Ms Claire McKay

Assistant Secretary, Data and Digital Policy Branch

Treasury

Langton Cres

PARKES ACT 2600

20 December 2024

Dear Claire,

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

Thank you for the opportunity to comment on the exposure draft of the Competition and Consumer (Consumer Data Right) Amendment (2024 Measures No. 2) Rules 2024.

Thank you also for the opportunity to meet with you and your team on 10 December to discuss the issues relevant to these rules. It provided a valuable opportunity to understand the background to these rules and the approach to giving effect to the Government's intent to improve the Consumer Data Right (CDR). We appreciate your open and transparent consultation approach.

The CDR, involving legal, data, systems and CX components, is so broad that no one person (or small organisation) can be fully across all aspect of the framework. For that reason, our commentary below focusses on the overall policy of the rules changes, including identifying some unintended potential outcomes from those policy decisions (even if we otherwise do not object to the policy decision itself). We have focussed less on the drafting of the particular rules, although we have noted some issues with the drafting and operation of the rules in relation to the prohibition of repayment history information and financial hardship information.

Noting the complexity of the rules, if we have failed to identify a solution to the issues and concerns we are raising, we would welcome any feedback and clarification.

De minimis threshold – impact on innovation, competition and financial inclusion

As previously advised, we agree that there should be a de minimis threshold for mandated participation by non-bank lenders so that competition and innovation is not discouraged or hindered through disproportionately high compliance costs. However, we do not have a firm view on the setting of that threshold. Our comments below outline the potential unintended outcomes of the de minimis threshold and we make recommendations for the monitoring of those outcomes.

The setting of the threshold will affect both:

- competition between CPs, particularly where close competitors in a lending sector straddle the relevant threshold; and
- financial inclusion for consumers who are more likely to acquire products from lenders that sit below the threshold (and therefore do not get the benefits from the improved portability of their data).

Importantly, the effect of the threshold needs to be considered at the industry sector level; rather than just for the overall lending market.

For example, there may be little overlap in targeted customer segments between a smaller car financier (say, $800M loan book) and a major bank, however there may be significant overlap in the targeted segments between that smaller car financier and a slightly larger car financier (say, $1.2B). The smaller financier will have a competitive advantage of avoiding both the costs of CDR compliance and the greater risk of

customer attrition arising from participating in the CDR[1]. The smaller car financier could even obtain the benefits of the CDR without participating as a Data Holder.[2]

Similarly, the effect on financial inclusion needs to consider the impacts on specific consumer segments. We would expect that, overall, less financially included consumers (e.g. lower income; financially vulnerable etc) are more likely to use products from smaller non-bank lenders. That is, they are more likely to use products from payday lenders and less mainstream car financiers. It is likely that those products are going to be more expensive than products offered by larger, mainstream lenders.[3]

Not requiring those smaller non-bank lenders to participate in the CDR makes it harder for the customer to use their data to refinance or move to mainstream and/or cheaper credit.

We consider that those issues are both compounded by the relative lack of participation in comprehensive credit reporting by the same sectors of the non-bank lender market, i.e. payday lenders and car financiers.

To provide context, of the 105 credit providers[4] that have signed the Principles of Reciprocity and Data Exchange (PRDE), 43 (41%) would not meet the threshold to be a mandated Data Holder (and are not ADIs)[5]. This suggests that a large proportion of the credit providers in Australia will not be captured as mandated Data Holders.[6] We observe that the voluntary participation by those smaller lenders in CCR also demonstrates the relevant cost efficiency of the CCR (when compared to CDR).

Of those smaller lenders who have voluntarily chosen to participate in CCR, we do not hold detailed data about the types of product they offer (i.e. payday loans; car finance). However, our engagement with those lenders suggests that there are very few payday lenders participating and reasonably few dedicated car financiers. If Treasury would like us to, we could undertake further work to quantify the gap in coverage of PRDE participation (to provide insight into the level of 'invisibility' of those smaller credit providers across both the CDR and CCR data sharing regimes).

