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Mr James Kelly
First Assistant Secretary
Digital, Competition and Payments Division
The Treasury
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By email: CDRRules@treasury.gov.au

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

Dear Mr Kelly

Thank you for your letter of 26 November 2024 consulting me on draft amendments to the *Competition and Consumer (Consumer Data Right) Rules 2020* (CDR Rules) which will expand the Consumer Data Right (CDR) to the non-bank lending (NBL) sector and also narrow the scope of CDR data in the banking and NBL sectors.

Under section 56BR of the *Competition and Consumer Act 2010* (CC Act) the Information Commissioner is required to analyse the likely effect of making rules on the privacy or confidentiality of consumers' information. In accordance with this function, I have analysed the *Competition and Consumer (Consumer Data Right) Amendment (2024 Measures No. 2) Rules 2024* (draft rules).

The OAIC supports the expansion of the CDR to the NBL sector and Treasury's efforts to narrow the scope of CDR data to help reduce costs. Data from the NBL sector will give consumers greater access to the financial information held about them by the banking and NBL sectors and will support consumers to find and make informed decisions about suitable financial products.

We note Treasury has updated the draft rules since consulting on the Expansion to the NBL sector[1] in October 2023 to which the former Information Commissioner made a submission[2] (former submission).

[1] Consumer Data Right rules – expansion to the non-bank lending sector | Treasury.gov.au

[2] OAIC - Submission in response to: Consumer Data Right rules – expansion to the non-bank lending sector

We welcome Treasury's decision to reduce the scope of transaction data, to be shared in both the banking and NBL sectors in relation to open accounts, from 7 years to 2 years.

We also support Treasury's efforts to reduce costs for data holders by narrowing the scope of products and datasets to be shared in the CDR. As part of any further consideration of products to be included in the CDR, we reiterate the recommendation in our former submission to consult with consumer advocacy groups on identification of products with the highest potential to impact vulnerable consumers.

For Treasury's consideration, I make the following observations and recommendations regarding the privacy and confidentiality impacts of the draft rules particularly in relation to ensuring entities can identify and understand their obligations in the CDR system.

These recommendations go to ensuring clarity about the applicability of the draft rules.

Who is a data holder and application of the de minimis threshold

The draft rules have increased the proposed de minimis threshold for data holders who would be subject to mandatory data sharing; and for large providers there is a monetary threshold and a customer threshold. The draft rules also make other clarifications regarding white labelling arrangements, that CDR data sharing obligations would apply to managers of loans that provide credit on behalf of a non-bank lender, and the ability for non-bank lenders who do not meet the de minimis threshold to voluntarily choose to join the CDR.

From a compliance perspective, it is important that prospective data holders can easily and clearly identify whether or not they would be subject to mandatory CDR data sharing obligations. We consider additional guidance would be beneficial in supporting entities, ahead of binding obligations, to assess whether they will be considered a data holder in the NBL sector.

<u>Recommendation 1</u>

We recommend that Treasury consider including in the explanatory materials examples that highlight the type of non-bank lenders that will or will not be captured by the rules. Examples could also illustrate how the de minimis (monetary and customer) thresholds are to be calculated/applied.

Conditions for accredited persons who are relevant non-bank lenders to hold CDR data as a data holder

Under the CDR Rules, clause 7.2 of Schedule 3 sets out the conditions for an accredited authorised deposit taking institution to be a data holder in the banking sector. The draft rules propose extending the conditions in clause 7.2 to relevant non-bank lenders who are data holders of other CDR data under Part 6 of Schedule 3.

Under the draft rules, accredited person non-bank lenders who meet the conditions in clause 7.2 will be permitted to hold more CDR data as a data holder. This amendment may enable more CDR data to be held outside of the CDR framework and increase the duality of privacy protections as raised in my submission[3] to Treasury's CDR Consent Review and Operational Enhancements Rules[4] consultation.

There are also opportunities for Treasury to clarify when a relevant non-bank lender will be permitted to meet the conditions in clause 7.2 including how this applies to voluntary data holders arising from the staged and entity specific application of Part 6.

From a compliance perspective, the application of the conditions should be clear to ensure the adequate protection of consumer data within the applicable privacy framework. This will make it less likely that ADIs could misapply or misconstrue their obligations.

Recommendation 2

To ensure clarity for consumers, entities and regulators, the OAIC recommends Treasury consider amending the draft rules and explanatory materials to be clear about which privacy framework is intended to apply to relevant nonbank lenders and when, including more explicit explanation of the point at which the privacy frameworks change under the draft rules.

Other matters

There may be benefits in amending the phrasing at the top of page 13 of the explanatory materials to include the following underlined words:

[3] Office Of The Australian Information Commissioner - Consumer Data Right Rules: consent and operational enhancement amendments consultation

[4] Consumer Data Right Rules: consent and operational enhancement amendments consultation | Treasury.gov.au

If either the Office of the Australian Information Commissioner (OAIC) or the Australian Competition and Consumer Commission (ACCC), as co-regulators of the CDR, receives a CDR consumer complaint in relation to the non-bank lenders sector, the matter will be transferred to AFCA if it is best dealt with by them.

This is because the transfer of CDR complaints received by the OAIC is not automatic and the legislation requires the OAIC to first form an opinion against certain requirements prior to transfer to an external dispute resolution body.[5]

Finally, there may be a typographical error in draft rule 3.2A, which refences 'subclause 2A.' Treasury may wish to review prior to finalising the draft rules.

Since my appointment I have enjoyed a productive engagement with Treasury, and we look forward to continuing to engage regarding the draft rules and on future guidance to support entities' understanding of the changes to the CDR.

If you have any questions about this submission, please contact Mr Annan Boag, General Manager Regulatory Intelligence and Strategy at Annan.Boag@oaic.gov.au.

Yours sincerely

Elizabeth Tydd
Australian Information Commissioner

6 December 2024

[5] See section 50 of the *Privacy Act 1988*, as extended to CDR by section 56ET of the *Competition and Consumer Act 2010.*