



[1798]

INTERIM GOVERNMENT OF THE REPUBLIC OF THE FIJI ISLANDS

ELECTRONIC TRANSACTIONS PROMULGATION 2008  
(PROMULGATION No. 25 OF 2008)

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IN exercise of the powers conferred upon the Interim Government, and upon the exercise of my own deliberate judgment as President of the Republic of the Fiji Islands as to what is best and good for the people of the Republic of the Fiji Islands, and by the exercise of the executive authority of the State in accordance with section 85 of the Constitution and such other powers as may appertain, and with the approval of Cabinet, I, Josefa Iloilovatu Uluivuda, make this Promulgation—

## TO FACILITATE ELECTRONIC COMMUNICATIONS, AND FOR OTHER RELATED MATTERS

### PART 1—PRELIMINARY

#### *Short title and commencement*

- 1.—(1) This Promulgation may be cited as the Electronic Transactions Promulgation 2008.
- (2) This Promulgation commences on a date appointed by the Minister by notice in the *Gazette*.

#### *Objective*

2. The objective of this Promulgation is—
  - (a) to recognise the validity of and promote the development of electronic communications in commercial and non-commercial dealings and in dealings with governmental entities; and
  - (b) to remove uncertainty about using electronic methods to satisfy various legal requirements about documents and record-keeping.

#### *Interpretation*

3. In this Promulgation, unless the context otherwise requires—
  - “consent” includes consent that can reasonably be inferred from the conduct of the person concerned;
  - “data” means representations, in any form, of information or concepts, and includes the whole or part of a computer program (and, for this purpose, “computer program” means a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result);
  - “data storage device” means any article or material (for example, a disk) from which information is capable of being reproduced, with or without the aid of any other article or device;
  - “document” includes—
    - (a) any paper or other material on which there is writing;
    - (b) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and
    - (c) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device;
  - “electronic communication” means—
    - (a) a communication of information in the form of data, text or images by means of guided or unguided electromagnetic energy, or both; or
    - (b) a communication of information in the form of speech by means of guided or unguided electromagnetic energy, or both, where the speech is processed by an automated voice recognition system;
  - “governmental entity” means—
    - (a) a Minister;
    - (b) any of the following authorities of Fiji—
      - (i) a public office or the holder of a public office;
      - (ii) a person who holds or performs the duties of an office under a law of Fiji;
      - (iii) a statutory body, whether incorporated or not, or a local authority under the Public Health Act (Cap. 111);
      - (iv) a state service or a ministry, department or other part of a state service;

- (v) a company over which the Government has the capacity to exercise control, and each entity (if any) under the control of that company; or
- (c) an officer or employee of the Government or of an authority referred to in paragraph (b);

whether or not any authority, officer or employee referred to in paragraph (b) or (c) is subject to ministerial control or direction, but does not include—

- (a) a company over which the Government does not have the capacity to exercise control; or
- (b) any person or other entity prescribed by the Regulations not to be a governmental entity for the purposes of this Promulgation, either generally or in relation to specified matters;

“information” means information in the form of data, text, images or speech;

“information system” means a system for generating, sending, receiving, storing, displaying or otherwise processing electronic communications;

“information technology requirements” includes software requirements;

“law of Fiji” means—

- (a) any written law in force in Fiji; or
- (b) any other law in force in Fiji, whether derived from the common law or the rules of equity or otherwise;

“non-profit body” means a body that is not carried on for the purposes of profit or gain to its individual members and is, by the terms of the body’s constitution, prohibited from making any distribution, whether in money, property or otherwise, to its members;

“place of business”, in relation to a governmental entity, an agency of a foreign government or a non-profit body, means a place where any operations or activities are carried out by that entity, agency or body;

“public office” and “state service” have the same meanings as in the Constitution;

“transaction” includes—

- (a) a transaction of a commercial or non-commercial nature;
- (b) a single communication; and
- (c) the outcome of multiple related communications.

*Promulgation binds Government*

4. This Promulgation binds the Government.

PART 2—DEFAULT GENERAL RULES ABOUT ELECTRONIC COMMUNICATIONS

*Validity of electronic transactions*

5.—(1) A transaction is not invalid because it took place wholly or partly by means of one or more electronic communications.

(2) The general rule in subsection (1) does not apply in relation to the validity of a transaction to the extent to which another, more specific provision of Part 3 deals with the validity of the transaction.

*Time of dispatch*

6.—(1) If an electronic communication enters a single information system outside the control of the originator, the dispatch of the electronic communication is taken to occur when it begins to enter that information system.

