

21 January 2015

By email: ashly.hope@asic.gov.au

Ashly Hope
Strategic Policy Advisor
Australian Securities and Investments Commission

Dear Ms Hope

ASIC Consultation Paper 224: Facilitating electronic financial services disclosure

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on ASIC Consultation Paper 224: Facilitating electronic financial services disclosure.

In summary, our responses to the proposals are set out below:

- Proposal A1: we broadly welcome steps to remove unnecessary obstacles to providing disclosure electronically as long as doing so does not remove the ability for consumers to choose to receive paper documents;
- Proposal B1: We broadly support this proposal, but recommend RG 221 be amended to encourage FSPs to ask consumers to indicate how they would prefer to receive disclosure documents at the point that they are collecting contact information.
- Proposal B2: we support providing class order relief allowing disclosure to be made via website or other electronic facility without seeking further consent, but only if the consumer has already nominated to receive disclosure electronically. This method of disclosure is not appropriate for consumers who have nominated their postal address for receiving disclosure;
- Proposal C1: We support the proposal to grant class order relief to facilitate innovative PDSs, subject to reasonable restrictions;
- Proposal D1: We support in principle steps to make it easier to deliver credit disclosure by electronic channels, though we would want to see specific proposals before reaching a firm position.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Consumer Action Law Centre

Level 7, 459 Little Collins Street Telephone 03 9670 5088
Melbourne Victoria 3000 Facsimile 03 9629 6898

info@consumeraction.org.au
www.consumeraction.org.au

Proposal A1: Threshold options

We broadly welcome steps to remove unnecessary obstacles to providing disclosure electronically. However, in removing obstacles we should not remove the ability for consumers to choose to receive paper documents. The objective should be to give Financial Service Providers (**FSPs**) and consumers options, rather than swapping one default setting for another.

We see this consultation process as an opportunity to not only improve the delivery of disclosure but to also improve disclosure itself. We understand that ASIC is not contemplating any changes that will require reform to the law. However if there are opportunities to make disclosure more accessible, understandable and useful for consumers we should take them. For this reason we support Proposal C, to allow more innovative disclosure.

Responses to questions in the consultation paper

A1Q1 Do you agree that we should further facilitate electronic disclosure, or take Option 5 (i.e. no change)? Please provide reasons.

Yes. Further electronic disclosure should be permitted for the reasons given in paragraph 1 of the consultation paper; that it may allow more innovative disclosure and create savings. An additional reason is that electronic disclosure will be preferred by many consumers.

We do not support all elements of all of the proposals in the consultation paper. Further details are provided below.

Proposal B1: Enabling electronic disclosure to be the default method

We understand proposal B1 to mean that ASIC would update Regulatory Guide 221 to better express the position in the Corporations Act. That is, if a consumer has 'nominated' their email address as a channel for receiving disclosure, then an FSP may send disclosure to that address without receiving further consent.

We have no concerns with ASIC updating RG 221 to properly reflect the Corporations Act. However, we do not want RG 221 to give the impression that FSPs may send disclosure electronically simply because they have an email address belonging to the customer. We do not think this amounts to 'nomination', which we take to mean that the customer has not simply provided the email address in the knowledge that it will be used for certain purposes. For that reason, we do not agree with the following statement at paragraph 221.33 of the draft updated RG 221:

...if a client has provided their email and postal address as part of their application, the provider could deliver disclosures in respect of the product the client applied for to either address.

For reasons we explain below, many consumers may provide an email address but may not want disclosure delivered electronically. 'Nomination' should require some expression of a preference. We suggest that the best way to be sure that an email address is 'nominated' for this purpose is to ensure that consumers are given the choice of how they would prefer to

receive disclosure documents. Giving the choice does not need to create any real burden for FSPs. It can simply involve a question being asked at the point that contact details are being collected. The payoff will be that consumers are more likely to notice and engage with disclosure when it is provided to them.

We go into more detail in our responses to the consultation questions below.

Responses to consultation questions

B1Q1 Do you agree with this proposal? Please give reasons for your answer.

We agree that RG 221 should be updated if it does not currently reflect ASIC's interpretation of the disclosure requirements under the Corporations Act. But we do not want RG 221 to encourage FSPs to effectively default to electronic disclosure if they have an email address for the client.

We propose that, when FSPs collect an email address from a consumer (such as in a telephone conversation, or on a written form) the FSP says that there are documents they are required to provide to the consumer when they enter a contract, and ask whether the consumer would prefer to receive these documents electronically or on paper.

