
CLICK HERE FOR DETAILS: **E-commerce and consumer credit**

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Introduction

The Uniform Consumer Credit Code Management Committee (UCCCMC) recognises the increased interest from credit providers in the use of electronic communications in connection with consumer credit. UCCCMC is currently working towards a set of modest amendments to the Uniform Consumer Credit Code (the Code) aimed at implementing the e-commerce recommendations in the Post Implementation Review (PIR) of the Code.

Since the recommendations were made, there have been significant developments in the e-commerce legal framework – in particular, the enactment of Federal and State electronic transactions legislation. There have also been useful soft law developments, such as the *Electronic Funds Transfer Code of Conduct* and the best practice guidelines, *Building Consumer Sovereignty in Electronic Commerce: A Best Practice Model for Business*. The UCCCMC has taken these developments into account in considering how best to roll out the PIR recommendations.

The aim of the PIR e-commerce recommendations is to:

"Recognise electronic transactions by harmonising the Code, as far as possible, with the Electronic Transactions Bill 1999. In addition, the Code will need to adopt specific consumer protection measures to respond to issues that arise specifically out of the consumer credit environment."¹

The operation of the electronic transactions legislation (now enacted in each State and Territory) plays a crucial role in assessing what is needed to facilitate e-commerce in respect of Code-regulated credit. The provisions of the electronic transactions legislation are in the same terms in each jurisdiction and are based on the *Electronic Transactions Act 1999* (Cth). For convenience, I will refer to the *Electronic Transactions (Victoria) Act 2000* (ETV Act) as representative of the electronic transactions legislation.

The first part of this paper comments on the PIR recommendations and the second part describes the draft Bill that is nearing completion and will be released for consultation before the end of the year.

¹ Recommendation 2.19 of the Post Implementation Review.

Part one

Recommendation 2.20

Amend the Code's definition of writing and sign to make it clear that the Code recognises both electronic records and the electronic authentication of records.

The definition of *writing* and *sign* is fundamental to the recognition of electronic consumer credit transactions and the use of electronic communications in the ensuing relationship between debtor and credit provider. Writing and sign are defined in Schedule 2 of the Code, though not exhaustively.

Writing is defined to include "any mode of representing or reproducing words in a visible form". Sign is defined to include "the affixing of a seal or a mark": Schedule 2, Part 3 of the Code. The former is an extension of the common law definition of writing (it would already cover facsimiles, for instance) while the latter restates one well-established component of the common law meaning of 'signature'.

It may be that since these definitions are not exhaustive, the Code itself already permits electronic writing and electronic signatures.² Certainly, the definition of writing seems *prima facie* to cover electronic documents. However, there is widespread uncertainty amongst stakeholders. The UCCCMC takes the view that as electronic transactions legislation is specifically designed to facilitate the use of electronic transactions, we would like to rely on it as much as possible.

It has been suggested that the requirement in section 12 of the Code for a credit contract to be a "written contract document" may not benefit from the equivalence provisions in the ETV Act. This is because the requirement for the debtor and the credit provider to use a written contract may not constitute "giving information" within the meaning of section 8(5) of the ETV Act.³ The better view is that the general rule about validity in the ETV Act has the effect that a contract is "not invalid because it took place wholly or partly by means of one or more electronic communications."⁴

² For example, in an article in the [Butterworths Consumer Credit Bulletin](#) (No. 4 of 2002), Alistair Grant argues that the Code's definition of writing would cover words communicated by an HTML file or a PDF document. Grant also notes that the definition of *document* in the Code is wide enough to cover all sorts of electronic documents. As for 'signature', Grant suggests that since the evidentiary/consent, caution and record-keeping functions belonging to a signature can be emulated by electronic signatures (or even a simple warn-before-clicking process), they too are valid under the present regime.

³ Section 8 (writing) of the ETV Act addresses situations where a law requires a person "to give information in writing". Section 8(5) provides that giving information includes a range of acts such as lodging a claim, making a declaration and giving a statement of reasons. None of the examples are akin to entering a contract.

⁴ Section 7 ETV Act.

Recommendation 2.21

Give further consideration to those types of contracts, such as real property mortgages, which need to be exempted from being able to be entered into electronically.

The UCCCMC considers that in principle, all forms of credit contract should be able to be made electronically.

Reservations about the use of electronic communications in connection with real property mortgages are largely because real property transactions have always been paper based, due to conveyancing and sale of land legislation, the Statute of Frauds and previous manual recording systems. This is set to change, because land titles offices across Australia have agreed to implement electronic conveyancing.⁵

The UCCCMC does not want the Code to be a barrier to electronic conveyancing. If a credit contract is secured by a real property mortgage, the Code requires that not only must the contract be in writing, but so too must the mortgage. Indeed the latter is otherwise unenforceable: section 38. Electronic conveyancing cannot function properly if the mortgage relating to a credit contract cannot be executed and stored electronically.

That said, the UCCCMC believes that a regulation making power in the Code to prohibit designated transactions from being undertaken electronically will ensure that the Code can be responsive to demand and technological progress while also protecting consumers' interests.

Recommendation 2.22

Permit electronic communications where the consumer has an electronic address, the means to notify a change of address, elects to receive communications electronically and has a right to cancel this election.

There is a wide variety of circumstances in which the Code makes provision for specified types of communication from credit provider to debtor. Examples include supplying periodic statements of account (section 31), notifying a change to fees or charges (section 61) and serving a notice of default (section 80). Vice versa, a debtor is entitled to request the credit provider to supply details of their current balance (section 34) or a payout statement (section 76).

Section 172 provides that whatever terminology the Code uses when a notice or other document is to be *given to a person* (be it *notify, serve, inform* or whatever), the requirement is deemed to be met if one of the specified modes of communication is used. For individuals, these are personal service and “post, telex, facsimile or **similar facility**” [emphasis added]. Where the notice or other document is to be given to a body corporate, the designated modes are personal service or “post, telex, facsimile or **similar electronic facility**” [emphasis added].

⁵ For example, Land Victoria's [Electronic Conveyancing Victoria](#) project is scheduled to deliver e-conveyancing by 2004.

Section 172 goes some way towards establishing electronic equivalence, but it does so in the non-standard, ambiguous terminology and the limitation of *similar electronic facility* to use with corporate bodies is anomalous.

Section 8(3) of the ETV Act suggests that the equivalence ordinarily achieved via section 8 (1) and (2) ETV Act will not apply because s.172 makes provision for a particular kind of electronic communication.⁶ The UCCCMC does not want the Code to employ a variety of different terms that all imply some form of electronic communication.

Recommendation 2.23

Prohibit documentation under the Code that triggers an enforcement process being able to be provided electronically

The PIR expresses concern about permitting documents that signal the commencement of a statutory process of enforcement to be served electronically, at least until electronically conducted credit and commencing court process by electronic communication is more commonplace.

Initially the UCCCMC envisages that a notice of default under section 80(1) and a notice of repossession under section 80(2) ought not to be served solely by means of electronic communication. The UCCCMC will need to consider other potential exclusions, such as a section 78(1) notice of intention to return goods and a section 94(1) mortgagee notice of the value of repossessed goods.

Recommendation 2.24

Implement the following in relation to the storage and reproduction of information:

(1) Ensure that the pre-disclosure statement and the contract is capable of being stored both before and after the transaction is completed.

Contract law already entitles consumers to access to a copy of the credit contract before they sign. The Code requires that a copy of the precontractual statement and the information statement are to be provided in advance: section 14(1). If all of these documents are to be supplied by electronic communication, then section 8 of the ETV Act requires that they must be "readily accessible so as to be useable for subsequent reference". Electronic documentation supplied prior to signing that cannot be read and retained would infringe the ETV Act.

Recommendation 2.24(1) states that a copy of the electronic credit contract should be capable of being stored and retained after the agreement is entered into. This complements section 18 of the Code, which compels a credit provider to supply the consumer with a copy of the credit contract in the form in which it was made.

⁶ Section 8(3) of the ETV Act provides that where an Act already specifies particular information technology requirements in terms of either data storage devices or types of electronic communications, the Act prevails over the ETV Act.

It is assumed that where a credit provider enters into a credit contract electronically, they will at the same time obtain the consumer's positive election to receive notices and other documents required by the Code electronically.

(2) Ensure that all electronic communications are capable of being retained and are accompanied with instructions on how to do so.

This overlaps with one of the prerequisites in the ETV Act before writing can be satisfied electronically - namely, that the electronic writing be readily accessible so as to be useable for subsequent reference. Whenever electronic communications move between the credit provider and the debtor, they will need to be *capable of being retained* to comply with the ETV Act. For example, an electronic communication encoded so that it can be read but not printed or downloaded would not comply.

