Law Council
OF AUSTRALIA

Consultation on the Consumer Data Right Rules Framework

Australian Competition and Consumer Commission Consultation

12 October 2018

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges the assistance of the Alternative Dispute Resolution Committee of the Litigation and Dispute Resolution Section of the Law Council, the Privacy Committee and the Consumer and Competition Law Committee of the Business Law Section of the Law Council, and the Law Society of New South Wales in the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to provide comments on the Australian Competition and Consumer Commission's (**ACCC**) Consultation on the Consumer Data Right Rules Framework (**Framework**).

2. The Framework is intended to give stakeholders an understanding of the structure and content of proposed rules that will underpin the implementation of Open Banking, including a phased approach to implementation. It sets out how the ACCC proposes to address particular issues in the Consumer Data Right (**CDR**) Rules. The objectives of the CDR are stated as follows:

> *The CDR will provide individuals and businesses with a right to efficiently and conveniently access specified data in relation to them held by businesses; and to authorise secure access to this data by trusted and accredited third parties. The CDR will also require businesses to provide public access to information on specified products they have on offer. CDR is designed to give customers more control over their information leading, for example, to more choice in where they take their business, or more convenience in managing their money and services.*[1]

3. The Law Council notes that the *Treasury Laws Amendment (Consumer Data Right) Bill 2018* (**Bill**) seeks to set out a framework for the CDR through the *Competition and Consumer Act 2010* (Cth). The Framework sets out a succinct history of the legislation.[2]

4. The Law Council has provided a submission to the Treasury on the Bill and refers the ACCC to that submission.

5. For the reasons outlined in this submission, the Law Council makes the following key recommendations:

   - The ACCC engage with Treasury to postpone the Open Banking commencement date and establish a feasible timeframe to achieve implementation across all Authorised Deposit-taking Institutions (**ADI**) simultaneously.
   - In relation to consumer consent on a one-off basis, a shorter period of time is applied, for example, 5 business days.
   - In relation to consumer consent on an ongoing basis, a consumer is required to re-certify their consent every 90 days.
   - The ACCC should consider allowing businesses to on-sell CDR data and use CDR data for direct marketing purposes, if the consumer provides their consent.
   - The ACCC should ensure that the rules do not have the effect of excluding non-ADI entities such as the Australian Financial Services Licence (**AFSL**) and Australian Credit Licence (**ACL**) holders, from participating in Open Banking.
   - The ACCC make regulations requiring parties involved in disputes between larger business consumers or disputes between CDR Participants to engage

[1] Australian Competition and Consumer Commission, *Consumer Data Right Rules Framework* (September 2019), 7.
[2] Ibid.

in a form of alternative dispute resolution before proceedings are instituted. If this proposal is accepted, it will be necessary for the ACCC to establish guidelines for the appointment of independent persons to conduct the dispute resolution process.

- The dispute resolution provisions of the Australian Financial Complaints Authority (**AFCA**) rules be amended to provide for or permit independent mediation of disputes, to avoid the risk of an impression of over-familiarity and possible favouritism.

Consumer Data Rights Legislation

6. As stated in the Framework,[3] the legislative objective is to improve the availability, quality and range of data that informs selection by customers of products and services to meet their needs and requirements, and that if a customer makes a switching decision, reduces friction experienced by the customer in shifting the customer's business. Empowering bank customers through data may affect market dynamics and lead to changes in market structure. Services enabling comparison of financial products, and smaller financial service providers, are likely to be beneficiaries of achievement of this legislative objective. However, the legislative objective is facilitating consumer knowledge and the ability to move between providers, not to effect supply-side structural reform in provision of financial services.

