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Consumer data right in non-bank lending: CDR rules and data standards design paper

Thank you for the opportunity to comment on the consumer data right (**CDR**) rules and data standards design paper for non-bank lending. This is a joint submission from the Financial Rights Legal Centre (**Financial Rights**) and Financial Counselling Australia (**FCA**).

1. Executive summary and recommendations

This submission is in two parts.

The first section raises concerns with respect to Treasury's approach to the Privacy Impact Assessment (**PIA**) and argues for the need to conduct an independent PIA, external to Treasury which proactively consults with key stakeholders including consumer groups and privacy specialists by a reviewer expert and experienced in PIAs, the CDR and the comprehensive credit reporting (**CCR**) regime.

This PIA should commit significant resources to conduct a comprehensive analysis and examination of the interactions between the CCR and CDR regimes to identify all privacy and regulatory risks, and recommend appropriate mitigations of these risks – in line with the recommendation of the Office for the Australian Information Commissioner (**OAIC**).[1]

The second section of this submission responds to a number of the questions posed in the rules and design paper.

[1] Office of the Australian Information Commissioner, Report on the draft Consumer Data Right (Non-bank Lenders) Designation 2022 A report by the Australian Information Commissioner, pursuant to section 56AF of the Competition and Consumer Act 2010, September 2022

In summary, this submission argues for the following:

- Buy now pay later (**BNPL**) should be included in the CDR regime if BNPL is regulated and required to meet the CCR regime. Generally though, those entities not subject to the CCR or have chosen not to voluntarily take part should not be included in the scope of the CDR's application to the non-bank lending sector. These entities should not be provided the ability to access information equivalent to repayment history information and financial hardship information and avoid the consumer protections under the CCR.
- Direct debit and recurring payment information from old or recently closed accounts should be included in the data standards and made available to consumers in order to improve cancellation and transferring uses.
- 'Financial hardship information', (**FHI**) must be excluded from data sharing requirements, but further clarity as to what this entails needs to be thought through.
- Repayment History Information (**RHI**) should also be excluded until the issue is more comprehensively considered and appropriate consumer protections are in place.
- In order to prevent the obtaining and misuse of information equivalent to FHI and RHI, all consumer protections built in to 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. This includes, but is 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;[2]
    - 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.[3]
- Any rules developed here must also reflect the fact that different use cases may require different approaches such as checking credit worthiness versus historical investigations into poor responsible lending decisions.
- Direct marketing of high cost credit products be prohibited. Also prohibited should be:

[2] See Resolution 7 of the OAIC 2021 I*ndependent review of the Privacy (Credit Reporting) Code, September 2022*

[3] Section 67 of the National Credit Code, schedule 1 of the *National Consumer Credit Protection Act 2009*

    - for-profit budgeting services and other debt management use cases targeting vulnerable consumers;
    - the on-sale of identified and de-identified data for marketing or any other purpose;
    - price optimisation practices including personalised pricing;
    - inappropriate price discrimination targeting those experiencing financial hardship; and
    - offering incentives to the commercial exploitation of personal data.
- A fiduciary duty should be introduced and applied to all CDR participants.
- Since the concept of "trusted advisors" breaches the objectives of the CDR legislation it should be replaced with a tiered accreditation system.
- In order to improve Treasury's understanding of the impact on vulnerability and decision-making, we recommend senior leaders (and other CDR stakeholder decision makers) take part in Financial Counselling Australia's A Day in the Life program.[4]
- Treasury and the Data Standards Body should conduct specific research into the decision-making processes of those experiencing financial hardship with respect to the purchasing of financial service products, and their relationship to data sharing practices.
- The government should provide funding to the not-for-profit sector to develop the CDR tools and applications for mooted use cases that it is relying on to ensure consumers experiencing financial hardship will be appropriately served by the CDR.
- With respect to the impact of the non-bank lending sector's designation on joint account holders, the rules, guidance and standards must be updated to require that the non-disclosure option applies by default rather than pre-approval. Further amendments to the joint account data standards should be implemented.

[4] Financial Counselling Australia's A Day in the Life

1. Approach to the Privacy Impact Assessment

We continue to be concerned with the way Treasury are conducting Privacy Impact Assessments (**PIAs**).[5] Best practice requires that the PIA be conducted, not as an add-on to a consultation on the rules and design but:

- separate and distinct to this process;
- be independent of and external to Treasury;
- with proactive consultation with key stakeholders including consumer groups and privacy specialists;
- by a reviewer expert and experienced in Privacy Impact Assessments;
- conducted at a time early enough to influence the development of the regime.

It is not clear that this will be the case here. The non-bank lending rules and data standards paper states that:

> *Treasury will also be conducting a Privacy Impact Assessment (PIA) considering the privacy risks of making the non-bank lending Rules. Treasury seeks feedback on any privacy issues or risks relating to the nonbank lending Rules that should be addressed in the PIA.*

As Financial Rights pointed out in 2018 when Treasury drafted the first PIA of the CDR itself, this approach is not appropriate due to clear conflicts of interest and it not in keeping with the OAIC guidance.

