ELECTRONIC BILLS OF EXCHANGE: WILL THE CURRENT LAW RECOGNISE THEM?

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ABSTRACT

In the twenty first century the utility of many forms of business mechanisms will be measured by the ease in which they can be used in an electronic environment such as the Internet. Bills of exchange are one such mechanism. Currently there are two main areas for concern regarding the enforceability of electronic bills of exchange. First, it is unclear whether electronic bills of exchange satisfy the writing and signature requirements set out in the *Bills of Exchange Act 1909* (Cth). Secondly, it is also uncertain whether an electronic bill of exchange can be adduced as evidence in civil proceedings. The thesis of this paper is that electronic bills of exchange do comport to the law and that the problems discussed above are more apparent than real. However, as the relevant law tends to be couched in language that contemplates paper based bills of exchange, legislation drafted in technology neutral terms is called for to provide certainty in this area.

I. INTRODUCTION

For negotiable instruments in the form of bills of exchange to retain their convenience in international trade in the next millennium, they must be recognised as valid in electronic form.[1] It would be incongruous if increasingly trade related activities, such as the transmission of letters of credit which are only regulated by

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1 "Fully negotiable instruments were developed for the purpose of extending credit and obtaining payment in international transactions. In the form of bills of exchange and promissory notes they now play an integral role in the mobilisation of short term capital": J Vaughan, T Sewards and R Kelso, *Study of the Law of Internet Commercial Transactions*, Circit (1997) p 40.

contract law, were conducted over the Internet; but the relevant laws required payment mechanisms, such as bills of exchange, to be transmitted physically.[2] This would also ignore the efficiencies inherent in the use of an electronic letter of credit, if the payment method prescribed in an electronic letter of credit were an electronic bill of exchange. However, commercial expediency does not determine issues of law and a court may well find that electronic bills do not satisfy current legal requirements.

To ensure certainty (the keystone of international trade)[3] in this area, individual legislatures should adopt rules that accommodate developments in technology. The United Nations Commission on International Trade Law Model Law on Electronic Commerce 1996 (hereafter 'the Model Law')[4] is a set of rules that provides a model for reform in this context. To overcome deficiencies in the current statutory regimes, the Model Law should be adopted to increase certainty in relation to the enforceability of electronic bills of exchange.

II. VALID BILLS OF EXCHANGE

This section of the paper will focus on whether the main requirements for a bill of exchange are satisfied by a putative electronic bill of exchange.[5] Bills of exchange provide a secure, reliable mechanism to make international payments and mobilise short term capital. However, the traditional requirements of a valid bill threaten the widespread adoption of the electronic bill of exchange.[6] The requirements set out in the relevant Australian law will be the focus for this discussion.[7] The main issues that arise are the need for signatures, the need for writing,[8] and the possibility of electronic bills of exchange being admitted as

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2   PB Fry, "Negotiating Bit by Bits: Introducing the Symposium on Negotiability in an Electronic Environment" (1995) 31 *Idaho Law Review* 679 at 680.

3   See *Australian Law Reform Commission Report 80, Legal Risks in International Transactions*, May 1996, Chapter 6 - "Electronic Commerce" at 47.

4   The complete text of the Model Law can be viewed by visiting the United Nations web site at: <http.www.un.or.at/uncitral/en-index.htm> and clicking the "Conventions, Model Laws and Other Texts" link, followed by the "Electronic Commerce" link. The Model Law was adopted by the United Nations Commission on International Trade Law (UNCITRAL) at its 29th Session. As at 11 July 1998 the Model Law had not been adopted by any nation: see International Trade Law Branch of the United Nations of Legal Affairs servicing UNCITRAL, "Status of Conventions and Model Laws," <http://www.un.or.at/uncitral/en-index.htm>.

5   The focus will be on bills of exchange. However, most of the observations that follow can apply *mutatis mutandis* to other payment mechanisms such as promissory note and cheques.

6   The implications of Electronic Data Interchange (EDI) will not feature in this paper. EDI agreements are contracts that regulate how and when the electronic interchange of data will occur between large independent enterprises. Whilst they overcome some legal difficulties, being contracts they only operate *inter se* and these agreements do not solve the problem of government agencies that require signatures or writing and these agreements are not suited to short term trading relationships because of the costs associated with negotiating EDIs: R Hill and I Walden, "The Draft UNCITRAL Model Law for Electronic Commerce: Issues and Solutions," (1996) 13(3) *The Computer Lawyer* 19.

