AUSTRALIAN
RETAIL
CREDIT
ASSOCIATION

Market Conduct and Digital Division
Treasury
Langton Cres
Parkes ACT 2600

By email:

11 October 2023

Re: Consumer Data Right rules – expansion to the non-bank lending sector

Dear Madam,

Thank you for the opportunity to provide feedback on the exposure draft rules and associated material, that would provide for expanding the CDR to the non-bank lending ('NBL') sector. We support the adoption of a staged implementation approach. However, we are concerned that the proposed timeframes are still too tight.

In extending CDR to the NBL sector, NBLs are likely to need to rely on a small pool of third-party specialists to implement data holder capabilities. In addition, CDR in the banking sector is in its infancy, with insights into low use of the CDR still to be understood. Also, there is the potential for other changes relevant to CDR (e.g., banning of screen scraping), which will also need to be resourced or may require changes to the CDR regime's design. In light of this context, we would argue that the start of implementation of CDR for the NBL sector should be further delayed and the timeframe between each stage extended.

In the table in Annexure A (below), we provide more detailed feedback. Given the importance of the CDR Rules to our members, we would appreciate an opportunity to discuss this feedback with you in person. In the meantime, if you have any questions about this submission, please feel free to contact me.

Yours sincerely,

Dimitri Diamantes
General Manager – Policy & Regulation

AUSTRALIAN RETAIL CREDIT ASSOCIATION

ANNEXURE A

TABLE 1: FEEDBACK ON EXPOSURE DRAFT

Issue	**Proposed Amendments [including extracts from draft Explanatory Materials]**	**ARCA Feedback**
What products are covered by data sharing obligations?	*Covered products for the banking and non-bank lenders sectors* [Covered products for NBL sector include (a) a personal credit or charge card account; (b) a business credit or charge card account; (c) a residential home loan; (d) a home loan for an investment property; (e) a mortgage offset account; (f) a personal loan; (g) business finance; (h) a loan for an investment; (i) a line of credit (personal); (j) a line of credit (business); (k) an overdraft (personal); (l) an overdraft (business); (m) asset finance (including leases); (n) a consumer lease; (o) a reverse mortgage; (p) a buy now, pay later product.] The intention is that the list of covered products … should capture retail products offered by banks and non-bank lenders. A 'covered product' will be subject to data sharing if it is publicly offered under a standard form contract. A product is not considered to be publicly offered unless the relevant contractual arrangements are subject to only low levels of negotiation. Products offered under modified standard form contracts that result in more advantageous terms for particular customers would be regarded as having low levels of negotiation. A product need not be available to all members of the public in order to be publicly offered. For example, a product offered to consumers who	In relation to 'mortgage offset accounts', the account may be offered in one of two ways. It may be a separate transaction account that is offered by an ADI under an arrangement with the non-bank lender. In this case, the rules will need to address which party the consumer data request should be made to (we assume that it would be the ADI which holds the account). Alternatively, the 'offset account' may consist of a 'sub-account' held by the non-bank lender where that sub-account does not involve a separate financial product.[2] While the customer may perceive two separate accounts, there is, contractually, only one 'product' (i.e. one overall credit contract). Again, the rules and standards will need to address how the data for such arrangements is provided. For example, is the data to be provided separately for each account (i.e.,

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	meet certain eligibility requirements, such as small business consumers, could be publicly offered. An example of a product that is not publicly offered is an 'invitation-only' product offered to select individuals based on criteria that are not publicly available or are commercially sensitive.	home loan account & offset sub-account) or is it to be consolidated to reflect the status of the overall credit contract? We are unsure as to why 'overdrafts' are included in this list. An overdraft is ordinarily linked to a transaction account (so that they cannot be offered by non-bank lenders). We support the inclusion of BNPL products (although, noting that BNPL lenders will need to be given sufficient time to prepare for the obligations). We have not identified any concerns in relation to the criterion that the product needs to be publicly offered.
What data can be provided in response to a valid data request?	The rules require 'required consumer data' and 'required product data' to be disclosed in response to a valid data request. ['Voluntary consumer data' and 'voluntary product data' may be provided in response to a valid data request.] *Required Consumer Data* This data is aligned with the banking sector requirements and pertains to CDR data for which there's at least one CDR consumer. It includes banking sector data or NBL sector data related to a relevant account of the CDR consumer and is held digitally. *Required Product Data*	Overall, we support the proposals. However, we consider that it is important not to assume the same level of sophistication in systems and business processes for non-bank lenders compared to Authorised Deposit Taking Institutions (ADIs). ADIs are subject to the prudential requirements under the Banking Act and, as a result, may have more sophisticated systems and business practices compared to non-bank lenders.