Following our raising this issue, Treasury instituted true independent, external PIAs for most iterations of the rules drafting process. In these PIAs an external law firm was engaged to draft the PIA, where they conducted proactive interviews with stakeholders to identify privacy risks and seek solutions to those risks.

This does not seem to have been the case with the sectoral assessment for non-bank lending. That PIA attached to the sectoral assessment, does not name an independent reviewer, stating:

> *The privacy risks examined in the PIA were identified through consultation with stakeholders, as well as engagement with the OAIC and specialist privacy consultants. The PIA also examines privacy risks that were raised by stakeholders to related CDR consultations, such as the telecommunications sectoral assessment consultation, where it was considered they would also be applicable to the non-bank lending sector.*

No proactive contact was made with consumer groups by an independent reviewer to discuss the unique privacy risks related to non-bank lending. The PIA was also far from comprehensive, not touching on some of the privacy issues raised by consumer groups in our previous submission, nor fully considering the mitigation strategies put forward.

[5] Financial Rights outlined these general concerns to the Independent Statutory Review

We note that subsequent to the release of this PIA and sectoral assessment that the OAIC released its *Report on the draft Consumer Data Right (Non-bank Lenders) Designation 2022 report*.[6]

In this report the OAIC recommended that a PIA be conducted with "proactive consultation with consumer advocacy groups." We have yet to be proactively contacted and/or consulted by either Treasury or an appropriately engaged external, independent PIA reviewer.

We also note that the OAIC recommended a series of matters that need to be included in the PIA including:

- how the proposed exclusion of financial hardship information intersects with requirements to disclose financial hardship information under Part IIIA of the *Privacy Act*;
- how participants can be supported to ensure compliance under the CDR and credit reporting system and whether any amendments to the CDR rules, consumer experience standards or other risk mitigations are required to better enable participants to understand and comply with their obligations under the two regimes;
- whether the sharing of financial information in the CDR not ordinarily subject to Part IIIA reporting requirements may enable credit providers to undertake credit assessments which are supported or supplemented by financial information not subject to the protections under Part IIIA;
- whether additional CDR rules or protections are required for consumers where financial information, or aggregated CDR data, is used to assess a person's credit worthiness outside of the scope of Part IIIA; and
- to support its consideration of the interaction between the CDR and Part IIIA of the *Privacy Act*, and the increased potential for credit information subject to Part IIIA to be shared following the designation of the non-bank lending sector, Treasury should engage with the Attorney-General in relation to the consultation on the review of credit regulation under Part IIIA.

The current rules and design paper does not meet any of these recommendations. The rules and design paper merely touches upon the issue and asks for input on some of these issues. It does not provide a thorough-going analysis or consideration of the complex interactions of the two regimes, and the potential impact on the privacy of consumers via the increased speed and ability to access and share sensitive financial information and credit history.

The serious consequences of the interaction between the CDR regime and the CCR regime requires a separate comprehensive investigation, assessment and consideration conducted by independent experts experienced in both regimes.

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[6] Office of the Australian Information Commissioner, Report on the draft Consumer Data Right (Non-bank Lenders) Designation 2022 A report by the Australian Information Commissioner, pursuant to section 56AF of the Competition and Consumer Act 2010, September 2022

Privacy, confidentiality, safety and security issues are central to the sharing of data and its regulation via the CDR. This necessitates at a minimum that the PIAs are conducted in a way that meets best practice.

Anything less is unacceptable and will directly feed the growing lack of confidence, the consumer movement has in the development of a safe and secure Consumer Data Right.

2. Responses to the questions posed by the rules and design paper

What products are in scope?

6. Is the proposed list of products in scope for the CDR appropriate for the non-bank lending sector?

We assume small amount credit contracts and medium amount credit contracts are captured under "personal loans".

The joint consumer submission to the current consultation on regulating buy now, pay later has argued that buy now pay later should be subject to the credit law, including responsible lending obligations, and included in the CCR regime[7]. If this were to be enacted, then we support the inclusion of buy now pay later products in the CDR, with the protections outlined in this submission put in place.

If, for some reason, they are not included in the CCR regime, we maintain the position that they should not have access to the CDR since, if they were, they would have an ability to gain access to information equivalent to repayment history information and financial hardship information, misuse this information (through inappropriate risk segmentation and price discrimination) and avoid the consumer protections in place under the CCR.

We maintain our long-held position that screen scraping should be prohibited. The only reason these organisations can obtain this information currently is through screen scraping.

7. For the avoidance of doubt, should reverse mortgages be specifically referenced in the product list?

Yes. Clarity and detail is preferable.

