

15 September 2022

Sectoral Assessments
Consumer Data Right Division
The Treasury
Langton Cres
Parkes ACT 2600

By email:

Dear

Consumer Data Right (Non-Bank Lenders) Designation 2022 – Exposure Draft

Thank you for the opportunity to provide a submission in response to the exposure draft of the Consumer Data Right (Non-Bank Lenders) Designation 2022 (designation instrument).

As noted in our earlier submission in response to the Consumer Data Right Open Finance Sectoral Assessment (included as Annexure A), we support the inclusion of Open Finance under the Consumer Data Right. Subject to our comments below, we also support the approach to adopt a similar designation instrument to that in the banking sector.

Our earlier submission noted some of the particular features of the non-bank lending sector that may require specific treatment under the Open Finance regime; particularly ensuring that the appropriate entity that is subject to the Data Holder obligations is identified, that other entities in the lending structure do not have residual obligations under the regime, and that the obligations under the Consumer Data Right do not overly burden small or start-up entities. We also noted the importance of ensuring that Buy-Now-Pay-Later providers are subject to the Open Finance regime.

The designation instrument does not explicitly address these issues, however, as noted in the explanatory material, the rules will provide the required level of detail.

On that basis, we do not have any comments in relation to the drafting of the designation instrument. We look forward to continuing to work with Treasury in developing the relevant rules for the Open Finance sector.

Protecting vulnerable customers

We note the observation in the *Consumer data right: non-bank lending sectoral assessment, final report* (page 6) that “the non-bank lending sector typically has a higher proportion of vulnerable consumers (people who are unable to access credit through banks)”. To the extent that this is true, as noted in our earlier submission, making data available in respect of products offered by non-bank lenders will help to improve the financial inclusion of those customers by making their credit history available to a broader range of credit providers.

We also recognise the concern raised about the “potential for misuse of CDR data to contribute to harm for vulnerable consumers” (page 13); particularly on the basis of predatory lenders ‘targeting’ vulnerable customers who have a poor credit history or are experiencing financial hardship. We would anticipate that any inappropriate credit activities or behaviours which arise as a result of, or in connection, with misuse of CDR data would be in breach of a lender’s Australian Credit Licensing obligations and as such, would be appropriately monitored by ASIC, with the potential for enforcement action where required to prevent or stop such activity.

As previously noted, ARCA supports the development of ‘standardised consents’ for certain common, high value use cases, such as lending. We consider that developing such standardised consents – which would establish the types of data to be shared and the purposes for which the data can and cannot be used – will both help credit providers make better use of the Consumer Data Right regime, while also protecting consumers¹. Through those standardised consents, we expect that certain protections and limitations that exist in the credit reporting system can be applied to the use of data obtained through the Consumer Data Right.

ARCA will, over the next few months, begin the process to develop standardised consents with its Members for use in the consumer credit sector. We look forward to engaging with Treasury (and other relevant stakeholders) as part of this process.

If you have any questions about this submission, please feel free to contact me

Yours sincerely,

Michael Blyth

Executive Director – Policy & Advocacy

¹ As we have previously noted, the use of standardised consents would not restrict data recipients from using the data in other, innovative ways. However, they would need to obtain separate, distinct consents. This will help to ensure that regulator oversight can be focused more on those distinct consents, rather than the standardised consents.

Annexure A – ARCA Submission to Consumer Data Right Open Finance Sectoral Assessment

15 April 2022

Sectoral Assessments
Consumer Data Right Division
The Treasury
Langton Cres
Parkes ACT 2600

By email:

Dear

Consumer Data Right Open Finance Sectoral Assessment

Thank you for the opportunity to provide a submission in response to the Consumer Data Right Open Finance Sectoral Assessment (sectoral assessment).

Our submission sets out some specific feedback (below) in response to the questions raised on page 19 of the sectoral assessment (as well as our broader feedback on the nature of the entities that participate in the non-bank lending sector). We note that many of those questions in the sector assessment relate to whether there are any inherent differences between the banking and non-banking sectors that would require special treatment in the sectoral designation or the rules and standards. As an industry association that counts both bank and non-bank credit providers as Members, we do not generally consider there are inherent differences which would require such different treatment. Other than as noted in our specific feedback, we believe a similar approach should be taken to most issues for the non-bank lending sector as for the banking sector (e.g. in relation to products and datasets, eligible customers and materially enhanced information). However, while we support a similar approach, prior to outlining our specific feedback to the questions raised we wish to outline one key issue that needs to be resolved to ensure the CDR is effectively extended to the non-bank sector.

Identifying the appropriate entity to be included in the CDR regime

As a preliminary observation in relation to the non-bank lending sector, we note that the lending structures in that sector are often more complex than in the bank lending sector due to the funding structures that are employed by the non-bank lending sector (which does not have direct access to deposits that the bank lending sector has). Those structures are entirely appropriate and help the non-bank lending sector to bring competition to the consumer and SME lending markets. However, they do cause challenges when seeking to apply the relevant regulatory obligations to the non-bank lending sector.

