FinTech Australia

Consumer Data Right draft rules: Expansion to the non-bank lending sector

Submission
October 2023

About this Submission

This document was created by FinTech Australia in consultation with its members. In developing this Submission, interested members participated in roundtables and individual meetings to discuss key issues and provided feedback to inform our response to the exposure draft rules and explanatory materials.

We acknowledge the support and contribution of K&L Gates to the development of this submission.

About FinTech Australia

FinTech Australia is the peak industry body for the Australian fintech sector, representing over 420 fintech companies and startups across Australia. As part of this, we advocate on behalf of a range consumer data right (**CDR**) participants as well as fintechs spanning payments, consumer and SME lending space, crypto and blockchain, wealthtech and neobanking, regtech and insurtech.

Our vision is to make Australia one of the world's leading markets for fintech innovation and investment. This submission has been compiled by FinTech Australia and its members in an effort to advance public debate and drive cultural, policy and regulatory change toward realising this vision, for the benefit of the Australian public.

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Executive Summary

Fintech Australia recognises the great opportunities that the Consumer Data Right (CDR) presents. We are excited by the potential for CDR to support the rapidly developing, data-driven economy here in Australia. As an important piece of digital infrastructure for Australian consumers and businesses, we welcome the opportunity to provide a submission on the exposure draft rules which expand the CDR to the non-bank lenders sector (Draft Rules).

Overall, FinTech Australia is generally supportive of the Draft Rules. However, some Fintech Australia members have expressed concerns with some aspects of the Draft Rules:

- Regarding the eligibility requirements, we consider that there is a need for greater clarity around what constitutes an account which can be accessed online, as well as who will be responsible with respect to white-labelled products.
- In relation to in-scope products and data set requests, members seek further clarity on what "publicly offered" means in respect of covered products. Members have also queried why financial hardship data and repayment history information have been excluded from CDR data.
- We support a broader trial product exemption, which expands the proposed parameters for duration and permitted customers, to encourage experimentation and innovation.
- Members also consider that the current proposed staged implementation does not provide sufficient time for the affected non-bank lenders to prepare to comply with the Draft Rules.

1. Eligibility requirements for consumers

1.1 Online account access

FinTech Australia members have concerns regarding the additional eligibility criteria in Part 2.1 of the Draft Rules in relation to online access.

Members note the requirement that the account can be accessed online raises uncertainty about situations where a non-bank lender offers a product which is available online, but a particular customer has not set up online access. In this situation, it is unclear whether the eligibility criteria are met.

Additionally, there are some non-bank lenders, particularly in the SME lending space, which provide minimal online access, such as only the ability to download PDF statements. It is unclear whether these lenders will also be captured under the Draft Rules.

As raised in previous submissions, members are concerned this requirement could have the unintended effect of inhibiting digital transformation, particularly in SME lending, if it is used for avoidance.

We seek clarification on how these issues will be addressed.

1.2 White-labelling issues

Members seek additional clarity on the CDR data holder obligations in respect of white labelled products offered by non-bank lenders, particularly regarding the onus of the obligations.

We understand that there is current CDR guidance stating when two data holders are involved in offering a white-labelled product, the data holder with a contractual relationship with the consumer is responsible for responding to product data requests and this can be altered if the two data holders agree that one data holder will perform the product data request obligations on behalf of the other. We recommend this arrangement be formally incorporated into the Rules for clarity and consistency.

The Draft Rules include monetary thresholds for the definitions of 'initial provider' and 'large provider'. However, in the context of white labelled products, these monetary thresholds will only capture the intended non-bank lenders if they hold the contractual relationship with the consumer. Consequently, if these non-bank lenders do not meet the monetary thresholds set for initial and large

providers, no data holder obligations will be imposed on these non-bank lenders.

Members are concerned there may be circumstances in which either the larger non-bank lender is not captured (because they do not have a direct contractual relationship with the consumer), or no data holder is captured at all (because the relevant non-bank lender does not meet the monetary thresholds for initial and large providers).

