Consumer Data Right Division

Treasury

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**Consumer data right in non-bank lending: CDR rules and data standards design paper**

Thank you for the opportunity to make a submission in response to the design paper.

**What data holders should be required to share CDR data? (Questions 1 and 2)**

We note the proposal to limit mandatory participation within the CDR to non-bank lenders with ‘total resident loans and finance balances of over $400 million’.

We agree with the proposal that a *de minimis* threshold should apply so that competition and innovation is not discouraged or hindered through disproportionately high compliance costs. We do not have a firm view on whether the $400 million threshold appropriately balances the compliance costs to small lenders against the loss of consumer benefit from the lender’s non-participation in the CDR system.

As a comparison, however, we note that approximately 14% of signatories to the Principles of Reciprocity and Data Exchange (PRDE) are non-bank lenders with disclosed loan portfolios less than $10 million. An additional 40% of signatories have a disclosed loan portfolio of between $10million - $1billion. That is, a significant number of smaller lenders have voluntarily signed up to the PRDE data sharing arrangements based on a favourable assessment of the cost/benefit of that regime.

We suggest that Treasury ensure that the rate of smaller lenders voluntarily signing up to the CDR regime is monitored on an ongoing basis as a key metric of the success of the extension of the CDR regime to the non-bank lending sector. A lack of voluntary participation by smaller non-bank lenders would be a strong indicator that either the costs of participating are too high, or the perceived benefits are too low.

Otherwise, we have the following specific feedback and questions:

1. At what point does a lender assess whether they have met the $400M threshold? Is it a continuous obligation, or must it only be done at certain times?
2. Does a lender become subject to the CDR regime as soon as the threshold is met (even if only momentarily)? Or does the threshold need to be met for an extended period?
3. Does a transition period apply once the $400M threshold is met?
4. Does the non-bank lender remain subject to the CDR regime once the $400M threshold has been met, even though their total lender subsequently falls below the threshold? i.e. is the rule ‘once in, forever in’?
5. How is the $400M threshold applied across corporate groups? See also point (vi), below (in the context of securitisation structures).
6. We assume that a smaller non-bank lender (<$400M) will be subject to reciprocal data holder obligations if it chooses to be an accredited data recipient? Will this also be the case if the smaller non-bank lender indirectly obtains CDR data (i.e. using the services of an accredited data recipient)?

**White labelled products and securitisation (Questions 3 – 5)**

Overall, we agree with the proposal in relation to white labelled products that – as between the white labeller and the brand owner – the data holder that has the contractual relationship with the consumer must respond to the product data requests and consumer data requests.

This generally reflects the fact that the white labeller is ‘the’ lender and, almost always, controls the account data (whereas the brand owner is unlikely to have sufficient control of the data to meet, at least, consumer data requests).

However, the commentary in relation to securitisation entities is less clear. The paper notes that some lenders may fund loans using “special purpose securitisation entities” and that such entities are “technically … the lender of record”. This type of lending is sometimes referred to as ‘off balance sheet lending’[[1]](#footnote-1) and the ‘lender’ is known as the ‘servicer’. From the customer’s perspective, the servicer is ‘the’ lender despite not being named as such on the credit contract and mortgage (and the lender of record has no real role in the management of the loan). Importantly, the lender of record is unlikely to have sufficient control over the customer data to meet consumer data requests.

It is unclear how Treasury considers this concept of ‘lender of record’ intersects with the earlier mentioned concept of the entity that ‘has the contractual relationship with the customer’. Is there an expectation that the lender of record would be subject to the CDR obligations as a data holder?

To be clear, we consider that the lender of record should not have any obligations as a ‘data holder’ under the CDR; although it may be necessary to establish a process to ensure that the relevant entity (i.e. the servicer) takes on the role of data holder.

As noted in our earlier submission to the Consumer Data Right Open Finance Sectoral Assessment (dated 15 April 2022), this could involve adopting a similar approach to the *National Consumer Credit Protection* (NCCP) regime where the servicer is nominated as being responsible under the NCCP Act and is required to hold the relevant licence. In the context of the CDR, the nominated servicer would be deemed to be the data holder, and the lender of record would have no residual obligations as a data holder.

We consider that this will simplify the operation of the CDR and ensure the obligations of a ‘data holder’ are placed on the right entity, i.e. the servicer that is, for all relevant purposes, ‘the’ lender and controls the account data necessary to meet consumer data requests.

