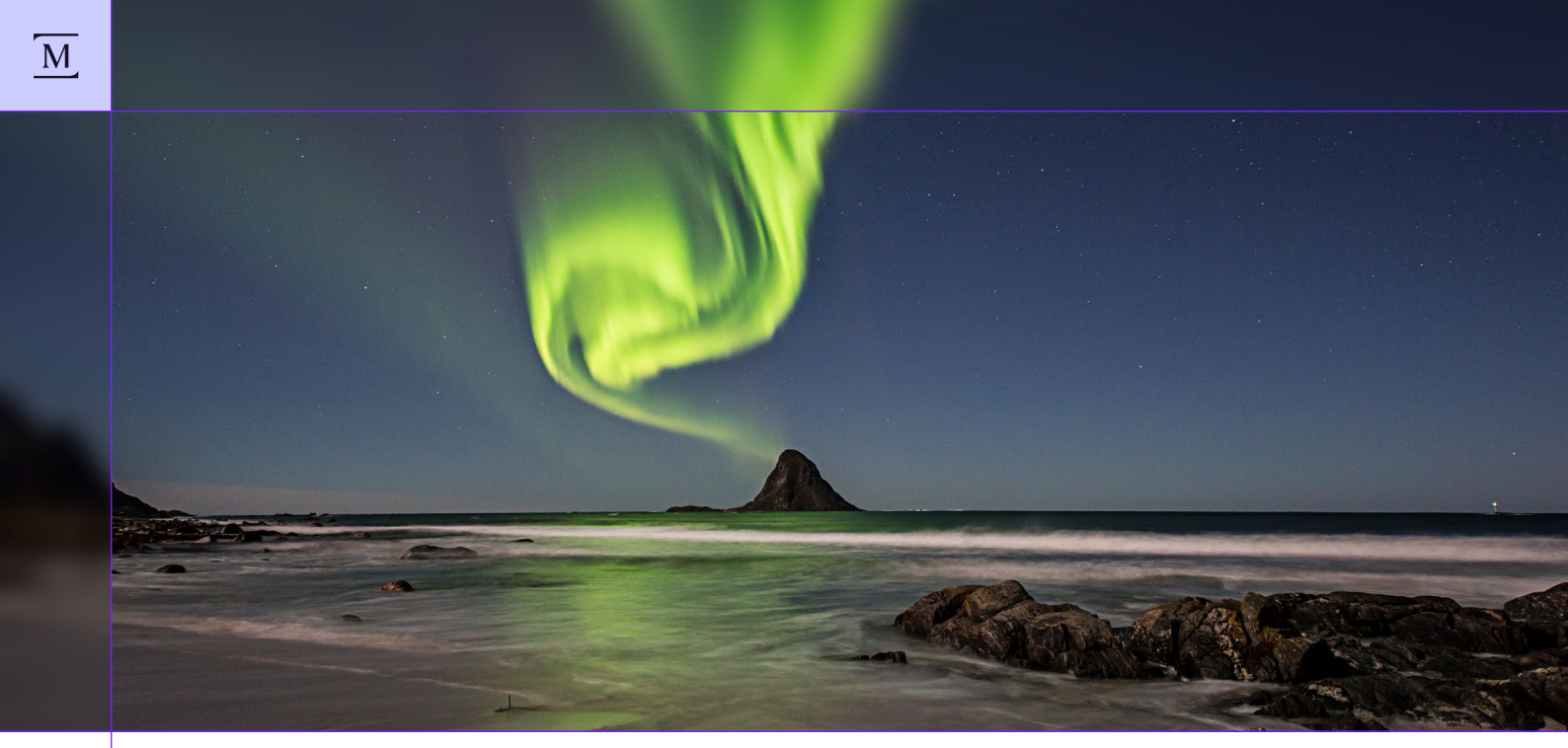


IT BYTES

What methods should I approve for providing formal notices under a contract?

When does this question tend to arise?

You hold a significant enterprise software licence with a key vendor. The licence is due to auto-renew in 60 days unless you give written notice of non-renewal. Your procurement team has decided not to renew. Given the tight timeframe, you send the non-renewal notice by email to your usual contact at the vendor. Two months later, an invoice arrives for the licence renewal. The vendor's position is that your email did not comply with the notice clause, which requires notice to be delivered by registered post to a nominated address. You review the clause and realise the vendor may have a point - email is not listed among the approved methods. Was your non-renewal notice effective, or are you now locked into an extended licence term?

What does the law say?

Most commercial contracts include a notice clause that specifies how formal communications under the contract (such as termination notices, breach notices, renewal notices and other important notices) must be given. The approved methods and any associated requirements (such as the address for service) are a matter of contractual agreement between the parties.

Australian courts generally require strict compliance with the prescribed method of giving notice. A notice that is not given in the manner specified in the contract may be found ineffective, even if the intended recipient actually received it and was aware of its contents. This reflects the broader principle that contractual terms should be given effect according to their plain meaning - if the parties have agreed that notice must be given in a particular way, the courts will typically hold them to that bargain.

A related question is whether email can satisfy a contractual requirement for notice to be given "in writing". The *Electronic Transactions Act 1999* (Cth), along with corresponding state and territory legislation, provides that a "transaction" (which is defined to include amongst other things a notice made in connection with the performance of a contract) is not invalid simply because it takes place by means of an electronic communication. So, by default, if a contract is silent on the matter, then it is legitimate to issue contractual notifications by email. However, that default position can be displaced by a contrary agreement. If a contract prescribes specific methods of giving notice that require hard copy delivery (eg by postal mail or courier), the electronic transactions legislation is unlikely to override that contractual position.

Notice clauses also commonly include "deemed receipt" provisions, which specify when a notice is taken to have been received. For example, three business days after posting for registered post, or on delivery for hand delivery. These provisions provide certainty as to when time starts to run for any obligations triggered by the notice, such as a cure period before termination takes effect. As with format requirements, courts will tend to strictly apply these requirements, so parties will need to carefully factor those deeming provisions into any actions they take under the contract.

What are the practical implications for your contract?

Be specific about approved delivery methods

Clearly set out the permitted delivery methods - common options include hand delivery, registered post (or a specified courier service), and email. If you intend for email to be permitted, say so expressly - do not assume it will be implied. If the listed methods are intended to be exhaustive, state that clearly.

Think carefully about whether to allow email

Email offers speed and a clear electronic record, but there are risks. Emails can be caught by spam filters, overlooked in a cluttered inbox, or sent to the wrong address. For notices with significant legal consequences (such as termination notices), a more deliberate method like registered post may be preferable. A sensible middle ground is to permit email but require that a copy also be sent by registered post.

Include deemed receipt provisions for each delivery method

Specify when a notice is taken to have been received. For example, a set number of business days after posting for registered post, or on delivery for hand delivery. For email, consider deeming receipt when the email enters the recipient's system, or at a specified time on the next business day. This avoids arguments about whether the recipient actually opened or read the email.

Keep delivery methods and contact details current

Remove outdated methods like fax from template agreements and consider whether newer tools - such as online portals or messaging platforms - should be addressed. Include an obligation for each party to notify the other promptly if their contact details change.

Consider how the notice clause interacts with other provisions

The notice clause typically interacts with termination rights, cure periods, renewal options and dispute resolution mechanisms. Ensure the notice requirements are practical in the context of any time-sensitive processes. For example, deemed receipt provisions may have an impact on when a 30-day cure period starts to run and, by extension, when a termination right under the contract becomes exercisable.

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