



**JOINT IDA-AGC REVIEW OF
ELECTRONIC TRANSACTIONS ACT
STAGE II: EXCLUSIONS UNDER
SECTION 4 OF THE ETA**

(Consultation Paper)

25 June 2004

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**EXECUTIVE SUMMARY OF PUBLIC CONSULTATION
ON REVIEW OF ELECTRONIC TRANSACTIONS ACT
STAGE II: EXCLUSIONS UNDER SECTION 4 OF THE ETA**

1 The Infocomm Development Authority of Singapore and the Attorney-General's Chambers are conducting a review of the Electronic Transactions Act (ETA) and the Electronic Transactions (Certification Authority) Regulations (CA Regulations). For this purpose, a public consultation is being carried out in 3 stages dealing with electronic contracting issues, exclusions from the ETA under section 4 and secure electronic signatures and certification authorities.

2 Stage I of the Public Consultation, which concerned **Electronic Contracting Issues**, was launched on 18 February 2004 and closed on 15 April 2004. The Consultation Paper on Electronic Contracting Issues (LRRD No.1/2004) is available on the AGC website (www.agc.gov.sg, under Publications) and the IDA website (www.ida.gov.sg, under Policy and Regulation, IDA Consultation Papers). Responses to the Consultation, available on the IDA website, are currently under consideration.

3 Stage II of the Public Consultation, concerning **Exclusions from the ETA under section 4**, is being conducted in consultation with the Ministry of Law. The ETA contains provisions clarifying that electronic records are the functional equivalent of paper records and providing that an electronic record or signature satisfies any rule of law requiring writing or a signature. Section 4 of the ETA however excludes those provisions from applying to any rule of law requiring writing or signature in certain kinds of transactions, namely:

- the creation or execution of a will;
- negotiable instruments;
- the creation, performance or enforcement of an indenture, a declaration of trust or power of attorney, with the exception of constructive and resulting trusts;
- any contract for the sale or other disposition of immovable property, or any interest in such property;
- the conveyance of immovable property or the transfer of any interest in immovable property; and
- documents of title.

4 The Consultation Paper reviews the rationale for these exclusions and developments affecting them, and seeks feedback whether any of these exclusions should be modified or deleted.

5 The issues are described in greater detail below:

Effect and Rationale of Section 4 (Part 2)

Section 4 prevents Parts II and IV of the ETA (containing provisions clarifying that electronic records are the functional equivalent of paper records) from applying to any rule of law requiring writing or signature in certain kinds of transactions. This Paper discusses, generally, the rationale for excluding those transactions. Views are sought whether any changes should be made to the exclusions under section 4.

Wills (Part 3)

No change to the exclusion of wills is proposed. The advantages of electronic wills are outweighed by the potential disadvantages.

Negotiable Instruments (Part 4)

No change to the exclusion of negotiable instruments is proposed. If provisions are to be made for electronic negotiable instruments, we propose that specific legislation may be made to address the complex issues raised and special safeguards required for the use of electronic negotiable instruments. Provisions on documents used in carriage of goods (including negotiable instruments) are however under consideration (see Part 9).

Indentures (Part 5)

The adequacy of electronic equivalents of writing, sealing, signing, attestation and delivery are discussed. It is tentatively proposed to adopt a provision to allow secure electronic signatures (or perhaps only secure digital signatures) to satisfy the requirement for the sealing of deeds.

Trusts (Part 6)

The declaration of trusts, with the exception of constructive and resulting trusts, is currently excluded. It is proposed to limit the exclusion to testamentary trusts and trusts relating to land.

Powers of Attorney (Part 7)

The advantages of electronic powers of attorney appear to be outweighed by their disadvantages. Nevertheless some jurisdictions limit their exclusion only to certain types of powers of attorney. Views are therefore sought on whether the exclusion of powers of attorney should be amended. It is proposed however that powers of attorney used in the transfer of land should continue to be excluded.

Transfers of Immovable Property (Part 8)

Comments are sought as to whether the scope of exclusion of land transactions should be restricted so as to allow certain classes of persons to enter electronic transactions relating to the transfer of land, or to allow certain kinds of land transactions to be effected by electronic contracts. The wider implementation of an e-conveyancing system goes beyond the scope of the current consultation.

Documents of Title (Part 9)

No change to the exclusion of documents of title is proposed. If provisions are to be made for electronic documents of title, we propose that specific legislation may be made to address the complex issues raised and special safeguards required for the use of electronic documents of title. Feedback is sought whether to adopt general provisions on documents used in carriage of goods (including documents of title and negotiable instruments) based on provisions in the UNCITRAL Model Law on Electronic Commerce.

Other Issues (Part 10)

Views are sought whether any other changes should be made to section 4. In particular, feedback is sought whether the ambit of any exclusions should be narrowed or whether any classes of persons should be exempted from any exclusions or whether any other transactions should be added to the existing exclusions. Further, we also seek comments whether clarification is necessary as to the application of the ETA to any transactions or specific legislation.

CONSULTATION PAPER

JOINT IDA-AGC REVIEW OF ELECTRONIC TRANSACTIONS ACT STAGE II: EXCLUSIONS FROM THE ETA UNDER SECTION 4

PART I INTRODUCTION

- 1.1 This Consultation Paper on **Exclusions from the ETA under section 4** forms Stage II of a Joint IDA-AGC¹ Public Consultation on the Review of the Electronic Transactions Act. Stage II of this Consultation is being conducted in consultation with the Ministry of Law. This Consultation Paper is intended to solicit the views of industry and business, professionals, the public and Government Ministries and agencies, in order to inform the Government in its review of the ETA.
- 1.2 With the enactment of the Electronic Transactions Act (Cap.88) in 1998, Singapore became the first country in the world to enact electronic transactions legislation based on the UNCITRAL Model Law on Electronic Commerce. Since then, numerous other countries have adopted electronic commerce legislation based on the UNCITRAL model.²
- 1.3 In view of these developments overseas and internationally, the Ministry of Information, Communications and the Arts (MITA), the Infocomm Development Authority of Singapore (IDA) and the Attorney-General's Chambers (AGC) are undertaking a joint review of the Electronic Transactions Act in 3 stages. Stage I of the Public Consultation concerning Electronic Contracting Issues was launched on 18 February 2004 and closed on 15 April 2004.³ Stage III, which

¹ Infocomm Development Authority of Singapore – Attorney-General's Chambers. Stage II of the Public Consultation is being conducted in consultation with the Ministry of Law.

² See Annex A for list of recent legislation on electronic transactions and useful websites.

³ The Consultation Paper on Electronic Contracting Issues (LRRD No.1/2004) is available on the AGC website (www.agc.gov.sg, under Publications) and the IDA website (www.ida.gov.sg, under Policy and Regulation, IDA Consultation Papers). Responses to the Consultation, available on the IDA website, are currently under consideration.

will follow in the coming months, will deal with Secure Electronic Signatures, Certification Authorities and e-Government.

- ❖ Please send your feedback on this Consultation to the Law Reform and Revision Division of the Attorney-General's Chambers, marked "**Re: Exclusions from the ETA under section 4**"
 - via e-mail, at agc_lrrd@agc.gov.sg;
 - by post (a diskette containing a soft copy would be appreciated) to "**Law Reform and Revision Division, Attorney-General's Chambers, 1 Coleman Street, #05-04 The Adelphi, Singapore 179803**"; or
 - via fax, at **6332 4700**.
- ❖ Please include your personal/company particulars as well as your correspondence address, contact number and e-mail address in your response.
- ❖ The closing date for this Consultation is **25th August 2004**.
- ❖ A soft copy of the Consultation paper may be downloaded from <http://www.ida.gov.sg/idaweb/pnr/index.jsp> or <http://www.agc.gov.sg> (under Publications).
- ❖ In accordance with the standard practice of IDA, responses to this Consultation (including your name and your personal/company particulars) will be posted on the IDA website. Your response may also be quoted or referred to in subsequent publications or made available to third parties. Any part of the response which is considered confidential must be clearly marked and placed as an annex to the comments raised.
- ❖ If you need any clarifications, please contact:
 - **Mr Lawrence Tan** via e-mail at lawrence_tan@ida.gov.sg; or
 - **Mrs Joyce Chao** via e-mail at agc_lrrd@agc.gov.sg.
- ❖ The Consultation will be carried out in 3 stages. This Consultation on Exclusions from the ETA under Section 4 forms Stage II.

PART 2

EFFECT AND RATIONALE OF SECTION 4

2.1 Effect of Section 4

2.1.1 Parts II and IV of the ETA contain provisions clarifying that electronic records are the functional equivalent of paper records. In particular, sections 7 and 8 provide, respectively, that an electronic record or signature satisfies any rule of law requiring writing or a signature.

2.1.2 Section 4 of the ETA however excludes those provisions from applying to any rule of law requiring writing or signature in certain kinds of transactions, namely:

- (a) the creation or execution of a will;
- (b) negotiable instruments⁴;
- (c) the creation, performance or enforcement of an indenture⁵, a declaration of trust or power of attorney⁶, with the exception of constructive and resulting trusts;
- (d) any contract for the sale or other disposition of immovable property⁷, or any interest in such property;

⁴ A cheque, promissory note, bill of exchange, security or any document representing money payable which can be transferred to another by handing it over (delivery) and/or endorsing it (signing one's name on the back either with no instructions or directing it to another, such as "pay to the order of ABC").

⁵ An indenture is usually a deed made between two or more parties, and sealed by the parties e.g. a conveyance, lease, mortgage, settlement etc. Formerly it was usual to write the copies in duplicate (or triplicate, etc, as the case may be) on the same parchment or paper, and to divide it by cutting it through in a wavy line. The parts could then be fitted together to prove their genuineness. Afterwards only indenting was used, every deed to which there was more than one party being indented with a wavy line at the top.

⁶ A power of attorney is a formal instrument by which one person empowers another person to represent him or act in his place for certain purposes. It is usually executed in the form of a deed poll (i.e. a deed made by only one party) and attested by two witnesses.

⁷ i.e. land. Immovable property includes land, benefits that arise out of land and things attached to the earth or permanently fastened to anything attached to the earth: Interpretation Act (Cap.1) s.2.

- (e) the conveyance of immovable property⁸ for the transfer of any interest in immovable property; and
- (f) documents of title⁹.

2.1.3 The effect of section 4 is that, in such excluded transactions, one cannot rely on the provisions in the ETA that enable electronic records and signatures to satisfy legal requirements for writing and signature.¹⁰ For example, sections 6 and 7 of the Civil Law Act¹¹ impose legal requirements for writing and signature in the case of certain land transactions and for trusts respectively.

2.1.4 **The exclusion does not however operate where there are no form requirements.** In such cases, there is no need to rely on the provisions of Part II or IV of the ETA to validate transactions. In most contractual situations, the law imposes no form requirements. A contract can generally be concluded by any means intimating an offer and acceptance. In recognition of this, the provision on formation and validity of contracts in section 11 of the ETA is couched in terms of an avoidance of doubt provision.

