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Facilitating electronic financial services disclosures

Submission by the Financial Rights Legal Centre

The Financial Rights Legal Centre (*formerly known as the Consumer Credit Legal Centre (NSW)*) is a community legal centre that specialises in helping consumer's understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the Credit & Debt Hotline, which is the first port of call for NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. Financial Rights took over 22,000 calls for advice or assistance during the 2013/2014 financial year.

Financial Rights also conducts research and collect data from our extensive contact with consumers and the legal consumer protection framework to lobby for changes to law and industry practice for the benefit of consumers. We also provide extensive web-based resources, other education resources, workshops, presentations and media comment.

This submission is an example of how community legal centres utilise the expertise gained from their client work and help give voice to their clients' experiences to contribute to improving laws and legal processes and prevent some problems from arising altogether. Federal Government changes to Community Legal Services Program funding agreements in mid 2014 restrict policy and law reform that community legal centres can undertake with Federal Government funds. These restrictions have the potential to deprive Government and others from valuable advice and information and reduce efficiency and other improvements in the legal system. For more information please see http://www.communitylawaustralia.org.au/law-reform-and-legal-policy-restrictions/

General Comments

Thank you for the opportunity to respond to Consultation Paper 224: Facilitating electronic financial services disclosures. Our primary expertise relevant to this Consultation Paper is in relation to consumer credit products and insurance (general and life). Our comments are largely informed by our experience in these areas only.

The proposals outlined in this paper are generally supported subject to some concerns outlined below under the specific questions, and to one over-riding proviso: that the overall result is to improve consumer understanding of the benefits and limitations of the financial products and services they are in investing in.

ASIC's Report 416 indicates that of a group of 1058 consumers of home insurance policies responding to an online survey, only 20% of those who took out new insurance or considered switching had read the Product

Disclosure Statement ("PDS"). In depth qualitative research undertaken for the same report suggested that even these 20% did not read the whole document, but only selected parts (as summarised in REP 415 at p7).

These findings accord closely with our experience of giving advice about insurance products to individual callers from around Australia. Financial Rights has taken over 20,000 advice calls in relation to insurance since the commencement of our Insurance Law Service (ILS) in 2007. Solicitors answering the ILS advice line report that a large percentage of callers have clearly not read their PDS, and/or are misinformed about the meaning and implications of their insurance contract.

The proposals within this Discussion Paper have the potential to save industry significant sums in printing and postage of disclosure documents. We submit that some of the resources freed up in this way must be redirected to improving consumer understanding of the products they are purchasing.

Better regulation of product suitability is clearly required. Disclosure is always going to form a key part of the spectrum of mechanisms forming adequate consumer protection and effective markets. We submit that financial service providers cannot continue to claim they meet their obligations as licensees to provide services efficiently, honestly and fairly and to provide disclosure that is clear, concise and *effective*, while relying entirely on documents which mounting evidence suggests significant percentages of their customers don't read, or don't understand.

In insurance there is the added obligation to act consistently with the duty of utmost good faith (Insurance Contracts Act, s14A), yet ASIC Report 415 found that:

> "*online and telephone sales processes are generally designed around insurers' need to understand certain risk or underwriting criteria about consumers so that they can sell home insurance quickly and efficiently to a consumer, rather than as a way to improve a consumer's understanding of the home insurance they are enquiring about or purchasing*" (Report 415, p6, para 17).

ASIC needs to give clear guidance that this situation is no longer acceptable: Financial Service Providers must take some responsibility for testing whether their customers receive and comprehend vital disclosure information. ASIC should make the continuance of any class order relief dependent on Financial Service Providers conducting regular consumer testing to ensure that these changes improve consumer understanding in meaningful ways.

We also endorse the submission of Consumer Action Law Centre to the effect that electronic disclosure should not simply become the new default. Consumers should be given a genuine choice of delivery mechanism, after being given appropriate information about the nature of the information that will be supplied via that mechanism. Financial Service Providers should also have some obligation to check in with consumers to ensure important disclosures are being received.