It is not appropriate for the lender of record to have residual obligations as a data holder (i.e. the nomination of the servicer as the relevant data holder should remove any obligations of the lender of record as a data holder). If the lender of record were to continue to have those obligations, we note the following issues would need to be resolved:

1. There would be a lack of clarity as to the application of the CDR regime where the servicer met the threshold of >$400M) but that servicer utilises multiple small specifical purpose funding vehicles (each <$400M)? How could the servicer be a ‘data holder’ when each entity that is named on the credit contract is not a data holder? i.e. allowing for the servicer to be nominated as ‘the’ data holder makes it clear that the $400M threshold applies based on all the loans for which it is the servicer.
2. What happens if a small servicer (<$400M) uses the services of a large external trustee (who will be the lender of record)? i.e. if the large external trustee is deemed a data holder under the CDR (based on the overall value of loans for which it is a trustee), the small servicer will effectively be forced to participate as a data holder under the CDR. That is, if the large external trustee has obligations of a data holder, as it does not control the relevant account data to meet consumer data requests, it will effectively have to pass those obligations on to the small servicer (essentially negating the reason for applying the threshold).
3. A large external trustee (as lender of record) is likely to undertake that role in relation to many lending programs for different servicers. If the large external trustee has obligations as a data holder, how is the liability and risk under the CDR legislation quarantined based on the relevant lending program?

**What products are in scope? (Questions 6 – 8)**

Overall, we support the proposals.

We have the following specific feedback and questions:

1. In relation to ‘mortgage offset accounts’, the account may be offered in one of two ways. It may be a separate transaction account that is offered by an ADI under an arrangement with the non-bank lender. In this case, the rules will need to address which party the consumer data request should be made (we assume that it would be the ADI which holds the account). Alternatively, the ‘offset account’ may consist of a ‘sub-account’ held by the non-bank lender where that sub-account does not involve a separate financial product.[[2]](#footnote-2) While the customer may perceive two separate accounts, there is, contractually, only one ‘product’ (i.e. one overall credit contract). Again, the rules and standards will need to address how the data for such arrangements is provided. For example, is the data to be provided separately for each account (i.e. home loan account & offset sub-account) or is it to be consolidated to reflect the status of the overall credit contract?
2. We are unsure as to why ‘overdrafts’ are included in this list. An overdraft is ordinarily linked to a transaction account (so that they cannot be offered by non-bank lenders).
3. We strongly support the inclusion of BNPL products (although, noting that there will need to be a sufficient timeline for meeting the obligations).

**Definition of eligible consumer (Questions 17 – 20)**

Overall, we support the proposals.

However, we consider that it is important not to assume the same level of sophistication in systems and business processes for non-bank lenders compared to Authorised Deposit Taking Institutions (ADIs). ADIs are subject to the prudential requirements under the Banking Act and, as a result, may have more sophisticated systems and business practices compared to non-bank lenders.

A key example is in relation to holding a ‘single customer view’. APRA has expectations of ADIs that they be capable of understanding the holistic relationship between the ADI and the customer and, therefore, ADIs system are likely to be more sophisticated in that respect. It is more likely that a non-bank lender could manage their loans on an ‘account by account’ basis, rather than on a customer basis.

While this should not otherwise change the obligations placed on non-bank lenders in their capacity of data holder, this difference should be considered by Treasury when establishing the rules. For example, this may impact the way the rules and standards apply to providing dashboards and managing joint accounts (including authorisations, impact of domestic abuse etc).

**Proposal to exclude ‘FHI’ from data sharing requirements (Questions 14 – 15)**

As a starting point, we agree that there are real risks to consumers of data recipients misusing information about a customer’s pre-existing financial difficulty in order to promote inappropriate, high-cost credit or debt management services to the consumer.[[3]](#footnote-3)

For example, a data recipient may use a record of financial difficulty to promote such high-cost services to consumers who they know to be in a vulnerable position (and accordingly more likely to take out those services despite not being in their best interests).

Nevertheless, we disagree with the simplistic approach to ‘prohibit’ the inclusion of ‘financial hardship information’ (FHI) in the meaning of ‘account data’.

