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ASSOCIATION

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ARCA submission on the ACCC Exposure Draft of the Consumer Data Right rules

Thank you for the opportunity to provide a submission on the Exposure Draft of the Competition and Consumer (Consumer Data) Rules 2019.

We provide the following observations:

1. CDR contract

We note the requirement that "the CDR consumer and the accredited person need to be in a contractual relationship *under which* the accredited person *provides goods or services* to the CDR consumer using the consumer's CDR data" (as summarised in the simplified outline in Rule 4.1, emphasis added).

Where CDR data is being used by a credit provider to help assess a loan application, we note that the contract for the service being sought by the consumer (i.e. the credit contract) will not be formed until after the data exchange has happened.

In order to satisfy the requirement that there be a 'contractual relationship', it appears that an artificial approach must be taken in relation the formation of the relevant 'CDR contract' which would view the loan application process as involving a 'service' being offered by the credit provider. This is not how the loan application process is ordinarily treated by credit providers and it is unclear whether it is possible to identify a 'contract' at this stage. For example, given that the loan assessment is being done for the *credit provider's* own purpose (i.e. to see if the credit provider is willing to offer a loan), can it be said that 'assessing a loan' is a 'service' being offered to the consumer? What is the relevant consideration for the contract? If it is possible, what implications flow from treating the loan application in this way. For example, a credit provider is under no obligation to provide credit regardless of the outcome of the loan application. Does treating the loan application process as a 'service' being provided to the consumer change this fundamental assumption?

We believe that this approach needs reconsideration. We assume that the requirement to have a relevant contractual relationship – rather than merely a consent-based approach as contemplated in the Bill – is an attempt to ensure the limitations and restrictions in the legislation and under the Rules are enforceable by the consumer. If this is the case, we suggest that this be dealt with in the Rules and, if necessary, in the enabling legislation.

Further to the above, if it is assumed that the CDR contract involves the provision of the 'service' of assessing the loan application (rather than being the provision of the actual credit contract), we note the CDR data obtained by the credit provider may not be able to be used to establish or manage the credit account as this is not the 'service' that is being provided under the CDR contract (noting paragraph (b) of the 'data minimisation principle' which requires the

accredited person to not use the CDR date beyond what is reasonably need in order to provide goods or services *under* a CDR contract). For example, if the credit provider allows the consumer to prepopulate the loan application form with CDR data obtained from another ADI, that data could not be used to populate the account information (assuming the loan was approved).

2. Using CDR data to create models and algorithms

We would like to confirm our understanding of how the definition of prohibited uses and disclosure applies to the use of CDR data for the creation of models and algorithms.

Credit providers use consumer data to build scoring models and other necessary algorithms, including behavioural scoring models which are used to predict a consumer's likelihood of defaulting on a loan. Where a credit provider is using Open Banking transaction data to support responsible lending assessments, the credit provider may need to build models to better understand the meaning of that transaction data.

Such model building involves using consumer data – which, in this case, would include data obtained under the consumer data right – and aggregating that data with the data of other consumers to create insights and algorithms that can be used to predict or explain behaviour of other consumers. For example, a credit provider could use the data of previous CDR consumers to estimate that, of every $100 spent in a supermarket (as shown on their transaction records), approximately $75 relates to 'non-discretionary' expenses (which is relevant to the responsible lending assessment). That algorithm would then be applied to other persons (i.e. persons who are not the 'CDR consumer' for that original data) to 'compile insights' and 'build a profile' for that other person.

Similarly, we note that – outside of the credit related uses – it is likely that a product comparison website will use CDR data from consumers to create algorithms that help to match *other* consumers with a suitable product. For example, a provider may use the data of previous CDR consumers to create an algorithm that predicts what subsequent CDR consumers are looking for. A subsequent CDR consumer's data will (with the content of the consumer) be put into the algorithm to help predict what that consumer wants.

Is our understanding correct that the references to "prohibited uses or disclosure" would not prevent the use of de-identified CDR data for the purposes of creating, and possibly 'selling' or 'disclosing' such models and algorithms (on the basis that there is no CDR consumer for the deidentified CDR data, s56EB of the Bill)?

3. Other matters under the Rules

Rule 4.12 provides that consent will end after 12 months. We note that it is likely that many services will be provided on a 12-month basis (e.g. those that relate to taxation). As a matter of convenience, we note that it may be appropriate to extend this 12-month period to 13 months so as to reduce the risk that consent will expire prior to the service being finalised.

In relation to the stated application of the Rules in 4.4 of Schedule 2, we note that a data holder that is an accredited person is not required to make their own data available until 1 July 2021 – a full 18 months after ADIs (either for all major banks or accredited ADIs). This will mean that non-ADI lenders, which hold credit-related data that is likely to be the same as the credit-related data held by ADIs, will not be required to make their data available even though they are benefitting from participation in the system. To the extent that have invested the time and

money to be able to 'consume' the data, it seems reasonable for such entities to make their data available on the same timeline as ADIs. The comprehensive credit reporting system, as supported by the Principles of Reciprocity and Data Exchange, has shown the benefits of a system that includes a fairly applied reciprocity requirements.

4. **Schedule 2 – Provisions relevant to the banking sector**

In respect of the Rules relating to joint account:

- Should the definition of 'joint account' refer to '..2 *or more* joint account holders…"?
- It appears that the effect of the Rules relating to joint account *prohibits* any disclosure unless an election under Rule 3.2(1)(a)(i) – as opposed to the 'default position' that was described in 7.9 of the Rules Outline.
- As we have previously noted, we are concerned by the risk that this approach to joint account holders introduces, particularly in relation to the third party becoming aware of the consumer's desire (and, by inference, reason) to share their data and that a non-cooperative joint account holder could prevent the consumer sharing their own data.

If you have any questions about this submission, please feel free to contact me or Michael Blyth.

Yours sincerely,

Mike Laing
Executive Chairman