed to dual risks. On one hand, due to non enforceability of contracts, as a result of remoteness of the transaction and technical risks as mentioned above as well as the extended liability for the acts of the agents. Therefore, traditional law does not provide adequate commercial security to businesses in relation to electronic contracts. In general, analysis also support the view that the risks faced in the online context are beyond the risks faced in traditional transactions. Electronic contracts can have wider implications. Hence, simplified approach provided under the traditional laws is not convincing. Traditional contract principles display shortcomings; therefore, confinement of electronic contracts merely to traditional contract principles can be problematic. In addition, neither the *Electronic Transactions Act 1999* nor the proposed amendments to the Act deal with the issue of privacy of contract. Therefore, issues seen in *Communication and Media Authority v Mobiligated Ltd a company Incorporated in Hong Kong and Others* (2009), *R v Kelly-Anne Theresa Haugland* (2009) and *Zoran Markovic v R* (2010) can arise in relation to privity of contracts (table 1).

**CONCLUSION**

The aim of this study was to examine the extent to which issues related to electronic contracts are resolved in Australia. Analysis of case laws, *Electronic Transactions Act 1999* and international developments clearly indicate that regulatory gaps still exist. The major finding of the study was that the both traditional contract law principles and the *Electronic Transactions Act 1999* cannot adequately deal with the issue of capacity and privity of contracts. Another finding of the study indicated the extent of the issue by mapping cases dealing with electronic contracts and its impact on the effective development of electronic commerce.

The research is significant as it has expanded our understanding of issues associated with electronic contracts. The research primarily focused on the issues dealing with capacity and privity of contracts. The research has found new gaps in relation to these issues. Based on the findings of this research further research on other aspects of electronic contracts can be carried out.

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 Australian Competition and Consumer Commission v Allphones Retail Pty Ltd (2009) FCA 17.

**Table 1: Summarises the GAPS found in the article**

Issues	GAPS
Capacity of contract	<i>Electronic Transactions Act 1999</i> (Cth) does not deal with capacity of contract. Issues seen in <i>Australian Competition and Consumer Commission v Allphones Retail Pty Ltd</i> (2009), <i>Australian Communication and Media Authority v Mobiligated Ltd a company Incorporated in Hong Kong and Others</i> (2009), <i>Australian Competition and Consumer v Clarion Marketing Pty Ltd</i> , (2009), <i>ACCC v Jetplace Pty Ltd</i> (2010), <i>Australian Competition and Consumer Commission (ACCC) v Boost Tel Pty Ltd</i> (2010) can arise in relation to capacity of contracts.
Privity of contract	<i>Electronic Transactions Act 1999</i> does not deal with privity of contract. Issues seen in <i>Communication and Media Authority v Mobiligated Ltd a company Incorporated in Hong Kong and Others</i> (2009), <i>R v Kelly-Anne Theresa Haugland</i> (2009) and <i>Zoran Markovic v R</i> (2010) can arise in relation to privity of contracts.

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