



NATIONAL AUSTRALIA BANK SUBMISSION

Consultation on *Treasury Laws
Amendment (Consumer Data Right)
Bill 2018 (Second stage)*

12 October 2018

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1. Introduction

NAB welcomes the opportunity to respond to the Department of Treasury (Treasury) second stage consultation on the *Treasury Laws Amendment (Consumer Data Right) Bill 2018 (Bill)* which will enable the establishment of Open Banking in Australia. NAB supports Open Banking being established as part of an economy-wide data sharing framework under the Consumer Data Right (CDR). As a member of the Australian Banking Association (ABA), NAB has also contributed to its submission.

This submission should be read in addition to NAB's 7 September 2018 submission to the first consultation on the Bill. NAB is also concurrently lodging a submission to the Australian Competition and Consumer Competition (ACCC) Consumer Data Right Rules Framework.

Given the timeframe for this consultation and that it occurs concurrently with one undertaken by the ACCC, NAB is still compiling feedback on the *Consumer Data Right (Authorised Deposit-Taking Institutions) Designation 2018*. This will be provided directly to Treasury in the near future.

2. Executive Summary

NAB welcomes the proposed changes to the Bill as important and significant changes. However, NAB believes the Bill still needs further refinement before being legislated.

Most significantly, NAB continues to believe that the Australian Privacy Principles should be 'switched off' and substituted with the proposed privacy safeguards in the Bill. NAB also urges the ACCC to include reciprocity in the first version of the rules, and that there should be a legislated requirement for the ACCC to undertake further consultation for second and subsequent versions of the rules.

NAB looks forward to ongoing engagement with the ACCC on the Rules and the Data Standards Body (Data61) on the Standards.

3. Proposal 1: Derived information

The revision in the Proposal states that "derived data... would need to be specifically included in a designation instrument to be within scope of the access and transfer right." NAB welcomes this amendment and notes it aligns with NAB's 7 September 2018 submission that any further information intended to be captured by the CDR (beyond an individual's transaction data and banking product data) should be specified in the data sets as part of the banking legislative designation.

More broadly, NAB continues to believe though that the CDR definition in the legislation should not extend to data derived, either directly or indirectly, from CDR data. It should apply only to an individual's transaction data and data that relates to a banking product. NAB believes this also best reflects recommendation 3.3 from the Open Banking Review that value-added data should not be included in the scope of Open Banking.¹

As stated in the 7 September 2018 submission, NAB considers customer derived data to be: information developed by a bank based on information provided by its customers, such as analytics, and derived insights or information obtained by a bank from a third

¹ The Open Banking Review defined value-added customer data as "data that has been enhanced by a data holder to gain insights about a customer".

party under a commercial arrangement – such as credit scores and property valuations.² NAB considers this type of data – for example customer segmentation, propensity indexes, or internally derived risk ratings – to be both proprietary and unique to NAB. NAB also believes the definition of ‘value-added data’ in the Open Banking Review, and supporting examples,³ should be considered similarly.

4. Proposal 2: Interaction of the Privacy Safeguards with the Privacy Act

NAB has consistently stated that protections to ensure the confidentiality of customer data are critical to the success of the CDR regime. Strong and clear privacy protections are needed so customers are not put at risk.

While the proposed amendments to the Bill aim to reduce the complexity of the privacy framework, NAB considers that the approach remains overly complicated and creates uncertainty and duplication. Two specific examples are:

- **Policies:** Under both the Australian Privacy Principles (APPs) and the privacy safeguards, parties are required to have a policy, although the APP 1 requirement is for a general privacy policy and the privacy safeguard 1 requires a policy about the management of CDR data. A simpler approach would be to mandate that the privacy policy under APP 1 addresses CDR data matters for all data holders (acknowledging that a gap cannot be created if a data recipient is not caught by the APPs – in this case, it should be mandated these parties comply with APP 1 with respect to CDR data).
- **Notifications:** APP 5 requires that an APP entity that collects personal information about an individual must take steps to notify the individual of specified matters. Privacy safeguard 5 also imposes a requirement for notification of CDR consumers of the collection of CDR data, although the matters to be covered in the notification are not yet clear as they are to be proscribed in the Rules.