Historical data and closed accounts

13. Is the proposed approach to historical data and closed accounts appropriate for the non-bank lending sector?

The rules and design paper proposes that CDR data that is not required consumer data includes data:

> *"where an account has been closed for any period of time: all data on direct debits."*

We understand that this is already contained in the banking rules.

Consumers regularly have issues with respect to direct debits (withdrawing money from your bank account) and recurring payments (from a credit card). It is very difficult for a consumer to identify all their direct debits and recurring payments, let alone know that there is a difference between the two and understand the consequences of that difference. This makes transferring or cancelling direct debits and recurring payments difficult, making it harder for consumers to

[7] We have argued BNPL should be subject to mandatory CCR, but whether or not this is enacted, they should not have access to CDR unless they are subject to the credit law and all the protections that entails. Being subject to the credit law will automatically result in access to the CCR regime.

manage their own money. Problems with cancellation of direct debits, for example is well documented since banks still have low rates of compliance with commitments under the banking code to cancel direct debits.[8]

Another issue is the difficulties in transferring multiple direct debits and recurring payments to a new account which can, at times, need to occur after an account has been closed. A key use case of the CDR in finance is to streamline this process and enable consumers to:

(a) obtain a list of direct debits and recurring payments to transfer or to consider for budgeting purposes; and

(b) in a CDR with action initiation, to cancel, transfer or initiate new direct debits and recurring payments.

We are concerned that excluding direct debit and recurring payment information from old or recently closed accounts would impede this use case for consumers. If this is the practical result of this rule, this needs to be reconsidered and, access to these details needs to be retained for a reasonable period.

What data is excluded from data sharing requirements?

14. Should 'financial hardship information', as defined by the credit reporting regime, be explicitly excluded from data sharing requirements? If so, are there implications for doing so given the interaction with the credit reporting regime?

As detailed above we recommend that a comprehensive analysis and investigation of the interactions of the CCR regime and the CDR regime be conducted by an independent and external PIA proactively consulting with key stakeholders.

Addressing this one element of the interaction of the CCR and CDR regimes, we support 'financial hardship information', (**FHI**) as defined by the credit reporting regime, being excluded from data sharing requirements.

However we seek clarity as to what this will cover and what will by implication be included.

FHI is defined under the *Privacy Act* at section 6QA(4) and captures permanent variation arrangement and temporary relief or deferral of obligation arrangements. Financial hardship information is then included as a code on a credit report to show that a consumer has entered into a financial hardship arrangement and the type of arrangement. This is specific to the credit reporting regime. The credit report does not include the reason for the hardship arrangement, nor the details of the arrangement.

FHI impacts upon Repayment History Information (**RHI**) in that during the financial hardship arrangement, a consumer's repayment history will be reported against that arrangement and there will be a hardship indicator next to their RHI. The indicator is either a:

[8] Banking Code Compliance Committee, BCCC compliance update: cancellation of direct debits, September 2021

- "A": Temporary Financial Hardship Arrangement
- "V": Variation Financial Hardship Arrangement

FHI is also subject to additional protections under the *Privacy Act* and the *Credit Act*, including, but not limited to:

- strict provisions around when a credit reporting body can disclose FHI;
- a prohibition against it being used by credit reporting bodies in the calculation of credit scores;
- FHI is only kept on a credit report for 12 months. After this time, it must be deleted; and
- a prohibition on recipients of FHI from refusing to provide further credit or reducing a credit limit based on FHI.[9]

Two issues arise out of this.

First, it is not clear whether RHI – information specific to the credit reporting regime – will also be either excluded or included as a dataset under the CDR. Given FHI is referenced specifically, we assume by its absence that it will.

Does this mean that the dataset of RHI codes will be included in the CDR? In other words, will the 0 or tick (indicating payments up to date), 1-6 (indicating how many months repayments are overdue or an X indicating repayments are 7 or more months overdue be included in the CDR? This is not clear.

RHI information is incredibly sensitive for people concerned with their credit rating and ongoing ability to obtain credit. Protections have been built into the CCR to ensure that consumer privacy is respected, as per the objectives of Part IIIA of the *Privacy Act*.

Accessing RHI under the CDR for uses linked directly to the limited use cases under the CCR, with the consumer protections built into these sharing arrangements would be acceptable. However, the use (or misuse) of this highly sensitive information outside of the bounds and protections of the CCR regime would be unacceptable. This includes use of RHI for use cases outside of that foreseen by the CCR regime or access, and use of RHI by those participants (and so called "trusted advisors" who are not subject to the regime).

We believe RHI is specific to the CCR regime and should also be excluded until the issue is more comprehensively considered and appropriate consumer protections are in place.

Secondly, there is the outstanding issue of proxy or equivalent indicators of FHI and RHI that are available to all CDR participants (CCR participants or otherwise), through simple analysis of transaction and product data to obtain the same information.

