

EXPLANATORY MATERIALS

Treasury Laws Amendment (Consumer Data Right) Bill 2019

Consumer Data Right (Authorised Deposit-Taking Institutions) Designation 2019

The *Treasury Laws Amendment (Consumer Data Right) Bill 2019* (the Bill) which is currently before the Parliament will amend the *Competition and Consumer Act 2010* (the Act), the *Privacy Act 1988*, and the *Australian Information Commissioner Act 2010* to establish a consumer data right (CDR).

The CDR will provide individuals and businesses with a right to efficiently and conveniently access specified data that relates to them held by businesses; and to authorise secure access to this data by accredited third parties.

The CDR will also require businesses to provide public access to information on specified products they have on offer.

CDR is designed to give customers more control over their information leading, for example to more choice in where they take their business, or more convenience in managing their money and services.

The sectors of the Australian economy that are covered by the CDR and the type of information consumers can request are limited to designations which will be made by the Treasurer. This designation is a disallowable instrument.

Following passage of the Bill, section 56AC(2) of the Act will provide that the Treasurer may designate a sector of the Australian economy as subject to the consumer data right by making a legislative instrument.

Banking is the first sector of the Australian economy to which the CDR is applied.

The *Consumer Data Right (Authorised Deposit-Taking Institutions) Designation 2019* (the Designation) sets out the classes of information that are subject to the CDR regime, the persons who hold this information and will be required or authorised to transfer the information under the regime and the earliest date that the information being held is subject to the CDR. Data holders may be required to disclose the data in this Designation in accordance with the consumer data rules. The rules may also authorise data holders to choose to share this data through the CDR.

Consistent with the findings of the Review into Open Banking, the banking data included in the designation is customer-provided data, data about the use of banking products and data about banking products.

The Designation does not specify any information as being subject to fees for access or use for the purposes of paragraph 56AC(2)(a) of the Act.

Details of the Designation are set out in [Attachment A](#).

The Designation will commence on the day after it is registered.

Details of the Consumer Data Right (Authorised Deposit-Taking Institutions) Designation 2019

Section 1—Name

This section provides that the title of the Designation is the *Consumer Data Right (Authorised Deposit-Taking Institutions) Designation 2019* (the Designation).

Section 2—Commencement

This section provides that the Designation will commence on the day after the instrument is registered.

Section 3—Authority

This section states that the Designation is made under subsection 56AC(2) of the Act.

Section 4 —Definitions

The Designation includes a number of definitions. These are:

Act means the *Competition and Consumer Act 2010*.

Associate has the same meaning as section 318 of the *Income Tax Assessment Act 1936*. This includes a person's relatives such as spouse, children or siblings. This definition of associate is also included in the Bill. Including an associate in the designation as a potential customer reflects that for banking products there can be more than one account holder or the primary account holder may give access to a relative or spouse.

Australian law has the same meaning as subsection 6(1) of the *Privacy Act 1988*. This definition includes an Act of the Commonwealth, State or Territory or subordinate legislation made under one of these Acts, a Norfolk Island enactment, or a rule of common law or equity. This definition is used when determining if an exclusion for materially enhanced information applies.

Authorised deposit-taking institution has the same meaning as it would under the *Banking Act 1959*. An authorised deposit-taking institution is a body corporate that has been authorised by the Australian Prudential Regulation Authority to carry on a banking business.

Product means a good or service that is or has been offered or supplied to a person in connection with

- taking money on deposit, for example a savings account;
- making advances of money, for example a mortgage or credit card; or
- another financial activity prescribed by regulations for the purposes of the definition of a banking business.

These elements reflect the elements of the definition of *banking business* in section 5 of the *Banking Act 1959*.

A **product** also means a purchased payment facility that is or has been offered or supplied to a person.

Purchased payment facility means a facility, other than cash which is:

- purchased by a person from another person; and
- is able to be used as a means of making payments up to an amount available under the conditions applying to the facility; and
- the payments are made by the provider of the facility.

The criteria that a product must satisfy to be a purchased payment facility reflect the criteria in section 9 of the *Payments System (Regulation) Act 1988*. However, unlike the *Payments System (Regulation) Act 1988*, if a product meets the relevant criteria it will be purchased payment facility regardless of a declaration by the RBA, or determination by APRA.

Section 5 — Designation of sector subject to the CDR

This section sets out:

- The classes of information that are prescribed and therefore subject to the CDR (see the detailed explanation for sections 6, 7 and 8 of the Designation);
- That the information prescribed in section 6, and 8 is specified unless it falls within the scope of section 9, and that the information prescribed in section 7 will be specified unless it falls within the scope of section 9 or 10 (see the detailed explanation for sections 9 and 10 of the Designation);
- That authorised deposit-taking institutions are specified as the persons that hold this information, or who the information is held for; and
- That the earliest date that the classes of information can become subject to the CDR is 1 January 2017.