2.1.5 **Even where legal form requirements apply, exclusion under section 4 of the ETA may not necessarily prevent such transactions from being done electronically.** Electronic records or signatures could still possibly satisfy the legal requirements without reliance on the provisions of the ETA. It would be a matter for legal interpretation whether an electronic form satisfies a particular legal requirement for writing or signature. Some legislative provisions, by reason of their detailed specifications, would clearly exclude the use of electronic means even if the ETA were applicable. For example, the Wills Act arguably does not contemplate the creation or execution of

⁸ See footnote 7

⁹ This is a document used in the course of commerce as proof of the possession and control of goods and the transfer of which, by mercantile custom long recognized as law, gives the transferee, or enables the transferee to complete, the right of property in the goods described in and represented by the document of title e.g. bills of lading, delivery orders, store warrants and dock warrants, etc. (*Oxford Companion to Law*, David Walker, 1980)

¹⁰ In particular sections 7 and 8 of the ETA. Examples of legal requirements for writing and signature are found in sections 6 and 7 of the Civil Law Act. Also notices required under the Hire Purchase Act (Cap.125), and notice of general meeting under the Land Titles (Strata) Act (Cap.158).

¹¹ Cap.43.

wills in electronic form because it refers to a will being signed at the foot or end thereof.¹² Similarly, the use of electronic forms would necessarily be excluded where legislation requires that certain records must be indicated in “ink” or issued “under the hand of” someone.¹³ It is also generally accepted that because the Bills of Exchange Act includes a number of paper-based concepts, it requires bills of exchange to be in paper form.¹⁴ Provisions that merely refer to the need for a record or notice without prescribing their form are however more likely to be interpreted to allow the use of electronic forms.

2.1.6 The UK Law Commission holds the view that the requirement for writing may (without the need for any enabling legislation) be satisfied by e-mail or web transactions, and that signature requirements can be satisfied by digital signatures, scanned manuscript signatures,¹⁵ the typing of a name or initials, or even clicking on a web-site button, although they recognise that there is a lack of consensus on these issues.¹⁶

2.1.7 Such an approach gives rise to uncertainty as to whether electronic forms may be used in a particular case. Case law or commercial practice could possibly develop to put such issues beyond doubt, but these take time and tend to be limited to particular facts. The ETA provisions seek to avoid such uncertainties.

2.2 Rationale for the Exclusions

2.2.1 The original rationale for excluding these transactions was that e-commerce was at an infant stage and international developments in

¹² (Cap.352) s.6(2) Every will shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and the signature shall be made or acknowledged by the testator as the signature to his will or codicil in the presence of two or more witnesses present at the same time, and those witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

¹³ For example, Companies Act (Cap.50), s.40 (requiring alterations to be indicated in ink on copies of memorandum and articles issued to members); Road Traffic (Driving Instructors and Driving Schools) Rules, rule 15 (requiring driving instructors to make entries in their record in ink); Land Titles (Strata) Act (Cap.158), s.17 (requiring an instrument of proxy to be under the hand of the appointer).

¹⁴ UK Law Commission, *Electronic Commerce: Formal Requirements in Commercial Transactions* (December 2001), para.9.6, available at www.lawcom.gov.uk.

¹⁵ This is not considered an electronic signature as it serves no authentication purpose.

¹⁶ UK Law Commission, *Electronic Commerce: Formal Requirements in Commercial Transactions* (December 2001), Part 3, available at www.lawcom.gov.uk.

this area were still evolving. As such, it was felt that the provisions of the ETA should not go so far as to require recognition of all electronic signatures and electronic documents in place of physical forms¹⁷. With the significant advances in information technology (including technological controls against fraud) and rapid growth in its use, these exclusions need to be reconsidered.

2.2.2 Other more enduring reasons for exclusion are:

- (a) the excluded transactions require more detailed rules, or more safeguards for their users, than can be established by a general purpose statute like the ETA;¹⁸
- (b) the excluded transactions should be conducted through conventional means because of their solemnity, significance, or the need for certain formalities for execution, or the likelihood of technological obsolescence because such documents will be needed¹⁹ for a long time in the future;²⁰ and
- (c) it is considered that an appropriate level of technology and established process are not yet widely available to allow these transactions to be included, and that the public interest in the transactions is large enough to disallow people from taking the associated risks in the event of potential lapses²¹.

2.2.3 Internationally, the following trends may be observed:

- (a) the following transactions are almost **universally excluded**: wills, testamentary trusts, enduring powers of attorney and transfers of land generally;

¹⁷ Electronic Transactions Bill, Parliamentary Debates 1998, Column 254.

¹⁸ For example, electronic bills of lading, which are currently excluded under section 4 of the ETA. Singapore re-enacted the UK Carriage of Goods by Sea Act 1992 as the Bills of Lading Act, allowing for the authorisation of electronic bills of lading by regulation. No such regulations have been made in the UK or Singapore to date.

¹⁹ After a long passage of time, the technology with which the document was first created is likely to become obsolete and it may become difficult or impossible to access the document with new technology. To ensure continued accessibility of the old documents, it would be necessary to monitor changes in technology and to periodically invest time and expense to convert old documents to keep up with technology. Technology used to authenticate may also be no longer available or secure.

²⁰ Wills are the classic example.

²¹ For example, high value transactions such as the conveyance of immovable property.

- (b) the following transactions are **commonly excluded**: negotiable instruments, documents of title, and other powers of attorney and trusts; and
- (c) most jurisdictions also provide for other specific exclusions such as affidavits and other sworn declarations, consumer protection notices, court proceedings, and specific Acts or provisions within an Act, usually relating to these areas.²²

See the comparative table of excluded transactions at Annex B.

2.2.4 In contrast, the recent New Brunswick Electronic Transactions Act does not exclude any of the above areas.²³ The New Brunswick Department of Justice was of the view that exclusions were either superfluous or undesirable. Given that the Act does not force an electronic version of any document on anyone²⁴, they felt that nothing was really to be gained from ‘excluding’ them from the Act. Furthermore, inclusion or exclusion of a document in the Act does not itself mean that the document can or cannot be prepared electronically. All it means is that the particular rules set out in the Act do not apply.²⁵

2.2.5 An additional point affecting the ambit of electronic transaction legislation is that some jurisdictions limit certain provisions of their Acts to listed legislation. In Singapore’s ETA, the provisions relating to electronic records and signatures apply to the requirements of “a rule of law” (which includes both rules in written law and common law).²⁶ By contrast, similar provisions in the New Zealand ETA are

²² The Australian Electronic Transactions Regulations 2000 excludes listed legislation from certain provisions in the Electronic Transactions Act 1999. The listed legislation includes, amongst others, the Corporations Act 1989, Corporations Law, Cheques Act 1986, the Bills of Exchange Act, provisions relating to tax, insurance and banking.

²³ Exclusion Regulation - Electronic Transactions Act (Regulation 2002-24) only excludes a small number of Acts.

²⁴ Nothing in the Act requires anyone to use or to accept information in electronic form: section 6(1), which is common to the UECA.

²⁵ New Brunswick Department of Justice, Law Reform Notes, Number 15, September 2001. Their Consultation Paper on the Electronic Transactions Act is available at <http://www.gov.nb.ca/justice/index.htm>.

²⁶ The meaning intended in the UNCITRAL Model Law, on which the Singapore ETA is based, is instructive. The Guide to Enactment of the UNCITRAL Model Law states that the words “the law” are to be understood as encompassing not only statutory or regulatory law but also

restricted in their application to requirements in “enactments” and would therefore apply only to requirements imposed by statute.²⁷

- 2.2.6 A final point to note is that the ambit of the express exclusions in legislation could also depend upon whether the legislation is framed broadly as electronic transaction legislation or whether it is restricted to electronic commerce. In the case of electronic commerce legislation, it would not be necessary to expressly exclude clearly non-commercial transactions, such as legal requirements as to wills, affidavits and the delivery of Government services, since these would already by definition be excluded. Nevertheless, in practice, those jurisdictions that restrict their legislation to electronic commerce have taken a cautious approach by expressly excluding even non-commercial transactions.²⁸

judicially-created law and other procedural law, including common law. However, “the law”, as used in the Model Law, is not meant to include areas of law that have not become part of the law of a State and are sometimes, somewhat imprecisely, referred to by expressions such as “lex mercatoria” or “law merchant”. The definition of “rule of law” in the ETA merely states that it includes written law, which in turn is defined in the Interpretation Act (Cap.1) to mean “the Constitution and all previous Constitutions having application to Singapore and all Acts, Ordinances and enactments by whatever name called and subsidiary legislation made thereunder for the time being in force in Singapore”. In its ordinary meaning, the term would also include common law.

²⁷ s.15(2) of New Zealand ETA. Ministry of Economic Development policy analyst Andrew McCallum, who played a dominant role in shepherding the legislation into being over four years, reportedly observed that the act applies a lot less broadly than many people think as it pertains only to statutory requirements in laws and regulations imposed by government agencies. Communications concerning private arrangements between businesses are still a matter for common law, which the act does not change. Likewise, the requirement for parties to give consent to receiving documents in electronic form only applies to statutory matters. In private dealings, parties may assume that electronic communications will be valid unless another party to the deal specifically says they are not. See <http://www.itworldcanada.com>.

²⁸ The US E-Sign Act restricts the definition of “transactions” to an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons, including (A) the sale, lease, exchange, licensing, or other disposition of (i) personal property, including goods or intangibles, (ii) services, and (iii) any combination thereof; and (B) the sale, lease, exchange, or other disposition of any interest in real property, or any combination thereof.

The Uniform Law Commission of Canada, in its introduction to the Uniform Electronic Commerce Act (UECA), states that the UECA (despite its name) applies beyond the scope of “commerce” to almost any legal relationship that may require documentation.

The New Zealand Law Commission had originally restricted their recommended legislation to “trade” related transactions as it would avoid the need to list individually many such transactions which should be excluded from the application of the Act. The Government however finally decided to apply the Electronic Transactions Act to all transactions (including those relating to the delivery of Government services) unless specifically excluded by the Act.

2.3 Approach to Exclusions

- 2.3.1 The approach adopted in this Paper is to favour a wide application of the ETA provisions rendering electronic records the functional equivalent of paper records²⁹, in furtherance of the purpose enunciated in section 3(b) of the ETA: to facilitate electronic commerce, eliminate barriers to electronic commerce resulting from uncertainties over writing and signature requirements, and to promote the development of the legal and business infrastructure necessary to implement secure electronic commerce. Such functional equivalence provisions should, in principle, be allowed to apply unless there are overriding reasons why they should not apply in a particular context.
- 2.3.2 Legislation cannot keep up with the pace of technological change and therefore should not put obstacles in the way of the development and adoption of practical and commercially viable electronic means as they become available. The lack of an existing electronic means of effecting an electronic equivalent of a paper transaction under current technology should not, by itself, dictate that such a transaction must be excluded under section 4.
- 2.3.3 Continued exclusion under section 4 of the ETA may however be justified if there are overriding concerns of public policy, such as the continued need to protect the public or certain sectors of the public. Modern technology is complex and lack of understanding of technology may open the uninformed or the unwary to unexpected pitfalls in the use of technology.
- 2.3.4 The existing exclusions under section 4 are examined in turn in the following Parts of this Paper. In some cases, we propose that the existing exclusions should be narrowed to allow more electronic transactions to benefit from the functional equivalence provisions in the ETA.

