



Australian Government  
Attorney-General's Department

Consultation to inform  
options for implementing the  
**Model Law on Electronic  
Transferable Records in Australia**



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# Chapter 1: Background

## 1.1. Introduction to the consultation

The Attorney-General's Department (**the department**) is undertaking a public consultation to advise the Australian Government on options for implementing legislation aligned with the Model Law on Electronic Transferable Records (**MLETR**).

The purpose of this consultation is to collect information and insights from the public, which will help us develop potential implementation options, and advise Government on which option would most effectively and appropriately enable the use of electronic transferable records in Australia.

The delivery of options for implementing legislation aligned with MLETR is part of the Government's Simplified Trade System (**STS**) reforms. It is a priority reform under a 3-year regulatory reform roadmap, which will deliver benefits to business by simplifying and modernising Australia's cross-border trade regulatory environment.<sup>1</sup>

## 1.2. What is the Model Law on Electronic Transferable Records?

The MLETR is a model law developed by the UN Commission on International Trade Law (**UNCITRAL**), which was published in 2017.

It contains a set of model provisions which, if adopted into domestic law, would allow existing Australian laws that apply to paper-based transferable records to apply in the same manner to transferable records that are in the form of electronic data (or **electronic transferable records**).

The MLETR defines 'transferable documents and instruments' (called **transferable records** in this paper) as a class of document, issued on paper, which entitles the holder to claim performance of an obligation, and which can be transferred to another person along with the right to performance.<sup>2</sup> Examples of these records might include bills of exchange, promissory notes, consignment notes, bills of lading and warehouse receipts.<sup>3</sup>

Accordingly, the MLETR is intended to confirm that electronic bills of exchange, bills of lading, promissory notes and other electronic transferable records will have the same legal recognition as their traditional paper-based equivalents – and therefore provide industry stakeholders with confidence that they can choose to use electronic methods for managing these records, and enjoy any potential associated efficiencies or other benefits.

A copy of the MLETR is attached to this consultation paper at Annexure A.

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1 For more information about the whole-of-government STS reforms, please visit the [STS Webpage](#).

2 MLETR, article 2. The 'obligation' may generally refer to claim the delivery of goods or the payment of a sum of money: see [Explanatory Note to the UNCITRAL Model Law on Electronic Transferable Records \(MTETR explanatory note\)](#), paragraph [6].

3 MTETR explanatory note, paragraph [38].

## 1.3. Why are we pursuing this project?

### Confirming the legal validity of electronic transferable records is a key part of paperless trade

Transferable records are an essential requirement in many Australian and international trade processes. However, despite advances in technology, most cross-border trade documents (including transferable records) are still in paper form, which is in part due to the limited recognition of electronic transferable records under law.<sup>4</sup>

The Australian Government has heard that the need to produce paper transferable records can slow or disrupt the trade of goods or other commercial processes, causing inefficiencies and additional costs along the supply chain. The costs and complexity of trade can create a barrier to trade, particularly for resource-constrained small businesses.

Conversely, the Australian Government understands that recognising the legal validity of electronic transferable records may be a foundational step towards other initiatives to enable 'paperless trade' and, based on work undertaken by the Australian Border Force (**ABF**), may help to reduce these inefficiencies and costs, make trade more accessible, and provide other related economic benefits.

### Why we are exploring options for the Australian legal context

Recognising electronic transferable records by implementing a globally-recognised standard, such as the MLETR, also has the potential to ensure Australia's legal framework is interoperable with those of our trading partners, and to support other international interests and commitments.<sup>5</sup>

However, the existing legal frameworks relating to transferable records and electronic transactions in Australia can be complex. Also, some of the technologies used to issue these records electronically are relatively new, and we wish to promote industry confidence to develop and take up appropriate technologies and technological standards under an Australian legal framework.

Accordingly, we are now seeking to explore potential options for legislative reform, to confirm the legal validity of electronic transferable records in a way that promotes industry confidence, preserves the key functions of these records and is consistent with existing Australian law.

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<sup>4</sup> Digitalising Trade: The Role of Paperless Platforms, APEC Policy Support Unit Policy Brief No. 59, March 2024, page 2.

<sup>5</sup> See [part 5.1](#) of this paper for a discussion on interoperability, and Australia's international engagement in relation to the MLETR.

## 1.4. What options are being considered?

The questions in this consultation paper are intended to help us target the most appropriate options for implementation of MLETR under domestic Australian law, and other associated legal or practical issues which may arise in the implementation of MLETR.

However, at this early stage, we anticipate that potential options might include adoption of MLETR-based legislation within:

- existing electronic transactions law, that is, the *Electronic Transactions Act 1999* (Cth) (**ETA**)
- existing substantive Commonwealth laws relating to transferable records
- standalone Commonwealth law.

Any adoption of the MLETR may include such modification or changes necessary to address any unique Australian legal circumstances which are identified in the consultation process.

Any options for adoption of MLETR-aligned legislation should also take into account the potential impact upon any relevant state and territory laws, and broadly identify any other laws which might interact with the updated legal framework.

## 1.5. What happens after this consultation process?

The department will analyse stakeholder responses to build a list of potential options for implementing the MLETR in Australia. We will present these to government for consideration in 2025, with our recommendation of the most appropriate implementation option to pursue.

Subject to government approval of any option, the department will undertake further work to implement appropriate legislation under Australian law, and develop guidance materials to help support industry engagement with the legislation. This work will likely involve further consultation, on more targeted questions relating to the approved implementation option.

## 1.6. How to share your views

This paper contains a number of questions, which are also copied at Annexure B for convenience. You may choose to answer as many of these questions as you like: you do not need to answer them all.

The department's preference is that you share your views by providing an online survey submission. This will allow the department to more easily cross-reference positions and data. You may access and answer the survey questions on our Consultation Hub via this link: <https://consultations.ag.gov.au/international-relations/mletr>.

You may also upload a document containing your written answer to the survey questions via the department's Consultation Hub. To help us analyse data more effectively, please identify whichever questions you are answering in your response.

If you are having difficulty using the Consultation Hub, you may email a written submission with your written answers to the survey – or your experiences using transferable records and views on adoption of MLETR in Australia – via [MLETR@ag.gov.au](mailto:MLETR@ag.gov.au).

The closing date for submissions is **28 October 2024**.



# Chapter 2: How transferable records are used in Australia

The MLETR confirms that electronic transferable records are just as legally valid as traditional, paper-based transferable records.

If enacted in Australia, the MLETR would therefore give confidence to Australian trade participants that they may use and exchange electronic transferable records (like electronic bills of lading and bills of exchange) instead of paper versions for the purpose of Australian law.

However, Australian laws dealing with industry's use of transferable records do not necessarily require much day-to-day oversight from government. Accordingly, this part of the consultation paper is intended to collect information about how stakeholders currently use transferable records.

This will allow us to build a preliminary understanding about what types of records might be included in the scope of any Australian MLETR legislation, and what uses and practices need to be enabled by electronic means.

## 2.1. What are transferable records?

This section introduces transferable records, and asks stakeholders which paper-based transferable records they use in an Australian context.

Transferable records are a specific type of document with a special characteristic, where a person who 'holds' or 'possesses' the original paper document is given a legal right to claim performance of an obligation from another person. This generally means the holder can collect goods or money from that other person. A person can also 'transfer' that right by transferring the paper document.<sup>6</sup>

Any record that holds the above characteristics is 'transferable', regardless of how it is named.

Over a long period, the use of different types of transferable records has become commonplace in many aspects of Australian and international trade and commerce.

As a preliminary step, we are interested in undertaking an inventory of the types of transferable records which are currently used by Australian stakeholders. This will also help us identify to readers the kinds of documents in which we are most interested.

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<sup>6</sup> Based on the MLETR definition of '*transferable document or instrument*': MLETR, article 2.

### Question 1

Please identify which of the below documents you most predominantly use in your business activities. You may select more than one.

Alternatively, if you do not use any of these documents yourselves, please select those with which you are most familiar, or with which others in your network most predominantly use.

- |   |   |
|---|---|
| <b>(a) bills of exchange</b>  | <b>(h) air waybills<sup>7</sup></b>               |
| <b>(b) cheques</b>  | <b>(i) letters of credit<sup>8</sup></b>          |
| <b>(c) promissory notes</b>   | <b>(j) dock warrants</b>                          |
| <b>(d) consignment notes</b>  | <b>(k) dock receipts<sup>9</sup></b>              |
| <b>(e) bills of lading</b>  | <b>(l) ships delivery orders</b>                  |
| <b>(f) warehouse receipts</b>   | <b>(m) mate's receipts<sup>10</sup></b>           |
| <b>(g) transferable insurance certificates, like marine insurance policies and cargo insurance certificates</b> | <b>(n) warehouse-keeper's certificates</b>        |
|   | <b>(o) wharfinger's certificates<sup>11</sup></b> |

### Question 2

Can you identify any other document, used in Australia or by Australian entities, where a person needs to physically possess the document in order to claim the goods or money stated on the document?

*Under the MLETR, a 'transferable record' is a type of document, issued on paper, which entitles the holder to claim performance of an obligation, and which can be transferred to another person along with the right to performance.*

<sup>7</sup> Examples (a)-(h) are listed as indicative transferable records in the MLETR explanatory note, paragraph [38].

<sup>8</sup> Example (i) is described as document which might be transferable, depending on the laws of the relevant country. Along with investment instruments and investment securities [like shares and bonds] these documents are provisionally excluded from the MLETR's application. See [part 4.1](#) of this paper and MLETR explanatory note, paragraph [28(a)].

<sup>9</sup> Examples (j)-(k) are listed in §1-201(b)(16) of the United States Uniform Commercial Code as potential examples of 'documents of title'.

<sup>10</sup> Examples (l)-(m) are listed in the UK *Electronic Trade Documents Act 2023 (ETDA)* ETDA as potential examples of 'trade documents'. As discussed in [part 4.2](#), the definition of 'trade document' is different to the MLETR definition of 'transferable record'.

<sup>11</sup> s (n)-(o) are listed in section 65 of the *Goods Act 1958 (Vic)* (and may be listed in other comparable state and territory legislation) as potential examples of 'documents of title'.



## 2.2. How are transferable records currently used in Australia?

We are also interested in undertaking an inventory of the different ways that transferable records are used in Australia. This will help us identify the different commercial uses which may need to be enabled by electronic means, as well as any potential legal and constitutional issues.

For example, based on our preliminary engagement with stakeholders, our understanding is that 'bills of lading' may be used for a wide number of different commercial purposes, including the following:

- sellers of goods can hold onto the original bill of lading until the buyer has paid for the goods, or has met another condition of the sale contract, to incentivise payment
- shippers of goods may need to sign or endorse a bill of lading to give effect to a valid transfer of the bill to the consignee
- consignees of a bill of lading may produce or give up the bill to a carrier at a port of discharge, in order to collect the transported goods
- buyers of goods can cause the original bill of lading to be transferred to a bank, to be held as security for a loan
- banks can register a security interest over a physical bill of lading. Note that we discuss potential linkages to the *Personal Property Securities Act 2009* (Cth) (**PPSA**) below at [part 3.2](#) of this paper
- banks can require an original bill of lading to be transferred to them, before they issue a letter of credit to a seller
- insurance providers might pay insurance proceeds only to the person who is in possession of the original bill of lading.

Bills of lading can also be used for evidentiary or regulatory purposes: A person may be required to lodge or store a bill of lading, or a copy of the bill, with another entity in accordance with law or contract.

### Question 3

Please describe how you (or your business) use transferable records in your day-to-day business practices. Please reference any records you identified in [Question 1](#) and [Question 2](#).

Alternatively, if you do not use these records yourself, please describe broadly the ways in which you understand these records are most commonly used.

