

*“Explanatory paper
e-commerce and the
Uniform Consumer
Credit Code”*

The Uniform Consumer Credit Code
Management Committee



“ *Making a submission* ”

All interested individuals and organisations are encouraged to provide comments on this discussion paper.

Comments in writing should be forwarded to:

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Closing date for submissions: 3 September 2004.

It should be noted that unless confidentiality for submissions is specifically requested, the contents of submissions may be made publicly available in any subsequent review process.

Also, submissions may be subject to Freedom of Information and other laws and this should be taken into account when making submissions.

“ Section 1 Introduction ”

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The Ministerial Council on Consumer Affairs has ultimate responsibility for the Uniform Consumer Credit Code. The Standing Committee of Officials of Consumer Affairs (SCOCA) (heads of fair trading and consumer affairs agencies across Australia) provides advice to the Ministerial Council on the Code. In turn the Uniform Consumer Credit Code Management Committee (UCCCMC), established by SCOCA, advises SCOCA on the administration, monitoring and review of the Code, including work on policy and implementation of policy. UCCCMC comprises representatives from each State and Territory, drawn from consumer affairs and fair trading agencies.

UCCCMC recognises the increased interest from credit providers in the use of electronic communications in connection with consumer credit. UCCCMC has been working towards a set of amendments to the Uniform Consumer Credit Code (the Code) to implement the e-commerce recommendations in the Post Implementation Review (PIR) of the Code. The PIR e-commerce recommendations are at the end of this paper.

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

"Recognise electronic transactions by harmonising the Code, as far as possible, with the [Cth] Electronic Transactions [Act] 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."

Since the recommendations were made, there have been significant developments in the e-commerce legal framework – in particular, the enactment of electronic transactions legislation in all States and Territories, using the *Electronic Transactions Act 1999 (Cth)* as the template. There have also been complementary developments, such as the Electronic Funds Transfer Code of Conduct and Building Consumer Sovereignty in Electronic Commerce: A Best Practice Model for Business. The revised Code of Banking Practice also addresses electronic communications.

The implementation of the e-commerce recommendations has taken all of these developments into account. The result is the Consumer Credit (Queensland) Amendment Bill and the Consumer Credit Amendment Regulation (No. 1) 2004.

Current position

There are differing views about the extent to which the Code, the uniform electronic transactions legislation and the general law permit the use of electronic communications for transactions, dealings and statutory requirements governed by the Code.

The definition in Schedule 2 of the Code of document ("any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being reproduced (with or without the aid of another article or device)") and writing ("any mode of representing or reproducing words in a visible form") already make some reference to electronic communications, as do the provisions governing the manner of giving notice in Part 11.

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 etc.), the requirement is deemed to be met if one of the specified modes of communication is used.

For individuals, these include "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 include "post, telex, facsimile or **similar electronic facility**" [emphasis added]. Hence section 172 does go some way towards entrenching e-commerce, but in a somewhat outdated and inconsistent manner. Section 173(1)(c) continues this pattern by referring to an "**electronic transmission**" [emphasis added]. Section 163(3) permits a copy of a contract or other document to be provided "in the form of a **computer generated facsimile** containing the same information as was contained in the original document ...". [emphasis added]

The only part of the Code that contains modern provisions addressing the electronic medium is Part 9A, on comparison rates. Section 146K(4) of the Code requires credit providers, finance brokers and suppliers to ensure that if they advertise consumer credit on their "Internet site, or any other public electronic system", they must give consumers "electronic access" to the relevant comparison rate schedule.

Aside from the Code itself, the other major determinant of the use of electronic communications is the regime established by the *Electronic Transactions Act 1999* (Cth). This Act has been substantially re-enacted in each State and Territory. The objects of the electronic transactions legislation include:

- To facilitate the use of electronic transactions.
- To promote business and community confidence in the use of electronic transactions.

The standard provisions provide:

- that transactions are not invalid merely because they occur by means of an electronic communication
- that a legal requirement to give information in writing, provide signatures, produce a document, and record or retain information can validly be met by electronic communications
- assumptions for determining time and place of dispatch and receipt
- assumptions regarding attribution of an electronic communication.