Responses to specific proposals and questions

A.1 Options 1-5

1. *Give FSPs additional option of publishing on-line and then notifying consumers it is available;*

2. *Clarify that if FSPs have an e-mail address for clients they can use that e-mail for the purpose of delivering disclosures without the need for specific consent (no opt in to electronic disclosure required)*

3. *Facilitate the use of more innovative PDS's*

4. *A combination of the above*

5. *None of the above*

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

We agree that ASIC should further facilitate electronic disclosure. However, we are opposed to changing the default setting to electronic disclosure. We are particularly opposed to changing the default setting to electronic where consumers have supplied an e-mail address at some point in the past without any information or warnings about it being used as the primary means of communicating important information required to be disclosed by law. There are also potential privacy implications where consumers have not been made aware of the nature of communications that will be sent to the particular e-mail address. Consumers should be given a choice about their preferred method of communication and warnings about the consequences and risks.

We are also concerned that while consumers may *prefer* a particular mode of communication, this will not necessarily increase the likelihood that they will read and understand the communication. Further research is required to determine whether consumer preference should be the only guide. In circumstances where the information being disclosed is crucial – such as the limitations of a home building insurance policy or a default notice under a loan if these principles were extended to credit – it is arguable that multiple methods of communicating with the customer should be mandated, unless the Financial Services Provider has positively identified that the information has been received.

A1Q2 *What benefits do you consider will result from our proposed approach?*

While there may be some obvious benefits flowing from saved costs to industry and the environment (to the extent that documents are not simply printed by the consumer rather than the Financial Services Provider), we consider the most valuable potential benefits will not flow automatically. There needs to be active pressure placed on industry to use both the savings produced, and the additional opportunities the electronic environment provides (in terms of innovative presentation of information and monitoring use)to improve the effectiveness of disclosure in increasing consumer understanding.

A1Q3 *What disadvantages do you consider will result from our proposed approach?*

An internal survey of Financial Rights staff revealed eight solicitors rostered to answer the Insurance Law Service consumer advice line between 3-12 hours per week were asked what percentage of the callers appeared to have read their PDS. Their answers ranged from 5% to 33%, with an average percentage of 14% across all answers. It should be noted that the vast majority of these callers have not just purchased their insurance but are at the point of making a claim (or having it refused). The number of insurance consumers who have read their PDS prior to entering the contract, or within the cooling off period, is likely to be even lower.

This problem is not likely to be addressed by consumers receiving their disclosure electronically, and potentially consumers will be even less likely to read their PDS if received electronically. For example:

- a consumer opening a document received by traditional mail is likely to at least scan the first or last page before storing (or destroying) whereas an e-mailed document may not even be opened (even if it saved and filed);

- consumers may overlook important disclosures within a crowded e-mail inbox;
- consumers may lose reliable access to their e-mail through the disconnection of their internet service, their mobile device, or simply because they have changed e-mail addresses and forgotten a number of communications that are received that way.

Despite this, we are not opposed to electronic disclosure provided the consumer has clearly opted for it, as we are aware that some consumers prefer electronic disclosure, and will be equally likely to read something delivered electronically as otherwise. However, this opportunity to improve the understanding of those who do not read their disclosure (likely to be between 65% and 95%) should not be squandered. Even the e-mail attaching the disclosure documents themselves could have some key information included in the body of the e-mail to draw the consumer's attention to crucial information and possibly whet their appetite to delve further into the main document. Electronic communications also provide opportunities for financial service providers to determine whether recipients of e-mails have opened documents or clicked on links. They should be actively required to monitor such information to determine the effectiveness of their processes.

No charges for paper documents

It should be absolutely clear that consumers cannot be charged for opting to receive paper copies of legally mandated disclosure. Estimates provided by Financial Rights staff about the percentage of clients who could not supply an e-mail address ranged from 10-30%. Older people, rural people and indigenous people were often in the category (although by no means always). Allowing Financial Service Providers to charge for papers copies of mandated disclosure will effectively exclude a significant proportion of the population from benefiting from the intent of the law, including a large cross-over with the groups most in need of its protection.

B1 E-mail addresses and consent -regulatory guidance

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

We have a number of concerns about simply using an e-mail address without the customer understanding that this will be the primary method of communication. We submit that consumers should be given appropriate information and privacy warnings and be able to make an active choice.