FinTech Australia members would appreciate further clarity and guidance about the application of the Draft Rules to white labelled products and consideration of the risk of no data sharing obligations being imposed on non-bank lenders offering white-labelled products.

2. In-scope products and data set requests

2.1 Covered products

FinTech Australia members are generally satisfied with the way in-scope products are covered in the Draft Rules. However, some members would like clarification in relation to how legacy products are treated.

For example, some non-bank lenders maintain legacy products that continue to serve existing customers but are no longer accessible to new clientele. As such, these products may no longer be "publicly offered". Some FinTech Australia members would like clarification in the Draft Rules regarding the inclusion of these legacy products within the 'covered product' definition and whether the associated data holders will be subject to CDR data sharing obligations for these products. Additionally, FinTech Australia seeks clarification on whether data holders can offer customers the ability to share their CDR data even if such data does not fall under the "covered product" definition, particularly concerning legacy products.

Some FinTech Australia members would also like further information and clarification about what is classified as a "publicly offered" product. Some banks may assert that their corporate institutional products are not "publicly offered" as they are not publicly advertised and are only offered to select customers. However, it is also arguable that these products are in fact "publicly offered" as many corporate institutions are offered the same product (albeit with different pricing). Additionally, there are numerous products offered by non-bank lenders that are all subject to various levels of negotiation between the non-bank lender

and the customer. As such, some FinTech Australia members are concerned that some banks and potentially a large number of non-bank lenders may potentially use the ambiguity that is currently present in the definition of "covered product" as a way to avoid having to comply with the CDR data sharing obligations. In relation to transaction data, whether an account is "publicly offered" or not should not be a relevant consideration.

2.2 Trial product data

FinTech Australia members remain concerned the current six month trial period is too short. Six months does not provide sufficient time to trial the product itself, let alone enough time to analyse the data to determine whether the new product is viable or not.

As an alternative, some FinTech Australia members consider a flexible and scalable trial period of at least 12 months and ideally 18-24 months would be more appropriate and likely encourage experimentation and innovation. This would give non-bank lenders more time to properly trial its new products, assess the viability of its new products and if successful, to prepare data to be shared in accordance with the CDR rules.

The customer number threshold is also likely too restrictive to result in meaningful uptake of the trial exemption, particularly for business customers, and we recommend expanding this customer limit to 5000-10000.

Some members have also suggested that a combination of number of users and a monetary value threshold (i.e lending volume) be introduced instead of the current flat threshold of 1000 customers.

2.3 Financial hardship data and repayment history

Financial hardship data and repayment history is proposed to be excluded from the definition of 'account data'. FinTech Australia has concerns about the accuracy and completeness of CDR data if these exclusions are maintained.

Furthermore, some FinTech Australia members would like more clarity on what constitutes the financial hardship data that should be excluded from account data. It is currently unclear what should be excluded - i.e. is it the fact that the account has a financial hardship application or is it the circumstances which demonstrate financial hardship? FinTech Australia members would like clarity on what exact information should be excluded in relation to financial hardship data

and repayment history information. If "financial hardship data" is interpreted broadly, it could include transaction data which upon review shows that the customer is not meeting their repayments. On this interpretation, it would be impossible to exclude such data from the dataset.

One of the primary benefits of CDR is to enable consumers to compare products and find more affordable or suitable products. Consumers in financial hardship are likely to benefit from these use cases. However, by excluding hardship and repayment history information, these consumers may not be able to obtain a realistic indication of the costs to them of taking out an alternative product. Also, by excluding this information, lenders who wish to consider CDR data will need to build independent non-CDR processes to gather this information in order to make their lending decisions (or make lending decisions without the benefit of this relevant information). This is because these consumers will not be able to provide a full and complete picture of their financial history as this data is excluded from the CDR under the Draft Rules.

