



AUGUST 2004

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Inside:

Lenders will need to carefully consider proposed ecommerce changes to the Consumer Credit Code

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New credit legislation

The Consumer Credit (Qld) Amendment Bill and the draft Consumer Credit Amendment Regulation (No.1) 2004 (Qld) were recently released for comment. They contain changes relating to electronic transactions under the Consumer Credit Code. Lawyer Regina Kho and Partner Catherine Parr highlight the key features of the proposed amendments and some important points for lenders to consider.

Introduction

The changes contained in the Bill and draft Regulation address some of the issues which came out of the Post Implementation Review of the Consumer Credit Code.

The Bill confirms that, subject to some specific protections for consumer credit, the electronic transactions legislation in each jurisdiction will apply to the Consumer Credit Code (the **Code**). It aims to ensure that consumers who choose to transact electronically are afforded the same level of protection as those who elect to transact via a traditional paper-based method. Electronic transactions legislation serves the fundamental principle of technology neutrality by providing that a transaction is not invalid simply because it took place by means of electronic communication. For the purpose of this article, we use the *Electronic Transactions Act 2000* (NSW) (the **ETA**) as the reference electronic transactions legislation.

Summary of changes

Loan contracts and mortgages

The proposed amendments make it clear that Code-regulated credit contracts and mortgages can be formed electronically, provided that the relevant provisions of the ETA are satisfied.

The Code requires these documents to be **written** and **signed**.

To satisfy requirements of 'writing' under the ETA, the following must be satisfied:

- at the time the information was given, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference; and
- the customer consents to this requirement being met by electronic communication.

Therefore, a document attached to an email, or a document, the text of which appears on a lender's website, can be 'written' for the purposes of the Code.

The ETA provides that a requirement for a signature in relation to an electronic message is satisfied if:

- a method is used to identify the person whose signature is required;
- that method indicates that person approves of the message's contents;
- that method is as reliable as appropriate for the purpose for which the information is communicated; and
- that person consents to the requirement being met by that method.

Storage and reproduction

The ETA requires information communicated electronically to be 'readily accessible so as to be useable for subsequent reference'. The Bill goes further by providing that the electronic notice or document must be in a format that enables it to be printed or saved.

Timing of delivery

The Bill also overhauls the notice provisions for electronic communications. It removes specific language relating to electronic communications as such language will be unnecessary when the ETA applies (although reference to 'telex' will be retained to avoid any uncertainty about whether a telex is an electronic communication).

Currently, the Code's provisions governing delivery of notices and documents do not provide for deemed receipt of documents but rather that electronic communications are taken to be given on the date they bear, or the date the device from which they were sent records their dispatch, whichever is the later. The Bill provides that notices are taken to be given when

they are received by the intended recipient. The ETA will determine when an electronic communication is received. It provides that unless otherwise agreed between the sender and the addressee, an electronic message is received:

- when the message enters the information system designated by the addressee; or
- if no information system is designated, when the message comes to the attention of the addressee.

Excluded documents

Certain types of documents are not regarded as valid if made, given or provided by electronic means under the Bill and draft Regulations. These include Code-regulated guarantees and notices of default, repossession and demand.

The changes contained in the Bill and draft Regulation address some of the issues which came out of the Post Implementation Review of the Consumer Credit Code.

The carve-out in respect of guarantees is predictable. Even had this carve-out not been included, lenders may have been reluctant to accept guarantees signed electronically. The risks of a guarantee being unenforceable are already reasonably high, even where the guarantor physically signs a document that contains a prominent warning. The Code of Banking Practice imposes stringent requirements on banks in relation to taking guarantees that involve providing to guarantors detailed information, some of which may not be available electronically in any event. Lenders usually require that guarantors obtain independent legal advice. Accordingly a guarantee is not usually something that is entered into quickly and delivery and execution of the guarantee is usually a separate process from the process for entering into credit contracts. The continuing requirement for a physical signature is unlikely to adversely affect lenders at a practical level.

It is interesting to note, however, that if the amendments proceed in the current form, the Code itself will in fact permit a guarantee to be given electronically, unless a regulation provides to the contrary. This suggests that the regulators see the possibility, down the track, that guarantees might be able to be formed electronically. If there was a firm

policy that electronic guarantees should never be possible, then presumably the new enabling section in the Code itself would exclude guarantees.

While a guarantee cannot be entered into electronically, other documents involving a guarantor can.

The exception for default notices is also predictable, and follows a recommendation in the Post Implementation Review. The Code already treats default notices differently in that it requires individual notices to be served on each affected debtor or guarantor, even if they are joint debtors or guarantors who have agreed that it is sufficient, generally, if one of them receives notices.

Presentation of information

The draft Regulations provide that if a credit contract or notice is given by electronic communication, it must be clearly and conspicuously expressed without distractions such as pop-up boxes or advertisements. Essentially:

- the text of the document must be capable of being viewed legibly;
- the electronic communication must not contain any image, message, advertisement or the like that is likely to distract the debtor from understanding the document. If there are any such features accompanying or associated with the electronic communication, the lender must ensure that the debtor would be able to easily differentiate those features from the document;
- the document must have scrolling capability; and
- the street address and contact number of the lender must be included in the document.