(New Zealand Law Commission Report 68, *Electronic Commerce: Part Three – Remaining Issues*, December 2000, paragraph 9.)

²⁹ In Parts II and IV of the ETA.

PART 3 WILLS

- 3.1 **No change is proposed to the exclusion of wills in the ETA.** This category has been universally excluded in other jurisdictions, as well as the Commonwealth Model Law on Electronic Transactions³⁰. The advantages of using electronic wills, as compared with paper wills, are small and they are counterbalanced by significant disadvantages.³¹
- 3.2 The Uniform Law Conference of Canada (ULCC) considered the issue of electronic wills.³² The discussion paper noted that the formalities required for wills were intended to ensure that only authentic expressions of testators' intentions are recognised by law for the purposes of probate and to serve administrative efficiency. Electronic wills would offer no significant advantages in terms of convenience or cost of preparation, ease or security of storage, durability and accessibility.
- 3.3 It was highlighted that electronic wills are likely to be created by individuals i.e. non-business entities acting through computer systems which may not be secure. It would also be difficult to achieve an acceptable level of reliability with electronic wills because of lapse of time³³, the lack of current monitoring of authenticity³⁴, the lack of secure electronic equipment³⁵, and the lack of the testator's testimony³⁶.
- 3.4 In any case, it is likely that a will in electronic form will eventually have to be put in paper form, with some form of verification, to satisfy

³⁰ Report of the Commonwealth Expert Working Group on Legal Aspects of Information Technology and the Related Law of Evidence (London 26-30 Jun, 2000). See comparative table of excluded transactions in Annex B.

³¹ Notably, it is still the practice to require CPF and insurance beneficiary nominations (which perform a similar function to a will) to be made on paper, with the signature of the person nominating.

³² Their discussion paper and resolutions at the 2001 Annual Meeting are available at <http://www.ulcc.ca/en/poam2/>

³³ A will only takes effect after the death of the testator which, usually, occurs many years after the making of the will. There is a risk that the will may no longer be readable by that time due to technological obsolescence.

³⁴ It may be impossible, without such current monitoring, to ascertain authenticity after the testator has died.

³⁵ There is no certainty that the document has not been tampered with.

³⁶ Because wills take effect only after the death of the testator.

third parties who are required to act in accordance with it. There are also uncertainties as to the meaning of ‘original’ in relation to an electronic will. Further, if the recognition of electronic wills would create a risk that a non-authentic record in a person’s computer will be accepted as a person’s will and hence supersede an earlier executed paper will, prudent and knowledgeable computer-owners would feel some compulsion to adopt security measures that would not otherwise have been necessary.

Q.1 Do you agree that electronic wills should continue to be excluded from the application of the ETA? If you think electronic wills should be recognised, please justify and suggest how they may work in practice.

- 3.5 **Dispensing power in Wills Act.** While the Uniform Law Commission of Canada decided to retain the exclusion of wills from the Uniform Electronic Commerce Act, they also resolved to prepare statutory provisions to amend the Uniform Wills Act to allow courts to recognise electronic wills in appropriate cases by giving them the power to dispense with strict compliance with formalities. The exclusion of wills under the ETA does not prevent other legislation, e.g. the Wills Act, from making provision for them.
- 3.6 The Canadian Uniform Wills Act s.19 gives a court power “notwithstanding a lack of compliance with all the formalities of execution” imposed by the Act, to declare effective a “document” which is “intended by a deceased to constitute a will” and which “embodies the testamentary intention of the deceased”. In the Quebec case of *Rioux v Columbe* (1996) 19 ETR (2d) 201 (Que.S.C.), such a dispensing power was used to admit an electronic record to probate. The facts of the case were however highly exceptional in that the creation of the record was almost contemporaneous with the testator’s death and she left directions in her own writing as to where the record was to be found.³⁷
- 3.7 The Singapore Wills Act (Cap.352) does not contain a provision to dispense with compliance with formalities (except in the case of

³⁷ The testator committed suicide and a note beside her body gave directions to an envelope containing a computer disk marked “this is my will/Jacqueline de Rioux/(date)”.

military personnel or seamen). The Singapore Wills Act³⁸ requires a will to be in writing and signed at the end by the testator in the presence of 2 witnesses who subscribe the will (i.e. sign at the bottom) in the testator's presence. The removal of the exclusion of the creation and execution of wills by section 4 by itself would not enable a will to be made electronically. The requirements for signing at the end of the page and for signing in the presence of 2 witnesses do not easily translate to the electronic medium.

- 3.8 It would appear that a provision allowing a court to dispense with formalities for a will would be exercised only in highly exceptional cases. Indeed it may not serve public policy to be seen to facilitate the making of a will in precipitous circumstances such as that in the case of *Rioux v Columbe*.

Q.2 Should the Wills Act be amended to facilitate the use of electronic wills in exceptional cases? If yes, please suggest what circumstances such a provision may be used in and the amendments that should be made.

³⁸ Cap. 352, section 6. Other provisions relate to signature to validate alterations etc (s.16) and writing to revoke a will (s.15).

PART 4

NEGOTIABLE INSTRUMENTS

- 4.1 A negotiable instrument includes a cheque, promissory note, bill of exchange, security or any document representing money payable which can be transferred to another by handing it over (delivery) and/or endorsing it (signing one's name on the back either with no instructions or directing it to another, such as "pay to the order of ABC"). In commercial practice, negotiable instruments provide a convenient method of transferring the right to payment from one person to another by delivery of a document, without the complexities of effecting an assignment of the right.
- 4.2 The Bills of Exchange Act³⁹ governs certain kinds of negotiable instruments, including cheques⁴⁰. By its definition in the Act, a bill of exchange must be in writing and signed by the person giving it.⁴¹ The exclusion of negotiable instruments by section 4 prevents reliance on Parts II and IV of the ETA to satisfy these requirements for writing and signature in order to use negotiable instruments in electronic form. Although it is possible to replicate the functions of a bill of exchange electronically by way of a series of promises to pay, they would not provide the protection afforded by the Bills of Exchange Act to bona fide purchasers for value.
- 4.3 Cheques are one of the most commonly used forms of bills of exchange. An **electronic cheque (or check) system** has been developed by the Financial Security Technology Consortium, a US banker's organisation. The Electronic Check reportedly performs the payment and other financial functions of paper checks, by using

³⁹ Cap 23.

⁴⁰ A cheque is defined as a bill of exchange drawn on a banker payable on demand.

⁴¹ A bill of exchange is defined 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. It is generally accepted that because the Bills of Exchange Act includes a number of paper-based concepts, it requires bills of exchange to be in paper form. UK Law Commission, *Electronic Commerce: Formal Requirements in Commercial Transactions* (December 2001), para.9.6, available at www.lawcom.gov.uk.

cryptographic signatures and secure messaging over the Internet,⁴² and satisfies the legal requirements for negotiable instruments.⁴³

- 4.4 Currently, there are no plans for an e-cheques initiative in Singapore.⁴⁴ In practice, most cheques are crossed and therefore not negotiable. The widespread availability of fund debit facilities at point of sale, such as NETS and Cashcard facilities, possibly satisfies most business and consumer requirements.

⁴² Phase I involving payment by the US Treasury of Department of Defence contractors was successfully completed in 2000. Phase II involved trial participation by a broader range of participants. For legal and technical details of the electronic check project see “The Electronic Check Architecture” by Milton M. Anderson, available at <http://fstc.org>. Echecks provide for authorisation, instruction, and transaction (like paper checks) and additionally authentication. Every aspect of the payment transaction can be automatically processed by any party, independently. Echecks are signed using a smartcard and PIN to unlock the electronic checkbook. Payer signatures and endorsements are applied as digital signatures. Multiple signatures are supported and can be mandated in account restrictions. Signatures can optionally cover any attachments to the echeck, but attachments can be removed without invalidating the signature.

Confidentiality and security of transport are provided by other electronic security measures such as secure email and secure Web sessions. It allows duplicates but there is duplicate detection to ensure that the paying bank pays only once. It employs a 3-level certification authority hierarchy, with banks authoritative for checking accounts and a central bank or government agency authoritative as to which banks may operate.

⁴³ UCC Section 3-104. Form of Negotiable Instruments. “(1) Any writing to be a negotiable instrument within this article must (a) be signed by the maker or drawer; and (b) contain an unconditional promise or order to pay a sum certain in money and no other promise, ... (c) be payable on demand or at a definite time; and (d) be payable to order or to bearer.” The Federal Evidence Regulations R 1001(1) provides that writing includes electronic recording. UCC Section 1-201(39) provides that sign includes any symbol executed or adopted by a party with present intention to authenticate a writing.

These provisions are similar to the provisions of Singapore’s Bills of Exchange Act (Cap.23), read with the definition of “sign” and section 7 (on the requirement for writing) in the ETA.

⁴⁴ The various initiatives introduced by NETS (Network for Electronic Transfers Pte Ltd) do not constitute negotiable instruments. In the US, a variety of electronic payment methods are also referred to as ‘electronic checks’. However, these payment methods are not truly ‘cheques’ and do not constitute negotiable instruments. For example, electronic check conversion is a process in which a paper check is used as a source of information – for the check number, payer’s account number and financial institution. The information is then used to make a one-time electronic payment from the payer’s account – an electronic fund transfer. The service was developed to reduce the costs associated with accepting checks at the point of sale and to expedite the settlement of funds into the store’s account through the use of the Automated Clearing House network. See glossary of terms is available at <http://ecc.nacha.org>. Information brochure on “Electronic Check Conversion” is available from the Board of Governors of the Federal Reserve System at <http://www.federalreserve.gov/pubs/checkconv/checkconv.pdf>.

- 4.5 The UK Law Commission noted in December 2001 that they were not aware of any demand to create an electronic equivalent of a bill of exchange with negotiable status. They pointed out that if such demand did arise, reform should be approached internationally so as to maintain uniformity of the laws on bills of exchange world-wide.⁴⁵
- 4.6 **No change is proposed to the exclusion of negotiable instruments.** This category has commonly been excluded as negotiable instruments raise specific legal issues relating to transferability and negotiability.⁴⁶ These issues require special rules and special technology. In view of the complexity of these issues, we feel that **any provision for electronic negotiable instruments should be made by introducing new legislation or amending existing legislation⁴⁷, as necessary, in conjunction with the relevant agencies, rather than by removing the exclusion from the ETA.** For example, provisions have already been made for cheque truncation by amendments in the Bills of Exchange Act.⁴⁸

<p>Q.3 Do you agree that negotiable instruments should continue to be excluded from the application of the ETA?</p>
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- 4.7 However, please consider further the discussion in Part 9 on documents used in Carriage of Goods, which potentially include negotiable instruments.⁴⁹

⁴⁵ UK Law Commission, *Electronic Commerce: Formal Requirements in Commercial Transactions* (December 2001), para.9.7, available at www.lawcom.gov.uk.

⁴⁶ The Commonwealth Model Law on Electronic Transactions excludes negotiable instruments because of such “unique document” security concerns: Report of the Commonwealth Expert Working Group on Legal Aspects of Information Technology and the Related Law of Evidence (London 26-30 Jun, 2000). The New Zealand ETA also excludes it.

