12 October 2018

Mr Bruce Cooper
General Manager
Consumer Data Right Branch
Australian Competition & Consumer Commission
23 Marcus Clarke Street
CANBERRA ACT 2601

Email: accc-cdr@accc.gov.au

Dear Mr Cooper

ACCC Consumer Data Right Rules Framework

The Customer Owned Banking Association (COBA) welcomes the opportunity to comment on the ACCC's Consumer Data Right Rules Framework (the Framework). COBA is also grateful for the roundtable session to discuss the Framework with the ACCC on 25 September 2018.

COBA is the industry association for Australia's customer owned banking institutions (mutual banks, credit unions and building societies). Collectively, our sector has $113 billion in assets, 10 per cent of the household deposits market and 4 million customers.

Customer owned banking institutions account for around three quarters of the total number of domestic Authorised Deposit-taking Institutions (ADIs).

COBA supports Open Banking as it presents an excellent opportunity for our sector to further enhance how we deliver value to our customers. Our view is that ADIs with excellent customer service and highly competitive pricing, like customer owned banking institutions, stand to gain from participating in the Open Banking system.

COBA is a significant stakeholder in Open Banking. We are pleased that the ACCC is consulting on the Framework, given its complexity and the need for the Consumer Data Right (CDR) Rules to be appropriately designed to support industry solutions for Open Banking to help drive innovation and competition in Australia's banking sector.

In this regard, COBA believes that it would be beneficial for the ACCC to continue to provide industry a sufficient level of transparency over the ACCC's proposed approach to the CDR Rules, leading up to the release of the draft CDR Rules in December 2018.

COBA suggests that an ACCC interim response to submissions or a further consultation roundtable later this month or early November would be beneficial. This would help support an informed and smooth consultation of the draft CDR Rules, particularly given the indicative timing for the passage of enabling legislation and the Government's intended Open Banking transition timeframes, as announced in May this year[1].

[1] Government Response to the Open Banking Review, 9 May 2018.

In relation to the timing for the enabling legislation, COBA understands from the ACCC that the Treasury Laws Amendment (Consumer Data Right) Bill 2018 (the Bill) is planned for introduction into Parliament in December this year, and that, in its view, the earliest opportunity for the Bill to become law would be in February or March next year.

COBA is very concerned with this indicative timeframe, chiefly as the potential timing of the next Federal election may operate to inadvertently delay the legislative process.

As the ACCC would appreciate, this creates a high level of uncertainty for industry, and places at risk the planning and investment by industry for Open Banking, which have been made based on the expectation that Open Banking will commence as announced by the Government in May this year.

- Indeed, some of COBA's members are well advanced in their planning and investment for Open Banking, while other industry participants, through their own preparations for Open Banking, have also made significant investments.

To help minimise investment uncertainty and expedite the creation of the CDR to enable Open Banking, COBA's view is that the Bill should be introduced into Parliament this month, which may allow for the Bill to be passed this year. COBA raised similar concerns with the Treasury in its submission[2] concerning the Bill.

If this is not practicably possible, we consider that the Open Banking system framework should be formalised prior to any *final decision* being made on the timelines for industry implementation. Recognising that the ACCC would be empowered to adjust the timing for implementation where necessary[3], our view is that the ACCC may need to revisit the Government's intended transition timeframes, depending on when the Bill becomes law and the final CDR Rules are released for implementation. However, any revision must not alter the 12-month extension for non-major ADIs.

As the ACCC may appreciate, many core banking providers typically undertake projects to implement proposed legislative reforms with an expectation that there will be minimal changes to final law. However, as demonstrated with the Credit Card Reforms, fundamental design principles can change. This has a significant impact on the project timelines and systems configurations of our members.

Further to this, as COBA explained at the ACCC roundtable, some of our members are facing particular challenges with implementing Open Banking by the Government's announced timeframes and would require more time to avoid unnecessarily burdensome costs. Some of our members are in the process of implementing major changes to their information and data systems (software and infrastructure overhauls to replace outdated systems).

- For these members, implementing Open Banking by the Government's announced time frames would require legacy systems to be reconfigured to accommodate Open Banking, while work is performed to determine how Open Banking should be implemented in their new systems.
- This means that they may need to operate 2 systems simultaneously, before closing their legacy systems down at a later stage than initially planned, and that their significant expenditure on legacy systems would be wasted.