Some jurisdictions have excluded the Code from the reach of the electronic transactions legislation until the status of electronic communications in connection with consumer credit is clarified.

Some credit providers and their advisers have taken the view that it is already possible to provide statements of account by means of electronic communication, notwithstanding that electronic transactions legislation is not operational for consumer credit in all jurisdictions. There is at least one scheme that uses a combination of email and secure website to deliver statements of account electronically.

The majority of industry stakeholders appear to have taken the view that until such time as the availability of electronic communications is clarified, they will not pursue it.

Proposed amendments

The principle underlying the proposed amendments is that the application of the electronic transactions legislation in each State and Territory is the main vehicle by which equivalence for electronic communications will be achieved. The policy agreed among all jurisdictions is that the provisions of the electronic transactions legislation do not need to be repeated in each new statute that might otherwise require equivalence, because to do so defeats the purpose of having the generic legislation.

The other aim of the proposed legislative package is to ensure that consumer protection is not diminished merely because the credit contract was formed electronically or because the debtor elects to receive notices electronically.

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Section 2 Consumer Credit (Queensland) Amendment Bill

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Introduction

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

Application of electronic transactions legislation

The Bill confirms the application to the Code of the electronic transactions legislation in each jurisdiction: proposed section 164A of the Code. 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.

Notice

Sections 171 and 172 have been overhauled to rationalise the current inconsistent references to electronic forms of notice and to confirm the availability of the Internet to assist the giving of notice: see sections 8 and 9 of the Bill. Attention is drawn to the 3 step process for giving notice using an electronic address in the nature of a website or similar facility: see proposed section 172(3B) of the Code.

When is notice given?

Notice is taken to be given when the consumer receives the communication, as determined by the electronic transactions legislation. This is the effect of electronic transactions legislation. It is different from the current position in section 173(1)(c) of the Code, by which notice is given on the date the communication bears or the transmission date generated by the sender's "machine", whichever is the later.

Retention

The draft Bill expresses the importance attached to the consumer having the opportunity to print and/or save contracts and statutorily required information. This is evident from proposed section 172(3C), in connection with notice given on a website.

Hard copy references

Provisions of the Code that do not accommodate electronic communications have been amended. For example, the reference in section 17 to annotating a credit contract in the "margin" will be removed and the reference in section 162 to "printed" or "typed" will be restricted to paper documents.

Regulations

The Regulations complement the e-commerce amendments in the Bill. The Regulations contain some miscellaneous amendments to the Consumer Credit Regulation 1995, designed to overcome provisions of the Code that otherwise demand hard copy. However, the main features are in proposed regulations 40AA to 40AC.

These new regulations require mandatory information to be supplied to a consumer about their right to cancel an election for electronic communications, set out certain transactions and notices that may not be effected by electronic communications and spell out certain standards of legibility .

Commentary on Consumer Credit (Queensland) Amendment Bill 2003

(headings follow the section headings in the Bill)

1 Short Title

Self explanatory

2 Commencement

As soon as feedback from this consultation has been considered, and then allowing time to obtain the authorisation of the Ministerial Council on Consumer Affairs to introduce the Bill in Parliament.

3 Code amended

Self explanatory

4 Alteration of contract document

Section 17 refers to the debtor affirming a post-contractual alteration by signing or initialling in the margin. This will not work for the electronic medium. It is proposed to amend section 17 so that an alteration after the contract has been made simply needs to be agreed in writing. Since "writing" includes electronic writing, an electronic communication from the debtor will be sufficient.

5 Legibility and language

Section 162 refers to print or type, which connotes hard copy documentation rather than a document in electronic form. The amendment confirms that provisions referring to print or type (see reg. 39 of the Consumer Credit Regulation 1995) apply only to contracts on paper. The insertion of a new subsection – s.162(d) - is designed to ensure that credit contracts, notices etc. comply with any additional regulations made to ensure consumer protection is maintained in the electronic environment.