⁴⁷ E.g. Bills of Exchange Act (Cap.23)

⁴⁸ For the purpose of establishing a Cheque Truncation System, amendments were made to the Bills of Exchange Act in September 2002 to (a) provide banks an alternative means of presenting cheques by transmitting electronic images and payment information of the cheque, and (b) recognise the rights of holders of Image Return Documents (IRDs), which are documents that banks issue instead of returning the original cheque when a cheque is dishonoured.

⁴⁹ Please see paragraph 9.8.

PART 5

INDENTURES

- 5.1 An indenture is a deed entered between 2 or more persons.⁵⁰ At common law, there is a legal requirement for deeds to be made on parchment (i.e. paper) and for the sealing of deeds. In practice, deeds are also almost always attested even though there is no legal requirement for it. Additionally, deeds are not regarded to be legally binding until they have been delivered to the other party.
- 5.2 Historically, the purpose of sealing was to provide authentication as to the identity of the maker of the deed. In the context of widespread illiteracy, a seal provided a substitute for a signature.⁵¹ The process of affixing a seal also serves to add solemnity to the occasion to underline the legally binding nature of the transaction. This is of particular significance since deeds provide an exception to the doctrine of consideration.⁵²
- 5.3 In England, the requirement for parchment has been abolished. The requirement for sealing in the case of individuals has been replaced by a requirement for the signature of the person executing the deed and the attestation of 2 witnesses. In the case of companies, a common seal is no longer required and a deed may be executed by the signature of certain officers of the company. Similar amendments are being considered in Singapore to abolish the requirements for parchment and sealing of deeds under a proposed Instruments (Formalities) Bill.⁵³

⁵⁰ See footnote 5.

⁵¹ White Paper on “Electronic Signatures: Understand the Past to Develop the Future” by McCullagh, Little and Caelli, especially pages 13-15. Available at http://spyrus.com/content/information_resource_center/white_papers/Electronic_Signatures.pdf.

⁵² The rule of law which requires that in order to have a legally binding agreement, a benefit must have been conferred on the promisor. The Contracts (Rights of Third Parties) Act (Cap. 53B) enables parties to an agreement to confer benefits on third parties but it does not affect the need for consideration as between the parties to the agreement. See LRRD Report on the Contracts (Rights of Third Parties) Act (LRRD No 2/2001) available at <http://www.agc.gov.sg>.

⁵³ See LRRD Report No.1/2001 (Revised w.e.f. 1st October 2001) on “The Instruments (Formalities) Bill 2001” available at <http://www.agc.gov.sg>. These amendments are based on provisions in the UK Law of Property (Miscellaneous Provisions) Act 1989 and the draft Instruments (Formalities) Bill (proposed by the UK Law Commission in their Report No.253 on “The Execution of Deeds and Documents By or On Behalf of Bodies Corporate”). Further amendments to the proposed Bill are being considered and a Supplementary Report will be published at a later date.

- 5.4 The requirements of signing and sealing, attestation (i.e. witnessing) and delivery are considered in more detail in the following paragraphs. Some jurisdictions now have legislative provisions allowing for electronic equivalents of sealing and attestation.

Q.4 Should the creation, performance or enforcement of an indenture continue to be excluded from the application of the ETA?

5.5 Signature or Seal

- 5.5.1 Signing or sealing may serve many purposes, for example, to provide evidence of the identity of the signor, that the signor agreed to be bound by the agreement and that he did so voluntarily, that the document is final and complete, or that the information has not been altered after signing.⁵⁴ They may also caution the signor and indicate the intent to act in a legally binding manner.
- 5.5.2 The ancient seal may in modern times be replicated by the private key value that will be used to digitally sign an electronic document.⁵⁵ In the context of electronic transactions, secure electronic signatures can provide the necessary assurance of reliability. The application of secure digital signatures (i.e. electronic signatures based on PKI infrastructure) would ensure authenticity of the signature, assurance of the identity of the signor and integrity of the document.
- 5.5.3 There are specific provisions for secure electronic signatures, with appropriate certification, to be used in place of a seal in Ireland.⁵⁶ The Canadian Department of Justice recommended that global rules should contain a provision that any requirement for a personal seal be satisfied if the document is signed using a secure electronic signature.⁵⁷

⁵⁴ See Sneddon “Legislating to Facilitate Electronic Signatures and Records: Exceptions, Standards and the Impact of the Statute Book” (especially Part 2.II on “Policy Objectives of Writing and Signature Requirements) University of NSW Law Journal available at <http://law.unsw.edu.au/publications/journals/unswlj/index.html>.

⁵⁵ *Ibid*, p.14.

⁵⁶ Irish Electronic Commerce Act 2000, section 16.

⁵⁷ Consultation Paper on Facilitating Electronic Commerce: Statutes, Signatures and Evidence, Canadian Ministry of Justice, available at <http://canada.justice.gc.ca/n/cons/facilt7.html>.

5.5.4 Notably, the e-Conveyancing⁵⁸ initiatives in a number of countries also contemplate the use of electronic documents and signatures in land transactions involving deeds. The UK model envisages execution of deeds by solicitors on behalf of their clients via an Intranet. The Victorian model envisages the use of secure digital signature technology via Internet with digital cards issued by a Certification Authority.

5.5.5 **We tentatively propose to adopt a provision in the ETA to allow secure electronic signatures (or perhaps only secure digital signatures⁵⁹) to satisfy the requirement for sealing of deeds.** Contracts (including indentures) for the sale or disposition or conveyance or transfer of immovable property are discussed separately in Part 8.

Q.5 Should Singapore adopt a provision in the ETA to allow secure electronic signatures (or only secure digital signatures) to satisfy the requirement for sealing?

Q.6 If you answered yes to Q.5, should any class of transactions be excluded from the provision allowing electronic signatures (or secure digital signatures) to satisfy the requirement for sealing e.g. land transactions?⁶⁰

5.6 Attestation

5.6.1 The purpose of attestation is to preserve evidence of the signing. The witness, if cross-examined on the circumstances surrounding the signing, can give such knowledge as is within his knowledge.⁶¹

5.6.2 It has been argued that traditional witnessing processes are not wholly adaptable to the process of electronically signing documents. There is no assurance that the image on the screen is in fact the document to which the electronic signature will be affixed. All that the witness and the signor can see is a human readable representation on the computer

⁵⁸ See paragraph 8.9 on e-conveyancing.

⁵⁹ Secure digital signature is defined in s.20 of the ETA. The term “digital signature” is defined in relation to PKI (public key infrastructure) technology.

⁶⁰ On land transactions, see Part 8.

⁶¹ White Paper on “Electronic Signatures: Understand the Past to Develop the Future”, especially pages 15-18. See footnote 51.

screen of what is allegedly in memory. When the witness sees the signor pressing the keyboard, the witness will not know with certainty what is actually happening. It would be possible to ensure that the screen display corresponds to the contents of the computer memory and that the signor's keystrokes correspond to his intentions only if the computer has been evaluated to effect a trusted path by trusted evaluation criteria. It has been suggested that the witness would have to verify that the document has been electronically signed by first using the signor's public key to verify the initial signing and then also to electronically sign the document himself. The software which affixes the witness' signature must both note the witness as an attester and not as the primary signor and affix his signature in a manner that embodies the whole document including the signature of the signor.⁶²

5.6.3 A Certification Authority would be able to perform a similar function to the attesting witness by certifying that the private key belongs to the person purporting to sign the deed. If the signor uses a secure digital signature without an attesting witness, it would still be possible to verify the authenticity of the signature, the identity of the person to whom the signature belongs, the integrity of the document, and probably even the date and time of signing. In this sense, a secure digital signature is superior to an ordinary hand-written signature. The advantages of having, in addition, an actual witness to attest a secure digital signature would probably be minimal unless, exceptionally, the voluntariness of the signing was in question.⁶³

5.6.4 The New Zealand ETA provides that a legal requirement for a signature or seal to be witnessed is met by the *witness'* electronic signature, without specifying the technology to be used.⁶⁴

⁶² *Ibid*, p.18

⁶³ See views in the context of land transactions in Part 8, para. 8.3(b).

⁶⁴ NZ Electronic Transactions Bill, section 23.

"23.(1) Subject to subsection (2), a legal requirement for a signature or seal to be witnessed is met by means of a witness' electronic signature if, -

- (a) in the case of the witnessing of a signature, the signature to be witnessed is an electronic signature that complies with section 22; and
- (b) in the case of the witnessing of a signature or a seal, the electronic signature of the witness –
 - (i) adequately identifies the witness and adequately indicates that the signature or seal has been witnessed; and
 - (ii) is as reliable as is appropriate given the purpose for which, and the circumstances in which, the witness' signature is required.

5.6.5 In the context of e-conveyancing, the majority of respondents in a consultation by the UK Lord Chancellor's Department were of the view that attestation was inappropriate for electronic conveyancing documents because authorisation or certification takes the place of attestation.⁶⁵

Q.7 Should the ETA enable a secure electronic signature (or secure digital signature) to satisfy the attestation requirement, i.e. signing of a document by its maker using such a signature need not be witnessed by another person?⁶⁶

Q.8 Should the ETA provide that a legal requirement for a signature or seal to be witnessed is met by the *witness*' electronic signature?⁶⁷

Q.9 If you answered yes to Q.7 or 13, should any class of transactions be excluded from the provision e.g. land transactions?⁶⁸

5.7 Delivery

5.7.1 Additionally, a deed is not binding on the signatory until it has been delivered. However, the deed need not be physically delivered provided that the intention of the party to be bound by the obligations in the deed can be established. It has been suggested that since delivery is a question of fact to be determined in the circumstances of each case, the same should apply to electronic deeds.⁶⁹

5.7.2 In the context of e-conveyancing, most respondents to the UK Lord Chancellor's consultation preferred that electronic deeds should take effect on the date and at the time specified by the parties since traditional concepts of delivery do not translate well to the Internet.⁷⁰ Some respondents however felt that clarifications were needed in

(2) A legal requirement for a signature or seal to be witnessed, if that signature or seal relates to information legally required to be given to a person, is met by means of a witness' electronic signature only if that person consents to receiving the witness' electronic signature."

⁶⁵ See paragraph 8.9.3(b).

⁶⁶ See discussion in paragraphs 5.6.1 and 5.6.3.

⁶⁷ E.g. NZ Electronic Transactions Act, see footnote 64.

⁶⁸ On land transactions, see Part 8.

⁶⁹ White Paper on "Electronic Signatures: Understand the Past to Develop the Future", p.14-15. See footnote 51.

⁷⁰ See Part 8.

relation to withdrawal from a transaction and alteration of the effective date or time of an electronic deed or of a minor term therein.

Q.10 When should an electronic indenture take effect?

Q.11 What should be the requirements for withdrawal from or amendment of an electronic indenture?