Consumers should not pay any extra costs for choosing to receive documents by post. FSPs are required by law to provide these disclosure documents. It is not appropriate to charge a fee for meeting that obligation.

Recommendation:

RG 221 should be amended to encourage FSPs to ask consumers to indicate how they would prefer to receive disclosure documents at the point that they are collecting contact information. This could be included in the good practice guidance section of RG 221.

RG 221 should continue to state that consumers should not have to pay more to receive disclosure in hardcopy. The RG currently discusses this at point 7 in the good practice guidance section.

B1Q2 Are there other barriers to using email addresses for delivery of disclosures?

Our financial counsellors advise that low income consumers who do have reliable internet access may only have access through their phones. FSPs should ensure that disclosure documents delivered electronically should be accessible through all devices.

B1Q3 What are the consequences of making this change? For example, are there significant numbers of clients who have supplied email addresses and who currently do not have disclosures delivered to those email addresses, but who would be able to under this proposal?

No response.

B1Q4 Do you agree that the provision of an email address means a client or potential client is comfortable with all forms of disclosure being delivered to that email address? If yes, are there any consumers or groups of consumers for whom this might not be the case?

No. Our financial counselling team advises that people with email addresses may still prefer to receive disclosure documents by post. For example, clients with email addresses may not have easy access to the internet. Some can only access the internet occasionally at public libraries, or at the homes of friends. When our financial counsellors need to email documents to clients, some clients nominate addresses belonging to family members or friends.

Many people are eager to keep their financial dealings private, especially those in financial trouble. People may not want to open and read financial documents sent by email if they can only access email in public places.

Others simply have a preference to deal with financial or important documents on paper. An informal poll of staff in this office found that many have paper-based systems for dealing with things like bills or important documents, and those people tend to miss documents which arrive electronically. Others say the opposite, preferring to handle these kinds of matters online. Either way, this suggests that people are more likely to engage with disclosure documents if they have choice about how they receive them.

This anecdotal response is supported by research from the UK which indicates that up to one third of consumers either do not use, or prefer not to use the internet (references have been removed):

Consideration has to be given to the question of 'digital divides' and the exclusion from the Internet of some groups in the population. For the United Kingdom, The Oxford Internet Survey research suggests that 'divides are narrowing, but digital inequality persists by age, education, income'. The issue is not physical access: almost everyone can get access via a library or a 'proxy'. Barriers relate more to cognitive abilities, skills and culture. Furthermore, the OIS has discovered that 14% of those with online access are not fans.

They do "not feel that the Internet makes them more efficient, nor do they enjoy being online to pass the time... they feel frustrated that the Internet is difficult to use and harbours too much 'immoral material... they feel excluded from a technological context which is "not made for them"".

We have worrying suggestions from research that, though young people have high levels of access to the Internet through near ubiquitous mobiles and smartphones, it cannot be assumed that they are willing or able to use it as a definitive source of advice.

Once this 14% of discontented users is added to the reported 20% of non-users, we have around a third of the population either not using the Internet or not happy with doing so. This figure for exclusion is likely to reduce over time if only as those now young and familiar with smartphones inevitably age—but people who are poor, old, less well educated and (at least at present) with a disability, are likely to continue to be disproportionately excluded. Currently excluded populations will, to some degree, adapt to the surrounding culture and be forced to do so by governments keen to drive digital services in order to save costs of administration. However, we are left with a sizeable group of the excluded—likely to be high amongst those on low incomes. A reasonable working assumption would seem to be that the overall excluded population rises from about a

third to around a half of those on low incomes because, amongst them, will be more of the specifically excluded populations.¹

We submit that the findings of this research would be very similar if conducted with Australian consumers. People who, for whatever reason, prefer to receive important documents on paper may be less likely to notice or read them if delivered electronically. Preserving choice will increase the likelihood that the disclosure will be effective.

B1Q5 When a provider is seeking an address from a client or potential client, should there be any information, warnings or advice given about the potential ways the address might be used?

Consumers should be asked whether they wish to receive disclosure documents by email. RG 221 should be clear that addresses provided for receiving disclosure should never be used for marketing. If people come to expect that emails from their FSP usually contain marketing, they may get into the habit of ignoring or deleting them, and so miss disclosure documents when the FSP sends them by the same channel.

B1Q6 Are there particular kinds of disclosure for which consumers might be more or less likely to prefer electronic delivery?

We think the consumer's preferences are more relevant than the type of document.

B1Q7 Does it matter to whom the consumer provided the email address?

Not if the consumer is given a choice about how to receive disclosure at the time they are providing contact details.