7. The distinction between facilitating customer choice and effecting supply-side market restructuring is fundamental in addressing confusion often arising in discussion as to 'reciprocity'. A 'principle of reciprocity' is not intended to give effect to market restructuring or fairness or equal treatment as between service providers. Reciprocity is intended to be for the consumer's benefit: namely, to ensure that a customer that takes the benefit of exercising the CDR in favour of a customer's nominated accredited data recipient (**ADR**) can in the same way conveniently exercise a corresponding CDR to require that ADR to transfer specified data (within the same classes of data as specified for the CDR as applicable to the 'big four' banks, although not only that same data) to the customer or to any another intermediary ADR or another financial services provider which might or might not be another ADI (and would be an ADR in relation to its handling of that received data). For example, a customer may have requested two 'big four' banks to each provide customer data to a comparison service provider (itself an ADR) which then collates that information with customer volunteered data and provides comparisons to the customer. The customer may wish to act upon that comparison and take their business, including that data, to another financial service provider. A CDR exercisable by that customer in relation to the comparison service provider ADR enables the customer to conveniently and safely cause that data to be moved data to the new financial services provider.

8. Accordingly, 'reciprocity' should mean no more than the customer enjoying the right to exercise a CDR in relation to the same categories of data 'down the chain' of ADRs to the extent (and only to the extent) that customer data within those categories was derived from CDR data as disclosed by a 'big four' bank at the customer's request at the head of the chain. This raises a question as to whether 'reciprocity' need be an element of the initial Open Banking framework, or whether any need and specification for reciprocity might be better understood when the market dynamics as to inter-ADR transfers become clearer. There clearly is complexity in implementing reciprocity, as data sets evolved downstream become more complex and more difficult to track and identify as CDR data, and the cost burden of imposing that obligation upon ADRs may be prohibitive, and result in less comparisons being available to consumers. This concern should promote caution in implementing reciprocity as an initial requirement universally imposed on ADRs: there may be a case for a sandbox or other reasoned and controlled differential treatment of some ADRs. This issue is discussed further below.

[3] Ibid 7.

Framework – general structure

9. In the course of industry consultations conducted by the ACCC, officers of the ACCC stated the ACCC's intention to progressively develop the CDR rules. This first version Framework outlines proposed 'minimum viable product' CDR rules essential for commencement of Open Banking as at 1 July 2019 but not addressing all issues and concerns as may arise after implementation. In the Law Council's view, this approach is not ideal and will generate unnecessary uncertainty within the industry. The implementation of Open Banking is a significant project that will require substantial investments of time and resources, including a fundamental re-working of data flows and data processes, controls and safeguards within the four major banks and re-structure of information technology infrastructure. In this context, it is unreasonable to expect industry to incrementally modify their Open Banking implementation in response to 'rule creep'. The Law Council suggests that it would be far better for the ACCC to finalise the rules by 1 July 2019, with the expectation that they will be reviewed in, for example, a three (3) year period. The ACCC should also consider that subsequent rule changes may undermine the quality of data provided under the first version of the rules, which will substantially reduce data utility to consumers.

10. The Law Council also notes that the ACCC proposes a phased implementation, commencing with the 'four major banks'.[4] This means that the ACCC will be leveraging the compliance and information technology expertise of those ADIs to supplement the progressive development of the rules for application across the wider industry. Arguably, this places an unfair compliance burden on the four major banks. More importantly, it may also have the unintended side-effect of generating rules that will be inappropriate for many smaller ADIs.

Recommendation

- **The ACCC engage with Treasury to postpone the Open Banking commencement date and establish a feasible timeframe to achieve implementation across all ADIs simultaneously.**

Consumer data fields and derived data

11. The Law Council notes the proposed minimum consumer data sets that are in scope for Open Banking.[5] The Law Council suggests that the ACCC consider prescribing information fields that should not be included in the data sets – for instance, sensitive information like sexual orientation or health information. There is otherwise a risk that the consumer's rich data sets held by one ADI might be shared more broadly to their detriment (e.g. a consumer with a history of hardship applications in connection with illness may be less likely to obtain re-financing from an alternative ADI).