As the ACCC is to be empowered to adjust timeframes where necessary, COBA strongly encourages the ACCC to also include CDR Rules on criteria that entities would need to satisfy to be granted a time extension to implement Open Banking. COBA recognises that any time extension request would need to be considered by the ACCC on a case-by-case basis and would need to be supported by an adequate case (such as significant commercial detriment).

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[2] COBA submission, of 7 September 2018, to the Commonwealth Treasury on the Exposure Draft of the Treasury Laws Amendment (Consumer Data Right) Bill 2018 (first stage of consultation).

[3] ACCC Consumer Data Right Rules Framework 12 September 2018. Page 16 refers.

The particular challenges faced by ADIs in implementing Open Banking were noted recently by the Chairman of the Australian Prudential Regulation Authority (APRA), Wayne Byres, who stated[4] that "the complexity of systems and process environments and reliance on manual processes has made the mapping of data lineages, managing data quality and the aggregation of data difficult". For these reasons, Mr Byres emphasised that "significant investment will be needed to meet the new obligations".

COBA recognises that the intent of the Framework is to outline, as far as possible, the approach and substantive and/or 'in-principle' positions the ACCC proposes to take when making the CDR Rules.

We understand that the Framework does not outline the ACCC's proposed drafting for particular CDR Rules, and that some of the Framework proposals would apply broadly to different industry sectors that are designated for the CDR regime.

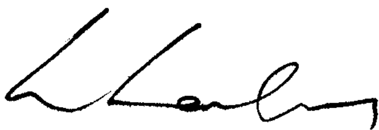
COBA notes that the ACCC will release a first draft of the CDR Rules for public consultation in December 2018, and that the ACCC will not have legal authority to make the CDR Rules until the passage of the enabling draft legislation.

The Attachment to this submission provides COBA's detailed comments on the following aspects of the Framework (set out as sequenced in the Framework):

- sharing data with third party recipients
- CDR consumer – who may take advantage of the CDR
- data holder – who is obliged to share data
- data sets – what data is within scope
- accreditation
- consent
- Authorisation and authentication process
- making generic product data generally available
- use of data, and
- dispute resolution.

COBA looks forward to continuing to work with the ACCC to finalise the Framework and develop the CDR Rules to help facilitate a smooth and efficient transition to Open Banking. If you have any questions or comments in relation to any aspect of our submission, please do not hesitate to contact Tommy Kiang, Senior Policy Manager, on [redacted] [redacted].

Yours sincerely



LUKE LAWLER
Director - Policy

[4] Speech by Wayne Byres, APRA Chairman - 2018 Curious Thinkers Conference, Sydney, 24 September 2018.

ATTACHMENT

SPECIFIC COMMENTS ON THE PROPOSED CDR RULES FRAMEWORK

2. Sharing data with third party recipients

2.3 *Sharing must not attract a fee*

COBA notes that the ACCC proposes that the sharing of the data outlined in the Open Banking review (i.e. not derived data) would not be made subject to any fees under the **first version** of the CDR Rules (emphasis added).

As the ACCC is aware, the Treasury is consulting[5] on amendments to the Bill and the draft Consumer Data Right (Authorised Deposit-Taking Institutions) Designation 2018 (draft Designation Instrument). As part of this consultation, Treasury is proposing further details on the framework for charges for access and use of CDR data.

As recommended by the Open Banking Review, the Treasury proposes that the data sets in the Open Banking Designation Instrument would not be chargeable data sets – this proposal does not appear to be limited to the first version of the ACCC's CDR Rules.

- The Treasury proposal adds that for no-charge data sets, data holders would be able to incorporate the cost of disclosing data into their cost base for the provision of the original good or service.
- However, where data holders voluntarily provide access or services that are *beyond* what is required under the CDR, the Treasury proposes that these data holders would be able to determine the appropriate charge.

COBA notes that where the Minister *designates a data set as being a chargeable data set*, each data holder of that data set may adopt their *own charging strategy* (i.e. market based pricing) as the initial charging approach.

- However, COBA notes that in this situation, data holders would *not be required* to introduce a charge for chargeable data sets – they would have the option to introduce a charge.

Where market pricing arrangements for a chargeable data set is determined to be unreasonable, COBA notes that the Treasury proposes a test to enable the ACCC to intervene to regulate the price of a chargeable data set. COBA notes that pricing arrangements would *only* be imposed after consideration of whether:

a. the existing charging arrangements for access and use to the data are unreasonable
b. the objects of the Consumer Data would be promoted by a pricing declaration
c. pricing arrangements would promote the public interest, and
d. the effect of imposing pricing arrangements on investment in collecting, generating, holding and maintaining the data set; and markets that depend on access to the service that underlies the data set.

