AUSTRALIAN
RETAIL
CREDIT
ASSOCIATION

28 February 2019

Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Treasury Laws Amendment (Consumer Data Right) Bill 2018

Thank you for the opportunity to provide a submission on the *Treasury Laws Amendment (Consumer Data Right) Bill 2018* (the Bill).

The Australian Retail Credit Association (ARCA) is an industry association with the objective to promote both the integrity of the credit reporting system and best practices in credit management, enabling better lending decisions. In respect to the 'credit reporting system', this includes the system as established under Part IIIA of the Privacy Act (Part IIIA) and also the broader range of data available to credit providers to assist with credit management, such as that potentially sourced under the Consumer Data Right. As discussed below, the data that credit providers may be able to access under the Consumer Data Right will help improve credit providers lending practices.

ARCA supports the concept of the Consumer Data Right on the basis that, with consumer consent, making more data available to a broad range of entities for a wide range of services is good for competition and for consumers. This is true for both the initial Open Banking regime, and the planned expansion to other sectors.

ARCA also supports the legislative approach creating the overarching framework for the Consumer Data Right within the Bill, with the detailed rules being defined outside the Bill by the ACCC, and the Data Standards by Data61. This type of approach is sensible, in that it allows greater flexibility to tailor rules and standards to specific circumstances, and this flexibility is also required because the Consumer Data Right operates across multiple industry sectors.

In our submission, we set out:

- ARCA's key role in developing the frameworks for comprehensive credit reporting, and how this experience can provide useful insights to the successful introduction of the Consumer Data Right.
- How the Consumer Data Right will work with the credit reporting system and improve responsible lending practices.

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- Important considerations in relation to consumer consent and how this interacts with responsible lending.
- How the introduction of 'standardised consents' for some frequent and critical uses will improve consumer understanding and adoption of the Consumer Data Right, better protect individual's privacy, and allow more efficient oversight by regulators.

ARCA's role in developing the CCR framework

There are many similarities between the proposed implementation of the Consumer Data Right and the introduction of comprehensive credit reporting, particularly in terms of the exchange of consumer data between a broad range of industry participants. ARCA played a significant role in facilitating the implementation of comprehensive credit reporting and our experience provides useful insights into the challenges involved for the Consumer Data Right.

For example, the *Privacy (Credit Reporting) Code 2014* (CR Code) – much like the proposed Rules for the Consumer Data Right – builds upon the general legislative requirements for credit reporting as detailed under Part IIIA of the Privacy Act, providing a further level of detail in respect of the operation of the credit reporting system. The Privacy Act allows the Information Commissioner to appoint a 'code developer' to develop the rules under Part IIIA, and ARCA was appointed by the Information Commissioner to be that code developer. Those rules (i.e. the CR Code) were then reviewed and ultimately registered by the OAIC.

Likewise, ARCA played a central role in developing the Principles of Reciprocity and Data Exchange (PRDE) and the Australian Credit Reporting Data Standards (ARCDS), which, respectively, establish a set of business-to-business rules for credit reporting that encourage a competitive and efficient sector and ensure that the data shared in the system is consistent and meaningful. The PRDE includes key principles such as reciprocity, participation levels and exceptions, which are similarly being addressed by the Australian Competition and Consumer Commission (ACCC) in the Consumer Data Rules.

We have also assisted the Treasury and the Attorney-General's Department in building their understanding of the credit reporting system in respect of their work in relation to, respectively, the mandatory CCR legislation and the review of hardship arrangements.

ARCA has been an active participant in the process to develop the Consumer Data Right and the initial Open Banking implementation. We have constructively engaged with the Treasury, the ACCC and Data61, and have made submissions in respect of most milestones. Drawing on our experience in developing and implementing the CCR regime, we have sought to provide feedback and suggestions that provides a balance between the interests of consumers and those of industry (both as data holders and accredited data recipients).

For example, we have advocated for the introduction of 'standardised consents' for critical and potentially highly sensitive uses of CDR data that are common across many data recipients. We believe this will provide benefits to consumers, industry and the regulators and help develop confidence in the integrity of the system. The Treasury, in its Privacy Impact Assessment, has noted the purpose of such standardisation as aiding in "consumer comprehension by creating a short-hand and shared understanding of common uses."[1]

[1] Privacy Impact Assessment Consumer Data Right December 2018, p108.

