



13 December 2021

Manager
Market Analysis and Deregulation Unit
Market Conduct Division
Treasury

Via Email: mbcomms@treasury.gov.au

Dear Sir or Madam,

Improving the technology neutrality of Treasury portfolio laws

The Australian Banking Association (**ABA**) welcomes the opportunity to make a submission to the Treasury consultation, *Improving the technology neutrality of Treasury portfolio laws*, and is supportive of the intent of the proposed changes to the *Treasury Laws Amendment (Modernising Business Communications) Bill 2021*. To improve clarity in the Bill and to provide greater flexibility to businesses and customers regarding how different types of business communications are sent and received, a number of suggested changes are included for Treasury's consideration.

Industry's main comments regard allowing:

- (under National Credit Code (**NCC**)) the 'publish and notify' and 'in any other way agreed to' methods of communications which are permitted under the Corporations Act;
- more than one address to be used at any given time, which may be appropriate depending on the type of communications; and,
- communications via secure portals instead of an email address, as securely housing certain notifications and communications within the credit providers (**CP**) information system, where it can be retrieved by customers after appropriate authentication, better balances the need for accessibility, security and technology neutrality.

Further detail on these, and other suggested changes, is attached for Treasury's consideration.

We remain very supportive of the Treasury's ongoing efforts to improve the technology neutrality of the Treasury portfolio and look forward to further engagement on this, and subsequent, tranches of legislative change.

We also note that the *Corporations Amendment (Meetings and Documents) Bill 2021* – with the important changes to sections 126 and 127 which are a priority to industry – is currently before the Senate. The comments provided below assume the passage of that Bill.

Should further information on these, or other topics, be helpful for Treasury's deliberations, please do not hesitate to contact me at brendon.harper@ausbanking.org.au or 0411 281 562.

Yours sincerely,

Brendon Harper

Policy Director
Australian Banking Association



Treasury Laws Amendment (Modernising Business Communications) Bill 2021 – NCC issues

The focus of the Treasury changes is on the nominated address of the customer for the receipt of notices under the NCC – that is ‘where’ notices can be given. The principles which underpin these changes are welcomed. However, the changes do not address, and in some ways further restrict, the method by which notices can be ‘given’ to customers.

Changes needed to NCC to address uncertainty as to ‘publish and notify’ method for communications

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).²

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.

The ABA also recommends that the rules provide an avenue for the customer and the CP to agree to methods of delivery of notices and documents under the NCC (such as by the publish and notify method which were a feature of the *Electronic Transactions Regulations 2000 (Cth)* or by other methods made clear to the customer prior to purchase of the relevant product).

Communications via secure portals instead of email address

The proposed changes only provide a method of delivery of notices to a customer’s electronic or physical address. Many of the notices and documents issued by credit providers to customers will be confidential and will contain personal information. As a result, given the common understanding that email is considered a non-secure method of communicating, preference is given to securely housing any notifications within the CP’s information system (or mobile app / website) so that it can be retrieved by customers after appropriate authentication – following notification of the availability of the document or notice, or otherwise, usually to a customer’s email address. It is not clear as to whether this method of delivery of NCC notices is possible, given the amendments only refer to documents and notices being given to the customer’s electronic or physical address. This should be expressly permitted to ensure that the regime recognises the increasing need for more secure electronic communication channels noted above. We recommend such permission could be framed in a manner similar to the now repealed Regulation 10(2) of the *Electronic Transactions Regulations* in force in 2019 (however, with removal of the requirement for notice to be in writing).

Further details on these, and other issues, are provided in the tables below.