COBA supports the Treasury's proposals, as it would be more sensible to allow the market to set any fees, where appropriate, and have the ACCC intervene in this process only if the market does not act in good faith.

[5] Treasury consultation on the Treasury Laws Amendment (Consumer Data Right) Bill 2018 (second stage of consultation) and Designation Instrument for Open Banking. Released 24 September 2018.

3. CDR consumer – who may take advantage of the CDR

3.1 *Former customers*

COBA notes that the ACCC sees utility in providing former customers with the right to access relevant data concerning their prior accounts, and that it is seeking views on what would be a reasonable timeframe for requiring data holders to share the data of former customers under the CDR regime. We note that the ACCC proposes that the first version of the CDR Rules would *not* enable former customers to exercise the CDR.

In the context of Open Banking, COBA does not support the ACCC's proposal to require data holders to share the data of former customers, as there does not appear to be a clear benefit to enabling this. For new lending applications, for example, the data of former customers would typically be out of date and therefore unusable.

As this issue may be subject to further consultation by the ACCC, COBA encourages the ACCC, in the interim, to provide some clear examples in the Open Banking context to support its view and further stakeholder consideration.

4. Data holder – who is obliged to share data

4.1 *ADIs*

COBA is concerned that there remains no indication – either in the Bill, the draft Designation Instrument or the Framework – that *non-ADI lenders* would also be mandated to participate as CDR data holders under Open Banking. We raised similar concerns in our submission[6] to the Treasury on the Bill.

COBA notes from the Explanatory Materials accompanying the Bill[7], that if non-ADI lenders are not captured by the Minister's designation, the ACCC would only be permitted to require non-ADI lenders to provide data they hold:

a. if that data falls within the definition of CDR data for the banking sector, and
b. if they were accredited data recipients.

As the ACCC would appreciate, because non-ADI lenders typically issue credit products and services that are also issued by ADIs (such as home loans, personal loans and small business loans), it is highly likely that non-ADI lenders also hold data that would fall within scope of CDR data for Open Banking – such as 'customer information', 'product use information' and 'information on the product (as specified in the draft Designation Instrument[8]).

It is important to understand that non-ADI lenders not only compete in some of the same key credit markets as ADI lenders, but that their share in some of these markets has expanded over recent times.

Notably, the Reserve Bank of Australia (RBA) estimated earlier this year[9] that growth in residential mortgage lending by non-ADI lenders in Australia picked up materially over 2017 and was significantly higher than for banks.

The RBA estimated that non-ADI lenders accounted for around 4 per cent of outstanding residential mortgages at the end of 2017, and that the non-ADI lending sector's growth in residential mortgage lending was aided by developments in both mortgage and residential mortgage-backed security markets.

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[6] COBA's 7 September 2018 submission to the Treasury on the Exposure Draft of the Treasury Laws Amendment (Consumer Data Right) Bill 2018 (first stage of consultation).

[7] Explanatory Materials of the Exposure Draft of the Treasury Laws Amendment (Consumer Data Right) Bill 2018 (first stage of consultation). Paragraph 1.110. Pages 23-24 refer.

[8] Draft Consumer Data Right (Authorised Deposit-Taking Institutions) Designation 2018.

[9] Reserve Bank of Australia, Financial Stability Review April 2018. Pages 40-41 refer.

In this regard, it is not clear why non-ADI lenders would be provided a *choice* about whether to participate as data holders in Open Banking, solely based on whether they are able to obtain accreditation as data recipients from the ACCC.

Non-ADI lenders should also be mandated as data holders, chiefly because the objectives of enhancing competition and innovation through Open Banking will be harder to achieve if only ADI lenders participate.

COBA notes the ACCC's clear recognition in the Framework that the "Open Banking review recommended a broad definition of 'consumer' within the CDR regime, with the obligation to share data to apply in relation to **all customers** holding a relevant bank account in Australia"[10]. [Emphasis added].

In this sense, any customer of a non-ADI lender holding a relevant account should be provided the same opportunity to participate in Open Banking, as would be provided to customers of ADI lenders. There does not appear to be any valid reason as to why customers of non-ADI lenders should be denied the same opportunity to participate.

For these reasons, COBA emphasises that the ACCC should recommend to the Minister that the Minister make an instrument to either:

a. vary the draft Designation Instrument to also include non-ADI lenders, or
b. designate the non-ADI lending sector to be subject to Open Banking.

