

12 October 2018

Mr Daniel McAuliffe
Structural Reform Group
The Treasury
Langton Crescent
PARKES ACT 2600

Email: data@treasury.gov.au

Dear Mr McAuliffe

Treasury Laws Amendment (Consumer Data Right) Bill 2018: Provisions for further consultation and Draft Designation Instrument for Open Banking

The Customer Owned Banking Association (COBA) welcomes the opportunity to comment on the Treasury Laws Amendment (Consumer Data Right) Bill 2018: Provisions for further consultation (the Second Bill) and the draft Consumer Data Right (Authorised Deposit-Taking Institutions) Designation 2018 (the Draft Instrument).

COBA is the industry association for Australia's customer owned banking institutions (mutual banks, credit unions and building societies). Collectively, our sector has \$113 billion in assets, 10 per cent of the household deposits market and 4 million customers.

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

COBA understands from the Treasury's proposals paper¹ that the Second Bill seeks to respond to issues raised by stakeholders in submissions on the Exposure Draft of the Treasury Laws Amendment (Consumer Data Right) Bill 2018 (the First Bill).

COBA appreciates the Treasury's efforts to address stakeholder issues raised in submissions on the First Bill. However, we remain concerned that the draft legislation is still intended for introduction into Parliament in December this year, with the earliest opportunity for the draft legislation to become law in February or March 2019.

As COBA emphasised in its submission to the Treasury on the First Bill² and also its submission to the Australian Competition and Consumer Commission (ACCC) on the Consumer Data Right (CDR) Rules Framework³, the potential timing of the next Federal election may operate to inadvertently delay the legislative process.

To help minimise investment uncertainty, the draft legislation should be introduced into Parliament this month, which may allow for it to be passed this year. If this is not practicably possible, the Open Banking system framework should be formalised prior to any *final decision* being made on the timelines for industry implementation.

¹ The Treasury: [CDR proposals for further consultation](#). Page 3 refers.

² COBA [submission](#) of 7 September 2018 to the Treasury on the Exposure Draft of the Treasury Laws Amendment (Consumer Data Right) Bill 2018.

³ COBA submission of 12 October 2018 to the ACCC on the Consumer Data Right Rules Framework.

Depending on when the law commences and the ACCC's final CDR Rules are released for implementation, the ACCC may need to reconsider the Government's intended transition timeframes and make appropriate adjustments.

Specific comments on the Second Bill and Draft Instrument

While COBA is broadly supportive of the Second Bill, we are concerned that non-ADI lenders have not been included in the Draft Instrument. Set out below are COBA's specific comments on certain proposals⁴ in the Second Bill and the Draft Instrument.

Proposal 1: *Derived information*

COBA broadly supports the Treasury's proposal to limit the CDR Rule-making powers requiring access to derived data. COBA understands that, among other things, the proposed limitation would require derived data to be *specifically included* in the Designation Instrument for Open Banking to be within scope of the system.

COBA considers that it is important to place clear boundaries around the scope of derived data, chiefly given the need to retain commercial incentives for data analysis that help support product and service innovation and positive consumer outcomes. COBA raised this as a key issue in its submission⁵ to the Treasury on the First Bill.

With that said, COBA notes that subsection 56AE(3) of the First Bill would enable variations to be made to a sectoral designation instrument, which may, among other potential variations, broaden the specified types of derived data for Open Banking.

COBA would be concerned if any derived data specified in the Designation Instrument for Open Banking directly interfered with an ADI's existing commercial arrangements.

While the Treasury has stated that, as a general rule, derived data captures data that has been enhanced, but not materially so (e.g. account balances), it also stated that, on an exceptions basis, derived data can also capture data that has been *materially enhanced*, and could in some circumstances be classed as *intellectual property*, such as the outcomes of a Know-Your-Customer (KYC) verification.

COBA reiterates that the December 2017 Report of the *Review into Open Banking* (the Review) strongly cautioned *against* including value-added customer data within scope of Open Banking. The Review ultimately recommended 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.

Proposal 3: *Reciprocity*

COBA notes the Treasury's proposal to clarify the operation of reciprocity and how it can operate in Open Banking. The ACCC has appropriately recognised, in the CDR Rules Framework paper, that reciprocity raises complex issues requiring further consideration. COBA agrees with the ACCC and supports the ACCC's proposal to *not* make any CDR Rules on reciprocity in the first version of the CDR Rules. Our view is that reciprocity should not apply before the date that non-major ADIs are obligated to have available the final tranche of Open Banking data.