The note to section 5 clarifies that the data included in the Designation is not ‘chargeable data’. That is a fee cannot be charged for this data.

Sections 6 to 8 — Classes of information

Sections 6 to 8 specify the three types of information which is subject to the CDR.

Information about the user of the product- Section 6

The first type of information is ‘customer’ information. This is information about the person to whom the product has been or is being supplied or the person’s associate where the product has also been or is also being supplied to the associate.

The information must have been either:

- supplied directly by the person or their associate when acquiring or using a product, for example, the person’s name and address; or

- otherwise obtained by the ADI (or the entity that holds data on the ADI's behalf). For example, this may include information that an ADI has received from another ADI with the consent of the relevant customer.

Information about the use of the product – Section 7

The second type of information is information about the use of the product by the person or an associate of the person.

This includes the type of information that a customer would typically see on a statement, such as the balance of their account, debits and credits on the account and when these occurred, and to whom payments were made.

Information on the use of a product also includes information on the authorisations attached to a product. For example, persons who are authorised to use, access or view information about the account or an authorisation to make a payment to a third party.

However, the Designation limits the information about the use of the product where this information has been materially enhanced as a result of analysis or insight by the provider. A more detailed explanation is given below.

Information about a product – Section 8

The third type of information is information about a product.

This would include information such as information identifying or describing a product, the price of a product such as fees and charges or interest rates, terms and conditions and eligibility criteria that a customer needs to meet to be provided with the product.

The product information can be about a certain type of product for a particular customer or group of customers, such as savings accounts for students or retirees.

Information that is not information about the user of a product – Section 9

Part IIIA of the *Privacy Act 1988* regulates consumer credit reporting in Australia. It does this by regulating the handling of personal information about individuals' activities in relation to consumer credit. In particular, Part IIIA of the *Privacy Act 1988* outlines:

- the types of personal information that credit providers can disclose to a credit reporting body for the purpose of that information being included in an individual's credit report;
- what entities can handle that information; and
- the purposes for which that information may be collected, used and disclosed.

The Bill amends the *Privacy Act 1988* to exclude the CDR and associated subordinate legislation as an Australian law that would permit the use or disclosure of credit reporting information or credit eligibility information.

Under the *Privacy Act 1988*, Credit Providers may also disclose credit information to other Credit Providers where the customer consents to the disclosure. In this context, to reduce overlap between the regulation of credit information and the CDR the Designation excludes the following information from the CDR:

- a statement that an information request has been made for the individual by a credit provider, mortgage insurer or trade insurer (consistent with paragraph 6N(6) of the *Privacy Act 1988*);
- new arrangement information about serious credit infringements (consistent with subsection 6S(2) of the *Privacy Act 1988*);
- court proceedings information about the individual (consistent with paragraph 6N(i) of the *Privacy Act 1988*);
- personal insolvency information about the individual (consistent with paragraph 6N(j) of the *Privacy Act 1988*); and
- the opinion of a credit provider that the individual has committed a serious credit infringement (consistent with paragraph 6N(l) of the *Privacy Act 1988*).

Information that is materially enhanced which is not subject to CDR – Section 10

Section 10 carves out information about the use of a product which might otherwise be designated by section 7 where that data has been materially enhanced.

The concept of materially enhanced information refers to data which is the result of the application of insight, analysis or transformation of data to significantly enhance its useability and value in comparison to its source material. For the purposes of this test, source material is information to which subsection 7(1) applies. This means that while materially enhanced information may have been derived either entirely from information to which subsection 7(1) applies, or from a combination of information covered by subsection 7(1) and other information, the test only requires the enhanced information to be significantly more valuable than the subsection 7(1) inputs.

The intention is that information whose value has been largely generated by the actions of the data holder will be carved out by the ‘materially enhanced’ test. For example materially enhanced information may include: the outcome of an income, expense or asset verification assessment; or a categorisation of transactions as being related to groceries or rent; or significantly improved descriptions of transactions utilising geolocation or business name data from external sources.

Data holders may not be required to disclose materially enhanced data under the CDR, but nonetheless may be authorised to disclose it through the CDR if they so wish.

Section 10 also provides examples of information that is not materially enhanced. The purpose of this list is to both avoid any doubt in relation to these items, and to illustrate where derived data would not be significantly enhanced to aid in the interpretation of the materiality test.

These examples are:

- a calculated balance;
- an amount of interest earned or charged;

- a fee charged;
- a reference number, including a routing number, a clearing house number or a swift code;
- information identifying a person, body, product, transaction or account;
- data on authorisations;
- the categorisation of source material based on a feature of the product to which it relates, including categorisation by the fees or interest rates applicable to the product;
- information that results from filtering or sorting source material by reference to a date, period, amount or classification.