RECENT DEVELOPMENTS NO. 2
EFTPOS - AN UPDATE

DR CHIN YEN LEE

Senior Lecturer in Law
Monash University

Introduction

The recent proliferation of automated teller machines (ATMs) and electronic funds transfer/point of sales (EFTPOS) systems in Australia has goaded the government on both Federal and State levels into some action. The emphasis is on the word "some" because, to date, we have only the Report of the Working Group Examining the Rights and Obligations of the Users and Providers of Electronic Funds Transfer Systems ("the RWG"), the draft Guidelines for Consumer Protection in Electronic Funds Transfer Systems of the State Ministers of Consumer Affairs in the various States and a very small First Report of the Australian Payments System Council.

In this session, we have time only to discuss some consumer protection aspects of the RWG and the draft guidelines. The Working Group referred to above was established by the Commonwealth Treasury on 25 June, 1984 and comprised officials from the Treasury (in the Chair), Reserve Bank of Australia, Attorney-General's department, Telecom Australia, and other Commonwealth departments and bodies including Communications, Industry, Technology and Commerce, Home Affairs and Environment, Prime Minister and Cabinet. That represents a delay of almost three years since the Campbell Committee of Inquiry into the Australian Financial System recommended in its 1981 Report, that a task force be set up with the States and Territories, the providers of EFT services and related consumer groups to examine the need for legislation to protect users of EFT.

The representatives from the States were conspicuously absent from the Working Group established by the Commonwealth. The main reason, one suspects, was that the time-tables of the Commonwealth and State Ministers for action on EFT were at variance, with the Commonwealth advocating basically a "wait and see" approach while the State Ministers, on the other hand, were concerned with the lack of consumer redress. It should be noted that in keeping with the spirit of non co-operation, there is no Commonwealth input in the draft Guidelines for Consumer Protection which were developed mainly by the States of New South

Wales, Victoria, and Western Australia. The latest information to hand does, however, suggest that the two groups will probably meet in June to discuss further developments.

Major Conclusions and Recommendations of the RWG

My brief today is to give you an over-view of the Report of the Working Group and, because time is limited, to deal in a little bit more depth with the troublesome issue of Dispute Resolution.

The main conclusions of the RWG were as follows:

1. In a number of areas, there was reason to believe that financial institutions should either change their present practices or more clearly state their obligations in the contract so as to reflect more equitably the rights of the customer.

2. There is a need for greater effort to be made in consumer education.

3. The areas of privacy, fraud and security were not really within their terms of reference and should be better left for consideration by other bodies.

4. There is no problem with adequacy of paper records associated with EFT transactions.

5. Although legislation may protect consumers, there is no immediate need for such measures. In the face of recent intense competition arising from the deregulation of the banking and finance industry, the Working Group was convinced that financial institutions, on the whole, would not seek to enforce harsh terms and conditions but would be more interested in nurturing customer relationships with the institutions. Other factors which militate against the introduction of legislation were the low incidence of consumer complaints, the difficulties associated with making legislation uniform in all States and Territories, and the fact that the Working Group thought the present common law was largely adequate to protect the consumer.

6. Perhaps the most important factor influencing the Working Group was that in the present climate of deregulation, very strong and cogent reasons would have to be produced before legislation was introduced. The better view, according to the Working Group, is that financial institutions should be given an opportunity to respond to criticisms and to amend some of their harsher Terms and Conditions of Use. In their opinion, it is not necessary to even formulate a code of conduct, so confident were the majority that various means of industry self-regulation would come about without government intervention. They recommended, however, that the Working Group be reconvened within six months of the public release of their Report to review the situation, and

a further assessment in two years, by the Treasurer, the Attorney-General and other relevant Commonwealth Ministers.

Main Recommendations of the Working Group

1. There should be clear and unambiguous contracts governing the conditions of the use of EFT systems, disclosure of terms at the time when application is made for a card, and the RWG exhorted financial institutions to display such terms at all branches. There is also a recommendation to the effect that financial institutions should consider providing documentation in several languages, but I have no doubt that financial institutions will never take that particular recommendation to any stage beyond that of mere consideration.

2. In relation to proposed major variations of EFT contracts, written notice of at least a month should be given to cardholders.

3. Financial institutions should provide telephone 24-hour "hot-line" services through which notification of lost or stolen cards could be advised by the customer.

4. Financial institutions should spell out clearly the consequences and liability for unauthorised access to accounts or unauthorised use of plastic cards and suggest to the customer means of recording the personal identification number "PIN" without compromising its security.

5. Financial institutions should accept a contractual obligation to limit the customer's liability for unauthorised use to the specified daily transaction limit.

6. Financial institutions should amend their clauses excluding liability for malfunction of their equipment and set out the circumstances within which they will, or alternatively will not, accept liability.

7. Customers should be advised as to the means by which the financial institution's procedures for dispute resolution may be activated and of the number of stages and length of each process. All disputed transactions should be centrally recorded and Consumer Affairs Agencies and Small Claims Tribunals should be allowed to become "meaningfully involved" in the resolution of EFT disputes.