Proposal 4: *Process for designation and rule-making*

COBA supports the Treasury's proposal to introduce further legislative consultation requirements for CDR sectoral designation and CDR Rule-making, to provide minimum consultation requirements prior to a sector being designated or CDR Rules being made.

⁴ The Treasury: [CDR proposals for further consultation](#).

⁵ COBA [submission](#) of 7 September 2018 to the Treasury on the Exposure Draft of the Treasury Laws Amendment (Consumer Data Right) Bill 2018.

⁶ Recommendation 3.3 of the December 2017 [Report](#) of the Review into Open Banking. Page 38 refers.

Proposal 5: Framework for charges for access to and use of CDR data

COBA supports the Treasury's proposed framework for charges for access to and use of CDR data, noting in particular the following elements of this proposal:

- Data sets in the Open Banking Designation Instrument would not be chargeable.
- For no-charge data sets, data holders would be able to incorporate the cost of disclosing these data into the provision of the original good or service.
- Where access or services are voluntarily provided *beyond* what is required, data holders would be able to determine an appropriate charge.
- Where the Minister designates a data set as being a *chargeable data set*, each data holder of that data set may adopt their *own* charging (i.e. market pricing).
- Where market pricing is determined unreasonable (via the Treasury's proposed test), the ACCC would be empowered to intervene to declare a price.

COBA agrees with the Treasury that it would be more sensible to allow the market to set any charges, where relevant, and have the ACCC intervene in this process only if the market does not act in good faith. COBA raised this as a key issue requiring attention in its earlier submission⁷ to the Treasury on the First Bill.

The Draft Designation Instrument for Open Banking

COBA is disappointed that the non-ADI lending sector is not included in the Draft Instrument. As we explained in our submissions to the Treasury on the First Bill and to the ACCC on the CDR Rules Framework, non-ADI lenders typically issue credit products that are also issued by ADI lenders, such as home loans, personal loans and small business loans.

Therefore, non-ADI lenders are highly likely to also hold data that would fall within scope of Open Banking data classes, such as 'customer information', 'product use information' and 'information on the product' (as specified in the Draft Instrument⁸).

Further to this, it is important to appreciate the nature of the non-ADI lending sector in Australian lending markets. In particular, non-ADI lenders not only compete in some of the same key credit markets as ADI lenders, but the share of non-ADI lenders in some of these markets has expanded over recent times.

Notably, the Reserve Bank of Australia (RBA) estimated in April this year⁹ that growth in residential mortgage lending by non-ADI lenders in Australia picked up materially over 2017 and was significantly higher than for banks.

The RBA estimated that non-ADI lenders accounted for around 4 per cent of outstanding residential mortgages at the end of 2017, and that the non-ADI lending sector's growth in residential mortgage lending was aided by developments in both mortgage and residential mortgage-backed security markets.

Furthermore, COBA notes that the ACCC has clearly recognised, in the CDR Rules Framework, that the "Open Banking review recommended a broad definition of 'consumer' within the CDR regime, with the obligation to share data to apply in relation to **all customers** holding a relevant bank account in Australia"¹⁰ [emphasis added].

⁷ COBA [submission](#) of 7 September 2018 to the Treasury on the Exposure Draft of the Treasury Laws Amendment (Consumer Data Right) Bill 2018.

⁸ [Draft Consumer Data Right \(Authorised Deposit-Taking Institutions\) Designation 2018](#).

⁹ Reserve Bank of Australia, [Financial Stability Review April 2018](#). Pages 40-41 refer.


¹⁰ ACCC [Consumer Data Right Rules Framework](#) 12 September 2018. Page 14 refers.

In this sense, any customer of a non-ADI lender holding a relevant account should be provided an equal opportunity to participate in Open Banking, as would be provided to customers of ADI lenders. There does not appear to be any valid policy reason to deny customers of non-ADI lenders the same opportunity to participate in the system.

For these reasons, the Draft Instrument should be varied to also include the non-ADI lending sector. If this is not practicably possible, then the non-ADI lending sector should be designated, in a separate instrument, to be subject to Open Banking. COBA notes that subsection 56AE(3) of the First Bill would enable the ACCC to facilitate this.

If you have any questions or comments in relation to our submission, please contact Tommy Kiang, Senior Policy Manager, on [REDACTED] or at [REDACTED].

Yours sincerely

A handwritten signature in black ink, appearing to read 'L. Lawler', written in a cursive style.

LUKE LAWLER
Director - Policy