(2) If an electronic communication enters successively 2 or more information systems outside the control of the originator, the dispatch of the electronic communication is taken to occur when it begins to enter the first of those information systems.

*Time of receipt*

7.—(1) If the addressee of an electronic communication has designated an information system for the purpose

of receiving electronic communications, the time of receipt of the electronic communication is taken to be the time when the electronic communication begins to enter that information system.

(2) If the addressee of an electronic communication has not designated an information system for the purpose of receiving electronic communications, the time of receipt of the electronic communication is taken to be the time when the electronic communication comes to the attention of the addressee.

*Place of dispatch*

8. An electronic communication is taken to have been dispatched at the place where the originator has its place of business.

*Place of receipt*

9. An electronic communication is taken to have been received at the place where the addressee has its place of business.

*Originator or addressee with more than one or no place of business*

10. For the purposes of the application of sections 8 and 9 to an electronic communication—

- (a) if the originator or addressee has more than one place of business, and one of those places has a closer relationship to the underlying transaction, it is to be assumed that that place of business is the originator's or addressee's only place of business;
- (b) if the originator or addressee has more than one place of business, but paragraph (a) does not apply, it is to be assumed that the originator's or addressee's principal place of business is the originator's or addressee's only place of business; and
- (c) if the originator or addressee does not have a place of business, it is to be assumed that the originator's or addressee's place of business is the place where the originator or addressee ordinarily resides.

*Attribution of electronic communications*

11.— (1) The purported originator of an electronic communication is bound by that communication only if the communication was sent by the purported originator or with the authority of the purported originator.

(2) Subsection (1) is not intended to affect the operation of a law of Fiji that makes provision for—

- (a) conduct engaged in by a person within the scope of the person's actual or apparent authority to be attributed to another person; or
- (b) a person to be bound by conduct engaged in by another person within the scope of the other person's actual or apparent authority.

(3) Subsection (1) is not intended to affect the operation of a law of Fiji relating to negligence or estoppel.

(4) Subsection (1) is not intended to affect the operation of a law of Fiji relating to the treatment of a statement made by a person as an admission made by a party to judicial proceedings or the admissibility of such a statement.

*Application of this Part*

12.—(1) Section 5 applies to a transaction except to the extent that—

- (a) the parties to the transaction otherwise agree; or
- (b) a written law provides otherwise.

(2) This Part applies to an electronic communication except to the extent that—

- (a) the parties to the communication otherwise agree; or
- (b) a written law provides otherwise.

(3) This section does not limit the exclusions under sections 18 to 20 or the Schedule.

## PART 3—REQUIREMENTS UNDER LAWS OF FIJI

*Writing*

13.—(1) If, under a law of Fiji, a person is required to give information in writing, that requirement is taken to have been met if the person gives the information by means of an electronic communication, where—

- (a) at the time the information was given, it was reasonable to expect that the information would be accessible so as to be useable for subsequent reference;
- (b) the person to whom the information is required to be given consents to the information being given by way of electronic communication; and
- (c) the applicable requirements (if any) of the Regulations have been met.

(2) If, under a law of Fiji, a person is permitted to give information in writing, the person may give the information by means of an electronic communication, where—

- (a) at the time the information was given, it was reasonable to expect that the information would be accessible so as to be useable for subsequent reference;
- (b) the person to whom the information is permitted to be given consents to the information being given by way of electronic communication; and
- (c) the applicable requirements (if any) of the Regulations have been met.

(3) This section does not affect the operation of any other law of Fiji that makes provision for or in relation to requiring or permitting information to be given, in accordance with particular information technology requirements—

- (a) on a particular kind of data storage device; or
- (b) by means of a particular kind of electronic communication.

(4) This section applies to a requirement or permission to give information, whether the expression “give”, “send” or “serve”, or any other expression, is used.

(5) For the purposes of this section, “giving information” includes, but is not limited to, the following —

- (a) making an application;
- (b) making or lodging a claim;
- (c) giving, sending or serving a notification;
- (d) lodging a return;
- (e) making a request;
- (f) making a declaration;
- (g) lodging or issuing a certificate;
- (h) making, varying or cancelling an election;
- (i) lodging an objection;
- (j) giving a statement of reasons.

*Signature*

14.—(1) If, under a law of Fiji, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication, where—

- (a) a method involving an electronic signature is used by or with the authority of the person to identify the person and to indicate the person’s approval of the information communicated;
- (b) the person to whom the signature is required to be given consents to that requirement being met by way of the use of the method mentioned in paragraph (a);
- (c) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated; and

(d) the applicable requirements (if any) of the Regulations have been met.

