

# **Electronic Commerce in New Zealand**

## **NEW ZEALAND**

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### **Introduction**

New Zealand, like any other country, has needed to define what is meant by electronic commerce and then decide how it affects the law and how the law affects it.

A relatively narrow view has been taken by the New Zealand Law Commission in Report 50, *Electronic commerce Part 1, A Guide for the Legal and Business Community* 1998 ([www.lawcom.govt.nz](http://www.lawcom.govt.nz)). The Report concentrates upon the electronic implications for New Zealand of international business as distinct from localized electronic commerce which has a consumer focus (as to which see New Zealand Ministry of Consumer Affairs, discussion paper, *Electronic Commerce in New Zealand Consumer Issues, and Strategies for the Futures*, August 1997: [www.moc.govt.nz/mca](http://www.moc.govt.nz/mca)).

There is, of course, a wider view which defines electronic commerce, particularly the Internet, as something revolutionary, the virtual community, home-steading on the electronic frontier, on the margins, full of adventure and the excitement of the electronic, information highway.

### **Law on the I-Way**

What is the road New Zealand businesses are on? One way of organising this information highway and placing the legal aspects of electronic commerce within it is to consider three main elements, “applications”, “infrastructure” and “policy”.

As far as *applications* are concerned they cover at least the following: *supply chain* arrangements which deal directly with electronic commerce between businesses and among businesses whether by intranets or extranets; so-called “*video*” which deals predominantly with sounds and images as parts of the information transferred on the highway; “*shopping*” which goes beyond books and groceries to banking and just about anything you could imagine; backed up by *marketing* which is the profitable, targeted sale of products and services, finally reinforced by *advertising*, the means of reaching buyers *en masse* or on the targeted basis required by marketing.

The *infrastructure* involves common business services such as transaction security and payment systems for goods and services as well as information — sending it, getting it and distributing it, the hard surface of the highway whether it is cable, television, telecom, wireless and, of course the Internet.

*Policy* falls into two broad categories. The first category deals with public policy issues such as criminal law, civil rights, privacy, competition and pricing law, and access issues all of which end up in a form of rule-based system, backed up by sanctions, that is, a law. The second category is technical standards and compatibility. This relates once again to the infrastructure and the means of distribution of the information on the I-highway.

The common element is “*information*” and beyond that digitalized information which has led to an apparently accelerating convergence of content (links between Amazon and Sothebys, or Jay Leno’s *Tonight Show* with Jay digitalized in cartoons); transmission mechanisms (Microsoft’s investment in cable and television, America Online’s investment in Hughes satellite) and access and geography where the information highway goes beyond being multi-national to non-national and where the particular location of services or addresses becomes irrelevant. An illustration of this latter issue is the location of New Zealand sites offshore for cost reasons (see [www.circle4.com/allblack/top40.html](http://www.circle4.com/allblack/top40.html)).

### **The Internet**

One example of the electronic highway is the Internet. It is increasingly the most important because of its flexibility and its ability to tie together business to business, internal business and consumer-related business.

### **New Zealand use of the Internet**

A recent New Zealand survey by the Internet Institute based at Victoria University, Wellington shows New Zealand as third behind Iceland and Sweden in the number of Internet users per head of population (see generally <http://www.nzii.org.nz>). Earlier surveys showed it to be ninth in the number of websites per head of population (see the *allblack* site cited above). The Internet survey stated that currently New Zealanders spent \$US9.9 million on online shopping but that 90% of that shopping is done offshore because of credit card conversion problems. This amount of activity is predicted to increase to \$US495 million by the year 2002. The average individual is expected to spend \$NZ1,400 online and the average business \$NZ7,200 (see *Sunday Star Times*, 27 June 1999). Leaving aside national hubris these use and involvement statistics are high.

### **Uniqueness of the Internet**

What’s different about the Internet? Apart from its anonymity, in the commercial context it dramatically increases the value of information. It also provides the basis of a consumer power shift under which consumers have individual choice. Vendors of products or services must customize what they offer to individuals or to niche groups of consumers.

## **Non-Consumer E-Commerce**

However, the focus upon consumers of goods or services should not obscure, first, the significance of electronic commerce between organizations for the transfer of data and the organization or delivery of products and services, nor secondly (particularly with larger corporate groups), the similar transfer of vital commercial information and communication with those organization. In fact, a *Financial Times* report of 21 June 1999 stated that an Ernst & Young study noted that 80% of electronic commerce transactions in the United States were business-to-business (see <http://educause.edu/pub/edupage.html>).

To assess the legal implications of New Zealand electronic commerce we need to take one step back and consider what the legal tools of that commerce might be.

### **One Step Back — Legal Tools of Commerce**

There are six basic legal tools of commerce with a seventh, the criminal law, standing grimly in the background.

