

BILL NO. 53 OF 2016

A BILL

FOR AN ACT TO AMEND THE ELECTRONIC TRANSACTIONS PROMULGATION 2008

ENACTED by the Parliament of the Republic of Fiji—

Short title and commencement

- 1.—(1) This Act may be cited as the Electronic Transactions (Amendment) Act 2016.
- (2) This Act comes into force on the date the Electronic Transactions Promulgation 2008 comes into force.
- (3) In this Act the Electronic Transactions Promulgation 2008 is referred to as the “Promulgation”.

Section 2 amended

2. Section 2 of the Promulgation is amended by—
 - (a) in paragraph (a), deleting “and” after “entities;”;
 - (b) in paragraph (b), deleting “.” and substituting “;”;

- (c) inserting the following new paragraphs after paragraph (b)—
- “(c) facilitate and give effect to the domestic implementation of the United Nations Convention on the Use of Electronic Communications in International Contracts (2005);
- (d) provide for the efficient delivery of ICT services by Government entities; and
- (e) provide for rules governing evidence with regard to electronic communication.”

*Section 3 amended***3.** Section 3 of the Promulgation is amended by—

- (a) deleting the definition of “electronic communication” and substituting the following—
- ““electronic communication” means any communication that the parties make by means of data messages;”
- (b) in the definition of “place of business” inserting the following after “or body;”—
- “and in relation to other parties, means any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location;”; and
- (c) inserting the following new definitions—
- ““addressee” of an electronic communication means a party who is intended by the originator to receive the electronic communication, but does not include a party acting as an intermediary with respect to that electronic communication;
- “automated message system” means a computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system;
- “certification service provider” means a person providing certification services within the meaning of this Act;
- “certification services” means any service which is provided to the senders or recipients of information in electronic form, or to those storing such information, and is designed to facilitate the use of cryptographic techniques for the purpose of ascertaining that the confidentiality, authenticity and integrity of such information is secured;

“communication” means any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract;

“data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy;

“electronic document” includes documents, records, information, communications or transactions in electronic form;

“electronic record” means a written document, or other record created, stored, generated, received, or communicated by electronic means;

“electronic signature” means—

- (a) electronic data; or
- (b) an electronic process, that is attached to or logically associated with a data message, electronic document, electronic record or electronic communication and that may be used to identify the signatory in relation to the communication and to indicate the signatory’s intention in respect of the information contained in the communication;

“ICT” means Information, Communication and Technology; and

“originator” of an electronic communication means a party by whom, or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as an intermediary with respect to that electronic communication;”.

Section 5 amended

4. The Promulgation is amended by deleting section 5 and substituting the following—

“Validity of electronic transactions

5. A data message, electronic document, electronic record or other communication must not be denied legal recognition, effect, validity, or enforceability on the ground that it is in electronic form.”

New section 5A inserted

5. The Promulgation is amended by inserting the following new section after section 5—

“Requirements for original form

5A.—(1) Where any written law requires information or documents to be presented, stored, retained or generated in its original paper based form, such requirement is deemed to be satisfied by information contained in a data message, electronic document, electronic record or other communication in electronic form, if there exists a reliable

assurance with regard to assessing the integrity of the said information from the time such information in a data message, electronic document, electronic record or other communication is available in electronic form and the information contained in the data message, electronic document, electronic record or communication is available and can be used for subsequent reference.

(2) For the purposes of subsection (1)—

- (a) the standard for reliability of the assurance shall be assessed having regard to the purpose for which the information in a data message, electronic document, electronic record or other communication was presented, stored, retained or generated and all other relevant circumstances; and
- (b) the criterion for assessing the integrity of information in a data message, electronic document, electronic record or other communication, is whether the same has remained complete and unaltered, apart from the addition of any endorsement or any change which arises in the normal course of communication, storage or display.”

Section 6 amended

6. The Promulgation is amended by deleting section 6 and substituting the following—

“Time of dispatch

6.—(1) If an electronic communication leaves an information system under the control of the originator or of the party who sent it on behalf of the originator, the dispatch of the electronic communication is taken to occur when it leaves that information system.