¹ [Electronic Transactions Regulations 2000 \(legislation.gov.au\)](https://www.legislation.gov.au)

² Pre-contractual disclosure, credit guides and contracts can be delivered by the publish and notify method pursuant to regulation 28L of the National Consumer Credit Code Regulations and [ASIC Credit \(Electronic Precontractual Disclosure\) Instrument 2020/835 \(legislation.gov.au\)](https://www.legislation.gov.au)



Treasury Laws Amendment (Modernising Business Communications) Bill 2021

Schedule 2 – Documents under the National Credit Code and payments

Draft section	Comments
Section 187 – Electronic transactions and documents	
<p>Removal of the application of paragraphs 9(1)(d) and (2)(d) of the <i>Electronic Transactions Act 1999</i></p> <p>Note: Paragraphs 9(1)(d) and (2)(d) of the <i>Electronic Transactions Act 1999</i> deal with the consent of the recipient of information to the information being given by way of electronic communication.</p>	<p>Industry is supportive of this amendment which has the effect of removing a specific element of consent from sending NCC notices electronically to customers.</p> <p>This brings the NCC in line with modern practices – it should reflect that postal communications are no longer the primary means through which consumers expect communications from their providers and that electronic communication should be a standard way of sending statutory notices which does not require any additional layer of consent.</p> <p>This change should be enhanced by providing an avenue for the customer and CP to agree to methods of delivery of notices and documents under the NCC (such as by the publish and notify method which were a feature of the <i>Electronic Transactions Regulations 2000 (Cth)</i>).</p>
Section 195 – Manner of giving notice or other document	
<p><u>General</u></p>	<p><u>Preferred approach</u></p> <p>Industry strongly suggests that any 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:</p> <ul style="list-style-type: none"> ▪ electronically; ▪ by post; ▪ in a way specified by the regulations; or ▪ in any other way agreed with the customer. <p>It should also provide a mechanism which enables banks to notify customers they will start receiving notices electronically, after being given an opportunity to opt out, in circumstances where customers may not have indicated a preference for electronic communications.</p>



This would also ensure that 'fully digital' products can be provided where this is part of the product terms and conditions (subject to any necessary exceptions, for example default notices). This would also be consistent with RG 221 and the ePayments Code, which state that for digital only products, providers need not make printed or printable copies of disclosures available.

As suggested above, mirroring the *Corporations Act*, as well as including a method for existing customers to be transitioned to electronic communications, would likely remove or reduce some of these challenges.

Feedback on current Treasury proposals

The bill allows recipients to opt out of electronic communication or change their address nomination using 'any appropriate manner' (Schedule 2, item 2, section 195(6) of the NCC). To ensure CPs are able to receive and action any requests, the obligation should be on the CP to specify or agree an appropriate method to nominate an address, cancel or change the nomination.

Industry also recommends there be a mechanism that addresses the possibility of system/channel failure, for example, if a customer attempts to provide a nomination but the system used to receive that is unavoidably down.

The changes are drafted to contemplate one customer address being active at any given time. If a customer has not nominated an address, a CP must identify the appropriate address to use by first looking to whether the CP has previously given a document to the recipient. If the CP has previously given a document, it must use this same address unless it has notified the customer of a change to the address.

This complicates the process and fails to reflect the reality that different methods of delivery of communication may be necessary depending on the type of document or notice. For example, certain communications that contain personal information may be more appropriately sent by physical mail rather than email (for *Privacy Act* considerations). Conversely, a customer may not keep their postal address up-to-date and the bank may be better placed to communicate with the customer by email or other electronic method.



	<p>The ABA suggests that the amendments should permit more than one address be used at any given time for a customer.</p> <p>Section 195 should be kept simple, enable flexibility and reflect the reality that customers provide 'contact details' to their bank (which will usually include an email address, a postal address and a mobile phone number) which may then be managed by indicating preferences (for example through online banking platforms). It should also contemplate the different methods of communication available (for example email, online banking with an email notification, SMS, post and other methods).</p>
<p><u>Where recipient has nominated an address, it must be used (section 195(2)(a))</u></p> <ul style="list-style-type: none"> • Address may be electronic • Recipient can nominate an address in an <i>“appropriate manner, whether or not in writing”</i> (section 195(6)) 	<p>In relation to section 195(6), the amendments place great emphasis on there being a 'nominated' address. However, there is no guidance as to what would constitute a nomination. Although this may also be an issue under the current drafting of the NCC, what constitutes a 'nomination' is placed in greater prominence by the amendments.</p> <p>The ABA suggests that the rules make it clear that an appropriate manner of nomination would include any agreement between the customer and CP – and that more than one address may be 'nominated' at any one time – such as the customer filling out their email/physical address in an application form, maintaining contact details through an online banking platform or updating their address over the phone.</p> <p>Also, it is unclear how a CP should respond when a nominated address is no longer working/valid. Clarification is required, for example, if a CP can use any other physical or electronic addresses it has on record, where there is no valid nominated address.</p>
<p><u>Section 195(3) and (4)</u></p>	<p>It is unclear to industry whether the operation of proposed s195(3) and (4) may have the practical effect that CPs are unable to contact certain recipients (where physical addresses have not been updated) despite having a valid electronic address (because of a historical 'opt out' nomination that was subsequently forgotten).</p> <p>Industry suggests clarification be included to allow CPs to contact recipients electronically, despite a historical 'opt out', where a valid physical address is not available (to the extent any opt-out mechanism is retained in section 195 to facilitate CPs notifying customers that they will start to be communicated with electronically).</p>
<p><u>If a recipient has not nominated an address</u> If a recipient does not have a nominated address, there are the following methods for identifying the</p>	<p>Industry understands the intention of sections 195(8) and (9) is to allow the credit provider to notify the customer of a change in nominated address to which it will send future notices and documents.</p>



