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Mr Shane Rigby
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Dear Shane,

ELECTRONIC TRANSACTIONS UNDER THE NATIONAL CREDIT CODE

You have received a new requirement around credit contracts, mortgages and guarantees being served electronically.

The Law

Section 187(1) of the National Credit Code ("NCC" or "Code") is expressed in very wide terms to provide that any contract, mortgage or guarantee referred to in the Code may be made in accordance with the laws of the jurisdiction in relation to electronic transactions. Section 187(2) elaborates this to state explicitly that any requirement or permission required by the Code to give information, to provide a signature, to produce a document, to record information or to retain a document may be met in accordance with the laws of the jurisdiction in relation to electronic transactions.

Sections 203A and 203B of the Code authorises ASIC and the regulations to exempt certain persons, contracts, mortgages, guarantees and consumer leases from the provisions of the Code. My inquiries to date indicate that no exemptions from section 187 of the Code have been promulgated. This is consistent with the intention of the Code to permit electronic dealings in such documents.

Section 184(2) of the Code requires that electronic messages must be easily legible, clearly expressed and conform with the provisions of the regulations as to content, legibility and accompanying information. Section 195 requires notices or other documents to be sent to an "appropriate address" which may be one nominated in writing by the receiver. The nominated address may be an electronic address.



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Personal Liability limited by a scheme approved under professional standards legislation.

Section 196(1)(c) provides that a notice or other document is taken to be given, in the case of an electronic communication, at the time given by s 14(3) of the *Electronic Transactions Act 1999* (Cth). That section provides, in effect, that the time is when the communication enters the information system of the receiver, unless otherwise agreed.

There are two attribution rules in the Uniform Consumer Credit Code (UCCC): see s 173A. The first is the same as that in the Electronic Transactions Acts: the purported originator is bound only if that person actually sent the message or authorised it to be sent. However, under the UCCC, the purported sender and the addressee may instead agree to be bound by the provisions of the Electronic Funds Transfer Code of Conduct as published on the Web site of the Australian Securities and Investments Commission: s 173A(1)(a). The National Credit Code is silent on the question of attribution of electronic messages.

The Explanatory Memorandum to the *National Consumer Credit Protection Bill 2009* (Cth), which introduced the National Credit Code, says it is intended that the classes of transactions, documents or information prohibited under the then prevailing Uniform Consumer Credit Code regulations would be prohibited under the regulations made under the *Electronic Transactions Act 1999* (Cth). This is why the National Credit Regulations do not prohibit any classes of transactions, documents or information to be served or entered into electronically.

The Electronic Transactions Amendment Regulations 2010 (No 1) inserts a new Part 3 into the Electronic Transactions Regulations 2000. The new Pt 3 deals with electronic communications under the National Consumer Credit Protection Act 2009. Regulation 10(1) and 10(3) provide that a debtor, mortgagor, guarantor or any other person may consent to receiving notices electronically, but only after giving written consent. Before obtaining consent, the person must be informed that paper documents may no longer be given, electronic communications must be regularly checked, and consent may be withdrawn at any time. This is an "opt in" procedure. Electronic service should not be assumed or implied (eg by email or online credit applications or by a failure to opt out after documents are served electronically).

Regulation 10(2) sets out the means for delivering notices or other documents to a debtor, mortgagor or guarantor. The credit provider may serve a notice or other document by making it available on the credit provider's information system for retrieval. The credit provider must also notify the recipient by electronic communication that the notice or other document is available. This notice must contain advice as to the nature of the notice or other document being made available. The recipient must be able to retrieve the notice or other document by electronic communication.

Regulation 10(4) provides that any notice or other document given by sending to a nominated electronic address or in any manner described in reg 10 must be in a format that allows it to be saved in an electronic file and to be printed. It must also be reasonable to expect that the intended recipient would be able to save it and print it. Presumably, this last condition is to prevent some unusual format which would require specialist knowledge to save or to print.

Regulation 10(5) specifically provides that consent to receive by electronic means may be cancelled or withdrawn by the person who gave it.

The Electronic Transactions Act permits a document to be signed electronically *providing*;

- Firstly, that a method is used to identify the person and to indicate the person's approval of the information communicated; and
- Secondly, that having regard to all the circumstances, the method was as reliable as was appropriate for the purposes for which the information was communicated; and
- Lastly, that the person to whom the signature is required to be given consents to the requirement being met by using the applicable signing method.