The exclusion of financial hardship data and repayment history information will also mean that consumers' CDR data will be incomplete and inaccurate. This will have broader ramifications to the CDR regime as non-bank lenders may be dissuaded from using CDR data (for example, in the context of their lending decisions) as it does not provide an accurate picture of a consumer's financial situation. The inaccuracy and incompleteness of consumers' CDR data could also impact the uptake and usage of action initiation (when launched) as well in respect of the non-bank lending sector.

2.4 Product data requirements for SME products

Some members also again support updating and expanding the product data requirements to reflect the nuances of SME product data. Richer data would open up new use cases and greater uptake by SMEs.

This could include: specific product details (rather than just product category); loan limit (particularly as revolving or pre-approved limits are more common for non-bank lenders); interest type (i.e. fixed, variable); repayment type (i.e. interest only, P&I, structured repayment cycles); expiry of interest only period; interest rate reference rate (i.e. BBSW, cash rate etc); line/facility limit fee; repayment frequency; contractual repayment amount; contractual maturity date; a greater range of repayment types (e.g. structured repayments, interest in arrears vs advance, mixture of I/O then P&I); and balloon or final repayment amount.

3. Internal and external dispute resolution

Although we do not have any comments on this aspect of the Draft Rules, members remain concerned that AFCA may not be the most suitable EDR provider for CDR consumer complaints in the non-bank lending sector.

FinTech Australia members are concerned that AFCA may not have the expertise to address the technical issues which may arise from complaints related to CDR or data standards. As posed in previous submissions, considering the uniqueness of CDR and the complaints and disputes that may arise out of data-sharing or data standards, we consider it may be more appropriate to have a CDR specific body which would be equipped to best deal with complaints and disputes.

4. Staged implementation

4.1 Insufficient time for implementation

Members remain concerned the current transition period is too short and we strongly recommend reconsideration of the proposed timelines for implementation.

While we appreciate the consultative approach taken in developing the rules, non-bank lenders still face a substantial change management task and need a reasonable time to allocate the required resources and budgets to comply with the rules by the tranche 1 date. The transition period must be proportionate to the relative resource constraints of non-bank lenders, compared to their ADI counterparts, and acknowledge the regulatory burden of compliance with the CDR regime.

A longer transition period and flexibility is particularly important in light of other forthcoming CDR developments, including the implementation of 'action initiation' and the potential phase out of screen scraping (which many non-bank lenders rely on)

Given the significant technical and compliance uplift required, some members encourage timeframes more aligned with those provided for ADI Open Banking data holders. As currently proposed, the phasing will be completed over just 12 months – significantly shorter than the four-and-a-half-year rollout for Open Banking.

Members also support phasing of data sharing obligations by size of non-bank lender as well as by product type, with prioritisation of products where there are clearer use cases and alignment with Open Banking product types.

We are also concerned about the lack of awareness among relevant non-bank lenders. While FinTech Australia members are generally engaged on this, the lack of submissions from others in the non-bank lending space to the previous Design Paper may suggest greater outreach, engagement and education is required. We note some ADRs are already doing this and encourage the Government to support and promote these efforts to educate prospective data holders.

4.2 Product reference data prioritisation

Currently, the Draft Rules prioritise the implementation of product reference data requests over consumer data requests. However, through their experiences with how the CDR operates with respect to the banking sector, some FinTech Australia members contend that, in practice, customer transactional data is currently used far more than product reference data.

As such, some FinTech Australia members urge the Treasury to consider giving non-bank lenders additional time to focus on being able to comply with their obligations in respect of customer transaction data, rather than prioritising product reference data which is currently used much less in practice.

4.3 Non-bank lenders should be grouped by sub-sector classes

Currently, the non-bank lenders which will be captured under the Draft Rules are initial providers and large providers. These providers are defined by their loan book values as well as how many customers they have. We appreciate this approach to tranching was suitable for the banking sector as the customers of the major banks are similar and the same segments of the market will be captured.

Some FinTech Australia members consider that the non-bank lending sector should be treated differently. The non-bank lending sector captures a wider variety of businesses such as asset finance businesses, buy now, pay later providers to non-bank mortgage providers. These businesses operate very differently with completely different user bases.