12. The revised exposure draft of the CDR Bill removes the concept of derived data and replaces this concept with data specified in the designation instrument. As drafted, designated data could still include value-added data derived from CDR data. While this limitation is preferable to the unguided discretion for the ACCC to determine whatever categories of data it might specify in the CDR rules that was proposed in the first Exposure Draft, the Law Council suggests that neither a data designation nor the CDR rules should specify derived or value-added data, not being basic

[4] Ibid 16 [4.2].
[5] Ibid 18 [5.3].

transformations of data through data cleansing or aggregations or simple re-presentations of transaction data and customer supplier data. Derived or value-added data, including inferences or recommendations based upon data, will generally be the output of investment in data analytics and other intellectual property and a differentiator of competitive offerings. There would be consumer detriment if this value-adding differentiation, and supply-side competition through investment in value-adding differentiation, is dampened through regulatory mandate. The Law Council notes that the Productivity Commission in its *Data Availability and Use Report*, made a recommendation, which was accepted by Government, that specifically states:

> *Data that is solely imputed by a data holder to be about a consumer may only be included with industry-negotiated agreement. Data that is collected for security purposes or is subject to intellectual property rights would be excluded from consumer data… Data that is not able to be re-identified to a consumer in the normal course of business within a data holder should not be considered consumer data.*[6]

Reciprocity

13. The Law Council notes the ACCC's view on reciprocity[7] and its proposal to reserve implementation of a principle of reciprocity for further consultation. The Law Council notes concerns with this approach. It may be considered that reciprocity is an important structural factor in the successful implementation of Open Banking, distinguishing it from the more limited comprehensive credit reporting regime, where consumer credit reporting information is shared between credit providers based on an industry agreement with those providers. The underlying data in the consumer credit reporting arrives in the system by virtue of notice given to the individual (not consent). By contrast, the CRD regime is consumer consent driven. In the CRD context, reciprocity promotes maintenance of data quality and security and also simplifies switching by customers, as specified categories of data flow in standardised fields and formats pass (only at and following the customer's specific request) directly between security accredited entities, rather than through the customer. Without graded reciprocity as part of day one of the regime, some participants are likely to seek to exclude the rich data sets that may be of most benefit to consumers.

14. However, while reciprocity is important, the Law Council considers that it is also important to understand how the rules and the overall CDR framework works for industry participants first, before considering how they would be extended to other accredited data recipients, especially when the Bill itself is still evolving.

15. It is not ideal to leave the development of reciprocity rules to version two, particularly if the ACCC thinks there are complex issues. These issues, once identified, may well significantly affect the implementation by industry participants of the rules. The Law Council suggests that rather than simply deferring the reciprocity rules for other accredited data recipients to a later version, the ACCC should start consulting on a draft version as soon as possible. This is especially critical if one is to give legal meaning to consumer consent as envisaged and ensure that there is clarity in each given scenario that all data sharing is consistent with the consumer consent as given and potentially modified in the course of the given relationship. The Law Council submits that this can be achieved by making it clear that ability to share data on a reciprocal basis is a feature of the accreditation process and forms the basis of what is

[6] Productivity Commission, *Data Availability and Use,* Inquiry Report No 82 (31 March 2017) Recommendation 5.2, 210.
[7] Australian Competition and Consumer Commission, *Consumer Data Right Rules Framework* (September 2019), 21 [5.4].

in essence a closed system. To achieve this, it will be important that all regulatory instruments, whether these are designations under the Bill or rules made under the Framework, are clear on the following rights and obligations of the parties:

- reciprocity deals with the rights of the data shares in the system to share data as designated, a closed system;
- such sharing is always subject to the terms of the designation;
- the sharing must accord with the consent of the consumer as given in relation to the data, its uses and who may have access to it;
- accredit parties are responsible at all times to ensure that they can comply with the rules of reciprocity and can demonstrate compliance if called upon to do so by the ACCC, the consumer and or the relevant ADR/CRD participants; and
- to the extent that there is conflict as to what data is to be shared pursuant to rules of reciprocity and the customer consent as given, the terms of the consent prevail, and the relevant ADR must demonstrate compliance if called upon to do so by the ACCC, the consumer and or the relevant ADR/CRD participants.

16. The Law Council considers that the rules should be as simple as possible, especially as they relate to the relevant safeguards and the co-regulatory regime being developed. In practice this will mean that the *Privacy Act 1988* (Cth) (**Privacy Act**) protections will continue to apply to information in the CDR system that is personal information as defined, and the balance of the CDR data by the Safeguards as finalised.