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	This data is aligned with the banking sector requirements and pertains to CDR data for which there are no CDR consumers. It includes banking sector data or NBL sector data about the eligibility criteria, terms, conditions, price, availability, or performance of a covered product. This data is product-specific and is held digitally. Customer data, account data, transaction data, and product specific data are all included in the same definitions as the banking sector. Complex request means a consumer data request that: (a) is made on behalf of a large customer; or (b) is made on behalf of a secondary user; or (c) relates to a joint account or a partnership account	A key example is in relation to holding a 'single customer view'. APRA expects that ADIs be capable of understanding the holistic relationship between the ADI and the customer and, therefore, ADIs' system are likely to be more sophisticated in that respect. It is more likely that a non-bank lender could manage their loans on an 'account by account' basis, rather than on a customer basis. While this should not otherwise change the obligations placed on non-bank lenders in their capacity of data holder, this difference should be considered by Treasury when establishing the rules. For example, this may impact the way the rules and standards apply to providing dashboards and managing joint accounts (including authorisations, impact of domestic abuse etc).
What data is excluded from data sharing requirements?	Account data doesn't include financial hardship information as defined in the Privacy Act 1988. Schedule 3, clauses 1.3, 3.2	We recognise the concerns raised by the unfettered provision of financial hardship information through the CDR regime (where the strict protections of Part IIIA will not apply). However, regard should be had to the implications of hardship information not being disclosed.

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		As we have noted in previous submissions, we consider that outright prohibitions on sharing of otherwise relevant and useful data is not the ideal way to prevent harm being caused by the potential misuse of that data by some recipients. For example, some credit providers offer hardship assistance by way of deferring existing contractual obligations. That is, the contractual payment will remain the same but the customer is not expected to immediately repay those amounts (but, if not paid, they will continue to fall due during the arrangement and need to be addressed at the end). Such an arrangement would be accompanied by a "FHI=A" in each month of the arrangement. If a data recipient receives the detailed account history for that customer (with the customer's consent), they will see that a payment was 'due' (i.e. $1000 per month), not paid (i.e. only $200 was paid) and that the customer was now in arrears by $800. Accordingly, without access to the relevant FHI-flag, the data recipient will be able to readily identify that the customer was in arrears and potentially in 'financial hardship' (because they are not meeting their contractual obligations) but not have the

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		context that the failure to meet the obligations was done in consultation with the credit provider. If the data recipient is using the data for questionable purposes (e.g., offering high-cost credit or debt management services), the mere fact that the customer is in arrears will be sufficient to help that business target those services to the customer. In effect, the CDR regime enables a consumer's hardship to affect their perceived creditworthiness. This has the potential to undermine the policy underlying the CCR regime of restricting who can access hardship information and how it can be used. We note that this is a key example of the limitations of the consent-based model adopted by the CDR regime. The concern is that, generally without awareness of the consequences, individuals are consenting to sharing their information under the CDR with the consequence that protections afforded under the Privacy Act and CDR are undermined. We will provide further commentary on this issue through our submission to the review relating to Screen Scraping.

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<tr><th>Issue</th><th>Proposed Amendments [including extracts from draft Explanatory Materials]</th><th>ARCA Feedback</th></tr>
<tr><td>Definition of eligible consumer</td><td>In order to be eligible in relation to a data holder, a CDR consumer:
must be an individual who is 18 years or older, or a person who is not an individual; and
must be an account holder or secondary user of an open account with the data holder, or a partner in a partnership for which there is an open account with the data holder.
For the banking and non-bank lenders sectors, the account … must be set up in such a way that it can be accessed online. Online access to an account may involve a range of modalities, including access via an online portal (whether by logging in or using a one-time password) or app-based access.

Under the CDR Rules, a ‘secondary user’ of an account with a data holder in a designated sector is a person over 18 who has account privileges in relation to the account and is endorsed by the account holder as a secondary user (see subrule 1.7(1)). A person with ‘account privileges’ is defined in Schedule 3 as a person able to make transactions on an account relating to a covered product.</td><td>Clarification is sought as to the intended scope of the additional criterion (about online access). In particular, we seek confirmation that the online access requirement is met only where the particular account or service has online access activated? In other words, the criterion is not met where, for example, the product allows online access but this is not an automatic account feature and it has not yet been enabled for the particular customer.

