

**For consideration on  
23 April 2004**

**Bills Committee on the  
Electronic Transactions (Amendment) Bill 2003**

**The Administration's Responses to Public Submissions**

This paper sets out the Administration's responses to the submissions on the Electronic Transactions (Amendment) Bill 2003 made by the following individuals and organizations –

- (a) Mr Damien Wong;
- (b) The Privacy Commissioner for Personal Data;
- (c) PCCW-HKT Telephone Limited;
- (d) Hong Kong IT Alliance Limited;
- (e) Consumer Council
- (f) Mr Lau Wai-cheung, Peter.

**Responses to Mr Damien Wong's Comments**

*Technology-neutral approach*

2. The Electronic Transactions Ordinance (ETO) follows a technology-neutral approach generally. The general concept of electronic signature has been incorporated in the Ordinance. Section 17 of the ETO also provides that, in the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be in whole or in part expressed by means of electronic records. If an electronic signature is attached to or logically associated with the electronic records, there is no stipulation as to what technology has to be used to generate the electronic signature. It is a matter to be agreed by the transacting parties. Thus, a technology-neutral approach is adopted for the use of electronic signature in contract formation.

3. However, we note that this approach has not been prominently set out in the Ordinance. We have therefore proposed to

amend the ETO to provide that, for transactions not involving government entities, a signature requirement under a rule of law<sup>1</sup> is met by any form of electronic signature subject to certain conditions as to reliability and appropriateness and consent of the recipient of the signature. For transactions involving Government entities, we propose to continue to accept digital signature only for clarity and operational reasons.

*Promotion of public key infrastructure technology*

4. The Government has taken various measures to promote the wider adoption of public key infrastructure (PKI) technology for the conduct of electronic transactions in a secure manner. These include dissemination of information on PKI on our Digital 21 website, participation in exhibitions and seminars to showcase the use and benefits of PKI, production of radio programmes, and distribution of reference materials on PKI to the public.

5. To lead by example, the Government has been widely adopting PKI in various internal functions such as the confidential e-mail system as well as in various E-government services. We have also put in place policies and procedures for adoption of PKI in the implementation of electronic services of the Government.

6. The Hongkong Post Certification Authority (HKPCA), the public certification authority (CA) recognized under the ETO, has also been actively promoting the use of PKI in the business sector. For example, it conducts regular seminars and technical workshops on the latest development of PKI applications in the market and the potential usage of the digital certificates issued by HKPCA (under the brand name “e-Cert”) in business applications for different industries including banking and finance, insurance, securities trading, traveling and e-merchants. HKPCA also provides the business sector with a free PKI development toolkit to facilitate fast and easy deployment of e-Cert-based applications in various industries. The development toolkit is also provided free to information technology (IT) solution

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<sup>1</sup> “Rule of law” is defined in the ETO as an Ordinance, a rule of common law or a rule of equity, or customary law.

vendors and developers for them to bundle PKI into their IT solutions for business clients.

*Guidelines for electronic signature*

7. In accordance with the technology-neutral approach, we consider that the Government should not set any “Direction, Guideline, Selection mechanism and/or Certification system” in the ETO to identify the technologies that are to be considered as acceptable by law as electronic signatures. For transactions not involving government entities, the transacting parties may decide for themselves whether and how they may wish to consider such factors as simplicity, easy to understand and easy to use in relation to the electronic signature that they may choose to use.

*Formation and validity of electronic contracts  
under the proposed section 17(2A)*

8. The approach of the new section 17(2A) is consistent with that of section 17(2) (and section 9), and is appropriate in dealing with cases where the law may or may not require a signature. Where the law does not require a signature, then legal recognition of an electronic signature should not necessarily follow. The ETO should simply provide that the electronic signature shall not be denied legal effect solely because it is an electronic signature. The parties to a contract should decide and agree what form of electronic signature best fits their particular needs. This also follows the technology-neutral principle.