For example, a significant amount of work was required by Treasury, ASIC and industry to develop special rules for how the National Consumer Credit Protection Act (NCCP) licensing and conduct regime would apply to off-balance lending structures where the 'lender of record' is a trustee entity with no active role in the provision or management of the credit. In that case, the NCC regulations allow for the nomination of a 'servicer' entity, which is the entity that, in practice, takes responsibility for the provision and management of the credit.² That servicer is required to hold the Australian Credit Licence under the NCCP and takes all responsibility for ensuring compliance with the relevant NCCP obligations (rather than the trustee lender of record). The trustee does not retain liability for the licensing and conduct obligations under the NCCP which instead apply to the servicer as the relevant 'licensee'.

In relation to lending through an off-balance sheet structure (where the service is a separate entity to the lender of record), another example of the complexities arising from the non-bank lending structure is in relation to the definition of 'credit provider' under the Privacy Act. The primary definition of 'credit provider' is in section 6G which, relevantly, defines a credit provider as a "bank" or another type of business for which "a substantial part of the business or undertaking is *the provision of credit*" (emphasis added). We consider that the servicer *is* a credit provider under section 6G as a substantial part of its business is the 'provision of credit' (even though the loans are not issued in its own name).³

The complexity of off-balance sheet lending (including mortgage manager structures) is an issue that ARCA, in its role as administrator of the industry rules for credit reporting known as the *Principles of Reciprocity and Data Exchange* (PRDE), is currently considering. That is, in an off-balance sheet structure, which entity should be the signatory to the PRDE and be responsible for contributing the data required under the industry rules? This is a complex question, which is made more complicated by some of the specific lending structures being used by prospective signatories under the PRDE. Importantly, while the structures being used in non-bank lending have broad similarities, the specifics between lending programs

² That trustee lender of record may not be related to the servicer, and may also offer those services to numerous other entities (i.e. other 'servicers').

³ The servicer may, under section 6H, also be a 'credit provider' as an 'agent' of the lender of record. However, this would limit their status as a 'credit provider' to situations in which it was acting as the lender of record's agent (which would limit the servicers in the credit reporting system). It would also impact their relationship with other entities, including white labelling entities, as those other entities could not be 'credit providers' themselves under section 6H (as that section prohibits 'agents of agents' being credit providers). Importantly, a bank acting as a servicer under an identical off-balance sheet structure would not face these issues as they are explicitly named as a type of credit provider in section 6G.

can differ in important ways (particularly in relation to the mix of responsibilities between the servicer and other entities involved in the lending program, including white labelling entities).

We also note that there is not a consistent lexicon in the industry to describe the entities, and their roles. For example, we have seen entities undertaking similar tasks being called a 'servicer', 'originator' and a 'mortgage manager' (where that last term could also refer to a white labelling entity that has a much more limited role in the management of the loans).

Based on our experience administering the PRDE – and given the parallels between the data sharing obligations under the PRDE and the Consumer Data Right – before finalising the designation for non-bank lenders we strongly recommend ensuring that sufficient time and resources are allocated to understanding the complexities and differences between the types of lending structures in the non-bank lending sector. This would, we expect, involve undertaking roundtables of participants in the sector. An important output of this process would be a dictionary of terms to describe the entities in the sector, their relevant roles, and how the CDR regime would apply to them.

Benefits and use cases

As noted above, we support the extension of the CDR to the non-bank lending sector. We agree with the sectoral assessment (page 8) which recognises that combining Open Finance with banking datasets already in the CDR can provide a much richer picture of someone's financial circumstances, including for "loan assessment purposes".

We note that the "loan assessment" use case has, at times, been given less attention than other use cases, even though it is likely to provide the most immediate and significant benefits for consumers and industry. We welcome the explicit recognition of that use case in the sector assessment and strongly support the view that loan assessment is an important use case for Open Finance and the CDR more broadly.

To ensure Open Finance is as effective and efficient as possible, the definition of non-bank lending must be sufficiently broad to capture all relevant 'credit' offered to consumers and SMEs as other lenders need visibility of all the individual's lending commitments and behaviours. For that reason, we would support a broad definition of 'credit', such as in the ASIC Act (although, noting that the rules may subsequently need to narrow that broad definition down as it may capture some businesses unintentionally, such as businesses providing goods and services on short payment terms).

We consider that the regime must extend to providers of Buy Now Pay Later (BNPL) products, payday and other similar lenders, and be capable of extending to other categories such as tech companies when and if they enter the lending market.

Buy Now Pay Later providers – further comments

Despite the way they are sometimes presented, BNPL products are credit products just like any other product which allows the deferment of debt. While there are differences (such as cost and length of credit terms), BNPL products essentially operate in the same way as credit cards by offering a mix of debt deferral and a payment mechanism.

BNPL users cover the broad spectrum of consumer segments. Reflecting this, consumer research indicates that overall BNPL users are credit active across multiple types of credit

including credit cards, personal loans, and home loans⁴. Hence, from a consumer perspective, and to ensure the use case of loan assessment is effectively enabled, there is value in consumers being able to have access through the CDR to all credit products they hold.