It will be very easy for a CDR participant to look at a consumer's transaction history, and product data and identify someone's repayment history and whether a financial hardship arrangement was in place outside of the 12 month period that FHI is meant to be limited to. For example, a

[9] Section 67 of the National Credit Code, schedule 1 of the *National Consumer Credit Protection Act 2009*

mortgage repayment halving for 6 months three years ago, and then returning to normal, or a mortgage repayment permanently varying. This concern is similarly raised in OAIC's report on non-bank lending.[10]

Merely excluding FHI from data sharing in the CDR does not solve the issue. Even excluding RHI from this CDR as we recommend, does not solve this issue.

Protections must be implemented to ensure that sensitive information equivalent to that in credit reports is not obtained, misused or abused by CDR participants both subject and not subject to Part IIIA of the *Privacy Act*.

We recommend that all consumer protections built into the credit reporting regime including under the Legislation and Code must be built into the CDR regime, including but not limited to:

- limiting access to transaction history to 12 months when it is accessed for the purpose of assessing a credit application - so that temporary setbacks do not have a lasting impact on one's credit worthiness;
- limiting what a lender can do with equivalent FHI e.g., a lender cannot use the information as the sole basis for closing a credit card or reducing a limit;
- preventing information 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 not able to access CCR from obtaining or asking for CDR data for purposes such as the assessment of rental applications;[11]
- limiting the circumstances in which other lenders can be told about financial hardship arrangement – so that other lenders can be told if you apply for another loan with them, but not for other reasons; and
- prohibiting da recipients from refusing to provide further credit or reducing a credit limit based on equivalent FHI.

This would be in line with the OAIC view that "the objectives of Part IIIA [be] maintained and the purpose of credit reporting is not undermined" and "the limitations on using and disclosing credit reporting information in Part IIIA are applied where that information has the potential to be shared in the CDR."

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[10] "While there are specific exclusions to the types of credit information, as defined under s 6N of the *Privacy Act*, that can be shared in the CDR, other credit information that is not specifically excluded, may be shared via the CDR.39 In the banking sector, this may include information such as repayment information on a home or car loan. The proposed expansion of the CDR to the NBL sector is likely to see a substantial increase in the range of credit reporting information, or information equivalent to credit reporting information, which is shared within the CDR, with consumers able to share financial information about their use of non-traditional lending products such as payday loans and BNPL products, some of which may not be subject to Part IIIA." OAIC, 2022

[11] See Resolution 7 of the OAIC 2021 I*ndependent review of the Privacy (Credit Reporting) Code, September 2022*

Given limited time and resources in contributing to this consultation, we have not undertaken a systematic identification of every consumer protection in the CCR that will need to be a part of the CDR non-banking rules update.

We reiterate the need for an independent and external PIA systematically do this work and identify all the consumer protections in the CCR legislation (including the regulations and the credit reporting code and its recent update) in order to be brought into the rules for non-bank lending.

In addition, any rules developed must reflect the fact that different use cases may require different approaches.

For example, using CDR data for the purposes of assessing credit worthiness and entitlement to credit should be limited to 12 months of data as required under the CCR, however obtaining CDR data for the purposes of advising people of their rights and undertaking an investigation of responsible lending decisions (a common practice of financial counsellors and consumer credit legal centre lawyers) should allow for more historical data. There may be other use cases for historical data, but it should not be allowed where it would undermine the careful balance struck in the *Privacy Act* between facilitating lending and protecting privacy.

We remain concerned that Treasury have yet to fully consider the interaction of credit reporting and CDR in a comprehensive manner. The sectoral assessment final report provided superficial analysis of this interaction and ultimately fell back on the trope that CDR will be of value with little to back this assertion, stating:

> *Treasury considers there is overall benefit in this information being available in the system as consumers are in control of what data they share and for what purpose. For example, consumers experiencing financial hardship should be able to opt-in to share their information to support financial counselling or budgeting services.*

This approach ignores the decade of work that the Attorney General's Department, the Australian Retail Credit Association, the OAIC and consumer groups have put in to ensure privacy and confidentiality issues are full considered in developing the credit reporting system so that consumers and their privacy are appropriately protected in ways that balance the legitimate needs of the lending sector.

Furthermore there continue to be a number of troubling assumptions underpinning Treasury's approach to this issue and protecting people experiencing vulnerability in the CDR more generally.

Firstly, Treasury continue to assume that people experiencing vulnerability – especially those experiencing financial hardship can in every instance provide genuine consent, free from the pressures placed upon them by their need for credit (or a budget or debt solution) and the willingness to ignore potential secondary and problematic uses cases put to them by a for-profit, debt management firm. It demonstrates a disappointing lack of understanding of the real world, lived experience of financial hardship and other vulnerabilities.

