Australian Banking Association

20 March 2023

Modernising Document Execution Section
Attorney-General's Department
By email: eta@ag.gov.au

To whom it may concern,

Consultation on the Electronic Transactions Act

The Australian Banking Association (**ABA**) welcomes the opportunity to respond to the Attorney-General's Department's (**AGD**) consultation on the Electronic Transactions Act (**ETA**). ABA members support many aspects of electronic signing in Australia and note that significant changes are not required to the operation of the regime.

However, there are opportunities to refine the regime, particularly to drive more consistent approaches between State, Territory and Commonwealth regimes.

Our position

The ABA is supportive of initiatives that increase digital efficiencies and reduce uncertainties regarding electronic transactions. The ABA's comments focus on consent requests, signatures, exemptions and inconsistencies, and record keeping.

In considering industry's feedback, we encourage the AGD to be mindful of retaining a technology neutral approach and facilitation of fully digital products along with enhancing clarity and promoting consistency in regimes across Australia. Electronic signing under the ETA is currently technology neutral and we support it remaining this way, as it offers businesses flexibility, enables competition within the market for electronic signing solutions and encourages innovation.

We also note that there are significant benefits in driving consistency across state and territory laws as well as relevant Commonwealth laws (which, we acknowledge, may be beyond the scope of this consultation). We would welcome further alignment between state and territory-based requirements (including state and territory requirements for dealing with real property and the ETA, particularly as relates to individual borrowers and guarantors signing deeds and other documents requiring witnesses (including ancillary documents such as statutory declarations and enduring powers of attorney) relating to lending products.

We provide further detailed comments in the following pages, and look forward to continued engagement on what remains an important issue for the evolving digital economy.

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

Regards,

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.

Consent requests

The ABA recommends removing paragraph 9(1)(d) and 2(d) of the ETA (and other related consent requirements in the ETA, such as paragraph 10(1)(d)), which would remove the consent requirement for the recipient of information by way of electronic communication.

Over time, electronic communication has emerged as a convenient and common way for businesses to interact with their consumers. Many consumers prefer the convenience and ease of connecting with business, governments and the broader community using electronic means. As a result, electronic communications are not an "alternative" method of communication and so should not require specific consent.

Currently, there are unnecessary and unhelpful differences in consent requirements between paper-based and electronic transactions, with consent not required for paper-based transactions. Paragraph 9(1)(d) and 2(d) of the ETA Act requires that:

> *if the information is required to be given to a person who is neither a Commonwealth entity nor a person acting on behalf of a Commonwealth entity—the person to whom the information is required to be given consents to the information being given by way of electronic communication.*

We recommend removing these consent requirements, and thereby bringing electronic communications in line with modern practices, reflecting that postal communications are no longer the primary means through which consumers expect communications from their credit provider (**CP**) and that electronic communications should be a standard way of communicating with consumers without the additional layer of consent.

This also aligns to changes recommended by the ABA to the Treasury in December 2021, *Improving the technology neutrality of Treasury portfolio laws*, excerpt below[1]:

> *As a result of changes made by Treasury in 2020 to repeal and replace Regulation 10 from the Electronic Transactions Regulations 2000 (Cth[1]) with the Electronic Transactions Regulations 2020, there is uncertainty as to how CPs can rely on a 'publish and notify' method for the delivery of electronic notices under the NCC (other than certain disclosure documents). The ASIC Corporations (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647 allows for issuers of products to agree with the customer as to how notices and documents can be given for the purposes of the Corporations Act (including electronically) as well as providing a method for existing customers to be provided with electronic disclosures. Similar provisions/relief do not exist in relation to the NCC. The ABA recommends Government considers providing for this for the NCC, to bring it into line with the Corporations Act regime and to facilitate flexibility and customer choice.*

Furthermore, aligning the electronic communications regime for credit products with the regime that governs customer communications in connection with financial products regulated under the *Corporations Act 2001*, would have material benefits beyond addressing the current gap in guidance on the availability of the 'publish and notify' option for credit products.

