

The logo for the Australian Retail Credit Association (ARCA) is displayed within an orange square. The text 'AUSTRALIAN RETAIL CREDIT ASSOCIATION' is written in white, stacked vertically in all caps.

AUSTRALIAN
RETAIL
CREDIT
ASSOCIATION

9 December 2021

Manager
Market Analysis and Deregulation Unit
Market Conduct Division
Treasury
Langton Cres
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Sent by email: mbcomms@treasury.gov.au

ARCA submission – Modernising Business Communications Bill & Regulations

Thank you for the opportunity to provide a submission on the *Treasury Laws Amendment (Modernising Business Communications) Bill 2021 (the Bill)* and *Treasury Laws Amendment (Modernising Business Communications) Regulations 2021 (the Regulations)*, which set out measures currently being proposed by the Government to help modernise business communications.

ARCA is the peak industry association for businesses using consumer information for risk and credit management. Our Members include banks, mutual ADIs, finance companies and fintech credit providers, as well as credit reporting bodies and, through our Associate Members, many other types of related businesses providing services to the industry. Collectively, ARCA's Members account for well over 95% of all consumer lending in Australia.

ARCA's previous submission & the Corporations Amendment Bill

As noted on Treasury's website, the Bill is intended to;

- modernise business communications by improving technology neutrality of specified commonwealth laws, and
- build upon the reforms contained in the *Corporations Amendment (Meetings and Documents) Bill 2021 (the Corporations Amendment Bill)*, which is currently being considered by Parliament.

A copy of ARCA's previous submission dated 9 September 2021, and which relates to a number of the proposed reforms to the Corporations Act contained within the Corporations Amendment Bill, is provided with this document at Annexure A (**the Previous Submission**).

ARCA's submission to the Bill

ARCA has previously expressed its support for the Government's proposed reforms to the Corporations Act which will make permanent a number of the temporary measures put in place to assist businesses during the COVID-19 pandemic (and which are now reflected within the Corporations Amendment Bill).

Having reviewed the Bill, Regulations and ancillary materials, ARCA is generally supportive of these legislative instruments and in particular, we are of the view that the measures proposed will assist the Government to meet its goals of modernising business communications, by improving the technology neutrality of Treasury portfolio laws.

In particular, ARCA notes and supports the following of the Government's proposed reforms:

- Expanding the scope of the types of documents under the Corporations Act which will be able to be signed and sent electronically:
- Allowing notices published in newspapers to be published in any accessible and reasonably prominent manner across Treasury portfolio laws: and
- Updating the *National Consumer Credit Protection Act 2009* (**NCCP Act**) (including the *National Credit Code* (**the Code**)) and associated legislation, to give consumers and their credit providers greater flexibility when updating their details and when sending documents.

Referring to the proposed amendments outlined above, we have set out below a summary of ARCA's submission to the Bill as well as raising further issues in respect of the Bill and related legal instruments, which we consider warrant further review and consideration.

(a) *Expanding the scope of the types of documents under the Corporations Act which will be able to be signed and sent electronically*

As noted in the Previous Submission, it is the experience of ARCA's subsidiary the Reciprocity and Data Exchange Authority Ltd (**RDEA**), that utilising technology to send, sign and receive documentation such as deeds, provides businesses with a number of benefits. These benefits include facilitating the execution of corporate documents within a far quicker turn-around time and requiring significantly less resources when compared to a 'physical' signature system. In particular, it is the experience of the RDEA that:

- Obtaining the electronic signatures of directors, company secretaries or witnesses to electronic versions of documents such as deeds (as opposed to obtaining 'wet ink signatures' on original 'paper' versions) is a significantly more streamlined and logistically simpler means of obtaining the relevant signatures; and
- The benefits associated with the electronic execution and dispatch of corporate documents such as deeds, apply to both large and small

organisations, and are particularly pronounced where the signatories of an organisation are located within differing offices or locations.

Accordingly, we are in strong support of the proposed measures contained within section 1 of the Bill and which will expand the scope of the Corporations Amendments Bill, so that all documents under the Corporations Act can be signed electronically and additional documents can be sent electronically and in hard copy.