Over-reliance on consent and disclosure as the central risk mitigant for the risks of sharing data places the entire onus on consumers to understand the consequences of these complex decisions and make decisions based upon a full evaluation of the risks rather than the CDR participants who are much better placed to know. This is unrealistic and unfair.

Financial service providers sell their products and services as solutions to people's problems with little to no explanation of the risks involved, and the real world consequences of agreeing to sharing data. People looking for solutions to their credit and debt problems are focussed on obtaining credit or finding a solution to their debt crisis and not at all focussed on every secondary (or even primary) use case put to them. Nor do people generally understand the consequences of sharing their data including price discrimination in the form of high cost credit, or being marketed further financial products that they do not need or may cause them harm. The relationship between a potential high-cost lender and someone experiencing financial hardship is one characterised by an inherent imbalance of power where the consumer feels they have little choice but to agree to any and all consents, in order to obtain the credit or other assistance they believe they need.

As the Senate Economics Committee found:

> *It is difficult to escape the conclusion that many [non-bank lending] providers' business models depend on vulnerable consumers who have limited awareness of other product options, limited negotiating power, and limited propensity to complain about improper or illegal behaviour.*

There also remains minimal research conducted by Treasury and the Data Standards Body into the behaviour of consumers experiencing financial hardship and their decision-making processes with respect to interactions with financial services sector and data sharing under the CDR, and whether the disclosure and consent will in fact protect consumers. Without this work, there remains little to justify the reliance placed on these by Treasury.

Secondly, there remains an assumption by Treasury that there will somehow be tools, apps and solutions developed using the CDR that financial counsellors will be able to use to analyse client financial data and provide appropriate assistance and advice. This is regularly put forward as a key use case justifying the sharing of data with few restrictions.

It is not clear to us that Treasury should assume this to be the case since it requires significant funding and expertise to develop and create such a tool, which the not-for-profit financial counselling sector does not have. It would also not necessarily be appropriate for members of the financial counselling or community legal centre sector to work with many specific CDR for-profit entities in a pro bono fashion given our role in working with clients that could put us in conflict with these entities.

Our fear, and current expectation, remains that CDR will lead to the development of more for-profit models of debt management which has already led to significant harm for consumers and will lead to more via the development of CDR based business models.

Unless government were to intervene and provide funding to the not-for-profit sector to develop these CDR led solutions – the creation of these tools are unlikely to ever take place.

In order to address these concerns we recommend that:

- Treasury CDR section senior leaders (and other CDR stakeholder decision makers) take part in Financial Counselling Australia's A Day in the Life program[12] to obtain a better

[12] Financial Counselling Australia's A Day in the Life

understanding of both the work of financial counsellors and the situations many consumers experiencing financial hardship find themselves in;

- Treasury and the Data Standards Body conduct specific research into the decision-making processes of those experiencing financial hardship with respect to the purchasing of financial service products and obtaining service from this sector, and their relationship to data sharing practices; and
- Government provide funding to the not-for-profit sector to develop the CDR tools and applications for mooted use cases that it is relying on to ensure consumers experiencing financial hardship will be appropriately served by the consumer data right.

15. Are there other data sets that should be explicitly excluded from the scope of 'required consumer data' on privacy grounds?

As detailed above, RHI and transaction data should be limited to 12 months, when accessed for the purpose of assessing credit worthiness.

16. Are there any other interactions between the CDR and the credit reporting regime that present compliance issues or where entities have conflicting obligations?

There are a series of interactions that will require further analysis, consideration and mitigation. These include but are not limited to the following:

- Consent is not a basis for the collecting, using or disclosing of information and is focused on the disclosure of information between credit providers and credit reporting bodies. Introducing consumer consent into disclosing this information be it through proxy or equivalent information gained via transaction data or the inclusion of credit reporting datasets can lead to problematic outcomes including increased risk segmentation, price discrimination and price optimisation.
- Through analysis of transactional data, entities who are not a part of the credit reporting system including those who have been specifically excluded including utilities, telecommunications, real estate agents, landlords, employers, foreign credit providers, foreign credit reporting bodies or insurance companies etc. will be able to access equivalent material. For example, a real estate agent will be specifically prevented from asking consumers to supply a credit report to apply for rental accommodation, [13] but there is nothing preventing them from asking for financial data via a CDR platform.
- The OAIC raises significant issues of complexity in complying with two regimes – the obligation under both being different.

We are certain that there are more unintended consequences arising out of the interaction between these two regimes. Asking for input in this consultation is not enough and given the

[13] Resolution 7 of the OAIC 2021 Independent review of the Privacy (Credit Reporting) Code, September 2022

limited resources of the consumer sector to undertake this critical work, it is an inappropriate approach to analysing this issue.

We once again reiterate the need for an independent and external PIA to comprehensively consider how the sharing of CDR data interacts with the credit reporting regime and the obligations of credit providers under Part IIIA, as recommended by the OAIC.