*For each of these uses, please describe:*

- *the commercial settings in which you use these records*
- *the entities or people from whom you ordinarily receive these records, and in what circumstances*
- *the entities or people you would give or transfer these records to, including why*
- *the reasons why physical possession or transfer of the paper record is necessary, if relevant*
- *the commercial benefits which come from your use of these records (for example, whether it minimises a particular risk).*

#### Question 4

If you or your business use transferable records in the context of trade, do you use these records in the context of international, inter-state or intra-state trade?

Please tick all that apply. You can select more than one.

- **International trade (goods imported into, or exported from, Australia)**
- **Inter-state domestic trade (goods produced in one state for use in a different state)**
- **Intra-state domestic trade (goods produced in one state for use in that same state)**

## 2.3. Current experiences using paper-based transferable records

We would also like to hear from stakeholders about how paper requirements for transferable records are impacting business' ability to conduct effective and efficient trade.

This will allow us to consider how to overcome these existing issues, and inform our analysis to government on implementation options for the MLETR.

### Expanding on previous STS consultations

Stakeholders may have already provided views or data on experiences with paper trade documents through prior STS consultations. These have included several public consultations relating to different aspects of simplified trade reform, including paperless trade.

For example, we have heard the following experiences of challenges and inefficiencies associated with using paper trade documents:

*"many SMEs [small and medium-sized enterprises] cannot access trade finance as they are resource-constrained when complying with paper-based trade requirements"*

*"manual handling of paper-based trade documents is also prone to error and fraud, leading to additional costs"<sup>12</sup>*

*"according to the World Bank, it takes an average of 43 hours to complete documentary and border compliance processes for a typical Australian shipment by sea."<sup>13</sup>*

We have also noted stakeholder support for Australian implementation of the MLETR specifically. For example, one large professional trade body noted that *"the implementation of international standards and frameworks, in conjunction with the MLETR, is critical in promoting digital solutions and enabling the transfer of electronic records in cross-border trade."*<sup>14</sup>

Building on these previous consultations, we would like to take this opportunity to hear from a broader range of stakeholders regarding the time and financial impacts which paper transferable records requirements have on their business activities – noting that previous consultations related to paper trade documents more generally, which are not necessarily 'transferable'.

If you have already addressed these issues in previous consultations, please feel free to provide us a copy of your prior submission and refer us to your response.

<sup>12</sup> ANZ, Submission to the STS Consultation, July 2023, paragraph [17].

<sup>13</sup> Australian Chamber of Commerce and Industry, Submission to the STS Consultation, August 2023, p 7.

<sup>14</sup> Institute of Export and International Trade, Submission to the STS Consultation, July 2023, p 5.

### Question 5

How many hours per year do you estimate you, or your business, spend in processing paper-based transferable records?

(Please refer to the records which you identified in [Question 1](#) and [Question 2](#)).

*Please provide an estimated or approximate number, for an aggregate of the transferable records you most frequently process, based on available data.*

*'Processing' for these purposes includes arranging couriers, posting, reviewing, completing, amending, accounting for unexpected changes or errors, filing, and other similar actions.*

### Question 6

What would you estimate to be the average annual financial cost to you, or your business, in processing paper-based transferable records?

(Please refer to the records which you identified in [Question 1](#) and [Question 2](#)).

*Please provide an estimated or approximate amount based on available data. Please account for employee or contractor hourly rates, legal fees, posting or printing, and other similar expenses.*

## Estimated impacts of reform

We are also interested in stakeholder estimates about the time or financial impact which using electronic transferable records (in place of paper) would have on business activities, assuming those stakeholders could access compliant technologies under a supportive legal framework.

### Question 7

If possible, please provide an estimate of how many hours you (or your business) might expect to save per year processing electronic transferable records, compared to paper versions.

*If applicable, please also provide a brief description of the basis on which you made this estimate.*

### Question 8

If possible, please provide an estimate of the financial savings you (or your business) might expect per year processing electronic transferable records, compared to paper versions.

*If applicable, please also provide a brief description of the basis on which you made this estimate.*

## Consumer benefits of reform

Productivity and cost benefits for businesses using electronic transferable records (through fewer manual and paper-based entry processes) may equate to benefits for these business' customers and consumers, and improved trade competitiveness may reduce the cost of imports, and put downward pressure on prices for imported items including household goods.

We are interested in preliminary stakeholder assessments on the extent to which the use of electronic transferable records (in place of paper versions) would reduce consumer costs.

### Question 9

How would you assess the impact of using electronic transferable record processes upon your or your business' customers and consumers?

- **It would likely result in lowered costs for my customers and consumers**
- **It would likely result in higher costs for my customers and consumers**
- **It would likely not have any effect on costs for my customers and consumers**

*Please expand on your answer – including, if applicable, a description of the basis on which you made this assessment.*

## 2.4. Paper-based transferable record requirements and paperless trade

We would also like to explore the extent to which paper-based transferable record requirements may be affecting broader 'paperless trade' initiatives.

As will be described in further detail below, Australian law does not clearly allow trade and commerce participants to use electronic transferable records. However, in trade and commerce, stakeholders may need to use a great variety of documents, many of which will not be 'transferable'. For example, different cross-border trade processes may involve non-transferable documents like invoices, order forms, certificates and contracts.

Australian law may already allow some of these non-transferable trade documents to be used and exchanged electronically.<sup>15</sup> Regardless, despite potential costs savings, we understand that trade participants may still often use (or require from others) paper-based versions of non-transferable trade documents.

Based on previous STS consultation responses, and other cross-government work on paperless trade including work being undertaken by the ABF, our understanding is that the continued reliance on paper trade documentation is due to several different factors, including:

- real or perceived differences in the legal validity or acceptability of electronic trade documentation across borders
- lack of trust, or concern about perceived or actual fraud, particularly for digital records
- the necessity and costs of updating systems and infrastructure to accommodate electronic trade documentation
- some examples where electronic non-transferable trade documentation may not be permitted under Australian law.<sup>16</sup>

However, we also understand that uncertainty around the validity of electronic transferable records specifically is one of the reasons for this continued reliance on paper trade documentation, and that this particular issue may be resolved through implementation of the MLETR.

<sup>15</sup> For example, the ETA may already confirm that electronic versions of non-transferable documents are equally valid as their paper-based equivalents.

<sup>16</sup> For example, if subject to an exemption under the *Electronic Transactions Regulations 2020* (Cth).

As one anonymous trade software company explained, trade participants may be able to exchange “8 out of 10” documents electronically – but participants will continue to rely on paper processes so long as “2 out of 10” documents must be in paper form: or, in other words, “you’re only as strong as your weakest link”.<sup>17</sup>

We would like to hear more views about the link between uncertainty regarding electronic transferable records, and uncertainty about paperless trade generally.

### Question 10

To what extent are your (or your business’) trade documentation processes generally affected by the specific issue of uncertainty about the legal validity of electronic transferable records?

- **Paper transferable record requirements do not affect our processes**
- **We use paper trade documents for several reasons, including paper transferable record requirements**
- **The primary reason we use paper trade documents is paper transferable record requirements.**

Please expand on your answer. For example, if applicable, please expand on which barriers prevent you from using electronic trade documentation generally.

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17 From STS user research interview with large trade-based software vendor.



# Chapter 3: Australian law applying to transferable records

The key provisions under the MLETR apply to requirements *under law* to possess and transfer a paper transferable record.<sup>18</sup>

In Australia, different types of transferable records are regulated by different laws and legal frameworks. Also, Australian laws dealing with transferable records do not necessarily require much day-to-day oversight from government.

Accordingly, the following sections ask stakeholders for help to identify Australian laws, legal frameworks and requirements which concern the use of transferable records.

This will help us build a preliminary understanding of how any Australian option for implementing MLETR should operate within and support these existing laws, as well as any potential overlap between the MLETR and other laws dealing with transferable records.

## 3.1. Possession, transfer and use of transferable records under Australian law

As described above, the key provisions under the MLETR apply to requirements or references under law to possess and transfer a unique transferable record.

If the MLETR were to be implemented in Australia, it would therefore apply to any requirement under Australian law to possess or transfer a transferable record and, specifically, confirm how these requirements could be met using electronic tools.<sup>19</sup>

In Australia, the uses of different transferable records may be regulated under a combination of Commonwealth, state and territory, contract and common law. To the extent any given transferable record is specifically regulated by law, the nature of the regulation or requirement may differ.

<sup>18</sup> MLETR, articles 10 and 11. The MLETR also applies to permissions under law to possess and transfer such records, to references to transferable records under law, and related processes like signing and amending a document. See [part 4](#) of this paper for a further brief discussion.

<sup>19</sup> See [part 4](#) of this paper for a discussion on how the MLETR enables electronic transferable records.

For example, under Australian legislation:

- the *Carriage of Goods by Sea Act 1991* (Cth) contains requirements for a sea carriage document (which may include a bill of lading)<sup>20</sup>
- the *Bills of Exchange Act 1909* (Cth) contains references to the ‘possession’ and ‘transfer’ of bills of exchange and promissory notes<sup>21</sup>
- the uniform state and territory Sea Carriage Documents Acts contain references to the ‘possession’ and ‘transfer’ of a bill of lading<sup>22</sup>
- the PPSA describes how security interests in ‘negotiable instruments’ (including bills of exchange, promissory notes and cheques), ‘documents of title’ (which may include bills of lading and warehouse receipts) and ‘financial property’ (which includes both negotiable instruments and documents of title) may be created, dealt with and enforced<sup>23</sup>
- state and territory goods acts, and comparable statutes,<sup>24</sup> contain references to the ‘possession’ and ‘transfer’ of ‘documents of title’, which are defined to include transferable records like bills of lading, dock warrants, warehouse-keeper’s certificates and wharfinger’s certificates.<sup>25</sup>

We would be interested in further examples from stakeholders of legal requirements or permissions of to use, transfer or possess a transferable record.

### Question 11

Can you identify any Australian laws – whether in legislation, the terms of a contract, or common law – which concern or require the possession or transfer or use of a paper transferable record?

*Please provide examples, references or extracts from contracts if possible.*

### Question 12

If the MLETR were implemented, what issues (if any) do you anticipate in its application to any of the laws referenced under this section (including any laws identified by yourself in Question 11)?

20 For example, at Schedule 1A, Article 3(3).

21 For example, in the definitions of the terms ‘bearer’ and ‘delivery’ under section 4, which are used throughout that Act.

22 For example, ‘possession’ is a required concept within the definition of the term ‘lawful holder’ under section 5 of the *Sea-Carriage Documents Act 1996* (NSW), which is used throughout that Act.

23 As defined under section 10 of the PPSA.

24 For example, comparable provisions may be found in the *Sale of Goods Act 1954* (ACT), *Mercantile Act 1936* (SA) and other comparable legislation.

25 *Goods Act 1958* (VIC), section 65.

## 3.2. Transferable records as property, including under the PPSA

We are also interested in exploring how the MLETR might apply to Australian laws which regulate the possession of transferable records as a form of 'property', such as under the PPSA.<sup>26</sup>

For example, the 'possession' or 'transfer' of negotiable instruments and documents of title (which can include transferable records like bills of exchange) can be integral to the creation of a security interest under the PPSA. For example, a security interest in a negotiable instrument may be 'perfected' if, amongst other things, the secured party is in possession of that instrument.<sup>27</sup>

Our preliminary position is that a MLETR framework should confirm that the PPSA provisions which apply to personal property are satisfied by an electronic transferable record. For example, a person who meets the criteria of possessing an electronic bill of exchange under the MLETR, should therefore also satisfy a requirement to possess a bill of exchange as a form of property for the purposes of the PPSA.<sup>28</sup>

However, the potential application of a MLETR-aligned framework to the PPSA and other property laws and frameworks may be more complex than to other laws, due to the relative complexity of 'property' as a legal concept under Australian law.