(2) In subsection (1)—  
“electronic signature” means—

- (a) electronic data; or
- (b) an electronic process,

that is attached to or logically associated with an electronic communication and that may be used to identify the signatory in relation to the communication and to indicate the signatory’s approval of the information contained in the communication.

(3) This section does not affect the operation of any other law of Fiji that makes provision for or in relation to requiring—

- (a) an electronic communication to contain an electronic signature (however described);
- (b) an electronic communication to contain a unique identification in an electronic form; or
- (c) a particular method to be used in relation to an electronic communication to identify the originator of the communication and to indicate the originator’s approval of the information communicated.

*Production of document*

15.—(1) If, under a law of Fiji, a person is required to produce a document that is in the form of paper, an article or other material, that requirement is taken to have been met if the person produces, by means of an electronic communication, an electronic form of the document, where—

- (a) having regard to all the relevant circumstances at the time of the communication, the method of generating the electronic form of the document provided a reliable means of assuring the maintenance of the integrity of the information contained in the document;
- (b) at the time the communication was sent, it was reasonable to expect that the information contained in the electronic form of the document would be accessible so as to be useable for subsequent reference;
- (c) the person to whom the document is required to be produced consents to the production, by means of an electronic communication, of an electronic form of the document; and
- (d) the applicable requirements (if any) of the Regulations have been met.

(2) If, under a law of Fiji, a person is permitted to produce a document that is in the form of paper, an article or other material, then, instead of producing the document in that form, the person may produce, by means of an electronic communication, an electronic form of the document, where—

- (a) having regard to all the relevant circumstances at the time of the communication, the method of generating the electronic form of the document provided a reliable means of assuring the maintenance of the integrity of the information contained in the document;
- (b) at the time the communication was sent, it was reasonable to expect that the information contained in the electronic form of the document would be accessible so as to be useable for subsequent reference;
- (c) the person to whom the document is permitted to be produced consents to the production, by means of an electronic communication, of an electronic form of the document; and
- (d) the applicable requirements (if any) of the Regulations have been met.

(3) For the purposes of this section, the integrity of information contained in a document is maintained if, and only if, the information has remained complete and unaltered, apart from—

- (a) the addition of any endorsement; or
- (b) any immaterial change,

that arises in the normal course of communication, storage or display.

(4) This section does not affect the operation of any other law of Fiji that makes provision for or in relation to requiring or permitting electronic forms of documents to be produced, in accordance with particular information technology requirements—

- (a) on a particular kind of data storage device; or
- (b) by means of a particular kind of electronic communication.

(5) The following provisions have effect—

- (a) the generation of an electronic form of a document for the purposes of this section does not constitute an infringement of the copyright in a work or other subject matter embodied in the document;
- (b) the production, by means of an electronic communication, of an electronic form of a document for the purposes of this section does not constitute an infringement of the copyright in a work or other subject matter embodied in the document.

*Recording of information and retention of documents and information*

16.— (1) If, under a law of Fiji, a person is required to record information in writing, that requirement is taken to have been met if the person records the information in electronic form, where—

- (a) at the time of the recording of the information, it was reasonable to expect that the information would be accessible so as to be useable for subsequent reference; and
- (b) if the Regulations require that the information be recorded, in electronic form, on a particular kind of data storage device, that requirement has been met.

(2) If, under a law of Fiji, a person is required to retain, for a particular period, a document that is in the form of paper, an article or other material, that requirement is taken to have been met if the person retains an electronic form of the document throughout that period, where—

- (a) having regard to all the relevant circumstances at the time of the generation of the electronic form of the document, the method of generating the electronic form of the document provided a reliable means of assuring the maintenance of the integrity of the information contained in the document;
- (b) at the time of the generation of the electronic form of the document, it was reasonable to expect that the information contained in the electronic form of the document would be accessible so as to be useable for subsequent reference; and
- (c) if the Regulations require that the electronic form of the document be retained on a particular kind of data storage device, that requirement has been met.

(3) For the purposes of subsection (2), the integrity of information contained in a document is maintained if, and only if, the information has remained complete and unaltered, apart from—

- (a) the addition of any endorsement; or
- (b) any immaterial change,

that arises in the normal course of communication, storage or display.