This is obviously a broad rule which could be satisfied any number of ways in practice.

Electronic Service of Documents

The above legislation will permit Credit Providers to serve offers of credit contracts, mortgages and guarantees upon borrowers, mortgagors and guarantors or their acceptable (i.e. acceptable to Credit Providers) nominated representatives (e.g. solicitors) electronically, but only after they give their written consent and thereby "opt in" to using e-commerce technologies.

Before obtaining consent, the person must be informed that paper documents may no longer be given, electronic communications must be regularly checked, and consent may be withdrawn at any time. The written consent of a borrower may be sourced from a borrower's application form. The consent of a third party mortgagor or guarantor would need to be obtained separately, or on the same form if practical. It is possible for the consent itself to be given electronically, provided the person's identity and approval can be reliably determined and communicated by the chosen electronic method.

The electronic service of documents can be achieved by emailing the documents in Picture Document Format (PDF) or by sending the intended recipient an email which encloses a secure link to access the documents via a web portal. Documents should be locked in an image format (such as PDF) so that their integrity is preserved. Care should also be used to guard the privacy and confidentiality of the documents being communicated pursuant to the National Privacy Principles and industry protocols; e.g. mark the email "Confidential" or "For the attention of the recipient only", or provide a user name and password to access the documents on a portal.

Given the ease of electronic communication, it would be prudent, but not essential, for Credit Providers to serve the documents on all borrowers, mortgagors and guarantors rather than on only one of them as representative for the others. If borrowers, mortgagors and guarantors authorise the service of the documents on their representatives (e.g. their solicitor), then again it would be prudent, but not essential, that such service be effected *in addition to* service upon the borrowers, mortgagors and guarantors. Each recipient (including the nominated representatives) needs to give prior written consent to electronic service; eg Credit Providers must first send an email to the borrower's nominated solicitor requesting confirmation of their nomination and acceptance of service of the documents electronically.

It would also be prudent for Credit Providers to give borrowers, mortgagors and guarantors a clear option to request (whether by phone, fax, mail, website or other accessible means) that hard copy documents be sent out in addition to any electronically served documents, or to withdraw their consent to electronic service. The "opt in" arrangements only subsist whilst consent to electronic service subsists, and recipients are entitled by law to withdraw their consent at any time, with or without reasons.

Debtors, mortgagors and guarantors may give their written consent to receiving copies of their signed credit contracts, mortgages and guarantees electronically upon request, provided that before such consent is given they are informed that paper documents may no longer be given, electronic communications must be regularly checked, and consent may be withdrawn at any time.

Summary

The following procedure is available to Brokers and Credit Providers;

- (a) Obtain the borrowers written consent to receive service of documents electronically by including the "opt in" provisions into loan application forms.
- (b) If the borrower/s nominate an acceptable representative to accept electronic service on the borrower/s behalf, the representative confirm its nomination.
- (c) The written consent of any third party mortgagor and guarantor also be obtained.
- (d) If the borrower/s nominate an acceptable representative to accept electronic service on the borrower/s behalf, the representative confirm its nomination.
- (e) The written consent of any third party mortgagor and guarantor also be obtained.

Forms and Notices

The following documentation facilitates the electronic service of documentation on borrowers and their Third Party Representative.

Please find attached the following;

1. Applicant's Consent to be used as an addendum or to be incorporated into a Credit Providers Loan Application Form.
2. Email notifications to borrowers and third parties, with or without a nominated Solicitor.

We trust this is helpful background information concerning the new requirement.

Yours faithfully

LEADPOINT DMS



David Maher
Legal Practitioner Director

CONSENT TO RECEIVE LOAN AND SECURITY DOCUMENTATION ELECTRONICALLY

By choosing to receive the documentation electronically you are increasing the efficiency of this transaction, reducing costs and helping the environment.

Send loan and mortgage documentation to:

Borrower* Guarantor Broker Planner Solicitor Accountant

Nominated person's name email :

.....

I authorise the documentation to be sent electronically.* (Note: if you do not check this box, they will be sent by post.)