We will further examine the interaction between the MLETR and general property laws in due course. However, at this stage we are interested to hear preliminary views, suggestions or potential issues regarding how to ensure that Australian law confirms that electronic transferable records are an identifiable form of possessable property.

We would especially be interested in views from stakeholders who have a practical experience with property law, and the PPS system.

### Question 13

Please describe any views, suggestions or issues which the department should consider, to ensure that electronic transferable records are an identifiable form of possessable property under Australian law, including under the PPSA.

*If possible, please also elaborate on the extent to which you consider the MLETR would provide sufficient confirmation of the property status of electronic transferable records.*

<sup>26</sup> We note that between September and November 2023, an Exposure Draft to amend the PPSA, along with new Personal Property Securities Regulations, was released for public consultation. For a copy of the exposure draft, please visit the department's website.

<sup>27</sup> Paragraph 21(2)(b).

<sup>28</sup> These key criteria are discussed in greater detail at [part 4.2](#) of this paper.



### 3.3. Evidence and regulatory requirements

We are interested in distinguishing between legal requirements to possess or transfer a unique paper transferable record (which engage the MLETR key provisions), and requirements to provide a copy of a transferable record for evidence or regulatory purposes (which may not necessarily engage these provisions).

Australian law may require a person to produce or store a transferable record (or information on a transferable record) for evidence or regulatory purposes. For example:

- the *Air Navigation Regulation 2016* (Cth) requires an aircraft to produce bills of lading for cargo on an aircraft at the Secretary's request<sup>29</sup>
- the *Customs Act 1901* (Cth) requires certain commercial documentation to be retained, which may include transferable records<sup>30</sup>
- section 24 of the *Foreign Evidence Act 1994* (Cth) confirms the extent to which business records, which might include transferable records, can be adduced as evidence in a proceeding.

We understand that these kinds of requirements do not necessarily require that a person hold, or part with, possession of the original or unique document. For example, a regulator (or an entity which requires evidence) may be satisfied with a copy of a transferable record, particularly if the original physical record is being possessed or transferred between private contracting parties.

We would like to undertake an inventory of these kinds of requirements under Australian law. This will help us identify whether there are any legal barriers to these kinds of requirements.

This will also help us consider the extent to which the ETA already applies to allow these requirements to be met electronically, or alternatively, whether these processes are exempted from the application of the ETA.<sup>31</sup>

#### Question 14

What other evidence or regulatory requirements relating to transferable records are you aware of, under Australian law?

<sup>29</sup> Paragraph 41(2)(b).

<sup>30</sup> For example, under section 240.

<sup>31</sup> See [part 3.5](#) for a further discussion on the ETA.

## 3.4. Substantive and content requirements

We also want to distinguish between legal requirements to possess or transfer transferable records, and 'substantive' legal requirements for transferable records, or requirements which relate to the contents of a transferable record.

### Substantive requirements to issue a transferable record, or consequences when one is held

'Substantive requirements' include requirements to use transferable records in certain situations.

For example, the *Carriage of Goods by Sea Act 1991* (Cth) may require a person to issue a bill of lading in certain instances.<sup>32</sup>

If the MLETR were enacted in Australia, it would not be expected to change any existing substantive obligations to use a transferable record: it would merely confirm that a person *could* use an electronic transferable record to fulfil that obligation, if they so choose.

Also, whilst the MLETR may be relevant in determining whether a person is in 'possession' of a transferable record, it will not affect the rights associated with possession under other substantive laws.<sup>33</sup> Therefore, any rights, benefits or obligations arising from the possession of a transferable record would continue to be set by other substantive law and would not be affected by the MLETR.

### Content requirements

'Content requirements' include requirements to include certain information on a transferable record.

For example, the *Bills of Exchange Act 1909* (Cth) requires that a bill of exchange include an unconditional order in writing to pay a sum of money.<sup>34</sup>

The MLETR also does not affect content or information requirements for transferable records.<sup>35</sup> If the MLETR were enacted in Australia, it would not be expected to change the information which is generally required on a specific record: it would merely confirm that this information could be provided or inputted electronically, if a person chose to use an electronic transferable record.<sup>36</sup>

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32 Sub-article 3(3) of schedule 1A.

33 MLETR explanatory note, paragraph [37].

34 Section 8.

35 MLETR explanatory note, paragraph [11].

36 We note that article 10 of the MLETR specifically requires that, to be legally equivalent, an electronic transferable record must contain the same information that would be needed for a paper transferable record.

## 3.5. Application of the Uniform Australian ETAs

Australia already has a legal framework that confirms the legal equality of various paper and electronic communications under Australian law: the ETA and its state and territory counterparts.

Our view is that, whilst the ETA does not currently enable electronic transferable records, Australia's implementation of the MLETR should be undertaken with careful consideration of the ETA, to avoid inconsistency between these different but related frameworks.<sup>37</sup> Also, as noted at [part 1.4](#) of this paper, implementation of the MLETR could potentially be achieved through amendments to the ETA.

Accordingly, this section introduces the ETA and its state and territory counterparts, which will be discussed further in the following part of this consultation paper.

### What are the Uniform Australian ETAs?

The ETA is a Commonwealth Act, which confirms that a variety of paper document processes referenced under non-exempted Commonwealth laws (like making signatures or giving written information) can be achieved using electronic tools.

Stakeholders may view the department's webpage on the ETA here: [Electronic signatures, documents and transactions | Attorney-General's Department \(ag.gov.au\)](#).

All Australian states and territories have enacted individual Electronic Transactions Acts,<sup>38</sup> which are largely uniform in scope and approach, though which apply to laws under each respective state and territory, and may be subject to different exemptions and other differences. These Acts, including the ETA, are referred to in this paper collectively as the **Uniform Australian ETAs**.

### Background to the Uniform Australian ETAs – the Model Law on Electronic Commerce

The Uniform Australian ETAs were enacted by the Commonwealth and each state and territory between 1999 and 2003,<sup>39</sup> to create a generally-applicable legislative framework for electronic transactions in Australia.

The Uniform Australian ETAs were based on the Model Law on Electronic Commerce (**MLEC**),<sup>40</sup> which was developed by Working Group IV of UNCITRAL in 1996, and has been enacted in 169 international jurisdictions.<sup>41</sup> The MLEC is the most widely enacted of UNCITRAL's model texts.<sup>42</sup>

Commencing in 2011, all of the Uniform Australian ETAs were amended to incorporate new articles contained in the UN Convention on the Use of Electronic Communications in International Contracts (**Electronic Communications Convention**),<sup>43</sup> which amongst other things clarified the application of the Uniform Australian ETAs to contracts governed under applicable Australian law.<sup>44</sup>

Working Group IV of UNCITRAL have prepared a number of other model texts and other instruments, which all relate broadly to the use of electronic tools to undertake commercial activities, and which were each broadly developed to be consistent and complementary with the MLEC. The MLETR is one of these texts, which accounts for the broad consistency between some MLETR provisions and some provisions under the Uniform Australian ETAs.<sup>45</sup>

37 This is also consistent with UNCITRAL's guidance: see para. [72] of the MLETR guidance note.

38 For example, the *Electronic Transactions (Northern Territory) Act 2000* (NT) applies to NT law.

39 From the *Electronic Transactions Act 1999* (Cth) to the *Electronic Transactions Act 2003* (WA).

40 Electronic Transactions Bill 1999, second reading speech.

41 According to the UNCITRAL MLEC Status Table, [[Status: UNCITRAL Model Law on Electronic Commerce \(1996\) | United Nations Commission On International Trade Law](#)], accessed 15 May 2024.

42 [Electronic Commerce | United Nations Commission On International Trade Law](#).

43 Electronic Transactions Amendment Bill 2011, second reading speech.

44 For example, under section 15E.

45 Some of these similarities are discussed under [part 4](#) of this paper.

## Do the Uniform Australian ETAs enable electronic transferable records?

The Uniform Australian ETAs apply to requirements under Australian law to send written information, provide physical signatures, produce paper documents and record information.<sup>46</sup> Like the MLETR, the Uniform Australian ETAs contain technology-neutral criteria which must be met for these activities to be done electronically.<sup>47</sup>

However, our preliminary view is that the Uniform Australian ETAs are currently insufficient to legally enable electronic transferable records generally, for several reasons:

- first, the Uniform Australian ETAs do not confirm how core processes like ‘possessing’ or ‘transferring’ a unique paper document can be achieved through electronic means. Though the Acts confirm the legal equality of electronic and paper documents, notices and signatures, these provisions may not be sufficient to provide industry confidence that an electronic transferable record is equivalent to a unique paper version<sup>48</sup>
- second, in some cases, laws relating to transferable records may be exempted from the application of the Uniform Australian ETAs. For example, the *Bills of Exchange Act 1909* (Cth) is exempted from the Commonwealth ETA,<sup>49</sup> and the *Electronic Transactions (Queensland) Act 2001* specifically exempts certain transferable records from its application.<sup>50</sup>

We discuss cross-overs between the ETA and the MLETR in further detail in the following part of this consultation paper.

### Question 15

We would welcome any preliminary comments from stakeholders regarding the applicability of the Uniform Australian ETAs towards electronic transferable records.

*For example, we would be interested in views about the consequences of any potential overlap or inconsistency between the MLETR and the ETA.*

## 3.6. Electronic bills of lading under current Australian law

Though the Uniform Australian ETAs may not confirm the legal validity of all electronic transferable records, other Australian laws give legal recognition to electronic bills of lading (**eBOLs**) specifically, though according to different criteria than the MLETR.

This section briefly discusses the extent to which the Sea-Carriage Documents Acts and the *Carriage of Goods by Sea Act 1991* (Cth) already recognise eBOLs, and asks stakeholders to describe their experiences using this existing framework.

This will help us identify how these existing approaches will impact, or may overlap, with potential Australian options for implementing MLETR.

<sup>46</sup> These are some of the functions under Division 2 of Part 2 of the ETA.

<sup>47</sup> For example, under paragraph 9(1)(a) of the ETA, it must be reasonable to expect that electronic written information (where required under Commonwealth law) would be “readily accessible so as to be useable for subsequent reference”.

<sup>48</sup> For example, the UNCITRAL explanatory note to the MLEC indicates that the MLEC articles applying to signatures and written information do not provide functional equivalents for the transfer of rights and obligations by the transfer of written documents, at paragraph [113].

<sup>49</sup> Schedule 1, Item 1(13).

<sup>50</sup> Schedule 1, Items 12-17.

## The Sea-Carriage Documents Acts

The Sea-Carriage Documents Acts (**SCDAs**) are broadly-uniform legislation which were enacted in all Australian states and territories between 1996 and 1998,<sup>51</sup> and which reformed the pre-existing law relating to bills of lading, sea waybills and ships' delivery orders.

The SCDAs were based on the *Carriage of Goods by Sea Act 1992* (UK)<sup>52</sup> and, amongst other things, confirm the extent to which rights and liabilities under a contract of carriage can be transferred to a new party through the transfer of a bill of lading to that party.<sup>53</sup>

## The *Carriage of Goods by Sea Act*

The *Carriage of Goods by Sea Act 1991* (Cth) (**COGSA**) is a Commonwealth Act which applies an amended version of the Hague Visby Rules in Australian domestic law.

