



Insurance Council
of Australia

17 March 2023

Attorney-General's Department
4 National Circuit
BARTON ACT 2600
By email: eta@ag.gov.au

Dear sir/madam

Public consultation on the Electronic Transactions Act 1999

The Insurance Council of Australia¹ (Insurance Council) welcomes the opportunity contribute to this consultation.

General insurers are required to provide product information in accordance with the disclosure requirements contained in the Corporations Act 2001 (the Corporations Act) and the Insurance Contracts Act 1984 (the IC Act). While electronic communications for disclosures under the IC Act are required to be sent in accordance with the Electronic Transactions Act (ETA), the disclosures under the Corporations Act are not subject to the ETA. This creates inconsistencies between the two pieces of legislation in respect of electronic communications.

Harmonisation should be undertaken to ensure relevant provisions of the ETA are consistent with other laws, specifically by removing the requirement to obtain consent and enabling electronic communication to be made available to customers by any nominated electronic means. This harmonisation would ensure that customers have fit for purpose options in their dealings with insurers, and insurers have certainty around electronic customer communications.

Consent Requirement

Section 9(2)(d) of the ETA requires that “the person to whom the information is required to be given consents to the information being given by way of electronic communication”. This requirement to obtain consent is out of step with the product information and disclosure requirements and options applying to financial services generally contained in the Corporations Act and associated ASIC relief². This presents a barrier for insurers to fully utilise the benefits of electronic forms of communication which does not always apply to other providers of financial services.

ASIC has encouraged financial services providers to use electronic forms of product disclosure, noting that such disclosure can enable delivery of information to consumers in faster and more convenient

¹ The Insurance Council is the representative body of the general insurance industry in Australia and represents approximately 89% of private sector general insurers. As a foundational component of the Australian economy the general insurance industry employs approximately 60,000 people, generates gross written premium of \$59.2 billion per annum and on average pays out \$148.7 million in claims each working day (\$38.8 billion per year).

² As amended by ASIC Corporations (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647, which enables financial product issuers to provide disclosure documents electronically without the need to seek a client's consent.

ways³. The requirement to obtain consent adds friction to the customer experience and results in more paper-based communications than would otherwise be the case for general insurers. As noted in our submission to the Modernising Document Execution consultation, the regulatory framework should allow electronic communication as a default by eliminating the need to obtain consent.

Our previous submission provides a brief overview of the industry's experience with the consent requirements, and our answers to the consultation questions specific to the consent issue are located at **Attachment A**.

Provision of Information on Websites or Other Electronic Facilities

There is inconsistency between the ETA and other legislative requirements applying to financial product disclosure. Under the Corporations Act⁴, financial product disclosures are permitted to be "made available to the client, or the client's agent, by a "nominated electronic means". This enables product information to be "made available" on a website or other electronic facility, provided customers are notified (for example, via a link or a referral to a web address or app) that the disclosure is available.

However, specific provisions of the ETA limit this approach being taken on other product information regulated under the ETA. For example:

- Section 5, which defines "electronic communication" to mean "a communication of information in the form of data, text or images by means of guided and/or unguided electromagnetic energy", and
- Section 14A(1), which provides that "the time of receipt of [an] electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee".

In the decision of the Queensland Supreme Court (*Conveyor & General Engineering Pty Ltd v. Basetec Services Pty Ltd & Anor* [2014] QSC 30), Justice McMurdo considered almost identical provisions in the Electronic Transactions (Queensland) Act 2001 (Qld) in relation to the use of a Dropbox link, which is a link to a file sharing application. Justice McMurdo concluded that the material within the Dropbox was not part of an "electronic communication" (as defined) and it could not be said that the Dropbox was "an electronic address designated by the addressee". In particular, he noted at para [28]:

...the material within the Dropbox was not part of an electronic communication as defined. None of the data, text or images within the documents in the Dropbox was itself electronically communicated, or in other words communicated "by guided or unguided electromagnetic energy." Rather, there was an electronic communication of the means by which other information in electronic form could be found, read and downloaded at and from the Dropbox website.

³ ASIC (2014), *Facilitating electronic financial services disclosures*, Consultation Paper 224.

⁴ As amended by ASIC Corporations (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647



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We submit that relevant provisions of the ETA should be amended, to be consistent with the Corporations Act and associated ASIC relief, to enable electronic communication to be made available by any nominated electronic means. This will ensure consistency in the regulatory approach to electronic disclosure for insurers relative to other providers of financial services.

The ETA should also include a presumption of successful delivery to the recipient's preferred form of electronic communication unless there is an automated failed delivery receipt.

Thank you for the opportunity to comment. If you have any further queries, please contact Ms Alexandra Hordern, General Manager, Regulatory and Policy at 0411281790 or ahordern@insurancecouncil.com.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Andrew Hall', written over a light blue horizontal line.

Andrew Hall

Executive Director and CEO

Attachment A – Response to Consultation Questions on Consent

The standard ETA process requires people to confirm consent from people before communicating or signing documents electronically.

In operating your business, have you ever experienced any of the following issues relating to getting consent from others?

If your organisation represents a group of other individuals or entities, please answer based on their common experiences.

You can select more than one.

-
- I have wanted to communicate electronically with a government department, but they didn't consent so I needed to use paper methods
-
- Someone didn't consent to transact electronically, and this led to delays / postage costs / other issues
- Someone didn't consent to transact electronically, but they didn't have any good reason for doing so
- I wasn't sure at what point I needed to collect consent from the other person
- I couldn't think of an appropriate way to collect consent
- It wasn't clear whether the other person had consented or not
- This hasn't been an issue for me – I've always been sure that other people consent for me to transact electronically
- This hasn't been an issue for me – I've never thought about the need to collect consent

What methods do you think are appropriate to make sure a person can access, and is comfortable with, electronic communication and signature tools?

You can choose more than one (e.g. if your answer depends on the transaction type)

-
- There should be clear consent for every type of e-transaction
-
- There should be clear consent from each person I transact with
- People should use 'consent form' or something similar to confirm consent
- If you have communicated electronically without complaint in the past, this should demonstrate consent
- If you provide an email or accept an e-signing link, this should demonstrate consent
- These days, it should be fair to assume that everyone is fine with electronic communications (unless they say otherwise)
- I've never really thought about e-commerce consent

Other

The requirement to collect consent makes it difficult to conduct electronic commerce in Australia

Strongly agree

Agree

Neither agree nor disagree

Disagree

Strongly disagree