7   Note that the critical issues that are raised in this paper are mirrored in other jurisdictions: see for example *Bills of Exchange Act* 1882 (UK), c 62, s 23.

8   See *Bills of Exchange Act* 1909 (Cth), ss 4 and 8.

evidence in a court of law.[9] It is argued that ex facie an electronic bill satisfies the above mentioned requirements.

A. Definition

The *Bills of Exchange Act* 1909 (Cth)[10] defines a bill of exchange as:

> an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer.[11]

This definition provides two critical requirements for present purposes. There must be writing and a signature. The implications of each of these requirements regarding the recognition of electronic bills of exchange will be discussed below.

B. Writing

(i) Current Law

The Act provides that "writing" includes "print".[12] However, neither of these terms provide any guidance as to whether electronic bills (e-bills) satisfy the writing requirement. The *Acts Interpretation Act* 1901 (Cth) reveals that "writing" includes "any mode of representing or reproducing words, figures, drawings or symbols in a visible form."[13] As the *Acts Interpretation Act* applies to the interpretation of the *Bills of Exchange Act*,[14] it would appear that "writing" in s 8 must be read as including the representation or reproduction of words in a bill in electronic form as long as they were capable of reproduction in a visible form. A reproduction on a computer screen or on a print out would satisfy the definition of writing in the *Acts Interpretation Act*. Accordingly, it is submitted that e-bills would satisfy the "writing" requirement as the law currently stands, because an e-bill would manifest itself either as a reproduction on a computer screen or as a print out of a computer screen. To put the matter beyond doubt Australia should adopt the Model Law.

(ii) Model Law

The Model Law seeks to overcome problems associated with electronic commerce such as the requirements of writing, signing and evidential questions.[15] The main reason for the Model Law is the need for certainty in risk allocation in international transactions. Traders need to be able to identify, with a degree of

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9   For instance, if the alleged bill cannot be adduced in evidence in court it will be impossible to prove an action based on the bill.

10   Unless the contrary is shown, all statutory references will be to the *Bills of Exchange Act* 1909 (Cth).

11   *Acts Interpretation Act* 1901 (Cth), s 8(1).

12   *Acts Interpretation Act* 1901 (Cth), s 11.

13   *Acts Interpretation Act* 1901 (Cth), s 25.

14   Section 2(1) of the *Acts Interpretation Act* provides that unless the contrary intention appears the *Acts Interpretation Act* applies to all Acts.

15   Article 1. Sphere of application: This Law applies to any kind of information in the form of a "data message" used in the context of commercial activities. "Data message" means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy: Model Law, Article 2(a).

precision, the risks that they will bear and the risks that the other party will bear. The Model Law attempts to provide traders with some certainty regarding these matters when they use mechanisms designed for electronic commerce, such as e-bills.

Article 6 of the Model Law provides that:

(1) Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be useable for subsequent reference.

(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being in writing.

(3) The provisions of this article do not apply to the following: [...]

Article 6(1) of the Model Law explicitly gives electronic transmissions the same legal value as writings. Although Article 6(3) is a place holder for contemplated exceptions, the provision is a great step forward because it provides certainty in relation to whether an e-bill would be in "writing." Consequently, if legislative changes grafted this type of provision into the law, the issue of whether the e-bills satisfied the writing requirement, that is, the Statute of Frauds requirement evident in s 8 of the *Bills of Exchange Act* 1909 (Cth), would be resolved in the affirmative. However, satisfying the writing requirement is only the first hurdle. The next issue that needs to be addressed is whether electronic signatures are recognised by Australian law.[16]

C.   Signature

(i)   Current Law

The legal significance of a signature does not "lie in the form of the signature but in the information it conveys."[17] A signature need only be a mark placed at any point of a document, which identifies its maker. The requirement for a signature is to show authenticity and is also presumptively attributable to one source. For this reason handwriting experts are often used to determine whether a signature is authentic or a forgery.

However, in the electronic age there are grave concerns regarding the possibility of fraud in electronic commerce. It may be possible using current technology to replicate a digital signature with precision. Further, documents transmitted electronically can be duplicated at every point that they pass through a computer on their way from sender to recipient. For instance, if an e-bill is sent from Sydney to Berlin and passes through computers located in London and Amsterdam during transmission, it is possible to copy that e-bill at each of those points. Some would argue that encryption is the answer to this problem. Given that current technologies provide highly secure encryption mechanisms and electronic signature capabilities, it appears that the focus moves from the concerns mentioned above to the issue of whether digital signatures comport with relevant statutory provisions.