B1Q8 Do you have comments or views on our example in draft updated RG 221: see Example 1 at RG 221.35?

As discussed above, we do not agree with the finding in 221.35 that a consumer should be assumed to have 'nominated' their email address as the preferred channel for disclosure simply because they have provided it in the past. Any uncertainty on this point could be removed by simply asking the consumer what their preference is when contact details are being collected.

B1Q9 For providers, how do you currently determine that an address (postal or email) has been nominated for the purposes of delivery of disclosures such as PDSs and Financial Services Guides (FSGs)?

No response.

B1Q10 Do you think that emailed disclosures are more or less likely to be lost (e.g. through changes to email addresses or misdelivery) than posted disclosures? Please provide supporting evidence if possible.

¹ Roger Smith (December 2014) *Digital Delivery of Legal Services to People on Low Incomes: Summary and Recommendations*, The Legal Education Foundation, pp 11-12. Accessed from <http://thelegaleducationfoundation.org/wp-content/publications/digital-delivery/index.html#1>

We do not have any evidence either way. But as we have indicated above, consumers tend to have their own systems for dealing with important documents and will be more likely to miss a disclosure document if it is delivered through a non-preferred channel.

B1Q11 Do you think that there is an issue with frequency of change of email addresses? Do you have any data to show frequency of change of email addresses?

We have no data on the frequency of change of email addresses. However, we know that some people only have one email address that is connected with their work, and lose that address when they move jobs. Some types of vulnerability may lead people to change their email addresses more often. For example, people escaping domestic violence are often advised to change their mobile number and keep a new bank account with details kept confidential.² We expect changing email addresses would be part of the same safety plan.

B1Q12 Are there any particular contexts in which the current requirement for a client to 'nominate' an address would provide a barrier to efficient electronic disclosure—for example, obtaining an address for clients who acquire products through a third party such as an employer or other agent?

No response.

B1Q13 Where there is a provision allowing a disclosure to be notified, sent, given, provided or delivered electronically, do you need any further guidance on whether you can use an email address, that you hold, to satisfy such a requirement?

No response.

B1Q14 Is there any other guidance or relief required to facilitate the delivery of disclosures by email to clients?

As discussed above, RG 221 should encourage FSPs to offer consumers a choice of how they would prefer to receive disclosure.

B1Q15 Please estimate any cost savings your business would expect to realise from this change.

No response.

B1Q16 Please estimate any additional costs that consumers might be expected to incur as a result of this change.

We think this change could only reduce costs for consumers, as long as it results in more consumers being given the choice to receive disclosure electronically, and consumers are still given the choice to receive documents on paper if that is their preference.

² See for example <https://www.1800respect.org.au/get-help/staying-safe-understanding-safety-planning/safety-planning-checklist/>

Proposal B2: Provision of disclosures on a website or other electronic facility

We understand that, under proposal B2, ASIC would grant relief to allow FSPs to use their clients' nominated channel to send notification that disclosure is available elsewhere (for example, an email with a link to a web version of the document) without receiving further consent.

We support this proposal for the reasons given in support of B1; that it will create more options for delivery of disclosure, make disclosure cheaper overall, and encourage more innovative disclosure. However, this method of disclosure is clearly inappropriate for somebody who does not have reliable access to the internet, or does not prefer to receive disclosure electronically. A letter with information on how to access disclosure online will be useless for someone without an internet connection, for example.

Recommendation:

We recommend amending proposal B2 to allow FSPs to provide disclosure in this manner without seeking further consent if:

- the consumer has already nominated to receive disclosure electronically (noting our comments above that nomination should involve an actual choice) or has consented to accessing disclosure on a website;
- the consumer is notified that the disclosure is available; and
- it is very easy, and cost-free for the consumer to elect to receive disclosure another way.

We do not support class order relief allowing FSPs to provide disclosure via a website without consent for consumers currently receiving disclosure on paper.

As the consultation paper says, people tend to accept defaults, and inertia may prevent people from making changes even if making the change will bring them benefits. It is important that we do not create new unsuitable defaults in trying to remove existing ones.

Answers to consultation questions

B2Q1 Do you support this additional method of disclosure? Please give reasons for your answer.

We suggest amending the proposal as discussed in the recommendation above.

B2Q2 Should clients be notified each time (via their existing method of communication) of the availability of the disclosure on a website or other electronic facility?

Yes. People will be more likely to notice and read the disclosure if the FSP brings it to their attention. It should not be costly or burdensome to require notification each time, especially given the notification will often be automated emails, and that FSPs will make savings in reducing paper disclosure and postage.

