CUSTOMER OWNED BANKING ASSOCIATION

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Mr Daniel McAuliffe
Structural Reform Group
The Treasury
Langton Crescent
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Email: data@treasury.gov.au

Dear Mr McAuliffe

Treasury Laws Amendment (Consumer Data Right) Bill 2018

The Customer Owned Banking Association (COBA) welcomes the opportunity to comment on the Exposure Draft of the Treasury Laws Amendment (Consumer Data Right) Bill 2018 (the Bill) and the accompanying explanatory materials. COBA is also grateful for the Roundtable session to discuss the Bill with Treasury on 28 August 2018.

COBA is the industry association for Australia's customer owned banking institutions (mutual banks, credit unions and building societies). Collectively, our sector has $111 billion in assets, 10 per cent of the household deposits market and 4 million customers.

Customer owned banking institutions account for three-quarters of the total number of Authorised Deposit-taking Institutions (ADIs) operating in Australia.

General comments

COBA supports the Consumer Data Right (CDR) being applied to the banking sector (or Open Banking) because it will improve consumers' capacity to find the products and services that best meet their needs. We believe that banking institutions that can demonstrate excellent customer service and highly competitive pricing, like customer owned banking institutions, stand to gain from Open Banking.

COBA is an active stakeholder in Open Banking and is pleased that the Government is consulting on this reform, given its importance and scale, but also the need for Open Banking to be appropriately designed to support industry solutions to help support innovation and competition in Australia's banking sector.

As Treasury is aware, some of COBA's members are well advanced in their planning and investment for Open Banking, and that other industry participants, through their own preparations for Open Banking, have also made significant investments.

We understand from Treasury at the Roundtable, that the Bill is expected to be introduced into Parliament during the first week of December, and that, in its view, the earliest opportunity for it to be passed by both houses would be in February 2019.

COBA is very concerned with this indicative timeframe, chiefly as the potential timing of the next Federal election may operate to inadvertently delay the legislative process.

As Treasury would appreciate, this creates a significant level of uncertainty for industry, and makes it difficult to efficiently plan and make decisions about investment for Open

Banking. To date, the expectation has been that the system will commence as announced by the Government in May[1] this year.

In order to minimise this investment uncertainty and expedite the creation of the CDR to enable Open Banking, COBA considers that the Bill should be introduced into Parliament during October 2018, which may allow for the Bill to be passed this year.

If this is not practicably possible, we consider that the Open Banking regulatory and technical framework should be formalised prior to any final decision being made on the timelines for implementation. We recognise that this may require revisiting the Government's intended transition timeframes.

Many core banking system providers typically undertake projects to implement proposed legislative reforms with an expectation that there will be minimal changes to final law. However, as demonstrated with the Credit Card Reforms, fundamental design principles can and have been changed, e.g. repayment assessment period from 5 years to 3 years. This has had a significant impact on the project timelines and systems configurations of our members.

Further to this, as Treasury is aware, some of COBA's members are facing particular challenges with implementing Open Banking by the Government's announced timeframes and would require more time to avoid unnecessary burdensome costs. For example, some of our members are in the process of implementing major changes to their information systems (software and infrastructure overhauls).

- For those members, implementing Open Banking by the Government's announced time frames would require legacy systems to be reconfigured to accommodate Open Banking, while work is carried to determine how Open Banking should be implemented in their new systems.
- This means that they may need to operate 2 systems simultaneously, before closing their legacy systems down at a later stage than initially planned, and that their significant expenditure on legacy systems would then be redundant.

While COBA appreciates that the ACCC is to be empowered to adjust timeframes if necessary[2], COBA encourages the Treasury to incorporate a mechanism within the Bill, such as under subsection 56BA(2), that explicitly sets out this ACCC power and the broad criteria that entities would need to satisfy to be granted a time extension.

COBA recognises that any time extension requests would need to be considered by the ACCC on a case-by-case basis, and that any application for an extension would need to be backed by a strong case, such as evidence of significant financial detriment.

Specific comments on the Bill

COBA is generally supportive of the Bill, and we see this as another reason to have the Bill introduced earlier into Parliament.

COBA notes that the Bill has been broadly drafted and recognises that its fundamental purpose is to set out the legislative framework of the CDR to provide consumers with the right to access specified data in relation to them and authorise secure access to this data by certain accredited entities.

COBA assumes that the broad drafting of the Bill is to support the application of the CDR to different sectors of the economy (e.g. banking, energy or utilities). We note that there are 5 key elements of the Bill which are designed to:

[1] Government Response to the Open Banking Review, 9 May 2018.

[2] Ibid.