Arca recommends that:

1. Treasury (or ACCC) monitor the rate of smaller lenders (<$1B) voluntarily participating in CDR as a Data Holder as a key metric of the success of the extension of the regime to the non-bank lending sector and of the efforts to reduce the compliance burden of the CDR.
2. Treasury (or ACCC) monitor the indirect use of CDR by smaller lenders[7] to assess whether a free rider situation is created by the exclusion of smaller lenders as mandated Data Holders.
3. Treasury (or ACCC) undertake additional work to understand the level of invisibility of smaller credit providers within both the CDR and CCR data sharing regimes. Should there continue to be invisibility across particular sectors of the market, this should trigger a further consideration of mandating CCR participation by those sectors.

De minimis threshold – impact on screen scraping

Arca and its Members recognise Government's clear expectation that credit providers move away from the use of 'screen scraping'. The basis for this expectation is, in part, the expansion of the CDR to non-bank lenders. However, its important to note that, based on the PRDE signatories, at least 65%[8] of non-bank

[1] That is, the customer will find it harder to find a better deal somewhere else because they cannot share their data through the CDR.
[2] While there are reciprocity rules that would require the smaller car financier to participate as a Data Holder if they participated directly as a data recipient, it is our understanding that this would not apply if they participated indirectly, i.e. through a form of intermediary.
[3] We are not suggesting that this is always the case. In fact, we consider that the expansion of the comprehensive credit reporting regime has promoted the ability of smaller lenders to compete with larger lenders on price and service.
[4] There are a total of 125 CP signatories, however we have consolidated the number across related entities and excluded non-financial services CPs.
[5] Which increases from 30 (29%) for a threshold of $400M.
[6] Adding in those smaller lenders that do not participate in CCR, we expect the proportion of lenders that would not be mandated CDR Data Holders to be higher than suggested by the PRDE signatory base.
[7] That is, ways that those non-participants obtain the benefits of CDR but do not trigger reciprocity obligations.
[8] That is, 43 of 66 non-bank PRDE signatories. Again, we expect the true figure may be higher.

lenders will be excluded from mandatory participation in CDR (where the true proportion is likely to be significantly higher).

This will mean that the CDR is not an adequate replacement for screen scraping in many situations. This problem will be greatest for lenders that compete with, or refinance credit from, non-participating non-bank lenders (as described above). Material non-participation in CDR will make it more difficult for those lenders to move away from screen scraping and, should voluntary participation in CDR be low, require the use of other methods of sharing customer data (which could be significantly less safe than screen scraping).

Industry recognises that it needs to move away from screen scraping. Arca is currently working with its Members to develop a 'roadmap' for doing so (i.e. the timeframes; preconditions etc). The application of the de minimis threshold does not change that need, however it is something that will be relevant to the roadmap.

We will engage further with Treasury on this issue once we have progressed the work to develop the roadmap.

De minimis threshold – uneconomical compliance costs for small portfolios

The Government has already recognised the problems of requiring compliance as a Data Holder for lenders with small portfolios, which these draft rules are partly seeking to address.

We agree with the proposed minimum covered product threshold of 1,000 eligible CDR consumers under rule 3.1(d) and 3.2(c). However, we consider that further consideration should be given to allowing for greater flexibility for small 'product' portfolios. This is because there will be situations in which the costs of CDR compliance will make it unviable to continue offering some products, where the number of customers for that specific product is very small (but the overall number for the 'covered product' type is greater than 1,000). The costs of that compliance will then be passed on to consumers or, in some cases, would result in those products being withdrawn (so that the relevant customers lose the benefit of the product).

For example, a credit card provider may have moved to a new core banking system to offer its products, while maintaining a small number of 'legacy' accounts on an older system. If there is a requirement to become fully compliant for that small legacy portfolio (which requires distinct development and maintenance costs due to being held on a different core banking system), the uneconomical compliance costs may require the credit card provider to close those accounts.

This issue has, in respect of credit reporting, been recognised and addressed under the Principles of Reciprocity and Data Exchange and the mandatory CCR provisions of the NCCP, which both provide an exception for such legacy products.[9]

A further example has been noted by an Arca Member in respect of white-labelled home loan products:

- CP has many 'white label' arrangements with third parties, under which the CP provides the credit using the branding of the third party.
- While the loans are generally of a similar nature and contractual terms, there may be some variation between portfolios. For example, the interest rate or monthly/annual fees may differ (based on the arrangement agreed with the third party).
- Some of those portfolios may include a very small number of loans (e.g. <10).
- Nevertheless, the customers can access the account online using a service branded with the third party's brand.
- To develop CDR Data Holder capability using the services of their third-party supplier, the CP has been quoted a significant monthly amount *per white label arrangement*.[10]

[9] See paragraph 31 of the PRDE and section 5(c) of the ASIC Credit (Mandatory Credit Reporting) Instrument 2021/541.
[10] Noting the commercial sensitivity of those arrangements, we have not included the actual monthly cost in our submission. We can provide this to you separately if necessary.