Some segments of BNPL users also have particular characteristics that would also make involvement in the CDR valuable. For example, because BNPL usage is skewed towards younger Australians, in relation to a credit assessment use case some of these younger consumers may otherwise be ‘credit invisible’ within the traditional credit reporting system (i.e. they have little credit history because they do not use regulated credit products⁵). For this credit invisible segment, the inclusion of BNPL in the CDR is consistent with the inclusion of telecommunications usage in the CDR, which from a credit assessment perspective is another useful indicator of credit behaviour.

Likewise, whilst comprising only a minority of overall BNPL users, users of payday lenders are also significant users of BNPL. Payday lenders have also chosen to avoid comprehensive usage of the credit reporting system and hence their clients are unable to establish credit histories that might enable them to access more mainstream and lower cost lenders. Again, there is significant benefit for consumers if all types of lenders were incorporated into the CDR (and the comprehensive credit reporting system as well).

Data holder and datasets

Data holders in off-balance sheet lending

As noted above, the lending structure within the non-bank lending sector are often more complex than in the banking sector.

We note the proposal to apply the “general principle that the entity holding the legal relationship with the customer should be the data holder” (p16 of the sector assessment) and agree that this should be a starting point to ensure that the regime captures the broad range of credit products and credit providers which exist in the sector. However, we believe that it is important that the regime have a process that allows for the practice of off-balance sheet lending, i.e. that recognises the ‘servicer’ is, in practice, the ‘credit provider’ (while the lender of record has little, if any, involvement in the provision or management of that credit, including control of the data).

Subject to our recommendation to conduct workshops with industry participants, we consider the following is likely to be an appropriate approach to identifying the relevant ‘data holder’ for the purposes of the CDR:

- Using the language from section 6G of the Privacy Act, the designation instrument could designate as potential ‘data holders’ those entities that are involved in the ‘provision of the credit’ in relation to the loan (rather than just the lender of record)

⁴ ARCA CreditSmart Consumer Survey by YouGov: December 2021. For example, BNPL users on average use 2.41 other credit types, while credit card users use only 1.81 other credit types.

⁵ While BNPL products can be reported through the credit reporting system, many monoline BNPL providers do not participate in the system (or participate in a very limited manner), which means their customers do not get the benefit of BNPL products contributing to their credit history. Credit providers that offer other types of credit products, as well as BNPL products, are more likely to be signatories to the PRDE and participate in the comprehensive credit reporting system.

- As a starting point, the obligations as ‘data holder’ should sit with the lender of record;
- Subject to any conditions considered appropriate (e.g. evidence of lending program structure; demonstrating control of data; expectations of the customer regarding the identity of ‘their’ credit provider), the lender of record may nominate a third party (a ‘servicer’) as the responsible data holder for a portfolio of loans issued under the relevant lending program; and
- The lender of record would have no residual obligations under the CDR (i.e. upon making a valid nomination, the lender of record should not be a ‘data holder’ under the CDR).

Other comments in relation to data holders and datasets

We make the following observations and suggestions:

- It may be appropriate to consider a limited transitional/materiality allowance for start-ups that is time-based and/or account-number based, so that until the start-up has operated for a nominated time and has reached a threshold of accounts, they would be exempted from being a data holder under the sectoral assessment. This would ensure that those start-ups are not immediately burdened by the costs of developing the capability to be a data holder (when, due to the limited number of accounts, there would be little consumer benefit in having the start-up participating). We consider that the nature of this allowance should be subject to further consultation once the fundamental principles relating to the sector assessment have been decided. Based on our experience in relation to the introduction of the PRDE, having an appropriate transitional framework is important to encouraging participation in the system.
- At this stage, we are not aware of any inherent differences in the credit products offered by the non-bank lending sector that would require material changes to the rules and standards that apply to banks. In its role as administrator of the PRDE, ARCA is also responsible for the Australian Retail Credit Data Standards (which apply to the disclosure of credit information by credit providers to credit reporting bodies). Those data standards apply in the same way to bank and non-bank credit providers. Importantly, the standards allow for the contribution of credit information for BNPL products in the same way as for other credit products (although, as discussed above, participation in the credit reporting system is largely limited to BNPL providers who also offer other products). Nevertheless, as noted above, we recommend ensuring that the sectoral designation is broadly drafted to capture all credit products, including those that may develop in the future (i.e. so as to avoid the need for additional designation).
- We agree that government held consumer datasets that are complementary to privately held consumer datasets should be within scope of the CDR as they support important use cases, including lending assessment. This could include ATO personal and company tax liability and BAS, ASIC registry data and Centrelink data. Over time, consumer data held by state and local governments, such as land titles data and council rates notices, could also be brought in to further enhance use cases and provide better value propositions.

Regulatory burden and cost considerations

The extension of the CDR to the non-banking sector will be a significant undertaking for many non-bank lenders. Appropriate lead times will be required, and the introduction should

occur in a practical, sequenced manner to allow for accreditation of new participants and to build the technical capability. Further consultation on the timeframes should be undertaken once the fundamental principles relating to the sector assessment have been decided.

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

Yours sincerely,

Mike Laing

Chief Executive Officer