For example, it would:

- allow flexibility for CPs to create modern, lower cost, digital only credit products for customers who seek them without compelling credit providers to do so, which would lead to differentiated product offerings, increasing competition and customer choice;

[1] ABA (2021) *Improving the technology neutrality of Treasury portfolio laws*, submission, 13 December

- provide a consistent legislative approach across all credit and financial products offered to Australian consumers and allow issuers of both to adopt a consistent approach across their product lines; and
- provide for a significantly simpler approach to customer communications and so promote efficiency and reduce the scope for operational errors (and resulting breaches) by credit providers.

Alternatives if consent requirements are retained

Specifically, for digital only products the requirements to collect express consent and to allow opt outs from electronic communication create unnecessary friction points. The ABA recommends that in the context of a digital offering, there should be deemed consent to electronic communications as part of agreeing to the terms and conditions of the product with that consent applying for the life of the product. If a customer agrees to a 'digital only' product there should also not be a requirement to offer opt out.

While electronic communications should be a standard way of communicating with consumers without the additional layer of consent, for select non-digital only products, we believe that individual banks may choose to offer an opportunity for some customers to 'opt out' of electronic communication, if they are not able to participate in electronic communication or digital signatures (for example, vulnerable customers or people who have no access to technology).

Additionally, for existing customers receiving paper communications, it would be helpful to allow a broader range of customer consent e.g. deemed consent if a customer has provided an email address, or a similar process to "publish and notify" as described in ASIC RG 221, where customers will receive notice of electronic communication and have 7 days to opt out. Practically, it is difficult to obtain active consent from a large number of existing customers as there can be inertia about responding to requests for this.

Signatures

The ABA is supportive of the current provisions of the ETA that accommodate technology neutrality which takes into account a future perspective where technology will continue to change and develop. It is an important consideration for laws to allow for future developments.

Currently, the ETA provision on the verification of a person's identity has provided users with discretion by not expressly prescribing a 'method' on how to identify a person and their intention when electronically signing a document.

While this has enabled organisations to implement their own methods for electronic transactions (e.g. DocuSign and multifactor authentication), it also comes with a degree of uncertainty on what constitutes a compliant and reasonable 'method'. It is likely that most organisations have to interpret what a compliant method would look like when considering applying the requirements of the ETA.

There is scope for greater clarity on what methods are considered compliant to reduce the possibility of disputes based on a claim that a person did not intend to sign the document because a particular type of method was not a proper method in identifying an individual and their intention. An example would be using a 'minimum standards' approach which would clarify what would be considered non-compliant at a minimum. These are further discussed below.

Method of signing

The ABA would welcome guidance on the types of electronic signatures that can be used when options such as DocuSign and Adobe Sign are not available.

Many clients agree and sign terms and conditions online at the time of applying for products. Further clarity is needed on what is permissible as an online signature. For example, can it take the form of typed names, using a stylus pen or mouse, or using a photo of a signature? Where there are online application forms, whether they are signed online, or downloaded and then signed electronically – what method of signing can be used? Typed names? Using a stylus pen? Using a mouse? Using a photograph of a signature? Ticking an 'I accept' box or a 'Continue' button?

Where documents are to be signed in writing, e.g. CHESS sponsorship agreement as per section 7 of the ASTC Settlement Rules, the best way to have these documents electronically signed to ensure legal validity is unclear, and guidance would be welcome here.

While banks have developed practices, guidance would provide clarity on methods that are considered compliant. The ABA would welcome the opportunity to work with the AGD to develop this guidance.

Exemptions and inconsistencies

The ABA recommends that laws should be consistent across Australia to avoid unnecessary variances in practices and processes and to remove incentives for parties to choose the preferred jurisdiction/law for the documents. In addition, external legal practitioners do not necessarily agree on how the various items of legislation interact with each other.

We note that one focus of this consultation is on users navigating Commonwealth ETA exemptions. However, we also note that a key issue that banks encounter is inconsistences in state and territory requirements, particularly in relation to deeds (including the need for a deed to be witnessed), mortgages and remote witnessing. Many states have enabled electronic execution of deeds and mortgage forms, while others still require witnessing of these documents.