Where a notice or other document is given to a debtor on a website, the credit provider will also be under an obligation to ensure that the information can be printed or saved.

The UCCCMC considers that it is not practicable to make the provision of instructions on retention an enforceable obligation. However, credit providers should encourage consumers to retain any documentation they receive or have access to electronically. Credit providers could also supply practical instructions to help the consumer achieve this.

(3) Ensure that the capacity to store or retain electronic communications includes both the capacity to copy them on a personal electronic file and make a paper print out.

See above.

(4) Ensure that any electronic communications so retained be able to be done in a manner that satisfies conditions of reliability and identification of place, time and date of origin and receipt of this information.

The ETV Act provides default outcomes about time and place in lieu of specific agreement between the contracting parties. In the absence of specific agreement, section 13 provides that the time of dispatch is when the credit provider's electronic communication "enters a single information system outside the control of the sender [credit provider]"; the time of receipt will be the time that the communication enters the debtor's information system; and place of origin of the communication is deemed to be the credit provider's place of business.⁷

(5) Ensure that the electronic communications permit the display of text messages in a clear and readily understandable format. (see also Recommendation 2.26)

Section 162 of the Code provides that credit contracts, guarantees and notices must be *easily legible* and *clearly expressed*. Regulation 39 requires that print or type be not less than 10 point font. These requirements will need to apply to credit contacts,

⁷ "Information system" is defined in the ETV Act to mean a system for generating, sending, receiving, storing or otherwise processing electronic communications.

guarantees and notices in electronic format, though the size of font is ultimately controlled by the end user rather than the sender of the communication.

The Code's regulation making power needs to be wide enough to permit prohibition of the use of gimmicks such as flashing text. It should also enable regulations to prescribe documents or electronic communications that cannot contain anything other than text and tables. It might be helpful to confirm that *easily legible* includes ensuring sufficient contrast between lettering and background. Where a hyperlink is used to propel the consumer from one document to another - eg. from the information statement to the credit contract, credit providers should take reasonable steps to signal this to the consumer.

- (6) Require that credit providers take reasonable steps to ensure that the pre-contractual information and the contract are complete and unaltered at the point at which a consumer receives them.**

The UCCCMC considers that credit providers already operate under this obligation.

- (7) Give further consideration to the kinds of documentation or other information that would not be considered to be appropriate to post on a website for the purposes of providing that information to the consumer.**

Information specific to a particular consumer should not be posted on any part of a website to which the public or other customers of the credit provider have access. In any event, to do so would breach the National Privacy Principles to which credit providers are subject.

The UCCCMC does not object to information being supplied on a website where a credit provider has the means to offer secure access, provided the protections in Recommendation 2.22 are in place and the debtor is notified that the notice or other information is posted on the website.

Recommendation 2.25

Require that precontractual and contractual information is able to be scrolled through before any contract can be entered into, in a form that enables consumers to download it or print it out if they choose. (See also Recommendation 2.24(3)).

The print and save aspect has been addressed above.

Not everyone with access to the internet or email will be in a position to print out a large credit contract or save it to their computer or network drive. Therefore credit providers must ensure that if the precontractual statement, the information statement and the credit contract are rendered by electronic communication, all of these documents can be read in full on the screen, if the consumer so chooses, before the contract is formed.⁸

⁸ This should apply whether access is via the credit provider's website, or in an attachment to an email or whatever.

If the contract is accessed and entered into on the credit provider's website, it is probably feasible to require that credit providers arrange the presentation of the precontractual statement, the information statement and the credit contract so that the credit contract cannot be entered into unless these documents have already been opened, though this falls short of requiring the consumer to scroll through the entirety of the document. However, if a credit contract and associated documentation is attached to an email sent to the consumer, and then the consumer digitally signs the contract and returns it, there will not be the same scope for controlling the sequence of the consumer's behaviour.

Recommendation 2.26

Amend section 162 of the Code or make a regulation under section 13 to ensure that important electronic communications are clearly and conspicuously expressed without distractions.

The intention is that the regulations will prohibit content or display that could mislead, deceive or detract from the gravity of the contract process or the information that is being imparted to a consumer. (See also Recommendation 2.24(5))

Recommendation 2.27

Ensure that the Code's minimum requirement for font size for paper based documentation is also required for electronic communication.