(b) *Allowing notices published in newspapers to be published in any accessible and reasonably prominent manner across Treasury portfolio laws.*

ARCA notes and supports the following measures contained within Schedule 3, Part 1 of the Bill, which will operate so as to amend the following provisions of the Code:

- Amend section 64 of the Code (*Interest rate changes*) so that unless an exception applies, the references to a notice being provided within a ‘*newspaper circulating throughout each state and territory*’ is removed and a credit provider will instead be able to comply with the applicable notice obligations by publishing a notice “*in a manner that results in the notice being accessible to the public and reasonably prominent*” (Schedule 3, Part 1, section 41, 42, 43 of the Bill).
- Amend section 66 of the Code (*Credit fees and charges changes*) so that unless an exception applies, the references to a notice being provided within a ‘*newspaper circulating throughout each state and territory*’ is removed and a credit provider will instead be able to comply with the applicable notice obligations by publishing a notice “*in a manner that results in the notice being accessible to the public and reasonably prominent*” (Schedule 3, Part 1, section 44, 45 of the Bill).
- Amend section 119 of the Code (*General provisions relating to applications by credit providers or ASIC*) so that the requisite notice is not required to be published in a ‘*newspaper circulating through one or more States or Territories*’ and instead, it is required to be published “*in a manner determined by the Court*” (Schedule 3, Part 1, section 46 of the Bill).

We consider that these amendments are appropriate and reflective of modern community expectations of how credit providers should communicate with their customers generally and how important matters should be brought to the attention of both customers and the public.

(c) *Updating the National Consumer Credit Protection Act 2009 (NCCP Act) (including the National Credit Code (the Code)) and associated legislation to give consumers and their credit providers greater flexibility when updating their details and when sending documents*

Subject to the further issue discussed below, ARCA supports the repeal of the current section 195 of the Code and the insertion of the ‘new’ section 195 (as set out at Schedule 2, part 1 of the Bill). These measures will permit a consumer to nominate an electronic address to which a credit provider can give documents or notices required or permitted by the Code to be given to a person.

We note that without this amendment, the *Electronic Transactions Regulations 2020 (ETR 2020)* would continue to operate so as to remove the application of certain provisions of *the Electronic Transactions Act 1999 (the ETA)* to specified notifications and documents required or permitted to be given to consumers under the Code. In particular, without the passage of the measures contained at Schedule 2, Part 1 of the Bill, a credit provider would remain prohibited from giving the following notices or documents by way of electronic communication:

- A notice of default under credit contracts and mortgages, as referred to at section 88 of the Code
- A notice of intent to enter a residential property to take possession of goods, as referred to at section 99(1)(b) of the Code: and
- A notice to repossess goods under consumer leases, as referred to at section 178 of the Code.

We note that the ETA applies to the notice and documents which are permitted or required to be given to a customer under the Privacy Act in connection with the reporting of credit information, including information relating to a default under the customer's credit contract. In addition to the requisite Privacy Act notices, in certain instances a credit provider will also be required or permitted to give to its customer a notice(s) or document under the Code, prior to the reporting of credit information in connection with a default under the customer's credit contract.

The current inconsistencies in the application of the ETA to the relevant notices or documents which are permitted or required to be given under the Code and the Privacy Act, has led to differences between the requirements which a credit provider must comply with when seeking to give or send relevant notices or documentation, including permitting some to be given or sent by electronic communications but not others.

For example, under the Privacy Act a credit provider may give to its customer a section 21D(3)(d) notice (which is a notice prescribed by section 21D(3)(d) of the Privacy Act) via electronic communication¹. Should the credit provider wish to combine the section 21D(3)(d) with a notice under section 88 notice of the Code (as referred to above and which must be given before the credit provider can enforce a credit contract or mortgage against a defaulting debtor or mortgagor), the credit provider would not be able to give this combined notice via electronic communication, as a result of the current inconsistencies in the application of the ETA.

We consider that the proposed reforms to permit the electronic dispatch of notices permitted or required to be given under the Code, will help reduce the inconsistencies which currently exist between how notices and documentation under the different legal regimes are, or can be, given to consumers.

¹ Refer to section 9.3(d) of the Privacy (Credit Reporting) Code 2014 (version 2.1), which provides that "...*The Section 6Q notice and section 21D(3)(d) may be sent by electronic communication. Note: (1) Electronic communication should meet the requirements of the Electronic Transactions Act 1999.*

Further issues

(i) 'Giving' or 'sending' information

We note Treasury's statement that in the next phase of this project the Government will be giving further consideration to further legislative reforms including considering exemptions to the ETA. Whilst not an 'exemption' per se, we have set out below an area of the ETA which we consider is appropriate for review and potential amendment.

As noted previously, the ETA permits the 'giving' of information via electronic means. Subsection 9(5) of the ETA provides that generally, *giving*, *sending* or *serving* information includes, but is not limited to, the following:

- (a) making an application;
- (b) making or lodging a claim;
- (c) giving, sending or serving a notification;
- (d) lodging a return;
- (e) making a request;
- (f) making a declaration;
- (g) lodging or issuing a certificate;
- (h) making, varying or cancelling an election;
- (i) lodging an objection;
- (j) giving a statement of reasons.