That cost would make it unviable for that CP to continue offering those products. In addition, we believe that a similar situation would apply for other credit providers, which would limit innovation in the white labelling space by making it uneconomical to offer 'small batch' white label arrangements.[11]

While the relevant Arca Member is investigating their options, it may be possible to develop a viable solution to satisfy consumer data requests by having a non-branded solution that can be used for all the relevant white-label arrangements (so that separate instances of the solution are not required for each arrangement).[12] However, such as non-branded solution would not work for product data requests due to the different pricing and terms and conditions across the white label arrangements. That is, it may not be necessary for the Member to seek a complete exception under the CDR regime for the white label arrangement. Rather, a tailored exception may be sufficient. In this case, the exception would be in respect of product data requests; but not consumer data requests.

In respect of both examples above, we note that there may be a question as to whether the relevant product is 'publicly offered' (under 1.4(1)(a)) or the relevant product data is 'publicly available' (as referred to in the note to 3.1(1)). That is, some of our concern regarding the uneconomical compliance costs for small portfolios could be addressed if it is deemed that the relevant products are not 'publicly offered' or the relevant product data is not 'publicly available'.

Arca recommends that:

4. Treasury consider implementing rules that allow for more flexible exceptions for small portfolios of specific products, where the costs of CDR compliance would be uneconomical (i.e. the consumer benefits of the CDR are outweighed by the costs to the lender and/or the detriment to the customer of having the product withdrawn).
5. Treasury otherwise clarify the meaning of 'publicly offered' and 'publicly available' to help clarify whether the CDR requirements must be complied with in relation to those small portfolios.

Securitisation arrangements

Our previous submissions have noted the prevalence of 'off-balance sheet' lending in the non-bank lending sector. That is, where the 'lender of record' (whose name is on the credit contract) may be a separate, unrelated entity to the 'servicer' (which acts in all respects as 'the' lender, including holding the data and providing the online service capability). We have noted that the rules will need to address this situation as it is vital for the proper application of the de minimis threshold. It is also important for the proper allocation of compliance responsibilities between the participants in those types of lending structures.

While the draft rules include some provision for entities to discharge another entity's obligations, the treatment of off-balance sheet arrangements is a separate matter and does not appear to have been addressed. We have previously spoken to Treasury about the potential for the rules to clarify that the Data Holder requirements apply directly to the servicer entity, rather than to the lender of record. We understood this would clarify that the CDR rules apply to the entity that holds the data and offers the online service to the customer. While we expect that this proposal requires further consultation, it appeared to be a viable approach.

Arca recommends that:

6. Treasury clarify the operation of the rules to off-balance sheet lending and, if necessary, draft rules to apply the requirements directly on the relevant servicer, rather than the lender of record.

Timelines

Overall, we consider that the timelines for implementing the CDR to the non-bank lenders are appropriate (subject to the finalisation of the rules and other requirements within a reasonable period). However, we note

[11] For example, a CP may otherwise offer a service to medium-sized employers to offer home loans using the employers' brand (i.e. as part of the employer's employee retention strategy). This is only possible if the incremental costs of creating those 'small batch' white label arrangements are kept low.

[12] This solution still needs to be properly scoped. Also, we note that there is a question as to whether it would comply with the relevant CX requirements under the CDR rules.

that many non-bank lenders will rely on the services of third party providers to achieve compliance as a CDR Data Holder. To the extent that bottlenecks in the availability of those third parties develop, we consider that a degree of flexibility may be required.

Privacy Impact Assessment

The Privacy Impact Assessment (PIA) process is an important element of the implementation of the CDR.

Nevertheless, we are concerned that the supplementary PIA relied upon for the expansion of the CDR to the non-bank lending sector demonstrates an ill considered and dismissive approach to concerns raised by stakeholders. To the extent that Treasury has relied upon the PIA to guide their approach to addressing the issues (or, more significantly, to *not* address the issues), we consider those issues must be reopened and subject to proper consideration and consultation.