Secondary users, joint accounts and nominated representatives

18. Are there specific features of the non-bank lending sector, or products, that mean sector-specific variations to the concepts of secondary users, joint accounts or nominated representatives will need to be considered?

We remain of the view that the decision to introduce an opt-out consent regime for joint account holders contrary to the regime's own consent principles needs to be reversed.

The Statutory Review recognised the potential risks identified in submissions by the opt-out model (as well as the potential frictions an opt-in would present to the consumer) and ultimately found an insufficient basis to reassess the model. The Reviewer suggested time should be given to allow the system to mature and develop, before further considering a change.

We respectfully disagree with this approach. It is flawed because, firstly, the original opt-in iteration of the rules were not given similar time before a change was implemented. Further it is an approach that does not seek to prevent harm happening in the first place but actively places consumers in harm's way – essentially waiting to see if real world harms occur before making a switch back to a more consistent approach. This is not an approach that places the consumer at the centre of the Consumer Data Right. Nor is it the way policy development should take place.

With respect to non-bank lending, by expanding the ability for joint account holders to obtain higher cost credit from the non-bank lending sector, without the active prior consent of their joint account holder, the potential for harm by perpetrators of family violence and economic abuse increases exponentially.

The harm is also more likely to take place given the absence of effective and enforceable codes of practice in the non-bank lending sector that make commitments to take steps to support vulnerable consumers – unlike general commitments made under the Banking Code of Practice and the Customer Owned Banking Code of Practice. For example, there are no commitments from the non-bank lending sector to make contact details easily available to support people experiencing a vulnerability.

Furthermore the current design standards and guidance on joint accounts and sharing are weak and ultimately ineffective.

For example, it is not mandatory for a data holder under the design standards to

> *"provide further information about any services or processes in place for supporting vulnerable consumers or reporting risks of physical, psychological, or financial harm or abuse to the data holder."*[14]

As well, the Joint Account implementation guidance merely "encourages" data holders to develop and implement processes to protect vulnerable consumers.[15]

While there is some thought given to the situation where a vulnerable joint account holder may wish to use the CDR regime and not alert their partner, there is little to no regard to the situation where an abuser seeks to use the CDR regime against the interests of a victim survivor joint account holder.

For example, the Joint Account implementation guidance only "encourages" data holders to notify relevant consumers that the pre-approval option will apply by default to their joint account[16] rather than require it to alert people to something that may either surprise them when something occurs or when harm arises.

Further, the rules regarding the withdrawal of approval by a joint account holder do not explicitly address what occurs to the data that has already been shared. The guidance[17] only states that "data from the joint account must no longer be shared with that particular accredited person." In the case of an authorisation to share joint account data in an ongoing way, this guidance may be interpreted as only requiring stopping sharing from the point of the withdrawal onwards. The Consumer Experience Guidelines regarding withdrawal do not explicitly address this issue either.[18]

Finally there continues to be no requirement to have a clear pathway for a consumers to alert a data holder or ADR that they may be experiencing some form of vulnerability, let alone any requirements for CDR participants to proactively identify vulnerability when such vulnerability is clear.

This is not good enough. It makes treating people experiencing real difficulties with respect and providing pathways for empowerment as merely an option to take up … or not. In doing so it empowers CDR participants to not provide appropriate services and processes for vulnerable people at all, since it is not necessarily in their commercial interest to do so without a strict requirement. This is especially the case for those participants who not subscribers to a Code of Practice that requires such steps – i.e. most of the non-bank lending sector.

We recommend that the rules, guidance and standards be updated to:

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[14] Consumer Data Standards, Notification Standards, Joint account notifications

[15] Para 11.1, Treasury, Joint account implementation guidance for version 3 of the rules and onwards, January 2022

[16] Paras 9.5-9.8, Treasury, Joint account implementation guidance for version 3 of the rules and onwards, January 2022

[17] Paras 9.7, Treasury, Joint account implementation guidance for version 3 of the rules and onwards, January 2022

[18] Consumer Experience Guidelines, Withdrawal,

- require that the non-disclosure option applies by default rather than pre-approval;
- require all CDR participants to develop and implement processes to protect vulnerable consumers;
- require all CDR participants to have a simple way to contact the participant to tell the CDR participant that they are experiencing a vulnerability and that they have concerns that they may be subject to abuse via the sharing of their data;
- require all CDR participants to proactively identify vulnerability;
- clarify or explicitly require that where a joint account holder withdraws approval all data that has already been shared must be deleted;
- require CDR participants to provide joint account holders the ability to withdraw sharing of joint account data with all pre-approved authorisations at once, rather than placing the onus on the joint account holder to withdraw each and every pre-approved authorization individually; and
- in the event that pre-approval remains the default against the interest of consumers, the rules must require all Data Holders explicitly notify relevant consumers that the pre-approval option will apply by default to their joint account, explain the consequences of this default and how to easily change this.