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Likewise, the Treasury has welcomed our technical insights into the complex issue of how the Bill interacts with the credit reporting system as established under Part IIIA.

Interaction between the Consumer Data Right and Credit Reporting System

The Consumer Data Right – particularly the Open Banking regime – will make more data available (with the consent of the consumer) to assist credit providers to assess a consumer's credit worthiness and undertake the inquiries and verification steps required by the *National Consumer Credit Protection Act* ('risk and responsible lending' practices). This is because a credit provider's ability to successfully make a risk and responsible lending assessment is dependent on the availability and accessibility of relevant, accurate, and up-to-date data about the consumer.

The credit reporting system established under Part IIIA provides such data in respect to a consumer's existing consumer credit arrangements. In 2014, changes were made to Part IIIA to allow credit providers to access more comprehensive data than previously. However, despite these changes, Part IIIA still severely restricts the depth and breadth of data that may be reported in Australia compared to other markets such as UK, Canada and the US. Importantly, the Australian credit reporting system does not permit any details regarding the required and actual repayment amounts under an account, the balance of the account or any repayment history information in respect of utility and telecommunications accounts.

The Consumer Data Right will provide access to additional data sets in respect of a consumer's credit arrangements, together with other data relevant to the risk and responsible lending assessment.

For example:

i. In relation to existing credit arrangements, the Open Banking implementation of the Consumer Data Right will provide a much richer set of data about the credit and how the consumer uses that credit, such as the required and actual repayment amounts, actual balance and costs (e.g. interest rate) of the product.
ii. Once the Consumer Data Right has been extended to utilities and telecommunications companies, it will provide credit providers with details about the consumer's payment history with those types of accounts.[2]
iii. Credit providers will have access to transactional history (either through transaction or credit card accounts) that will provide data for income and living expense verification, and which may provide further insight into the consumer's behaviour.

ASIC recognises the ability of both the Consumer Data Right and comprehensive credit reporting to improve responsible lending has been recognised by ASIC[3]. Likewise, the

[2] Which is not currently permitted in the credit reporting system as the utility or telco does not hold an Australian Credit Licence. This means that a credit provider is not able to verify the payment history in respect of those accounts through the credit reporting system. This makes it harder for people to demonstrate their credit worthiness if they do not have a history with traditional credit accounts (i.e. credit cards, home loans etc). As an example, the only 'credit' held by many young people is their post-paid mobile phone account, which will not assist that person to demonstrate good payment history through the credit reporting system as it is not allowed to be reported.
[3] Paragraph 20, Update to RG 209: Credit licensing: Responsible lending conduct. Consultation Paper 309 (ASIC February 2019)

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Treasury has noted that the Consumer Data Right is "intended to support improved compliance with regulations"[4], such as the responsible lending obligations.

In respect of a borrower's expenses, the Banking Royal Commission highlighted the need for credit providers to take greater steps to verify actual expenses, and rely less on benchmarks.[5]

In practice, it is likely that credit providers will rely on the combination of credit reporting data and CDR data – both being records of the borrower's *actual* financial situation – to undertake these verification steps. For example, a credit provider that seeks the consumer's consent to obtain their data through the regime established under the Bill, will also rely on the credit report as a record of the consumer's liabilities to ensure that they obtain data on all relevant credit accounts.

Importantly, the regime established under the Bill will ensure such data is obtained via a secure, reliable and efficient process that represents a significant improvement in current approaches to obtaining similar data (e.g. copies of paper statements, or 'screen scraping' internet banking websites that require disclosure of customer internet banking credentials). We would also expect that in the absence of the CDR legislation, continued advances in data collection from consumers (with consent) will occur, but it is unlikely this would occur with the speed or breadth of participation envisaged for the CDR, and would lack the same regulatory oversight.