(4) If, under a law of Fiji, a person (the first person) is required to retain, for a particular period, information that was the subject of an electronic communication, that requirement is taken to be met if the first person retains, or causes another person to retain, in electronic form, the information throughout that period, where—

- (a) at the time of commencement of the retention of the information, it was reasonable to expect that the information would be accessible so as to be useable for subsequent reference;
- (b) having regard to all the relevant circumstances at the time of commencement of the retention of the information, the method of retaining the information in electronic form provided a reliable means of assuring the maintenance of the integrity of the information contained in the electronic communication;
- (c) throughout that period, the first person also retains, or causes the other person to retain, in electronic form, such additional information obtained by the first person as is sufficient to enable the identification of the following—

- (i) the origin of the electronic communication;
- (ii) the destination of the electronic communication;

- (iii) the time when the electronic communication was sent;
- (iv) the time when the electronic communication was received;
- (d) at the time of commencement of the retention of the additional information covered by paragraph (c), it was reasonable to expect that the additional information would be accessible so as to be useable for subsequent reference; and
- (e) if the Regulations require that the information be retained, in electronic form, on a particular kind of data storage device, that requirement is met throughout that period.

(5) For the purposes of subsection (4), the integrity of information that was the subject of an electronic communication is maintained if, and only if, the information has remained complete and unaltered, apart from—

- (a) the addition of any endorsement; or
- (b) any immaterial change,

that arises in the normal course of communication, storage or display.

(6) This section does not affect the operation of any other law of Fiji that makes provision for or in relation to requiring information to be recorded or retained, in accordance with particular information technology requirements—

- (a) on a particular kind of data storage device; or
- (b) by means of a particular kind of electronic communication.

(7) This section does not affect the operation of a law of Fiji that—

- (a) requires or permits a person to give information in writing, as referred to in section 13;
- (b) requires the signature of a person, as referred to in section 14; or
- (c) requires or permits a person to produce a document, an article or other material, as referred to in section 15,

in circumstances where the relevant provisions of section 13, 14 or 15 (as the case may be) are not satisfied in such a way as to authorise the requirement to be met or the permission to be exercisable by means of an electronic communication.

(8) The generation of an electronic form of a document for the purposes of this section does not constitute an infringement of the copyright in a work or other subject matter embodied in the document.

#### PART 4—MISCELLANEOUS

##### *Consent*

17.—(1) Subject to subsection (2)—

- (a) nothing in this Promulgation requires a person (including a governmental entity) to use, provide or accept information in an electronic form without the person's consent; and
- (b) consent may be given subject to conditions, including but not limited to conditions regarding any or all of the following—
  - (i) the form of the information;
  - (ii) the means by which the information is produced, given, sent, received, processed, stored or displayed;
  - (iii) the action to be taken by way of verifying the receipt of information;
  - (iv) without limiting anything else in this paragraph, the use of particular information technology requirements or the use of particular kinds of electronic communications.

(2) The Regulations may do any or all of the following—

- (a) require a governmental entity or a person acting on behalf of a governmental entity to consent to the use, provision or acceptance by the entity of information in an electronic form in specified circumstances;



- (b) specify conditions or kinds of conditions that must be attached to a consent given by a governmental entity or a person acting on behalf of a governmental entity in specified circumstances;
- (c) provide that specified conditions or kinds of conditions must not be attached to a consent given by a governmental entity or a person acting on behalf of a governmental entity in specified circumstances.

*Exclusion – evidence laws not affected*

18. Without limiting the operation of item 3 of the Schedule, Parts 2 and 3 do not affect the operation of—
- (a) the Evidence Act (Cap. 41) or the Civil Evidence Act 2002; or
  - (b) a law of Fiji that makes provision for the way in which evidence is given in proceedings in a court or tribunal.

*Exclusions under the Schedule*

19. Parts 2 and 3 do not apply to the matters listed in the Schedule.

*Exclusions under the Regulations*

20. The Regulations may provide that all or specified provisions of Parts 2 and 3 do not apply to—
- (a) a specified requirement or specified class of requirements;
  - (b) a specified permission or specified class of permissions; or
  - (c) a specified law of Fiji or a specified class of laws of Fiji.

*Regulations*

- 21.—(1) The Minister may make Regulations to give effect to the provisions of this Promulgation.
- (2) Without limiting subsection (1), the Regulations may make provision for or with respect to any matter in respect of which a provision of the Promulgation contemplates that Regulations may be made.
- (3) The Regulations may—
- (a) apply generally or be limited in their application by reference to specified exceptions or factors;
  - (b) apply differently according to different factors of a specified kind; or
  - (c) authorise any matter or thing to be from time to time determined, applied or regulated by an specified person or body,
- or may do any combination of those things.
- (4) A requirement of the Regulations (whether made for the purposes of section 17(2) or for the purposes of a provision of Part 3) prevails over the terms of a condition of consent given under this Promulgation to the extent of any inconsistency.

