



Australian Banking
Association

24 January 2022

Nolan Noeng
Associate Director
Market Conduct Division, Markets Group
Treasury

Via Email: mbcomms@treasury.gov.au; Nolan.Noeng@treasury.gov.au

Dear Mr Noeng,

Modernising Business Communications legislation package

The Australian Banking Association (**ABA**) welcomes the ongoing opportunity to contribute to Treasury's work on *improving the technology neutrality of Treasury portfolio laws* and modernising business communications. The banking industry remains supportive of the intent of the proposed changes and provides a range of suggestions below to enhance the Bill's clarity while ensuring the provisions are future proof and enable beneficial and workable flexibility in the ways customers receive communications from their credit providers (**CP**).

The attached recommendations build on those previously provided to Treasury by the banking industry in our 13 December 2021 letter and at the 21 January 2022 workshop between the ABA and Treasury.

We look forward to further engagement with Treasury, including the development of the associated explanatory memorandum which will provide clarity on very important concepts, such 'reasonably prominent form'.

Should further information on the below suggestions, or other topics, be helpful for Treasury's deliberations, please do not hesitate to contact me.

Yours sincerely,

Brendon Harper
Policy Director
Australian Banking Association

About the ABA

The Australian Banking Association advocates for a strong, competitive and innovative banking industry that delivers excellent and equitable outcomes for customers. We promote and encourage policies that improve banking services for all Australians, through advocacy, research, policy expertise and thought leadership.

Enhancing customers flexibility

The ABA is very supportive of the increased customer flexibility contained in the proposed changes. Customers increasingly engage with CPs via digital means. As such, it is increasingly important that customers are provided the flexibility to receive relevant information in the forms and via the means most relevant to them.

In providing increased flexibility, the changes should, to the extent possible, mimic those established and provided in existing legislation in relation to financial products. They should also avoid creating undue and unhelpful complexity, either for customers or CPs.

As an overarching philosophy, the ABA recommends:

- CPs be permitted to determine which (sub)classes of documents are available via electronic and/or other means:

This would ensure the changes are workable from their implementation – discussed in more detail below under ‘Flexibility vs complexity’ – ensure appropriate means of delivery are available for different document types (for example for sensitive information) and provide CPs the ability to increase the range of documents available via alternative means as their capabilities develop (and new technologies become available).

This would also allow communications to be aligned with current practice and customer preference, such as nominating delivery preferences on a product basis; and

- CPs be permitted to provide electronic-only communications, with a consumer’s agreement.

If customers can always elect to be provided documents physically, solely digital credit products will become unworkable. Additionally, failure to provide this flexibility would inhibit the business model of some CPs, reducing competition and customer choice.

Flexibility vs complexity

Allowing customers to elect different methods of communication and nominate different addresses for use with different (sub)classes of documents could create an unworkable level of complexity, risk and implementation cost – under the draft provisions a customer could, for example, nominate multiple different email and postal addresses for different document types (for example, email A for statements, email B for notices about changes, postal address A for anything enforcement related and postal address B for any other documents).

Some CPs may decide to provide this heightened level of flexibility and customisation. However, imposing this on all CPs could introduce a very significant amount of complexity and risk, and would require very significant process and system changes at a very high cost to implement. As such, industry strongly recommends this requirement be removed from the Draft Bill.

Furthermore, CPs should be permitted to communicate in any manner agreed with customers and should have flexibility to send communications by various alternative means should the primary method be unsuccessful or is known to be out-of-date (for example, an email bouncing back and using an SMS or online banking message as an alternative).

If ‘election’ provisions are retained:

- There should be scope for CPs to use a combination of physical or electronic communications to send notices to customers where customers are made aware that both methods may be used.

While the preference for both CPs and customers will generally be for digital communications over paper, many communications at some CPs are not yet set up for digital delivery and are sent via post due to existing processes and systems. While these paper communications are likely to be digitised over time, there is considerable manual work involved in digitising the templates for these communications and preparing them for digital delivery. The current drafting

would increase regulatory burden by forcing CPs to digitise all communications within tight timeframes and at potentially considerable costs.

- The ‘failure to comply with election’ provisions in sections 195C(4) and (5) should be amended to state that a document is taken to be given if “*the giver is reasonably satisfied that the recipient receives the document*”.

This is a pragmatic approach as, for example, the giver will likely not receive confirmation from the recipient that a document was in fact received. The giver may be reasonably satisfied that the recipient received the document if, for example, it was sent to the correct address on the customer’s file and was not subject to an email bounce-back.

‘Seven days’ and ‘first business day’ requirements

Industry has concerns with the operational complexity and increased risk of errors and breaches that would be associated with the introduction of the ‘seven day’ and ‘first business day’ rules as currently proposed in sections 195B, 195C and s195CA.

As discussed at the 21 January 2022 workshop, there are material practical implications to ensuring strict compliance with such prescriptive rules. For example, the dissemination of certain documents, particularly via physical channels, can involve various areas within (and external to) a CP. As a result, there can be an unavoidable period between when a communication is ‘initiated’ and when it is disseminated (and finally received). A customer’s election could occur between a communication being ‘initiated’ and disseminated (or received). As such, requiring CPs to comply with an election on “the first business day after the day on which the giver receives [a] notice” would require CPs to develop systems to assess all communications initiated in the days prior to, on and shortly after a nomination is received.