Firstly, some perspective on electronic commerce is necessary. In the past, not far back in time, bargains were face to face, done on a handshake. Then commerce moved to collective groupings such as fairs which moved to buyers round the countryside and then to fixed public places such as cities where persons moved to the seller and there was security.

If one considers the great period of the English 19th century novel one starts off in the early 1980s with Dickens and *The Pickwick Papers* and the predominance of coach travel. Later, in the 1860s we have Anthony Trollope and the theme throughout all his novels of railway timetables. Lastly, in the early years of this century, we have Conan Doyle's classic Sherlock Holmes novels where post and telegram communication is key.

No doubt in each era was "stagecoach", "post" and "telegraph" law and lawyers. Each of these forms of communication was revolutionary in its own way and its own time. Technology drives on and the law struggles, following (probably inevitably) behind. In short, we search in vain for something that can be boxed in as "electronic commerce law". It does not exist. As with all previous technologies "labeled law" is just an expression of general law, dealing with change. However, there is an added complication that electronic commerce using the Internet has an anonymous, international, immediate, and low cost aspect which raises the stakes, the uncertainty and the complexity of dealing with it satisfactorily.

### **Legal Tools as Means of Risk Management**

In that respect law is risk management, the attempt to impose some certainty on economic relationships and to lower transaction costs through a set of rules. Those rules or techniques are as follows:

**Custom — “self-regulation”.** This is the most basic form of law, involving face to face communication and the assumption that “what goes around, comes around”. There is an almost “family” assumption that those within the group can deal with problems themselves without involving outsiders. In the New Zealand context this approach has been raised in respect of e-commerce by The Internet Society of New Zealand’s proposed set of industry rules (see <http://www.isco.nz/code.html>) and by the Ministry of Consumer Affairs in its 1997 report which saw self-regulation as one possible answer to the problems of international jurisdiction.

**Bargain or contract.** This is the most powerful legal tool, generally one to one, reinforced by mutual expectations and ultimately some kind of societal sanction. It is a key tool for most common forms of electronic commerce, that is between and within businesses where the relationships are known or can be known and the risk managed. Litigation on contracts is the exception rather than the rule. Contracts as a legal ritual require formalities: the intention to create a legal relationship, offer and acceptance, the elusive concept of consideration and some form of signature. The bargain or contract is an effective risk management tool because the parties are known.

**Legal duties outside the bargain.** These raise more difficult risk management issues particularly when the powerful concept of negligence is considered: in the electronic context “who is my neighbour”? My acts or omissions may cause damage to reasonable foreseeable persons who nonetheless are unknown or unidentified at the time of the actual omission. The policy of the courts is usually unpredictable particularly in marginal areas. Therefore, this is a high risk area.

**Written rules for a society or “statute”.** Obviously, this is a key legal influence particularly as we have to protecting status, examples being the protection of consumers through the New Zealand Consumer Protection Act 1993 and with unfair competition through the New Zealand Commerce Act 1986, and the Fair Trading Act 1986 (both based substantially on the Australian Trade Practices Act 1974). Over time, rules many societies develop through international relationships reflected in treaties or conventions or suggested legal frameworks such as those produced by the United Nations. A law or examples, these international rules impact on domestic statutory rights.

**Intellectual Property.** In the digital context this raises the question of what is “property”? Property relates primarily to information (whether confidential or data), expressions of ideas (protected primarily by copyright), signs and branding (protected by copyright and trade marks), and the underlying structures for intellectual electronic commerce, whether hardware or software (protected by copyright or patents).

Lastly, there is the dark side of policy: **crimes**, where offences against society are dealt with usually through statutes such as the New Zealand Crimes Act 1961.

## One Step Forward — The Website as an Example

Why choose a website as an example of electronic commerce? The answer is that it is the most public example of electronic commerce. That visibility should not lessen the significance of the internet (electronic commerce within a business) and the extranet (the electronic commerce between businesses) as expressions of the supply chain for products, services or information referred to earlier. As also noted, these commercial activities are considerably more significant than consumer electronic commerce, at least for the moment.

Much business commentary upon the Internet and websites distinguishes between the use of websites merely as a catalogue or digitalized brochures and its “being something else”, the electronic homestead or virtual community. Most law and patent and trade mark firms have websites which are more in the nature of catalogues or digitalized firms brochures; it is difficult to provide and interactive service to clients.

