

## **EXPOSURE DRAFT EXPLANATORY MATERIALS**

### **Issued by authority of the Assistant Treasurer and Minister for Financial Services**

#### *Competition and Consumer Act 2010*

#### *Consumer Data Right (Non-Bank Lenders) Designation 2022*

Subsection 56AC(2) of the *Competition and Consumer Act 2010* (the Act) provides that the Minister may, by legislative instrument, designate a sector of the Australian economy to be subject to the consumer data right. The consumer data right is set out in Part IVD of the Act.

The purpose of the *Consumer Data Right (Non-Bank Lenders) Designation 2022* (the Designation) is to designate the non-bank lending sector as subject to the consumer data right.

The Designation sets out, in relation to this sector, the classes of information that are subject to the consumer data right, the persons who hold this information and will be required or authorised to transfer the information under the regime, and the earliest date that the information must have begun to be held to be subject to the consumer data right. This information will be CDR data (see section 56AI of the Act). Data holders may be required to disclose CDR data in accordance with the consumer data rules. The rules may also authorise data holders to choose to share this data through the consumer data right.

The non-bank lending data specified as information by the Designation is customer provided data, data about the use of non-bank lending products, and data about non-bank lending products.

The *Treasury Laws Amendment (Consumer Data Right) Act 2019* amended the Act to establish a consumer data right.

The consumer data right provides individuals and businesses with a right to efficiently and conveniently access specified data that relates to them and is held by data holders, and to authorise secure access to this data by accredited third parties. The consumer data right also requires businesses to provide public access to information on specified products that they offer.

The consumer data right is designed to give customers more control over their information leading, for example, to more choice in where they take their business, or more convenience in managing their money and services.

From 15 March 2022, the Treasury conducted four weeks of consultation to inform its sectoral assessment for the non-bank lending sector. Non-bank lending is the fourth sector of the Australian economy to which the consumer data right will be applied, following the previous designations of the banking, energy and telecommunication sectors.

Details of the Designation are set out in Attachment A.

The Designation is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Designation will commence on the day after it is registered.

**Details of the Consumer Data Right (Non-Bank Lenders) Designation 2022**

**Section 1—Name**

This section provides that the title of the Designation is the *Consumer Data Right (Non-Bank Lenders) Designation 2022*.

**Section 2—Commencement**

This section provides that the Designation will commence on the day after it is registered.

**Section 3—Authority**

This section states that the Designation is made under subsection 56AC(2) of the Act.

**Sections 4 and 5 —Definitions**

The Designation includes a number of definitions. These are:

**Act** means the *Competition and Consumer Act 2010*.

**Associate** has the same meaning as in section 318 of the *Income Tax Assessment Act 1936*. This includes an individual's relatives such as spouse, children or siblings, or a company's parents or subsidiaries. This definition of associate is also used in the definition of 'CDR consumer' in section 56AI of the Act. The expression 'associate' is used in the Designation so that, where a non-bank lending product is supplied to multiple persons, information about each of those persons and their use of the product is captured by the Designation. This may occur where the product has more than one account holder, or where the primary account holder has given access to other persons such as a relative or spouse.

**Product** means a good or service that is or has been offered or supplied to a person in connection with any of the following:

- taking money on deposit;
- making advances of money, for example a mortgage or credit card;
- letting goods on hire, including on hire-purchase;
- another financial activity prescribed by regulations for the purposes of the definition of 'banking business' in the *Banking Act 1959*.

The element of the definition relating to the hire of goods is intended to capture a lease of the following kinds:

- a consumer lease;
- an equipment operating lease;
- a finance lease (for either a vehicle or equipment);
- a novated lease (used for car finance when employees salary sacrifice through their employer, with the lessor making the lease arrangement with the employer);

- vehicle fleet leasing;
- asset finance or ‘asset purchase’ (the provider purchases and owns the asset, and the business customer buys it from the provider in instalments over an agreed period, with ownership transferring to the business customer upon final payment).

The intention is to capture a lease whether or not the lessee has a right or obligation to purchase the goods to which the lease relates.

A **product** also includes a purchased payment facility that is or has been offered or supplied to a person.

**Purchased payment facility** means a facility, other than cash, which:

- is purchased by a person from another person; and
- is able to be used as a means of making payments up to an amount available under the conditions applying to the facility; and
- involves the provider of the facility making payments.

The criteria that a product must satisfy to be a purchased payment facility reflect the criteria in section 9 of the *Payments System (Regulation) Act 1988*. However, unlike the *Payments System (Regulation) Act 1988*, if a product meets the relevant criteria it will be a purchased payment facility regardless of a declaration by the RBA or a determination by APRA.