We note, in particular, the following statement (page 16):

> *Some stakeholders have expressed concern regarding reliance on consent as the main strategy for mitigating risk, and have submitted that protections offered by the CDR consent framework should be supported by other mechanisms to protect consumers, noting that consumers are not always well-placed to assess the risks and benefits of sharing their data, particularly in circumstances where the consumer is experiencing vulnerability. We do not share this sentiment. Consent is a key feature of the CDR (the consent framework often being described as "rigorous" and being the "bedrock of the CDR system"). It does not follow, in our view, that because a customer is vulnerable they are not in a position to give their informed and express consent to the use and disclosure of their CDR data. Indeed, for the reasons discussed above in respect of Issue 2, there are genuine policy reasons for sharing a more complete picture of a customer's financial position (for example, so customers can be offered financial counselling services).*

The clear empirical evidence shows that vulnerability (e.g. being financially stressed) impacts the ability of a consumer to absorb and comprehend information, and therefore reduces their ability to make fully informed decisions. It is not merely a 'sentiment' shared by a few stakeholders. Arca's own consumer testing of its consumer education website (creditsmart.org.au), which focussed on financially stressed consumers, clearly demonstrates that those consumers have more difficulty in absorbing information.

We consider that recognising the impact of vulnerability (including financial stress) is a cornerstone of the CX profession, and it is concerning that the PIA reviewer would not recognise this. We have reservations about whether it is appropriate for a law firm to be solely responsible for preparation of the PIA, where consideration of those privacy issues depend heavily on an understanding of consumer behaviour (and, specifically, the behaviour of consumers who often have very little in common with a well-paid commercial lawyer). At a minimum, we would hope that the relevant law firm was able to seek the input of the CX experts that are otherwise engaged to develop the CDR.

Further, it is a disappointing attitude to dismiss those concerns and refuse to consider other forms of consumer protection on the basis that '{c}onsent is a key feature of the CDR'. To ignore stakeholders' recommendations simply because 'that's the way it's supposed to be' is unsatisfactory.

We are also confused by the apparent contradiction between the observation that "there are genuine policy reasons for sharing a more complete picture of a customer's financial position" and then the suggestion that access to data which (in some unstated way) "prejudices or unfairly targets vulnerable consumers" should be limited. We cannot see how any form of data inherently does that; it is invariably how the data is *used* rather than the data itself (which, again, suggest that controls on use other than 'consent' or 'prohibition' may be more appropriate in some circumstances). Further, we note that prohibiting the flow of otherwise relevant data appears to be the antithesis of what is desired under the CDR.

Arca recommends that:

7. Treasury consider again the concerns raised by stakeholders regarding the limitation of 'consent' as the primary consumer protection method, with the aim of articulating a clear policy for:
    a. when consent may not be appropriate as the primary consumer protection mechanism; and

b. the alternatives to consent that are evidence based and do not simply rely on prohibiting the flow of certain data (e.g. which may focus on the inappropriate use of the data instead, while promoting appropriate and valuable uses).

Exclusion of RHI and FHI from CDR data sharing

Drafting comments on the RHI/FHI exclusion

As a starting position, we do not consider that repayment history information (RHI) and financial hardship information (FHI) should (or would) be shared under the CDR. However, we are unclear about the necessity of the specific prohibition in the draft rules or of the effectiveness of the drafting of those rules.

Both RHI and FHI are constructs of the credit reporting system that are derived on a monthly basis (if applicable) by a credit provider. The information is not typically stored or maintained in the credit provider's core banking system (from which we expect CDR data to be drawn). That is, the 'raw' RHI/FHI is unlikely to be available for sharing by a credit provider (as a Data Holder) through the CDR, regardless of whether there is a specific prohibition.

The actual RHI and FHI is very basic information, consisting of either a single numerical or letter code.