COBA notes that subsection 56AE(3) of the Bill would enable the ACCC to make such recommendations to the Minister, as the ACCC would also be taking lead on issues concerning the designation of new sectors of the economy to be subject to the CDR[11].

4.2 *Phased implementation*

COBA notes from the Framework that the ACCC would be responsible for determining the detail of phasing the implementation for Open Banking and would have flexibility to adjust the timing for implementation where necessary.

As we explained in the cover of this submission, some of COBA's members are facing particular challenges with implementing Open Banking by the Government's announced timeframes and would require more time.

COBA strongly encourages the ACCC to also include CDR Rules on criteria that entities would need to satisfy to be granted a time extension for implementation, recognising that any extension would only be granted in exceptional circumstances.

4.4 *Exemptions*

COBA notes the ACCC's view that in subsequent phases of Open Banking, there may be a need to exempt certain entities from some or all of the obligations. We note that the ACCC proposes to make CDR Rules that would acknowledge that exemptions may be granted in certain cases.

COBA's view is that it would be important for any exemption criteria to be drafted broadly to support ACCC flexibility and discretion, given the diverse range of CDR participants and their potential roles as data holders, data receivers or both.

If possible, COBA suggests that the ACCC utilise these proposed exemptions to also cater for granting time extensions for implementation where necessary (see our comments at section 4.2 above).

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[10] ACCC Consumer Data Right Rules Framework 12 September 2018. Page 14 refers.

[11] Explanatory Materials of the Exposure Draft of the Treasury Laws Amendment (Consumer Data Right) Bill 2018 (first stage of consultation). Paragraph 1.12. Page 5 refers.

5. Data sets – what data is within scope

5.2 *Derived data*

As the ACCC is aware, the Treasury's proposed amendments to the Bill would limit the CDR Rule-making powers requiring access to derived data[12].

COBA understands that this means that derived data would now need to be *specifically included* in a designation instrument to be within scope of the Open Banking access and transfer right.

- COBA notes that the draft Designation Instrument appears to specify a number of potential examples of derived data, such as the 'balance of an account associated with a product', 'a fee or charge associated with a product' or 'an interest rate associated with a product'.

COBA supports the Treasury's proposed limitation to the CDR Rule making powers, as this would help place boundaries around the scope of derived data.

With that said, COBA notes that subsection 56AE(3) of the Bill would enable variations to be made to the Designation Instrument for Open Banking, which may, among other potential variations, broaden the specified types of derived data for Open Banking.

COBA would be concerned if any derived data specified in the Designation Instrument for Open Banking directly interfered with an ADI's existing commercial arrangements.

While the Treasury has stated that, as a general rule, derived data captures data that has been enhanced, but not materially so (e.g. account balances), it also stated that, on an exceptions basis, derived data can also capture data that has been *materially enhanced*, and could in some circumstances be classed as *intellectual property*, such as the outcomes of a Know-Your-Customer (KYC) verification.

COBA emphasises that the December 2017 Report of the *Review into Open Banking* (the Review) strongly cautioned against including value-added customer data within scope of Open Banking, explaining that:

> "Data holders invest heavily in analysis to give themselves an edge over their competitors and create new business opportunities.
>
> If Open Banking (and broader access to data reforms) is to support the creation of an innovative Australian data industry, retaining incentives to make those investments will be important.
>
> Imposing an obligation that data holders share such information with other parties (including their direct competitors), if instructed to do so by a customer, could confer an unfair advantage on their competitors."[13]

The Review went further to recommend that "data results from material enhancement by the application of insights, analysis or transformation by the data holder **should not be included** in the scope of Open Banking"[14]. [Emphasis added].

However, COBA recognises that the Review's [single] exception to this recommendation relates to granting customers the right to instruct their bank to share the result of an identity verification assessment performed on them, to improve efficiencies in the KYC verification process – as also pointed out by the Treasury[15].

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[12] The Treasury: CDR proposals for further consultation, Proposal 1. Pages 4-5 refer.

[13] December 2017 Report of the Review into Open Banking. Page 38 refers.

[14] Recommendation 3.3 of the December 2017 Report of the Review into Open Banking. Page 38 refers.

[15] The Treasury: CDR proposals for further consultation, Proposal 1. Page 4 refers.

5.3 *Data sets*

COBA notes that the draft Designation Instrument proposes the following 3 specific classes of information for Open Banking: customer information, product use information, and information on the product that is public.

COBA understands that the ACCC's CDR Rules would be required to further delineate the classes of information specified in the final Open Banking Designation Instrument.

To delineate the classes of information, COBA notes the ACCC's proposed *minimum* list of customer data, transaction data and product data items, such as a customer's name, the opening and closing balance of an account and product type.

While COBA is broadly supportive of the ACCC's minimum list of identified Open Banking data items, we are concerned with what could be shared under the proposed customer information and product use information classes.

In particular, COBA is concerned about the ACCC's proposal to include payee information – which may include a BSB, an account number or payee name – as this may compromise a payee's identifiable information.

In this regard, COBA encourages the ACCC to carefully consider the practical implications of any proposed data item and to continue to consult openly with industry stakeholders. We also encourage the ACCC to focus only on the minimum data requirements, at first, to enable Open Banking and help expedite transition to the new system by the Government's announced timeframes.

Related to this, COBA notes that the ACCC is inviting views from stakeholders on what transaction metadata (i.e. data providing information about one or more aspects of the transaction data) could be within scope.

To help provide further feedback on this question, it may first be helpful to better understand from the ACCC what the scope of metadata would look like. Our general view is that the provision of transaction metadata should be based on a clear purpose for use. This should also be supported by a sufficient level of control measures to ensure its appropriate access and use, but to also minimise the risk of scope creep.

Furthermore, COBA supports the ACCC's proposal to not include identity verification assessments (KYC) within the first version of the CDR Rules.

Given KYC is partially risk-based, there are a variety of different standards that may be used by different entities. In this sense, it is difficult to know what standard has been used by an entity (e.g. what KYC information was collected and verified by an ADI).

There would need to be a sufficient level of detail to enable one entity to rely on the ID verification performed by another entity. Otherwise, all participating entities would have to agree to a minimum standard for KYC information collection and verification.

In this context, and given the potential legal issues involved, COBA encourages the ACCC to work with the Australian Transaction Reports and Analysis Centre (AUSTRAC) on any potential future deliberation to include KYC outcomes within the CDR Rules.

5.4 *Reciprocity*

COBA agrees with the ACCC's view (expressed in the ACCC's CDR Rules Framework) that reciprocity raises complex issues requiring further consideration. COBA supports the ACCC's proposal to *not* make any CDR Rules on reciprocity in the first version of the CDR Rules. Our view is that reciprocity *should not apply* before the date that non-major ADIs are obligated to have available the final tranche of Open Banking data.

6. Accreditation

6.2 *Proposed rules for accreditation model and criteria*

COBA notes that the ACCC proposes the following four criteria for the general tier of accreditation as a data recipient, being that an applicant:

1. is a 'fit and proper' person to receive CDR data
2. has appropriate and proportionate systems, resources and procedures in place
3. has internal dispute resolution processes that meet the requirements specified in the CDR Rules and the applicant is a member of an external dispute resolution (EDR) body recognised by the ACCC, and
4. holds appropriate insurance, relevant to the nature and extent of the applicant's management of CDR data.

The general tier of accreditation would entitle an accredited data recipient to receive and hold any type of CDR data in scope for Open Banking, subject to compliance with the relevant requirements.

We understand that the ACCC intends to provide a streamlined accreditation process for ADIs. COBA strongly supports this approach. In practical terms, the prudential regulatory framework for ADIs meets all four elements of the criteria. A potential model is the treatment of ADIs under the general obligations of Australian Financial Services Licensees (see s912A(1) of the *Corporations Act 2001*). In recognition of the prudential framework, AFS licensees that are ADIs are exempt from the AFS obligations to:

- have adequate financial, technological and human resources to provide the financial services covered by your licence and to carry out supervisory arrangements, and
- establish and maintain adequate risk management systems.

Provided below is more detailed feedback on the ACCC's proposed criteria for the *general tier* and *lower tiers* of accreditation.

1. *'Fit and proper' person to receive CDR data*

As the ACCC may be aware, ADIs are already subject to comprehensive requirements under the Australian Prudential Regulation Authority's (APRA) *Prudential Standard CPS 520 Fit and Proper* (CPS 520). This cross-industry prudential standard sets out minimum requirements for APRA-regulated institutions in determining the fitness and propriety of individuals to hold positions of responsibility[16].

To ensure consistency with CPS 520 and to avoid unnecessary regulatory burden, COBA strongly encourages the ACCC to ensure that this accreditation criterion is appropriately aligned with and/or recognises compliance with APRA's CPS 520.

2. *Appropriate and proportionate systems, resources and procedures*

COBA emphasises that a strong information security framework is a necessity of Open Banking, as this will help assure the level of consumer trust that is absolutely crucial to the success of the new system and the CDR regime more broadly.