PART 6

TRUSTS

- 6.1 **We are of the view that the declaration of testamentary trusts should continue to be excluded under section 4.** This is for consistency with the position on wills since testamentary trusts must comply with the requirements of the Wills Act.⁷¹ As discussed in Part 3, the advantages of allowing testamentary instruments to be created electronically are few compared to the possible pitfalls of doing so.
- 6.2 We recognise however that the same objections may not apply to other kinds of trust. Laws governing the formation of trusts contain few or no requirements for paper, writing or signatures. Constructive and resulting trusts are already excepted from the exclusion under section 4. A resulting trust in favour of the settlor is created automatically when an express trust fails. Where the courts impose a trust on parties, e.g. to prevent fraud, there is a constructive trust.⁷² Trusts may also be implied. Implied trusts should probably be similarly excepted from section 4.
- 6.3 **Trusts of land** may however require special consideration.⁷³ There can be an express, implied, resulting or constructive trust of land. An express trust may be created either by (1) transferring legal title to a third person as a trustee or (2) the owner simply declaring himself a trustee for the beneficiary.
- 6.4 The transfer of legal title to land to a third person as trustee would have to be done in the appropriate manner i.e. by deed in English for unregistered land⁷⁴ or by registered transfer under the Land Titles

⁷¹ (Cap.66). See Part 3 on Wills.

⁷² E.g. the doctrine in *Rochefoucauld v Boustead* [1897] 1 Ch 196, that the Statute of Frauds cannot be used as “engine of fraud”.

⁷³ See generally Tan Sook Yee “*Principles of Singapore Land Law*”, 2nd edition, 2001, Butterworths, Chapter 7 on Trusts. The pre-1826 law of strict settlement of land, being common law, is part of the law of Singapore. The Singapore Settled Estates Act (Cap.293) governs transactions involving settled estates, defined as “all immovable property ... which are subject to a settlement” and “settlement” is defined as “any statute, deed, agreement, will or other instrument ... under which any immovable property stands limited to or in trust for any person or persons by way of succession.” The Act enables the Court, in certain limited circumstances, to order sale of settled land.

⁷⁴ Conveyancing and Law of Property Act (Cap.61) s.53

Act⁷⁵ for registered land. Such transfers would fall within the exclusion of transfers of immovable property discussed in Part 8.

- 6.5 Where the owner declares himself a trustee, the trust must be evidenced in writing or it would be unenforceable.⁷⁶ Nevertheless, where a trust is not evidenced in writing, the courts will allow parol evidence of the trust to be admitted so that the statute cannot be used as “an engine of fraud”.⁷⁷ Therefore, even if land transactions via electronic records continue to be excluded under section 4, the court could in appropriate cases uphold the declaration of trust on the basis of evidence provided by the electronic record.
- 6.6 The requirement for writing and signature for a declaration of trust respecting immovable property or any interest in such property under section 7(1) of the Civil Law Act is only for purposes of evidence and enforceability. It also does not affect the creation of resulting, implied or constructive trusts.
- 6.7 If sections 7 and 8 of the ETA were applied to the interpretation of section 7 of the Civil Law Act, an electronic record would satisfy the requirement for writing in section 7 of the Civil Law Act if the information contained in the record is accessible so as to be usable for subsequent reference and an electronic signature would satisfy the requirement for signature. Such a result would not prejudice the protection provided by section 7 of the Civil Law Act.
- 6.8 **Arguably however, a declaration of trust by the owner over land by electronic means should continue to be excluded, for consistency with the fact that a transfer to a third party as trustee would be excluded⁷⁸ and with our proposal in Part 8 to continue to exclude transfers of land.** Similarly, should an actual transfer of land by an owner fail because it purported to be effected by electronic

⁷⁵ Cap.157

⁷⁶ Civil Law Act (Cap.43) s.7. Under the Land Titles Act (Cap.157), the beneficiary can protect his interests by lodging a caveat under s.115 of that Act. Under the Registration of Deeds Act (Cap.269), the trust document can be registered if it is a deed. In any case, a caveat can be registered in respect of a trust: sections 8, 9.

⁷⁷ The doctrine in *Rochefoucauld v Boustead* [1897] 1 Ch 196. See footnote 72

⁷⁸ See para 6.4.

means, a resulting trust should not be imposed on the owner as this would avoid the safeguards intended for the owner.⁷⁹

- Q.12** Do you agree that section 4 should exclude testamentary trusts i.e. the ETA should not apply to testamentary trusts?
- Q.13** Do you agree that section 4 should exclude trusts in relation to land i.e. the ETA should not apply to trusts for land?
- Q.14** Do you agree that Parts II and IV of the ETA should be allowed to apply to implied trusts, in addition to constructive and resulting trusts (which are currently allowed)?
- Q.15** Do you agree that Parts II and IV of the ETA should be allowed to apply to trusts (other than testamentary trusts and trusts in relation to land) created electronically? If the ETA is amended to enable non-testamentary trusts to be made electronically, what special requirements, if any, should apply to the creation of such trusts?

⁷⁹ See reasons for excluding land transfers discussed in Part 8, namely the need to protect unsophisticated homeowners from unwittingly parting with their homes.

PART 7

POWERS OF ATTORNEY

- 7.1 Section 4 excludes Parts II and IV of the ETA from facilitating the creation, performance or enforcement of powers of attorney by electronic means. Powers of attorney have been excluded to varying degrees in the electronic transactions legislation of other jurisdictions. New Zealand (like Singapore) has a complete exclusion⁸⁰, whereas some other jurisdictions restrict their exclusions to particular kinds of powers of attorney. Ireland only excludes enduring powers of attorney.⁸¹ Canada has excluded powers of attorney with respect to financial affairs and personal care⁸². Some Canadian states exclude enduring powers of attorney as there are formality issues.⁸³ In contrast, New Brunswick has not excluded powers of attorney on the basis that powers of attorney are simply a form of agency contract and agency contracts in general are not excluded.⁸⁴
- 7.2 It has been pointed out that the few advantages of making powers of attorney electronically are outweighed by the disadvantages.⁸⁵ Since the purpose of a power of attorney is to show it to third parties to establish the power of the attorney to alter the grantor's legal relationships, it is highly likely that the power of attorney will have to be put in paper form (with proper authentication) at an early stage, thus negating any advantages of permitting the use of the electronic form.⁸⁶ If powers of attorney are not excluded, there is a risk that people might make them electronically in ignorance of the practical limits on their use.

⁸⁰ New Zealand Electronic Transactions Act 2002.

⁸¹ Irish Electronic Commerce Act 2000, s.10(1)(a)(iii).

⁸² UECA section 2(3)(c).

⁸³ An Alberta Law Reform Institute Report on Electronic Wills and Powers of Attorney was discussed at the 2001 Annual Meeting of the Uniform Law Conference of Canada (ULCC), the Report, which discouraged the use of electronic wills and powers of attorney, was received by the ULCC but the ULCC did not make any resolution on the issue of powers of attorney.

⁸⁴ New Brunswick Department of Justice Consultation Paper on the Electronic Transactions Act is available at <http://www.gov.nb.ca/justice/index.htm>.

⁸⁵ See footnote 83.

⁸⁶ If a requirement for consent for use of electronic records is adopted (see Consultation Paper on Electronic Contracting Issues LRRD No.1/2004, available at www.agc.gov.sg, under Publications), there would be a problem of obtaining consent to the use of the power of attorney from all the third parties who are affected by it. The inconvenience may well be enough to discourage people from making electronic powers of attorney.

- 7.3 The Conveyancing and Law of Property Act⁸⁷ provides for instruments creating a power of attorney to be deposited in the Registry of the Supreme Court. On a sale under a contract providing for the execution of the conveyance by an attorney under a power of attorney, the purchaser is entitled to require that the power of attorney be so deposited.⁸⁸ The Registrar of Titles and Deeds may require such deposit of a power of attorney upon execution of an assurance or caveat⁸⁹ (or lodgement for registration of an instrument executed by an attorney)⁹⁰ by an attorney. Similarly, under the Trustees Act, a power of attorney delegating trusts during an absence of the trustee abroad is required to be deposited with the Registry of the Supreme Court.⁹¹ Such deposit, which must be accompanied by affidavit or other evidence of the execution of the power of attorney, is intended to provide verification of the execution of the power of attorney. In the event that electronic powers of attorney are permitted, these existing paper-based procedures would have to be revamped to allow for the deposit of electronic instruments.
- 7.4 In practice, powers of attorney most often relate to land transactions. It would therefore be consistent with the exclusion of conveyances to exclude them.⁹² The high value of such transactions justifies the extra precautionary measures to be taken.
- 7.5 Further, under common law, a power of attorney which empowers the execution of documents under seal must itself be made under seal. This requirement for sealing would prevent such a power of attorney from being made electronically, subject to provision for an electronic equivalent for sealing.⁹³ However, an amendment is currently being considered to abolish this requirement.⁹⁴
- 7.6 Reference was made to enduring powers of attorney above. These are powers of attorney which continue to be effective despite the intervening mental incapacity of the donor of the power of attorney.

⁸⁷ (Cap.61) s.48.

⁸⁸ (Cap.61) s.8. A mortgagor has a similar right on the execution of a reconveyance or transfer or discharge of a mortgage by an attorney under a power of attorney.

⁸⁹ Registration of Deeds Act (Cap.269) s.10.

⁹⁰ Land Titles Act (Cap.157) s.147.

⁹¹ (Cap. 337) s.27

⁹² See Part 8.

⁹³ On sealing requirement, see Part 5, para. 5.5.

⁹⁴ See footnote 53.

Under general law, powers of attorney would cease upon the mental incapacity of their donor. In many jurisdictions, legislation has been promulgated to make it possible for persons to create powers of attorney in contemplation of their becoming mentally incapacitated. It is widely recognised that the creation of such powers of attorney require special safeguards to prevent abuse of powers by attorneys. A major consideration is that after becoming mentally incapacitated, the original donor would no longer be in a position to verify the execution of the power of attorney or to check on the exercise of the powers by the attorney. The exclusion of enduring powers of attorney from being made electronically is understandable in view of the analogy with wills. Further the formalities and safeguards imposed often do not lend themselves easily to being carried out by electronic means. There is currently no provision in Singapore law for enduring powers of attorney.

Q.16 Should electronic powers of attorney continue to be excluded from the application of the ETA? If you think electronic powers of attorney should be permitted, please explain why they should be permitted and how they may work in practice.

Q.17 Do you agree that powers of attorney used in relation to the disposition of land should continue to be excluded from the application of the ETA?

PART 8

TRANSFERS OF IMMOVABLE PROPERTY (i.e. LAND/REAL ESTATE)

- 8.1 Section 4 excludes Parts II and IV of the ETA from applying to the sale, disposition, conveyance or transfer of immovable property⁹⁵. The main obstacles to land transactions being carried out electronically are the various requirements for writing, signature or deed in the context of land transactions.
- 8.2 The Conveyancing and Law of Property Act (CLPA)⁹⁶ provides that a conveyance of any estate or interest in land other than a lease for a period not exceeding 7 years at a rack rent shall be void at law unless it is by deed in the English language. As discussed in Part 5, the requirement for a deed need not be an obstacle to adopting electronic means. This is because electronic equivalents for signing, sealing and attestation exist. Further, there is an initiative to abolish the requirement for sealing of deeds.
- 8.3 Even where a deed or writing is not required to effect a transaction (for example, in the case of leases for a term of less than 7 years, or an option to purchase land), the Civil Law Act⁹⁷ (CLA) prevents contracts for the sale or other disposition of immovable property, or any interest in such property, from being enforced unless they are evidenced in writing and signed. The rationale for this requirement of the CLA is the prevention of fraud. However, courts have consistently allowed parol evidence to be admitted in the absence of signature or writing so that the statute cannot be used as “an engine of fraud”.⁹⁸ Therefore, even if land transactions via electronic records continue to be excluded under section 4, the court could in appropriate cases uphold the transaction on the basis of evidence provided by the electronic record.
- 8.4 Various other disabilities flow from the lack of writing or deed in the context of land transactions. Section 6 of the CLPA provides for general words in a conveyance to transfer all land and buildings and

⁹⁵ For simplicity, the term “land” is used interchangeably with references to “immovable property” in the rest of this Part.