See our concerns below under **B1Q4 & 10.**

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?*

a. Privacy

In our experience consumers may share e-mail addresses, or nominate the e-mail address of another person when asked to supply one. When our staff were asked about how often clients were unable to supply an e-mail address, many of them noted that some clients, particularly older clients, did not have an e-mail address but sometimes supplied the e-mail of another person (such as a younger relative) as a potential contact. It cannot be assumed that because someone has supplied an e-mail address on a form that they are comfortable with receiving all communications to that e-mail. Further, sending confidential information (such as financial statements) to an e-mail box that is

accessible to others (shared, or even belonging to another person) risks breaching privacy law unless the intended recipient has been clearly informed of the purpose of e-mail when they supplied it.

b. Reliability

In our experience, e-mail is not always a reliable method of communication (see below under **B1Q10).** While for some people an e-mail address may be a more consistent method of staying in contact than a physical address (particularly for younger people and some itinerant parts of the population), people do not lose access to postal services as a result of financial difficulty or technological difficulties. People are also more aware of the need to update their postal address than their e-mail address, particularly if they have been receiving significant amounts of unwanted electronic communications and see changing their e-mail address as a method of escaping this inundation.

While many older clients are very computer savvy, there is still a significant number who lack the skills or are reticent to use electronic communications. Some can supply an e-mail that has been set up for them but are not confident using it. In most cases these same consumers will be expecting to receive any important correspondence by traditional mail.

Electronic communications are also more easily overlooked or accidentally deleted.

c. Cultural expectations and assumptions

While e-mail and other forms of electronic communications have become increasingly predominant, and for many people are their preferred method of communication, there is a still a strong assumption that important communication will be sent by mail unless another method has been specifically agreed. Certainly consumers who have historically received statements and renewals by mail will not anticipate that these documents will start arriving by e-mail because they once supplied an e-mail address.

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?*

We submit that before an e-mail address can be used as the primary address for disclosure the consumer must:

- Be warned about privacy and the potentially confidential nature of communication that will be sent to their e-mail address;
- Be warned that they will not receive communications, including important disclosure documents via mail also; and
- Consent (either orally or in writing after being told the above).

We disagree that this is overly burdensome for industry. We agree that inertia may be preventing some consumers from opting for electronic disclosure on existing products/contracts. A letter asking a customer to take active steps to log on, write or telephone the financial services provider to make such an election my not be effective (even consumers who intend to do this may never get around to it), but we submit that where consumers are consulted by phone (after appropriate identity checks),

or as part of an initial application/sign up process, there will be a significant shift towards electronic communication including for the purpose of disclosures.

If an insurer intends to use the address for all types of communications (eg renewal notices, direct debit failures & policy cancellations) then there must be a warning to consumers saying as much. We suggest best practice would be that renewal notices, direct debit failures and cancellation notices are so important they should be sent to multiple contacts if there is no action taken by consumer (e-mail, e-mail and SMS).

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

Only in so far as it needs to be made clear what entity or entities will be using the e-mail address and for what types of communications.

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.*

One of the solicitors at Financial Rights Legal Centre analysed her contact arrangements with the 47 casework clients she has assisted over the last 12 months (we only hold this type of information about casework clients – thousands of advice clients contact us one or more times but we do not attempt to contact them back.) Of the 47, 15-20% could not provide an e-mail address at all. Of the 80% or so clients who did provide an e-mail address, problems occurred in 20-25% of cases in communicating with the client by e-mail over the course of the case, including clients who could no longer access the e-mail address provided (disconnection from communications services, e-mail belonged to someone else and relationship has broken down, client has changed e-mails) and clients who provided an e-mail address but did not appear to actually read or respond to e-mails consistently or at all. In the same period, only 2 of the 47 clients moved causing their mail to be returned to sender.

Other staff noted clients being disconnected from internet access (and therefore e-mail) was occasionally an issue and several noted that clients might have to go to friends and family or the library to access their e-mail and could be unresponsive for periods of time as a result. Pre-paid internet access can present similar problems when clients have insufficient credit. Another issue that came up was data allowances. Clients could take calls but often could neither download nor read documents on their phones (which may be their primary mode of email access) because they had insufficient data.

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 apart from the above. Several staff noted, however, that people sometimes ran multiple e-mail addresses for different purposes and did not check them with equal regularity. Further, unchecked e-mail in-boxes can be quickly filled up with spam, making it easy for consumers to overlook important communications.

