



# ELECTRONIC TRANSACTIONS

## PERSONAL LIABILITY IN THE DIGITAL AGE

### **Electronic transactions are now an everyday part of business life.**

The benefits to business of embracing electronic transactions such as online credit applications and the electronic exchange of credit agreements are obvious. What is not so obvious is the new categories of risk which electronic transactions create.

By understanding these risks and implementing some fairly simple, practical strategies, it is possible to gain the full benefit of electronic transactions while limiting the risk of future loss.

### **The 10 points below summarise the key considerations for businesses seeking to rely on credit agreements formed or exchanged electronically.**

#### **1. Not all contracts need to be in writing**

While written contracts are easier to enforce, contracts can also be created verbally and by conduct. As a general rule, this applies equally to credit agreements (subject to the points below). When sending out a credit agreement for signing, remember to include a covering letter which stipulates that the terms will be accepted by placing an order for further supply or failing to write back objecting to the terms.

#### **2. Personal guarantees must be in writing**

Most Australian states have adopted and retain the Statute of Frauds requirement that personal guarantees must be signed and in writing to be enforceable. Although there is no express requirement to this effect in NSW and SA, it is prudent to treat these strict requirements as applying equally across all Australian jurisdictions.

#### **3. A charging clause over real property must be in writing**

Often one of the strongest recovery tools is a charging clause which allows a caveat to be lodged over the real property of your customer and/or guarantor. Such clauses are only enforceable if they are in writing and signed by the person charging their interest in property.

#### **4. Electronic signatures can be as effective as ink signatures**

All Australian states, as well as the Commonwealth, have enacted an Electronic Transactions Act with largely identical provisions. Provided that the requirements of the legislation are met, electronic signatures are just as effective as ink signatures.

#### **5. There are three common forms of electronic signature**

- a Ink on paper, which is then scanned and returned electronically.
- b A signature applied electronically to a document.
- c Digitised signatures (which incorporate additional security in the form of an encrypted digital thumbprint).

As a general rule, the first 2 options carry a similar degree of risk. Digitised signatures can incorporate additional security measures, and are becoming increasingly common in the financial services space. In trade credit, however, their effectiveness from a practical perspective will vary from business to business.

## 6. Authentication is the biggest risk

To rely on a personal guarantee it is not enough for us to prove that the signature is a valid electronic signature for the purpose of the *Electronic Transactions Act*. We must also show that the signature was applied by or with the express authority of the personal guarantor. From an evidentiary perspective, this can be a very difficult exercise when the signature has been applied electronically.

## 7. A signed original is best

When we have an original signed document, it is possible to call a handwriting expert to verify that the person who applied the signature was the intended guarantor. This option is unlikely to be available if the original signed guarantee is not returned. A signed original can be obtained without necessarily slowing up the credit approval process. Consider, for example, providing an interim credit limit for 30 days based on a scanned copy of the personal guarantee, with the limit to be formalised upon receipt of the original signed documents.

## 8. Don't forget the witness

The purpose of having a witness is to verify the identity of the person who applied the signature. It is very difficult to do this if there is no witness, or if the identity of the witness is not known.

## 9. Ratification is a good way to limit risk

If execution of a personal guarantee cannot be established, it may be sufficient to prove that the intended guarantor had full knowledge of the existence of the guarantee and the creditor's reliance on the guarantee. A practical way to gain the benefit of the doctrine of ratification can be to incorporate a standard letter to guarantors within the credit approval process. The letter should be addressed to the guarantor, verify that credit has been granted on the basis of the personal guarantee and enclose a copy of the guarantee documents.

## 10. Credit insurance

There is always a degree of risk associated with providing credit. Credit insurance can be a very effective tool for limiting this risk while embracing the commercial benefits associated with electronic transactions.

### Conclusion

Online credit applications and the electronic exchange of credit agreement documents are valuable tools for credit teams. It is, however, essential to ensure that appropriate measures are in place to ensure credit agreements and personal guarantees are legally binding, and are capable of later being enforced in the event of a customer default. For further assistance or information, please contact either Results Legal or NCI.