As the table below demonstrates, there are considerable differences across states and territories:

State	Electronic Deeds?	Need for deed to be witnessed by individual?	Electronic mortgages	Remote Witnessing
ACT	No	No	No	No
NSW	Yes	Yes	Yes	Yes
NT	No	Yes	No	No
SA	No	Yes	Yes	No
Tas	No	Yes	No	No
QLD	Yes	No	Yes	Limited
Vic	Yes	No	Yes	Yes
WA	No	No	No	No

While the ETA provides that a contract or a transaction is not invalidated because it has taken place by way of electronic communication or signed electronically, there are limitations and the lack of clarity contained within state-based ETAs in how they apply.

In addition, the inconsistencies in how the Commonwealth ETA and State and Territory ETAs apply, can cause difficulties and delays in a transaction. This can cause confusion to customers which ultimately results in a negative customer experience.

To resolve these inconsistencies, banks often need to analyse if a particular transaction was affected by specific legislation and regulation. Given the complexity, banks may seek external legal advice given the differences that can apply between Commonwealth and State and Territories. This adds further to inefficiencies and uncertainties for businesses, adding cost and time to processes

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Two areas of particular note are discussed below in relation to a key inconsistency (witnessing) and a key exception (bills of exchange).

Witnessing

The ABA recommends that witnessing requirements for certain deeds and mortgage forms be removed, as they are no longer necessary and are not required in all jurisdictions.

There is no clear rationale for retaining witnessing requirements for deeds and mortgage forms. We note that the security benefits of electronic signatures using DocuSign address most of the concerns that originally gave rise to the witnessing requirement. Many states have also removed witnessing requirements for these documents recognising they no longer serve a clear purpose. However, some jurisdictions retain them and this adds inconvenience and complexities for consumers, and also adds cost and inefficiencies for businesses that operate nationally. The costs of these are often also passed onto consumers, who ultimately bear the price of inefficient processes.

Although some state legislation allows for witnessing by audio-visual link, we do not think there is any additional benefits for consumers or businesses. This is because, prior to the signing of loan documents, financial institutions have a number of customer engagements in the mortgage process, from verifying identity, assessing vulnerability as well as understanding the needs and objectives of customers. We note these often render the witnessing process redundant.

We finally note that there is no good policy justification for retaining witnessing requirements for some commercial documents when most ordinary contracts (regardless of their significance) and many deeds (e.g. under the Corporations Act) do not require a witness.

Bills of exchange

The ABA recommends removing the exception for negotiable instruments in the ETA.

Currently, negotiable instruments under the *Bills of Exchange Act 1909* (Cth) are excluded from the ETA. In our view, it is not clear why this is the case and we consider that bills of exchange and promissory notes should be expressly permitted to be:

- In electronic form;
- Signed electronically; and
- Negotiated and transferred electronically.

Removing the exception to these instruments would better facilitate transactions in the digital economy. Presently, digital assets cannot be characterised as bills of exchange or promissory notes under the *Bills of Exchange Act 1909* (Cth). This means that some digital assets (including stablecoins) may be subject to prior equities upon transfer, reducing the confidence that a third party purchaser has that they will receive the full benefit of the digital asset.

The ASIC Act

The ASIC Act should not be excluded from the ETA. For instance, this exclusion currently has the effect that requests for new debit and credit cards under section 12DL of the ASIC Act cannot benefit from the ETA.

Record keeping

The ABA recommends that greater clarity and consistency be implemented across jurisdictions on the type of record-keeping requirements that businesses are required to hold.

Banks save a number of important customer facing documents electronically and will generally develop internal protocols to meet the guardrails set out in the ETA around record keeping.

