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Law Division
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Via email: LawImprovement@treasury.gov.au

To whom it may it concern,

Rationalisation of ending ASIC Instrument Measures

The Australian Banking Association (**ABA**) welcomes the opportunity to comment on Treasury's consultation on exposure draft legislation to move matters in legislative instruments made by the Australian Securities and Investments Commission (**ASIC**) into the primary laws and regulations.

Our position

The ABA supports the intent of simplifying obligations on entities by rationalising requirements into primary legislation or regulations. We also support initiatives that facilitate efficient development of digital only, or paper free, business relationships. We note that a majority of changes proposed for inclusion in the law or regulations mirror obligations from retiring Class Orders or legislative instruments. However, there are additional requirements in the draft regulations that appear to reduce flexibility and detract from broader reforms to ensure technology neutrality in business communications.

For example, the draft regulations insert new regulations 72A, 72B, and 72C into the NCCP Regulations to replace ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835, which is due to lapse later this year. Although these new provisions mirror the ASIC instruments in most respects, they include some additional mandatory requirements for electronic service of precontractual documents. We also query the utility of reinforcing the complexity of the existing requirements contained in the legislative instrument, rather than exploring steps towards simplification.

As an overarching comment, we note that the proposed new regulations reinforce the existing bias for paper-based communications in connection with regulated credit products – that is, that paper communications are the 'default' option and that electronic communication requires additional steps to be taken by the credit provider – in proposing that credit providers comply with differentiated obligations, depending on whether a precontractual disclosure is given by post or electronically.

As a principle, the same obligations should apply to a credit provider, regardless of the method of delivery of a precontractual disclosure.

We note below two key issues, for which greater clarity in the draft bill would be welcome:

- 1) pre-contractual disclosures; and
- 2) consent in relation to electronic communications.

Pre-contractual disclosure

Under the changes in the proposed regulation 72A, unless a precontractual document (which many providers include in or with the credit contract itself) is physically handed to the borrower, lenders will



need to be 'satisfied on reasonable grounds' that the borrower received the document. While this is similar to provisions in the ASIC instrument, the draft regulation adds that:

the credit provider is not to be satisfied that the debtor has received the precontractual document if the debtor has told the credit provider that the debtor has not received the documents

The regulations further add that the credit provider can be satisfied that the debtor has received the document if the debtor has 'told' the provider they have retrieved it through an information system. While proposed regulation 72A(4)(b) provides that certain matters are *deemed* to be reasonable grounds (as opposed to providing an exhaustive or mandatory list), it is unclear whether it is intended that a credit provider could be satisfied that the document has been received in the absence of being told by the debtor. Furthermore, this does not align with the definitive statement on page 3 of the Explanatory Statement, that "the credit provider may be reasonably satisfied only if the debtor tells the credit provider they have received the document" (emphasis added). To reduce uncertainty, the Explanatory Statement should be amended to better reflect the wording of the proposed regulation.

As noted above, our view is that, in order to be genuinely technology neutral, the law should apply identical obligations to precontractual disclosures, whether delivered by post or electronically. Instead, these aspects to the draft regulations, when compared with the ASIC instrument, add confusion and appear to unnecessarily create additional burden for electronic communication.

Where a document is retrieved from an information system, it is unnecessary for a customer to 'tell' the bank that it has been received. In such a circumstance, a separate confirmation adds an unnecessary step for customers. It is not clear to industry why this additional requirement should be applied to retrieval from an electronic system only, in contrast to the limited obligations attached to sending the same document via post or when attaching the same document to an email.

Finally, the proposed regulation 72C provides under subregulation 3 that the notice must state that:

the precontractual document is a precontractual statement, a document forming part of a precontractual statement, a variation of a precontractual statement or an information statement (whichever is applicable)

There is currently no such existing equivalent requirement and it is likely that some customers will not readily understand this technical detail, particularly if being referred to in an email. The ABA recommends this requirement be removed as the current requirements per the Instrument are working well and industry is not aware of concerns with the current processes.

The ABA recommends these proposed provisions be removed and the draft regulation simply mirror the ASIC Instrument 2020/835, which does not include these prescriptive requirements.

Additionally, the proposed regulation 72A is unclear as to the impact of a debtor telling the credit provider that they didn't receive the document. In particular, it is unclear to industry how this interacts with section 195 of the NCC if the disclosure was sent to the address nominated in writing, but the customer later states they have not received it. The proposed regulation doesn't resolve this conflict.

This creates uncertainty for the credit provider, for example if credit was provided some time ago and the customer advises later they did not receive the pre-contractual disclosure, despite it being sent to the nominated address and despite the credit being drawn down. Credit providers should not be held responsible for what happens to a disclosure after it is sent to the address specifically nominated by the customer (particularly if sent by post and left in a mailbox for some time, opened by other people in the household or similar).

We note that this issue exists in the current ASIC instrument (at s 6(2)(e)).

Consent for electronic communications

Under the proposed regulation 72B, a credit provider must not give a precontractual document to a debtor using electronic communication unless the debtor consents to it being given in an electronic format. The provision further provides that the debtor can withdraw that consent at any time.



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It is unclear to industry whether regulation 72B refers to a once-off consent or to a consent for all future pre-contractual statements provided to the customer. If a credit provider chooses to obtain consent on every occasion, it should not have to provide a notice under 72B(2)(a).

From a practical point of view, in the context of draft regulation 72B, presumably this only relates to the giving of precontractual documents, such that the withdrawal of consent would only be an issue if the customer withdrew consent *after* giving it but *before* a credit provider has given the precontractual document electronically. Further, as precontractual disclosure, by its nature, is only given once for a particular credit contract it appears unnecessary, as proposed in regulation 72B(2), to tell the customer that a credit provider might not give precontractual documents to them in paper form in the future. Relatedly, it's unclear in that section what the consequence is of a customer withdrawing their consent to pre-contractual disclosure being given electronically once it has been given. Allowing this is unnecessary and creates uncertainty.

Notwithstanding these limitations, a key concern of industry is that the ability to withdraw consent at any time. This poses challenges for businesses, particularly those that operate primarily digital channels and have invested significantly in digital offerings. Businesses providing their services may not have a significant physical capacity to move towards paper-based forms, or may have designed their forms in a purely digital environment that does not translate well into a paper form.

We also note that, conceptually, the approach proposed in the draft regulation 72B largely brings the regime for communication of s16 precontractual document into line with the operation of NCCP Regulation 28L for giving other NCC disclosures electronically. When the Electronic Transactions Regulations were updated in 2020, certain requirements – such as the requirement in the old Regulation 10 to give additional disclosures to the effect that paper documents may no longer be given, electronic communications must be regularly checked, and that e-consent may be withdrawn at any time – fell away. Those same requirements remained in NCCP Regulation 28L(4) but it was understood that this was an oversight that would be corrected in future. On this basis, it is not clear to industry why these requirements are to be replicated in the proposed new Regulation 72B(2). Instead, we recommend that they be removed from both the proposed new Regulation 72B(2) and the existing NCCP Regulation 28L.

If you would like to discuss or require additional information on any matter raised in this letter, do not hesitate to contact me on

Yours sincerely

Policy Director
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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.