**Relevant non-bank lender** means a corporation that is a registrable corporation under section 7 of the *Financial Sector (Collection of Data) Act 2001*, but without the \$50 million threshold in that Act applying.

The \$50 million threshold in the *Financial Sector (Collection of Data) Act 2001* excludes a corporation from being a registrable corporation if:

- the sum of the values of the corporation’s assets in Australia that consist of debts due to the corporation resulting from transactions entered into in the course of the provision of finance by the corporation does not exceed \$50 million; and
- the sum of the values of the principal amounts outstanding on loans or certain other financing does not exceed \$50 million.

If the non-bank lending sector is designated, the Government would develop amendments to the consumer data rules to establish the substantive rights and obligations for data sharing in this sector. It is likely that a threshold of \$50 million or higher would be reimposed at this rulemaking stage.

This would recognise that the introduction of CDR obligations, and associated compliance burden, may have an impact on smaller players and start-ups as they attempt to bring innovative products and business models to market to disrupt the incumbents.

The result of omitting the threshold at designation stage and reimposing it at rulemaking stage is that those entities under the threshold could participate in the CDR voluntarily, but only those entities who exceed it would be compelled.

## **Section 6 — Designation of sector subject to the consumer data right**

This section sets out the following:

- the classes of information that are prescribed and therefore subject to the consumer data right (see the detailed explanation for sections 7, 8 and 9);
- that the information prescribed in sections 7, 8 and 9 is specified unless it falls within the scope of section 10;
- that non-bank lenders are specified as the persons that hold this information, or on whose behalf the information is held;
- that the earliest date that the classes of information can become subject to the consumer data right is 1 January 2020.

The Designation is intended to capture ‘white-labelled’ products. These are products typically supplied by one entity (a white-labeller) and branded and retailed to consumers by another entity (a brand owner).

For securitisation arrangements in the non-bank lending sector, the intention is that CDR data sharing obligations generally apply to loan originators (the brand owner) – as the entity with whom the consumer has the lending relationship – rather than the special purpose entities providing the funding. Treasury seeks views during this exposure draft consultation on whether the definition of ‘relevant non-bank lender’ is broad enough to adequately cover loan originators for the variety of securitisation models in use in the sector.

Setting the earliest holding day as 1 January 2020 is consistent with the banking designation (made in September 2019) having set its earliest holding day as 1 January 2017 and maximising the amount of data that can be brought into the CDR to benefit consumers.

The note to section 6 clarifies that the information specified in the Designation will not be ‘chargeable data’. That is, a fee cannot be charged for CDR data covered by this Designation.

## **Sections 7 to 9 — Classes of information**

Sections 7 to 9 specify the three types of information which is subject to the consumer data right.

### Information about the user of the product – Section 7

The first type of information covered by the Designation is ‘customer’ information. This is information to which section 7 applies. This is information about the person to whom the product has been or is being supplied, or about the person’s associate where the product has also been, or is also being, supplied to the associate.

The information must have been either:

- provided directly by the person or their associate when acquiring or using a product, for example, the person’s name and address; or
- otherwise obtained by or on behalf of the non-bank lender (or the entity that holds information on the non-bank lender’s behalf). This will be information that the non-bank lender has obtained externally; for example, information that

a non-bank lender has received from another non-bank lender with the consent of the relevant customer.

Subsection 7(2) provides for specific information that is covered by subsection 7(1). This list of information is not exhaustive. The reference to ‘eligibility’ in paragraph 7(2)(b) is intended to cover matters such as a customer’s membership of a particular group or association where that is a precondition of accessing a product or service.

#### Information about the use of the product – Section 8

The second type of information covered by the Designation is information about the use of the product by the person or an associate of the person who is also supplied with the product. This is information to which subsection 8(1) applies.

This includes the type of information that a customer would typically see on a statement, such as loan repayments, interest charged or fees incurred.

Information about the use of a product also includes information about the authorisations attached to a product. For example, persons who are authorised to use, access or view information about the account or an authorisation to make a payment to a third party.

However, the Designation limits the information about the use of the product where this information has been materially enhanced as a result of analysis or insight by the provider. Materially enhanced information, defined in subsection 8(4), is excluded by subsection 8(3). A more detailed explanation is given below in the commentary on exclusions.

This designation is also intended to capture information about the use of buy now pay later (BNPL) products. For example, one such product involves a debt being applied to a specific item, which is provided directly to the customer at the time of purchase. BNPL companies pay the merchant the advertised cost of the item (minus a merchant fee) and the customer pays the item off in a series of instalments with no interest incurred. The profile of a customer’s future instalments is an example of the information this Designation is intended to capture. However, this Designation is only intended to cover the customer interaction, not the merchant interaction.