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16   It may appear somewhat myopic to concentrate on Australian law but this law is representative of the laws in most other countries.

17   J Vaughan et al, note 1 *supra*, p 34.

A bill must be "signed" if it is to be valid.[18] The word "signed" is not defined by the *Bills of Exchange Act* 1909 (Cth) or by the *Acts Interpretation Act* 1901 (Cth). Consequently, one must turn to the common law for a definition. Signing is defined in the cases as the:

> writing or otherwise affixing a person's name, or a mark to represent her name, by herself or by his authority[19] with the intention of authenticating a document.[20]

Further, Maule J stated in *Morton v Copeland*[21] that a signature can be "any mark which identifies it as the act of the party."[22] Higinbotham J concluded in *R v Moore; ex parte Myer*[23] that:

> a signature is only a mark, and where a statute merely requires that a document shall be signed, the statute is satisfied by proof of the making of a mark upon the document by or by the authority of the signatory.[24]

In light of these definitions it is certainly arguable that existing encryption techniques, namely digital signatures,[25] satisfy the signature requirement in s 8 of the *Bills of Exchange Act* 1909 (Cth).

Digital signatures can be used to maintain the integrity and authenticity of an electronic document.[26] A digital signature usually comprises three main elements: (a) public/private key pair;[27] (b) a one way hash function;[28] and (c) a reliable

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18   Section 8, *Bills of Exchange Act* 1909 (Cth).

19   See *R v Kent Justices* (1873) LR 8 QB 305.

20   JS James, *Stroud's Judicial Dictionary*, Sweet & Maxwell (1986) p 2431.

21   (1850) 16 CB 517.

22   *Ibid* at 535.

23   (1884) 10 VLR 322.

24   *Ibid* at 324. See also *Selby v Selby* (1817) 3 Mer 2.

25   A digital signature is a 9-15 alphanumeric character string such as Personal Identification Number (PIN) for an automatic teller machine card.

26   A McCullagh, "Legal Aspects of Electronic Contracts and Digital Signatures" in A Fitzgerald, B Fitzgerald, P Cook and C Cifuentes (eds), *Going Digital*, Prospect (1998) 114 at 118.

27   Standards Australia has proposed that public keys be freely distributed by a National Public Key Infrastructure (NPKI) framework of trusted third parties (TTP) called certification authorities (CA) which will register particular public keys to individuals whilst its corresponding private key is known only by its holder: see Standards Australia, MP75 "Public Key Authentication Framework" Infrastructure Report, October 1996. For a discussion of security and trust issues in relation to the TTPs and CAs see A McCullagh, *ibid* at 119-121 and B Schneier, *Applied Cryptography: Protocols, Algorithms and Source Code in C*, Wiley (2nd ed, 1996), chapter 21: "Identification Schemes". Public and private keys are two very large prime numbers that relate to each other mathematically, but it is computationally infeasible to work out the private key value even though one knows the public key value. This is the case even if one knows the algorithm used to generate the public/private key pair. A digital signature incorporated into an electronic document with a private key attaches the mark of the holder to every character in the electronic document and can only be verified by the use of corresponding public key: see A McCullagh, note 26 *supra* at 118. See further B Schneier, *ibid*, chapter 19: "Public Key Algorithms" and chapter 20: "Public Key Digital Algorithms".

28   That is, an algorithm that converts all electronic documents, no matter what their length, into a fixed length message digest, either 128 bit or 160 bit. A one way hash detects any change to the integrity of an original document and therefore fulfils a vital security role in relation to digital signatures. See also B Schneier, *ibid*, chapter 18: "One Way Hash Functions".

mechanism for publishing public keys.[29] These elements combine to produce a mechanism that can be used to confirm the identity of the person that signed the electronic document, the authenticity of the electronic document and the integrity of the electronic document.[30]

Therefore it is submitted that digital signatures are at the very least marks that authenticate the document and identify it as an act of signing by the party attaching the digital signature. Leading scholars in banking and finance law agree. Alan Tyree contends that digital signatures appear to satisfy "the legal criteria for valid signatures under the general law even without legislative recognition."[31] It is submitted that only a technologically averse court could decide otherwise. Nevertheless, to remove all uncertainty, it would be preferable if the issue was put beyond all doubt by Australia and indeed all countries, adopting a standardised definition of the "writing" and "signature" requirements in the digital age. This definition should be along the lines proposed by the UNCITRAL Model Law.

