
The Foundations of Electronic Commerce

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This paper looks at bread and butter legal issues that must be addressed by any business intending to have a serious web presence, let alone wishing to conduct electronic commerce over the web. It focuses on record keeping requirements and admissibility issues first from an interest commerce perspective.

In order to conduct electronic commerce over the web it is necessary to translate a business' existing commercial practices into the web context. In so doing it is very easy to overlook some of the most basic aspects of doing business. Ironically, the basics are so important and so integral to the conduct of a business that they are likely to be taken for granted.

Jurisdiction

In the real world it is quite clear where a corporation is conducting its business. If it is a supermarket, for example, it does so at the checkout on its own property. If it is a mail order company it is also clear where goods are being sent and where requests have originated (eg. from the postmark and the fact that posting and mailouts are administered by human beings). However, on the web, none of these is necessarily true and the automated nature of web transactions only make this work because transactions can be committed before any real examination of their risk occurs.

Australia is a Federalist system with relatively uniform laws from State to State. It is easy to assume that where you are carrying on business should not make any difference to how you do so, except perhaps for some minor ripples. However, once you begin trading around the world you expose yourself to a variety of regulatory regimes, not all of which are determined by an enlightened government according to democratic principles.

The most likely source of difficulty for a web trader are regulations with a consumer protection focus. They may, for example, require specific address and terms of trade disclosures to be made to their customers. Failure to comply with these regulations may mean that you are unable to enforce transactions or are liable to a fine in that foreign jurisdiction. To reverse the situation for a moment, it is illegal under the Commonwealth *Trade Practices Act* to represent that goods of a household or domestic nature are provided "as is" without warranties. United States companies selling into Australia which have the customary US wording to that effect would be in breach of this law (and would be liable for pecuniary penalties of up to \$200,000). In fact, the directors of those companies and the site's web master may also be personally liable for fines of up to \$40,000. There is no reason to think that Australian law is particularly abnormal in this respect. Flying blind into the internet can lead to a broad exposure to legislative sanction in foreign jurisdictions. Over recent years the United States has shown itself willing to take action against defendants in foreign jurisdictions, and other countries may follow suit.

As such, when launching a business on the net, thought should be given to exactly where your target market is, and whether it is important to do business with customers in overseas jurisdictions. At the very least, it is preferable to have specific conditions on the website restricting any offers that are made from the website to people in your target jurisdiction.

Existing Systems

In translating an existing system from reality to the net, a business must take specific care to ensure that the virtual processes are faithful reproductions of the real ones. An example of the difficulties that can be faced is

provided in *Holt Hauling and Warehousing System Inc v United States Customs Service* (650 F.Supp 1013.) In that case an American company had a licence to import specific products into the United States. That licence was granted by the United States government and had specific conditions attached to it. Holt, in its "real world" system, complied with the licensing terms and conditions. However, when they moved over to an electronic commerce system, the processes that they had evolved were not properly translated into the virtual world. As a result, they were in breach of their licence terms and forfeited their licence for a year.

The moral of this story is that if the legislature sets out certain conditions on which it permits you to do business, you ignore those conditions at your peril. The mere fact that to conduct your business over the net would be cheaper, faster or more efficient will not permit you to break the law in doing so. You must be sure, in the passage from reality to virtuality, that all your licensing and other obligations remain covered.

In addition to complying with laws a business must also ensure that their ecommerce system tracks their previous business process at a conceptual level. It is important to make as close a match as possible in order to preserve customer loyalty, and to encourage the transition to the net. Every change in a business' trading operations has the potential to alienate customers and the internet is no exception. It will first and foremost mean that your customers are required to learn a new interface. If the internet business process tracks the existing process closely this reduces the amount your customers are required to learn.

