

11 March, 2016.

Submission in response to Potential Changes to the Electronic Transactions Regulations 2000: Ref 23248/15

Introduction

Thank you for the opportunity to comment on the proposed changes.

This submission is lodged on behalf of the Mortgage and Finance Association of Australia (MFAA) and has been prepared in conjunction with Gadens lawyers.

The MFAA is the peak national body providing service and representation to over 12,000 professional credit advisers (mortgage and finance brokers, managers and aggregators) to assist them to develop, foster and promote the mortgage and finance industry in Australia. The short point is that increasingly consumers want to communicate electronically. Many become angry when there is delay occasioned by the use of paper. The changes will serve consumers and industry well.

Of particular importance to the MFAA and the brokers it represents is the current requirements of REG 28L and the requirement of prior consent before giving customers credit guides, proposal disclosure documents and quotes electronically. The MFAA strongly encourages ASIC and Treasury to remove this requirement from Reg 28L in line with the current proposed changes for a consistent, modern approach to electronic communications.

We support ASIC's recommendations

We support the removal of the tailored rules in Part 3 of the Electronic Transactions Regulations but submit that the exemptions in Attachment 2 of ASIC's communication should also be removed (for reasons set out later in this submission).

The Commonwealth government has called on Australia to innovate and to facilitate smart work practices. The initiative supports those objectives.

The removal of the restrictions will facilitate signing credit contracts, and giving notices electronically will enable entirely paperless loan and mortgage transactions. Significant cost savings will be derived from digitalisation and the removal of the need to create, print, and store paper documents. The significant cost of retrieving documents from storage for transactions will be avoided.

Towards that end most of the states are introducing electronic conveyancing using the PEXA system. As a result there will be no paper certificates of title in most states. The requirement to store paper duplicate certificates of title and original paper documents is the main reason why lenders have maintained extensive and expensive document storage facilities.

Clarify what comprises ‘consent’

Section 9 of the Electronic Transactions Act 1999 and the reciprocal state acts provide that the person to whom the information is required to be given must first consent to the information being given by way of electronic communication. The current proposal will only remove the need for written consent and for the prescribed warnings.

In contrast RG221 provides the disclosures may be delivered digitally if recipients provided email addresses as part of their contact details. We submit that providing an email address is effectively giving consent as contemplated by section 9.

Electronic communications and electronic contracts are increasingly common in Australia, but it is rare for businesses to specifically ask for consent as contemplated by section 9(1)(d). We request that the law be amended to align with RG221 and specify that providing an email address (or other electronic address) comprises giving consent to electronic communications. Consumers are adequately protected if they have the right to withdraw consent.

Australia Post delivery times

Australia Post has recently changed the delivery period taken for standard mail. The result is that ordinary mail may take seven business days or longer to reach the destination. With the intervention of weekends and public holidays, seven business days may convert to 10 or more ordinary days. As a result the intention of section 65 of the National Credit Code may no longer be achieved if post is used. The objective was to ensure that a notice of changed repayments could be given before the next monthly payment is due. We submit the period for notice should be reduced to 15 days. For consistency, s66, s68 and other sections requiring 20 days’ notice should be reduced to 15 days.

To avoid confusion about when a mail notice is deemed to be received, the law should specify a delivery time in line with Australia Post’s latest guidelines.

Retaining certain exemptions

The use of mail is decreasing significantly daily. Our intelligence is that many people rarely check their mailbox. Accordingly, giving notices by mail may be the least effective method of bringing a particular matter to the attention of a consumer.

Australia Post has flagged that it may cease daily deliveries to home addresses. There are some reports of increased theft from letter boxes. The substantial increase in apartment living also reduces the regularity with which mail boxes are checked. All these factors mitigate towards viewing mail as being superseded as the primary method of communication. It is no more appropriate to mandate the use of mail then to mandate the use of telex, fax, or telegraph.

We recommend that electronic communications should be permitted for all activities, and the exemptions listed in Attachment 2 of ASIC’s letter should also be removed. If this suggestion is not adopted, we suggest that the notice should be permitted to be given electronically so long as a letter is also mailed. This will avoid delays while letters are returned or delayed.

Regulation 28L and Class Order 10/1230

ASIC proposes to consult in relation to Regulation 28L and associated matters later. We make the following interim comments.

Regulation 28L as varied by Class Order 10/1230 requires the consent of the recipient to electronic communications, so our comments above in relation into section 9 of the Electronic Transactions Act similarly apply – namely that consent should be deemed to be given if an email address or other electronic address is given in relation to Regulation 28L.

Currently, finance brokers need to provide the warning and then obtain consent before giving customers credit guides, proposal disclosure documents, and quotes electronically. Given the very short time frame within which brokers are expected to collect information and make preliminary assessments prior to lodging an application with a lender, the use of electronic communication is often essential. The current requirements are unnecessarily cumbersome and do not match consumer expectations. There is no material risk to borrowers from receiving and signing these documents electronically.

Regulation 28L(4) requires a warning to be given which needs to be removed.

The Class Order extended the operation of Regulation 28L to pre-contractual statements and information statements given by credit providers but did not deal with giving copies of the credit contract itself. It will be important for these inconsistencies to be removed when the amendments to the Electronic Transactions Regulation commence.

Execution by companies

Item 28 and 30 of Schedule 1 of the Regulations provides that the Electronic Transactions Act does not apply to the Corporations Act 1989 or the Corporations Act 2001. This exemption causes great confusion when dealing with companies as some people take the view that nothing to do with companies can occur electronically except as specifically authorised by the Corporations Law.

It is important that companies should be able to sign electronically and that people dealing with companies electronically should be able to rely on the assumptions. Companies should be able to sign deeds electronically, currently restricted by the exclusion of section 127 of the Corporations Act 2001.

We submit that either Chapter 2B should be excluded from the exemption or alternatively, the exclusion of the Corporations Act 2001 as a whole be removed or re-examined.

Execution of deeds and witnessing

There are several documents which need to be witnessed in order to be validly executed. For example, deeds which are executed by individuals must be witnessed in all states and territories except for Victoria. Similarly, documents which are executed under powers of attorney must normally be witnessed.

The Electronic Transaction Act's regulations in NSW, QLD, WA and SA exclude any documents which require witnessing. So in these states and territories, it is not currently possible to electronically execute a document which by law requires witnessing.

There is no comprehensive definition of what exactly constitutes 'witnessing'. Case law and business practice suggests that witnessing exists to ensure that the correct party executed the relevant document, and to provide independent verification of this. So, except in NSW, Qld, WA, and SA documents which need witnessing can be done electronically as a person can witness someone electronically execute a document and the person can then electronically record their witnessing.

We submit that the law should be amended to remove the requirement for witnessing as it provides little if any evidentiary value and adds nothing to the integrity of a document. The law could be amended to permit electronic witnessing, but we submit that this requirement would add nothing. The validity of signatures is better dealt with by section 15 of the Electronic Transactions Act.

Duty charged on documents

We can find no provisions in the National Credit Code or the National Consumer Credit Protection Regulations that provide that duty is charged on a transaction only if the instrument is in hard copy form. Accordingly, we do not understand the purpose of retaining those exemptions.



Siobhan Hayden
Chief Executive Officer
Mortgage & Finance Association of Australia