If the non-bank lending sector is designated, the Government will develop amendments to the consumer data rules to establish the substantive rights and obligations for data sharing in this sector. The Government intends to make corresponding amendments to the rules at that time to ensure BNPL products offered by authorised deposit-taking institutions are also covered for the CDR.

#### Information about a product – Section 9

The third type of information covered by the Designation is information about a product. This is information to which section 9 applies.

This would include information such as information identifying or describing a product, the price of a product, including fees, charges or interest rates, terms and conditions, and eligibility criteria that a customer needs to meet to be provided with the product. For example, this section may include the type of information typically covered in a Key Facts Sheet (see, for example, Division 2 of Part 3-2A of the *National Consumer Credit Protection Act 2009*).

The product information can be about a certain type of product for a particular customer or group of customers. For example, a consumer might be on a particular

rate that differs from the advertised rate for a product, or use a legacy product that is no longer offered but continues to be provided to existing customers.

## **Sections 8 and 10 – Exclusions from specified classes of information**

### Information that is materially enhanced – Section 8

Subsection 8(3) carves out information about the use of a product from being specified under subsection 8(1) where that information has been materially enhanced.

Materially enhanced information, which is defined in subsection 8(4), is information which is the result of the application of insight or analysis of source material, such that its useability and value are significantly enhanced in comparison to the source material. The insight and analysis may be conducted by a human, a machine, or a combination of both, and must not have been undertaken in order to meet a regulatory requirement. For the purposes of the material enhancement test, source material is information to which subsection 8(1) applies. This means that while materially enhanced information may have been derived either entirely from information to which subsection 8(1) applies, or from a combination of information covered by subsection 8(1) and other information, the test only requires the enhanced information to be significantly more valuable than the subsection 8(1) inputs.

The intention is that information whose value has been largely generated by the actions of the data holder will be carved out by the material enhancement test. For example, materially enhanced information may include: the outcome of an income, expense or asset verification assessment; assessments of a customer's ability to meet loan repayments (also known as loan serviceability); or inferences that a customer has recently experienced a life event, such as a house purchase.

While subsection 8(3) excludes materially enhanced information from the class of information to which subsection 8(1) applies, such information may nonetheless be CDR data due to paragraph 56AI(1)(b) of the Act, which captures information that is wholly or partly derived from information that falls within a class of information specified in this instrument. This means that:

- the consumer data right applies to materially enhanced information, and
- while data holders are not required to disclose materially enhanced information under the consumer data right, customers can still authorise data holders to disclose this information through the consumer data right, where this is authorised under the consumer data rules.

Subsection 8(5) also provides examples of information that is *not* materially enhanced. The purpose of this list is to both avoid any doubt in relation to these items, and to illustrate where derived information would not be significantly enhanced to aid in the interpretation of the materiality test. These examples are:

- a calculated balance;
- an amount of interest earned or charged;
- a fee charged;
- a reference number, including a routing number, a clearing house number or a swift code;

- information identifying a person, body, product, transaction or account;
- information about authorisations;
- the categorisation of source material based on a feature of the product to which it relates, including categorisation by the fees or interest rates applicable to the product;
- information that results from filtering or sorting source material by reference to a date, period, amount or categorisation.

Information that is not information about the user of a product – Section 10

As noted above, any information to which section 7, 8 or 9 applies is not specified by this Designation if section 10 applies to the information.

Part IIIA of the *Privacy Act 1988* regulates the privacy of information relating to consumer credit reporting in Australia. It does this by regulating the handling of personal information about individuals' activities in relation to consumer credit. In particular, Part IIIA of the *Privacy Act 1988* outlines:

- the types of personal information that credit providers can disclose to a credit reporting body for the purpose of that information being included in an individual's credit report;
- what entities can handle that information; and
- the purposes for which that information may be collected, used and disclosed.

The *Privacy Act 1988* excludes the consumer data right and associated subordinate legislation as an Australian law that would permit the use or disclosure of credit reporting information or credit eligibility information under Part IIIA.

Under the *Privacy Act 1988*, credit providers may also disclose credit information to other credit providers where the customer consents to the disclosure. In this context, to reduce overlap between the regulation of credit information and the consumer data right, the Designation excludes the following information from the consumer data right:

- a statement that an information request under Part IIIA has been made for the individual by a credit provider, mortgage insurer or trade insurer (consistent with paragraph 6N(d) of the *Privacy Act 1988*);
- new arrangement information about serious credit infringements (consistent with subsection 6S(2) of the *Privacy Act 1988*);
- court proceedings information about the individual (consistent with paragraph 6N(i) of the *Privacy Act 1988*);
- personal insolvency information about the individual (consistent with paragraph 6N(j) of the *Privacy Act 1988*); and
- the opinion of a credit provider that the individual has committed a serious credit infringement (consistent with paragraph 6N(l) of the *Privacy Act 1988*).