<p>appropriate address (depending on what has occurred in the past).</p> <p>(1) If the giver has never given a document to the recipient, the giver may send the document to the giver's choice of the last known physical address or the last known electronic address of the recipient. [section 195(2)(b)]</p> <p>(2) If the giver <i>has</i> previously given a document to the recipient, then they must continue to use the same address they used last time, unless and until they have notified the person of a change to the address. [Section 195(2)(c)]</p> <p>According to the EM “<i>This ensures that there is only ever one ‘active’ address at a time, and a recipient will never be surprised by, or unaware of, a change in the address used.</i>”</p> <p>The notice of a change of address must contain a prominent statement to the effect that unless the recipient nominates another physical or electronic address, following the expiry of 14 days after the notice is given, the giver will give documents to the recipient at the address specified in the notice. <i>sections 195(2)(d), (8) and (9) of the NCC</i></p>	<p>As noted above, the ABA suggests that these provisions allow the delivery of notices and documents by the ‘publish and notify’ method after appropriate notification to the customer (as explained, this is permitted under <i>Corporations Act</i> relief).</p> <p>Also as noted above, under this drafting the only address that the credit provider can notify the customer of, is either the customer’s physical address or their nominated electronic address (which is presumably their email address or mobile number). The ABA suggests there be flexibility in allowing more than one address to be used / nominated.</p> <p>Similarly, for s195(2)(b) NCC, it is unclear if the ‘giver’ in this context can choose between the last known electronic or physical address, where no preference has been nominated. S195(2)(b)(iii) suggests that this is the case but s195(2)(a) appears to suggest that all existing customers that did not initially nominate an electronic address (or subsequently make such nomination) must still be communicated with by physical means. It is industry’s recommendation that, where an electronic address has also been provided (and no specific preference was indicated), that the electronic address may be used. As noted above, section 195 should reflect the reality of how customers provide contact details to their bank and may manage communication preferences on an ongoing basis. The legislation should enable flexibility and not ‘lock’ CPs into using one communication method where customers are also contactable by electronic means.</p>
<p>Schedule 2, item 2, section 195(7)</p> <p>(7) A nomination under this section ceases to have effect if it is cancelled by the recipient</p>	<p>NCC is proposed to state that if a recipient cancels their nomination, it no longer has effect (Schedule 2, item 2, section 195(7) of the NCC). There should be a grace period before a cancellation takes effect, as mail outs usually have a long lead period – if a customer cancels their nomination the day the notice is due to be mailed out, for example, it would be difficult to track this and re-send it to the recipient.</p> <p>More generally, the ABA notes the amendments take place one month after the Act receives Royal Assent – in relation to issues such as ‘opt out’, it may be difficult for CPs to implement the required system and operational changes in sufficient time.</p> <p>More fundamentally, the necessity of this provision remains unclear. It does not reflect the reality that customers simply maintain contact details with their bank and may update their</p>