(ii) Model Law

Article 7 of the Model Law provides that:

(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if:

(a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and

(b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

The definition in Article 7 makes it clear that digital signatures could fulfil the two functions of signatures: authentication (the intent to be legally bound by the contents) and integrity (verification of the integrity of the documents).[32]

However, para 3 of the provision is a place holder for exceptions so it may be the case that various jurisdictions provide different requirements regarding signatures. Consequently, we could find that the exceptions, if significant and widespread, would negate any positive effect the Model Law would have in this area. Thus if a dispute arose, this would lead to forum shopping and other conflict of laws complications.

In conclusion, the legal recognition of e-bills is crucial to the development of international trade. Bills of exchange grew out of the need for efficiencies and it is

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29   The current Australian proposal for creating a secure mechanism to publish public keys is the establishment of an X 500 directory using an X 509 (Version 3) certificate. This certificate would include the following information: (a) the name of the owner of the public key; (b) the value of the public key; (c) the algorithm used to sign the document; (d) the hashing algorithm used to create the message digest; (e) the serial number of the certificate; and (f) the validity dates of the certificate: A McCullagh, note 26 *supra* at 118.

30   *Ibid.*

31   A Tyree, *PINS and Signatures*: <http://www.law.usyd.edu.au/~alant/inchoate.html>.

32   R Hill and I Walden, note 6 *supra* at 20.

important that the law recognise this feature and accommodate electronic bills of exchange.

D. Negotiability

Negotiability is an essential quality of bills of exchange. Briefly, a bill of exchange is "negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill."[33] This involves the transferor either delivering a bearer bill to the transferee or indorsing a bill payable to order and then delivering that bill to the transferee.[34] The introduction or use of e-bills would not derogate from the concept of negotiability. Indeed, the use of e-bills would enhance negotiability because the act of indorsing bills and transferring them would be facilitated by the use of e-bills. However, other difficulties that might prevent the use of e-bills in electronic commerce, are discussed below.

III. FURTHER LEGAL ISSUES RELATING TO THE RECOGNITION OF E-BILLS

A. Evidence

(i) Current Law

Whether data messages can be used as originals and adduced as evidence in court is a critical issue to the acceptance of e-bills: one cannot prove a claim under the bill if it cannot be adduced as evidence.

Computerised records are generally admissible as evidence in courts in both civil law[35] and common law countries.[36] These records must be properly authenticated but the same is true for paper records. It is clear from case law and statute law in many common law countries that the hearsay rules and best evidence rules will not preclude the use of computerised records.[37]

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33   For a general overview of negotiability in this context see C Turner, *Australian Commercial Law*, Law Book Company (21st ed, 1997) pp 540-1.

34   *Ibid.*

35   UNCITRAL Report on Electronic Data Interchange: Preliminary Study of Legal Issues related to the Formation of Contracts by Electronic Means (18 May 1990; A/CN 9/333).

36   *Ibid.* See also B Wright, *The Law of Electronic Commerce: EDI, Fax, and E-Mail: Technology, Proof and Liability*, Little, Brown & Company, (1991).

37   For example a document manufactured and kept in the course of business is not subject to the hearsay rule pursuant to s 69, *Evidence Act* 1995 (Cth) and s 69, *Evidence Act* 1995 (NSW). Pursuant to these two Acts, a 'document' means any record of information, and includes, in s 69 (c), "anything from which sounds, images or writings can be reproduced with or without the aid of anything else". See the Dictionary in the Schedule to each Act. Similarly, the Queensland Act provides that documents reproduced by computer are admissible in certain circumstances: *Evidence Act* 1977 (Qld), s 95 (1) and (2).

(ii) Admissibility

The various Interpretation Acts under the Federal and State jurisdictions,[38] together with case law, provide guidance to what constitutes "writing". The Evidence Acts provide that electronic documents can be adduced as evidence in court. However, as noted by Vaughan et al:

> [T]he approaches vary in the situations and types of material that can be used ... [and] we can only speculate on [the Acts] relevance to Internet commerce, especially where an international [transaction] is being examined.[39]

Fortunately, in Australia an issue involving a bill of exchange is a matter of Commonwealth law and is therefore subject to the *Evidence Act* 1995 (Cth) if the action was brought in a federal court.[40] However, in cases where an action was brought in a supreme court outside New South Wales, the Evidence Acts of those jurisdictions would apply and could cause inconsistent results.[41]

Thus, even though the evidence laws of some jurisdictions are already capable of accommodating e-bills, the Model Law needs to be adopted to promote certainty.