(2) If an electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the dispatch of the electronic communication is taken to occur when it is received.”

Section 7 amended

7. The Promulgation is amended by deleting section 7 and substituting the following—

“Time of receipt

7.—(1) If the addressee of an electronic communication has designated an electronic address 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 becomes capable of being retrieved by the addressee at that electronic address.

(2) If an electronic communication has been sent to another electronic address of the addressee, the time of receipt of the electronic communication is taken to be the time when it becomes capable of being retrieved by the addressee at that electronic address and it has come to the attention of the addressee that the electronic communication has been sent to that address.

(3) An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee’s electronic address.”

Section 10 amended

8. The Promulgation is amended by deleting section 10 and substituting the following—

“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) a party’s place of business is presumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location;
- (b) if the originator or addressee has not indicated a place of business and has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;
- (c) if the originator or addressee has more than one place of business, but paragraph (b) 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;
- (d) if the originator or addressee, being a natural person, 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 of habitual residence of the originator or addressee;
- (e) a location is not a place of business merely because—
 - (i) the equipment and technology supporting an information system used by a party in connection with the formation of a contract are located in a particular place; or
 - (ii) it is where the information system may be accessed by other parties; and
- (f) the sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that the said party’s place of business is located in that country.”

New Part 2A inserted

9. The Promulgation is amended by inserting the following new Part after Part 2—

“PART 2A— INVITATIONS TO MAKE OFFERS

Invitation to make offers

12A. A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make

use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.”

Section 13 amended

10. Section 13 of the Promulgation is amended in subsection (1) by inserting “or if a written law provides consequences for the absence of writing,” after “information in writing.”.

Section 14 amended

11. The Promulgation is amended by deleting section 14 and substituting the following—

“Signature

14.—(1) If, under any written law in Fiji, the signature of a person is required, or if a written law provides consequences for the absence of a signature, 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 intention in respect of the information communicated;
- (b) the person to whom the signature is required to be given consent to that requirement being met by way of the use of the method mentioned in paragraph (a);
- (c) the method was—
 - (i) having regard to all the relevant circumstances including any relevant agreement, as reliable as appropriate for the purposes for which the information was generated or communicated; or
 - (ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence; and
- (d) any further requirements prescribed by regulations have been met.

(2) This section does not affect the operation of any other written law of Fiji that provides for or requires—

- (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 intention in respect of the information communicated.”

New Part 3A inserted

12. The Promulgation is amended by inserting the following new Part after Part 3—

“PART 3A—GENERAL PROVISIONS GOVERNING ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

Invitation to make offers

16A. A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

Use of automated message systems for contract formation

16B. A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, must not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract.

Error in electronic communication

16C.—(1) Where a natural person makes an input error in an electronic communication exchanged with the automated message system of another party and the automated message system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the portion of the electronic communication in which the input error was made if—

- (a) the person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication; and
- (b) the person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.

(2) Nothing in this section affects the application of any rule of law that may govern the consequences of any error other than as provided for in subsection (1).”

Section 17 amended

13. The Promulgation is amended by deleting section 17 and substituting the following—

“Efficient delivery of ICT services by governmental entities

17.—(1) Unless otherwise specifically provided in any written law, where any written law for the time being in force in Fiji requires—

- (a) the filing of any form, application, or any other document with any governmental entity in a particular manner or the creation and retention thereof;

- (b) the issue of a certificate, licence, permit, notice or any other form of approval; or
- (c) the issue of a receipt for payment of money, procurement or other transaction to be effected in a particular manner,

such requirement described in paragraphs (a), (b) and (c) must be deemed to have been satisfied, if such filing, creation, retention, issue of a certificate or licence, permit, notice or approval, issue of receipt for payment, procurement or other transaction, as the case may be, is effected in the form of electronic documents, electronic records or any electronic communication as may be specified by the relevant governmental entity.

