



16 March 2023

Mr Andre Moore  
Assistant Secretary  
Legislative Policy and Delivery Branch  
Law Division  
Treasury  
Langton Crescent  
Parkes ACT 2600  
Submitted via email to: [lawimprovement@treasury.gov.au](mailto:lawimprovement@treasury.gov.au)

Dear Mr Moore,

**Re: Treasury's Consultation on the Rationalisation of ending ASIC Instrument Measures**

The Australian Finance Industry Association (AFIA) is the only peak body representing the entire finance industry in Australia.<sup>1</sup> We appreciate the opportunity to respond to Treasury's consultation on the Rationalisation of ending ASIC Instrument Measures.<sup>2</sup>

We represent over 150 members, including bank and non-bank lenders, finance companies, fintechs, providers of vehicle and equipment finance, car rental and fleet providers, and service providers in the finance industry. We are the voice for advancing a world-class finance industry and our members are at the forefront of innovation in consumer and business finance in Australia. Our members finance Australia's future.

We collaborate with our members, governments, regulators and customer representatives to promote competition and innovation, deliver better customer outcomes and create a resilient, inclusive and sustainable future. We provide new policy, data and insights to support our advocacy in building a more prosperous Australia.

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<sup>1</sup> [Australian Finance Industry Association \(afia.asn.au\)](http://afia.asn.au).

<sup>2</sup> [Rationalisation of ending ASIC Instrument Measures | Treasury.gov.au](https://www.treasury.gov.au/consultations/rationalisation-of-ending-asic-instrument-measures).

## INTRODUCTORY COMMENTS

AFIA welcomes rationalisation efforts which make the law simpler and easier to understand.<sup>3</sup> We also agree with the Government that it is essential to Australia's continued economic prosperity for laws to be regularly updated to allow for the use of digital technologies, where doing so would increase the speed and flexibility of business without posing insurmountable risks.<sup>4</sup>

Modernisation and simplification facilitate compliance and minimise regulatory burdens for AFIA members and their customers.<sup>5</sup>

Therefore, we welcome this consultation, insofar as Treasury's stated intention is to:<sup>6</sup>

*[P]rovide greater certainty making it easier for stakeholders to identify their rights and obligations under the financial services law.*

We support the Minister for Financial Services' previous statement that:<sup>7</sup>

*The Australian Government is committed to reducing costs for consumers and businesses by addressing **unnecessary barriers to the use of digital communications** in Treasury portfolio laws.*

There are a number of documents included in this consultation, including:

1. The Treasury Laws Amendment (Measures for Consultation) Bill 2023: Rationalisation of ending ASIC instruments (Tranche 2) ([the draft Bill](#)).<sup>8</sup>
2. The Treasury Laws Amendment (Measures for Consultation) Regulations 2023: Rationalisation of ending ASIC instruments (Tranche 2) ([the draft regulations](#)).<sup>9</sup>

AFIA's recommendations to Treasury are guided by two clear principles:

1. Wherever possible, all documents should be able to be provided in electronic form, and not just precontractual disclosures.
2. Treasury portfolio laws should not impede documents and information being provided in digital form by the imposition of more onerous requirements than paper-based documents

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<sup>3</sup> [AFIA Submission to Treasury on Improving Corporations and Financial Services Law](#) (20 September 2022)

<sup>4</sup> The Hon. Stephen Jones MP (Minister for Financial Services and Assistant Treasurer of Australia), 'Modernising business communications in Treasury portfolio laws' (29 August 2022): [Modernising business communications in Treasury portfolio laws | Treasury Ministers](#).

<sup>5</sup> [AFIA Submission to Treasury on Improving Corporations and Financial Services Law](#) (20 September 2022)

<sup>6</sup> Treasury, *Rationalisation of ending ASIC Instrument Measures* (16 February 2023): [Rationalisation of ending ASIC Instrument Measures](#).

<sup>7</sup> The Hon. Stephen Jones MP (Minister for Financial Services and Assistant Treasurer of Australia), 'Modernising business communications in Treasury portfolio laws' (29 August 2022): [Modernising business communications in Treasury portfolio laws | Treasury Ministers](#).

<sup>8</sup> See too the accompanying [explanatory memorandum](#) for the draft Bill.

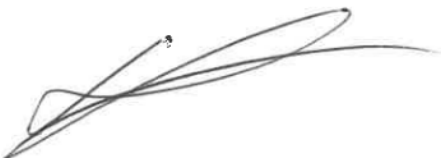
<sup>9</sup> See too the accompanying [explanatory statement](#) for the draft regulations.

To that end, **Attachment A** provides detailed proposals on how this necessary rationalisation could best achieve Minister Jones' stated objective, which AFIA supports, of: 'addressing unnecessary barriers to the use of digital communications in Treasury portfolio laws'.