	<p>details from time to time (that is a customer is most likely to simply update their address in online banking or an app rather than 'cancelling' anything).</p>
<p>Schedule 21 – Application and transitional provisions for Schedule 2 to the Treasury Laws Amendment (Modernising Business Communications) Act 2021</p>	
<p>Application – giving documents Transitional – addresses used before commencement Transitional – cancellations of nominations before commencement</p>	<p>In industry’s view, any amendments to section 195 should not disrupt the status quo and should simply enable flexibility going forward – any transitional provisions should ensure that banks do not have to make any changes to their arrangements from the commencement day.</p>
<p>Section 64 – interest rate changes (and use of newspaper notices)</p>	
<p>Currently, banks can give notice of interest rate such changes by publishing a notice in certain newspapers. Under the proposed Bill, the references to newspaper have been removed and banks would be required to publish notice of changes:</p> <ul style="list-style-type: none"> (a) unless paragraph (b) of this subsection applies—in a manner that results in the notice being accessible to the public and reasonably prominent; or (b) if a determination is in force—in a manner specified in the determination. <p>Section 119</p> <p>Section 119 of the National Credit Code contains provisions relating to application by credit providers or ASIC for court orders. Previously, the court could require notice of such applications to be published, in a form approved by the court, in certain newspapers. The court can now require notice of the applications to be published, in a form approved by the court, in a manner determined by the court.</p>	<p><u>Further guidance</u></p> <p>Industry would welcome greater guidance on what constitutes publishing notices “in a manner that results in the notice being accessible to the public and reasonably prominent.”</p> <p>The legislation or explanatory guidance could provide examples on items that are deemed to be reasonably prominent for example, publication on a bank’s website or app, a push notification or a text message. It would also be useful to have guidance on the period a notification is required for (noting only single publication in a daily newspaper is currently required).</p> <p>Further, to align to the newspaper method, where notices are published for one day only – it is unclear how long an alternative form of notice would have to be publicised for?</p> <p><u>Publicly accessible</u></p> <p>Notifications of interest rate changes are relevant to customers of that product, rather than the broader public. Customers are more likely to receive that information if it is targeted to them specifically, for example on an internet banking platform, rather than a national newspaper. Industry recommends that, rather than a notice being “accessible to the public”, it should be “accessible to the applicable customers”.</p>



Schedule 3 - Publication requirements and other amendments

Draft section	Comments
<p>National Consumer Credit Protection Act 2009, 41-46</p>	<p>In line with our comments on Section 64 in Schedule 2, industry welcomes the modifications to the NCC ‘publication in a newspaper’. However, we do not believe the requirement for the notice to be “accessible to the public and reasonably prominent” will result in the right audience for the relevant information being targeted in all circumstances.</p> <p>Industry recommends that, rather than a notice being “accessible to the public”, it should be “accessible to the applicable customers”.</p>

Schedule 3—Other amendments - National Consumer Credit Protection Regulations 2010

Draft section	Comments
<p>1 Subregulation 28L(3) After “consent”, insert “(whether or not in writing)”.</p> <p>2 At the end of subregulation 28L(3) Add: Note: The consent may be given, for example, by telephone or in person.</p>	<p>The ABA strongly suggests 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 (that is, in accordance with the <i>Electronic Transactions Act</i> under s 187 of the NCC / s 195 of the NCC).</p> <p>Regulation 28L contains prescriptive requirements in relation to giving certain documents electronically which are almost identical to the requirements for NCC documents under the <i>Electronic Transactions Regulations 2000</i> which were repealed in July 2020 to facilitate more efficient electronic communications. It is unclear why these prescriptive requirements have been retained in this regulation which covers a small number of disclosure documents under the <i>NCCP Act</i> when these requirements have been removed for all other NCC notices.</p>
<p>3 Subregulation 74(4)</p>	<p>Industry is supportive of these amendments which simply clarify the positioning of the relevant warnings that need to be given depending on whether the contract is being signed electronically or on paper.</p>
<p>4 Form 5 of Schedule 1 Omit “in a newspaper”, substitute “by your credit provider”.</p>	<p>Industry is supportive of this amendment which reflects that changes to interest rates etcetera will not necessarily be notified in a newspaper (as above in the draft amendments to the NCC).</p>