*Prohibition ‘FHI’ does not avoid potential consumer harm*

Reasons for not adopting this approach include:

* FHI is a construct of the credit reporting system and has no role in the management of an account by a credit provider. That is, the ‘A’ or ‘V’ (being types of FHI) are only created by a credit provider when sending the relevant repayment history information (RHI) through to the credit reporting body. The ‘A’ or ‘V’ are generally not otherwise kept as a part of the account or transaction data on the credit provider’s systems. Further, if the credit provider does not participate in comprehensive credit reporting (i.e. does not contribute repayment history information to credit reporting bodies), there is no need for the credit provider to identify/create any data within their system as ‘FHI’. While credit provider may have information ‘about’ hardship, it will not be treated/identified as ‘financial hardship information’. At its most basic level, this means the prohibition will be ineffectual given it is prohibiting the sharing of data which does not exist in the relevant account systems.
* FHI only relates to accounts regulated by the National Credit Code. Any prohibition on the inclusion of ‘financial hardship information’ will not apply to information about hardship relating to a non-regulated credit product (e.g. BNPL products).
* The prohibition on the inclusion of FHI in the meaning of ‘account data’ will be ineffective to avoid the anticipated consumer harm. This is because, where a data recipient has access to the detailed account and transaction history for customer (e.g. payments required; payments made; arrears status etc), that history provides a much clearer and stronger indication of any financial hardship experienced by the customer. In those circumstances, the non-inclusion of the simplistic ‘FHI’ flag is of very limited additional value when identifying a consumer experiencing financial hardship.

For example, some credit providers offer hardship assistance by way of varying the customer’s existing contractual payments; say from $1000 per month to $200 per month. Such a change would be accompanied by a “FHI=V” in the month that the change was made.[[4]](#footnote-4) If a data recipient receives the detailed account history for that customer (with the customer’s consent), they will see that the required minimum payments were reduced (and they will also see the payments that were actually made). Even without any FHI-flag, it will be clear to any data recipient that the customer was experiencing financial hardship and was in a hardship arrangement.

Other credit providers offer hardship assistance by way of deferring existing contractual obligations. That is, the contractual payment will remain the same but the customer is not expected to immediately repay those amounts (but, if not paid, they will continue to fall due during the arrangement and need to be addressed at the end). Such an arrangement would be accompanied by a “FHI=A” in each month of the arrangement. If a data recipient receives the detailed account history for that customer (again, with the customer’s consent), they will see that a payment was ‘due’ (i.e. $1000 per month), not paid (i.e. only $200 was paid) and that the customer was now in arrears by $800. Accordingly, without access to the relevant FHI-flag, the data recipient will be able to readily identify that the customer was in arrears and potentially in ‘financial hardship’ (because they are not meeting their contractual obligations) but not have the context that the failure to meet the obligations was done in consultation with the credit provider. If the data recipient is using the data for ‘nefarious’ purposes (e.g. offering high cost credit or debt management services), the mere fact that the customer is in arrears will be sufficient to help that business target those services to the customer.

* In addition to being ineffective at avoiding the anticipated harm, the proposal may increase the risk of poor consumer outcomes in some circumstances. For example, in the second example above (i.e. deferral of existing contractual obligations), if the data recipient is using the data for ‘legitimate’ purposes of assessing an appropriate loan, the customer will not get the benefit of the hardship arrangement.

**Recommendation:** At a minimum (and subject to our following comments), consult in more detail with relevant industry and consumer representatives to (i) identify and describe the type of information that needs to be subject to heightened protection (beyond using the simplistic concept of ‘FHI’); and (ii) consider other ways to protect consumers from misuse of that information, while allowing legitimate and trustworthy data recipients to access and use the information.

*Prohibiting data should not be a standard approach to avoid potential consumer harm*

Beyond those specific reasons, we are concerned that the prohibition of data is being relied upon as a fallback form of consumer protection (where the ordinary requirement for consumer consent is not considered sufficient). While we strongly agree that ‘consent’ is not always a sufficient means of ensuring consumer protection, the answer cannot be to simply prohibit the sharing of otherwise relevant and valuable data. We consider that this is fundamentally inconsistent with the core principles of the Consumer Data Right.

There are risks of poor consumer outcomes arising from the misuse of *any* CDR data by data recipients (where, in this context, ‘misuse’ refers to use that is arguably not in the consumer’s best interests yet is still consistent with the CDR rules). This is an inevitable outcome of creating a data sharing regime, where the primary consumer protection is ‘consent’.

For every business that intends to use the data in an ethical and consumer-focussed manner, there will be other businesses which use the data to exploit consumers’ behavioural biases, lack of financial literacy or vulnerabilities in the pursuit of profit.

In contrast to the CDR, the credit reporting system recognises the risks that data sharing may pose to consumers and includes strict limitations on which businesses can access data, what data can be accessed and how the data can be used. Under this regime, ‘consent’ plays almost no role as a consumer protection.