Internal dispute resolution

23. Are the internal dispute requirements outlined in Regulatory Guide 271 an appropriate standard for the non-bank lending sector?

Yes.

However these standards should apply not just to non-bank lending data holders but all participants including data recipients, 'trusted advisors' and any entity accessing data derived from the CDR ecosystem, where there is no equivalent set of standards or regulations to meet.

External dispute resolution

25. Is AFCA the most suitable EDR provider for CDR consumer complaints in the non-bank lending sector?

Yes.

Additional consumer protection measures

26. What are the specific behaviours by non-bank lenders that are of concern where consideration should be given to additional rules for consumer protection purposes?

Targeting vulnerable consumer especially those experiencing financial hardship

The number of Australian's experiencing financial hardship is significant. Research in 2019 found that 2.1 million Australians are under severe or high financial stress.[19] And for many of them they have no choice but to engage with the non-bank lending sector many of whom have built business models that specifically target financial hardship with higher priced credit. These include:

- small amount credit contract providers (pay day lenders),
- medium amount credit contract providers,
- consumer lease providers,
- Buy Now Pay Later services,
- Wage Advance services; and
- unlicensed financial service providers including avoidant credit models such as that offered by Cigno.[20]

We support prohibiting CDR participants from seeking consent for direct marketing from a consumer in relation to certain high-cost products, such as short-term consumer credit contracts (also known as payday loans) and consumer lease. This would be in line with recent reforms to the *Credit Act* that ensures personal information of a consumer (or a prospective consumer) is not misused by a consumer lease provider to market further products and services to the consumer[21] or being sold to third parties, and rules that pay day lenders must not make, or arrange for the making of, an unsolicited communication to the consumer.[22]

We are also aware from our casework that some non-bank lenders obtain consumer's bank account passwords to screen scrape financial data. In so doing they hold on to these passwords and use them at later times to identify if a bank account is low in funds. If the account *is* low in funds, they then proceed to spam the consumer with direct marketing material offering further high-cost loans. While access to quick credit may lead to benefits for some consumers, the reality is that this unscrupulous behaviour pushes many people into a spiral of debt.

Unfortunately, this unethical practice is highly likely to become commonplace given the ease of doing so under the CDR. This is because Privacy Safeguard 3 - regarding collection of solicited personal information - is drafted in such a way that it can give rise to abuse of the consent provisions. There are currently few, if any, restrictions on how often, how much or how regularly a non-bank lender can examine a consumer's financial data in order to identify financial hardship and subsequently target them with offers of additional credit. There is also little preventing them from selling or providing this information to other related or unrelated businesses who

[19] NAB and the Centre for Social Impact, Financial Security and the influence of economic resources, December 2018, https://www.csi.edu.au/media/2018-Financial-Resilience-in-Australia.pdf

[20] ASIC has attempted to use its product intervention powers to prevent Cigno avoiding the credit laws. See https://asic.gov.au/regulatory-resources/find-a-document/consultation-papers/cp-355-product-intervention-orders-short-term-credit-and-continuing-credit-contracts/

[21] Subsection160CB *National Consumer Credit Protection Act 2009*

[22] Subsection133CF(1)-(3) *National Consumer Credit Protection Act 2009*

target people in financial hardship such as debt management firms. Critically, Privacy Safeguard 3 lacks an explicit "fair collection" requirement which would act to prevent and discourage unfair practices.

We support prohibiting the regular (or ad hoc) access and collection of financial data to identify when people are experiencing financial hardship and subsequently use this information to directly market further high-cost credit products or sell this information to others.

Variety of fee, charges and interest, overall costs and comparison interest rates

Many non-bank lending products including pay day loans and consumer leases are structured in ways that obscure the true cost of a product. When the ever-growing range of fees (including establishment fees and monthly account service fees) and other charges are taken into account, these loans typically attract comparison annual interest rates of over 100%.

The data standards need to take into account the variety of fees and charges, as well as other business model structures, in order to enable full and complete comparison under the CDR - to enable an apples with apples comparison.

The structure of the CDR data standards should not be able to be taken advantage of to obscure or hide the true cost of high cost credit products in the non-bank lending sector.

Misleading use of interest free periods

Reference to interest free periods in marketing can be misleading and lead to poor consumer outcomes. ASIC has for example launched legal action against Latitude Finance Australia (Latitude) and Harvey Norman Holdings Ltd (Harvey Norman) over the promotion of interest free payment methods.[23] Interest free periods also need to be considered when developing the data standards for non-bank lending products to ensure that comparison services are able to analyse the true costs of financial products.

