AUSTRALIAN
RETAIL
CREDIT
ASSOCIATION

Analyst, Structural Reform Division
The Treasury

12 July 2019

Dear Ms Wardell

Second round consultation on the Open Banking Designation Instrument

Thank you for the opportunity to provide a submission in response to the revised draft of the Open Banking Designation Instrument.

In summary, we consider that the carve-outs in the draft Designation Instrument should be extended to exclude:

a. Credit information that an ADI has created in order to disclose to a credit reporting body (CRB); and
b. Value-added data provided to an ADI by a third-party provider – whether or not this information is "information about the use of a product".

To the extent that the issue identified below in relation to sections 21J and 22T of the Privacy Act are not addressed through the *Treasury Laws Amendment (Consumer Data Right) Bill 2019*, we recommend that the draft Designation Instrument should expressly exclude credit eligibility information held by the ADI (i.e. credit reporting information received from a CRB and any information derived from that information).

We also recommend that the exclusion in section 10 relating to "materially enhanced information" be amended to remove the exceptions to the exclusion in s10(2)(b)(ii) and (iii).

In addition:

- we wish to confirm that the reference in section 6(1)(b)(ii) to information that was "otherwise obtained by or on behalf of the entity" does not include information that

was *created* by the entity itself (noting that the Summary of proposals accompanying the Designation Instrument states that the instrument "explicitly excludes any derived data which describes the consumer themselves"). If our understanding is incorrect on this point, we would recommend that such information also be excluded.

- we suggest that the Explanatory Materials include additional discussion of the meaning of "information relevant to the eligibility of a person" (as used in section 6) to clarify that this relates to matters such as membership of a particular group or association (where that is a precondition of accessing a product or services), and does not include matters relating to whether a consumer satisfies the responsible lending test for a credit product under the *National Consumer Credit Code* (i.e. on the basis that it could be possible to interpret such an assessment as testing the consumer's 'eligibility' for the product).

Credit eligibility information received from a CRB

As noted in the Explanatory Materials to the Designation Instrument, the *Treasury Laws Amendment (Consumer Data Right) Bill 2019* amends the *Privacy Act* to "exclude the CDR and associated subordinate legislation as an Australian law that would permit the use or disclosure of credit reporting information or credit eligibility information". Accordingly, it appears that the intent of the Bill is to ensure that the CDR cannot require or authorise the disclosure of credit reporting information received by an ADI from a CRB or information that has been derived from that information (i.e. credit eligibility information) – so that the prohibition on disclosure of that information in s21G of the *Privacy Act* is maintained.

However, this approach does not remove the possibility for credit edibility information being subject to the CDR as, under Part IIIA of the Privacy Act, credit eligibility information may be shared with another credit provider (see s21J[1]) or an access seeker authorised by the consumer (s21T) – where that access seeker may be an accredited data recipient under the CDR (other than a credit provider). To the extent that Part IIIA *permits* disclosure to such entities, it would be possible for the CDR to *require* the disclosure of credit eligibility information.

The CDR should recognise and give effect to the need to maintain the integrity of the credit reporting system by protecting against potential 'leakage' of data from that system. Industry has, through the Principles of Reciprocity and Data Exchange (PRDE), developed a system under which comprehensive credit reporting (CCR) information can only be shared with credit providers that also share their own CCR information. This ensures that the data pool is maximised and the benefits of CCR are fully realised.

The need to protect this system has been recognised under the proposed mandatory credit reporting regime, which would restrict the sharing of data under the mandatory regime to credit providers that had signed the PRDE (see, for example, paragraph 1.181 of the

[1] The Explanatory Materials (at p5) states that under "the *Privacy Act 1988*, Credit Providers may also disclose credit information to other Credit Providers where the customer consent to the disclosure". This should be clarified to state that the permission relates to "credit eligibility information" (i.e. credit reporting information received from CRBs and information derived from that information). The disclosure of "credit information" (other than credit eligibility information) between credit providers is regulated by the Australian Privacy Principles, not Part IIIA.

explanatory memorandum to the *National Consumer Credit Protection (Mandatory Comprehensive Credit Reporting) Bill 2018*).

In its current form, the Bill, together with the draft Designation Instrument, opens up the possibility for entities (with the consumer's consent) to obtain CCR data directly from an ADI without being a signatory to the PRDE (which would potentially place that ADI in breach of its obligations under the PRDE). That is, the ADI may, when assessing a loan application from that consumer, have previously obtained a credit report about the consumer and, under the Designation Instrument, that information would be information "about a person to whom a product has been, or is being supplied". We note that it is likely that such information received from a CRB by an ADI would include value-added insights and be subject to confidentiality arrangements between the CRB and the ADI.

While we recognise that the Rules and Data Standards would also need to extend to such 'credit eligibility information' before an ADI was required to share that information, we consider that from a policy perspective the CDR should recognise and reflect the need to ensure the integrity of the credit reporting system is maintained.