*Electronic signature attached to or associated with  
a document that is not in the form of an electronic record*

9. To provide certainty to the conduct of electronic transactions, the ETO defines an electronic signature as any letters, characters, numbers or other symbols in digital form attached to or logically associated with an electronic record, and executed or adopted for the purpose of authenticating or approving the electronic record. If a document exists only in, for example, paper form and the signature is in electronic form, uncertainties will arise as to how to prove that the

electronic signature is attached to or associated with the paper document. Nevertheless, there are no provisions in the ETO prohibiting the use of an electronic signature to authenticate or approve a contract in non-electronic form as long as the contracting parties, subject to common law, agree to an approach or method facilitating that.

*“Electronic signature” should be identified by the term “digital”*

10. “Electronic signature” is defined under the ETO as any letters, characters, numbers or other symbols in digital form attached to or logically associated with an electronic record, and executed or adopted for the purpose of authenticating or approving the electronic record. As such, electronic signature has already been defined as in digital form.

## **Responses to Comments of the Privacy Commissioner for Personal Data (the Commissioner)**

### *Disclosure record for CAs*

11. Section 31(2) of the ETO, which provides that the Director of Information Technology Services (the Director) must publish in the CA disclosure record information regarding that CA relevant for the purposes of the ETO, already stipulates the purposes for which the Director is to publish information on a recognized CA in the disclosure record. The information published in the disclosure record generally concerns the recognition status and trustworthiness of the systems and operation of the recognized CA, which is relevant for the purposes of the ETO as provided for under section 31(2). Moreover, no personal data have been published in the disclosure record so far. If that ever happens, the Director will make reference to the guidelines issued by the Home Affairs Bureau in respect of the publication of personal data.

### *Repositories of recognized CAs*

12. Currently, under paragraph 3.6 of the Code of Practice for Recognized CAs (the Code of Practice), a recognized CA is required to comply with all applicable ordinances and regulations regarding the

privacy of personal information. We therefore consider it unnecessary to repeat such a requirement in the ETO. Nevertheless, the Director will expand the said paragraph 3.6 to specifically require a recognized CA to include a purpose statement in its repository along the lines suggested by the Commissioner.

*Collection of personal data by the Director and recognized CAs*

13. We agree with the Commissioner's comments. With regard to the collection of personal data by the Director from CAs, the Director has included statements in the application forms for recognition under the ETO setting out the purposes of the data collection and to whom the personal data may be transferred or disclosed.

14. With regard to collection of personal data by recognized CAs, paragraph 3.6 of the Code of Practice requires recognized CAs to comply with all applicable ordinances and regulations regarding the privacy of personal information. Nevertheless, in the light of the Commissioner's comments, the Director will expand paragraph 3.6 to require a recognized CA to give a written Personal Data Collection Statement to data subjects before or upon the collection of personal data from the data subjects.

**Responses to PCCW-HKT Telephone Limited's comments**

*Service of documents by electronic means*

15. It is our intention to expand Schedule 3 to accept, as and when the relevant bureaux and departments are ready, the service by electronic means of documents which currently have to be served by post or in person.

*Consent to the signature method used*

16. The proposed section 6(1), which covers cases where no government entities are involved, requires the consent of the recipient of an electronic signature to the method of generating the electronic signature. We propose to require such consent because it is important

that the method to be used must be made known and accepted by the recipient, and that the recipient must have a right not to accept it because he or she is not capable of handling the electronic signature due to technical or other reasons. This approach is consistent with the requirement in section 15(1) and (2) of the ETO for consent of the recipient of information given in the form of electronic record where no government entities are involved.

### **Response to Hong Kong IT Alliance Limited's comments**

*Retaining the words “of a certification authority”  
in the definition of “issue”*

17. As the words “of a certification authority” can be deleted without affecting the meaning of “issue”, we prefer not to retain them in order to keep the ETO concise.

*Defining the conduct that may be deemed as “consent”*

18. “Consent” can be given orally, in writing or by conduct. It is not practicable to define the range of conduct from which consent can be reasonably inferred.