(2) The relevant governmental entity requiring the use of electronic documents, electronic records or electronic communications specified in subsection (1), may recommend the making of regulations under this Act for the purpose of authorising or facilitating the use of electronic documents or electronic records, to the Minister responsible for the administration of this Act, by specifying—

- (a) the manner and format in which such electronic document or electronic record must be filed, created, retained or issued;
- (b) where such electronic documents, electronic record or electronic communication is required to be signed, the electronic signature type or method required, and the procedures required to be adhered to by certification service providers providing a certification service;
- (c) the control process and procedures required in order to secure confidentiality, authenticity or integrity of electronic documents, electronic records, procurements, transactions or payments;
- (d) the manner or method of payment of any fee or charges for the filing, creation, retention or issue of any electronic document or electronic record or electronic communication under paragraph (a);
- (e) the manner of doing anything which under any such provisions is required to be done or evidenced in writing or otherwise using a document, notice or instrument;
- (f) the manner of doing anything which under any such provisions is required to be or may be done by post or other specified means of delivery;
- (g) the doing of anything which under any such provisions is required to be or may be authorised by a person's signature or seal;
- (h) the making of any statement or declaration which under any written law is required to be made under oath or affirmation;
- (i) the making of any payment that is required to or may be made under any written law; or
- (j) any other matter relating to the use of electronic documents or electronic records in a governmental entity.

(3) In relation to practices and procedures of a court or tribunal, where electronic documents, electronic records or any electronic communications are envisaged, the court or tribunal may set rules to specify any of the matters prescribed in subsection (2).”

Section 18 amended

14. The Promulgation is amended by deleting section 18 and substituting the following—

“Rules governing electronic evidence

18.—(1) Notwithstanding the provisions contained in the Civil Evidence Act 2002 or any other written law, the following provisions shall apply to Parts 2, 3 and 4 of this Act, in any civil proceedings.

(2) Any information contained in a data message, electronic document, electronic record or any electronic communication—

(a) touching any fact in issue or relevant fact; and

(b) compiled, received or obtained during the course of any business, trade or profession or other regularly conducted activity,

shall be admissible in any civil proceeding under this Act, provided that direct oral evidence of such fact in issue or relevant matter, if available, shall be admissible; and there is no reason to believe that the information contained in a data message, electronic document, electronic record or any electronic communication is unreliable or inaccurate.

(3) The courts shall, unless the contrary is proved, presume the truth of information contained in a data message, electronic document, electronic record or electronic communication, and in the case of any data message, electronic document, electronic record or electronic communication made by a person or governmental entity, that the said data message, electronic document, electronic record or electronic communication was made by the person who is purported to have made it and similarly, shall presume the validity of any electronic signature or authentication method or distinctive identification mark therein.”

Schedule amended

15. The Schedule to the Promulgation is amended by deleting paragraph 3.

ELECTRONIC TRANSACTIONS (AMENDMENT) BILL 2016

EXPLANATORY NOTE

(This note is not part of the Bill and is only intended to indicate its general effect)

1.0 BACKGROUND

- 1.1 In 2008 the Electronic Transactions Promulgation 2008 (**‘Promulgation’**) was drafted with the objective of creating an environment of greater legal certainty for electronic transactions and enhancing trade and commerce through the internet. Although the Promulgation has not come into force, what it set out to achieve for the recognition of electronic transactions remains relevant, and must be further refined so as to adhere to accepted international standards.
- 1.2 The Promulgation is based on the United Nations Commission on International Trade Law (**‘UNCITRAL’**) Model Law on Electronic Commerce (1996). UNCITRAL then further developed the Convention on the use of Electronic Communications in International Contracts (2005) (**‘Convention’**) which aims to facilitate the use of electronic communications in international trade. The Convention was adopted by the United Nations General Assembly on 23 November 2005.
- 1.3 The Electronic Transactions (Amendment) Bill 2016 (**‘Bill’**) seeks to harmonise provisions of the Promulgation with the Convention and pave the way for the State to accede and become a state party to the Convention.
- 1.4 The overall implication of such harmonisation ensures that Fiji’s legislative framework for electronic transactions is modern and relevant to the needs of e-commerce and e-business in the Pacific region, and among other things achieve a more effective service delivery by the Government to the people of Fiji.