Amongst other things, COGSA sets binding rules and limitations regarding the liability of carriers (like shipping lines) in relation to their carriage of goods under a contract of carriage. For example, COGSA requires a carrier to provide a bill of lading to a shipper in specific instances,<sup>54</sup> and may limit a carrier's liability for damaged goods by reference to information on a bill of lading.<sup>55</sup>

## What are eBOLs which are enabled by contract?

The SCDAs and the COGSA confirm that eBOLs which are given legal effect by contract, are legally valid for the purposes of both of these Acts.<sup>56</sup>

For example, a carrier of goods may enter an agreement with all anticipated users of the eBOL, including the shipper of goods, the consignee and the financing bank. The agreement may confirm that all parties can use a particular system to issue, possess and transfer the eBOL and that the system's rules, processes and codes apply to the use of that eBOL.

In some cases, there may be a third party or system administrator attached to the electronic system. This administrator may track the transfer of the bill between all the various parties in the trade journey, potentially using a private electronic database to do so.

Accordingly, a person who 'possesses' an eBOL according to the agreed rules of a particular electronic system, may also possess that bill of lading for the purpose of any requirement under the above laws.

### Question 16

Have you (or your business) used, or do you currently use, electronic bills of lading through existing private contractual frameworks?

- **Yes**
- **No**

If you have, please describe what system you used, for what specific purposes, and what parties are typically parties to the underlying contract.

51 From the *Sea-Carriage Documents Act 1996* (Qld) until the *Sea-Carriage Documents Act 1998* (NT).

52 Explanatory notes, *Sea-Carriage Documents Bill 1996* (QLD), page 1.

53 For example, under sections 8 and 10 of the *Sea-Carriage Documents Act 1997* (NSW).

54 Schedule 1A, Article 3(3).

55 Schedule 1A, Article 4(5)(c).

56 Discussion Paper: Proposals for Reform of Australian Bills of Lading Legislation, Attorney-General's Department and Department of Transport, June 1994, page 25 (discussion regarding SeaDocs and CMI Rules).

## How does the COGSA and SCDA's approach to eBOLs differ from MLETR?

The COGSA and SCDA's each take a similar approach to enabling eBOLs. To summarise, both Acts:

- broadly, confirm that 'data messages' can be used to produce sea carriage documents including bills of lading<sup>57</sup>
- specifically, relegate the definition of key actions like 'possession' and 'transfer' of the document to the terms of an underlying contract.<sup>58</sup>

Neither Act sets any further criteria or limitations about how the underlying contract must enable eBOLs. For example, neither Act itself requires that a specific system be used to maintain a unique electronic record of the bill of lading.

This approach differs from the MLETR, which *does* contain specific criteria which must be satisfied for an electronic transferable record (including an eBOL) to be legally equal to a paper record.

These criteria are described in further detail in [part 4](#) of this paper, but include requirements that:

- the technology must incorporate a method to confirm that one person is in exclusive control of the record
- the technology must be appropriately reliable for the purpose, having regard to factors like security, verifiability, and industry standards.

Another key difference is that the MLETR applies to all types of transferable record, where referenced under all new (and future) laws – whereas the above Acts apply only to specified documents including bills of lading.

### Question 17

What comparative advantages or disadvantages can you identify in the approach to legal validity between the MLETR, and the approach enabled under the SCDA's and the COGSA?

Please refer to [part 4](#) of this paper for a discussion of the approach to functional equivalence under the MLETR.

### Question 18

How should an Australian option for implementing MLETR-aligned legislation interact with existing, contractually-enabled eBOLs?

57 For example, under Article 1A(1) to Schedule 1A of the COGSA: the Rules apply with 'necessary changes, to a [bill of lading] in the form of a data message in the same way as they apply to such a document in printed form'.

58 For example, section 6(3) of the NSW SCDA defines "possession", in relation to the [bill of lading], [as including] being in receipt of the document in any manner which constitutes possession under the terms of the contract of carriage...'.

## Stakeholder experiences using eBOLs which are enabled by contract

We understand that many international trade participants currently use a variety of contractual systems to issue and transfer eBOLs,<sup>59</sup> and that users of eBOLs may benefit from increased speed of transfer, and potential reductions in cost, errors and fraud-related risks.<sup>60</sup>

However, we have also heard that there may be potential barriers to adoption of eBOLs using contractual systems as provided under these Acts, such as cost and experience barriers for small and medium-sized enterprises (**SMEs**). For example, one large Australian bank provided the following comments to a previous STS consultation:

*'...a uniform code applicable to all the relevant trade documents for their sector may not exist [for SMEs]. Moreover, resource constraints mean it is also more challenging for SMEs generally to transition to new practices... These inefficiencies and constraints contribute to the growing gap in trade finance, which has been persistently large for at least a decade...'*<sup>61</sup>

We have also heard anecdotally that some eBOL systems, whilst providing efficiency benefits, may:

- be 'closed' to parties who had not signed the original contract, which can affect the validity of an electronic transfer of an eBOL to outside parties
- not necessarily allow transfers of eBOL between different private systems (that is, because different systems do not utilise common data definitions or compatible technologies).<sup>62</sup>

We are interested in further understanding the benefits enjoyed by stakeholders who use eBOLs under the SCDA and COGSA, as well as any perceived barriers to the use of eBOLs under contract. This will help us consider how any MLETR implementation options might address these gaps.

### Question 19

How do you assess the effectiveness of contractual frameworks to confirm the legal validity of electronic transferable records?

- **Generally effective**
- **Generally not effective**
- **Their effectiveness depends on how they are used**
- **Unsure**

Please expand on your answer.

*For example, what benefits, barriers or risks do you identify, or have you experienced, with these frameworks?*

59 [Digitalising Trade: The Role of Paperless Platforms](#), APEC Policy Support Unit Brief No. 59, March 2024, p 8.

60 E-Bills of Lading Article, Norton Rose Fullbright, February 2018, [[E-bills of lading | Australia | Global law firm | Norton Rose Fulbright](#)], accessed 15 May 2024.

61 ANZ, Submission to the STS Consultation, July 2023, para [18].

62 [Digitalising Trade: The Role of Paperless Platforms](#), APEC Policy Support Unit Policy Brief No. 59, March 2024, page 6; TradeTrust-Enabled Electronic Bills of Lading, Stephenson Harwood, July 2023, para [2.7]-[2.8].



# Chapter 4: The MLETR in an Australian context

This part of the consultation paper introduces stakeholders to the key provisions of the MLETR, and in particular, how these provisions confirm that electronic and paper-based transferable records are equal under law.

We also briefly discuss the extent to which the approach under these provisions is comparable with existing Australian law, as well as briefly commenting on deviations taken by some international jurisdictions to date in their adoption of MLETR-based legislation.

This is intended to draw out preliminary views on how the MLETR could be implemented in Australia in a manner which is consistent with Australian law, interoperable with comparable international framework, and appropriate to provide confidence to industry.

## 4.1. The MLETR – transferable records covered

We are interested in preliminary views about what kinds of records an Australian option for MLETR should apply to, and whether any transferable records should be considered out-of-scope.

### What types of records are covered by the MLETR?

As discussed above, the MLETR applies to laws relating to ‘transferable records’. The MLETR defines this term broadly by reference to the key characteristics of these records,<sup>63</sup> and does not specify the names or types of records that will necessarily hold these characteristics.

However, the explanatory note to the UNCITRAL MLETR (**MLETR explanatory note**) – a document prepared by UNCITRAL as an accompanying guide to the MLETR – indicates that these might include bills of exchange, cheques, promissory notes, consignment notes, bills of lading, warehouse receipts, insurance certificates and air waybills.<sup>64</sup>

The MLETR explanatory note also notes that the applicable substantive law of a jurisdiction should determine what documents or instruments are transferable within that jurisdiction.

<sup>63</sup> The definition of ‘*transferable document or instrument*’ under article 2 of the MLETR focuses on the key functions of transferability, and of providing a title to performance.

<sup>64</sup> Paragraph [38].



## Records provisionally excluded from the MLETR

The MLETR also provisionally excludes certain types of transferable records from its application.

Where a specific type of record is excluded, the MLETR would not confirm whether that document can be possessed, is transferable or can be used by electronic tools (though other laws may otherwise enable these documents to be used in an electronic form).

Specifically, the MLETR provisionally excludes:

- *Securities*, such as shares and bonds<sup>65</sup>
- *Other investment instruments*, which may refer to derivative instruments, money market instruments and any other financial product available for investment.<sup>66</sup>

The MLETR also clarifies that a jurisdiction may also consider whether to exclude other transferable records,<sup>67</sup> such as:

- *letters of credit*, to the extent that such documents may be considered transferable records within the enacting jurisdiction
- documents falling under the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) and of the Convention Providing a Uniform Law for Cheques (Geneva, 1931).

The department in considering the implementation of the MLETR has been primarily focussed on the area of cross-border trade, and therefore is not aware of any concerns or interest associated with the possession or transfer of shares, investment instruments, and letters of credit in electronic form.

Accordingly, the department is interested in preliminary stakeholder views about whether these financial and investment records may be transferable and, if so, any reasons why they shouldn't also be provisionally excluded from an Australian implementation of the MLETR.

### Question 20

In your view, should securities like shares and bonds, investment instruments, and letters of credit be excluded from any Australian implementation of MLETR?

- **Yes**
- **No**
- **Unsure**

Please expand on your answer.

*For example, what particular issues do you foresee if these financial instruments were included or excluded?*

### Question 21

Please share your views about whether any other records should be specifically included or excluded from Australia's implementation of MLETR?

<sup>65</sup> We note that the reference to 'securities' is in relation to financial instruments, and is not intended to exclude transferable records as a form of collateral for security rights purposes. See item [26] of the explanatory note.

<sup>66</sup> Article 1[3].

<sup>67</sup> These are described further at paragraphs [26] to [29] of the MLETR explanatory note.

## How other jurisdictions have applied the MLETR to specific records

As of July 2024, 10 international jurisdictions have enacted legislation which is based on or inspired by the MLETR.<sup>68</sup>

The majority of these jurisdictions have adopted the broad definition of ‘transferable document or instrument’ set out under the MLETR, that is, without specifying under law which records the MLETR will apply to.<sup>69</sup>

Singapore’s *Electronic Transactions Act 2010* uses the broad definition, and also specifies that the relevant MLETR-based provisions under their Act will apply to bills of exchange, promissory notes, and bills of lading as those terms are defined under relevant domestic law.<sup>70</sup>

The UK *Electronic Trade Documents Act 2023 (ETDA)* takes a different approach, by confirming that possession and other legal rights apply to electronic versions of paper trade documents. ‘*Trade documents*’ are documents in paper form, used in trade or trade finance, and which under law or custom require possession of the document to claim performance of an obligation.<sup>71</sup>

Unlike ‘transferable records’ under the MLETR, trade documents under the ETDA do not specifically need to be subject to ‘transfer’ for the ETDA to apply. This means that the ETDA is intended to also apply to trade documents which must be ‘possessed’, but whose transferability may be limited,<sup>72</sup> such as straight bills of lading.<sup>73</sup>

### Question 22

Should an Australian option for MLETR extend to documents like straight bills of lading, or other documents which must generally be physically possessed, but need not be transferable?

- **Yes**
- **No**
- **Unsure**

Please expand on your answer.

*For example, what other documents may be possessable but not transferable? Do you foresee any issues if these were included or excluded?*

### Question 23

Should an Australian option for MLETR be limited to transferable records which are used specifically in the context of international trade?

- **Yes**
- **No**
- **Unsure**

Please expand on your answer.

*For example, do you foresee any particular issues if MLETR were limited to international trade only?*

68 MLETR Tracker, International Chamber of Commerce Digital Standards Initiative, [[MLETR Tracker | Cross-Border Paperless Trade Database \(digitalizetrade.org\)](#)], accessed 17 July 2024.