*Transitional Regulations*

- 22.—(1) The Regulations may contain provisions of a transitional or savings nature consequent on the making or commencement of this Promulgation.
- (2) Regulations for the purposes of subsection (1) may be made only within 12 months from the commencement of this Promulgation.

## SCHEDULE—EXCLUSIONS

### (Section 19)

*Documents*

1. The following kinds of documents—
- (a) wills, codicils or other testamentary instruments;
  - (b) negotiable instruments (but only in relation to their creation);
  - (c) indentures, declarations of trusts or powers of attorney (but not including constructive or resulting trusts);
  - (d) contracts for the sale or other disposition of immovable property or any interest in immovable property;

- (e) instruments for the conveyance or transfer of immovable property or any interest in immovable property, or for the registration or notification of any security over immovable property or any interest in immovable property;
- (f) documents of title;
- (g) affidavits, statutory declarations, or other documents given on oath or affirmation.

*Legislative requirements*

2. The following kinds of requirements under a law of Fiji—
  - (a) requirements that a notice be given to the public or a section of the public;
  - (b) requirements that information be given in writing either in person or by registered post;
  - (c) requirements that a notice be attached to any thing or left or displayed in any place;
  - (d) requirements to produce or serve a warrant or other document that authorises—
    - (i) entry on premises;
    - (ii) the search of any person, place or thing; or
    - (iii) the seizure of any thing;
  - (e) requirements that information be given in order to protect the safety of any persons.

*Judicial proceedings*

3. Any matter relating to the practice and procedure of a court or tribunal, and, for this purpose, practice and procedure includes all matters in relation to which rules of court or of a tribunal may be made.

GIVEN UNDER MY HAND this 4th day of November 2008 .

J. I. ULUIVUDA  
President of the Republic of the Fiji Islands.

## ELECTRONIC TRANSACTIONS PROMULGATION 2008

## EXPLANATORY NOTE

*[This note is not part of the Promulgation and is intended only to indicate its general effect]*

## INTRODUCTION

1. **Objective.** The objective of the Promulgation, as stated in clause 2 of the Promulgation, is
  - to recognise the validity of and promote the development of electronic communications in commercial and non-commercial dealings and in dealings with governmental entities; and
  - to remove uncertainty about using electronic methods to satisfy various legal requirements about documents and record-keeping.
  
2. **Legal outcomes.** The Promulgation seeks to achieve the following legal outcomes:
  - (1) A transaction is not invalid because it took place by means of one or more electronic communications.
  - (2) The following requirements imposed under a law of Fiji can be met in electronic form:
    - a requirement to give information in writing
    - a requirement to provide a signature
    - a requirement to produce a document
    - a requirement to record information
    - a requirement to retain a document.
  - (3) Provision is made for determining the time and place of the dispatch and receipt of an electronic communication.
  - (4) The purported originator of an electronic communication is bound by it for the purposes of a law of Fiji if the communication was sent by the purported originator or with the authority of the purported originator.
  - (5) The Promulgation does not favour or advantage electronic commerce over paper. The aim is to facilitate electronic commerce by the removal of legal obstacles to the use of electronic communications.
  - (6) The Promulgation does not affect the content of any communication.
  
3. **Qualifications and exclusions.** There are various qualifications and exclusions set out in the Promulgation, and provision is made for exclusions by way of Regulation. It is also noted that some of the provisions of the Promulgation require consent before they operate, and that this requirement for consent extends to governmental entities (subject to Regulations requiring a governmental entity to give consent in specified circumstances).
  
4. **Background.** Legal requirements for writing, signing and originals in relation to documents may create uncertainty in commercial dealings conducted electronically. This uncertainty is a significant obstacle to the development of e-commerce. Many laws require that something be in writing or that a document be signed. There are also numerous record-keeping requirements. The law is not always clear about if and how electronic methods may be used to satisfy those requirements.
 

The Promulgation will make the law certain by recognising the validity of electronic communications and setting out default rules about their use and legal effect. The Promulgation is structured so that default “opt-out” rules are in Part 2, and “opt-in rules” are in Part 3.
  
5. **International legislation.** In formulating the Promulgation, account has been taken of a wide range of relevant legislation. The legislation of Australia and New Zealand has been particularly influential. The Electronic Transactions Act 1999 of Australia is referred to in this Note as the “Australian ETA”, the

corresponding legislation of the Australian States (eg the Electronic Transactions Act 2000 of New South Wales) is referred to as the "Australian State ETA", and the Electronic Transactions Act 2002 of New Zealand is referred as the "NZ ETA".