We also seek clarification as to what amounts to online access. Arguably, for example, access via a self-service IVR does not meet the requirement.</td></tr>
<tr><td>Staged implementation</td><td><table><tr><th>Threshold for non-bank lenders</th><th>Data Type</th><th>Commencement Date</th></tr><tr><td>Over $10 billion in resident loans and finance leases (on both commencement day of</td><td>Product data request</td><td>Tranche 1 – 1 November 2024
1.</td></tr></table></td><td>We agree, in principle, with having a staged implementation approach for non-bank lenders and basing the stages on data type. In relation to issues raised in our submission for an earlier stage of the consultations on extending the CDR to the NBL sector, we note that the exposure draft clarifies how the threshold test is assessed in the case where loans are due from related parties; clarifies</td></tr>
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<tr><th>Issue</th><th colspan="3">Proposed Amendments [including extracts from draft Explanatory Materials]</th><th>ARCA Feedback</th></tr>
<tr><td></td><td>amending rules and averaged over the previous 11 months) (‘initial provider’)</td><td>Consumer data request (other than a complex request)</td><td>Tranche 2 – 1 February 2025</td><td rowspan="2">that reciprocal data obligations apply to accredited persons (regardless of whether they meet the threshold tests); the averaging limb of the threshold test prevents prematurely capturing providers that momentarily exceed the asset threshold; and that large providers are given more time to implement the reforms.

Off-balance sheet lending

However, we are concerned that, in the case of off-balance sheet lending, data disclosure obligations would seem to be placed on the lender of record rather than the servicer (i.e., the entity that manages the loan and from the customer’s perspective is perceived as the lender). This policy position seems misaligned with the consumer’s likely perception that the servicer holds the consumer’s data and is responsible for it. The position I also at odds with the National Credit Act, where modification of the regulations has the effect that many obligations apply to the servicer.

Further, where the lender of record is a large external trustee, the data associated with small servicers (which may not be captured themselves as a ‘large lender’) would be</td></tr>
<tr><td></td><td></td><td>Complex request*</td><td>Tranche 3 – 1 May 2025</td></tr>
<tr><td></td><td>On a day on or before 1 November 2023, has over $500 million in resident loans and finance leases (both during the calendar month preceding that day and averaged over the previous 11 months) and over 500 customers; or accredited person ((‘large provider’)</td><td>Product data request</td><td>Tranche 1 – 1 November 2024</td><td></td></tr>
<tr><td></td><td></td><td>Consumer data request (other than a complex request)</td><td>Tranche 4 – 1 August 2025</td><td></td></tr>
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<tr><td></td><td>Complex request*</td><td>Tranche 5 – 1 November 2025</td></tr>
<tr><td rowspan="3">On a day after 1 November 2023, has over $500 million in resident loans and finance leases (both during the calendar month preceding that day and averaged over the previous 11 months) and over 500 customers; or accredited person ((‘large provider’)</td><td>Product data request</td><td>On and from the day 12 months after the date the provider becomes a large provider</td></tr>
<tr><td>Consumer data request (other than a complex request)</td><td>On and from the day 15 months after the date the provider becomes a large provider</td></tr>
<tr><td>Complex request*</td><td>On and from the day 18 months after the date the provider becomes a large provider.</td></tr>
</table>
* means a consumer data request that: (a) is made on behalf of a secondary user; or (b) relates to a joint account or a partnership account; or (c) is made on behalf of a CDR consumer who has nominated a representative to give, amend or manage authorisations to</td><td>covered by the data disclosure obligations (assuming the trustee meets the threshold test for being an initial providers or large provider). Although the trustee may be large and arguably be better placed to bear implementation and ongoing costs, these costs are likely to be passed onto servicers, with a potential dampening of competitive pressures. This outcome would seem contrary to the policy position underlying excluding the data disclosure obligations from applying to smaller providers and would concentrate risks and liabilities re data disclosures in a small number or organisations.

As discussed in our earlier submission, we are also concerned that the trustee may continue to have primary responsibility for meeting the data holder obligations (rather than those obligations being held by the relevant servicer). We consider this is not an appropriate outcome given the purpose of such structures and the role of the trustee.