Price discrimination and price optimisation

The speed and analytical power that the CDR can bring to use cases centred on financial data will concurrently play a central role in increasing risk segmentation and the targeting of financial hardship through inappropriate price discrimination, price optimisation (the practice of determining customers' response to higher prices for products and services) and high cost credit. Because of this, the CDR has the potential to widen the gap between the credit-haves and the credit-have-nots. While this can occur currently, the CDR lifts this ability to new levels, and is why rules need to be in place under the CDR to limit misuse – and should not be left to current sector regulations. In other words, CDR introduces something new to the financial services sector that needs to be restrained on its own terms.

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[23] ASIC, 22-270MR ASIC sues Latitude Finance Australia and Harvey Norman Holdings for allegedly misleading interest free advertising, 5 October 2022

Comparison services are often used as examples of key use cases – but there is nothing guaranteeing that the pricing or offers will be free from price or algorithmic discrimination nor price optimization strategies – strategies that can seriously impact those experiencing financial hardship.

It is important that Treasury introduce rules that restrict this behaviour. There are many approaches available here:

- introducing rules prohibiting price discrimination, algorithmic bias or price optimization, at the very least applied to those use cases that promote high-cost credit and fringe lending models;
- introducing a data fiduciary obligation to ensure that the best interests of the consumer are prioritised;
- prohibit unfair trading practices;
- increased oversight over CDR participant behaviours and practices including the obligation to share algorithms and other commercially sensitive decision-making systems with regulators; or
- prohibiting profiling or risk segmentation that leads to unfair, unethical or discriminatory treatment contrary to human rights law.

Ongoing noncompliance with the existing regulatory framework for consumer leases and payday loans

The 2019 Senate committee report was concerned about ongoing noncompliance with the existing regulatory framework for consumer leases and payday loans and included commentary about pay day lenders failing to comply with responsible lending obligations and pushing borrowers to accept shorter contract terms despite this being against their interests.

The committee also found that providers of pay day loans and consumer leases structure their businesses to avoid regulatory obligations.

The committee recommended that the government provide additional funding to strengthen the capability of the Australian Securities and Investments Commission to police the small and medium credit contract sector and consumer leasing sector.

We note that the government has recently introduced new laws applying to small amount credit contracts and consumer leases.

We therefore think it is timely that ASIC and the CDR regulators should have further funding to ensure that they are able to provide oversight of the non-bank lending and high credit contract and consumer leasing sector use of the CDR.

27. Are there any non-bank lending products that should be excluded from the CDR?

We recommend excluding all non-bank lenders and products that are not required to take part in the CCR regime (including but not limited to buy now, pay later products) and those who have not voluntarily engaged with the CCR, in order to minimise issues arising from interaction of these two regimes and prevent avoidance of the consumer protections baked into the CCR regime.

Avoidant credit models should also be excluded.

28. Should the rules prohibit Accredited Data Recipients from seeking certain types of consents, such as a direct marketing consent, from a consumer in relation to certain high-cost products, such as short-term consumer credit contracts (also known as payday loans) and consumer leases?

Yes.

We have outlined a number of use cases and consents of high-cost credit and exploitative debt management and budgeting services that should be prohibited in this submission.

Direct marketing is a key use case and includes:

- marketing of one's own products and services beyond that originally requested and authorized – in other words unsolicited offers to current or former customers;
- marketing of partner organisations and third-party high cost credit product and services; and
- sales of data to third parties to directly market high-cost credit products

Other implicit and explicit uses of data that should be prohibited include:

- for-profit budgeting services and other debt management firms targeting vulnerable consumers;
- the on-sale of identified and de-identified data for marketing or any other purpose;
- price optimization practices;
- inappropriate price discrimination targeting those experiencing financial hardship; and
- offering incentives for the commercial exploitation of personal data.

29. Are there other measures that could be considered in the rules for the purposes of meeting consumer protection outcomes?

We have outlined a series of recommendations elsewhere throughout this submission.

We note that the issue of whether a fiduciary duty should apply to CDR participants was raised by both the ACCC and the previous joint consumer submission. In response, the sectoral assessment stated that:

> *Treasury will consider this recommendation in the context of the broader CDR framework.*

We have yet to see this consideration. Now is a good time to introduce this obligation in order to balance the heavy burden placed on consumers by Treasury's over-reliance on consent and disclosure.

We also reiterate our objection to the concept of "trusted advisors" noting that the sharing of sensitive financial data to non-accredited parties is in breach of the objectives of the Act at section 56AA(a)(ii) which requires accredited persons to be the only ones able to access data through the CDR.

Consumer experience considerations

30. Are the existing sector-agnostic Data Standards appropriate for the non-bank lending sector? Do any sector-specific accommodations need to be considered?

This submission outlines a number of recommended changes to existing consumer experience standards re: joint accounts.

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please contact Drew MacRae, Senior Policy Officer, Financial Rights on (02) 8204 1386 or at drew.macrae@financialrights.org.au

Kind Regards,

Karen Cox
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Financial Rights Legal Centre