6. **Consent.** No consumer or governmental entity will be required by the Promulgation to use, provide, or accept information in electronic form without the consent of the consumer or governmental entity respectively. However, a provision is included empowering Regulations to be made requiring a governmental entity to give consent in specified circumstances, and specifying conditions that must or must not be attached to a consent given by a governmental entity.

7. **Electronic case management (ECM).** The Promulgation does not include ECM provisions, as ECM is a substantive subject matter that is separate from the need to clarify the legal status of electronic communications when used in e-business or e-government. It is relatively unusual for electronic transactions legislation to include ECM provisions.

## PART 1 – PRELIMINARY

### *Clause 1 – Short title and commencement.*

The clause assigns the short title for the Promulgation, and provides for it to commence on a date to be notified in the *Gazette*.

### *Clause 2 – Objective.*

The clause states the objective of the Promulgation, as set out above.

### *Clause 3 – Interpretation.*

The clause sets out definitions of terms used in the Promulgation. Definitions include

- "consent", which is defined to include consent that can reasonably be inferred from conduct
- "electronic communication", which refers to communication by means of guided or unguided electromagnetic energy, or both. The definition is intended to have the widest possible meaning. Communication by means of guided electromagnetic energy is intended to include the use of cables and wires, for example optic fibre cables and telephone lines. Communication by means of unguided electromagnetic energy is intended to include the use of radio waves, visible light, microwaves, infrared signals and other energy in the electromagnetic spectrum. The use of the term "unguided" is not intended to refer to the broadcasting of information, but instead means that the electronic magnetic energy is not restricted to a physical conduit, such as a cable or wire. The term "communication" should also be interpreted broadly. Information that is recorded, stored or retained in an electronic form but is not transmitted immediately after being created is intended to fall within the scope of an "electronic communication"
- "governmental entity", which is defined widely to include a Minister, a statutory body, a ministry or department, government-controlled companies, and officials (but the Regulations can declare a person or entity not to be a governmental entity)
- "law of Fiji", which is defined as a written or unwritten law in force in Fiji.

The clause is similar to the Australian ETA s5. The definition of "law of Fiji" corresponds to the definition of "law of this jurisdiction" in the Australian State ETA, but specifies that the term extends to unwritten law whatever its basis.

### *Clause 4 – Promulgation binds Government.*

The clause provides that the Promulgation applies to the Government.

The clause is similar to the NZ ETA s7.

## PART 2 – DEFAULT GENERAL RULES ABOUT ELECTRONIC COMMUNICATIONS

Part 2 contains default general rules that apply of their own force unless

- the parties to a transaction otherwise agree or
- a written law provides otherwise.

*Clause 5 – Validity of electronic transactions.*

The clause is a key provision making it clear that a transaction is not invalid because it took place by means of an electronic communication. This default general rule does not apply where another, more specific provision of Part 3 deals with the validity of the transaction.

The clause is similar to the Australian ETA s7(1) and (2) and the corresponding provisions in the Australian State ETA, with adjustments because Fiji has a unitary non-federal system.

*Clause 6 – Time of despatch.*

The clause provides a default general rule as to the time when an electronic communication is taken to have been sent.

The clause is similar to the Australian ETA s13(1) and (2) and the corresponding provisions in the Australian State ETA.

*Clause 7 – Time of receipt.*

The clause provides a default general rule as to the time when an electronic communication is taken to have been received.

The clause is similar to the Australian ETA s13(3) and (4) and the corresponding provisions in the Australian State ETA.

*Clause 8 – Place of dispatch.*

The clause provides a default general rule as to the place from which an electronic communication is taken to have been sent – the place where the originator of the communication has its place of business.

The clause is similar to the Australian ETA s13(5)(a) and the corresponding provisions in the Australian State ETA.

*Clause 9 – Place of receipt.*

The clause provides a default general rule as to the place at which an electronic communication is taken to have been received – the place where the addressee has its place of business.

The clause is similar to the Australian ETA s13(5)(b) and the corresponding provisions in the Australian State ETA.

*Clause 10 – Originator or addressee with more than one or no place of business.*

The clause deals with the operation of clauses 8 and 9 in a situation where the originator or addressee has more than one place of business or has no place of business.

The clause is similar to the Australian ETA s13(6) and the corresponding provisions in the Australian State ETA.

*Clause 11 – Attribution of electronic communications.*

The clause provides that the purported originator of an electronic communication is bound by the communication only if it was sent by or with the authority of the purported originator, except in certain circumstances specified in the clause.