**CLOSING COMMENTS**

Should you wish to discuss our submission or require additional information, please contact AFIA Senior Policy Adviser, Sebastian Reinehr, at [Sebastian.Reinehr@afia.asn.au](mailto:Sebastian.Reinehr@afia.asn.au).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Roza Lozusic', with a stylized, flowing script.

Roza Lozusic  
Executive Director of Policy and Strategy

## ATTACHMENT A: AFIA'S DETAILED PROPOSALS ON THE RATIONALISATION OF ENDING ASIC INSTRUMENT MEASURES CONSULTATION<sup>10</sup>

### Proposal 1 - All documents should be able to be provided electronically, not just precontractual disclosures

Clause 26 of the [draft bill](#) would allow precontractual disclosures, required under s 16 of the National Credit Code (NCC), to be given to customers electronically.<sup>11</sup>

However, we believe **all** documents and information required under the *National Consumer Credit Protection Act 2009* (Cth) ('the Credit Act') should be able to be provided electronically, not just precontractual disclosures.

In particular, AFIA members have concerns that the following types documents cannot be provided electronically:

- Default notices, as defined under 204 of the NCC.<sup>12</sup>
- Notices related to debt collections under the NCC.<sup>13</sup>

AFIA members understand an earlier draft of the Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2022 (Cth) would have allowed the above notices to be given electronically. We maintain that policy position is preferable to what is proposed in the draft bill and regulations.

AFIA members support a default presumption throughout the Credit Act and Regulations, that all documents should be able to be provided electronically. Any variation from this presumption should be by exception and only with clear and compelling policy reasons.

### Proposal 2 – The obligations on credit providers when providing documents should be the same whether a document is provided via post, email, or an electronic information system.

The draft bill and regulations propose for there to be differential obligations on credit providers, depending on how a precontractual disclosure is given.

If a document required under s 16 is provided via post, there are minimal obligations on the provider, beyond ensuring the letter is correctly addressed.<sup>14</sup>

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<sup>10</sup> [Rationalisation of ending ASIC Instrument Measures | Treasury.gov.au](#).

<sup>11</sup> The NCC is Schedule 1 of the *National Consumer Credit Protection Act 2009* Cth ('the Credit Act'): <https://www.legislation.gov.au/Details/C2023C00020>.

<sup>12</sup> See [s 88 of the NCC](#) for specific requirements for default notices regarding: credit contracts, mortgages and guarantees. For consumer leases, see [s 179D](#).

<sup>13</sup> See ss 6Q and 21D(3) of the *Privacy Act 1988* (Cth) – notices required under these sections are normally included in default notices provided under s 88 of the NCC. ACCC and ASIC's joint *Debt Collection Guideline: for Collectors and Creditors* (April 2021), 15 especially footnote 13:

<https://www.accc.gov.au/system/files/Debt%20collection%20guideline%20for%20collectors%20and%20creditors%20-%20April%202021.pdf>

<sup>14</sup> [Explanatory statement](#), 3.

However, we note the inclusion in the proposed [Regulation 72A](#) of the following new concept in relation to a credit provider being satisfied on reasonable grounds that the debtor has received the precontractual document:

*[T]he 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.*

However, if a document is provided via email, under the proposed draft [regulations 74A\(2\) and 74A\(3\)](#), the provider 'must be satisfied on reasonable grounds' the customer 'received the precontractual document'.<sup>15</sup>

Furthermore, if a document is provided via an 'electronic document retrieval system', i.e. an electronic mode other than email, under draft [regulation 72C](#), providers cannot be deemed 'satisfied' the document was 'received' **unless** the debtor 'has told' the credit provider they 'have retrieved' the document.<sup>16</sup>

The [explanatory statement](#) accompanying the draft regulations emphasises the differential treatment of some electronic documents, unequivocally, outlining:<sup>17</sup>

*Where a document was given to the debtor via electronic document retrieval system, the credit provider may be reasonably satisfied **only if the debtor tells the credit provider they have received the document.***

***In all other cases, the credit provider may be reasonably satisfied if the document was properly addressed to the debtor and sent to that address...***

AFIA believes it contradicts the objectives of modernisation and simplification to impose more onerous obligations on documents provided electronically than those which apply to documents provided via traditional post.

We propose that the only requirement for all documents provided electronically, in whatever form, should be that a document is correctly addressed, as with posted documents.

Furthermore, there should be a presumption the document was received, unless a customer expressly indicates otherwise, consistent with posted documents.

We also note that a comparable obligation currently appears, in relation to retrieval of credit guides from an information system only, in [regulation 28L\(8\)\(a\)](#) of the *National Consumer Credit Protection Regulations 2010*. In our view, this requirement should also be removed from that regulation.