(iii) Model Law

The adoption of provisions similar to those in Articles 8 and 9 of the Model Law would ensure that e-bills are able to- be adduced as evidence in court. Article 8 of the Model Law goes further and provides that:

(1) Where the law requires information to be presented or retained in its original form, that requirement is met by a data message if:

    (a) there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and

    (b) where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented.

(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being presented or retained in its original form.

(3) For the purposes of subparagraph (a) of paragraph (1):

    (a) the criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; and

    (b) the standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.

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38   *Acts Interpretation Act* 1901 (Cth), s 25; *Interpretation Act* 1967 (ACT) s 17; *Interpretation Act* 1987 (NSW), s 21(1); *Interpretation Act* 1978 (NT), s 26; *Acts Interpretation Act* 1954 (Qld), s 36; *Acts Interpretation Act* 1915 (SA), s 4; *Acts Interpretation Act* 1931 (Tas), s 24; *Interpretation of Legislation Act* 1984 (Vic), s 38; *Interpretation Act* 1984 (WA), s 5.

39   J Vaughan et al, note 1 *supra*, p 33.

40   *Evidence Act* 1995 (Cth), s 4. Most cases would proceed in a federal court because it is a much faster forum, from a practice perspective. The phrase "federal court" is defined in the Schedule to the Act.

41   The *Evidence Act* 1995 (NSW) is almost identical to the Commonwealth Act.

Further, Article 9 of the Model Law addresses the issue of the weight that should be given to electronic data in legal proceedings. It provides that:

(1) In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence:

    (a) on the sole ground that it is a data message; or,

    (b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

(2) Information in the form of a data message shall be given due evidential weight. In assessing the evidential weight of a data message, regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other relevant factor.

Consider the situation of an Australian plaintiff in the possession of an e-bill which conforms to the statutory requirements and could be adduced as evidence. If the above type of provisions were adopted, an indorser would be estopped from denying to any subsequent indorser or to the holder, that the bill was a valid and undischarged instrument at the time of indorsement and that the indorser had good title at the time.[42]

B. Stamp Duty

In Australian jurisdictions bills of exchange are not generally dutiable.[43] However, whether or not an e-bill would be dutiable is not an issue that will be peculiar to e-bills because e-bills would be affected by stamp duty, if any, in exactly the same way that traditional bills of exchange are affected by stamp duty. Further, non-payment of stamp duty will not affect the validity of a bill of exchange that is presented for acceptance, accepted or payable, outside Australia[44] because s 77A of the *Bills of Exchange Act* 1909 (Cth) provides that:

a bill issued in Australia which is presented for acceptance, accepted or payable, outside Australia shall not be invalid by reason only that it is not stamped, or is not properly stamped, in accordance with any law for the time being in force requiring that bill to be stamped, and any such bill which is unstamped or is not properly stamped may be received in evidence on payment of the proper duty and penalty (if any).[45]

Accordingly, if an e-bill were to attract stamp duty in a particular jurisdiction, the non-payment of that duty will not render any bill invalid and stamp duty issues can be dealt with at any time prior to the enforcement of a bill of exchange.

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42   *Bills of Exchange Act* 1909 (Cth), s 60 (2)(c).

43   For example, in Queensland the *Revenue Laws Amendment Act* 1993 abolished the stamp duty on bills of exchange and promissory notes.

44   This provision will apply to most e-bills that are used in an international trade context, especially if an e-bill is the payment mechanism provided for in a letter of credit.

45   By virtue of s 109 of the Constitution this provision will prevail over any inconsistent provision enacted by any State or Territory legislature. See also s 77 of the *Bills of Exchange Act* 1909 (Cth) for how conflict of laws rules apply in contexts where bills are issued in one country and presented for acceptance, accepted or payable in another country.

IV. ADOPTING THE MODEL LAW

The aim of this paper is to demonstrate that it is probably unnecessary for the law to be changed to refer specifically to e-bills in order to validate them. However, this argument would be pointless if the commercial world abstained from using e-bills for fear that they are invalid at law. Thus, parliament may be required to enact laws that deal specifically with the validity of e-bills in order to assuage the commercial world's fears about the validity of e-bills. However, there are a number of issues that must be explored prior to this step being taken by the legislature.