⁹⁶ Cap.61, section 53

⁹⁷ Cap.43, section 6(d)

⁹⁸ The doctrine in *Rochevoucauld v Boustead* [1897] 1 Ch 196.

rights appertaining to the land conveyed. Section 7 of the CLPA provides for covenants for title to be implied in a conveyance. Section 55 of the CLPA makes it unnecessary in a deed relating to land to add words of limitation to heirs when the intention is to give the absolute interest to a person and his heirs general. A transfer of land that is not effected by a conveyance or a deed will not benefit from these deeming provisions.

- 8.5 One of the main rationale for excluding electronic land transactions is the **protection of unsophisticated parties**. The exclusion avoids the danger that uninformed homeowners may be tricked into unwittingly parting with their property at undervalue through a clickwrap contract. The typical homeowner is inexperienced when it comes to home sales and is therefore vulnerable to being duped into a poor bargain. This argument takes on even greater importance in land scarce Singapore where property values are high. Further there is the difficulty of authenticating the identity of the contracting party.
- 8.6 On the other hand, sophisticated landowners such as corporations or statutory boards, and buyers or tenants of their property, could possibly benefit from the ease and convenience of being able to carry out certain land transactions electronically. An obvious example would be in the case of high volume or repetitive standard term transactions by property developers or statutory boards.⁹⁹ The possibility of effecting the renewal of commercial leases may be useful to institutional owners and their tenants. In this case, the danger of the parties being duped into an unintended transaction is minimal since both parties are already familiar with the property in question and the value of the lease.
- 8.7 **Technological obsolescence** is another concern which is relevant in the case of long term transactions and title documents. For example, if an option to purchase land granted by electronic means is to be exercised many years after the initial grant, the electronic record may no longer be accessible when that time comes to exercise the option. In the case of title documents, Land Registries which provide electronic registration of title will presumably be able to ensure timely conversion of records. Large corporations or statutory boards may also have the resources to convert their records. However, it is less certain

⁹⁹ E.g. the Housing Development Board (HDB) and Jurong Town Corporation (JTC).

whether private parties using electronic records in relation to non-registrable transactions will have the knowledge or ability to preserve their records in an appropriate manner.

- 8.8 **This category has been excluded from electronic transactions legislation of most other jurisdictions, but to varying degrees. Canada and New Zealand exclude only those instruments that require registration. Ireland excludes conveyancing but excepts contracts.** We seek feedback on whether the exclusion in section 4 of the ETA should be finetuned.

Q.18 Should any classes of persons be excluded from the operation of section 4(1)(d) or (e) of the ETA i.e. to enable them to enter electronic contracts for the sale or other disposition of land, or any interest in land? If yes, please specify in relation to which kinds of transactions, and propose any additional safeguards that may be necessary.

Q.19 Should any classes of land transactions be excluded from the operation of section 4(1)(d) or (e) of the ETA i.e. to enable such transactions to be carried out electronically? If yes, please specify any additional safeguards that may be necessary.

8.9 **E-conveyancing**

- 8.9.1 Singapore has already implemented an Electronic Lodgement System (ELS)¹⁰⁰ which enables documents to be lodged online with the Registrar of Titles.¹⁰¹ ELS does not however extend to e-marketing of properties, online execution of options to purchase, sale and purchase

¹⁰⁰ Amendments were made to the Land Titles Act to provide a legislative framework for ELS in 2002. Under the ELS, the entire process within the purview of the Registrar of Titles has been computerised. Documents are lodged online with the Registrar, and registered on-line through a back-end IT system resulting in the updating of the electronic land register. In the case of documents that pass title, pertinent details of such documents are submitted to the Registrar electronically under a priority booking system within ELS, however hard copies of such documents must still be presented to the Registrar within the same lodgement day. The lodgement system is available via Internet. Digital cards, employing public and private key infrastructure, issued to authorised users are used to authenticate identity to ensure non-repudiation of transactions.

¹⁰¹ A number of other jurisdictions have also introduced electronic lodgement systems e.g. New Zealand's *Landonline* (see <http://www/landonline.govt.nz>), the Australian State of Victoria (see Report on "Electronic Conveyancing Victoria" (ECV) prepared by the Department of Natural Resources and Environment of Melbourne, Victoria, Australia), and the UK Land Registry.

agreements and other relevant deeds. It also does not cater for electronic exchange of funds (which would obviate the need for cashier's orders for legal completion).

8.9.2 An e-Conveyancing system currently under study in the UK envisages a completely electronic conveyancing process, including all contract documents used in the course of the transaction and electronic funds transfer.¹⁰² In the US, on-line real estate transactions have already reportedly been carried out via on-line "signing rooms".¹⁰³

8.9.3 Responses to a consultation conducted by the UK Lord Chancellor's Department¹⁰⁴ indicated that a vast majority of respondents agreed that electronic conveyancing documents¹⁰⁵ should be permissible, subject to implementation of a secure system against fraud. Particular issues discussed included the:

- (a) *operative date and time of electronic documents.* Respondents were generally in favour of the operative time and date being stipulated in the electronic documents themselves, but some felt that further clarifications were needed in relation to withdrawal from the transaction and alteration of the effective date and time or minor terms;
- (b) *requirement for witnessing of documents.* The Chancery Bar Association proposed that the requirement for witnessing a document should not be abandoned as witnessing provides a valuable function as giving evidence not only that the person has executed the document, but also where and when it was executed. The majority of respondents however agreed that attestation was inappropriate for electronic conveyancing

¹⁰² See Lord Chancellor's Department Consultation Paper on "Electronic Conveyancing – A draft order under section 8 of the Electronic Transactions Act 2000" available at <http://www.lcd.gov.uk/consult/general/e.conv.htm>, and UK Land Registry's Consultation Paper and Report available at <http://www.landregistry.gov.uk/e-conveyancing>.

¹⁰³ A virtual, electronic room in which documents can be securely posted, edited and signed by parties to the transaction. Most of the transactions have centred on mortgages. See http://realtimes.com/rtnews/rtpages/20011003_paperless.htm, also 20000531 and 20000706. Also <http://www.nhomeloan.com/Press%20Release/paperless.htm> and <http://www.emergis.com/en/newsroom/newsreleases/2003/feb24.asp>.

¹⁰⁴ The Lord Chancellor's Department Consultation Response dated December 2001 available at <http://www.lcd.gov.uk/consult/general/e-convresp.htm>.

¹⁰⁵ For a general discussion on the application of the ETA to Indentures, and more particularly sealing, attestation, and delivery of deed, please see Part 5.

documents. The most common reason given was that authentication or certification of the electronic signature took the place of attestation. A number of respondents felt that there should be an added safeguard requiring the electronic signature to be affixed by a regulated professional. A small minority however thought that attestation is vital and its removal would be an erosion of fundamental principles;

- (c) *need for a secure repository* for dematerialised documents not held at the Land Registry; and
- (d) *preservation of the distinction between contract and deed*. Some felt that it was useful to preserve this distinction (e.g. for limitation purposes, and warranties and indemnities).

8.9.4 Respondents also identified a range of practical issues including:

- (a) the difficulty of combining paper and electronic documents in a single transaction or chain of transactions;
- (b) the need to provide proper assurance of an agent's authorisation where the agent signed a document electronically on behalf of the principal;
- (c) the possibility that standard forms may not be suitable for complex transactions;
- (d) the need to consider indemnity insurance issues; and
- (e) electronic stamp duty (in particular how documents could be adjudicated).

8.9.5 The issues relating to an e-conveyancing system are complex and fall beyond the scope of the current consultation. **In our view an e-conveyancing system, if adopted, cannot be implemented merely by amendment of the ETA but will require amendments to other relevant statutes**, e.g. the Conveyancing and Law of Property Act¹⁰⁶

¹⁰⁶ Cap.61.

and Land Titles Act¹⁰⁷, to ensure that the necessary safeguards are put in place to support electronic submissions and conveyancing.

¹⁰⁷ Cap.157.

PART 9

DOCUMENTS OF TITLE

- 9.1 Section 4 excludes Parts II and IV of the ETA from applying to documents of title. A document of title enables the person in possession of it to deal with property described in it as if he were the owner. They are used to prove ownership of property and may be deposited to provide security for mortgages or loans.
- 9.2 The most common type of document of title is the **bill of lading**. A bill of lading is a document of title transferable by endorsement and delivery, giving the holder the right to sue on it.¹⁰⁸ Provision for electronic bills of lading can be made via regulations under the Bills of Lading Act¹⁰⁹. To date no such regulations have been made.
- 9.3 Various contractual schemes have used electronic contracts in place of traditional paper bills of lading. Seadocs, launched in 1983, was a hybrid scheme which retained the paper bill of lading, but it was deposited with a third party, with the right to its possession being dictated by electronic communications. The International Maritime Committee (CMI) Rules for Electronic Bills of Lading, issued in 1990, rely on a series of attornments¹¹⁰ by the carrier to each new holder of the “electronic bill”. Finally, the Bolero scheme¹¹¹, launched in 1999, is based upon a multilateral contract in the form of a Rule Book binding all participants. It also relies upon attornments¹¹² by the carrier, giving contractual effect to them by way of novation and a central Title Registry. These are not true equivalents of the paper bill of lading. They require the involvement of the carrier or registrar on

¹⁰⁸ It is not a negotiable instrument so that the transferee obtains no better title than the transferor has. Carriage of Goods by Sea Act 1924. Osborn’s Concise Law Dictionary.

¹⁰⁹ Cap.384, section 1(5).

¹¹⁰ For meaning of attornment, see footnote 113.

¹¹¹ A Bolero Bill of Lading is the “functional equivalent of a conventional bill of lading” but its legal basis is the Bolero Rulebook which is adopted contractually. Authentication of messages is drawn from the user’s digital signature. The Bolero system acts as a postbox which checks on the authenticity of the digital signatures it receives and passes on messages. It also includes a title registry comprising an electronic database of information relating to Bolero bills of lading. It works only where all the parties are members of the Bolero Association. If a party wishes to sell cargo to a non-member, it will be necessary to switch to paper transactions; thereafter, the paper bill cannot re-enter the Bolero system. For more information on Bolero project see articles at <http://www.elbornes.com/articles/bolero.htm>, <http://maritimelegal.com/article.htm>, and <http://www.fedpress.aust.com/Word/BurnettChap2.doc>.