It is also important to note the key differences between the Consumer Data Right and the credit reporting system. Importantly, while the Consumer Data Right represents a *consumer's* right to access data about themselves, the credit reporting system can be described as a *credit provider's* 'right' to access data about the consumer. That is, to address the information asymmetry that puts credit providers at an information disadvantage when approached by potential borrowers, credit providers are given the right to share data about their customers' use of credit with a credit reporting body and other credit providers have the right to obtain that information from the credit reporting body to assist with their assessment and management of credit. The consumer must be informed about the sharing of their data but their consent is not required.[6]

In recognition of this, Part IIIA strictly limits the types of information that can be shared, the entities with whom it can be shared and the uses for which it can be used. In summary, only credit providers and associated entities (e.g. lenders' mortgage insurance providers, trade insurers) can access the credit reporting system and then only for purposes connected to assessing a credit application or management of that credit (e.g. collections purposes). A credit provider cannot use credit reporting information for marketing purposes – that is, they

[4] Page 20 Privacy Impact Assessment Consumer Data Right (The Treasury, December 2018)
[5] See, for example, page 75 of the Final Report, "…while the HEM can have some utility when assessing serviceability – that is to say, in assessing whether a particular consumer is likely to experience substantial hardship as a result of meeting their obligation to repay a line of credit25 – the measure should not, and cannot, be used as a substitute for inquiries or verification."
[6] There are limited exceptions in which a consumer's consent is required to access information, i.e. where a 'consumer credit' report is being obtained for 'commercial credit' purpose. Otherwise, if a consumer objects to the sharing of data with a credit reporting body, their option is to not apply for the credit. This approach recognises that, if permission could be withdrawn, the system would not work as consumers with negative history would simply withdraw consent to their data being shared.

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cannot seek to obtain the consumer's 'consent' to use it for purposes not provided for in Part IIIA.

In contrast, the Consumer Data Right largely permits any accredited entity to obtain data under the Consumer Data Right for any purpose – subject to obtaining the consumer's consent. The Bill does not limit the data that can be obtained by the data recipient, provided the data is available through the APIs.

The Bill, together with the Consumer Data Rules, will establish a framework to ensure that any consent obtained from a consumer is "voluntary, express, informed, specific as to purpose, time limited and easily withdrawn" and "that collection of CDR data must be reasonably necessary or required to provide the service the accredited data recipient is offering".[7]

Nevertheless, the fundamental difference between the credit reporting system and the Consumer Data Right is the requirement, or lack of requirement, for the consumer to consent to the sharing of their data. For credit reporting, the lack of consumer consent is a key reason why Part IIIA tightly restricts that sharing, while the Consumer Data Right largely permits the consumer to decide when and with whom to share their data – which is consistent with the objects of the Bill to put consumers in better control of their data and to promote choice and competition in the economy.

Consent as a precondition of the provision of a service

The interplay between the aims of the Bill to give consumers more access and control over their data through the inclusion of strict consent requirements, and the expectation that potential data recipients will use that data to fulfil their compliance obligations associated with providing services to consumers, creates one of the most challenging aspects of the proposed regime[8].

At a superficial level, the relationship between the requirement for consumer consent and a potential service provider's need to gain consent is simple. It is a tautology that businesses will require consent and a consumer must give consent as a precondition for a service to be provided. The key questions to be resolved is whether the consent is directly 'related to' the service being provided and whether a consumer understands the extent of the consent they are providing.[9]

For a data recipient to access consumer data under the Consumer Data Right, the Bill requires consumers to consent and, subject to limited exceptions, restricts a data holder's use of that information to purposes that are established in the consumer's consent.

As noted above, the ACCC proposes to establish that consent must be "voluntary, express, informed, specific as to purpose, time limited and easily withdrawn" and "that collection of

[7] ACCC, Consumer Data Right Rules outline, paragraph 7.10.
[8] This is certainly true for credit providers providing NCCP-regulated credit, but we would expect this to be a general issue affecting many other types of services that will delivered through the Consumer Data Right
[9] The ACCC will require that an accredited data recipient must not make consent a precondition to obtaining *another* unrelated product or service. See ACCC Rules Outline, 7.10(b).

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CDR data must be reasonably necessary or required to provide the service the accredited data recipient is offering".

Considering their risk and responsible lending obligations, some – if not most - credit providers will at some point make consent to access CDR Data (in particular Open Banking data) a precondition of making an application for credit. This is particularly the case given ASIC's and the Treasury's commentary regarding responsible lending referred to above.

Making consent a precondition of applying for the credit is consistent with the Bill and the ACCC's interpretation of 'consent' described above, despite the fact refusal to provide consent is likely to inhibit a consumer's ability to access credit from lenders. The consumer has a "genuine opportunity to provide or withhold consent" and there is unlikely to be "duress, coercion or pressure" applied by the credit provider.[10]

This is consistent with the approach taken in the United Kingdom, which has similar provisions to those proposed in Australia, such that any consent that is conditional on the provision of the service must be restricted to only that data necessary for the provision of the service.

In most cases it is likely that the question of whether the consent is related to the service being provided is reasonably clear. This would include credit providers seeking consent to access CDR data for the purposes of assessing an applicant's credit worthiness and for responsible lending inquiries and verification steps.

However, the delineation between what is acceptable and what is not may not always be clear-cut, and it may not be immediately obvious to consumers regarding the implications of them granting consent.

For example, if a customer applied to ABC Bank for a home loan of $500,000, it would be permissible to make the application conditional on the consumer consenting to have their CDR data accessed for risk and responsible lending purposes. A consent could be framed to the consumer as "I consent to my data being accessed for the purposes of assessing my application for a loan". As that purpose is directly related to the service being sought the consumer is free to consent or not. It is likely that a consumer would recognise that this was a legitimate purpose and would be more likely to consent.

However, a credit provider may also want to assess whether the consumer can afford a higher value loan, which could then be offered to the consumer. Would it be permissible to make the consent conditional on the credit provider also using the data for that purpose?

Extending this example, it is likely that a credit provider would also want to use that information for assessing the price the consumer would pay for the loan. So called "risk based" pricing already occurs in the Australian market, and given the decision to approve a loan and the price of that loan is directly related to assessed risk, this purpose also appears directly related to the original purpose. For clarity, the wording of the original consent could be extended to say, "I consent to my data being accessed for the purposes of assessing my application for a loan including the price of the loan I will be offered".

[10] As per the Office of the Information Commissioner's guidelines on voluntary consent summarised in the ACCC's Rules Outline, at 7.10(a).

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However, assessing the price of a service might also mean assessing a consumer's price sensitivity (e.g. whether the consumer would be willing to pay a higher price based on their transaction history). While we are not aware such approaches to pricing operating in the regulated consumer credit industry in Australia, we understand they do operate in other sectors. Such a usage would probably not be within the consumer's understanding, and they would be unlikely to agree to that purpose if they genuinely understand the nature of the consent they were giving.

Would the form of consent described above permit the usage of the CDR data to assess a consumer's price sensitivity? If not, and the credit provider was required to specifically seek consent to use the data for the price sensitivity assessment, could the credit provider (or another type of service provider) make that consent a precondition of the service (noting that, from the credit provider's perspective, the consent is directly related to the provision of the service)?

The Bill does provide a framework to deal with such issues. For example, the Consumer Data Rules will establish the boundaries of what is acceptable and, ultimately, permits the ACCC to prohibit certain uses of the data. But we raise these issues to highlight the practical issues that will face consumers (and the regulators who are tasked with monitoring the operation of the Consumer Data Right i.e. ACCC and the OAIC) – who will face different formulations of consent from multiple businesses offering apparently similar services.

The ACCC and the OAIC will be tasked with regulating the conduct of possibly many thousands of accredited data recipients, where each data recipient will use different forms of consent, access different data sets and use the data for different purposes.

Implications of refusing to renew consent or withdrawing consent

A further issue with consent that is required as a precondition of a service, are the implications for an ongoing service, of the consumer not renewing consent or withdrawing consent.

In the case of a credit provider seeking consent for risk and responsible lending purposes, it is unclear whether that credit provider could proceed with the application if the consent was not provided (i.e. the credit provider did not have access to the data required). This issue will need to be addressed by ASIC as part of its current review of Regulatory Guide 209: *Credit licensing: Responsible Lending* (RG 209).

Where an ongoing service is being provided which is dependent on access to CDR data, we note that the withdrawal of consent may have serious consequences for the consumer. For example, if a consumer has been approved for a 'construction' home loan (i.e. where progressive draw down payments are made as the construction progresses), the credit provider may make access to CDR data a precondition of each drawdown payment. Likewise, a credit provider may make access to an ongoing line-of-credit conditional on consent being maintained. In these examples, if the consumer withdraws their consent (or fails to renew consent), it is possible that, respectively, the credit provider would not provide further drawdowns (and the consumer would be unable to proceed with the construction) or the credit provider would require immediate repayment of the full balance of the line-of-credit. These are both serious consequences and have the potential to cause significant detriment to the consumer.

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These situations are not regulated as part of responsible lending and the update to RG 209 is unlikely to establish any guidelines for industry. In the absence of a common practice, it will be up to each credit provider to determine what they will do in this situation – which may result in consumer confusion and frustration, and is likely to make consumer's less likely to accept the introduction of the Consumer Data Right.

Standardised consents to improve consumer outcomes

We consider the Consumer Data Right to be a highly positive initiative for consumers, that will improve choice and innovation and – in respect of credit – improve lending practices.

However, the magnitude of this initiative should not be underestimated. Consumer's acceptance and adoption of the Consumer Data Right will be directly linked to the trust that they place in the system – which, in turn, is driven by how well they understand the system, and whether the system operates as they expect.

It is an unfortunate reality that the general financial literacy levels of the public are not high, and the Consumer Data Right initiative requires a good level of understanding. Over the past 18 months ARCA and its Members implemented a consumer education campaign in respect of CCR. While we believe that we have had some success with raising awareness of CCR, it has been from a very low level of consumer engagement with and understanding of the credit reporting system. We believe that an effective consumer education process for CCR will take many years.

While we recognise that funding will be allocated for a consumer education campaign for the Consumer Data Right, the challenges are greater than CCR which is far more limited in scope (in terms of breadth of data, the uses of data, and participants). Given the complex ways in which data recipients will want to analyse and use data, there is a high likelihood that many consumers won't understand the process and – as a result – won't trust the CDR regime, or worse, find their data used for purposes to which they did not think they had consented.

Further, as noted above, the task of regulating the Consumer Data Right regime will be significant.

While there will be many varied and innovative uses of the CDR data, it is highly likely that there will also be many uses and practices that are common across large numbers of data recipients. For instance, the use of CDR data by credit providers for risk and responsible lending practices is likely to be broadly the same across all credit providers.

We believe that there is a clear opportunity to create a number of 'standardised consents', which set out the form of consent, the types of data included and the purposes for which the data is used. In this way, a consumer would see a common consent across all similar data recipients, which will remove complexity and ensure transparency – which, in turn will maximise consumer acceptance and engagement with the Consumer Data Right. An important aspect of standardising the use cases, is to establish and implement the data that credit providers need – and therefore should access – to undertake their risk and responsible lending processes. In this way, the individual's privacy will be better protected.

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The standardised consents would act as a form of 'trust mark' that provides consumers a shorthand manner of understanding what is being done with their data – and, importantly, what is not being done with that data.

This will also have the important secondary benefit of freeing up the regulators' resources as they would be able to focus more attention on data recipients offering services with more unique consents.

To be clear, we are not suggesting that the creation of some standardised consents should limit the circumstances in which an accredited person can access CDR data through a separate unique consent that defines the types of data accessed and the uses to which that data is put. Rather, it will provide a set of default uses where stakeholders – government, CDR regulators, financial services regulators, industry representatives and consumer representatives – have agreed that it is appropriate to develop protocols based on the types of data accessed and the purposes for which it is used.

We consider that it is highly likely that many consumer's first experience with the Consumer Data Right will be through a credit application – possibly a home loan, car loan, or credit card – where they will be asked to consent to the credit provider accessing their CDR data for risk and responsible lending purposes. Ensuring those consents are simple and straightforward – and consistent between credit provider for a consumer who is shopping around – will increase the chances of successful adoption of the Consumer Data Right by the public.

It is important that the development of the standardised consents is undertaken as a matter of priority – preferably prior to CDR data being made available through the Open Banking system. Once CDR data is available, data recipients will have already established their processes, so it is preferable to have certainty around consents before this occurs. Delaying the development of the standardised consents will, for the reasons set out above, raise the risk of a consumer having a poor initial experience with the regime, which will have long lasting implications for the acceptance and adoption of the Consumer Data Right by consumers.

For these reasons, we consider that the ACCC and OAIC should, as a matter of priority, encourage and support industry (with the involvement of other stakeholders) to identify common uses and develop standardised consents. Priority should be given to the use cases relating to risk and responsible lending, which could be developed in parallel to the work being undertaken by ASIC to review RG 209.

We would be very happy to provide any further information or clarification that you require.

If you have any questions about our feedback, please feel free to contact me

Yours sincerely,

Mike Laing
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