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<sup>15</sup> Draft regulation [72A\(3\)](#).

<sup>16</sup> Draft regulation [72A\(4\)\(b\)\(i\)](#) read alongside draft regulation 72C.

<sup>17</sup> [Explanatory statement](#), 3.

### **Proposal 3 – The obligation to expressly state that a precontractual statement is a precontractual statement should be removed.**

Draft [regulation 72C\(3\)](#) would oblige credit providers to expressly state a precontractual statement is a precontractual statement.

This obligation does not apply to documents provided via email or post, only to those provided via an ‘electronic document retrieval system’.<sup>18</sup>

It is undesirable for this obligation to apply to documents provided in one form but not in other forms. Therefore, in the interest of the simplification and modernisation of the law, pursuant to the Government’s stated objectives, AFIA suggests this obligation be removed.<sup>19</sup>

### **Proposal 4 – Certain cumbersome additional requirements should be removed.**

Under [Regulation 28L](#) of the Credit Regulations, the following cumbersome obligations apply:

1. An obligation to disclose that paper documents may no longer be provided, meaning documents may be provided electronically.<sup>20</sup>
2. An obligation to disclose that electronic communications must be ‘regularly checked for documents’.<sup>21</sup>
3. Notification that consent to giving documents electronically may be withdrawn.<sup>22</sup>

These same obligations are mirrored in draft [regulation 78B\(2\)](#).

AFIA members have indicated these obligations are overly onerous and should be removed from both [regulation 28L](#) of the Credit Regulations and draft [regulation 78B\(2\)](#), which is the subject of this consultation, for two substantive reasons.

Firstly, electronic communications and documents are now the norm. In this context, reminding customers they may receive emails and to check emails is unnecessary.

Secondly, when the [Electronic Transactions Regulations 2020 \(Cth\)](#) (‘the ETR’) were modified in 2020, at the height of the pandemic, the three classes of obligations outlined above were removed. It was understood they were redundant in modern Australia.

AFIA members were of the understanding that, as these onerous and unnecessary obligations had been removed from the ETR, they would also be removed from the Credit Regulations.

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<sup>18</sup> As defined under [draft regulation 72C](#).

<sup>19</sup> The Hon. Stephen Jones MP (Minister for Financial Services and Assistant Treasurer of Australia), ‘Modernising business communications in Treasury portfolio laws’ (29 August 2022): [Modernising business communications in Treasury portfolio laws | Treasury Ministers](#).

<sup>20</sup> Credit Regulations, r 28L(4)(a).

<sup>21</sup> Credit Regulations, r 28L(4)(b).

<sup>22</sup> Credit Regulations, r 28L(4)(c).

The explanatory memorandum for the 2020 update to the ETR outlined that the reasons for these updates to the ETR were:<sup>23</sup>

*[B]ased upon the principles of functional equivalence, which means that paper based commerce and electronic commerce **should be treated equally by the law**, and technology neutrality, which means that the law should not discriminate between forms of technology*

The same principles of ‘functional equivalence’ and ‘technological neutrality’ should be applied to provision of electronic documents under the Credit Act and Credit Regulations. It would seem inconsistent for such obligations to have been removed from the regulations governing electronic transactions generally but still apply specifically in the context of the Credit Regulations.

Therefore, AFIA strongly recommends the provisions outlined in **Proposal 4** of this submission be removed from both Regulation 28L of the Credit Regulations and draft [regulation 78B\(2\)](#) of this consultation.

This will help make these regulations more consistent with the Government’s principles of simplification and modernisation. Furthermore, it will help bring the Credit Regulations and these draft regulations into harmony with other existing regulations covering similar fields, like the ETR.<sup>24</sup>

As a general rule, AFIA recommends these changes avoid prescribing mandatory processes and apply the general regime in the ETR.

### Concluding comments

AFIA supports the Government’s efforts to modernise and simplify the law.<sup>25</sup> Our suggestions above are intended to ensure this objective can be achieved most effectively.

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<sup>23</sup> Explanatory Statement, *Electronic Transactions Regulations 2020* (Cth): [www.classic.austlii.edu.au/au/legis/cth/num\\_reg\\_es/etr2020202000956381.html](http://www.classic.austlii.edu.au/au/legis/cth/num_reg_es/etr2020202000956381.html).

<sup>24</sup> The Hon. Stephen Jones MP (Minister for Financial Services and Assistant Treasurer of Australia), ‘Modernising business communications in Treasury portfolio laws’ (29 August 2022): [Modernising business communications in Treasury portfolio laws | Treasury Ministers](#).

<sup>25</sup> *Ibid.*