69 For example, see section 3 of Papua New Guinea’s *Electronic Transactions Act 2021*.

70 Subsection 16A(1).

71 Section 1.

72 For example, see discussions relating to straight bills of lading and mate’s receipts under the UKDA at paragraph [3.37] and [3.43] of the UKLC 2022 Report.

73 For reference, a straight bill of lading is a bill of lading which is consignable to a named person, which must be produced by the consignee to effect delivery of the specified goods, but which cannot be transferred to another consignee (whether by delivery or endorsement).

## 4.2. The MLETR – functional equivalence

We are interested in preliminary views about how an Australian option for MLETR should confirm the legal equality, or functional equivalence, of electronic and paper records.

Accordingly, this section broadly discusses how the MLETR enables functional equivalence, and asks stakeholders for preliminary views on whether this approach would promote confidence in the legal validity of electronic transferable records in an Australian context.

### How does the MLETR enable functional equivalence?

**Functional equivalence** refers to an approach to legal validity which is based on an analysis of the essential functions of paper-based processes, with a view to achieving those functions through electronic means.

In developing the MLETR, UNCITRAL had regard to a number of essential functions relevant to transferable records: including the need that a unique and singular copy of such records is possessed and transferred by one person at a time.

Accordingly, MLETR is intended to give legal validity to electronic transferable records only if they achieve these functions in an electronic manner – that is, only if they are ‘functionally equivalent’ to a paper record. This is achieved primarily under articles 10 and 11 of the MLETR.

#### **Please refer to articles 10 and 11 at the MLETR, set out at Annexure A.**

Together, articles 10 and 11 confirm that a person can satisfy a requirement to possess a paper transferable record, if that person can be identified as having ‘*exclusive control*’ of an electronic transferable record which:

- contains all information normally required on the equivalent paper record, and
- uses a ‘*reliable method*’ to identify that the record is unique, ensure that it is subject to control, and retain the record’s integrity.

The requirement of ‘*control*’ is intended to be functionally equivalent to the notion of ‘*possession*’, which is a central requirement to the use of all transferable records.<sup>74</sup>

Further, the requirement that the holder be ‘*identified*’ as being in exclusive control is intended to be functionally equivalent to the ‘*singularity*’ of a paper trade document, and thereby limit the possibility of multiple claims of the same obligation using identical copies of an electronic document.<sup>75</sup>

### Functional equivalence, for functions other than possession and transfer

Where an electronic transferable record is functionally equivalent to a paper record, the MLETR also confirms that electronic tools may also be used to satisfy other relevant requirements or functions under law.

For example, the MLETR also contains provisions confirming the functional equivalence (or non-discrimination against) the following functions when completed electronically in respect of an electronic transferable record: writing on a transferable record; signing a transferable record; and indicating a time or place for, endorsing, and amending an electronic transferable record.<sup>76</sup>

<sup>74</sup> MLETR explanatory note, paragraph [107].

<sup>75</sup> MLETR explanatory note, paragraph [84].

<sup>76</sup> MLETR articles 8, 9, 13, 15 and 16, respectively.

## How are these provisions comparable with existing Australian law?

If the MLETR were implemented in Australia, provisions based on articles 10 and 11 may confirm how any requirement to possess or transfer transferable records under Australian law (including potentially those noted under [part 3](#) of this paper) could be undertaken electronically.

There is no equivalent to these articles under current Australian law. For example, as discussed at [part 3.6](#) of this paper, existing Australian laws which enable the use of eBOLs do not themselves require eBOLs to be functionally equivalent in the same manner.

However, with respect to functions other than 'possession' and 'transfer' under MLETR (for example, 'signatures' and 'information in writing'), our view is that the conditions for functional equivalence under other MLETR articles may be broadly comparable to those under the Uniform Australian ETAs.

For example, both section 9 of the ETA and article 8 of the MLETR require, amongst other things, that electronic written information must be '*accessible so as to be useable for subsequent reference*' in order to be functionally equivalent to physically-written information.

We note that, in developing these provisions, UNCITRAL had regard to maintaining consistency with earlier texts, in particular the MLEC and the Electronic Communications Convention. As described at [part 3.5](#) above, the Uniform Australian ETAs were substantially inspired by the MLEC and the Electronic Communications Convention.

### Question 24

Would adoption of the MLETR in its current form provide you with confidence that electronic transferable records are just as legally valid as paper versions of those records for the purpose of Australian law?

- **Yes**
- **No**
- **Unsure at this stage**

Please expand on your answer.

*For example: what, if any, modifications or clarifications would be necessary to provide you with confidence in the legal validity of electronic transferable records.*

## How other jurisdictions have enabled functional equivalence

Of the 10 international jurisdictions which have enacted MLETR-based legislation to date, the majority have established functional equivalence through substantial adoption of the MLETR. Most of these jurisdictions – particularly those which, like Australia, have existing legislation based on the MLEC – incorporated these provisions within their existing electronic transactions legislation.<sup>77</sup>

The UK – which has not previously enacted legislation based on the MLEC or the Electronic Communications Convention – took a different approach to confirming the functional equivalence of paper and electronic trade documents under UK law.

In brief, the UK ETDA:<sup>78</sup>

- does not say that the function of possessing a paper record can be achieved by a person being identified as having exclusive control of an electronic version of that record
- instead confirms, amongst other things, that an electronic ‘trade document’ is capable of being possessed,<sup>79</sup> and that anything done in relation to an electronic trade document has the same effect in relation to the document as it would have in relation to its paper counterpart.<sup>80</sup>

These above provisions were intended to ensure that the rights available to those in possession a paper trade document should also be available in respect of electronic trade documents,<sup>81</sup> though in a manner more appropriate to accommodate features particular to the law of England and Wales.<sup>82</sup>

At this stage, we would be interested in preliminary views regarding whether a distinct approach to functional equivalence might also be appropriate in an Australian context, given Australia’s connection with English law.

### Question 25

Please share your preliminary views about whether there is anything under Australian law which you think justifies a unique approach to confirming the functional equivalence of transferable records (that is, as distinct from the MLETR)?

77 Including without limitation, Singapore under the *Electronic Transactions Act 2010*; Belize under the *Electronic Transactions Act 2021*; Kiribati under the *Electronic Transactions Act 2021*; and Papua New Guinea under the *Electronic Transactions Act 2021*.

78 Both the [Digital Assets: Electronic Trade Documents Consultation Paper 254](#), United Kingdom Law Commission, 30 April 2021 (**UKLC 2021 Consultation Paper**) and UKLC 2022 Report contain comprehensive discussions and comparisons from the UKLC about the distinctions between the ETDA and MLETR.

79 UKLC 2022 Report, paragraph [4.48].

80 ETDA, subsection 3(3).

81 UKLC 2022 Report, paragraph [8.17].

82 UKLC 2021 Consultation Paper, paragraph [5.135].

## 4.3. The MLETR – technology-neutrality

We are also interested in preliminary views about how an Australian option for MLETR should provide flexibility for trade participants to use available technology or electronic systems, whilst also ensuring minimum levels of security and reliability.

Accordingly, this section broadly discusses how the MLETR provides a technology-neutral or flexible approach, and asks stakeholders for preliminary views on whether this approach would promote both innovation and confidence in the usability of electronic transferable records.

### How does the MLETR enable technology-neutrality?

**Technology-neutrality** refers to an approach to legal validity that provides generic rules to achieve functional equivalence, and which does not require any particular system or software to be used for compliance.

For example, several provisions under MLETR which establish functional equivalence, including articles 10 and 11, require that a sufficiently 'reliable' method be used to establish particular criteria, without specifying any technology, software or electronic method that must be used.

Article 12 of the MLETR contains the considerations relevant to an assessment of whether a specific method is sufficiently reliable. For example, under article 12, a method must be 'as reliable as appropriate': based on the function for which the method is being used and all relevant circumstances, including the following non-exhaustive factors:

- (i) any operational rules relevant to the assessment of reliability
- (ii) the assurance of data integrity
- (iii) the ability to prevent unauthorized access to and use of the system
- (iv) the security of hardware and software
- (v) the regularity and extent of audit by an independent body
- (vi) the existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method
- (vii) any applicable industry standard.

#### **Please refer to article 12 of the MLETR set out at Annexure A.**

Article 12 also confirms that a method which has 'in fact' fulfilled the relevant function, for example based on evidence to that effect, will be deemed appropriately reliable. This provision was intended to limit frivolous litigation concerning the reliability of demonstrably effective methods.

Subject to the method being appropriately reliable, parties may therefore generate or possess electronic transferable records using the method of their choosing, whether based on distributed ledger technology, registry, token, or any other technology.<sup>83</sup>

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<sup>83</sup> MLETR explanatory note, at [18].

## How are these provisions comparable with existing Australian law?

The approach under article 12 of the MLETR is comparable with the Uniform Australian ETAs, which likewise require that 'reliable' methods be used to electronically complete certain functions required or permitted under law (like making signatures), where the 'reliability' of these methods may be considered in light of the purpose for which it was used, and all other relevant circumstances.<sup>84</sup>

For example, this approach gives Australians the flexibility to use any technology or method of their choosing to generate an electronic signature as required under Commonwealth law, so long as the method identifies the signer and their intention, using a sufficiently 'reliable' method.<sup>85</sup>

Conversely, as discussed at [part 3.6](#) of this paper, existing Australian laws which enable the use of eBOLs do not themselves require that the method used to generate the eBOL be sufficiently reliable, nor set any factors relevant to reliability. In addition, eBOLs may be restricted to the technology or system referred to in the underlying agreement.

We are interested in preliminary stakeholder views about the appropriateness of factors upon which reliability can be assessed under article 12 of the MLETR, including any potential changes which may improve stakeholder confidence or clarity.

### Question 26

To what extent does the approach to reliability under article 12 of the MLETR appropriately balance stakeholder **confidence** (that is, confidence in the legal validity of a particular electronic method) and flexibility (that is, **flexibility** to use a technology or method of the stakeholder's choice).

- **Very well**
- **Well**
- **Somewhat**
- **Poorly**
- **Very poorly**
- **Unsure**

Please explain your answer, especially what other factors might be relevant to determining reliability, or any other changes which you consider might achieve this balance.

### Question 27

In your view, do the factors under article 12 sufficiently promote stakeholders trust and security in the use of electronic transferable records (including the prevention of fraud and the security of data relating to electronic transferable records)?

- **Yes**
- **No**
- **Unsure**

Please explain your answer, especially what other factors might be relevant to promoting trust and security in the use of electronic transferable records.

<sup>84</sup> For example, under section 10 and 12 of the Commonwealth ETA.

<sup>85</sup> Amongst other criteria in the ETA.

## How other jurisdictions have enabled technology neutrality

Of the 10 international jurisdictions which have enacted MLETR-based legislation to date, the majority have enabled technology neutrality through substantial adoption of article 12 of the MLETR.

Singapore, which adopted article 12 of the MLETR substantially, also included a provision to confirm that future regulations may specify electronic record management systems which are 'presumed' to be reliable.<sup>86</sup>

The UK ETDA also adopted general reliability standards based substantially on those under the MLETR.<sup>87</sup> Unlike Singapore, the ETDA does not contemplate the accreditation of a trade record management system.


### Question 28

Please share any views you have about whether an Australian MLETR implementation option should utilise an accreditation system to specify that certain electronic transferable record management systems are sufficiently reliable?

<sup>86</sup> Under section 16Q, also discussed in TradeTrust-Enabled Electronic Bills of Lading, Stephenson Harwood, July 2023, paragraph [5.19]. As of July 2023, we understand that no accreditation programme has been launched, nor any providers accredited pursuant to the above section 16Q.

<sup>87</sup> These general reliability standards are set out under subsection 2(5), and are based on the factors set out at article 12(a) of the MLETR. See para [6.46] of the UKLC 2022 Report.





