Financial Rights LEGAL CENTRE

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cc. Kym.Malycha@treasury.gov.au

Dear Mr Malycha

Consumer Data Right Rules – non-bank lending and banking data scope

Thank you for the opportunity to comment on Consumer Data Right (**CDR**) Rules – non-bank lending (**NBL**) and banking data scope.

This submission has been drafted by the Financial Rights Legal Centre (**Financial Rights**) with input and support from the Consumer Policy Research Centre (**CPRC**) and Financial Counselling Australia (**FCA**).

This submission will provide comment on:

- The Treasury approach to privacy impact assessments (**PIAs**)
- The proposed new de minimis threshold
- Excluding Financial Hardship Information (**FHI**) and Repayment History Information (**RHI**) from the NBL sector
- Instruction or guidance on the interaction of CDR, Part IIIA of the Privacy Act 1988 and the Comprehensive Credit Regime (**CCR**)
- The scope of historical data

Privacy Impact Assessment

We reiterate our concerns (raised in previous submissions) regarding Treasury's approach to the PIA process as it continues to fail to meet best practice.

The independent assessor did not undertake stakeholder engagement with consumer groups and we were not provided with an opportunity to speak with the independent assessor to discuss any potential privacy implications of the proposed rules.

The PIA process established by Treasury prevents consumer groups engaging directly with the assessor. Direct engagement would allow us to provide significant input into their considerations and have their recommendations genuinely impact upon the development of the CDR early enough to ensure that it is embedding a privacy-by-design and privacy-by-default approach in a meaningful way.

While we have not criticised the quality of the work of independent PIAs in the past, we believe that the analysis undertaken with respect to the interaction of the CDR and CCR in this case is flawed and the recommendation subsequently weak. We outline our concerns with it further under the Excluding FHI and RHI section below.

De minimis threshold

We do not support the de minimis threshold in the absence of a timetable to remove the threshold altogether. Without a ban on screen scraping there remains no genuine incentive for small, fringe non-bank lenders to engage with the CDR and improve their data collection and use practices. Incentives to voluntarily engage with the CDR have failed and will continue to fail without an explicit requirement in place to do so.

Further, the threshold ignores the reality that many of the most harmful financial services and data handling practices arise from those smaller firms that will now be excluded from being required to join CDR. It is this cohort too that targets the most financially vulnerable consumers. If Treasury are genuinely interested in balancing cost to industry against reducing consumer harm, it would include all NBLs since it would likely bring about the biggest improvement for the most vulnerable cohorts of consumers.

In the absence of any guarantee that screen scraping will be prohibited with a hard deadline in place, we recommend that the de minimis threshold be removed. At the very least, the threshold should return to $500 million to capture significant non-bank lenders and a sunset clause should be introduced to set a date for its removal.

Excluding Financial Hardship Information and Repayment History Information from the NBL sector

We support the decision to exclude FHI and RHI as defined under the Privacy Act from the scope of 'customer data' in relation to the scope of 'consumer data'.

However, the acknowledged risks involving the use and misuse of inferred financial hardship and repayment history information have not been appropriately mitigated against either under the current or proposed new rules.

The PIA outlines a series of "adequate protections in respect of the use and disclosure of "inferred information about financial hardship and repayment history." We do not accept that these are adequate or in any way mitigate the risks of misuse.

- The consent rules do not mitigate against the risk of misuse of *inferred* FHI and RHI since merely disclosing such a use fails to address the imbalance of power that is present where a person experiencing financial hardship is providing consent. Many consumers facing financial stress will be willing to tick a box or agree to any condition to obtain the advice, credit or other service or product that they are seeking. This situation has also been made worse with the introduction of the deceptive pattern of bundling under the recently introduced new consent rules. Structural protections like those found within the credit reporting regime are required here to prevent incentives for misuse by CDR participants
- Similarly, disclosing information about the types of data the CDR participant is seeking will not mitigate the risks. This is both because of the same imbalance of power described above but also because there are no requirements placed on how this information is described to a consumer and can consequently be easily obfuscated through ambiguous wording. Furthermore, there is no monitoring and enforcement of the disclosures taking place to identify where CDR participants may be obfuscating use cases to hide intentions.
- The ability for a data holder to refuse to disclose customer data in response to a request where the data holder considers this is necessary to prevent financial harm or abuse, is irrelevant to the risk needing to be mitigated here. This is because it would need to deem a request to share data instigated by the customer themselves to be by a CDR participant seeking to harm or abuse someone financially. That is not the intention of the rule. Even if it is in some way relevant (although it remains unclear to us how) it is not an effective risk mitigant since - as we have repeatedly identified and raised – consumers are unable to enliven the right because there are significant hurdles to informing the data holder that there is a problem. That is, there is no requirement under the rules to provide consumers with a simple way to alert a data holder of a situation of financial harm or abuse. Without this simple way the rule is practically useless as a protection.
- Finally, the data minimisation principle, accreditation, privacy safeguard 6 and the de minimis rules do not prevent CDR participants from inferring FHI and RHI data and using or misusing this data in ways that are exploitative of people experiencing financial hardship. There also remains no rule or protections in place to limit the use

> of a CDR data or insights from that data for non-CDR purposes.[1] And the PIA provides no explanation how they would decrease the risks involved.