6 Copies of documents

Since the electronic transactions legislation supplies equivalence for a copy in electronic form, section 163(3) is no longer required.

7 New section 164A inserted ["Electronic transactions and documents"]

This is the critical provision in the Bill. Proposed section 164A(1) puts it beyond doubt that credit contracts, mortgages and guarantees may be formed electronically under the electronic transactions legislation. It also confirms in section 164A(2) that the various equivalence provisions in the electronic transactions legislation apply to the Code.

The electronic transactions legislation itself contains built-in protections. For instance, a debtor cannot be compelled to receive notices under the Code electronically. This will only be possible where the debtor consents. Vice versa, a credit provider is not obliged to accept an electronic signature from a debtor – the credit provider must agree to this.

Proposed section 164A(3) empowers regulations to be made preventing specified transactions, notices or documents from being made, dispatched etc. electronically. The list of such transactions, notices etc. is at proposed regulation 40AB.

8 Giving notice or other document

Reference to facsimile or similar facility has been removed from section 171(2) on the basis that these forms of electronic communication will now be recognised by the operation of the electronic transactions legislation on the Code and therefore do not need express mention. Reference to 'telex' has been retained for the sake of certainty, even though a telex is arguably an electronic communication.

9 Manner of giving notice

Reference to facsimile or similar facility has been removed from section 172(1)(a)(ii) on the basis that these forms of electronic communication will now be recognised by the operation of the electronic transactions legislation on the Code and therefore do not need express mention. Reference to 'telex' has been retained for the sake of certainty, even though a telex is arguably already an electronic communication.

Reference to facsimile or similar electronic facility has been removed from section 172(b)(ii) on the basis that these forms of electronic communication will now be recognised by the operation of the electronic transactions legislation on the Code and therefore do not need express mention. Reference to 'telex' has again been retained.

Proposed subsection 172(3A) enables a person to change a nominated address or cancel the nomination. This will permit a person to inform their credit provider of a new electronic address or to notify their credit provider that they no longer have an electronic address. This new provision is not limited to electronic addresses.

Proposed subsection 172(3B) is designed to enable notice to be given on a website or similar facility. However, for this to be effective under the Code, the debtor must first be informed by electronic communication that the information the subject of the notice is available at the credit provider's "electronic address". In addition, the debtor must have consented to this form of notice and the debtor must be given the "ability to readily retrieve the information [on the website] by electronic communication."

Proposed subsection 172(3C) is designed to give consumers a minimum level of protection - one that is more specific than the general requirement in the electronic transactions legislation that the communication must be "useable for subsequent reference".

10 Date of notice or other document

Section 173(1)(c) of the Code provides that notices given by "facsimile transmission or some other form of electronic transmission" are taken to have been 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 removes this provision entirely.

It is to be replaced with new section 173(1)(c) and 173(1)(d). These switch the emphasis from the sender to the receiver. With electronic communications, notice is taken to be given when it is received by the debtor. The electronic transactions legislation supplies further detail of when an electronic communication is received. It is important to note that the electronic transactions legislation formula for determining date of receipt can be altered by mutual agreement.

11 Consequential amendment

Self explanatory.

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Section 3
Questions to help
focus your submission
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Will the proposed amendments enable credit providers to make full use of electronic communications in your consumer credit business? If not, why not? How can the proposals be improved?

Will the proposed amendments enable credit providers to make full use of the Internet in connection with your consumer credit business? If not, why not? How can the proposals be improved?

Does the implementation of the proposals have significant cost implications for credit providers? If so, in what way? Will this be offset by the benefits and cost savings possible as a result of increased usage of electronic communications?

Do the proposed amendments sufficiently protect consumers from any harm or loss that might occur due to the character and potential of electronic communications? If not, how can they be improved?

Are the proposed amendments consistent with other laws or rules that apply to electronic communications? If not, what are the consequences and how can the proposals be improved?

Are the proposed amendments sufficiently flexible to cope with future technology changes without the need for further amendments to be made?