# Chapter 5: International interoperability and industry engagement

The department's current role is to develop options for implementation of domestic legislation aligned with the MLETR.

However, we recognise the importance of considering broader and more practical considerations – outside of domestic legislation, and in collaboration with relevant cross-government agencies – so that any MLETR-based framework is usable for industry.

This final part of the consultation paper describes some of these broader considerations which the department considers relevant to the implementation of the MLETR under domestic law.

## 5.1. International legal interoperability

We are interested in preliminary stakeholder views about how to ensure Australia's electronic transferable record legal framework is compatible and legally interoperable with those of our international trading partners.

### Legal interoperability through adoption of an international standard

Transferable records are regularly used in course of trade between Australia and other countries. The effectiveness of any Australian legal framework for electronic transferable records may therefore be affected if it was generally inconsistent with Australia's trading partners' frameworks.

Accordingly, we have heard from stakeholders that any Australian option for enabling electronic transferable records should prioritise interoperability of legal approaches to electronic transferable records both in Australia, and across international borders.

For example, stakeholders responding to previous STS consultations have shared the following views on the need to ensure international legal interoperability:

*"given the inherently global character of cross-border trade, consideration of interoperability with trading partners' legal frameworks is essential..."<sup>88</sup>*

*"MTLER represents [an] internationally recognised set of standards and it would appear to be the appropriate basis for adoption in Australia..."<sup>89</sup>*

Based on this initial stakeholder feedback, the department's initial view is that adoption of a model law in Australia, like the MLETR, would provide the most effective means of ensuring that Australia's legal framework is harmonised with those overseas.

<sup>88</sup> Institute of Export and International Trade, Submission to the STS Consultation, July 2023, page 6.

<sup>89</sup> International Forwarders and Customs Brokers Association of Australia, Submission to the STS Consultation, August 2023, page 13.

In addition, according to the International Chamber of Commerce Digital Standards Initiative,<sup>90</sup> various other jurisdictions are at advancing stages of considering or adopting MLETR-aligned legal frameworks, including Cambodia, Canada, Colombia, Mexico, Spain and Thailand.

### Question 29

To what extent do you consider that adoption of the MLETR would enable an internationally-interoperable legal framework for electronic transferable records?

## International deviations to the MLETR approach

We are also interested in stakeholder views about whether inconsistent international approaches to electronic transferable records may affect the usability of any MLETR-based option in Australia.

Though the MLETR was developed broadly to achieve a more uniform international approach to electronic transferable records, the nature of a model law like MLETR is that any jurisdiction may enact it partially or with modifications of its choosing.

We also recognise that, potentially, not all jurisdictions may enact electronic transferable record legislation, whilst others may enact MLETR-aligned legislation at a different pace, or legislation which does not contain compatible criteria for functional equivalence.

Our preliminary view is that compatible international frameworks for electronic transferable records will improve the usability of such records across borders. As noted by Australia's engagement on the MLETR described below, Australia is actively participating in efforts to encourage international adoption of frameworks which take the MLETR into account.

However, our preliminary view is that inconsistent legal frameworks would still not necessarily prevent cross-border transactions involving transferable records because:

- the MLETR does not require any person to use electronic transferable records – it only confirms that a person may choose to use electronic transferable records if they so desire – and accordingly trade participants may continue to use traditional paper records where there is no alternative
- articles 17 and 18 of the MLETR enable trade participants to 'convert' electronic transferable records to paper records, and vice versa, for example if required to satisfy any paper-based requirements of another jurisdiction.

### **Please refer to articles 17 and 18 of the MLETR set out at Annexure A.**

However, we are interested in stakeholder views about the extent to which international adoption of comparable legal frameworks would be a factor in their use of electronic transferable records.

<sup>90</sup> MLETR Tracker, International Chamber of Commerce Digital Standards Initiative, [[MLETR Tracker | Cross-Border Paperless Trade Database \(digitalizetrade.org\)](#)], accessed 17 July 2024.

### Question 30

Assuming that Australia enacted legislation based on the MLETR: would you consider the legality of electronic transferable records in other international jurisdictions, before you adopted electronic transferable records into your business practices?

- **Yes**
- **No**
- **Unsure**

Please explain your answer, including (if applicable) the extent to which articles 17 and 18 would be sufficient for you to navigate between electronic and paper requirements.

## Australian international engagement on MLETR

In addition to feedback from trade participants, Australia's engagement in multilateral forums and with Australia's trading partners provides opportunities to leverage the benefits of international adoption of the MLETR, and learn from international experiences to drive domestic reform.

For example, Australia is currently leading an Asia-Pacific Economic Cooperation (**APEC**) project to analyse the legal gaps and economic benefits of APEC economies adopting a legal framework that takes the MLETR into account. Australia's engagement will help facilitate next steps for greater cooperation in our region towards collectively implementing paperless trade.

In addition, at the G7 hosted by the UK in 2021, Australia agreed to the 'Framework for G7 Collaboration on Electronic Transferable Records', which champions the work of UNCITRAL and promotes the adoption of legal frameworks aligned with the MLETR.

The Australian Government also participates in global rule-making to shape and support an open digital economy. For example, Australia has agreed to provisions in the Australia-Singapore Digital Economy Agreement,<sup>91</sup> and the Australia-United Kingdom Free Trade Agreement which recognise the importance of developing mechanisms to facilitate the use of electronic transferable records, and encourage parties to consider model texts like the MLETR.<sup>92</sup>

## 5.2. MLETR technology

The department's engagement in the MLETR project is limited to investigating options to confirm the legal validity of electronic transferable records. We are not considering the development of technology for the use of electronic transferable records.

However, we also recognise that trade participants will need to have access to appropriate technology based on appropriate technological standards, to use these records effectively.

Accordingly, this section of the consultation paper broadly seeks preliminary views about the technologies and technological standards which have been developed by relevant bodies and industry, to generate or transfer an electronic transferable record pursuant to the MLETR. We also ask stakeholders to identify any technology-specific challenges to the usability of electronic transferable records.

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<sup>91</sup> Article 8.4.

<sup>92</sup> Article 14.4(3).

## Identifying different technological options for MLETR

As described at [part 4.3](#) of this paper, the MLETR takes a technology neutral approach to electronic transferable records, and does not itself specify that any particular technologies be used to identify that the electronic record is unique and subject to exclusive control.

Technology systems which use distributed ledger technology (**DLT**) may provide one potential means of practically achieving these requirements.<sup>93</sup>

- Technologies using distributed ledgers will track information on a type of database, that is hosted and maintained collectively by a network of linked computers.
- New data can only be added if, by a collective consensus mechanism, all the linked computers have verified the data's trustworthiness.<sup>94</sup>
- A transferable record in the form of electronic data might therefore be issued via a distributed ledger, and accessible on a particular system. The data could reflect who controls the unique record, which could be transferable by the parties signing with their private keys. Any new data would need to pass the ledger's consensus mechanism, reducing the risk of tampering.<sup>95</sup>

However, trade participants can also use other technologies pursuant to the MLETR, so long as the system incorporates appropriately reliable methods. For example, we have heard initial assessments that some existing eBOL platforms of the type described under [part 3.6](#) may already satisfy the MLETR requirements, depending on their underlying rules and requirements.

### Question 31

Are you aware of, or have you ever used, an electronic system to issue or transfer a unique electronic document, in a way that maintains exclusive control of that document?

- **Yes**
- **No**

If yes, please describe your experiences using the system, broadly how the system tracked exclusive control of the record, and any challenges you experienced or of which you are aware?

## Data and technological interoperability

If the MLETR were enacted under Australian law, it would provide a more uniform framework for confirming the legal validity of electronic transferable records, accordingly to more uniform criteria relating to the reliability, security and accessibility of these records.

We anticipate that the MLETR-aligned framework may give technology-providers greater confidence to develop compliant systems for generating transferable records, and trade participants greater confidence to use these tools to generate and transfer transferable records under Australian law.

Electronic transferable records based on common legal frameworks may also be more easily transferable between different private systems, so long as those systems utilise common data standards or underlying technologies. For example, 'TradeTrust', developed by the Singapore Infocomm Media Development Authority, is an existing open-source technological framework based on a common distributed ledger, which can be used to exchange MLETR-compliant electronic transferable records between separate system providers.<sup>96</sup>

<sup>93</sup> UKLC 2021 Consultation Paper, paragraph [2.53].

<sup>94</sup> For a summary of DLT, see Annexure 3 of the UKLC 2021 Consultation Paper, page 172.

<sup>95</sup> White Paper on Transfer of MLETR-Compliant Titles, United Nations Centre for Trade Facilitation and Electronic (UN/CEFACT), September 2023, pages 8-14.

<sup>96</sup> [TradeTrust-Enabled Electronic Bills of Lading, Stephenson Harwood](#), July 2023.

We are also aware of efforts being undertaken, including by the International Chamber of Commerce (ICC) Digital Standards Initiative, to develop harmonised digitalised trade standards as a key enabler of enabling inclusive international digital trade.<sup>97</sup>

However, the MLETR does not itself require technology providers to develop or provide technology systems which can communicate, or share data, with other MLETR-compliant technology systems. For example, different providers may rely on different underlying systems, or use reference key data in a particular way, which may be incompatible with other systems or data standards.

Whilst the existence of unaligned technologies would not itself affect the legal validity of an electronic transferable record issued under MLETR, we are interested in the extent to which unaligned technologies may practically impact the usability of electronic transferable records.

We are also interested in stakeholder views on how to encourage software developers and vendors to develop technologies and platforms which are broadly interoperable (and may communicate) with other technology methods, including how to encourage the use of common data standards.

### **Question 32**

Please share any views on how the government can encourage interoperability between different technologies, and use of common data standards, under a MLETR-aligned legal framework?

### **Question 33**

What challenges do you expect software vendors may face in developing technology to enable the use and transfer of electronic transferable records in compliance with the MLETR?

## **5.3. Industry engagement and support**

Finally, we are interested in further views or strategies about how the government can encourage industry confidence in any approved MLETR-aligned framework, and industry readiness to use electronic transferable records when these are available.

### **Question 34**

How else can the Australian Government involve industry, and encourage industry readiness, to promote industry confidence in the usability of electronic transferable records?

### **Question 35**

Finally, we would welcome any further comments or considerations which you consider may be relevant to our consideration of options to implement the MLETR in Australia.

<sup>97</sup> [The ICC Digital Standards Initiative \(DSI\) | Digital Trade | Welcome \(iccwbo.org\)](#). In addition, the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) published a white paper on transfers of MLETR-compliant titles in September 2023.



# Annexure A – Model Law on Electronic Transferable Records

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

# UNCITRAL Model Law on Electronic Transferable Records



UNITED NATIONS  
New York, 2018

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Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

UNITED NATIONS PUBLICATION

Sales No. E.17.V.5

ISBN 978-92-1-133861-4

eISBN 978-92-1-362734-1

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This publication has not been formally edited.

Publishing production: English, Publishing and Library Section, United Nations Office at Vienna.