We therefore remain of the view that in order to prevent CDR participants obtaining and misusing *inferred* FHI and RHI, all consumer protections built into the credit reporting regime (including under the Part IIIA of the *Privacy Act*, the Credit Reporting Code and the *Credit Act*) must be built into the CDR regime. These include, but are not limited to:

- limiting access to transaction history to 12 months;
- limiting what a lender can do with equivalent FHI;
- preventing equivalent information to FHI from being used by a credit reporting body or other CDR participant in the calculation of a credit score;
- preventing real estate agents, landlords and other entities from accessing CCR by obtaining or asking for CDR data from consumers for purposes such as the assessing rental applications;
- limiting the circumstances in which other lenders can be told about financial hardship arrangements;
- prohibiting recipients of CDR data from refusing to provide further credit or reducing a credit limit based on equivalent FHI.

Finally, we note that the Treasury response to PIA Recommendation 1 is unclear. PIA Recommendation 1 states:

> *Treasury consider whether the exclusion to financial hardship information and repayment history information from "customer data" is sufficient or whether the exclusion should be extended to protect the privacy of vulnerable consumers.*

The Treasury response states:

> *The updates to the draft amendments do not substantively impact upon the proposed exclusion of financial hardship information and repayment history information from the scope of 'customer data' in relation to the non-bank lending sector. Under the updated draft amendments, these forms of information would still be excluded from CDR data sharing.*

On our reading, the recommendation relates to the consideration of the *inferred* forms of FHI and RHI – not the *Privacy Act* defined versions of FHI and RHI under the credit reporting

[1] See page 16 of Financial Rights, [CPRC and FCA submission to CDR rules: consent and operational enhancement amendments - Consultation paper and Decision Proposal 350]

regime. The Treasury response does not state whether any further consideration has been made in regard to these *inferred* forms of FHI and RHI.

Instruction or guidance on the interaction of CDR, Part IIIA of the Privacy Act 1988 and the Comprehensive Credit Regime (CCR)

We note that the PIA Recommendation 1 states:

> *Treasury, together with the Office of the Australian Information Commissioner and the Australian Competition and Consumer Commission, consider what instructions or guidance can be developed for credit providers to ensure credit providers comply with the CDR, Part IIIA of the Privacy Act 1988 and the Comprehensive Credit Regime (CCR) in relation to the handling of credit reporting information.*

The Treasury response states:

> *The updates to the exposure draft amendments do not substantively impact upon any interactions between the CDR Rules and the CCR in relation to handling credit reporting information. However, the PIA recommendation may be relevant to the updated draft explanatory materials Treasury has released together with the exposure draft amendments. Should the proposed amendments be made, the draft explanatory materials would provide guidance on the interpretation of the rules. Treasury has updated the draft explanatory materials to reflect the updates to the draft amendments.*

However, we cannot identify any updated material in the EM providing appropriate guidance on the interpretation of the rules, with respect to the interaction between the CDR Rules and the CCR. This is critically important.

We note that the recent Credit Reporting Review Report has highlighted there are in fact significant interactions between the two:

> *"The Review concluded that, although eventually the potential to bring the two regimes closer together should be explored, it would not be appropriate to allow CDR data within the credit reporting framework and vice versa. This could effectively circumvent the specific controls in place for data collected and used within each regime.*
>
> *Each is subject to a different set of regulatory requirements, with credit reporting data provided to credit providers relatively freely and without consumer control, but limited as to specific uses, whereas CDR data is not limited in its use but can only be provided to accredited participants and subject to initial and subsequent consumer consent for ongoing usage.*

> *There is the potential for some overlap to be accommodated, for example by allowing CDR data (such as repayment and loan information) to be incorporated into a credit score on an opt-in basis with consent. This would require changes to the so-called 'derived data' restriction within the CDR regime. This is a broader issue for Government to consider within its CDR strategy.*

The review also recommends clarification of a credit reporting business be undertaken.

> *The CDR specifically restricts use and disclosure of this information to purposes agreed by the consumer and there are equivalent protections to those under the Privacy Act. Relevant amendments should be made to avoid the unintended interaction of Part IIIA with the CDR, noting the situation would become more complex if the CDR provider also used the information to calculate and disclose a credit score that could be used more widely for credit assessment purposes.*

We would argue that if a CDR participant did so in the way described i.e. used CDR information to calculate a credit score, then they should fall within the definition of a credit reporting bureaux.

The scope of historical data

We note that the length of historical data relating to transactions occurring before the time a data request is made, has been reduced from 7 years to 2 years. While this is a positive step, we think this should be further reduced to 12 months.

The reason is that 12 months would align with the CCR regime that limits information and insights into financial hardship and repayment history to 12 months. We are also of the view that 12 months' worth of transaction data is enough to undertake most if not all use cases. The FCA pilot, for example, started with 365 days' worth of data but after a few months reduced it to 90 days as this is what was enough to support a client.

Any assertion that 2 years-worth of data are needed by industry should be looked with some scepticism by Treasury. Treasury should seek actual evidence to support this case.

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission, please do not hesitate to contact me at drew.macrae@financialrights.org.au .

Kind Regards,

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Financial Rights Legal Centre

About Financial Rights

Financial Rights is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters.