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Sectoral Assessments
Consumer Data Right Division
The Treasury
Langton Crescent
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via email: data@treasury.gov.au

Consumer Data Right - Open Finance Sectoral Assessment, Non-bank lending

The FBAA welcomes the opportunity to make a submission to the consultation around CDR in relation to open finance in the non-bank lending sector.

Our submission will only address select consultation questions posed in the paper.

At the outset, we identify a structural issue that must be addressed before any further changes to the CDR should be promoted.

We refer to our submission to Treasury dated 29 July 2021 in response to the proposed rule changes that occurred in October 2021. In that submission, the FBAA raised a concern with the deficient definition of Trusted Adviser under Rule 1.10C. The concern expressed in our submission was that the definition of Trusted Adviser was too narrow. The definition of Trusted Adviser under Rule 1.10C included mortgage brokers but, in our view, erroneously omitted brokers of other finance products including asset finance and personal loans.

Unless the Trusted Adviser definition is corrected to include more than mortgage brokers, the operation of further reforms to expand CDR to non-bank lenders will be compromised. Those who assist customers to identify suitable finance products will be prevented from accessing critical information.

The term “finance broker” is the appropriate collective name for those who assist consumers and business customers to access finance products other than home loans. Mortgage brokers are a narrow sub-set of finance brokers who provide credit assistance to consumers in relation to finance secured by residential property. It is recognised that mortgage brokers may also broker other forms of finance beyond residential property (and that finance brokers may also broker finance for residential property).

The term “mortgage broker” was created and enshrined in legislation in 2020 in response to the Royal Commission. It is important to acknowledge that the Royal Commission did not require the law be amended to create a sub-group of finance broker called “mortgage

brokers". What the RC did recommend was that the law be amended to provide that when acting in connection with home lending, mortgage brokers must act in the best interests of the intending borrower.

Prior to the post-Royal Commission amendments, the credit regime recognised all brokers as credit assistance providers. Under that broader definition, brokers who provided credit assistance in relation to any consumer finance products were subject to the same obligations as those who provided credit assistance in relation to home loans. Importantly, all were subject to legal requirements under the credit licensing regime and the NCCP Act.

We raise this issue again because the current consultation addresses the expansion of CDR to non-bank lenders. Further changes cannot deliver against the objective of "empowering consumers to make more informed decisions about non-bank lending products" where the primary support group to consumers, namely finance brokers, is excluded. Any benefit of expanding CDR to non-bank lenders is eroded by denying access to this information by the group that exists to assist consumers to source products offered by non-bank lenders.

As the consultation paper recognises, non-bank lenders offer a range of products beyond home loans, including credit cards, personal loans, consumer leases, margin loans and business finance. We cannot have a discussion about the expansion of CDR to non-bank lenders without addressing the problem that has been created by excluding finance brokers from the definition of Trusted Adviser.

We maintain that all necessary protections consumers require are embedded in the general obligations under the NCCP Act. While the best interests duty arguably imposes a higher obligation on "mortgage brokers", there are no specific obligations that arise under the best interests duty requirements that impose higher standards in relation to treatment of consumer data. Those obligations are embodied in the obligation to engage in activities fairly, efficiently and honestly and to comply with credit legislation (which extends beyond NCCP Act to relevant Cth legislation including the Privacy Act). There is nothing under BID to justify distinguishing mortgage brokers from other credit assistance providers when extending CDR access to finance brokers.

Any business case that supports making mortgage brokers Trusted Advisers must also be relevant to finance brokers.

As a preliminary point we call on the distinction between regulated finance brokers and mortgage brokers to be removed and to amend the definition of Trusted Adviser to include all NCCP regulated credit assistance providers.

As a second, equally important point, we must accommodate finance brokers that provide assistance to customers in relation to non-regulated finance in order for CDR to operate in the manner it is intended.

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Questions:

Benefits and use cases

• How could sharing non-bank lending data encourage innovation or new use cases for CDR data? Are there cross-sectoral use cases that non-bank lending data can support, in particular with Open Finance/Banking?

• May the benefits of sharing non-bank lending data vary across particular consumer groups; for example, vulnerable consumers?

• Would the designation of non-bank lending improve competition between lenders, including leveling the playing field with banks, or lead to greater market efficiencies?