Banks often need to obtain external legal advice to confirm the status of a document given the different regimes around Australia with respect to exemptions under the ETA. For example, when entering into loan contract with related securities, bank will have a number of documents signed by customers, such as those set out below:

- Consumer Credit Contract Schedule
- Deed of Guarantee
- Letter of Variation
- Caveat
- Withdrawal of Caveat
- Deed of Priority
- Change of Name Form
- Statutory Declaration
- Consents
- Home Loan On-Boarding Application form

Each of these documents are governed by different regulatory regimes, which in turn dictate the ability for them to be created electronically or via paper (although we note many of them will be dependent on State and not Commonwealth law). While the consultation notes that the Commonwealth is clearing up confusion around the use of scanned documents in litigation, this is not a consistent law that has been adopted in states or territories and the statutory wording varies between jurisdictions. Uniform wording in State and Territory legislation would reduce ambiguity.

A related concern is the various requirements in Commonwealth and State legislation on the destruction of evidence in the context of having a protocol for scanning paper documents and relying only on scanned copies. There is uncertainty as to whether retaining a scanned version of a paper document will be sufficient compliance with the various State and Commonwealth laws, or whether a court would accept a scanned document and not the "original" with wet signature as evidence.

Furthermore, there should be greater clarity on what types of documents can be kept in electronic form in lieu of hard copy documents especially when wet ink signatures are required.

For example, when lodging a mortgage through an electronic lodgement network (**ELN**), most state based property legislation (e.g. section 56 of the Real Property Act 1900 (NSW)) requires a mortgagee to certify that they ‘hold’ a mortgage granted by the mortgagor that is on the same terms as the mortgage lodged for registration.

However, the meaning of ‘hold’ and whether it includes holding a mortgage in electronic form (i.e. scanned mortgage) is unclear. While an interpretation can be made that is consistent with the purpose and obligation, legislation does not expressly prescribe in what form the document can be held. This may be a reason for the hesitancy in retaining documents solely in electronic form especially if certain documents could be more prone to be the subject of a dispute (e.g. fraud claims relating to mortgages).

It has also been flagged that there are inconsistencies between legislation in relation to the amount of time documents are required to be retained. It may assist in addressing this confusion if there is further clarity on whether certain records can be kept in electronic form and whether scanned documents are sufficient in being retained.

Overall, we are of the view that keeping electronic copies of documents can prevent the potential loss of documents that could easily be misplaced if it isn’t kept in electronic form.

Additional feedback

Issues that can arise when communicating electronically with organisations.

The ETA allows communications to be sent to individuals and businesses electronically. A problem which arises in relation to businesses is that it is not always clear to which electronic addresses a communication should be sent. This is particularly an issue with multi-person organisations which:

- may not necessarily have an email address for the organisation. This makes it more difficult to deal with that organisation; or
- nominate an individual's email address as its preferred address That individual may leave the organisation, fail to monitor their emails or fail to inform management if a notice is received.

A potential solution to this is to require organisations to have a registered email address which, those who deal with the organisation, can rely on for the purpose of sending communications (e.g. similar to section 109X of the Corporations Act 2001). This would provide greater certainty to those dealing electronically with organisations.

Electronic communications and signing in respect to organisations registered overseas

Currently, the ETA and Corporations Act 2001 do not address electronic communications and signing in respect to organisations registered overseas in a meaningful way. As a result, businesses often take on a greater risk than is needed when it comes to electronically communicating signing documents with organisations registered overseas.

Future state of verification of electronic signatures (if one can be developed).

The Government is exploring implementation of a centralised manner in which individuals (including directors of companies, board members of incorporated associations, etc.) can be verified as part of an electronic signing process. With this in mind, the following are included for consideration:

- Currently, the ETA does not contain a strict regime for the purpose of verification. Rather it is up to the parties. In the event of a dispute, courts would need to determine whether the individual named on the document intended to sign. While this provides flexibility to parties to adopt a risk-based approach, there is room for improvement.
- For example, it would be beneficial to have a process in which an individual (including directors of companies, board members of incorporated associations, etc.) could be securely and consistently identified prior to electronic signing which would remove much of the risk associated with verification come electronic signing. However, any improvements in this area should be driven by the Federal Government to ensure a secure and consistent approach. An example of where this has been done successfully is the electronic signing process used in Estonia which sees individuals verified by the Government (via an app or website) as part of the electronic signing process. The ABA notes that the government has already commenced this process by the introduction of the Directors ID requirement for companies. This requirement could be extended to authorised officers/representatives of other organisations.