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# **UNCITRAL Model Law on Electronic Transferable Records**

## **Resolution adopted by the General Assembly on 7 December 2017**

**[on the report of the Sixth Committee (A/72/458)]**

### **72/114. Model Law on Electronic Transferable Records of the United Nations Commission on International Trade Law**

*The General Assembly,*

*Recalling* its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

*Recalling also* its resolution 60/21 of 23 November 2005, by which it adopted the United Nations Convention on the Use of Electronic Communications in International Contracts and called upon all Governments to consider becoming party to the Convention, and its resolutions 51/162 of 16 December 1996 and 56/80 of 12 December 2001, in which it recommended that all States give favourable consideration to the Model Law on Electronic Commerce and the Model Law on Electronic Signatures of the Commission, respectively,

*Noting* that, while the Convention, the Model Law on Electronic Commerce and the Model Law on Electronic Signatures are of significant assistance to States in enabling and facilitating electronic commerce in international trade, they do not fully address issues arising from the use of electronic transferable records in international trade,

*Considering* that uncertainties as to the legal value of electronic transferable records constitute an obstacle to international trade,

*Convinced* that legal certainty and commercial predictability in electronic commerce will be enhanced by the harmonization of certain rules on the legal recognition of electronic transferable records on a technologically neutral basis and according to the functional equivalence approach,

*Recalling* that, at its forty-fourth session, in 2011, the Commission mandated its Working Group IV (Electronic Commerce) to undertake work on electronic transferable records,<sup>1</sup>

*Noting* that the Working Group devoted 10 sessions, from 2011 to 2016, to that work, and that the Commission considered at its fiftieth session, in 2017, a draft model law on electronic transferable records prepared by the Working Group, together with comments on the draft received from Governments and international organizations invited to sessions of the Working Group,<sup>2</sup>

*Believing* that a model law on electronic transferable records will constitute a useful addition to existing Commission texts in the area of electronic commerce by significantly assisting States in enhancing their legislation on electronic commerce, in particular as it relates to the use of electronic transferable records, or in formulating such legislation where none exists,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for completing and adopting the Model Law on Electronic Transferable Records;<sup>3</sup>

2. *Requests* the Secretary-General to publish the Model Law together with an explanatory note, including electronically, in the six official languages of the United Nations, and to disseminate it broadly to Governments and other interested bodies;

3. *Recommends* that all States give favourable consideration to the Model Law when revising or adopting legislation relevant to electronic commerce, and invites States that have used the Model Law to advise the Commission accordingly;

4. *Also recommends* that States continue to consider becoming parties to the United Nations Convention on the Use of Electronic Communications in International Contracts<sup>4</sup> and to give favourable consideration to the use of the Model Law on Electronic Commerce<sup>5</sup> and the Model Law on Electronic Signatures<sup>6</sup> when revising or adopting legislation on electronic commerce;

5. *Appeals* to the relevant bodies of the United Nations system and other relevant international and regional organizations to coordinate their legal activities in the area of electronic commerce, including paperless trade facilitation, with those of the Commission, to avoid duplication of efforts and to promote efficiency, consistency and coherence in the modernization and harmonization of legislation on electronic commerce.

*67th plenary meeting , 7 December 2017*

<sup>1</sup>Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17), para. 238.

<sup>2</sup>Ibid., Seventy-second Session, Supplement No. 17 (A/72/17), chap. III.

<sup>3</sup>Ibid., annex I.

<sup>4</sup>Resolution 60/21, annex.

<sup>5</sup>Resolution 51/162, annex.

<sup>6</sup>Resolution 56/80, annex.

# **Decision of the United Nations Commission on International Trade Law (UNCITRAL)**

## **The United Nations Commission on International Trade Law,**

*Recalling* General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the purpose of furthering the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,

*Mindful* that, while the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005),<sup>1</sup> the UNCITRAL Model Law on Electronic Signatures (2001)<sup>2</sup> and the UNCITRAL Model Law on Electronic Commerce (1996)<sup>3</sup> are of significant assistance to States in enabling and facilitating electronic commerce in international trade, they do not deal or do not sufficiently deal with issues arising from the use of electronic transferable records in international trade,

*Considering* that uncertainties as to the legal value of electronic transferable records constitute an obstacle to international trade,

*Convinced* that legal certainty and commercial predictability in electronic commerce will be enhanced by the harmonization of certain rules on the legal recognition of electronic transferable records on a technologically neutral basis and according to the functional equivalence approach,

*Recalling* that, at its forty-fourth session, in 2011, it mandated Working Group IV (Electronic Commerce) to undertake work on electronic transferable records,<sup>4</sup>

---

<sup>1</sup>General Assembly resolution 60/21, annex.

<sup>2</sup>General Assembly resolution 56/80, annex.

<sup>3</sup>General Assembly resolution 51/162, annex.

<sup>4</sup>*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 238.

*Having* considered at its fiftieth session, in 2017, a draft model law on electronic transferable records prepared by the Working Group,<sup>5</sup> together with comments on the draft received from Governments and international organizations invited to sessions of the Working Group,<sup>6</sup>

*Noting* that the draft model law prepared by the Working Group deals with the use of electronic transferable records equivalent to paper-based transferable documents or instruments and does not deal with the use of transferable records existing only in electronic form or transferable records, documents or instruments for which substantive law is medium-neutral,

*Believing* that an UNCITRAL model law on electronic transferable records will constitute a useful addition to existing UNCITRAL texts in the area of electronic commerce by significantly assisting States in enhancing their legislation governing the use of electronic transferable records, or in formulating such legislation where none currently exists,

1. *Adopts* the UNCITRAL Model Law on Electronic Transferable Records, annexed to the report of the fiftieth session of the Commission;

2. *Requests* the Secretariat to finalize an explanatory note that will accompany the UNCITRAL Model Law on Electronic Transferable Records by reflecting deliberations and decisions at the Commission's fiftieth session as regards the draft explanatory notes contained in documents A/CN.9/920 and A/CN.9/922;

3. *Requests* the Secretary-General to publish the UNCITRAL Model Law on Electronic Transferable Records together with an explanatory note, including electronically and in the six official languages of the United Nations, and to disseminate it broadly to Governments and other interested bodies;

4. *Recommends* that all States give favourable consideration to the UNCITRAL Model Law on Electronic Transferable Records when revising or adopting legislation relevant to electronic transferable records, and invites States that have used the Model Law to advise the Commission accordingly.

*1057th meeting  
13 July 2017*

<sup>5</sup>A/CN.9/920.

<sup>6</sup>A/CN.9/921 and addenda.



# UNCITRAL Model Law on Electronic Transferable Records

## Chapter I. General provisions

### Article 1. Scope of application

1. This Law applies to electronic transferable records.
2. Other than as provided for in this Law, nothing in this Law affects the application to an electronic transferable record of any rule of law governing a transferable document or instrument including any rule of law applicable to consumer protection.
3. This Law does not apply to securities, such as shares and bonds, and other investment instruments, and to [...].<sup>1</sup>

### Article 2. Definitions

For the purposes of this Law:

“*Electronic record*” means information generated, communicated, received or stored by electronic means, including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not;

“*Electronic transferable record*” is an electronic record that complies with the requirements of article 10;

---

<sup>1</sup>The enacting jurisdiction may consider including a reference to: (a) documents and instruments that may be considered transferable, but that should not fall under the scope of the Model Law; (b) documents and instruments falling under the scope of the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 1931); and (c) electronic transferable records existing only in electronic form.

*“Transferable document or instrument”* means a document or instrument issued on paper that entitles the holder to claim the performance of the obligation indicated in the document or instrument and to transfer the right to performance of the obligation indicated in the document or instrument through the transfer of that document or instrument.

### **Article 3. Interpretation**

1. This Law is derived from a model law of international origin. In the interpretation of this Law, regard is to be had to the international origin and to the need to promote uniformity in its application.
2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

### **Article 4. Party autonomy and privity of contract**

1. The parties may derogate from or vary by agreement the following provisions of this Law: [...].<sup>2</sup>
2. Such an agreement does not affect the rights of any person that is not a party to that agreement.

### **Article 5. Information requirements**

Nothing in this Law affects the application of any rule of law that may require a person to disclose its identity, place of business or other information, or relieves a person from the legal consequences of making inaccurate, incomplete or false statements in that regard.

### **Article 6. Additional information in electronic transferable records**

Nothing in this Law precludes the inclusion of information in an electronic transferable record in addition to that contained in a transferable document or instrument.

---

<sup>2</sup>The enacting jurisdiction may consider which provisions of the Model Law, if any, the parties may derogate from or vary by agreement.

### **Article 7. Legal recognition of an electronic transferable record**

1. An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form.
2. Nothing in this Law requires a person to use an electronic transferable record without that person's consent.
3. The consent of a person to use an electronic transferable record may be inferred from the person's conduct.

## **Chapter II. Provisions on functional equivalence**

### **Article 8. Writing**

Where the law requires that information should be in writing, that requirement is met with respect to an electronic transferable record if the information contained therein is accessible so as to be usable for subsequent reference.

### **Article 9. Signature**

Where the law requires or permits a signature of a person, that requirement is met by an electronic transferable record if a reliable method is used to identify that person and to indicate that person's intention in respect of the information contained in the electronic transferable record.

### **Article 10. Transferable documents or instruments**

1. Where the law requires a transferable document or instrument, that requirement is met by an electronic record if:
  - (a) The electronic record contains the information that would be required to be contained in a transferable document or instrument; and
  - (b) A reliable method is used:

- (i) To identify that electronic record as the electronic transferable record;
  - (ii) To render that electronic record capable of being subject to control from its creation until it ceases to have any effect or validity; and
  - (iii) To retain the integrity of that electronic record.
2. The criterion for assessing integrity shall be whether information contained in the electronic transferable record, including any authorized change that arises from its creation until it ceases to have any effect or validity, has remained complete and unaltered apart from any change which arises in the normal course of communication, storage and display.

### **Article 11. Control**

1. Where the law requires or permits the possession of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used:
  - (a) To establish exclusive control of that electronic transferable record by a person; and
  - (b) To identify that person as the person in control.
2. Where the law requires or permits transfer of possession of a transferable document or instrument, that requirement is met with respect to an electronic transferable record through the transfer of control over the electronic transferable record.

## **Chapter III. Use of electronic transferable records**

### **Article 12. General reliability standard**

For the purposes of articles 9, 10, 11, 13, 16, 17 and 18, the method referred to shall be:

- (a) As reliable as appropriate for the fulfilment of the function for which the method is being used, in the light of all relevant circumstances, which may include:

- (i) Any operational rules relevant to the assessment of reliability;
  - (ii) The assurance of data integrity;
  - (iii) The ability to prevent unauthorized access to and use of the system;
  - (iv) The security of hardware and software;
  - (v) The regularity and extent of audit by an independent body;
  - (vi) The existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method;
  - (vii) Any applicable industry standard; or
- (b) Proven in fact to have fulfilled the function by itself or together with further evidence.

### **Article 13. Indication of time and place in electronic transferable records**

Where the law requires or permits the indication of time or place with respect to a transferable document or instrument, that requirement is met if a reliable method is used to indicate that time or place with respect to an electronic transferable record.

### **Article 14. Place of business**

1. A location is not a place of business merely because that is:
  - (a) Where equipment and technology supporting an information system used by a party in connection with electronic transferable records are located; or
  - (b) Where the information system may be accessed by other parties.
2. The sole fact that a party makes use of an electronic address or other element of an information system connected to a specific country does not create a presumption that its place of business is located in that country.

### **Article 15. Endorsement**

Where the law requires or permits the endorsement in any form of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if the information required for the endorsement is included in

the electronic transferable record and that information is compliant with the requirements set forth in articles 8 and 9.

### **Article 16. Amendment**

Where the law requires or permits the amendment of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used for amendment of information in the electronic transferable record so that the amended information is identified as such.

### **Article 17. Replacement of a transferable document or instrument with an electronic transferable record**

1. An electronic transferable record may replace a transferable document or instrument if a reliable method for the change of medium is used.
2. For the change of medium to take effect, a statement indicating a change of medium shall be inserted in the electronic transferable record.
3. Upon issuance of the electronic transferable record in accordance with paragraphs 1 and 2, the transferable document or instrument shall be made inoperative and ceases to have any effect or validity.
4. A change of medium in accordance with paragraphs 1 and 2 shall not affect the rights and obligations of the parties.