Are the notices/transactions exempted under the regulations (see 40AB) appropriate? If not, why not?

“ Attachment ”

Recommendations from the Post Implementation Review

Note: Recommendations are in bold. Commentary on what is proposed by way of implementation of each recommendation is in Stone Sans font - below the corresponding recommendation.

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.

Proposed section 164A.

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.

No contracts or other instruments are exempted in the Bill itself. However, there is a power to make regulations to exempt transactions, documents or information: see proposed section 164A(3). The proposed regulations have the effect of preventing guarantees and default/repossession notices from being made exclusively by electronic communications.

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.

Proposed section 164A. Also proposed section 172(3A).

Recommendation 2.23

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

See the proposed regulations at regulation 40AB.

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.

Proposed section 164A invokes the electronic transactions legislation which requires that the information contained in the electronic communication be "readily accessible so as to be useable for subsequent reference." This in itself will meet the terms of this recommendation. In addition, proposed section 172(3C) requires the electronic document to be in a form that enables it to be printed or saved.

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

See 2.24.1. The UCCCMC does not consider it feasible to require instructions to be given, in view of the range of hardware and software available to consumers.

- 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 of it.

See proposed section 172(3C).

- 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 the information.

The electronic transactions legislation includes the general provision that an electronic communication is not invalid just because it occurs by way of electronic communication. The electronic transactions legislation also has provisions that address time and place of dispatch and receipt of electronic communications, as well as attribution. The Bill confirms that these provisions apply to the Code in each State and Territory: proposed section 164A.

5. Ensure that the electronic communications permit the display of text messages in a clear and readily understandable format.

Section 162 of the Code already requires legibility and clarity of expression. This applies equally to electronic communications. A proposed subsection has been added to section 162 - 162(1)(d) - to enable the making of regulations addressing content and legibility and any information that "accompanies" the electronic version of a notice, credit contract etc. This last element is especially aimed at permitting regulations concerning features like pop-up boxes on a website of a credit provider, or invitations to win a holiday that might be attached, "ticker tape" fashion, to a relevant electronic document: see proposed regulation 40AC.

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.

There is no specific provision in the Bill that addresses this recommendation. The UCCCMC considers that this recommendation is already met when the credit provider complies with Part 2 of the Code.

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 is not aware of any practice whereby information specific to an individual debtor is posted on a website such that anyone with Internet access may view the personalised information. Accordingly, it is not necessary to act on this recommendation.

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.

As explained above, consumers will be able to save or print, because this will be a specific requirement under proposed section 172(3C). The UCCCMC does not favour a requirement that the consumer scroll through the precontractual statement and the information statement before being able to enter into the credit contract to which they relate. In any event, this would not be technically feasible in all situations in which electronic communications are used to obtain these statements. That said, there is a proposed regulation to the effect that the consumer must be able to scroll through the entire document, rather than saving or printing it: see regulation 40AC(d).

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 clarity requirement applies already under section 162. See also the proposed regulation 40AC.

Recommendation 2.27

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

The proposed amendment to section 162(b) restricts the 10 point minimum font size requirement (see regulation 39) to the hard copy environment. The reason for this adjustment is that font size on a consumer's computer is as much a function of the "set-up" or screen/display settings that the consumer selects as it is the credit provider's electronic communication. Font size is therefore outside the control of the sender of the electronic communication.

Recommendation 2.28

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

It is not proposed to address this recommendation in the Bill. If there are practices that are systemic and not otherwise capable of challenge under the general law or statutory unfair trading provisions, UCCCMC will then consider the need to introduce additional remedies to cover the electronic environment. A national working party is working on national unfair contract term provisions that could be implemented in all jurisdictions. The proposal is that these would apply to the Code.

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 address to address this recommendation in the Bill. However, a national working party is currently developing a set of uniform unfair contract term provisions that could be implemented in all jurisdictions. The intention is that these would apply to the Code.

Recommendation 2.30

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

See the proposed regulations at 40AC(e).