It is proposed to amend Regulation 39 by removing reference to "print or type" and replacing it with technology neutral language.

Recommendation 2.28

Ensure that consumers are given the opportunity to challenge unfair presumptions concerning the sending and receipt of messages.

The PIR expresses concern about the potential for unfair or unjust terms to be imposed by credit providers in connection with the sending and receipt of messages. The comment is made that section 70 of the Code (*reopening unjust transactions*) may not offer suitable redress. The PIR suggests that additional protection may be needed.

The UCCCMC's view is that if and when credit contracts formed by electronic communication show a trend towards unfair presumptions about the sending and receipt of notices, we will assess the need for action. It is also worth noting that there is a current national project examining the prospect of consistent unfair contracts legislation. Such legislation would proceed on the basis that credit contracts ought not to be immune from this sort of regulation, even though at present, the unfair contracts provisions in Part 2B of the Victorian *Fair Trading Act 1999* do not apply to Code-regulated contracts.

Recommendation 2.29

Ensure that consumers are given the opportunity to challenge unfair contractual terms concerning the attribution of a message to them.

It is not proposed to introduce any additional provision into the Code to review terms or conditions in respect of the attribution of electronic communications where they depart from the default outcome in section 14 ETV Act.

Recommendation 2.30

Require credit providers to disclose a physical address in the context of electronic communications only.

Regulations could be made under section 150 of the Code requiring the credit contract to contain details of the physical address and telephone number of the credit provider. A regulation could also be made to require credit providers to include physical address and telephone number details on any electronically communicated notice to which section 172 of the Code applies.

Recommendation 2.31

Support a 2 stage process by:

- 1. requiring the introduction of a multi-clicking process at the stage which the consumer is considering the loan product and expressing their interest in proceeding to the formal contracting process; and**
- 2. requiring the introduction of mechanism that does not involve clicking at the stage at which they express their agreement to enter into legal relations. This mechanism would involve some kind of electronic signature, which is reliable in authenticating the identity of the consumer and of the intent of that person to be associated with the message. The consumer ought to have the option at this stage to enter into the contract by other means.**

Whatever the medium, debtors must have an adequate opportunity to review the credit contract before signing. They should not be confused about where they are in the contract sequence. That said, the UCCCMC does not consider that the provisions in the electronic transactions legislation need to be augmented by Code provisions. Best practice and self regulation should prevail in this area, ahead of any national agreement about consumer protection mechanisms in the electronic environment.

Recommendation 2.32

Address the issue of currency of disclosure in the electronic commerce context only.

The premise of this recommendation is that debtors are more likely to come across outdated information in electronic format than in hard copy format and that in the absence of face to face communication, there will be less opportunity for the credit provider to correct and update information for the consumer.

Part Two

Consumer Credit (Queensland) Amendment Bill 2003

Introduction

The Bill does not introduce new concepts: it is facilitative and therefore concise.

Application of electronic transactions statutes

The most important provision is one that confirms the application to the Code of the electronic transactions legislation in each jurisdiction. In some jurisdictions the Code is currently excluded from the operation of that legislation. This will cease to be the case once the amendments introduced by the Bill are in force.

Generic notice

Section 172 has been overhauled to rationalise the current disparate references to electronic mediums of notice and to confirm the option of incorporating the Internet into the giving of notice.

When is notice given?

Notice is taken to be given when the consumer receives the communication, as determined by the electronic transactions legislation, which is different from the provisions of section 173(1)(c).

Retention

The draft Bill expresses the importance attached to the consumer having the opportunity to save and download contracts and statutorily required information.

Hard copy references

Provisions that by their terms do not accommodate electronic communications equivalence are to be amended. For example, the section 17 reference to annotating a credit contract in the *margin* will be removed and a reference in section 162 to *printed or typed* will be restricted to paper documents.

Regulations

Aside from ensuring that the Code has the necessary regulation making power in respect of electronic communications, there will also be a set of regulations to complement the e-commerce amendments. These will comprise consequential adjustments to achieve equivalence (such as in reg. 20(2) where there is currently a need to have a warning *immediately above* the signature) and some consumer protection measures arising from the special nature of electronic communications. An example of such a measure was given above in connection with distracting features.