*** Important Notice**

If you opt-in to receive documentation electronically then:

1. you will not receive a paper copy of the documentation;
2. you must check your email regularly; and
3. you may withdraw your consent to receive documents electronically at any time by calling us on xxxxxxxxxx

We will either email the documents to you or the person nominated as a PDF file, or email login information to download the documents as a PDF file from a secure web-interface. If our email is returned because we have an invalid email address, we will post the documents instead. You can update your details with us or request paper copies of the documents at any time by calling xxxxxxxxxx. To access our privacy policy, visit www.xxxxxxxx or call xxxxxxxxxx.

- ADDENDUM -

CONSENT TO RECEIVE LOAN AND SECURITY DOCUMENTATION ELECTRONICALLY

By choosing to receive the documentation electronically you are increasing the efficiency of this transaction, reducing costs and helping the environment.

AUTHORITY

I/we the applicants and co-applicants hereby instruct xxxxxxxxx and its agents and related parties as follows:

Send loan and mortgage documentation to:

Borrower* Guarantor Broker Planner Solicitor

Nominated person's name email :
.....

I/we authorise the documentation to be sent electronically.* (Note: if you do not check this box, they will be sent by post.)

* Important Notice

If you opt-in to receive documentation electronically then:

- 4. you will not receive a paper copy of the documentation;
- 5. you must check your email regularly; and
- 6. you may withdraw your consent to receive documents electronically at any time by calling xxxxxxxxx on xxxxxxxxx.

xxxxxxx or its agent will either email the documents to you or the person nominated as a PDF file, or email login information to download the documents as a PDF file from a secure web-interface. If the email is returned because of an invalid email address, the documents will be posted instead. You can update your details or request paper copies of the documents at any time by calling xxxxxxxxx on xxxxxxxxx. To access our privacy policy, visit www.xxxxxxxx or call xxxxxxxxx.

Applicant's signature	
	Dated __/__/__

Co-applicant's signature	
	Dated __/__/__

EMAIL NOTIFICATION TO APPLICANT/CO-APPLICANT OF DOCUMENT AVAILABILITY

[EMAIL HEADER]

From: xxxxxxxxx**Sent:** [INSERT DATE AND TIME]**To:** [INSERT NAME OF APPLICANT / CO-APPLICANT]**Subject :** Your xxxxxxxxx Loan and Mortgage Documentation is now available online

Security Notice: You should update your anti-virus software, firewall and operating system before accessing emails or the internet. xxxxxxxxx emails do not include links to sign-in pages, or ask for your personal security information. For more information on security, visit www.xxxxxxxx

Dear [INSERT NAME]

Your loan and security documentation is now available to view and download from our online portal. To access the documents, simply visit [INSERT URL STRING] and follow the prompts. Your individual login details are:

- [INSERT USERNAME & PASSWORD DETAILS]

The cover letter explains what you have to do with the documents next.

The files are available as high-quality PDF files so you can easily view, save and print them out. Please be sure to keep an electronic and/or hard copy for your records.

If you have any questions about the documentation or this electronic service, please call us on xxxxxxxxx (INSERT CALL CENTRE HOURS).

Thank you for choosing to receive the documentation electronically. You are not only increasing the efficiency of this transaction, but also helping the environment and reducing costs.

Yours sincerely,

[INSERT SIGNATURE BLOCK]

*** Important Notice**

If you opt-in to receive documentation by email then:

7. you will not receive a paper copy of the documentation;
8. you must check your email regularly; and
9. you may withdraw your consent to receive documents by email at any time by calling us on xxxxxxxxxx.

You can update your details with us or request paper copies of the documents at any time by calling us on xxxxxxxxx To access our privacy policy, visit www.xxxxxxxx or call xxxxxxxxx.

Note: xxxxxxxxx's web-interface will need to advise the recipient how to print, sign and return the documentation. Please insert xxxxxxxxx's usual email notices and disclaimers for emails received in error, confidentiality of emails, and copyrighted information.