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

As above – informed consent/selection should be required.

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

Printing – this change is effectively shifting the cost of printing from industry to consumers, should they want a printed copy rather than simply referring to a stored electronic version.

B2 Disclosure on a website – class order relief

We propose to give class order relief to provide an additional method of delivery for most Ch 7 disclosures (where not already permitted), allowing providers to make a disclosure available on a website or other electronic facility, provided clients:
(a) are notified (e.g. via a link or a referral to a web address or app) that the disclosure is available; and
(b) can still elect to receive that disclosure via an alternative method of delivery, on request.

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

We have some concerns about requiring consumers to have to take an additional step to view the information provided. We believe a distinction can be drawn here between a disclosure the consumer may want to read (such as a payment statement) and a disclosure document that they *should* read but are not motivated to do so. With a document such as the PDS for an insurance policy, consumers are already failing to read this important document in such significant numbers that creating another step in the process is simply introducing another barrier to a failing process. Financial Service Providers should set up mechanisms whereby they can effectively monitor the rate at which this information is being accessed. As ASIC is giving industry relief from ensuring that each and every client has accessed the disclosure, this type of overall monitoring should be a mandated, along with other mechanisms for testing the effectiveness of the new processes.

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?*

If this class order relief proceeds, then we support the draft Regulatory Guidance given at RG 221.26 that the notification must be given each and every time and include an option for the client to opt to have the disclosure delivered to either an e-mail address or to a postal address.

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

Again consumers should be able to opt for their preferred method of notification (even if from a limited list of options).

We regularly receive calls to our advice line in relation to direct debit failures and renewals, and consumers regularly express frustration that there was no "follow up call" or other notification of issues that often were of significance (eg. direct debit failure on premium deduction, renewals and changing of sum insured's, automatic renewals). Industry should be encouraged to align their practice with what consumers want – it is noted some consumers will not want this service. Accordingly, innovation around email, SMS and telephone calls should be done in a systematic way to obtain informed consent (not hidden terms in the supplementary PDS).

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

Possibly printing (as above).

C1 Innovative PDSs - class order relief

We propose to facilitate more innovative PDSs, such as interactive PDSs, by giving relief:

(a) *from various provisions requiring a copy of a PDS to be given to a person on request and instead allowing a provider to give a copy of any current PDS for the relevant product or offer—meaning a provider can give a different printed PDS, even if technically it is not a 'copy';*

(b) *from the shorter PDS regime, provided the PDS communicates the same information that is required by that regime; and*

(c) *from the requirements for certain language to be included on the cover or 'at or near the front of' a PDS so they can equally apply to a more innovative PDS.*

C1Q1 *Do you have any comments on our proposals for relief in proposal C1(a) regarding copies of the PDS?*

The proposal sounds sensible so long as the substantive content is the same.

C1Q3 *Do you think that our proposed requirement in proposal C1(c) that the mandated language be included 'at or near the front of the PDS' will accommodate more innovative PDSs?*

We have no objection to the proposal and no further comment.

C1Q5 *Do you think any of our proposed relief should be extended to other types of disclosure, such as FSGs and SOAs?*

We repeat of our overarching comments that disclosure documents like FSG's and SOA's should be consumer tested as to their effectiveness. Consumer advocates are not opposed to innovative disclosure in FSG's and SOA's but only if there is sensible consumer testing that any such change or innovation will result in an improvement of disclosure and delivery of key information (as set out below)

C2 Innovative PDSs – regulatory guidance

We propose to update our guidance in RG 221 to:

(a) *make it clear that we think Pt 7.9 operates to allow a provider to have more than one PDS for a single financial product or offer, such as a version able to be printed and an interactive version;*

(b) *make it clear that the requirement that a consumer can identify the information that is part of the PDS is particularly important in the case of more innovative PDSs; and*

(c) *include further guidance on the use of more innovative PDSs and update our 'good practice guidance' on electronic disclosure to help ensure consumers receive clear, concise and effective information when disclosures are delivered electronically and in electronic form (see Section D of draft updated RG 221).*