A. Political Issues

There may be political considerations that weigh against creating a legislative scheme that would create certainty regarding the use of e-bills. For instance, the potential for computer related fraud is an issue that requires careful consideration. Before e-bills are utilised on a wide scale, the government and business community need to know that the wide spread use of e-bills will not create an environment in which fraud can flourish. However, this issue ties back to the nature of the security provided by encryption mechanisms. If contemporary encryption mechanisms offer a secure means by which to transmit and receive e-bills, there is no reason to expect fraud will be more prolific in relation to e-bills than in relation to traditional bills of exchange. Accordingly, if security concerns can be addressed, there should be no political hurdle to the introduction of legislation that recognises and allows e-bills to be used in commerce in Australia.[46] It would appear then that if there were no political obstacles to the enactment of legislation that recognised and regulated e-bills. The only other problem that may exist is the lack of constitutional power to enact legislation of this type.

B. Constitutional Issues

The Federal Parliament has express "power to make laws for the peace, order, and good government of the Commonwealth with respect to...[b]ills of exchange and promissory notes".[47] There is an issue as to whether, under s 51(xvi), the Federal Parliament has power to make laws with respect to bills of exchange in an electronic format. This requires consideration of the extent to which this head of power encompasses technological changes.

It would appear that the decision in *Attorney-General for New South Wales v Brewery Employee's Union of New South Wales*[48] stands for the proposition that the words "bills of exchange" have the same meaning which they had in 1900.[49] This may lead to the conclusion that as bills of exchange in 1900 were exclusively

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46   Indeed, if Australia's main trading partners enacted similar legislation, the utility of e-bills would be
       exponentially increased.
47   Section 51(xvi), Constitution of Australia.
48   (1908) 6 CLR 469.
49   See RD Lumb and GA Moens, *The Constitution of the Commonwealth of Australia*, Butterworths (5th ed,
       1995) p 180.

paper based, the parliament does not have the power to enact legislation with respect to electronic bills of exchange. However, this line of argument ignores the more recent High Court authorities that recognise that express heads of power can adapt to include technological developments in the areas to which the heads of power relate.

Toohey J recognised in *McGinty v The State of Western Australia*[50] that "the Constitution must be construed as a living force."[51] His Honour then went on to explain that "whilst the connotation of words in the Australian Constitution remain fixed, their denotation may vary over time[52] ... traditionally where there have been technological advances."[53] If one draws an analogy between the cases decided in this context and technological changes influencing electronic commerce, it appears that the Federal Parliament has the power to enact legislation regulating e-bills. The form of the enactment could either be an amendment to the *Bills of Exchange Act* 1909 (Cth) or could compose a part of an Act that applied to e-commerce generally. Irrespective of the form the enactment took, the core provisions of the enactment should reflect the Model Law discussed in this paper for the reasons set out in this paper.

However, given the inevitable delays associated with the passage of bills through parliament, even in a best case scenario, a considerable period of time would elapse before such legislation could be enacted. Consequently, alternative mechanisms for regulating the use of e-bills are required, at least in the short term.

C. Inclusion of Model Law into Agreements

Subject to national case law and statutes there is nothing preventing parties incorporating a facsimile of the Model Law into their agreement, with clauses such as:

> For the purposes of any business relation arising out of or in connection with this contract or offer, the provisions of the UNCITRAL Model Law on Electronic Commerce shall apply.[54]

This could lead to either state governments enacting similar provisions or courts commencing to recognise the law as part of international trade law by virtue of custom or trade usage.

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50 (1996) 186 CLR 140.

51 *Ibid* at 200, referring to Deane J in *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104 at 173. See also J Golds worthy, "Originalism in Constitutional Interpretation" (1997) 25 *Federal Law Review* 1.

52 This line of thought finds strong support in a long line of cases: see *Lansell v Lansell* (1964) 110 CLR 353 at 366, per Taylor J; *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 233-234, per Mason J; *Attorney-General (Vic); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 578, per Barwick CJ; *Street v Queensland Bar Association* (1989) 168 CLR 461 at 537, per Dawson J.

53 Note 45 *supra* at 200. For cases dealing with adaptation of heads of power to technological advances, see: *R v Brislan; Ex parte Williams* (1935) 54 CLR 262; *Jones v The Commonwealth [No 2]* (1965) 112 CLR 206.

54 R Hill and I Walden, note 6 *supra* at 21.

V. CONCLUSION

The adoption of the Model Law would increase certainty in the e-commerce age. It would behove the Federal Government to introduce legislation regulating the use of e-bills. Such legislation should be framed in similar terms to the provisions found in the Model Law. Furthermore, other nations would need to be persuaded to adopt such laws if the efficiencies that electronic commerce and e-bills promise are to be realised.