EMAIL NOTIFICATION TO THIRD PARTY REPRESENTATIVE OF DOCUMENT AVAILABILITY

[EMAIL HEADER]

From: xxxxxxxxxxx
Sent: [INSERT DATE AND TIME]
To: [INSERT NAME OF THIRD PARTY REPRESENTATIVE]
Subject : xxxxxxxxxxx and Mortgage Documentation for [INSERT NAME OF APPLICANT / CO-APPLICANT] is now available online

Security Notice: You should update your anti-virus software, firewall and operating system before accessing emails or the internet. xxxxxxxxxxx emails do not include links to sign-in pages, or ask for your personal security information. For more information on security, visit www.xxxxxxxxx

Dear [INSERT NAME]

You have been nominated to receive loan and mortgage documentation for the following loan applicant/s:

- [INSERT NAME OF APPLICANT/CO-APPLICANT].

They have instructed us to send you the documents electronically.

The loan and security documentation is now available to view and download from our online portal. In order to:

1. confirm your nomination by the applicant(s) / co-applicant(s); and
2. provide your consent to receive the documents electronically; and
3. access the documents (including our cover letter enclosing them),

simply visit [INSERT URL STRING] and follow the prompts. Your individual login details are:

- [INSERT USERNAME & PASSWORD DETAILS]

If you do not confirm your nomination and provide your consent within 48 hours of this email (ie by [INSERT DUE DATE]), we will send you paper copies of the documents by post.

The cover letter and checklist provided with the documents explains what you have to do with them next.

The files are available as high-quality PDF files so you can easily view, save and print them out. Please be sure to keep an electronic and/or hard copy for your records.

By consenting to receive the documentation electronically, you will increase the efficiency of this transaction, reduce costs and help the environment.

If you have any questions about the documentation or this electronic service, please call us on xxxxxxxxxx (INSERT CALL CENTRE HOURS).

Yours sincerely,

[INSERT SIGNATURE BLOCK]

*** Important Notice**

If you opt-in to receive documentation by email then:

10. you will not receive a paper copy of the documentation;
11. you must check your email regularly; and
12. you may withdraw your consent to receive documents by email at any time by calling us on xxxxxxxxxx.

You can update your details with us or request paper copies of the documents at any time by calling xxxxxxxxxx. To access our privacy policy, visit www.xxxxxxxx or call xxxxxxxxxx.

Note: xxxxxxxxxx's web-interface will need to advise the recipient how to print, sign and return the documentation. Please insert xxxxxxxxxx's usual email notices and disclaimers for emails received in error, confidentiality of emails, and copyrighted information.

NOTES : The representative will login to the portal from the homepage using the username and password that has been assigned to them. The representative will then be directed to this page to confirm their nomination and to consent to receiving the loan and security documents electronically. Once this is done, the representative will be directed to the webpage where they are given access to the documents.

**THIRD PARTY REPRESENTATIVE CONFIRMATION OF NOMINATION AND CONSENT TO RECEIVE
LOAN AND MORTGAGE DOCUMENTATION ELECTRONICALLY**

Given by : [INSERT NAME OF REPRESENTATIVE] of [INSERT ADDRESS OF REPRESENTATIVE],
[SOLICITOR/ACCOUNTANT/OTHER]

in respect of the finance application by [INSERT NAME/S OF APPLICANT/S] and [INSERT
NAME/S OF CO-APPLICANT/S].

AUTHORITY

I/we hereby instruct xxxxxxxxxx and its agents and related parties as follows:

- I confirm that I represent the above applicant/co-applicant and that I have been nominated by them to receive loan and mortgage documentation electronically;*

AND

- I consent to receiving and accessing the loan and security documentation electronically.*

(Please check both boxes to submit.)

*** Important Notice**

If you opt-in to receive and access documentation electronically then:

13. you will not receive a paper copy of the documentation;
14. you must check your email regularly; and
15. you may withdraw your consent to receive and access documents electronically at any time by calling us on xxxxxxxxxx.

You can update your details with us or request paper copies of the documents at any time by calling xxxxxxxxxx. To access our privacy policy, [\[click here\]](#).

CLICK HERE TO SUBMIT *

(If you do not submit this authority by [INSERT DUE DATE], then we will post the loan and security documentation to you. By clicking 'submit' you will be directed to a webpage where you can access the documentation electronically. If you wish to contact us about your nomination, please call xxxxxxxxxx.)

*** Note:** The representative should only be able to click the submit button after checking all three boxes.