Record Keeping

The "back office" is the next most likely place for a false assumption to

occur. You ordinarily think that records are kept for your own purposes. However, there is a large body of legislation in each State and at the Federal level that requires persons carrying on business to keep certain records and, often, to keep them in a certain manner or format. When one remembers that the legislation requiring record keeping may have been drafted 20 or more years ago when computers effectively did not exist. The rules which allow documents to be put before a Court were also written in a time when computers were in their infancy. It may be that, even though you have kept thorough and meticulous records, you are unable to use them to prove your case because they do not meet the rules for the relevant Court. In the end it will all come down to whether the records have been kept in a manner permitted by the legislation, and a strict reading of many of these provisions exclude records which are kept electronically.

This means that it may not be possible to prove an agreement (e.g. on line sign-up terms) in the event of a dispute!! If you intend to do business outside your home state you must anticipate the possibility of action in any State in which you do business. If your record keeping processes do not comply with the laws of *all* States you may find that you are unable to defend yourself in a litigation because you have no admissible evidence. For example, if you fail to keep the records required to be kept under the South Australia legislation you won't be able to prove your case when sued there. The fundamental problem facing businesses in this context is that it is too late to wait until action is taken against them—they may need to be keeping their records at the time of the transaction. That is— *now*.

Regulatory Requirements

As each piece of legislation requiring record keeping sets out its own standards, it is impossible to treat this topic generically. However, it is useful to examine a single piece of legislation, in this case, the *Income Tax Assessment Act* to illustrate the issues involved. Under that Act, documents which

evidence a transaction are required to be kept for a period of 5 years. Further, the Act requires that those documents be kept "in writing or reducible to writing in English". There are similar provisions in the *Corporations Law*. The first thing to notice is the "in writing" requirement for record keeping. Prima facie you would assume that "writing" does not include electronically stored documents. The Act itself does not provide any assistance in this regard. The *Commonwealth Acts Interpretation Act* says that writing includes "any mode of representing or reproducing words, figures, drawings or symbols in a visible form".

On this definition, documents stored on a computer will not be stored "in writing". However, if they can be printed out, they will meet the "reducible to writing" limb of the test. As such, the mere keeping of documents in an electronic form will not be in breach of the *Income Tax Assessment Act*. However, and this question is not obvious, if they are stored on a computer are they still "documents"? Several years ago, the answer would have been "no" or "it's not clear". The same provision that defines the meaning of "writing" also covers that of "document". It provides that a document includes: "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". Technically on this definition, an entire computer comprises a single document, but it is commonly interpreted to mean documents as we commonly understand them.

Now if, for storage or security purposes, the documents are compressed or encrypted it is not longer clear that they are "reducible to writing in English". This will be a question of fact and degree in each instance. If the Tax Commissioner is not able to have ready access to the material, there is a definite question as to whether the material meets the record keeping requirements and a risk of being in breach of the Act.

Retention Periods

Another issue that must be addressed is the relatively long record retention periods. Under many Acts documents are required to be retained for periods in excess of five years. For example, the *Income Tax Assessment Act* requires records to be kept for five years or longer. Other periods include six years in which to bring an action under an agreement and twelve years under a deed (*Limitation Act NSW*), and three years to bring an action under the *Trade Practices Act*. Over the past 20 years storage formats have undergone an almost generational change in each 5 year period. From a software perspective, archival and backup software companies have been conceived, grown, declined, and died all within a period of 5 years. It may be that, for technical reasons, records stored today are not accessible in 5 years time or that records stored 5 years ago are not accessible today. In order to comply with typical record keeping requirements therefore, it is necessary to retain not only the records themselves but also the software used to archive them, and also possibly the hardware that was used to archive it. In short, you must ensure that your records are able to be retrieved at any time at least up to the end the record keeping period and possibly longer if they might be used for litigation.

Conclusion

In planning an ecommerce implementation on the internet you must have regard to issues relating to:

- jurisdiction;
- conformance with existing systems;
- record keeping and admissibility;
- regulatory requirements; and
- record retention requirements.

As the future admissibility of your documents will be determined by what you do now, it is too late to wait till you've been sued to address these issues. If it takes 3–5 years to establish proper procedures that literally translates into 3–5 years of exposure.