¹¹² For meaning of attornment, see footnote 113.

each transfer, achieving the same result as paper bills of lading by means of direct attornment¹¹³ by the carrier, or by the registrar on the carrier's behalf, to a new 'holder', together with a direct contract between them incorporating the terms of the original contract of carriage.¹¹⁴

- 9.4 At present, there is no true electronic equivalent of a paper bill of lading. Nor does there seem to be any market demand for it. It remains to be seen whether technology of the future will provide the commercial world with a true electronic equivalent of the paper bill of lading.¹¹⁵ The obstacle is a lack of international consensus on the elements of an electronic bill of lading. International consensus is essential as bills of lading are used in cross-border transactions.
- 9.5 Other examples of documents of title are delivery orders (issued by the owner of goods and addressed to the keeper of the warehouse where they are stored), and store warrants and dock warrants (by which a custodian acknowledges that he holds goods and undertakes to deliver them to a person named in the order). A dock warrant is a document of title issued by a dock company stating that certain goods therein mentioned are deliverable to a person named therein or his assigns by endorsement.¹¹⁶
- 9.6 The Commonwealth Expert Working Group noted that the "use of electronic bills of lading would give rise to the same "unique document" security concerns that lead most countries to presently exclude negotiable instruments¹¹⁷ from their electronic transactions legislation" (e.g. issues of multiple copies and originals, and authenticity).¹¹⁸

¹¹³ A bailee's acknowledgment that he will hold the goods on behalf of someone other than the bailer (Blacks Law Dictionary, 7th ed).

¹¹⁴ UK Law Commission, *Electronic Commerce: Formal Requirements in Commercial Transactions*, December 2001, Part 4.

¹¹⁵ UK Law Commission, *Electronic Commerce: Formal Requirements in Commercial Transactions*, December 2001, para.4.8.

¹¹⁶ Osborn's Concise Law Dictionary, Seventh Edition, by Roger Bird (Sweet & Maxwell 1983).

¹¹⁷ See Part 4 on Negotiable Instruments.

¹¹⁸ Report of the Commonwealth Expert Working Group on Legal Aspects of Information Technology and the Related Law of Evidence (London 26-30 Jun, 2000). The Commonwealth Model Law on Electronic Transactions excludes Documents of Title. Similarly, the NZ Electronic Transactions Act (s.14(2)(d), referring to the First Schedule, Part 3) also excludes bills of lading.

- 9.7 **No change to the exclusion of documents of title is proposed.** It would be more appropriate for provisions for electronic forms of documents of title to be made in specific legislation dealing with those types of documents of title as they would require special rules, e.g. the Bills of Lading Act.

Q.20 Do you agree that electronic documents of title should continue to be excluded from the application of Parts II and IV of the ETA?

Q.21 Should Singapore enact any legislation to facilitate the use of electronic documents of title? If yes, please specify what kinds of documents of title, how they may work in practice and what legislative provisions will be required.

9.8 Carriage of Goods

9.8.1 The UN Model Law on Electronic Commerce¹¹⁹ contains a Part relating to contracts of carriage of goods and transport documents. In preparing these provisions, UNCITRAL noted that carriage of goods was the context in which electronic communications were most likely to be used and in which a legal framework facilitating the use of such communications was most urgently needed.

9.8.2 The provisions, which apply to both negotiable and non-negotiable documents, would encompass bills of lading and negotiable instruments used in relation to carriage of goods. They provide for actions in connection with, or in pursuance of, a contract of carriage of goods carried out by one or more data messages to satisfy legal requirements for such actions to be carried out in writing or using a paper document. The reference to “one or more data messages” is intended to reflect the fact that, in the context of the transfer of rights through data messages, some of the functions traditionally performed through a single transmission of a paper bill of lading would necessarily imply the transmission of more than one data message.

9.8.3 The provisions also introduce a requirement of the guarantee of singularity in order to satisfy unique document requirements. The electronic procedures must ensure that it is not possible for more than one person (except in the case where title to goods are jointly held) to

¹¹⁹ Articles 16 and 17, and Guide to enactment, paragraphs 108 to 122.

lay claim to the right at any one time and that there is reasonable assurance that the same data message cannot be multiplied and that no two media can be simultaneously used for the same purpose. The provisions also seek to address the situation where the use of data messages have to be replaced by paper documents.

- 9.8.4 Further, the provisions seek to ensure that laws such as the Hague and Hague-Visby Rules are not excluded merely by the use of data messages instead of paper documents.
- 9.8.5 The Canadian Uniform Electronic Commerce Act adopts these provisions from UN Model Law on Electronic Commerce. Although negotiable instruments and documents of title are excluded from Canadian legislation based on the Uniform Electronic Commerce Act¹²⁰, the application of the provisions on Contracts for Carriage of Goods to such documents has been preserved.
- 9.8.6 Such provisions are presumably intended to give a proactive boost to the growth of international trade by facilitating the adoption of electronic communications. However, it is recognised that, in the context of international trade, for a scheme of electronic communications to be viable there needs to be widespread acceptance of a similar legislative regime by one's trading partners. Currently there does not seem to be widespread adoption of such provisions. Nevertheless there does not seem to be any harm in adopting such legislation in anticipation of the growth of international consensus on the issue.
- 9.8.7 Alternatively, it may be felt that instead of having such general provisions on documents used in carriage of goods, more specific legislation (possibly under some other Act) is required. Nevertheless, the existence of general provisions on the subject would not prevent the adoption of more specific provisions in future, should the need arise.

¹²⁰ Manitoba Electronic Commerce and Information Bill C-31, Part 4; Ontario Electronic Commerce Act 2000, s.23. These provisions are based on the UNCITRAL Model Law on Electronic Commerce.

Q.22 Should Singapore enact legislation based on chapter 1 of Part 2 of the UN Model Law on Electronic Commerce¹²¹ relating to documents used in carriage of goods?

¹²¹ Chapter 1 of Part 2 of the UNCITRAL Model Law on Electronic Commerce:

“Article 16. Actions related to contracts of carriage of goods

Without derogating from the provisions of part one of this Law, this chapter applies to any action in connection with, or in pursuance of, a contract of carriage of goods, including but not limited to:

- (a) (i) furnishing the marks, number, quantity or weight of goods;
 - (ii) stating or declaring the nature or value of goods;
 - (iii) issuing a receipt for goods;
 - (iv) confirming that goods have been loaded;
- (b) (i) notifying a person of terms and conditions of the contract;
 - (ii) giving instructions to a carrier;
- (c) (i) claiming delivery of goods;
 - (ii) authorizing release of goods;
 - (iii) giving notice of loss of, or damage to, goods;
- (d) giving any other notice or statement in connection with the performance of the contract;
- (e) undertaking to deliver goods to a named person or a person authorized to claim delivery;
- (f) granting, acquiring, renouncing, surrendering, transferring or negotiating rights in goods;
- (g) acquiring or transferring rights and obligations under the contract.

Article 17. Transport documents

- (1) Subject to paragraph (3), where the law requires that any action referred to in article 16 be carried out in writing or by using a paper document, that requirement is met if the action is carried out by using one or more data messages.
- (2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for failing either to carry out the action in writing or to use a paper document.
- (3) If a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if the law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer, or use of, a paper document, that requirement is met if the right or obligation is conveyed by using one or more data messages, provided that a reliable method is used to render such data message or messages unique.
- (4) For the purposes of paragraph (3), the standard of reliability required shall be assessed in the light of the purpose for which the right or obligation was conveyed and in the light of all the circumstances, including any relevant agreement.
- (5) Where one or more data messages are used to effect any action in subparagraphs (f) and (g) of article 16, no paper document used to effect any such action is valid unless the use of data messages has been terminated and replaced by the use of paper documents. A paper document issued in these circumstances shall contain a statement of such termination. The replacement of data messages by paper documents shall not affect the rights or obligations of the parties involved.
- (6) If a rule of law is compulsorily applicable to a contract of carriage of goods which is in, or is evidenced by, a paper document, that rule shall not be inapplicable to such a contract of carriage of goods which is evidenced by one or more data messages by reason of the fact that the contract is evidenced by such data message or messages instead of by a paper document.
- (7) The provisions of this article do not apply to the following: [...].”

PART 10

OTHER ISSUES

10.1 In the preceding Parts of this consultation paper, we have discussed each existing exclusion under section 4 of the ETA in turn. In some cases it may be felt that an existing exclusion can be completely removed because the rationale for the exclusion no longer applies. In other cases, it may be felt that the categories need to be finetuned by narrowing certain excluded transactions or, perhaps, by limiting the operation of the exclusions only to parties who are likely to need their protection. For example, should the exclusion for the creation of trusts be limited only to testamentary trusts? Should corporations and statutory boards be allowed to sell land electronically since they are less likely to require protection from the pitfalls of improper use of electronic transactions? We have included general questions below¹²² to seek any feedback that may not have been discussed in the earlier Parts of this Paper.¹²³

10.2 **We also seek views on whether any other transactions should be added to the exclusions under section 4.**¹²⁴ Notably, the electronic transactions legislation of some jurisdictions have excluded listed legislation and certain kinds of transactions not currently excluded under section 4 of the Singapore ETA. These excluded legislation and transactions relate broadly to:

- (a) affidavits and other sworn documents;
- (b) warrants to enter, seize or search;
- (c) court documents and proceedings; and
- (d) consumer protection notices.

10.3 We do not think that specific provision needs to be made for the types of documents referred to in paragraph 10.2 (a), (b) and (c) because the requirements for such documents are usually specified in legislation

¹²² See questions 1 to 3.

¹²³ Section 4(1) of the Singapore ETA can be modified by order of the Minister for Communications, Information and the Arts.

¹²⁴ See question 2.

and would come under the scrutiny of the courts. In most cases their form is already governed by rules relating to court administration. In addition, they would often come within the purview of some other Government agency, in which case the discussion in paragraph 10.9 below would be relevant.

- 10.4 Some jurisdictions¹²⁵ exclude the provision of information required by consumer protection legislation from their electronic transactions legislation because of concerns that consumers may be given inadequate notice of such information if electronic means are used. Canada and Ireland however do not exclude consumer protection legislation.
- 10.5 Many jurisdictions have specific legislation imposing requirements on the use of electronic communications in relation to consumer transactions. For example, in relation to the legal requirement for information to be provided to consumers in writing, the US E-sign Act requires traders to obtain the consent of the consumer to use electronic records and inform the consumer of his right to withdraw his consent and to keep the consumer informed in relation to procedures, technical requirements and fees for such withdrawal.¹²⁶ European jurisdictions and Canadian provinces impose notice requirements on distance selling in their consumer protection legislation.
- 10.6 Some examples of consumer notices required under Singapore law are:
- (a) the Hire-Purchase Act which renders a hire-purchase agreement unenforceable if it is not in writing. The agreement must be signed and served on the hirer. There are also requirements for certain notices to be given to the hirer and specification as to the size of type and legibility of prescribed documents.¹²⁷
 - (b) the consumer information notice provided under the Consumer Protection (Fair Trading) (Cancellation of Contracts)

¹²⁵ A general exclusion in the New Zealand ETA, and a more limited exclusion in the US E-Sign Act (relating to specified transactions such as cancellation of utilities, foreclosure etc). Australia excludes the ETA only in relation to specific provisions in relevant legislation, such as the Trade Practices Act.