2.0 CLAUSES

- 2.1 Clause 1 of the Bill provides for the short title and the commencement provision.
- 2.2 Clause 2 of the Bill amends section 2 of the Promulgation by inserting 3 new provisions under the objectives of the Promulgation.

- 2.3 Clause 3 of the Bill amends section 3 of the Promulgation by inserting new definitions as well as amending existing ones. These amendments to the interpretation provision are of particular significance and necessary for compliance with international standards.
- 2.4 Clause 4 of the Bill amends the Promulgation by deleting section 5 and substituting a new provision that provides for electronic transactions and communication to be legally recognised and valid, particularly for electronic Government (**‘e-Government’**) related transactions.
- 2.5 Clause 5 of the Bill amends the Promulgation by inserting a new section 5A which provides that information required to be in paper form can be authenticated with information stored electronically if there is reliable assurance in accessing the integrity of the said information.
- 2.6 Clause 6 of the Bill amends the Promulgation by deleting section 6 and substituting a provision which binds Fiji to be in compliance with Article 10 of the Convention relating to the time of dispatch of electronic communication. Time of dispatch is taken to have occurred when it leaves that information system sent by the originator or on behalf of the originator.
- 2.7 Clauses 7 of the Bill amends section 7 of the Promulgation relating to the time of receipt of electronic communication. The general presumption is that electronic communication is capable of being retrieved by the addressee when it reaches the addressee’s electronic address. To prevent the addressee from deliberately delaying or impeding delivery of electronic communication by not accessing it, the time of receipt has now been amended to when electronic communication becomes capable of being retrieved by the addressee and the addressee is aware that it has been sent. This ensures that the originator of the electronic transaction is not held responsible for technical issues that occur in the information systems outside its control.
- 2.8 Clause 8 of the Bill amends section 10 of the Promulgation which refers to the determination of the location of parties (the originator or the addressee) in more than one place of business. A party’s place of business is presumed to be the location indicated by that party. Determination, however, should not be based merely on the location of equipment or technology, the use of a domain name or an e-mail address connected to a specific country. This clause lays out the procedures for determining location of the parties.
- 2.9 Clause 9 of the Bill amends the Promulgation by inserting a new Part 2A in regards to invitation to make offers, a well-known rule in contract law that a proposal made to unspecified parties is an invitation to make offers and not a contractual offer. This is particularly useful in electronic commerce or e-Commerce as it prevents electronic merchants with limited stock of certain

goods from being bound by a large number of contracts. Under this approach, the contract concludes only upon verification by the vendor that the item is in fact available and the vendor's subsequent acceptance of the offer made by the buyer.

- 2.10 Clause 10 of the Bill amends section 13 of the Promulgation relating to writing requirements and electronic equivalents where a written law may now provide for consequences in the absence of writing.
- 2.11 Clause 11 of the Bill amends section 14 of the Promulgation which refers to electronic signatures and authentication methods where the reliability of the signature method is determined in the light of all the circumstances, including any relevant agreement.
- 2.12 Clause 12 of the Bill amends the Promulgation by inserting a new Part 3A on general provisions governing electronic communications in international contracts.
- 2.13 Clause 13 of the Bill amends section 17 of the Promulgation to ensure that the electronic transactions laws in Fiji provide legal validity to filing, retention, processing of electronic documents and electronic records as well as automation of all types of Government processes based on the UNCITRAL functional equivalence concept. These changes would give legal effect to all types of e-Government related transactions, legal recognition to all types of electronic signatures and provide the framework for the authentication technologies to be used for all types of domestic electronic transactions.
- 2.14 Clause 14 of the Bill amends section 18 of the Promulgation which would ensure ease of admissibility for electronic evidence in civil proceedings.
- 2.15 Clause 15 of the Bill amends the Promulgation by deleting paragraph 3 of the Schedule which will enable electronic filing and case management systems in courts and tribunals to ensure efficient delivery of judicial services to the public.

3.0 MINISTERIAL RESPONSIBILITY

- 3.1 The Act comes under the responsibility of the Minister responsible for communications.

A. SAYED-KHAIYUM
Attorney-General