Clause 11(1), (2) and (4) are similar to the Australian ETA s15(1), (2) and (5)(c) and the corresponding provisions

in the Australian State ETA. Clause 11(3) is inserted in response to constructive comments on the Australian ETA (Duggan & Duggan, *Electronic Transactions*, para 5.4.26, LexisNexis NZ Ltd, 2004).

*Clause 12 – Application of this Part.*

Clause 12 provides that the default general rules in Part 2 apply except to the extent that the parties otherwise agree or a written law otherwise provides.

The clause, so far as it relates to agreement by the parties in connection with clause 5, is formulated in response to constructive comments on the Australian ETA (Duggan & Duggan, *op. cit.*, para 2.2.3). The clause, so far as it relates to agreement by the parties in connection with clauses 6-10, corresponds to the effect of provisions in the Commonwealth ETA s14. The clause, so far as it relates to a written law otherwise providing, corresponds in part to the power of regulations under the Australian ETA to prescribe exclusions.

PART 3 – REQUIREMENTS UNDER LAWS OF FIJI

Part 3 contains rules that apply if certain conditions are met, including for clauses 13-15 the giving of consent to their application. Consent is defined in clause 3 as including consent that can reasonably be inferred from conduct. The rules apply to requirements under written or unwritten laws of Fiji.

*Clause 13 – Writing.*

The clause provides that, if a person is *required* under a law of Fiji to give information in writing, the requirement is met if the person gives the information by means of an electronic communication where

- it was reasonable (when the information was given) to expect that the information would be accessible for future reference
- the person to whom the information is given consents to its being given by way of electronic communication
- any requirements under the Regulations have been met.

Similarly, if a person is *permitted* under a law of Fiji to give information in writing, the person may give the information by means of an electronic communication where

- it was reasonable (when the information was given) to expect that the information would be accessible for future reference
- the person to whom the information is given consents to its being given by way of electronic communication
- any requirements under the Regulations have been met.

The clause does not affect the operation of any other law of Fiji regarding the need to use particular information technology requirements.

The clause is similar to the Australian ETA s9 and the corresponding provisions in the Australian State ETA. However, the clause departs from the Australian ETA s9 in that the consent of the person to whom the information is to be given is required even where that person is a governmental entity, and also in that the clause requires compliance with any applicable Regulations.

The clause refers to information as being “accessible” for future reference, rather than “readily accessible”. The word “readily” has not been included in the clause 13, or in clauses 15 and 16, after consideration of constructive comments (Duggan & Duggan, *op. cit.*, paras 4.1.14, 4.1.16, and 4.1.17).

*Clause 14 – Signature.*

The clause provides that, if the signature of a person is required under a law of Fiji, the requirement is met where

- a method involving an “electronic signature” is used by or with the person’s authority to identify the person and indicate the person’s approval

- the person to whom the signature is given consents to its being given by that method
- the method was appropriate in the circumstances
- any requirements under the Regulations have been met.

The clause defines an “electronic signature”. The clause does not affect the operation of any other law of Fiji regarding electronic signatures.

The clause generally corresponds to the Australian ETA s10, and so far as it refers to electronic signatures corresponds in part to the NZ ETA s22 and more particularly the legislation referred to in constructive comments (Duggan & Duggan, *op. cit.*, para 5.2.10). However, the clause departs further from the Australian ETA s10 in that the consent of the person to whom the signature is to be given is required even where that person is a governmental entity, and also in that the clause requires compliance with any applicable Regulations.

*Clause 15 – Production of document.*

The clause provides that, if a person is *required* under a law of Fiji to produce a document in paper or other physical form, that requirement is met if the person produces, by means of an electronic communication, an electronic form of the document, where

- the method of generating the electronic form of the document provided a reliable means of assuring the maintenance of the integrity of the information in the document
- it was reasonable (at the time of the communication) to expect that the information would be accessible for future reference
- the person to whom the document is produced consents to its being produced by means of an electronic communication
- any requirements under the Regulations have been met.

Similarly, if a person is *permitted* under a law of Fiji to produce a document in paper or other physical form, the person may produce, by means of an electronic communication, an electronic form of the document, where

- the method of generating the electronic form of the document provided a reliable means of assuring the maintenance of the integrity of the information in the document
- it was reasonable (at the time of the communication) to expect that the information would be accessible for future reference
- the person to whom the document is produced consents to its being produced by means of an electronic communication
- any requirements under the Regulations have been met.

The clause does not affect the operation of any other law of Fiji regarding the production of documents in accordance with particular information technology requirements.