Accordingly, on a plain reading the restriction in rule 1.3 limits the exchange, through the CDR, of:

- for RHI, the numbers 0 – 6 and the letter x
- for FHI, the letters A and V

How is the prohibition intended to operate? For example, would it prohibit the sharing of other codes that replace the codes mandated in the CR Code, such as a "B" instead of the "A" (where each code represents that a temporary financial hardship arrangement had been agreed).[13]

A credit provider that has received credit reporting information from a credit reporting body is likely to hold many forms of credit eligibility information that is, in part derived from RHI/FHI; some of which will be closely tied to the raw data and other types of that derived data will have a more remote link. For example, they will likely hold derived data such as:

- a numerical representation of how many times the customer has been in arrears in the past 6, 12 or 24 months. For example, if the customer has been in arrears three times in the last 12 months, they will hold a numerical code of '3' that is derived from the RHI but is <u>not</u> RHI, i.e. that '3' means a different thing to '3' that is set out in section 8 of the CR Code (that describes the permitted values of RHI).
- a letter of Y or N, which represents whether the customer has or hasn't agreed to a financial hardship arrangement in the last 12 months.
- a credit score derived by the CRB or an application score derived by the credit provider (that incorporates RHI and, theoretically for a credit provider, FHI).

Does the prohibition in the CDR rules apply to some or all that derived data? If it does, is there a limit on how remote the connection to RHI or FHI must be before the prohibition falls away?

In addition to the narrow concept of RHI and FHI that involves a simple numerical or letter code, both data sets are also the subject of broader, descriptive definitions in the Privacy Act; section 6V for RHI and section 6QA for FHI. Those definitions appear to cross over other data definitions within section 1.3 of the draft rules.

For example, section 6V defines the following as repayment history information about an individual:

(a) whether or not the individual has met an obligation to make a monthly payment that is due and payable in relation to the consumer credit;
(b) the day on which the monthly payment is due and payable;
(c) if the individual makes the monthly payment after the day on which the payment is due and payable—the day on which the individual makes that payment.

[13] To be clear, we do expect that any Data Holder would look to create this additional data simply for the purposes of avoiding the restriction in the CDR Rules. As discussed below, it would be much easier to share more power information about the relevant financial hardship arrangement based on the transaction history, rather than a very limited single letter code.

Each of those elements of the RHI definition appear to cross over with the elements of 'transaction data' in rule 1.3, which would appear to create an inconsistency with the prohibition placed on RHI. A similar analysis applies to FHI. Therefore, is the specific prohibition on RHI/FHI inappropriately limiting the data that is otherwise permitted (or purportedly required under the data standards) to be shared?

Arca recommends that:

8. Treasury clarify the operation of the prohibition on RHI and FHI in rule 1.3, particularly to ensure that the prohibition does not unintentionally restrict the sharing of other data (noting the broad definitions in section 6QA and 6V).

Feedback on policy of prohibiting RHI/FHI

We consider that the proposal for the rule limiting access to RHI/FHI clearly illustrates our concerns described above in relation to the 'data prohibition' approach recommended in the PIA. That is, the concerns raised by stakeholders regarding the sharing of FHI (in particular) relate to the unscrupulous use of that data by recipients. The exclusion of RHI/FHI from the CDR does little to protect against that risk. Subject to the next comment, the transaction data that is available through the CDR is going to tell a much more powerful story about a customer's financial difficulties, which could either be used to assist the consumer (e.g. by a financial counsellor or in a beneficial refinance situation) or exploit the customer (e.g. by an unscrupulous recipient promoting high-cost credit or other poor value services).

A key limitation with the transaction data available through the CDR is the fact that many 'financial hardship arrangements' do not involve a change to the credit contract. As a result, the transaction data (showing the payments that are contractually due and the payments which are actually made) will show to data recipients that the customer was not meeting their contractual obligations, without the context that this was done with the credit provider's agreement. If the credit provider also requests the customer's credit reporting information, the credit provider may see the context from that information. However, this is not always going to be the case; some credit providers, including telcos and utilities, cannot see that information through the credit reporting system. Other credit providers may simply refuse the application outright due to the apparent poor credit behaviour (without performing the credit check). This may result in a greater risk of the consumer being financially excluded from mainstream credit despite having done the right thing when experiencing financial hardship by working with their credit provider (and, accordingly, being left more vulnerable to exploitation by less scrupulous lenders and other businesses).

Again, we consider that RHI/FHI are constructs of the credit reporting system and shouldn't be shared through the CDR. However, their specific exclusion, without addressing the broader issues does little to assist consumers and may, in some cases, result in poorer consumer outcomes.

We consider that this issue can be better addressed through our recommendation 7.

If you have any questions about this submission, please feel free to contact me.

Kind regards,

Michael Blyth

GM, Policy and Advocacy