As the ACCC would appreciate, the expected growth of third parties in the provision of financial services, through Open Banking, may see in an increase in financial crime (such as fraud) if the Open Banking information security framework is insufficient.

COBA recognises that information security is central to the CDR accreditation process and that an entity's information security framework will have a significant influence on its ability to receive accreditation from the ACCC as a data recipient.

[16] For further information on CPS 520, please see APRA Industry standards and guidance.

As the ACCC may be aware, APRA has in place established prudential practice guides to assist APRA regulated entities, such as ADIs, manage their data risks (*CPG 235 Managing Data Risk*) and also identify, target, and manage IT security risks (*CPG 234 Management of Security Risk in Information and Information Technology)*[17].

Further to this, APRA is presently finalising a new cross-industry framework for the management of information security. This will include a new cross-industry prudential standard, Prudential Standard CPS 234 Information Security (CPS 234), which will set out minimum requirements for the management of information security[18].

While COBA supports the intent of APRA's proposed information security obligations, certain elements of APRA's proposals – such as the notification and auditing requirements – would place significant resourcing pressure on smaller ADIs.

This is primarily because a significant number of COBA members rely heavily on third-party service providers for their core banking system and information technology service requirements. Therefore, many of APRA's proposed requirements are cost-prohibitive and would need to be outsourced. COBA raised similar concerns, in its June 2018 submission[19], with APRA to its consultation on the draft version of CPS 234.

Nevertheless, COBA still encourages the ACCC to ensure that this accreditation criterion is aligned with and/or recognises compliance with the *final version* of APRA's new cross-industry framework for the management of information security. COBA notes that the final version of CPS 234 is expected to be released before the end of this year[20].

However, as mutual ADIs do not have the scale of information security resources compared to larger ADIs (and also other APRA-regulated entities operating in different industries), it would be important for the ACCC's requirements underpinning this criterion to not inadvertently disadvantage mutual ADIs, as this would only operate to further exacerbate the competitive imbalance between mutual ADIs and larger ADIs.

COBA looks forward to continuing to work with the ACCC and the Data Standards Body (Data61) on the design of the information security CDR Rules and technical standards.

3. *Internal and external dispute resolution*

COBA supports the ACCC's proposed approach to dispute resolution arrangements for Open Banking – please see the section '15. *Dispute resolution'* in this Attachment for COBA's detailed commentary.

4. *Holding appropriate insurance*

While COBA supports the intent of this criterion, we encourage the ACCC to explore further the availability and cost of insurance cover that would be required, to ensure that this criterion would be practicable for potential accreditation applicants to satisfy.

COBA's general understanding, from discussions with industry stakeholders, is that some insurance markets, such as for stand-alone cyber risk insurance products, are at an evolving stage and, in some cases, either may not offer products that meet particular a business need or are cost effective for a business.

Lower tiers of accreditation

COBA supports the ACCC's proposed development of lower tiers of accreditation in the first version of the CDR Rules, noting that lower tiers of accreditation may limit access to

[17] For further information on CPG 235 and CPG 234, please see APRA Industry standards and guidance.

[18] APRA 7 March 2018 consultation Information security requirements for all APRA-regulated entities.

[19] COBA's 6 June 2018 submission: *APRA Consultation on Information Security Requirements*.

[20] Australian Prudential Regulation Authority 7 March 2018 Discussion Paper: *Information security management: a new cross-industry prudential standard*. Page 15 refers.

particular types of Open Banking data (or have other restrictions) and have reduced requirements for accreditation.

Our view is that it would be important for the accreditation model to allow for accreditation to be provided at different levels, considering the different risks associated with the activities undertaken within different designated sectors and also the diverse range of entities that may apply for accreditation as CDR data recipients.

COBA supports the view in the Explanatory Materials accompanying the Bill[21] that some entities should have to meet a higher standard in order to be accredited to receive certain types of higher risk data.

This is particularly important in the context of information security, and COBA would support a lower tier of accreditation for non-ADI entities, as these entities do not benefit from, for example, the robust risk management requirements set out by APRA.

6.3 *ADI accreditation*

COBA supports the ACCC's proposal to make CDR Rules to provide a streamlined accreditation process for ADIs that are specified in the CDR rules to be data holders, and that wish to be registered as accredited data recipients.

COBA supports the ACCC's position that its proposed streamlined process would not apply to restricted ADIs or providers of purchased payment facilities.