As an alternative to the currently proposed tranching model, FinTech Australia members ask Treasury to consider categorising non-bank lenders into sub-sectors and design tranching on that basis. In our view, this would provide a more useful and efficient CDR system with respect to the non-bank lending sector. For example, capturing a large majority of providers across each sub-sector of the non-bank lending space is more useful than capturing the largest providers across the whole non-bank lending sector (which may end up excluding some sub-sectors in the non-bank lending space).

5. Definitions

5.1 Large provider

Under the Draft Rules, if a relevant non-bank lender on a particular day meets the criteria outlined in Division 6.1(4), then it will be a 'large provider' and will continue to be even if the non-bank lender subsequently does not meet any of the criteria.

The Explanatory Materials states the rationale for this drafting is due to the definition of 'large provider' requiring a lender to have met the applicable monetary thresholds for a year, so it is likely that a lender will have ongoing capacity to meet their CDR obligations.

While FinTech Australia supports a definition which provides stability, we consider that it could have unintended consequences. For example, a change in circumstances could result in a non-bank lender ceasing to reach the monetary thresholds for a sustained period of time (e.g. 12 months). In these circumstances, FinTech Australia members consider that it may not be appropriate for these particular non-bank lenders to be still subject to data sharing obligations if they are no longer 'large providers'.

5.2 Voluntary and required consumer data exclusions

Consumer data which relates to debts bought by debt buyers or debt collectors are excluded from the definitions of 'voluntary consumer data' and 'required consumer data'. We understand Treasury's rationale behind this decision is because individuals who are subject to debt collections are likely to be in financial hardship, and therefore such data should be outside the scope of the CDR in order to protect such individuals.

Some FinTech Australia members consider that these types of data should be categorised as 'closed accounts' and should not be automatically excluded from the CDR regime. This is because these accounts have transaction histories which should be able to be shared if consumers wanted the information to be shared. Additionally, the individuals whose debts have been bought by debt collectors or debt buyers may not necessarily be in financial hardship, but this data will automatically be excluded from the CDR under the current Draft Rules.

Furthermore, where acquisition occurs by way of legal assignment in these circumstances, it is unclear why the purchasing entity should not have the same obligations as the original lender. Again, excluding this data will have an impact on the useability of the CDR data by others (such as other lenders).

5.3 Deferral period for non-bank lenders becoming an ADI

Non-bank lenders which become an ADI after the commencement of the Draft Rules have deferred compliance periods of 12, 15 and 18 months in relation to the 3 types of data requests.

FinTech Australia is satisfied with these deferral periods as they relate to the new data that the 'non-bank lender turned ADI' must share. However, in relation to the data that the non-bank lender had to share before it became an ADI, FinTech Australia members query why the new ADI's data sharing obligations would cease during the deferral period. FinTech Australia members consider that it is appropriate and reasonable to expect that the new ADI should have to continue to share the data it was required to share when it was a non-bank lender. Failure to do so could have a significant impact on customers who relied on access to this data, without a clear and justifiable reason for discontinuing access.

5.4 Definition of ‘high cost products’ in Privacy Impact Statement

Some members raised concerns about the analysis and conclusions drawn in ‘Issue 4’ of the Privacy Impact Statement regarding high cost products. The analysis in this section, which considers whether high cost products should be included in the CDR, currently categorises Buy Now Pay Later (BNPL) products as high cost.

Members question whether BNPL products should be categorised alongside pay day loans and consumer leases, and the lack of explanation for how this conclusion was reached. These products are fundamentally different and subject to specific Small Amount Credit Contracts (SACC) and Consumer Lease

regulations due to their high cost nature. This assumption and conflation, which forms the basis of the Impact Statement's 'Recommendation 2', demonstrates a misunderstanding about BNPL products and how they are designed. Unlike SACC's, which are permitted to impose relatively high fees and costs, BNPL products are generally designed to be free for the consumer when instalments are paid on time and have responsible spending rules and other consumer protections inbuilt.