In the case of organisations which choose to 'give' information within a customer's online portal or online account, it is unclear if sending the customer a notification via email that there is information which is able to be viewed or accessed from their individual online portal/account, is a legally valid means of ensuring compliance with the relevant legal requirements surrounding the 'giving' of information.

Whilst we note that the list at section 9(5) of the ETA as to the ways by which information can be 'given' is inclusive (and therefore, it does not expressly prohibit the 'giving' of information via a customer's online portal or account), we consider that further review and potential amendment of the ETA to account for information which is 'given' via a customer's online portal or account is appropriate.

We also note that this method of 'giving' a notice or document was explicitly established in the predecessor legislation to the NCC, the *Uniform Consumer Credit Code*. Further, it was mirrored in section 10 of the previous version of the ETA Regulations, *Electronic Transaction Regulations 2000 (ETR 2000)*. The explanatory statement to the ETR 2020 did not discuss the relevance of removing section 10 of the ETR 2000 however, given the importance of this method of giving notices and the clear intent of the Government to facilitate the electronic provision of documents, we do not believe there was any intent to limit the provision of documents through an online portal/account. We believe that this should be confirmed.

(ii) *The address of the recipient*

The '*Treasury Laws Amendment (Modernising Business Communications) Bill 2021: Exposure Draft Explanatory Materials*' (**the Explanatory Materials**), provides the following explanatory statement in relation to certain amendments to the Code contained with the Bill:

“Summary of new law

2.4 The Bill allows a credit provider to send documents to **either** the last known physical **or** electronic address of the recipient, unless the recipient has nominated **a** specific address... [our emphasis added]

The reference in the Explanatory Materials to a credit provider sending documents to a specific address nominated by the customer or either the last known physical or electronic address of the recipient, implies that the Bill may operate so as to require a credit provider to send all documents to a single address. That is, a credit provider may only be able to send all documents to either the customer’s nominated specific address or their last known physical address or email address.

We consider that any requirement upon a credit provider to send all documents to a single customer address has the potential to negatively impact customers as it will remove the ability for a credit provider to send different documents to different addresses in instances where this is appropriate, such as:

- In situations where there are heightened privacy or interception concerns surrounding certain documents, or
- where a customer has requested different methods of communication for different documents.

Accordingly, we strongly urge the Government to review the drafting of the Bill clarify the ability for credit providers to send documents to different addresses.

If you have any questions about this submission, please feel free to contact me on 0414 446 240 or at mlaing@arca.asn.au, or Mary Vancea on 0403 137 435 or at mvancea@arca.asn.au.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'M. Laing', with a stylized flourish at the end.

Mike Laing
Chief Executive Officer
Australian Retail Credit Association

Annexure A



9 September 2021

Market Conduct Division
The Treasury
Langton Crescent
Parkes ACT 2600

Sent by email: businesscomms@treasury.gov.au

Using technology to hold meetings and sign and send documents Draft exposure bill

Thank you for the opportunity to provide a submission on the *Treasury Laws Amendment (Measures for Consultation) Bill 2021: Use of technology for meetings and related amendments* exposure draft legislation, the content of which will support companies and their officers to be able to permanently use technology to satisfy *Corporations Act 2001* (**the Corporations Act**) requirements (**the Proposed Legislation**).

The Proposed Legislation

ARCA welcomes the introduction of the Proposed Legislation. We strongly support the Government's reform of the Corporations Act which will make permanent a number of the temporary measures put in place to assist businesses during the COVID-19 pandemic.

We note that such temporary measures include those contained in the *Treasury Laws Amendment (2021 Measures No.1) Act 2021* (**the Temporary Legislation**) and we understand that the Proposed Legislation will make permanent changes to the Corporations Act so as to;

- enable the permanent use of technology in relation to the execution of documents (including deeds);

- allow companies and registered schemes to hold hybrid meetings and thereby give shareholders the ability to choose to attend meetings either in person or remotely; and,
- allow for the use of technology in the signing of meeting-related documents and the provision of those documents to members.

ARCA's submission

ARCA is the peak industry association for businesses using consumer information for risk and credit management. Our Members include banks, mutual ADIs, finance companies and fintech credit providers, as well as credit reporting bodies and, through our Associate Members, many other types of related businesses providing services to the industry. Collectively, ARCA's Members account for well over 95% of all consumer lending in Australia.

In addition to its role as industry association group, ARCA developed the business-to-business rules and data standards under which credit reporting information is exchanged between credit providers, comprising the Principles of Reciprocity and Data Exchange (**PRDE**) and the Australian Credit Reporting Data Standards.