There is, of course, a risk that a customer will not scroll through or read the entire contract before entering into it. The same risk exists, however, with a paper document. The regulators have commented that it would not be technically feasible in all situations to ensure that the debtor scrolls through the precontractual statement and the information statement before entering into the related credit contract. In their view, the ability for the customer to save or print the document is adequate protection.

What will the changes mean in practice?

Identification

A major obstacle to transactions with a customer solely by electronic means is the requirement for an identification record for each signatory under the *Financial Transaction Reports Act 1988*. This can be either:

- an identification reference; or
- a verification in accordance with the prescribed procedure.

Both methods require the signatory to produce certain original documents and to sign in the presence of the party giving the reference or undertaking the verification. This means that physical documents will still have to be produced by face-to-face contact with the customer when identification of a new customer is required.

One significant issue with purely electronic transactions is that it is difficult for the lender to ensure that it is correctly identifying each customer, that they are receiving an authentic message from the customer or that the electronic message has not been intercepted or altered in transit by some other person. There are also significant practical issues when there are joint debtors. For example how does the lender ensure each of them has signified their consent (when entering into a contract or a variation) or received information?

Issues can also arise with guarantors. While a guarantee cannot be entered into electronically, other documents involving a guarantor can. If a debtor and a guarantor live at the same address, and the lender is seeking the guarantor's agreement that their guarantee extends to an additional advance, how does the lender know it is the guarantor, and not the debtor, sending an electronic communication in the guarantor's name to agree the extension of liability?

In light of these potential issues, it would be prudent or lenders to employ additional security measures if they do decide to rely on electronic communication.

Signature

The draft changes to the Code don't prescribe what is an adequate functional equivalent for a signature. There was some suggestion in the Post Implementation Review that the consumer credit legislation should mandate a specific process for customers to express

their interest in proceeding to the formal contract stage and for customers to enter into a contract.

There are some features of online delivery and acceptance of contract terms that may provide additional arguments for a customer seeking to reopen their credit contract on the grounds that the contract, when entered into, was unjust.

Reliance on the ETA alone means that lenders are still faced with the difficult question of what form of electronic signature is adequate to identify the debtor, denote his or her approval of the contents of the electronic communication and 'be as reliable as appropriate' for the relevant purpose. Lenders will need to carefully weigh the commercial benefits of contracting with customers on-line against the risks of identification and authentication to determine whether they will accept electronic signatures and, if so, what they will use as the functional equivalent of a real signature on paper.

Contracting out of the deemed service provisions

As mentioned above, the deemed service provisions in the ETA will only apply to the extent that the parties have not agreed otherwise. It would be possible for lenders to include different deeming provisions in their credit contracts. There were some recommendations in the Post Implementation Review to the effect that consumers should be given the right to challenge any unfair presumptions concerning the sending and receipt of messages and any unfair contract terms concerning the attribution of a message to them. Those recommendations have not been addressed. Lenders are on notice, however, that the regulators will consider additional remedies if practices emerge that they view as unfair or inappropriate. As the regulators highlight in the explanatory material accompanying the Bill, a national working party is currently developing a set of uniform unfair contract terms provisions that could be implemented in all jurisdictions and would apply to the Code.

Version control

If contract terms are provided electronically credit providers will need to ensure they can prove which version of the terms was applicable at the relevant

time. Version control is already a big issue with paper documents. It may become more of an issue if the terms of an electronic document can be readily changed and the changes broadcast or posted instantly to a website.

Business purpose declarations

The current draft does not amend regulation 10 relating to form and content requirements for business purpose declarations for loans, although it does amend the equivalent provision in regulation 34 dealing with leases.

Purpose declarations are typically contained in application forms. Where those application forms are submitted electronically through an intermediary (such as a broker) credit providers will face particular issues about what is an effective 'signature'.

Unjust transactions

There are some features of online delivery and acceptance of contract terms that may provide additional arguments for a customer seeking to reopen their credit contract on the grounds that the contract, when entered into, was unjust. The court can take into account a number of factors in determining whether a contract is unjust, including whether the lender took measures to ensure that the customer understood the nature and implications of the transaction and, if so, the adequacy of those measures. In electronic transactions disabilities, language difficulties or other vulnerabilities are not easily identifiable. Customers may argue they were not aware that they were in fact entering into a binding contract. These risks can be addressed (although not completely removed) by additional questions and warnings.

Regulators' concerns that customers may not be able to distinguish between advertising material and contract terms, or may be distracted by adjacent advertising material, have been addressed by specific requirements in the new Regulation referred to under 'Presentation of information' above.

Have your say

The regulators have invited submissions on the draft amendments. They have posed some specific questions on which they are inviting comment. The closing date for submissions is 3 September 2004. A copy of the Bill, the draft Regulations and the accompanying explanatory paper can be found on the website of Consumer Affairs Victoria under 'HotTopics'. See: www.consumer.vic.gov.au.

We will continue to monitor the submissions process and will let you know of any changes to the forthcoming legislation and its potential impact on your business.



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