Notifications (and the disclosure website itself) should also provide the opportunity to elect a different method of disclosure. For example:

- an email notification could include a link that the consumer can click if they want to change their disclosure preferences (much like 'unsubscribe' links on promotional emails);
- disclosure websites could have a prominent button or link to change delivery preferences; and
- disclosure websites could have an option to download a PDF if the interactive version is not accessible for clients.

B2Q3 What are acceptable methods of notification (e.g. letter, email, SMS, voice call, or other)?

We are not opposed to any particular methods of notification as long as they:

- are clear about the purpose of the notification;
- are not also used to deliver marketing; and
- are delivered with some awareness that some consumers will want to keep their financial dealings private, especially if the notification or the product relates to financial difficulty or other sensitive matters.

B2Q4 How should notifications be made? Are there any design considerations you would suggest in the notice to help ensure clients do not miss the opportunity to access their disclosures? What guidance should ASIC give on this issue?

The problem of consumers receiving disclosure and not reading them is related to disclosure documents being long, complex and hard to understand. This is a problem regardless of how the document is delivered. The solution is to improve and simplify the disclosure documents themselves.

B2Q5 Do you have any data on the likelihood of clients printing their own copies of relevant disclosures when they are made available online?

We do not have any data on this. However, we do not think it is safe for FSPs to assume that consumers will print off disclosure documents, even if the document suggests that they do. This is particularly the case as more consumers access the internet through mobile devices while they are away from a printer. FSPs should be obliged to ensure that all previous versions of disclosure remain easily accessible if consumers need them in future.

B2Q6 Do you think we should restrict the use of hyperlinks in notifications?

We would be wary of using hyperlinks in notifications because it would be relatively easy for scammers to design phishing attacks which mimic these kinds of notifications. We suggest that ASIC consults ACCC's Scamwatch for advice on whether this creates scam risks.

There should be other easy options which mean that notifications do not need to include hyperlinks. For example a notification could explain to consumers how to access the document online, or documents could be delivered through apps.

B2Q7 Please provide feedback on the costs to your business of:

(a) developing or modifying an electronic facility;

(b) printing and mailing disclosures (including, where possible, volumes and expected changes in volumes based on the proposal); and

(c) any savings you would expect to make were this proposal implemented.

No response.

B2Q8 Please estimate any costs that consumers might be expected to incur as a result of this change.

See response to Question B1Q16.

Proposal C1: Class order relief to facilitate innovative PDSs

We support the proposal to grant class order relief to facilitate innovative PDSs. We see this as an opportunity to improve the accessibility of PDSs and make them more engaging.

However, the proposal needs to be subject to some restrictions, including that:

- PDSs are designed to ensure that the most important information is clear and accessible (the draft update to RG 221 considers this at RG 221.60-221.64);
- PDSs should never contain marketing material or links to marketing, for the reasons given above. The draft update to RG 221 considers this at 221.59 but should be more strongly worded.

We have no concerns with the updated good practice guidance in Section D of the draft updated RG 221. We do not have any responses to the consultation questions on pages 22-23 of the consultation paper.

Proposal D1: Electronic delivery of credit disclosures

As above, we broadly support allowing businesses to provide disclosure and other documents electronically if it creates savings, and means it is more likely that consumers can choose the disclosure channel that suits them best. However, all of the limitations and safeguards discussed above would apply to credit disclosures, and we would want to see specific proposals before giving a firm position.

It is also not clear whether this proposal extends beyond disclosure documents to things like default notices. Encouraging more use of electronic delivery for documents like default notices may work for some consumers, however some consumers would be less likely to see the notice when it arrived, which may lead to adverse listings on credit files, and enforcement procedures. It may be missed, for example, if that person only checks email intermittently or an email notification goes to a spam folder.

Electronic delivery may cause some consumers shame and distress if the notices are opened in the presence of others (for example if the consumer only accesses email at a library, or at a friend's house). Consumers may not want to open even standard disclosure documents if they relate to a product or provider that is typically used by people in financial distress.

In line with our responses above, it is important that consumers have real choice over how their FSP or credit provider communicates with them.

A useful first step may be to conduct research to consider whether consumers are more likely to notice documents like default notices if they are delivered electronically, and whether consumers are more likely to keep copies, or be able to access copies when they need them.

Please contact David Leermakers on _____ if you have any questions about this submission.

Yours sincerely

CONSUMER ACTION LAW CENTRE

Gerard Brody
Chief Executive Officer

David Leermakers
Senior Policy Officer—Insurance