*Quantifying “as soon as reasonably practicable”  
in the publication of certificates in a CA’s repository*

19. The timing of publication of a certificate should be a business issue to be agreed between the subscriber and the CA. Moreover, how soon a CA is able to publish an issued and accepted certificate in the CA’s repository depends on the technical set up and operational design of the CA. Currently, under the Code of Practice, a recognized CA is required to specify in its certification practice statement (which is publicly accessible) the policy and mechanism for publication of information relating to its certificates in its repository. These arrangements have been working smoothly. So far, there has not been any reported incident in which the timing of the publication of certificates is the cause of any problem or complaint. We consider it unnecessary to

institute additional controls over the publication of certificates by recognized CAs at this stage.

20. We have also made reference to relevant regulatory requirements in some other jurisdictions, including Singapore, a number of States in the USA, India, Malaysia and South Africa. There are generally no specific requirements in these jurisdictions with regard to the timing of the publication of certificates by CAs.

## **Responses to Consumer Council's Comments**

### *Stipulating standards for PIN management in the ETO*

21. Under the proposed section 6(1), for transactions not involving government entities, the concerned parties may choose to use any form of electronic signature (including but not limited to personal identification number (PIN)) subject to certain conditions. The parties concerned should consider the reliability and appropriateness of the electronic signature having regard to all the relevant circumstances and intended purpose, and choose and agree on the use of any signature technology that is commensurate with the risks involved in the transaction. It will not be practicable or appropriate to set legislative standards for the use of different forms of electronic signature, including but not limited to PIN, by businesses or individuals.

22. Nevertheless, the Government has established policies and guidelines to facilitate Government bureaux and departments in addressing the security requirements and implementation of their information systems, including those on user authentication and access control such as user and password management. Under the security policies, bureaux and departments are also required to conduct regular security risk assessment and review of individual information systems to verify the effectiveness of the security implementation, including user authentication and access control measures. These policies and guidelines are available for public reference on the website of the Information Technology Services Department at <http://www.itsd.gov.hk/itsd/english/itgov/esecpol.htm>.

*Reliability levels of information systems handling PIN*

23. Under the proposed section 6(1), for transactions not involving government entities, the concerned parties may choose to use any form of electronic signature (including but not limited to PIN) subject to certain conditions. The level of reliability offered by any chosen signature technology, including PIN, will be a matter to be agreed by the parties concerned having regard to all the relevant circumstances and intended purpose. The parties should be free to agree on the use of any signature technology that is commensurate with the risks involved in the transaction. It will not be practicable or appropriate for the Government to define the levels of reliability of the information systems of businesses and individuals to handle the different signature technologies including PIN of their choice, or to establish recognition schemes for different signature technologies.

*Electronic contracts*

24. The ETO is a generic legal framework whose primary purpose is to facilitate adoption of e-business by providing electronic record and signature the same legal status as that of their paper-based counterparts. It is not intended as a vehicle to regulate the contractual arrangements between buyers and sellers in an electronic environment. We also consider that, if the Consumer Council's suggestions on electronic contracts between buyers and sellers were to be included in any piece of legislation, consultation with the relevant parties should be conducted beforehand.

25. On Consumer Council's suggestion to include in the ETO Article 11 "Invitations to make offers" recommended by the United Nations Commission on International Trade Law (UNCITRAL) Working Group (Electronic Commerce), our legal advice is that case law points out that advertisements advertising for the sale of certain goods or offering of certain services are merely "invitation to treat" (i.e. invitation to make offers) (see *Partridge v Crittenden* [1968] 1 WLR 1204). The UNCITRAL Working Group recommended Article 11 probably due to the difference between the common law and civil law systems. While the



concept of “invitation to treat” is not recognized in the civil law system, it is recognized by the courts in the common law system which Hong Kong adopts. As regards the Consumer Council’s suggestion to include in the ETO Article 12 “Use of automated information systems for contract formation” recommended by the UNCITRAL Working Group, our legal advice is that the courts have already recognized contracts formed between automated information systems and individuals (see *Thornton v Shoe Lane Parking* [1971] 2QB 163).

**Response to the Comment of Mr Lau Wai-cheung, Peter**

26. Please see paragraphs 21 to 23 above.

**Communications and Technology Branch  
Commerce, Industry and Technology Bureau  
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