



Australian Government



Consumer
Data Right

Banking Designation Instrument - minor and technical amendment

Sectoral assessment report

October 2022

Prior to the Minister amending a designation instrument (including minor and technical amendments) there is the requirement to conduct a sectoral assessment which considers the effect of the proposed change (section 56AE of the *Competition and Consumer Act 2010*) (the Act).

Summary

The *Consumer Data Right (Authorised Deposit-Taking Institutions) Designation 2019* (designation instrument) formally designated the banking sector as subject to the consumer data right (CDR) in September 2019. The designation instrument was a key component of implementing the 2018 Review into Open Banking in Australia (Open Banking Review)¹, which recommended a broad range of lending products provided by banks be in scope for the CDR, including lease products.

The *Competition and Consumer (Consumer Data Right) Rules 2020* (the Rules) have been drafted on the basis that lease products are within scope of the designation - this is because lease products, including consumer leases and asset finance, fall within the prescribed list of banking products.² The sector is currently operating consistently with these obligations.

There is currently uncertainty around whether the definition of 'product' in the designation instrument covers all lease products.³ For the avoidance of doubt, Treasury publicly consulted on a proposal to amend the designation instrument to explicitly capture the full range of lease products offered by banks (irrespective of how these products are structured).

Having regard to submissions received to the designation instrument consultation and its analysis of the statutory factors as outlined below, Treasury recommends the designation instrument be amended to include the proposed new definition of 'product'.

Proposed new definition of 'product'

Broadly, the existing definition of 'product' in the designation instrument captures goods and services that have been supplied in connection with taking money on deposit, making advances of money, or another financial activity prescribed by regulations for the purposes of the definition of 'banking business'. The definition also captures a purchased payment facility. Treasury recommends the definition be amended to capture goods and services that have been supplied in connection with the letting on hire of goods⁴ (leases), including on hire-purchase.

This definition is consistent with that recommended for inclusion in the non-bank lending designation instrument by the Sectoral Assessment Final Report.⁵ Making this change will ensure there is consistency in definitions between the banking and non-bank lending sectors. This is important given the complementary nature of the datasets across the two sectors and the benefits that will come from sharing these datasets through the CDR.

¹ The Open Banking Review was commissioned in 2017 to recommend the best approach to implement Open Banking in Australia.

² In clause 1.4 of Schedule 3 to the *Competition and Consumer (Consumer Data Right) Rules 2020*.

³ Clause 4 of the *Consumer Data Right (Authorised Deposit-Taking Institutions) Designation 2019*.

⁴ This definition draws on the meaning of 'provision of finance' outlined in section 32 of *Financial Sector (Collection of Data) Act 2001* which includes "the letting on hire of goods".

⁵ Treasury, August 2022, *Non-bank Lending Sectoral Assessment Final Report*. Available: <https://treasury.gov.au/sites/default/files/2022-08/p2022-300402-finalreport.pdf>

Consultation

Consistent with statutory requirements, Treasury undertook a 28-day public consultation on the proposed changes, as well as sought views from the Australian Competition and Consumer Commission, the Office of the Information Commissioner and the relevant regulators - the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission.

Treasury received 4 formal submissions to the banking designation instrument minor and technical amendment consultation.

Stakeholders raised no concerns with the proposed amendment.⁶

Assessment of proposed change

The Treasury Secretary must comply with reporting obligations (section 56AE), including the need to consult and prepare a report which considers the impact of making a designation instrument by reference to a range of statutory factors.⁷ This report meets that requirement for the proposed minor and technical amendment to the designation instrument and serves to inform the Minister's decision on whether to make the proposed amendment.

The implementation of banking in CDR was informed by the Open Banking Review. The Open Banking Review recommended a regulatory framework under which an open banking regime would operate, having regard to international best practice, competition, fairness, innovation, efficiency, regulatory compliance costs and consumer protection.⁸

The final report of the Open Banking Review considered the type of banking data that should be in scope for the CDR and recommended that consumer leases and asset finance (including leases) be expressly covered. The Review analysed the likely benefits to consumers and the economy of sharing banking information through the CDR and examined the use cases that could be supported by this information.

A privacy impact assessment was also conducted which examined the impact of Open Banking on the privacy of individuals.⁹ The Information Commissioner notes the proposed amendment seeks to address a minor and technical issue within the banking designation instrument and does not seek to broaden the CDR system beyond what was recommended in the Open Banking Review. The Commissioner concluded the privacy and confidentiality impacts of the proposed amendment can be appropriately mitigated and managed within the CDR framework.¹⁰

The ACCC notes that:

The proposed minor and technical amendment will not alter the way that the Consumer Data Right has been operating in the banking sector or increase existing obligations on data holders or other CDR participants. The amendment to ensure leases are included in the designation instrument would also conform with the

⁶ CBA submission, p.3; Australian Banking Association submission, p.2; Australian Competition and Consumer Commission submission, p.1; Office of the Information Commissioner submission.

⁷ Before making an instrument, section 56AD requires the Minister to consider the likely effect of making the instrument on the interests of consumers, the efficiency of relevant markets, the privacy or confidentiality of consumers' information, promoting competition, promoting data-driven innovation, intellectual property and the public interest.

⁸ Treasury, December 2017, *Review into Open Banking*, p.vii.

⁹ Treasury, September 2019, Consumer Data Right Regime Privacy Impact Assessment. Available: https://treasury.gov.au/sites/default/files/2019-12/p2019-41016_PIA_final.pdf

¹⁰ Office of the Information Commissioner submission.

recommendations of the Open Banking Review - Final Report for in-scope lending products.¹¹

Accordingly, as the amendment merely formalises the current operation of the CDR Rules for the avoidance of doubt, the ACCC considers that the proposed minor and technical amendment will have a negligible impact on the statutory factors in 56AD(1)(a) to (e) of the Act.¹²

Treasury considers the change proposed is a minor and technical amendment to ensure that the CDR regime in the banking sector continues to operate as it was envisaged. The proposed change does not seek to broaden the regime beyond what was recommended, or how it is currently operating in practice, and submissions from industry did not raise any concerns with the proposed amendment. Given this, Treasury considers the likely impact of making the proposed technical amendment, assessed by reference to the section 56AD factors, is negligible, and recommends the Minister make the proposed amendment to the designation instrument.

¹¹ Australian Competition and Consumer Commission, p.1.

¹² Australian Competition and Consumer Commission submission, p.1.