Changes in total value of assets

We are also concerned that a provider that ceases to be a large provider will nevertheless remain subject to the</td></tr>
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	disclose CDR data for the purposes of these rules on the consumer's behalf.	obligations to disclose data. For example, a provider that was a large provider before 1 November 2023, but no longer meets the threshold requirement, will nevertheless be subject to the obligation to disclose data. The policy rationale for this aspect of the exposure draft is unclear. In addition, the tight timeframes for implementation are troubling as is the policy position that providers that are large providers on or before 1 November 2023 have more time to implement the data request requirements than those who become large providers after this date. In our view, large providers should receive the same implementation timeframe regardless of when they become large providers. Further, the time between each tranche for both initial providers and large providers should be increased and the tranches should be further divided. *Business products and services* In addition to the categories (i.e., product data request, consumer data request and complex request) mentioned in the exposure draft of the rules, we would suggest further

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		dividing the implementation tranches in line with whether the products or services are business or personal. More specifically, there should be delayed start dates for the obligations to share data in relation to business products and services. The reason for this approach is that it has been suggested that there is a limited vendor market for supporting NBLs to develop data holder capabilities. In turn, more time is likely to be needed to develop robust data sharing capabilities. *Capacity* Anecdotal feedback suggests that it is likely that almost all non-bank lenders will use third party suppliers to provide CDR functionality, and that there are only a couple of such third party providers able to assist. Given this context, meeting the tight implementation timeframes may be very difficult. *Impact of other CDR-related reforms* Further, there are many other changes to the CDR regime or that are relevant to the regime, including, notably, possible restrictions on screen scraping. Given the

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		resourcing these other changes will require, it is appropriate to expand the implementation schedule for extending CDR to the NBL sector. In our view, delaying implementation for business accounts is appropriate given the broader range of data, compared to personal products and services, that can be requested in relation to business products and services. *Use of CDR in bank sector* We understand that there has been a very low use of CDR in the bank sector. If this is because of design issues, these should be addressed before extending CDR to another sector. It is appropriate that the reasons for that low uptake are understood and addressed before the NBL sector is required to undertake the significant task of meeting their data holder obligations. We note that the current CDR Consent review is an initial step to do this (where that review – and the Screen Scraping review – are likely to identify changes to the existing CDR Rules). In implementing CDR, the NBL sector could

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		then use insights gathered from the steps taken for the bank sector. *Targeted exemptions framework* We note that the ACCC Act already provides for exemptions to be made, including in relation to the CDR rules. Under s 56GD exemptions can be made for a person and, under s 56GE, regulations can be made exempting a person or class of persons. However, seeking exemptions through these pathways might not result in timely relief. Ideally, the ACCC would be empowered to provide class-based exemptions, which would avoid the need to seek relief on an individual basis or wait for regulations to be made. At any rate, given the broad range of non-bank lenders and their diverse circumstances, we would ask that consideration be given to mechanisms that would assist the Regulator to • take a pragmatic approach to monitoring compliance in the early stages of the regime applying to the NBL sector; and

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		• show understanding in relation to mistakes made where the entity has taken all reasonable steps to comply. *Additional issues* Consideration should also be given as to whether the proposed *de minimis* thresholds would mean that, for some sub-sectors, only a small proportion of businesses in the sub-sector have obligations to share data under the CDR regime. It has been suggested that some sub-sectors may have only a small number of providers that would be captured by the obligations to disclose data. While this outcome might be considered acceptable in terms of the potential competitive benefits from smaller competitors in the market, the one or few providers with data sharing obligations are particularly affected by the reforms. There is perhaps an argument for calibrating the thresholds at the sub-sector level to avoid the burden of the regime falling on one or a very limited number of providers relative to the sub-sector as a whole. Although relevant asset value may be an appropriate proxy for capacity to absorb the costs of implementing CDR data sharing obligations, there may be a risk associated with most of the business being generated in

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		the sub-sector not needing to factor in the costs of data holder obligations. While, in theory, obligations on accredited persons to share their data may expand the scope of organisations captured by the obligation to disclose data, it is likely that many businesses are obtaining data through CDR representative arrangements, thereby falling outside the reach of the obligation to share their own data.

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PO Box Q170, Queen Victoria Building NSW 1230 | (03) 9863 7859 | info@arca.asn.au | www.arca.asn.au | ABN 47 136 340 791