The clause provides that copyright is not infringed by the generation or production of an electronic form of a document.

The clause is similar to the Australian ETA s11 and the corresponding provisions in the Australian State ETA. However, the clause departs from the Australian ETA s11 in that the consent of the person to whom the document is to be produced is required even where that person is a governmental entity, and also in that the clause requires compliance with any applicable Regulations.

*Clause 16 – Recording of information and retention of documents and information.*

The clause provides that, if a person is required under a law of Fiji to record information in writing, that requirement is met if the person records the information in electronic form, where

- it was reasonable (at the time of recording the information) to expect that the information would be accessible for future reference

- any requirement under the Regulations regarding the use of a particular kind of data storage device has been met.

The clause also provides that, if a person is required under a law of Fiji to retain for a particular period a document in paper or other physical form, the requirement is met if the person retains an electronic form of the document throughout that period, where

- the method of generating the electronic form of the document provide a reliable means of assuring the of the information in the document
- it was reasonable (at the time of generating the electronic form of the document) to expect that the information would be accessible for future reference
- any requirement under the Regulations regarding the use of a particular kind of data storage device has been met.

The clause also provides that, if a person is required under a law of Fiji, to retain for a particular period information that was the subject of an electronic communication, the requirement is met if the information is retained in electronic form throughout that period, where

- it was reasonable (at the time of commencing to retain the information) to expect that the information would be accessible for future reference
- it was reasonable (at the time of commencing to retain the information) to expect that the information would be accessible for future reference
- the person also retains additional information identifying the origin and destination of the electronic communication and the time it was sent and received
- it was reasonable (at the time of commencing to retain the additional information) to expect that the additional information would be accessible for future reference
- any requirement under the Regulations regarding the use of a particular kind of data storage device has been met.

The clause refers to the retention of an electronic form of a document by a person required to keep the document. It is intended, in accordance with general legal principles, that such retention could be effected by the person personally or by an employee, officer or contractor.

Clause 16(7) makes it clear that clause 16 does not have the effect of overriding any legal requirement to give information in writing, sign a document or produce a document where the relevant requirements of clause 13, 14 or 15 are not satisfied. In other words, clause 16 does not authorise a "paperless" record system where the consent (and other) requirements of those clauses are not satisfied.

The clause is similar to the Australian ETA s12 and the corresponding provisions in the Australian State ETA. However, the clause departs from the Australian ETA s12 in that the clause requires compliance with any applicable Regulations and clause 16(7) does not have a counterpart in the Australian ETA s12.

#### PART 4 – MISCELLANEOUS

##### *Clause 17 – Consent.*

Clause 17(1) states that nothing in the Promulgation requires a person (including a governmental entity) to use, provide or accept information in an electronic form without the person's consent, and that consent may be given subject to conditions. This is subject to clause 17(2), which allows Regulations to be made requiring a governmental entity to give consent in specified circumstances, and specifying conditions that must or must not be attached to a consent given by a governmental entity.

Clause 17(1) corresponds generally to the NZ ETA s16. Clause 17(1)(b)(i)-(iv) reflect the kinds of conditions that are referred to in the Commonwealth ETA ss9-12. Clause 17(2) has a counterpart in the Vanuatu Electronic



Transactions Act 2000 s5, which provides that the Minister may, by notice in the Gazette, indicate that a ministry, department or agency of the government will receive and process electronic records relating to such matters as may be specified in the notice.

**Clauses 18 to 20** provide for exclusions from the operation of Parts 2 and 3.

**Clause 18 – Exclusion – evidence laws not affected.** The clause provides that Parts 2 and 3 do not affect the operation of laws relating to evidence.

**Clause 19 – Exclusions under the Schedule.** The clause provides that Parts 2 and 3 do not apply to the matters listed in the Schedule to the Promulgation.

**Clause 20 – Exclusions under the Regulations.** The clause empowers the making of Regulations prescribing exclusions from the operation of Parts 2 and 3.

**Clause 21 – Regulations.** The clause contains a general power to make Regulations.

**Clause 22 – Transitional Regulations.** The clause authorises the making of Regulations of a transitional or savings nature, but these Regulations may be made only within 12 months from the commencement of the Promulgation.

**Schedule – Exclusions.** The Schedule specifies the kinds of documents, legislative requirements and judicial proceedings that are excluded from the operation of Parts 2 and 3 (see clause 19 above). This exclusion extends to contracts for the sale of property, instruments for the conveyance or transfer of property, instruments for the registration or notification of any security over property, and documents of title: further legislation would be needed to implement a scheme of electronic conveyancing.