In addition, the maintenance of a dual regime with overlapping APPs and privacy safeguards becomes further complicated given that a party may receive CDR as an accredited data recipient (thereby subject to the privacy safeguards) and the same party may later be deemed to be a data holder (as per example 1.7 in the Explanatory Memorandum). Once the party is deemed to be a data holder the APPs would revert in relation to the same data. Managing the temporal elements of the regime will be challenging from a compliance perspective.

NAB considers that a preferred approach to privacy would involve the APPs being ‘turned off’ and replaced with the privacy safeguards. NAB provided further details on how this model could operate in its 7 September 2018 submission to Treasury.

5. Proposal 3: Reciprocity

NAB has long argued that reciprocity is a fundamental principle in order to create a level playing field for all participants under the CDR. Recommendation 3.9 in the Open Banking Review supported reciprocity and data recipients also providing customer data at a customer’s direction, including ‘any data held by them that is transaction data or that is the equivalent of transaction data.’

² See NAB submission September 2017 to Open Banking Review, p9. Some of this content is reproduced here. .

³ Review into Open Banking: giving customers choice, convenience and confidence, p33

NAB welcomes the proposal to allow the ACCC to write rules requiring accredited entities holding equivalent data, where the data set is prescribed in the designation instrument, to transfer that data to accredited parties in response to a request from a customer. This would allow customers of a non-authorised deposit-taking institution (ADI) to request their CDR data be transferred to an ADI or another accredited data recipient. The power is in the hand of the consumer. At the time a non-ADI seeks to become an accredited data recipient, the Accreditation Registrar should determine if they hold designated CDR data. If they do hold designated CDR data, then the non-ADI should also be accredited as a Data Holder.

NAB urges the ACCC to make use of this power and draft rules to establish the principle of reciprocity in the first version of the rules so reciprocity exists from the commencement of the CDR on 1 July 2019. Enabling reciprocity from day one will give consumers more choice and opportunity to participate in the CDR and support the growth of the data economy. Not addressing this in version one of the rules would allow non-ADIs to receive data from ADIs at the request of customers, but have no ability for customers to request that comparable data be transferred to other entities for an unknown period of time. This would not be a level playing field.

For institutions who wish to become accredited entities but who do not hold data that is prescribed in a sector specific designation – such as offshore based global technology companies – an understanding of what constitutes ‘equivalent transaction data’ remains fundamental to reciprocity. NAB considers that an appropriate point to determine ‘equivalent transaction data’ for these entities is when they become an accredited data recipient, via the accreditation process.

NAB also believes there should be a requirement that CDR data should be held in Australia by all CDR participants. This requires offshore participants in the CDR to invest in Australian data infrastructure in order to participate in the CDR and resultant open data economy.

6. Proposal 4: Process for designation and rule-making

NAB notes the ACCC has indicated they will adopt a versioning approach to the rules, with certain areas to be addressed in second and subsequent versions. Given this, NAB believes the ACCC should have a legislative requirement to undertake consultation with a sector prior to making each version of the rules, not just when it establishes rules for a newly designated sector under the CDR.

This requirement would ensure appropriate consultation on challenging areas that may be left to second and subsequent versions of the rules. 28 days would be a sufficient time to consult on changes to the rules.

7. Proposal 5: Framework for charges for access to and use of CDR data

NAB welcomes the proposal that where fees may be imposed for designated data sets, the initial pricing approach is market based pricing. NAB understands that this approach would allow a data holder to set a fee for service and that the ACCC would only be involved in setting a price if it believed that the data holder was imposing an excessive fee. NAB is also broadly supportive of the factors listed in the Proposal that the Minister would need to consider in regards to charging. NAB welcomes further information on the framework for charging for datasets.

While noting that that the data sets in the banking designation instrument will not be chargeable, NAB considers that a consultation process should occur for future sectors designated under the CDR focussing on determining whether a data set is a chargeable data set.

8. Conclusion

The establishment of the CDR, and subsequent designation of the banking sector, is a significant development in the Australian financial services industry. Open Banking has the potential to improve the speed of decision-making and offers opportunities to enhance customers' experience. It also offers the potential to increase competition in the banking sector and NAB welcomes competition that enhances customer outcomes.

The implementation of Open Banking remains complex and challenging. NAB looks forward to further and ongoing engagement with Treasury, the ACCC and Data61 on implementation.