6.8 *Accreditation and outsourcing*

As the ACCC may be aware, ADIs are subject to requirements under APRA's *Prudential Standard CPS 231 Outsourcing* (CPS 231). This cross-industry prudential standard chiefly requires that all outsourcing arrangements involving *material business activities* entered into by an APRA-regulated entity be subject to appropriate due diligence, approval and ongoing monitoring.

On this basis, COBA encourages the ACCC to leverage CPS 231 for the development of this criterion, recognising that this criterion would apply to *all outsourcing*, not just *material* outsourcing activities as targeted under CPS 231. In this regard, not all of the requirements under CPS 231 may be appropriate for the requirements of this criterion.

8. Consent

8.1 *Who can provide consent*

COBA notes that the ACCC seeks stakeholder views on how the CDR Rules should deal with consent in relation to complex accounts.

COBA's view is that complex accounts should not be in scope of the first version of the CDR Rules. Complex accounts, such as corporate accounts for example, would require a detailed examination of how the unique business rules that typically apply would operate in an Open Banking system.

8.3 *Consent provided to accredited data recipients*

COBA supports the ACCC's proposal that a consumer's consent to the collection and use of CDR data should be *explicit*.

COBA notes that this would require accredited data recipients to ensure consumers make an *affirmative action* when consenting to the collection and use of data, and that any implied forms of consent (e.g. a negative assurance) would not be permitted.

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[21] Explanatory Materials of the Exposure Draft of the Treasury Laws Amendment (Consumer Data Right) Bill 2018 (first stage of consultation). Paragraph 1.72. Page 17 refers.

In relation to a possible time limit to how long a consumer's consent (to allow an accredited data recipient to receive the consumer's data from the data holder) should remain valid, COBA supports the ACCC's proposal of a consent time limit of 90 days.

In relation to recurring consent requests from an accredited data recipient, COBA considers that it would be beneficial to enable the submission of 'short-form' consent requests.

As the ACCC would appreciate, a streamlined recurring consent process would help minimise burden on both consumers and accredited data recipients and maximise the utility of the Open Banking system.

Also, the issue of potential express consent *formats* does not appear to be addressed in the Framework. While we recall this being briefly raised at the Sydney roundtable, COBA strongly encourages the ACCC to consider either releasing suggested approaches for Open Banking or issuing guidance to support industry design.

Further to the above issues, COBA notes that the ACCC is seeking stakeholder views regarding the extent to which a consumer should be able to decide whether their redundant CDR data is de-identified or destroyed.

COBA considers that the treatment of redundant data in the CDR Rules should be appropriately aligned with the requirements under *Australian Privacy Principle 11: Security of personal information* (APP 11), which provides that:

> "An APP entity must take reasonable steps to destroy or de-identify the personal information it holds once the personal information is no longer needed for any purpose for which the personal information may be used or disclosed under the APPs. This requirement does not apply where the personal information is contained in a Commonwealth record or where the entity is required by law or a court/tribunal order to retain the personal information."[22]

COBA agrees with the ACCC that the issue of treating redundant CDR data is a central component to developing CDR Rules around withdrawing consent. COBA considers that the CDR Rules concerning the withdrawal of consent should explicitly include what an entity is required to do with redundant data, in a consistent fashion with APP 11.

However, it is important to recognise that an accredited data recipient may de-identify a consumer's CDR data immediately upon receipt, and that the de-identified data may be used as a fundamental driver for a commercial modelling platform, for example.

This situation raises the question of whether it is appropriate to provide a consumer the right to destroy de-identified data, which would appear to become 'redundant' if the consumer withdraws their consent.

This may be problematic for a data recipient, as the destruction of de-identified data would require its re-identification and isolation. It is important to be aware that contemporary technologies that are being used by industry to mask data may make re-identification of de-identified data impossible, given the complexities of the technology.

9. Authorisation and authentication process

9.5 *Duration of authorisation*

COBA supports the ACCC's proposal to make a CDR Rule that would limit the period of authorisations to 90 days (consistent with EU PSD2). COBA agrees with the ACCC's view that re-authorisations should be enabled via a simplified process.

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[22] Office of the Australian Information Commissioner *APP Guidelines* Chapter 11: APP 11 — Security of personal information.

In a similar vein to our earlier comments on recurring consent, a simplified process for re-authorisation would operate to help minimise the burden on consumers and data holders and encourage participation in Open Banking.

Further to this, it appears that the proposed authorisation process would only enable a consumer to authorise the data holder to disclose *all* of their CDR data. COBA suggests that the ACCC explore the possibility of a scaled authorisation process to enable a consumer to elect the types of CDR data that they may wish to have disclosed.