¹²⁶ US E-Sign Act s.103.

¹²⁷ Cap.125, s.3, 4, 5.

Regulations.¹²⁸ To be effective, a consumer information notice must be in a prescribed form and must be “brought to the attention” of the consumer.

- 10.7 Bearing in mind that the ETA is intended to promote the use of electronic commerce, the preferable approach would be to limit exclusions from the ETA as far as possible. Additional protective measures can be added in relevant legislation where it is felt that special safeguards are required, for example in relation to consumer protection. It can be made clear that the ETA does not affect such additional safeguards.¹²⁹
- 10.8 **At the same time we also seek feedback whether the application of the ETA is uncertain in respect of any class of transactions,**¹³⁰ for example because of any specifications relating to the form of certain transactions (or the lack thereof) make it uncertain whether they may be done electronically. (Please refer to the discussion in paragraphs 2.1.5 to 2.1.7 above.)
- 10.9 In most cases this does not pose a practical difficulty since form requirements in legislative provisions usually relate to official forms required by Government agencies and the ETA already allows such agencies to use electronic forms notwithstanding anything to the contrary in any written law. Further, nothing in the ETA compels a Government agency to accept or issue any document in the form of electronic records. Therefore reliance cannot be placed on any provision of the ETA to deem that an electronic record satisfies form requirements, such as writing or signature, as against a Government agency, unless the Government agency decides to do so. Further,

¹²⁸ G.N. No. S620/2003.

¹²⁹ A provision modelled, for example, on section 9(4) of the ETA may be expanded to include the situation:

“9(4) Nothing in this section shall —

- (a) apply to any rule of law which expressly provides for the retention of documents, records or information in the form of electronic records; or
- (b) preclude any department or ministry of the Government, organ of State or a statutory corporation from specifying additional requirements for the retention of electronic records that are subject to the jurisdiction of such department or ministry of the Government, organ of State or statutory corporation.”.

¹³⁰ See question 25.

Government agencies may make specifications with respect to the use of electronic records for such purposes.¹³¹

- Q.23** Should any class of parties or transactions be excluded from the operation of section 4 of the ETA? If yes, please explain.
- Q.24** Should any transactions be added to the exclusions under section 4 of the ETA? If yes, please explain.
- Q.25** Do the form requirements in any legislation need to be clarified as to whether or not they may be satisfied by electronic means? If yes, please specify and explain the difficulty posed by the provision.

¹³¹ ETA s.47.

LEGISLATION REFERENCES

Singapore

Electronic Transactions Act (Cap.88) (1998)

<http://www.ecitizen.gov.sg/>

Australia

<http://www.austlii.org/>

Commonwealth Electronic Transactions Act 2000

New South Wales Electronic Transactions Act 2000

<http://www.legislation.nsw.gov.au/>

Electronic Transactions (Victoria) Act 2000

<http://www.dms.dpc.vic.gov.sg/>

Canada

Uniform Electronic Commerce Act

<http://www.ulcc.ca/>

British Columbia Electronic Transactions Act (2001)

<http://www.qp.gov.bc/>

New Brunswick Electronic Transactions Act (2001)

Consultation paper: <http://www.gov.nb.ca/justice/under.htm>>.Paper

Ontario Electronic Commerce Act 2000

Manitoba Electronic Commerce and Information Act 2000

Hong Kong

Electronic Transactions Ordinance (Cap.553)

<http://www.justice.gov.hk/>

Ireland

Electronic Commerce Act 2000

<http://irlgov.ie/bills28/acts/2000/default.htm>

New Zealand

Electronic Transactions Act 2002

<http://www.legislation.govt.nz/>

UK

Electronic Communications Act 2000

<http://www.hmso.gov.uk/>

US

Electronic Signatures in Global and National Commerce Act (E-SIGN Act)
(2000)

<http://www.access.gpo.gov/>

UNCITRAL

<http://www.uncitral.org/>

Model Law on Electronic Signatures (2001)

Model Law on Electronic Commerce, with Guide to Enactment (1996) and
article *6bis* (1998)

Draft Convention on Electronic Contracting

draft used for discussion at 43rd session of Working Group IV, see
A/CN.9/WG.IV/WP.108

EU

<http://europa.eu.int/>

Directive on Electronic Signatures (Directive 1999/93/EC)

[eur-lex/eh/lif/dat/1999/en-399L0093.html](http://eur-lex.europa.eu/eur-lex/eh/lif/dat/1999/en-399L0093.html)

Directive on Electronic Commerce (Directive 2000/31/EC)

<http://europa.eu.int/eur-lex/eh/lif/dat/2000/en-300L0031.html>

The Commonwealth Secretariat

Model Law on Electronic Transactions

<http://www.thecommonwealth.org>

Comparative Table of Excluded Transactions

Excluded transaction	Canadian Uniform Electronic Commerce Act s.2	New Zealand Electronic Transactions Act 2002, First Schedule, Part 3 (unless otherwise stated)	Irish Electronic Commerce Act 2000, s.10	US E-Sign Act s.103	Commonwealth Model Law (* listed as possible exclusions)	Australian Electronic Transactions Act 1999, exclusions under ET Regulations 2000
Wills	+	+	+	+	+	-
Negotiable instruments	+ except Part 3 (Carriage of Goods)	+	-	-	+	+ by exclusion of Bills of Exchange Act 1999 and Cheques Act 1986.
Indentures	-	Requirement for signature or seal to be witnessed met by means of witness' electronic signature (s.23)	Requirement for signature to be witnessed met if signature to be witnessed and signature of witness are advanced electronic signatures (s.14) Requirement for seal met by advanced electronic signature, based on a qualified certificate. (s.16)	-	-	-
Trusts	+ created by wills or codicils to wills	Testamentary instruments	+	Testamentary trusts	*	-
Powers of attorney	+ in respect of financial affairs or personal care of	+ and enduring powers of attorney	Enduring powers of attorney	-	*	-

Joint IDA-AGC Review of Electronic Transactions Act
Stage II: Exclusions from the ETA under Section 4

	individual					
Land transfers	+ that require registration to be effective against third parties	Instruments or documents presented to Land Registry	Yes, except contracts (whether or not under seal) for the creation acquisition or disposal of interests in real property.	-	+	-
Documents of title	+ except Part 3 (Carriage of Goods)	Bills of lading	-	-	+	-
Others	-	Affidavits, statutory or sworn declarations	Affidavits, statutory or sworn declarations	Requirement for signatures or records to be notarized, verified or made under oath made by electronic signature		Statutory Declarations Act 1959
	-	Notices to be given to public/ in writing in person or by registered post/ to be attached or displayed.	-	-	-	
	-	Warrant to enter/ search/ seize	-	-	-	
	-	Consumer protection information	-	Cancellation of utilities, health benefits, product failure, foreclosure etc. Note provision on consumer disclosures: s.101(c)	*	Trade practices Act 1974,certain sections.
	-	Mental health notices/ certificates	-	-	-	

Annex B

	-	-	-	UCC except s 1 107, 1 206, Articles 2 and 2A	-	Corporations Act 1989, Corporations Law and subordinate legislation thereunder
	-	-	-	Adoption, divorce, family law	* documents relating to marriage	
	-	Ship registration instruments	-	-	-	
	-	Enactments relating to certain courts First Schedule, Part 4	Court procedures	Court proceedings	-	
	-	Listed Acts First Schedule, Part 1, 2	List Acts (s.11)	-	-	Other listed legislation

+ excluded.
- not excluded.

LIST OF QUESTIONS

- Q.1 Do you agree that electronic wills should continue to be excluded from the application of the ETA? If you think electronic wills should be recognised, please justify and suggest how they may work in practice.
- Q.2 Should the Wills Act be amended to facilitate the use of electronic wills in exceptional cases? If yes, please suggest what circumstances such a provision may be used in and the amendments that should be made.
- Q.3 Do you agree that negotiable instruments should continue to be excluded from the application of the ETA?
- Q.4 Should the creation, performance or enforcement of an indenture continue to be excluded from the application of the ETA?
- Q.5 Should Singapore adopt a provision in the ETA to allow secure electronic signatures (or only secure digital signatures) to satisfy the requirement for sealing?
- Q.6 If you answered yes to Q.5, should any class of transactions be excluded from the provision allowing electronic signatures (or secure digital signatures) to satisfy the requirement for sealing e.g. land transactions?
- Q.7 Should the ETA enable a secure electronic signature (or secure digital signature) to satisfy the attestation requirement, i.e. signing of a document by its maker using such a signature need not be witnessed by another person?
- Q.8 Should the ETA provide that a legal requirement for a signature or seal to be witnessed is met by the *witness*' electronic signature?
- Q.9 If you answered yes to Q.7 or 13, should any class of transactions be excluded from the provision e.g. land transactions?
- Q.10 When should an electronic indenture take effect?
- Q.11 What should be the requirements for withdrawal from or amendment of an electronic indenture?
- Q.12 Do you agree that section 4 should exclude testamentary trusts i.e. the ETA should not apply to testamentary trusts?

- Q.13 Do you agree that section 4 should exclude trusts in relation to land i.e. the ETA should not apply to trusts for land?
- Q.14 Do you agree that Parts II and IV of the ETA should be allowed to apply to implied trusts, in addition to constructive and resulting trusts (which are currently allowed)?
- Q.15 Do you agree that Parts II and IV of the ETA should be allowed to apply to trusts (other than testamentary trusts and trusts in relation to land) created electronically? If the ETA is amended to enable non-testamentary trusts to be made electronically, what special requirements, if any, should apply to the creation of such trusts?
- Q.16 Should electronic powers of attorney continue to be excluded from the application of the ETA? If you think electronic powers of attorney should be permitted, please explain why they should be permitted and how they may work in practice.
- Q.17 Do you agree that powers of attorney used in relation to the disposition of land should continue to be excluded from the application of the ETA?
- Q.18 Should any classes of persons be excluded from the operation of section 4(1)(d) or (e) of the ETA i.e. to enable them to enter electronic contracts for the sale or other disposition of land, or any interest in land? If yes, please specify in relation to which kinds of transactions, and propose any additional safeguards that may be necessary.
- Q.19 Should any classes of land transactions be excluded from the operation of section 4(1)(d) or (e) of the ETA i.e. to enable such transactions to be carried out electronically? If yes, please specify any additional safeguards that may be necessary.
- Q.20 Do you agree that electronic documents of title should continue to be excluded from the application of Parts II and IV of the ETA?
- Q.21 Should Singapore enact any legislation to facilitate the use of electronic documents of title? If yes, please specify what kinds of documents of title, how they may work in practice and what legislative provisions will be required.

- Q.22 Should Singapore enact legislation based on chapter 1 of Part 2 of the UN Model Law on Electronic Commerce relating to documents used in carriage of goods?
- Q.23 Should any class of parties or transactions be excluded from the operation of section 4 of the ETA? If yes, please explain.
- Q.24 Should any transactions be added to the exclusions under section 4 of the ETA? If yes, please explain.
- Q.25 Do the form requirements in any legislation need to be clarified as to whether or not they may be satisfied by electronic means? If yes, please specify and explain the difficulty posed by the provision.