In contrast, the New Zealand Companies Office now provides for on-line registration of companies (<http://www.companies.govt.nz/search/>, apparently a world first) and similar plans are under way for the New Zealand Land Registry. Particularly in the sale of products there are a number of New Zealand sites which are not essentially different from their offshore equivalents. They sell information or services and payment to provide a rich source of information for their clients, more convenient, possibly cheaper but above all else creating a close and hopefully lasting relationship with their customers. (See, for example, [www.woolworths.co.nz](http://www.woolworths.co.nz), on-line grocery shopping; [www.thewarehouse.co.nz](http://www.thewarehouse.co.nz), on-line retail consumer goods; <http://www.courier.net.co.nz>, courier services, and [www.bankdirect.co.nz](http://www.bankdirect.co.nz), on-line banking.)

## Website Design — Legal Issues

The design of websites is worth looking at from the legal perspective even if only to illustrate how the law fits into this building block of electronic commerce:

**Branding:** why has a website been created? How is it signposted? What impression, trade mark or domain name and means of access is intended? Who owns all those items?

**More generally:** Who is doing what, when and how and who owns the results of those activities? Particular issues of concern are ownership of intellectual property as well as the more usual issues of payment, milestones and maintenance.

**The website:** Who is to host the website? What relationships are there with the net service provider? Is security an issue, whether by hacking, cracking or other activity (the criminal law again).

**E-mail and liability issues:** If the site is accessible by e-mail (which it probably will be) are there any liability issues that need to be considered? There are a number of examples

in the United Kingdom and the United States (as well as New Zealand) where defamatory material conveyed on a website has caused serious problems for the employer of those involved in those activities, the website owner and the website host or Internet service provider. Recent comment noted that top New Zealand sports persons were increasingly becoming the target for spiteful rumours and innuendo circulated through the Internet bearing false attributions from the New Zealand Press Association or Reuters (see “Internet rumour suits likely, says lawyer”, *The Dominion*, June 1999, page 8). These kinds of issues raise the need for strict email and electronic commerce compliance programmes to deal with communication within the organization and externally.

### **The Website Itself — Legal Issues**

**Getting there:** The Internet is cluttered with overwhelming choice. Sites may be accessed by browsing. Often their existence is conveyed more by word of mouth or through a paper commentary or by direct searching. The problem for electronic commerce is that the Internet is anonymous. It requires the potential buyer of goods and services to identify that opportunity by accessing the site. Techniques of “cutting through the clutter” have legal implications. Most of these have uncertain legal answers, hence the need for risk management, after knowledge of those risks.

**Linking:** Essentially there is a hyper-text link (whether by word or an icon or image) to the same web page or to another web page. It is used to deal with the perceived needs of users and to lead them into other information, thereby creating that intense personal relationship which seems to be the essence of the commercialization of the Internet. Almost any web page will have examples of linking. As a generalization, no legal issues are raised by linking as such provided that there is no misleading or deceptive conduct or that someone else’s trade mark is not used as a linking item without permission. There seems to be no copyright issues. The link is just being another road sign on the information highway.

**Framing, which in a sense is “deep linking”:** This is, essentially, a variation on a link where there is no transfer of the user to another website but the incorporation of material from another website in the one originally viewed. Framing is used to add value. The legal question is, whose value? Many legal issues are raised by framing. Most of them are founded on copyright or some variation of passing-off or deceptive conduct. There seem to be no New Zealand cases directly on this issue but the very well-known *Shetland Times* case (Scotland, 1996) used several hyperlinks and in the settlement of the case the defendant had to acknowledge the origin of the material which was framed. Other well-known cases include those involving Ticket Master and Microsoft, and Total News and the Washington Post, and were concerned with a similar issue: the “by passing” of the ownership or “*provenance*” of a site in favour of its content. Such by-passing or “deep linking” reduces the value of the site because hyperlinkers would not see advertising on those sites or else would be misled or deceived as to the material viewed. Variations on hyperlinks or deep linking are:



**Meta-tags or key words:** A meta-tag is part of the computer language used to create web pages. It may include generic names or trade marks. The reason for these meta-tags is once again to cut through the clutter on the Internet. This is a highly dangerous legal practice, particularly if trademarks are used. Key words are related to meta-tags and deal with key words used in search engines, thus if in relation to a particular browser the word “dog” brings your advertisement for dog food you will have succeeded in cutting through the clutter. Generally, this practice does not have a high legal risk but there is obviously some considerable danger if a search for one trade mark throws up another: “Watties” for “McCains”, “Honda” for “Holden”.

**Domain Names:** All these activities have been overshadowed by the controversy concerning domain names which have been the focus of just as much controversy in New Zealand as elsewhere. In fact, there have been at least four cases at various levels of authority concerning domain names in New Zealand. In the *Oggi* advertising case (1998) the registration of the domain name with the word “*Oggi*” was challenged successfully by Oggi Advertising Limited on the grounds of passing-off. In a later case, involving New Zealand Post Limited, the domain name “*nzpost.com*” took a searcher to a collection of adult websites, not your usual post box. This was also successfully challenged on the basis of passing-off. Even more recently Telecom New Zealand Ltd. Obtained a successful injunction against the use of the colour yellow in relation to a website which was later sold to an offshore buyer, thereby effectively sidestepping the court order. This illustrates the fundamental and serious problems with reconciling the territorial nature of the trademark system with the inherently international nature of the domain name structure.