CPs are motivated to comply with customers’ nominations as soon as practicable. As such, the ‘seven day’ and ‘first business day’ rules, as currently proposed in sections 195B, 195C and s195CA, are unnecessary, unhelpful and likely to increase burden on industry without enhancing customers’ experience. Additionally, there are no provisions equivalent to the requirements under sections 195B(3) and 195CA(3) in Chapter 7 of the *Corporations Act* financial products regime.

Industry’s strong preference is for these rules to be removed or, failing this, be made less prescriptive.

Section 195 – Manner of giving documents

It remains unclear to industry why the proposed approach adopts the model from the *Meetings and Documents Bill*. While the *Meetings and Documents Bill* model reflects a recently tested approach for corporate communications, those communications occur in relatively limited circumstances (annual meetings, dividend payments and similar) whilst credit providers have periodic statements (which are monthly for credit cards), amendments to terms and conditions, default notices, changes in interest rates.

In addition, customers of banks often hold both financial and credit products (for example, a home loan with an offset account is in effect a bundled product) and introducing two different models for the same client (especially if they hold a bundled product) would create inconsistency and lead to inefficiencies, avoidable costs and potentially customer confusion.

Industry reiterates its preference that the amendments to section 195 be drafted in a way which mirrors the flexibility provided for in the *Corporations Act* (for example, section 1017B(c)) and the *Corporations Regulations* (7.9.75A) in relation to financial product notices by simply allowing for NCC notices to be given to customers:

- electronically;
- in writing;
- in a way specified by the regulations; or



- in any other way agreed with the customer.

This regime operates effectively and does so with the benefit of ASIC guidance under Regulatory Guide 221.

Adopting this approach:

- provides a consistent legislative approach, across all products offered to Australian consumers;
- ensures that issuers of both credit and financial products can adopt a consistent approach across their product lines, which results in a simpler client experience and a reduced compliance burden for issuers; and
- achieves the goal of flexibility, for example, it can incorporate the ‘classes of document’ elections concept proposed by Treasury in this round of drafting, where the customer and credit provider agree and without having to include any provisions to that effect.

Further detail on this approach is included in the ABA’s 13 December 2021 letter.

195A: Manner of giving document – technology neutral giving of documents

While the option (1)(c) “*by giving the recipient sufficient information in electronic form, by means of an electronic communication, to allow the recipient to access the document electronically*” could be viewed as similar to the ‘publish and notify’ method, it is not as broad as the *Corporations Act* method and it is not clear to industry whether it would allow the same flexibility due to the different wording. Industry understands that Treasury’s intent is, for example, to enable a CP to email a notification to a customer that directing them to the internet banking portal or app.

For simplicity, the ABA suggests aligning the wording to the *Corporations Act* ‘publish and notify’ method for consistency across products to allow the credit provider to:

“make the relevant communication available by an electronic means and notify the receiving person orally or by giving the receiving person a notice in printed or electronic form:

- (i) that the providing person has made the relevant communication available by the electronic means; and*
- (ii) how the receiving person can obtain the relevant communications through, or by using, the electronic means.*

Mirroring the *Corporations Act* would allow for more consistency and reduce some of the identified challenges.

195CA: Manner of giving document – nomination of address

Industry’s strong first preference is that CPs be permitted to agree with clients which (sub)classes of documents are available via electronic and/or other means. Should this not be explicitly adopted, the Bill should be drafted to facilitate multiple addresses for the same document (sub)classes. This would provide CPs flexibility to send necessary documents (or links to documents) by secure means where the elected means is deemed inappropriate.

195D: Manner of giving document – appropriate address

Under this drafting of section 195D, the only address the CP can notify the customer of is either the customer’s physical address or their electronic address (which is presumably their email address or mobile number). Industry’s preference is to allow more flexibility to enable more than one address to be used/nominated and to allow CPs to change methods of communication depending on the contents of the documents and whether they contain any sensitive information. Section 195D should also contemplate the different methods of communication available (for example email, online banking with an email notification, SMS, post and other methods).



Additionally, the legislation should enable flexibility and not 'lock' CPs into using one communication method where customers are also contactable by other means. The drafting should specify that (subject to any agreement with the customer) the giver may notify a recipient that a particular communication method and/or address will be used going forward (for example, electronic communications instead of postal) unless the recipient opts out. This capability should not be linked to an absence of a nominated address and instead be framed as a 'notice of change of method or address for giving of documents'.

Pragmatically, the Bill should specifically clarify that a formal notice is not required where a nominated address is found to be out of date or no longer current. For example, where a nominated physical address is known to be no longer current, a CP should be permitted to use an alternative known address, such as an electronic address. There would be no value, to the customer or CP, in requiring a formal notice be sent to an out-of-date address. By extension, a CP should not be deemed as failing to comply with the requirements in the Bill/Act, by attempting to deliver a document via an alternative address when the nominated address is known to not be current or out-of-date.

Regulation 28L of the National Consumer Credit Protection Regulations 2010

In the ABA's letter to Treasury on 13 December 2021, industry recommended that regulation 28L be amended so that the disclosure documents covered by it can be given electronically in a manner that is consistent with giving notices under the NCC electronically. Industry reiterates that recommendation.