1. empower the Minister to designate the sectors of the economy to which the CDR will apply and the types of CDR data for each sector (e.g. Open Banking data)
2. enable the Australian Competition and Consumer Commission (ACCC) to make specific rules to govern the operation of the CDR (CDR Rules)
3. establish a Data Standards Body (initially, Data61 of the CSIRO) to make technical standards to govern how data would need to be provided to accredited entities within the CDR system
4. establish the CDR privacy safeguards (which, in part, duplicate almost all of the Australian Privacy Principles under the *Privacy Act 1988*) to provide minimum standards for the treatment of CDR data, and
5. enable the Office of the Australian Information Commissioner (OAIC) to lead on matters relating to the protection of individual and small business consumer participants' privacy and confidentiality, and CDR privacy safeguard compliance.

COBA notes that the details of the CDR system for Open Banking, such as accreditation criteria, consent requirements and information security, will be set out in the ACCC's CDR Rules. COBA understands from Treasury that the ACCC will release a first draft of the CDR Rules for public consultation during the week of 10 September 2018.

Notwithstanding the broad nature of the Bill, set out below are COBA's comments on a number of aspects of the Bill; specifically, the scope of Open Banking data, non-ADI lender participation in Open Banking, information security and entity accreditation, fees that may be payable in relation to the disclosure of certain Open Banking data and ACCC nomination of an external dispute resolution scheme for Open Banking.

Scope of Open Banking data

COBA notes from the Exposure Draft Explanatory Materials of the Bill (the Explanatory Materials) that Open Banking data would include[3] data specified in the designation instrument for the banking sector as well as "value-added data" (i.e. data that results from effort by a data holder to gain insights about a customer[4]) which is derived from the data specified in the designation instrument.

COBA is concerned about the potentially broad scope of what might be captured as value-added data. Importantly, this would potentially capture a diverse range of value-added data sets held by an ADI, such as aggregated data, and may breach intellectual property rights or directly interfere with an ADI's existing commercial arrangements. As Treasury is aware, the December 2017 Report of the *Review into Open Banking* (the Review) also strongly cautioned against including value-added customer data within scope of Open Banking, explaining that:

> "Data holders invest heavily in analysis to give themselves an edge over their competitors and create new business opportunities.
>
> If Open Banking (and broader access to data reforms) is to support the creation of an innovative Australian data industry, retaining incentives to make those investments will be important.
>
> Imposing an obligation that data holders share such information with other parties (including their direct competitors), if instructed to do so by a customer, could confer an unfair advantage on their competitors."[5]

[3] Scope of CDR data, as explained on page 13 of the Explanatory Materials to the Bill.
[4] Definition of value-added data, December 2017 Report of the Review into Open Banking, page 33.
[5] December 2017 Report of the Review into Open Banking, page 38 refers.

The Review went further to recommend that "data results from material enhancement by the application of insights, analysis or transformation by the data holder **should not be included** in the scope of Open Banking"[6]. [Emphasis added].

- However, COBA recognises that the Review's exception to this recommendation relates to granting customers the right to instruct their bank to share the result of an identity verification assessment performed on them, to improve efficiencies in the 'know-your-customer' process.

While COBA appreciates Treasury's clarification at the Roundtable that value-added data would include, for example, less sophisticated calculations, such as balance summaries, clear boundaries should be incorporated in the designation instrument for the banking sector to provide certainty for data holders. We understand that the draft designation instrument for the banking sector will be released this month for public consultation.

Non-ADI participation in Open Banking

COBA notes from the Explanatory Materials that the banking sector designation instrument will prescribe that all ADIs provide data as described in the designation and the CDR Rules. However, there is no indication in either the Explanatory Materials or the Bill that non-ADI lenders would also be captured within this designation instrument.

- The Explanatory Materials explain that if non-ADI lenders are not captured by the Minister's designation, the ACCC would only be permitted to require non-ADI lenders to provide data they hold if that data falls within the definition of CDR data for the banking sector, and if they were accredited data recipients.

As Treasury would appreciate, because non-ADI lenders typically issue credit products and services that are also issued by ADIs (such as home loans and personal loans), it is highly likely that non-ADI lenders also hold data that would fall within scope of Open Banking data (for example, product information and transaction records[7]).

In this regard, it is not clear as to why non-ADI lenders would be provided a *choice* about whether to participate in Open Banking, solely based on whether they *choose to apply* for accreditation from the ACCC.

COBA submits that participation by non-ADI lenders should also be mandated, chiefly as the objectives of enhancing competition and innovation through Open Banking would be compromised if the only lenders that are required to participate are ADIs. Data sharing through Open Banking should be available for *all consumers* with a relevant product that contains the relevant data.

On this basis, COBA considers that all non-ADI lenders should also be prescribed within the Minister's banking sector designation instrument. If this is not possible, a separate and targeted designation instrument should be drafted – and issued prior to the commencement of Open Banking – to prescribe all non-ADI lenders.

Information security and accreditation

COBA would like to reiterate that a strong information security framework is a necessity of Open Banking, as this will help assure the level of consumer trust that is absolutely crucial to the success of Open Banking and also the application of the CDR to other sectors of the economy.