We appreciate that this approach is not consistent with the overarching principles underpinning the CDR. However, other methods to mitigate the risks of the consent-based framework have been identified through various reviews of the CDR regime, including recommendation 6.20 relating to Industry recommended and endorsed consents from the *Inquiry into Future Directions for the Consumer Data Right* (i.e. where such ‘standardised’ consents could be used to limit the data and use consents to what are agreed as necessary amongst a range of stakeholders).

Further, we suggest that Treasury (in consultation with industry and consumer stakeholders) consider whether there are other approaches that could be applied to minimise the risk of poor consumer outcomes (beyond simply prohibiting the inclusion of data within the rules). For example, should accredited data users be subject to a general conduct obligation such as acting ‘efficiently, honestly and fairly’ (as would apply if they held a relevant financial services licence)? Should ‘higher risk’ data be available only to certain types of accredited data recipients or for certain purposes (or, in the reverse, not available for certain uses or to certain data recipients)?

**Recommendation:** Treasury to recognise the inherent problem of relying on consumer consent as being the primary form of consumer protection and engage with industry and consumer advocates to consider other ways to reduce that risk in a consistent and effective manner.

**Interactions between the CDR and the credit reporting regime (Question 16)**

We recommend that further consideration be given to the interaction between the CDR and credit reporting regime as we consider this has not been given proper attention throughout the process to implement the CDR. For example, we note that entities that obtain CDR data on behalf of credit providers (in order to assist the credit provider to assess a loan application) are likely to trigger the definition of ‘credit reporting business’ in section 6P of the Privacy Act (so that the entity would then be a credit reporting body under the Privacy Act and subject to the relevant obligations). While section 56EC(3) allows for regulations to be made that alter the application of Part IIIA to CDR data, as far as we are aware, such regulations have not been made.

**Stage implementation (Question 22)**

We strongly support the proposal for a stage implementation, and the broader recognition of the need for adequate implementation timeframes.

We also strongly support that any implementation timeframe commence from publication of final rules and technical and consumer experience standards are finalised. We note that any subsequent changes to the rules or standards would typically require an extension of the impacted timeframes.

**Additional consumer protection measures (Questions 26 – 29)**

As noted in relation to the proposal to prohibit ‘FHI’, we consider that additional work needs to be done to review whether additional consumer protections need to be implemented (beyond reliance on consumer ‘consent’).

However, such work needs to involve a holistic review of the entire CDR framework.

We note that Treasury has identified stakeholder concern relating to potential predatory or discriminatory behaviour by non-bank lenders. However, such concern appears to relate to the potential activities of non-bank lenders in the capacity of data recipients, rather than as a data holder. While we strongly support additional work being done to identify additional ways to minimise poor behaviour by data recipients, we note that this should be done as a separate matter to this process.

If you have any questions about this submission, please feel free to contact me on 0409 435 830 or at [mblyth@arca.asn.au](mailto:mblyth@arca.asn.au).

Yours sincerely,



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1. In contrast to ‘on balance sheet lending’ where the loan is originated in the name of the lender and then the beneficial interest of the loan may be assigned to another entity for the benefit of investors (however, from the customer’s perspective the original lender remains the lender is all respects). [↑](#footnote-ref-1)
2. Pepper Money explains the nature of their sub-account here: [What are Offset Sub-Accounts? | Pepper Money](https://www.peppermoney.com.au/resources/offset-sub-accounts-explained) [↑](#footnote-ref-2)
3. In relation to the introduction of financial hardship information (FHI) into the credit reporting system, there was also a concern that consumers would be put off asking for hardship assistance from an existing credit provider if consumers (i) knew that other, existing credit providers could automatically access the FHI (and, potentially, stop access to that existing credit); or (ii) suspected or perceived that the record of the hardship arrangement could limit their ability to get credit in the future. Given that the CDR operates on a voluntary, express and informed basis, we consider that those concerns do not apply to the disclosure of hardship-related information under the CDR regime, i.e. if the consumer is concerned about sharing their history of financial hardship or financial assistance, they can simply choose not to provide consent. Even if these concerns are still applicable to the CDR regime, as described in relation to our pragmatic concerns, the proposed prohibition does nothing to solve for those concerns. [↑](#footnote-ref-3)
4. Again, this further demonstrates the problem with specifically prohibiting “FHI” (as defined in the Privacy Act). In this case, the information ‘about’ the customer’s hardship arrangement is only ‘FHI’ in the month the change took effect. Any other record held internally by the credit provider that the customer is still subject to the hardship arrangement in following months is not FHI and would not be subject to the prohibition. [↑](#footnote-ref-4)