

Receiving submissions by Email - Beware the E-mail Filter

Do you accept submissions and comments on draft planning instruments, development proposals and proposed community programs by e-mail? If so, make sure that your e-mail filters are set up properly. A South Australian Court has recently held that an objection to a development sent by e-mail was received by a Council even though the e-mail was blocked and deleted by the Council's e-mail filter: *William Close Pty Ltd v City of Salisbury and McDonalds Australia Ltd* [2012] SAERDC 26 (No 2).

Local Government Update

The City of Salisbury was required to give public notice of an application it had received to develop a McDonalds fast food restaurant.

The notice, which was published on 19 April 2010, invited submissions on the application to be made in writing or by e-mail on or before 6 May 2010 and stated that the application could be examined on the City's website. The website advised that "the central e-mail address for all departments is city@salisbury.sa.gov.au".

Regulation 35 of the *Development Regulations 2008* (SA) ("**Regulations**") required a representation to be lodged with the City within 10 business days after the date in which the City's notice was given, failing which the representor was not entitled to receive notice of the City's decision and could not lodge an appeal against the City's decision.

William Close Pty Ltd ("**Close**") lodged an objection to the proposed development by e-mail sent on the last day for lodgement of representations. The e-mail was received by the City's e-mail sanitation server which acted as a filter against SPAM, viruses and spyware ("**Filter Server**").

Close's e-mail contained a malformed line in its header which resulted in the Filter Server quarantining the e-mail before it could reach the City's internal e-mail server. The Filter Server then deleted Close's e-mail 7 days later without any notice to Close or the intended recipients.

Close later appealed against the City's decision to allow the development. McDonalds opposed the appeal on grounds that Close had not lodged an objection to the development within the required deadline.

Electronic Communications and the Regulatory Framework

State and Commonwealth governments have enacted legislation to provide a regulatory framework that facilitates electronic transactions and communications.

Who does this affect?

This decision affects Local Governments who accept submissions and comments on draft planning instruments, development proposals and proposed community programs by e-mail.

Article Highlights

- Local Governments should be aware that an e-mail filter server that quarantines and deletes an e-mail without any notice to the intended recipient creates the risk that the Local Government could still be found to have received that e-mail.
- Local Governments can reduce the risk by utilising appropriately worded disclaimers to rebut the presumption contained in the *Electronic Transaction Acts 2011* (WA).



Section 8(1) of the *Electronic Transactions Act 2000 (SA)* (**ETA-SA**) allowed a person to give information in writing, including the lodging of an objection, by means of an electronic communication when certain criteria were met.

Section 13(3) of the ETA-SA provided that where the addressee of an electronic communication had designated an information system for the purposes of receiving electronic communications, then unless otherwise agreed between the originator and the addressee of the electronic communication, the time of receipt of the electronic communication was the time when the electronic communication entered that information system.

Close relied on the above provisions in arguing that it had lodged its objection with the City within time.

The Case

The Court found:

- The City had by notice invited representations by e-mail and had designated an information system – namely its corporate email address city@salisbury.sa.gov.au – when it directed potential representors to its website.
- The Close e-mail, despite being quarantined by the Filter Server for having some malformed or redundant encoding, contained sufficient encoding mechanisms to enable it to be opened and read. It was therefore readily accessible so as to be useable for subsequent reference.
- Although the Close e-mail did not reach the City's internal e-mail server, the Filter Server was a part of the City's information system (because it processed electronic communications). When the Close e-mail reached the Filter Server, it entered the City's designated information system.

The Court held that Close had lodged an objection with the City on 6 May 2010 in accordance with the prescribed time limit and was therefore entitled to maintain its appeal against the City's decision to allow the development.

How does this apply to you?

Western Australia's applicable legislation, the *Electronic Transactions Act 2003 (WA)* mirrored the provisions in the ETA-SA until it was repealed in 2012. Its replacement, the *Electronic Transactions Act 2011 (WA)* ("**ETA-WA**") retained many of the provisions from the repealed legislation, although the time of receipt of an electronic communication has been changed to the time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee: section 14(1)(a) ETA-WA.

Unless otherwise agreed between the originator and addressee of the electronic communication, it is to be assumed that the electronic communication is capable of being retrieved by the addressee when it reaches the addressee's electronic address: section 14(2) ETA-WA.



The ETA-WA does not define the term “electronic address”, but the Explanatory Note to the *UN Convention on the Use of Electronic Communications in International Contracts* (which forms the basis for the ETA-WA) indicates that the change of term should not lead to any substantive difference as regards the time of receipt of an e-mail.

In *Reed Constructions Pty Ltd v Eire Contractors Pty Ltd* [2009] NSWSC 678, the New South Wales Supreme Court considered the question of whether an email address was an information system or simply a direction to an information system.

The Court answered this question by explaining how, when an e-mail is sent, the domain part of the recipient’s email address alerts a server which processes the e-mail and allocates it to the designated user account. *“Therefore an e-mail address is not simply a passive description of where mail should go but it is an active information system which performs a function within the meaning of the Electronic Transactions Act.”*

This suggests that the reasoning in **William Close** will remain applicable despite the recent legislative changes.

The decision in **William Close** has particular relevance to the advertisement of a proposed development or a proposal to amend a local planning scheme, but applies to any situation where information must be lodged by an end-date and can be submitted by e-mail. Local Governments should be aware that an e-mail filter server that quarantines and deletes an e-mail without any notice to the intended recipient creates the risk that the Local Government could still be found to have received that e-mail.

You can reduce this risk by including an appropriately worded disclaimer to rebut the presumption contained in section 14(2) of the ETA-WA as to when an electronic communication is capable of being retrieved by the addressee.

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