C2Q1 *Do you agree with this proposal? Please give reasons.*

We reiterate that while we are supportive of encouraging and accommodating more innovative PDSs, we think that encouragement and accommodation is insufficient. We submit that the existing law in relation to requiring a PDS to be clear, concise and effective is sufficient for ASIC to exact a higher standard of these lengthy and unwieldy documents. Further, general licensing obligations (and the duty of utmost good faith for insurers) also provide scope for requiring Financial Service Providers to lift their game in terms of promoting significantly improved consumer understanding. We note that Final Report of the Financial System Inquiry specifically noted that if the insurance industry does not rise to the challenge of improving consumer guidance

in relation to estimating an appropriate sum insured, the government should intervene to require it (FSI Final Report - Chapter 4: Consumer outcomes › Improve guidance and disclosure in general insurance).

ASIC Report 415 made a number of pertinent observations regarding insurer practices that are insufficient and suggestions for improvement (but we note this is not a comprehensive list):

- That the sales process was designed to meet the insurer's needs rather than promote understanding of the product for the consumer (p6);
- That sales staff were sometimes poorly trained in relation to product features and/or trained to avoid giving any explanations or guidance (no advice model);
- That insurer's telephone scripts could set out better ways for insurers to convey to their customers (p40-41, 44,):
    - Insurance features and exclusions (including how to weigh up price AND cover);
    - How cap and limits operate in practice (through the use of hypothetical examples) and drawing on the Key Fact Sheet requirements;
    - Include a plain English explanation of what the sum insured means and how it should be estimated with calculator style questions or at least references to available calculators;
    - Better information about why premiums have increased
- Online information should (p52 & 56):
    - Provide improved links to the PDS earlier in the process (including highlighting pertinent parts and allowing the entire document to be downloaded) and perhaps more than once;
    - Provide improved links to sum insured calculators throughout the online process in addition to building in calculator style questions.

Such examples could be more explicitly incorporated into the guidance on the use of more innovative PDS's. We also submit that the Guidance should go beyond *encouraging* providers to undertake consumer testing of proposed and existing disclosures to inform the design to *requiring* it. It is imperative that innovative disclosure should improve rather than detract from consumer understanding and ASIC should make it abundantly clear that the continuation of any of the Class Relief is dependent on Financial Service Providers producing solid evidence (by credible testing) to show that they have improved consumer understanding in practice. Such evidence (in addition to independent research) would also be critical to establishing whether the government should further intervene to create an additional legislative mandate consistent with the recommendations of the Financial System Inquiry above.

Marketing Material

We are strongly opposed to any marketing material being included with or linked to mandated disclosure material. We do not accept that using caution as suggested in paragraph 55 of the Consultation paper is sufficient. The commercial imperative to use any communication channel or document that is not clearly prescribed to insert marketing material is so strong that it should be expressly excluded as inconsistent with the requirement to be clear, concise and effective.

D1 Credit – similar treatment in future?

We are considering aligning the treatment of financial services disclosures and credit disclosures in the future.

D1Q1 *Do you agree we should align the treatment of financial services disclosures and credit disclosures? Please give reasons for your answer.*

Our comments above apply equally in the credit environment and our reservations even more so. Staff answering our hotlines report that there are specific groups which more commonly have problems with electronic access (internet and e-mail): Older people, rural people (and particularly older people on the land), people with mental health issues and sizable parts of the Aboriginal community. Further, there groups are more highly represented among callers to our Credit and Debt Hotline than to the Insurance Law Service. This is supported to an extent by our service statistics which show that while 36% of callers to the Credit and Debt Hotline in the last 6 months were in receipt of government benefits as their main source of income on 19% of ILS callers are in this category. In the same period 16% of credit casework clients identified as Aboriginal or Torres Strait Islander compared to 2% of insurance casework clients.

The privacy ramifications of credit information (particularly statements and default notices) are considerable, as are the consequences of non-receipt (repossession of home or car, legal action, bankruptcy) and as a result, we think credit disclosures will require careful consideration.

Concluding Remarks

Thank you again for the opportunity to comment on ASIC's Electronic Disclosure Discussion Paper. If you have any questions or concerns regarding this submission please do not hesitate to contact the Financial Rights Legal Centre on (02) 9212 4216.

Kind Regards,

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