9.7 Minimising friction in the authorisation process

COBA notes that the ACCC seeks views on whether the CDR Rules should specify certain service level standards for the authorisation and authentication processes, or whether this matter should be addressed in the technical standards.

Given the technical nature of this issue, COBA's view is that it would be more appropriate to have this matter addressed in Data61's technical standards.

11. Making generic product data generally available

Summary of proposed rules

COBA notes that the ACCC proposes to make CDR Rules that would require data holders to make 'generic product data' available via an application programming interface (API) in accordance with Data61's technical standards.

COBA would appreciate clarity from the ACCC on the scope of generic product data, to help provide operational certainty. Using credit card products as an example, generic product data about the interest rate could potentially mean an introduction rate, a purchase rate, a balance transfer rate, a cash advance rate, or a penalty rate.

Given the potentially broad scope, COBA suggests that the ACCC take a targeted approach to defining the scope of generic product data, to help ensure that any data that is made available supports the underlying objective of disclosure via an API and can be meaningfully used by a recipient.

12. Use of data

12.1 Disclosure of consumer data to other parties

COBA notes that the ACCC proposes to make CDR Rules that would require an *accredited* CDR data recipient to transfer CDR data to a *non-accredited entity* if:

1. directed by a consumer
2. a specific express consent from the consumer has been provided, and
3. the accredited CDR data recipient has notified the consumer that the receiving entity is not an accredited data recipient and that the disclosure is outside the protections of the CDR system.

COBA appreciates that consumers may wish to direct that their CDR data be shared with non-accredited entities for specific purposes, such as to an accountant for taxation purposes, as suggested in the Framework.

However, as the ACCC is aware, there are potentially significant risks associated with transferring CDR data to a non-accredited entity. COBA emphasises that it would be important for consumers to understand this and the potential implications of being "outside the protections of the CDR system". To help facilitate this, COBA suggests the incorporation of clear and appropriate disclosures in the express consent mechanism.

While it appears that an accredited data recipient would be protected from liability in the event that a non-accredited entity misuses CDR data provided to it, there may still be

material negative ramifications for the accredited data recipient, particularly in terms of significant long term reputational damage.

Further to this, COBA strongly supports the ACCC's proposal to not make CDR Rules that would permit the sharing of CDR data from a *data holder* to a non-accredited recipient.

15. Dispute resolution

15.2 *Internal dispute resolution*

COBA notes that the ACCC proposes to make CDR Rules requiring that all CDR participants (i.e. both data holders and accredited data recipients) have in place internal dispute resolution (IDR) procedures that comply with the CDR Rules.

COBA strongly supports the ACCC's proposal to largely replicate the obligations set out in the Australian Securities and Investments Commission's (ASIC) Regulatory Guide *RG 165 Licensing: Internal and external dispute resolution* (RG 165). We appreciate the ACCC's clear recognition that AFS licence holders and licensed credit providers, such as ADIs, are already required to have in place comprehensive IDR procedures specified in ASIC's RG 165.

15.3 *External dispute resolution*

COBA notes that the ACCC proposes to make a CDR Rule requiring that all CDR participants be a member of the external disputes resolution (EDR) scheme recognised by the ACCC for Open Banking.

COBA strongly supports the ACCC proposal to recognise the Australian Financial Complaints Authority (AFCA) to undertake the EDR role in relation to Open Banking. As the ACCC would appreciate, establishing a new scheme would be unnecessary, given the accessibility and independence of AFCA and its broad functions and powers as the new EDR scheme to deal with complaints from consumers involving financial services and products.

- As the ACCC is aware, AFCA replaces the three existing EDR schemes of the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and Superannuation Complaints Tribunal (SCT), so that consumers have access to a single EDR scheme.

COBA understands that AFCA will be more accountable[23] to users, including by having an independent assessor to deal with complaints about its handling of disputes. COBA also notes that AFCA will commence operations from 1 November 2018, so there appears to be a sufficient amount of lead time to arrange for AFCA's responsibilities to be extended to also include EDR for Open Banking.

Further to this, COBA notes that the ACCC is seeking views about the need for the CDR Rules to make provision for alternative dispute resolution arrangements for large business consumers and for disputes between CDR participants. COBA's view is that the ACCC should only intervene if existing dispute resolution mechanisms presently available to commercial entities are found to be inadequate following a sufficient period of experience with the CDR regime.

12 October 2018

[23] Australian Financial Complaints Authority website.