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ASSOCIATION

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By email:

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CDR rules and data standards design paper

Thank you for the opportunity to make a submission to the *CDR Consent Review, CDR rules and data standards design paper* ('the design paper').

ARCA strongly supports the intent of the design paper to explore opportunities to simplify the CDR Rules and standards to support a better consumer experience while maintaining consumer protections. Our Members have consistently identified the complex consent framework under the CDR Rules and standards as being a key impediment to the widespread adoption of the consumer data right by the credit industry.

We emphasise our strong support for the proposal to allow a form of bundling of consent, while also noting that there needs to be adequate controls to ensure that this does not create a situation in which consumers are inappropriately presented a 'take it or leave it' bundle] (particularly in a situation where it is left to the data recipient to determine what consents are 'reasonably required').

We consider that our proposal for 'standardised consents' (discussed below) will help to ensure that this does not happen, i.e. where the 'bundling' of the consents for common, high value use cases, such as lending would be done at an industry level (with the involvement of other relevant stakeholders).

We also note our cautious support for the proposals to a 'deletion by default' approach to redundant data handling and rules to mitigate the risks of the use of 'dark patterns'. In theory, those two proposals may improve the quality of consent given by the consumer. However, they will both increase the problems for credit providers in seeking to embed the consumer data right in their credit assessment and management processes.

Those two proposals will, respectively, increase the likelihood that a credit provider cannot use the data obtained through the consumer data right to improve and refine their credit

processes[1] and increase the overall complexity of participation in the consumer data right (so that only the largest and most highly resources credit providers will be able to directly participate in the consumer data right).

Accordingly, our support for those two proposals is conditional on the rules addressing the above concerns. As discussed below, we consider that our proposal for 'standardised consents' would largely address those concerns by ensuring credit providers have consistent and certain access to the data and permissions they need (although, in relation to mitigating the risks of dark patterns, we note that the rules must still be clear and straightforward so that accredited data recipients are not forced to use the services of behavioural scientists in all cases).

Is consent the best and only consumer protection tool available?

The CDR regime is built upon the concept of 'informed consent'. However, consent is not the panacea for all the potential harms to which consumers could be subject because of the consumer data right. Even the original Farrell review into Open Banking observed the inherent problems with consent when noting that:

> *Ensuring that consent is genuinely informed is becoming increasingly difficult in the 'big data' and digital age. Many customers are unlikely to be fully aware of how much data is being collected about them and used, as it is common practice for customers to simply accept terms and conditions of service (by clicking on 'I agree' on a screen), without fully understanding what they are agreeing to, or having any real choice but to agree if they want the service.*[2]

Notwithstanding that observation, the review then when on to recommend the proposed Open Banking regime be based on the concept of 'consent'; albeit with an abundance of controls that were designed to mitigate the risks of a consent-based models. Of course, some of those controls have been or may soon be relaxed, e.g. the changes to the relax the 'data minimisation principle' by allowing research-related consents that occurred in January 2021 and the current proposal for bundling of consents.

The review leading to this design paper and the other concurrent reviews relating to the non-banking lending sector rules and screen scraping suggest that the limits of the consent-based model have become apparent to stakeholders and other approaches are considered necessary.

For example, the draft non-bank lending sector rules have proposed explicitly prohibiting the sharing of financial hardship information (FHI) and repayment history information (RHI) through the consumer data right.

As noted in our submission to the draft rules, while we acknowledge the concerns raised in relation to the sharing of RHI/FHI, we consider that the prohibition on sharing of potential valuable and relevant data is an overly blunt approach and contrary to the fundamental principle that the consumer should be in control of their data (while also creating problems

[1] In the context of the credit reporting system under Part IIIA of the Privacy Act, this is known as 'internal management purposes'.
[2] Page 51, *Review into Open Banking: giving customers choice, convenience and confidence*

for both the consumer and users of the data if the data being shared provides only half the story).

To the extent that Treasury considers that additional consumer protection approaches need to be adopted to counter the risks of a consumer-based model, we strongly encourage Treasury to carefully consider the broad range of options available and not simply adopt a prohibition approach (as is being done with RHI/FHI).

In previous submissions in relation to the consumer data right, we have set out our proposal for the introduction of 'standardised consents'. In summary, for certain common, high value use cases, such as lending, the CDR rules should allow for the operation of industry developed standardised consents for particular use cases (e.g. lending) that establish the types of data covered by the consent and the types of things that the recipient is permitted to do with that data. Importantly, use of the standardised consent should override some of the more problematic elements of the consent-based model, for example:

- Where appropriate, the standardised consent would override the ordinary ability for the customer to require de-identification/deletion, i.e. so that credit providers can appropriately use the data to refine and improve the credit decisioning tools[3]; and
- Explicitly prohibiting or regulating the use of the data for purposes that are considered undesirable as part of that use case, e.g. incorporating the same or similar protections provided to RHI/FHI as given under the Privacy Act, or limiting the use of data for direct marketing purposes.

In essence, in relation to the lending use case, the use of standardised consents would incorporate the relevant protections and permissions applying to credit reporting data under Part IIIA of the Privacy Act (which is not dependent on a consent-based model4).

It goes without saying, that credit providers need to have reliable access to high value and broad data types to support the efficient and responsible provision of credit to Australian consumers. Our Members – including those who currently rely on the availability of screen scraping – have expressed a strong desire to adopt the consumer data right as a key part of their credit management practices.

However, they can only do so if the consent model is improved to make the consumer data right a viable option. The current consent model – even with the changes proposed in this design paper – mean that the consumer data right will continue to struggle to become that viable option.

We would welcome the opportunity to discuss with this issue with Treasury and provide further details on how we consider that the use of standardised consents can promote the adoption of the consumer data right by credit providers.

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[3] While, potentially, *requiring* de-identification/deletion once those purposes are satisfied.

[4] We note that the original Farrell misdescribes the credit reporting as being 'consent' based. See, for example, at page 3; "[a]t the time of application for credit, banks seeks customers' consent to allow the data sharing to occur in accordance with Australian privacy law". We consider that this is a significant misunderstanding as it fails to recognise that consent plays no part in credit reporting for consumer lending when considering what information the credit provider can access and for the purposes to which it can access and use the data.

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

Yours sincerely,

Michael Blyth
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