Lastly, once a potential consumer is at a website the process of data gathering begins. The comments made previously in relation to e-mail compliance policies to manage risk remain highly significant.

From another perspective the value of information accessed through users has an accelerating value, particularly if the virtual community theory of electronic business is accepted. Is there copyright in such data, to what extent should the United States or the European Community bases of protection be adopted and so on? In New Zealand there is the particular overlay of the Privacy Act 1993 which applies to personal information relating to identifiable human beings. Any data collection policy must take those rules into consideration. The significance of e-mails is highlighted in the public mind by the experience of Bill Gates in the Microsoft litigation and at a more serious level by the Law Commission’s comments on the need to allow the electronic keeping of records in order to fulfill various statutory obligations.

### **Selling and Buying on the Website**

Once again, familiar problems are faced by users and businesses in selling and buying on the Internet. Some perspective is useful. While most New Zealand consumers will be purchasing products on the Internet from offshore, in the event that they do purchase products from New Zealand websites the risks both for the buyers and sellers are

relatively slight. This is recognized both by the Ministry of Consumer Affairs 1997 Report, which focuses upon distant selling from offshore, and by a quick review of some of the distant selling website vendors in New Zealand.

Most of these are paper catalogues mailed to house holders or the electronic equivalent on websites. Products can be purchased by mail, by telephone or fax by stating that “a cheque is in the mail”, upon receipt of which an order will be completed or giving credit card details. The acceptance of the release of credit card information challenges an assumption still held by many that the use of credit card information over the net is insecure. However, that there is still something of a risk is illustrated by a recent report that over \$NZ200,000 of computer gear has been lost where the fraudsters used an Internet programme to access North American banks and get credit card numbers (see *The Dominion*, 19 June 1999).

The other issues are familiar, particularly in a local context. What is a purchaser buying and does the site have adequate terms and conditions that are clear and comply with the various consumer protection statutes, notably the Consumer Guarantees Act 1993 and the Fair Trading Act 1986? Most website terms and conditions would want to have something about:

- copyright and trade mark ownership, with a clear notice of the rights retained by the vendor in the website.
- in the case of downloadable material, what can be done with the download such as limiting to use on certain computers or for non-commercial purposes?
- limiting or excluding liability to the extent possible and doing the same in respect of other warranties or promises.
- limiting or excluding responsibility for linking to other sites.

However, most sites in New Zealand are focused on tangible products or services. Some of these downloading type issues are as yet, in practice, not so significant. The “click-on” means of accepting terms and conditions is likely to be accepted by New Zealand courts. The 1997 OECD codes of conduct for distance selling in the global market place recommend that electronic commerce is to be treated no different from any other means of commerce, also referred to in the 1997 Ministry of Consumer Affairs Report. To some extent this approach is picked up in a recent code of practice developed by the Internet Society of New Zealand for Internet service providers.

Lastly, as previously mentioned, New Zealand has a Privacy Act 1993 which impacts upon the gathering of personal information. Practical means of dealing with this legislation is to provide adequate notice of what information is being gathered, the degree to which it will be released to others and can be corrected. Liability for information or data gathering mechanisms such as software agents have not yet been dealt with in New Zealand but probably can be accommodated reasonably easily within the general



concepts of agency law. However, as they become sophisticated and “robotic” or the *alter egos* of their “owners” those principles as well as perhaps even the concept of “legal personality” are bound to be tested.

### **Liability: Civil and Criminal**

With an eye on the Australian case of *Telstra v APRA*, lawyers are aware of the possibility that Internet providers may be liable for web content. Most probably, the principle of control over material on the site will be relevant, highlighting once again the need for legal compliance programmes and policies.

As far as criminal liability is concerned the key issues are *hacking* or *cracking* of Internet service providers. Some high profile recent examples involved New Zealand Telecom’s Internet subsidiary, Xtra and local Internet service provider, IHUG. Hacking (directly accessing a computer) and cracking (interfering with data) do not seem to be adequately dealt with under the New Zealand Crimes Act 1961. The problems are the familiar ones of determining the extent to which digital data is property and deciding upon criminal jurisdiction: where is the server located, where were the instructions typed and so on? Pornography on the net is an expression of the darker realms of cyber space, being dealt with under the New Zealand Films, Videos and Publications Classification Act 1993. As a matter of practice the Department of Internal Affairs has prosecuted parties downloading pornographic material from the Internet.