We recommend that consideration be given to amending the Bill to ensure that s21J and s21T of the *Privacy Act* cannot act as a 'backdoor' method of extending the CDR to credit eligibility information. If this is not done, we recommend that the Designation Instrument expressly exclude all credit eligibility information from the CDR.

Credit information created by an ADI

Section 9 of the draft Designation Instrument excludes certain types of 'credit information' from the operation of the instrument. However, those exclusions have not been extended to all forms of credit information, including 'default information' and 'repayment history information', as the way in which those terms are defined in the *Privacy Act* would exclude too much data from the Open Banking regime.

As a result, the Designation Instrument may extend to information that the ADI has created for the purpose of sharing with the CRB, such as the record of a "default information" and the record of a customer's "repayment history information" in the form provided for in the *Privacy (Credit Reporting) Code 2014* (i.e. the numerical representation of the repayment history information status, such as "0", "1", "2" etc).

Again, we recognise that the Rules and Data Standards would also need to extend to such data, however as a matter of policy we consider the Designation Instrument should explicitly exclude the information created by an ADI for sharing with a CRB.

We note that much (but not all) of the credit information that an ADI creates to be shared with a CRB would involve information "about the use of a product" and could be subject to the exemption in section 10, however we do not consider that this is sufficient to exclude all that information as:

i. It is not certain that the information would be "significantly more valuable" than the source material (e.g. a record of "default information" or "repayment history information" reported to the CRB in the format required by the CR Code and Australian Credit Reporting Data Standards (that are provided for under the industry developed Principles of Reciprocity and Data Exchange) is

arguably no more valuable than the record of the underlying transactional information); and

ii. As set out below – the exceptions to the "materially enhanced information" exclusion in s10(2)(b)(ii) and (iii) mean that the exclusion has no operation in relation to this type of information, as APP 12 under the Privacy Act gives the customer the right to access that information held by the ADI.

On that basis, we recommend that section 9 of the Designation Instrument be extended to exclude 'credit information' that has been created to share with a CRB. Importantly, by limiting the exclusion to information created for 'purpose' of sharing with the CRB, it will not interfere with how the Designation Instrument applies to the raw (i.e. underlying) data, such as the payments that were required under the contact and the payments that were made under the contract, or to the types of derived data listed in s10(3).

Value-added data provided to an ADI by a third-party provider

The current draft of the Designation Instrument will exclude "materially enhanced" information produced by a third party on behalf of the ADI where that information includes "information about the use of a product" by the customer or their associate.

However, the exclusion does not extend to information that is given to the ADI by a third party and which includes information about the user of a product (section 6) or about a product (section 8), without including information about the use of a product.

For example, "information about the user of a product" may contain information about the customer's property holdings or other financial situation (e.g. a property valuation report) or other insights about the customer (e.g. a marketing propensity score). Likewise, the information from a third party may, using "information about a product", include insights relating to the ADIs product offerings (e.g. a comparison of that ADIs products to those offered by other providers that could be used by the ADI as part of its product development or management processes).

Such information may include value-added insights and may be subject to confidentiality arrangements between the third-party provider and the ADI. On that basis, we recommend that the exclusion in 10 (with relevant adjustments and subject to our comments below) be extended to all three forms of information contemplated in the Designation Instrument.

Exception to "materially enhanced information" exclusion

The operative effect of the "materially enhanced information" exclusion will be significantly limited by the exceptions contained in s10(2)(b)(ii) and (iii). In practice, most of the information that ought to be excluded under the definition of materially enhanced information would be "personal information" under the *Privacy Act* and therefore subject to the access rights under that Act. As a result, the exclusions contained in s10(2)(b)(ii) and (iii) would operate to nullify the effect of the exclusion (unless the ADI could argue that the information falls within one of the exceptions in the *Privacy Act* – which is unclear and could result in significant differences between ADIs).

Other Acts will also give the consumer rights to access their data held by an ADI. For example, the *National Credit Code* gives the consumer certain rights to account information. Likewise, the procedural rules for the various courts include disclosure requirements that apply in certain

circumstances. It is likely that other legislation will, in the future, grant additional rights and, as a result, further narrow the exclusion in section 10.

We recognise the logic behind exempting from the exclusion information to which the consumer can already access under other laws. However, the Consumer Data Right reforms are not simply about whether the consumer has the 'right' to access the data. Rather, the reforms are about giving safe and efficient access to data, where such access enables the sharing of the data on a much greater scale. Whether it is appropriate for "materially enhanced information" to be subject to sharing on that scale should be a matter to be determined under the Consumer Data Right regime and not subject to the operation of other laws (which may have put no consideration into whether the access to data should be shared on the scale made possible under the Consumer Data Right).

On that basis, we recommend that the exemptions to the "materially enhanced information" exclusion contained in s10(2)(b)(ii) and (iii) be removed.

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

Yours sincerely,

Mike Laing
Chief Executive Officer
Australian Retail Credit Association