### **Article 18. Replacement of an electronic transferable record with a transferable document or instrument**

1. A transferable document or instrument may replace an electronic transferable record if a reliable method for the change of medium is used.
2. For the change of medium to take effect, a statement indicating a change of medium shall be inserted in the transferable document or instrument.
3. Upon issuance of the transferable document or instrument in accordance with paragraphs 1 and 2, the electronic transferable record shall be made inoperative and ceases to have any effect or validity.

4. A change of medium in accordance with paragraphs 1 and 2 shall not affect the rights and obligations of the parties.

## **Chapter IV. Cross-border recognition of electronic transferable records**

### **Article 19. Non-discrimination of foreign electronic transferable records**

1. An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it was issued or used abroad.
2. Nothing in this Law affects the application to electronic transferable records of rules of private international law governing a transferable document or instrument.

# Annexure B – Consultation questions



## 2: How transferable records are used in Australia

### 2.1. What are transferable records?

#### Question 1

Please identify which of the below documents you most predominantly use in your business activities. You may select more than one.

Alternatively, if you do not use any of these documents yourselves, please select those with which you are most familiar, or with which others in your network most predominantly use.

- |   |  |
|---|--|
| <b>(a) bills of exchange</b>  | <b>(h) air waybills</b>                    |
| <b>(b) cheques</b>  | <b>(i) letters of credit</b>               |
| <b>(c) promissory notes</b>   | <b>(j) dock warrants</b>                   |
| <b>(d) consignment notes</b>  | <b>(k) dock receipts</b>                   |
| <b>(e) bills of lading</b>  | <b>(l) ships delivery orders</b>           |
| <b>(f) warehouse receipts</b>   | <b>(m) mate's receipts</b>                 |
| <b>(g) transferable insurance certificates, like marine insurance policies and cargo insurance certificates</b> | <b>(n) warehouse-keeper's certificates</b> |
|   | <b>(o) wharfinger's certificates</b>       |

#### Question 2

Can you identify any other document, used in Australia or by Australian entities, where a person needs to physically possess the document in order to claim the goods or money stated on the document?

*Under the MLETR, a 'transferable record' is a type of document, issued on paper, which entitles the holder to claim performance of an obligation, and which can be transferred to another person along with the right to performance.*



## 2.2. How are transferable records currently used in Australia?

### Question 3

Please describe how you (or your business) use transferable records in your day-to-day business practices. Please reference any records you identified in [Question 1](#) and [Question 2](#).

Alternatively, if you do not use these records yourself, please describe broadly the ways in which you understand these records are most commonly used.

*For each of these uses, please describe:*

- *the commercial settings in which you use these records*
- *the entities or people from whom you ordinarily receive these records, and in what circumstances*
- *the entities or people you would give or transfer these records to, including why*
- *the reasons why physical possession or transfer of the paper record is necessary, if relevant*
- *the commercial benefits which come from your use of these records (e.g. whether it minimises a particular risk).*

### Question 4

If you or your business use transferable records in the context of trade, do you use these records in the context of international, inter-state or intra-state trade?

Please tick all that apply. You can select more than one.

- **International trade (goods imported into, or exported from, Australia)**
- **Inter-state domestic trade (goods produced in one state for use in a different state)**
- **Intra-state domestic trade (goods produced in one state for use in that same state)**

## 2.3. Current experiences using paper-based transferable records

### Question 5

How many hours per year do you estimate you, or your business, spend in processing paper-based transferable records?

(Please refer to the records which you identified in [Question 1](#) and [Question 2](#)).

*Please provide an estimated or approximate number, for an aggregate of the transferable records you most frequently process, based on available data.*

*'Processing' for these purposes includes arranging couriers, posting, reviewing, completing, amending, accounting for unexpected changes or errors, filing, and other similar actions.*

### Question 6

What would you estimate to be the average annual financial cost to you, or your business, in processing paper-based transferable records?

(Please refer to the records which you identified in [Question 1](#) and [Question 2](#)).

*Please provide an estimated or approximate amount based on available data. Please account for employee or contractor hourly rates, legal fees, posting or printing, and other similar expenses.*

### Question 7

If possible, please provide an estimate of how many hours you (or your business) might expect to save per year processing electronic transferable records, compared to paper versions.

*If applicable, please also provide a brief description of the basis on which you made this estimate.*

### Question 8

If possible, please provide an estimate of the financial savings you (or your business) might expect per year processing electronic transferable records, compared to paper versions.

*If applicable, please also provide a brief description of the basis on which you made this estimate.*

### Question 9

How would you assess the impact of using electronic transferable record processes upon your or your business' customers and consumers?

- **It would likely result in lowered costs for my customers and consumers**
- **It would likely result in higher costs for my customers and consumers**
- **It would likely not have any effect on costs for my customers and consumers**

*Please expand on your answer – including, if applicable, a description of the basis on which you made this assessment.*

## 2.4. Paper-based transferable record requirements and paperless trade

### Question 10

To what extent are your (or your business') trade documentation processes generally affected by the specific issue of uncertainty about the legal validity of electronic transferable records?

- **Paper transferable record requirements do not affect our processes**
- **We use paper trade documents for several reasons, including paper transferable record requirements**
- **The primary reason we use paper trade documents is paper transferable record requirements.**

Please expand on your answer. For example, if applicable, please expand on which barriers prevent you from using electronic trade documentation generally.

## 3. Australian law applying to transferable records

### 3.1. Possession, transfer and use of transferable records under Australian law

#### Question 11

Can you identify any Australian laws – whether in legislation, the terms of a contract, or common law – which concern or require the possession or transfer or use of a paper transferable record?

*Please provide examples, references or extracts from contracts if possible.*

#### Question 12

If the MLETR was implemented, what issues (if any) do you anticipate in its application to any of the laws referenced under this section (including any laws identified by yourself in Question 11)?

### 3.2. Transferable records as property, including under the PPSA

#### Question 13

Please describe any views, suggestions or issues which the department should consider, to ensure that electronic transferable records are an identifiable form of possessable property under Australian law, including under the PPSA.

*If possible, please also elaborate on the extent to which you consider the MLETR would provide sufficient confirmation of the property status of electronic transferable records.*

### 3.3. Evidence and regulatory requirements

#### Question 14

What other evidence or regulatory requirements relating to transferable records are you aware of, under Australian law?

### 3.5. Application of the Uniform Australian ETAs

#### Question 15

We would welcome any preliminary comments from stakeholders regarding the applicability of the Uniform Australian ETAs towards electronic transferable records.

*For example, we would be interested in views about the consequences of any potential overlap or inconsistency between the MLETR and the ETA.*

### 3.6. Electronic bills of lading under current Australian law

#### Question 16

Have you (or your business) used, or do you currently use, electronic bills of lading through existing private contractual frameworks?

- **Yes**
- **No**

If you have, please describe what system you used, for what specific purposes, and what parties are typically parties to the underlying contract.

#### Question 17

What comparative advantages or disadvantages can you identify in the approach to legal validity between the MLETR, and the approach enabled under the SCDA and the COGSA?

*Please refer to [part 4](#) of this paper for a discussion of the approach to functional equivalence under the MLETR.*

#### Question 18

How should an Australian option for implementing MLETR-aligned legislation interact with existing, contractually-enabled eBOLs?

#### Question 19

How do you assess the effectiveness of contractual frameworks to confirm the legal validity of electronic transferable records?

- **Generally effective**
- **Generally not effective**
- **Their effectiveness depends on how they are used**
- **Unsure**

Please expand on your answer.

*For example, what benefits, barriers or risks do you identify, or have you experienced, with these frameworks?*

## 4. The MLETR in an Australian context

### 4.1. The MLETR – transferable records covered

#### Question 20

In your view, should securities like shares and bonds, investment instruments, and letters of credit be excluded from any Australian implementation of MLETR?

- **Yes**
- **No**
- **Unsure**

Please expand on your answer.

*For example, what particular issues do you foresee if these financial instruments were included or excluded?*

#### Question 21

Please share your views about whether any other records should be specifically included or excluded from Australia's implementation of MLETR?

#### Question 22

Should an Australian option for MLETR extend to documents like straight bills of lading, or other documents which must generally be physically possessed, but need not be transferable?

- **Yes**
- **No**
- **Unsure**

Please expand on your answer.

*For example, what other documents may be possessable but not transferable? Do you foresee any issues if these were included or excluded?*

#### Question 23

Should an Australian option for MLETR be limited to transferable records which are used specifically in the context of international trade?

- **Yes**
- **No**
- **Unsure**

Please expand on your answer.

*For example, do you foresee any particular issues if MLETR was limited to international trade only?*

## 4.2. The MLETR – functional equivalence

### Question 24

Would adoption of the MLETR in its current form provide you with confidence that electronic transferable records are just as legally valid as paper versions of those records for the purpose of Australian law?

- **Yes**
- **No**
- **Unsure at this stage**

Please expand on your answer.

*For example: what, if any, modifications or clarifications would be necessary to provide you with confidence in the legal validity of electronic transferable records.*

### Question 25

Please share your preliminary views about whether there is anything under Australian law which you think justifies a unique approach to confirming the functional equivalence of transferable records (that is, as distinct from the MLETR)?

## 4.3. The MLETR – technology-neutrality

### Question 26

To what extent does the approach to reliability under article 12 of the MLETR appropriately balance stakeholder **confidence** (that is, confidence in the legal validity of a particular electronic method) and flexibility (that is, **flexibility** to use a technology or method of the stakeholder's choice).

- **Very well**
- **Well**
- **Somewhat**
- **Poorly**
- **Very poorly**
- **Unsure**

Please explain your answer, especially what other factors might be relevant to determining reliability, or any other changes which you consider might achieve this balance.

### Question 27

In your view, do the factors under article 12 sufficiently promote stakeholders trust and security in the use of electronic transferable records (including the prevention of fraud and the security of data relating to electronic transferable records)?

- **Yes**
- **No**
- **Unsure**

Please explain your answer, especially what other factors might be relevant to promoting trust and security in the use of electronic transferable records.

### Question 28

Please share any views you have about whether an Australian MLETR implementation option should utilise an accreditation system to specify that certain electronic transferable record management systems are sufficiently reliable?

## 5. International interoperability and industry engagement

### 5.1. International legal interoperability

#### Question 29

To what extent do you consider that adoption of the MLETR would enable an internationally-interoperable legal framework for electronic transferable records?

#### Question 30

Assuming that Australia enacted legislation based on the MLETR: would you consider the legality of electronic transferable records in other international jurisdictions, before you adopted electronic transferable records into your business practices?

- **Yes**
- **No**
- **Unsure**

Please explain your answer, including (if applicable) the extent to which articles 17 and 18 would be sufficient for you to navigate between electronic and paper requirements.

### 5.2. MLETR technology

#### Question 31

Are you aware of, or have you ever used, an electronic system to issue or transfer a unique electronic document, in a way that maintains exclusive control of that document?

- **Yes**
- **No**

If yes, please describe your experiences using the system, broadly how the system tracked exclusive control of the record, and any challenges you experienced or of which you are aware?

#### Question 32

Please share any views on how the government can encourage interoperability between different technologies, and use of common data standards, under a MLETR-aligned legal framework?

#### Question 33

What challenges do you expect software vendors may face in developing technology to enable the use and transfer of electronic transferable records in compliance with the MLETR?



### 5.3. Industry engagement and support

#### **Question 34**

How else can the Australian Government involve industry, and encourage industry readiness, to promote industry confidence in the usability of electronic transferable records?

#### **Question 35**

Finally, we would welcome any further comments or considerations which you consider may be relevant to our consideration of options to implement the MLETR in Australia.