FBAA Response

The FBAA supports the expansion of the CDR to open finance and non-bank lending. Whatever benefits are observed to flow from CDR and banking are applicable to non-bank lending. The consultation paper already observes those potential benefits and we agree with the reasoning that the extension of data sharing beyond traditional banking will deliver benefits to consumers in the same way those benefits are perceived for the use of CDR data across the groups where it has already been introduced.

Data holder and datasets

• If non-bank lending is designated, which entities should be designated as data holders?

• How should data holders be described in a designation instrument? Is there potential to leverage existing definitions (for example, the definition of 'registrable corporation' in the Collection of Data Act or 'credit facility' in the ASIC Act)?

• Where lending is securitised or provided to a brand owner by a white labeller, does the same entity retain the legal relationship with the customer, as well as hold the data on the loan?

• Are there differences in the data held by non-banks and banks that would require adapting the rules and standards that apply to banks so that those rules and standards would apply to non-bank lenders? If so, why?

• Are there products offered by non-bank lenders that aren't covered by the existing rules and standards applying to banking data in the CDR? Are there CDR rules and standards that apply to banking data that warrant exclusion for non-bank lenders?

• Are there any government-held datasets that would be complementary to privately-held datasets and could support possible use cases in non-bank lending?

• What is the level of standardisation across products within business finance? Are there key datasets that are common across different types of business finance products that could be usefully compared? What are the key attributes of a product that would be useful for comparison services?

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FBAA Response

We recognise the difficulties of identifying the correct definition non-bank lenders who should be designated as data holders. Clearly the NCCP Act is too limited as it would exclude all non-consumer lenders. This is a material issue and should be the subject of additional consultation once further submissions are provided that may highlight limitations or difficulties with adopting definitions from other legislation including the ASIC Act or the Collection of Data Act.

The question regarding securitised lending / white-labelling is complex. There is a wide range of arrangements that exist amongst operators in the Australian market. Some white-label arrangements result in entities being heavily involved in the establishment and ongoing administration of credit facilities while others have limited involvement at the inception with the lender of record taking responsibility for the ongoing management of the facility. The amount of data a white-label operator may hold will vary considerably depending on whether they maintain an ongoing role.

As to the question of whether there are differences in the data held by banks and non-banks we believe that both groups would hold the information that is relevant to satisfying a consumer data request. It is likely that only very small operators lack the technological sophistication and infrastructure to be able to participate. It would seem appropriate to focus on financial thresholds as the most balanced way of determining which non-bank lenders might be excluded from the CDR obligations. We do not have data on what that threshold should be.

Business finance remains an area where there are high levels of variance between lenders. Different lenders have distinct eligibility criteria and price risk differently. It is appropriate that non-bank lenders that make submissions to this consultation paper might assist Treasury to identify common attributes that could be useful for comparison services. We recognise that there are high levels of individual pricing in business finance that may take into account many more factors than those that are readily quantifiable. This may include subjective assessments about the past history of the applicant, the type of industry they operate in and the current economic conditions and how they impact particular sectors of the economy.

Privacy considerations and intellectual property

• Are there privacy concerns specific to non-bank lending that should be taken into account when considering the designation of the sector?

Do you consider the existing privacy risk mitigation requirements contained in the banking rules and standards are appropriate to manage the privacy impacts of sharing non-bank lending data?

• Are there other examples of materially enhanced information specific to the non-bank lending industry?

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FBAA Response

We make no submission to these questions.

Regulatory burden and cost considerations

• Feedback is sought on the potential costs or regulatory burden implications across the spectrum of potential data holders and scope of product types and datasets that could be captured.

• What datasets would cost more for a data holder to share securely, and why?

• Which entities, defined either by size or product offering, would be less suitable for CDR data holder obligations from a cost or technological sophistication point of view, and why?

• What would be the likely cost of implementation and ongoing compliance with CDR data sharing obligations for your entity? Please provide detail where possible.

• What barriers to product data sharing exist for your entity or product offering? Please provide information on the types of systems you use and whether there is the potential to limit access to information, such as where data storage obligations are outsourced to third-parties.

• Does your business have consumers that are unable to access their account and transaction information online and, if so, what proportion of your customers are 'offline'?

FBAA Response

We make no submission to these questions.

Yours faithfully

Peter J White AM *MAICD*
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Life Member – FBAA
Life Member – Order of Australia Association

Executive Chairman & Co-Founder - The Sanity Space Foundation
Advisory Board Member – Small Business Association of Australia (SBAA)
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