8. Consumer education programs should be implemented by governments, financial institutions, retailers, consumer and community groups.

Dispute Resolution

Disputes between the cardholder and financial institution with regard to an EFT transaction could arise for any number of

reasons. The unauthorised use of a card or account is but one example. An ATM may malfunction and not carry a transaction through to completion or it might produce false records of the transaction. There may be fraud by a third party, an employee of the financial institution, or by the customer himself. Or there could be some inadvertent error on somebody's part. Is it necessary to provide some kind of forum (other than the courts) or at least some formal procedure, for the resolution of such disputes? In all such contests, the consumer is invariably in the weaker position, and in the absence of some form of control or regulation, he is usually at the mercy of the financial institution.

In the U.S.A., Regulation E provides for an error resolution procedure. The basis of that procedure is that a customer has to notify the financial institution of any error and upon receipt of such notification, the financial institution must investigate the complaint and make a determination as to whether an error has in fact occurred. It is also required to report the results of such investigation and determination to the consumer within ten business days of receipt of notice of error. If it determines that there has been no error, Regulation E then requires the financial institution within three days after conclusion of the investigation to provide the customer with an explanation of its findings together with all relevant documents.

This procedure has the advantage of forcing financial institutions to make an investigation within a reasonable period of time.

The American procedure contrasts with the draft Guidelines for Consumer Protection which require the financial institution concerned to investigate the matter but unlike the US provisions, give the financial institutions up to twenty-one days for notification to the customer of the outcome of such investigation. The Guidelines also provide that the customer should be given an indication of what remediable action if any, will be taken by the financial institution. The time limit may be extended so long as the customer is notified of the fact of extension and reasons for the delay are given.

The Guidelines further provide that if the investigation reveals that an error has been made, the financial institution should forthwith correct that error and notify the customer accordingly. It is required to re-credit to the customer's account any fees or charges incurred as a result of that error and to pay the customer interest on the amount debited, provided that amount exceeds $100 and the customer has been denied the use of that amount for more than one month.

Where the financial institution cannot positively establish that a transfer was made in response to the correct PIN/card combination, or if it cannot produce records relating to the transfer about which a complaint has been made, the draft Guidelines provide that the financial institution shall not be

entitled to debit its customer's account with the amount of that transfer.

A customer who is dissatisfied with a financial institution's findings is entitled to request and be supplied with any material on which the finding was based.

The Guidelines also thoughtfully provide that neither charges shall be imposed nor enforcement action taken against the customer or cardholder in respect of a complaint that is being investigated.

Three observations should be made with regard to the changes proposed in these Guidelines. First, the procedure assists the customer, but only ever so slightly, in my opinion, if he cannot prove that he did not make a particular transfer. It does throw the onus upon the financial institution if no record exists of the transaction. But it does not improve the consumer's position if the records show that in fact a transfer has been made in response to the correct PIN/card combination. In other words, the difficulties associated with proving that a transaction was unauthorised have been alleviated only marginally. For example, it might still be argued that the customer bears the onus of proof where the disputed transaction was not a result of malfunctioning equipment, or where the thief, through no fault of the customer, obtained or worked out the correct PIN/card combination. Records could also be in error owing to a mistake by an employee of the financial institution. Thirdly, the time constraints given in the Guidelines seem to be capable of being stretched ad infinitum.

One should also note that the error-resolution procedures contained in the Guidelines are dependent on the meaning of the word "error" which is defined, as it ought to be, in wide and inclusive terms. It includes mistakes, uncompleted or unauthorised transfers, and the failure to provide a receipt at an electronic terminal.

Whether the last item should really be included in the definition of "error" is the subject of some debate. On the one hand, the failure to provide a receipt is something that needs to be remedied, but on the other hand, the investigative procedure would seem inappropriate for this kind of omission. What is really needed is the imposition of a duty upon the financial institution to keep their equipment in good running order and an obligation to remedy any defect as soon as it is practicably possible. In the interim, a malfunctioning ATM should be de-activated to protect other users. The inclusion of the failure to produce a receipt as an error, however, might assist the consumer in that an unrecorded transaction is not debited to his account. But what if there are computer records of the transaction but simply no receipts for the consumer? This can happen, for example, when the machine runs out of paper. The consumer is not covered in this particular case.

These draft Guidelines recognize that there are problems with error-resolution and the attempt by the State Ministers to strengthen the consumer's position is a commendable one. But what of the Working Group?

The RWG made three main recommendations in the area of Dispute Resolution:

1. Information: Financial institutions should, as a matter of course, provide advice to their customers on how to activate the internal investigative processes of the particular institution in the event of a disputed transaction.

2. Recording Procedures: Where there are no centralized recording procedures, the financial institution concerned should establish such centralized recording procedures so as to be in a position to identify the incidence and nature of the more important areas of disputed transactions.

3. Tribunals: State and Territorial governments should give consideration to enhancing the role of Tribunals to include the examination of EFT disputes.

4. It refused to make any recommendations in relation to the question of onus of proof, preferring to rely on the assertions of financial institutions that they would seek constructively to resolve disputes and to provide relevant documentation.