Organisations are only bound by the PRDE if they agree to become a signatory and accept the principles contained in the PRDE. In order to become a signatory to the PRDE, organisations must sign the PRDE Deed Poll, which binds the organisation to exchange credit reporting information in accordance with the requirements of the PRDE.

ARCA's subsidiary, the Reciprocity and Data Exchange Authority (**RDEA**), is the PRDE Administrator Entity.

As the Administrator of the PRDE, the RDEA's functions include management of the day-to-day operation of the PRDE framework comprising paperwork (such as arranging for the execution of the PRDE Deed Poll by organisations), finances and the running of the PRDE compliance framework.

In providing this submission, ARCA draws heavily upon the experience of the RDEA as the PRDE Administrator Entity.

The benefits of the use of technology to sign and send documents (including deeds)

Based on ARCA's experience detailed above, our submission relates primarily to the provisions relating to the signing and sending of documents as contained within the '*Technology neutral signing*' provisions set out at Schedule 1, Part 1.2AA—*Signing and sending documents*, Division 1, sections 110 to 110B.

The explanatory memorandum to the Proposed Legislation (**the EM**), provides that;

"... the Bill allows certain documents to be signed in flexible and technology neutral manners. This allows for business communications to be conducted with greater ease and lower costs."

The experience of the RDEA in utilising technology to send, sign and receive documentation such as the PRDE Deed Poll, has been consistent with the statement set out above and has

allowed for the RDEA's dealings with organisations to be conducted in a far more efficient, timely and transparent manner (when compared to relying on a 'wet ink' or a 'paper' method of communication or execution of documents).

In particular, we have noted that obtaining the electronic signatures of directors, company secretaries or witnesses to electronic versions of the PRDE Deed Poll (as opposed to obtaining 'wet ink signatures' on original 'paper' versions), has resulted in these documents being executed within a far quicker turn-around time and appears to require significantly less resources.

It has also been our experience that the benefits associated with the electronic execution and dispatch of documents such as the PRDE Deed Poll, apply to both large and small signatory organisations, and are particularly pronounced where the signatories of an organisation are located within differing offices or locations.

In terms of potential drawbacks associated with the use of technology in this context, the RDEA's predominant concern to date has been the legal uncertainty which was to arise after 31 March 2022, when the Temporary Legislation was to cease being in force.

In the absence of the Proposed Legislation (or legislation of similar effect), the RDEA may be unable to comply with the Corporations Act (including section 127) without reverting back to requiring 'wet ink signatures' on original 'paper' documents. In this regard, we note that in the absence of federal legislative provisions, the RDEA may be unable to rely on the recent legislative changes in Victoria (the jurisdiction of which applies to the PRDE Deed Poll) to provide for the simplified electronic execution and sending of documents, such as deeds².

Given the above, ARCA re-emphasises its support of the Proposed Legislation and its removal of the legal uncertainty which will otherwise exist post 31 March 2022.

Other benefits of the Proposed Legislation

ARCA wishes to also note the following provisions of the Proposed Legislation, which we consider will also be of assistance to organisations when seeking to utilise technology in connection with the signing of documents (including deeds):

- Introducing the ability for agents to make, vary, ratify or discharge contracts and execute documents (including deeds) on behalf of companies (Schedule 1, item 3, sections 126(1) and (4));
- Amending the Corporations Act so that companies with a sole director and no company secretary can use the statutory document execution mechanisms contained within the legislation (Schedule 1, items 4 and 7, sections 127(1)(c) and 127(2)(c));
- Allowing businesses to assume that a document has been duly and validly executed by a company, if the document appears to have been signed in accordance with section 127(1) of the Corporations Act, or if a company seal appears within the document, that it appears to have been fixed to the document in accordance with

²Refer to the *Electronic Transactions (Victoria) Act 2000*.

sections 127(2) and 127(2A) of the Corporations Act (Schedule 1, items 15 and 16, sections 129(5) and (6)): And,

- inserting within the Corporations Act a clear statement that the Proposed Legislation does not require a person to:
 - (i) sign the same form of the document as another person;
 - (ii) sign the same page of the document as another person;
 - (iii) use the same method to sign the document as another person; or
 - (iv) require the document signed by a person to include all the information recorded in the document (Schedule 1, item 1, section 110A(4)).

If you have any questions about this submission, please feel free to contact me on 0414 446 240 or at mlaing@arca.asn.au, or Mary Vancea on 0403 137 435 or at mvancea@arca.asn.au.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'M. Laing', is positioned above the typed name and title.

Mike Laing
Chief Executive Officer
Australian Retail Credit Association