As Treasury would appreciate, the expected growth of third parties in the provision of financial services, through Open Banking, may see in an increase in financial crime (such as fraud) if the Open Banking information security framework is insufficient.

[6] Recommendation 3.3 of the December 2017 Report of the Review into Open Banking, page 38 refers.
[7] Exposure Draft Explanatory Materials of the Bill, paragraph 1.50, page 13 refers.

In this regard, COBA looks forward to working closely with the ACCC and Data61 on the design of the information security CDR Rules and required technical standards.

COBA recognises that information security is central to the accreditation process and that an entity's information security framework will have a significant influence on its ability to receive accreditation from the ACCC.

COBA notes from the Explanatory Materials that accreditation will initially be managed by the ACCC, which will also operate as the Government's 'Data Recipient Accreditor', and that accreditation will be based on criteria set out in the ACCC's CDR Rules.

COBA appreciates that the accreditation model would allow for accreditation to be provided at different levels, taking into account the different risks associated with the activities undertaken within a designated sector or by the type of entity applicant.

COBA supports the view in the Explanatory Materials that some entities should have to meet a higher standard in order to be accredited to receive certain types of higher risk data[8]. This is particularly important in the context of information security, and COBA strongly encourages high standards for accreditation of non-ADI entities, as these entities do not benefit from, for example, the robust information security requirements set out by the Australian Prudential Regulation Authority (APRA).

COBA also notes from the Explanatory Materials that if a person provides information to another person or allows that person to access information, in good faith and complying with a CDR system requirement, the person providing the information is protected from liability (whether civil or criminal).

While COBA welcomes this proposed protection, this should not operate to diminish the need to ensure that higher accreditation standards are set for some entities, such as non-ADI entities. For example, while an ADI would be protected from liability in the event that a third-party misuses Open Banking data provided to it by the ADI, there may still be significant ramifications for the ADI in terms of reputational damage.

On a related matter, COBA notes that section 56EN of the Bill covers, among other things, the destruction or de-identification of redundant data. We would appreciate clarification within the Bill or Explanatory Materials on circumstances where it would be preferable to de-identify redundant data as opposed to destroying redundant data.

Fees that may be payable for certain data

COBA notes from the Explanatory Materials that the ACCC's CDR Rules may also establish that a fee is payable in relation to the disclosure of a certain class (or classes) of information.

COBA notes that the intent of this proposal is to acknowledge that some data may be value-added data or that in some circumstances, the provision of data for free would impact on incentives for data holders to collect data.

COBA notes that the Government contemplates that a fee for access and use may be appropriate or required if there is an acquisition of 'property'. (Please see above our strong concerns with the proposed broad scope of Open Banking data).

However, COBA's view is that the ACCC may not be well placed to establish any fees that may be payable, given the very diverse range of data holders and their operating and therefore cost structures.

[8] Exposure Draft Explanatory Materials of the Bill, paragraph 1.72, page 17 refers.

COBA considers that it would be more sensible to allow the market to set any fees and have the ACCC intervene in this process only if the market does not act in good faith.

External Dispute Resolution scheme recognition

COBA notes from the Explanatory Materials that the CDR Rules may require CDR participants to have internal or external dispute resolution (EDR) processes that either relate to the CDR Rules or meet criteria which are outlined in the CDR Rules.

COBA appreciates that the Explanatory Materials appropriately acknowledges the existence of a variety of EDR schemes across several sectors of the economy – such as the recently established Australian Financial Complaints Authority (AFCA) – and that the CDR regime intends to leverage these existing schemes where appropriate.

COBA notes that the ACCC may, by notifiable instrument, recognise an EDR scheme for the resolution of issues relating to the CDR Rules or the CDR.

- In considering the appropriateness of a proposed EDR scheme, COBA notes that the ACCC will consider the accessibility of a scheme as well as the level of independence with which the scheme operates.

COBA would strongly support the recognition of AFCA as the EDR scheme for the resolution of issues relating to Open Banking. Establishing a new scheme does not appear to be necessary, given the accessibility and independence of AFCA and its broad range of functions and powers as the new EDR scheme to deal with complaints from consumers involving financial services and products.

- As Treasury is aware, AFCA replaces the three existing EDR schemes of the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and Superannuation Complaints Tribunal (SCT), so that consumers have access to a single EDR scheme.
- Notably, AFCA will be more accountable to users, including by having an independent assessor to deal with complaints about its handling of disputes.
- COBA also notes that AFCA will commence operations from 1 November 2018, so there would appear to be sufficient time to arrange for its remit be extended to also include Open Banking.

COBA looks forward to continuing to work closely with the Government to settle the Open Banking framework and to a smooth and efficient transition to the new system.

Please do not hesitate to contact Tommy Kiang, Senior Policy Manager, at tkiang@coba.asn.au or on 02 8035 8442 if you wish to discuss this submission.

Yours sincerely

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