'Original' document

When a document is signed electronically, there is legal uncertainty about what is the "original" document. This is relevant as banks' AML/CTF programmes commonly require certified copies of original documents. Originals or certified copies of originals may be required in other circumstances.

Some take the view that where a document is signed using a signing platform such as DocuSign, the original resides on the signing platform's servers. This creates the risk that the document might not be available for a certifier to view or is not accessible after a period. There is also legal uncertainty as to what constitutes the original of a document signed electronically *without* a signing platform (including a digital image of a signature affixed to a document or clicking “I accept”). Given the differing views (and general unwillingness to opine on what is an original), the problem lends itself to a statutory solution.

The ABA would welcome the opportunity to work with AGD to develop a workable solution.

The interaction of the ETA with other Commonwealth laws

There is an opportunity to also consider the interaction of the Electronic Transactions Act with other legislation, including the National Consumer Credit Protection Act (NCCPA). Reforms to the Electronic Transactions Regulations in 2020, for example, were not also made in the NCCP Regulations so the benefits of those changes were limited.[2] More broadly, reforms such as aligning the credit products e-consent regime with the Corporations Act regime could also allow the NCCPA to be excluded from the operation of the Electronic Transaction Act altogether, mirroring the current exclusion of the Corporations Act.

The ABA would welcome the opportunity to work with AGD to consider these opportunities further.

Consumer credit

In the context of consumer credit, there are several competing regulations (e.g. Regulation 28L of the National Consumer Credit Protection Regulations) that make it difficult to apply electronic communications to certain banking products. ABA believes there should be one, simplified regime.

Address

The concept of an 'address' is used in legislation in a way that does not clearly allow for technological developments, such as delivering documents in apps. For example, section 195 of the National Credit Code requires customers to be able to change their delivery address, but it is not clear how this applies when not using a traditional address (email or physical) but instead using other means such as an app. We recommend that customers be able to agree (for example through terms and conditions) to any document delivery method (such as delivering through the credit provider’s app). We note that this is allowed in the context of financial products and delivery in app is a specific example given in RG 221 of methods that might be agreed to (see RG 221.28).

ASIC Regulatory Guide 221

It would also be helpful if aspects of regulatory guide 221 relating to fully digital products and services, the ability to agree to alternative methods of delivery, the ability to apply a ‘publish and notify’ approach and good practice guidance for digital disclosure (or similar guidance) was extended to the majority of communications relating to credit products (recognising that there may be some notices, such as default notices, which require more specific treatment).

Outdated references

Section 196 of the National Credit Code refers to a section of the Electronic Transactions Act that has been repealed. The ABA recommends an audit of these cross references, particularly if the ETA changes again.

Intersection of record retention requirements

The format in which records must be retained under various legislation can be unclear. For example, while some Corporations Act documents may be kept electronically (so long as a hard copy can be reproduced from them) it is not clear whether this applies to all Corporations Act documents.

[2] For example, the disclosure requirements in the old Electronic Transactions Regulation 10 were removed but equivalent changes were not made to National Consumer Credit Protection Regulation 28L, meaning that credit providers must still comply with those requirements.

The length of time for which a record must be retained may also be unclear due to the various sources of record retention requirements. For example, certain tax records must be retained for a defined period, the general ASIC requirement is that records be retained for seven years, while litigation-readiness, state Evidence Acts, and limitation periods may dictate different periods.

Given the Privacy Act obligation to take reasonable steps to destroy or de-identify personal information once it is no longer needed for any permitted purpose, having such a complex and varied regime of retention requirements makes compliance with the Privacy Act obligation complex. That complexity is compounded in large organisations with information stored digitally where the same information can be used and disclosed for various purposes. This can lead to excessive retention of information or, conversely, premature deletion of information in an attempt to comply with a particular obligation.

Clear and consistent rules for what records may be retained electronically and for how long would be welcome.