17. The Law Council further submits that consideration should be given to setting out rules articulating how consent is evidenced, for example:

- articulating standards that must be met in respect of consent;
- creating a safe-harbour regime where such measures are in place and consent management addressed; and
- making it clear that in the case of shared accounts, consent to share funds or operate the account is not the same as consent to share data. Joint account holders may give different consents at different points in time.

18. It would appear to be difficult to mandate reciprocity given the consent framework governing the CDR. The ACCC should consider keeping this issue under review, and should consider international views on this issue. In particular, the ACCC should consider how the introduction of reciprocity will benefit or disadvantage consumers and other stakeholders.

Accreditation

19. The Law Council strongly recommends that any accredited foreign entities[8] must agree to hold all data subject to the Australian Privacy Principles 2 – 13,[9] even if the Privacy Act itself does not apply to the foreign entity. There are numerous exemptions to the jurisdiction of the Privacy Act available to foreign entities. It should be a significant concern to the ACCC that the data of Australian consumers may be disclosed and held off-shore subject to protections at a lesser standard than enforced under Australian law.

[8] Ibid 27 [6.5].
[9] *Privacy Act 1988* (Cth) Schedule 1, Australian Privacy Principles.

20. The ACCC should consider ensuring that the accreditation standards are not so low as to give rise to cyber security concerns, which would undermine consumer confidence in the regime. However, the Law Council notes that this concern should be balanced against the need to ensure that the accreditation standards are not so high as to prevent smaller innovative players from participating in the regime.

Time limited consent

21. The Law Council agrees with the ACCC's proposal to place a time limit on the validity of a consumer's consent.[10] The Law Council notes that the ACCC proposes a 90-day period. The Law Council recommends that the ACCC consider a more nuanced approach. Consumer data may be used by a recipient (A) on a one-off basis, for example to offer a preferential rate on a home loan or (B) on an ongoing basis, for example real-time budgeting tools. The Law Council proposes that in scenario (A) a shorter period of time is applied, that better suits that intended use – for example 5 business days. Scenario (B) is more complex and may require a consumer to re-certify their consent on a cyclical basis – for example 90 calendar days.

Recommendations

- **In relation to consumer consent on a one-off basis, a shorter period of time is applied, for example, 5 business days.**
- **In relation to consumer consent on an ongoing basis, a consumer is required to re-certify their consent every 90 days.**

On-selling of CDR data or use of CDR data for direct marketing

22. The Law Council recommends that the ACCC should consider allowing businesses to on-sell CDR data and use CDR data for direct marketing purposes, if the consumer provides their consent. This will allow businesses to tailor products and services to consumers, thus providing them with greater choice. The Law Council considers that the potential risks that may arise from the on-selling of data and use of data for direct marketing may be appropriately addressed by more stringent consent requirements.

Recommendation

- **The ACCC should consider allowing businesses to on-sell CDR data and use CDR data for direct marketing purposes, if the consumer provides their consent.**

[10] Australian Competition and Consumer Commission, *Consumer Data Right Rules Framework* (September 2019), 37 [8.3.1] and 43 [9.5].

Right to erasure

23. The ACCC should consider whether the consumer should have a right to request that their information be de-identified, but should not have a right to request that their information be deleted. The inability to de-identify data and use de-identified data would inhibit the ability for businesses to develop insights, and would thus inhibit data-driven innovation. Furthermore, the right to erasure is not necessary as the de-identification of redundant data should be sufficient to address any privacy concerns.

24. In addition, there are many complexities involved in legislating for a right to deletion (including the range of legal obligations to retain records) and the fact that individuals currently have no right to instruct deletion of their personal records under the Privacy Act. The Law Council considers that it may be beyond the scope of open banking to mandate a special right to deletion of information.

Inclusion of AFSL and ACL holders

25. The Open Banking regime focuses on the provision of banking services by ADIs. However non-ADIs, such as the AFSL and ACL holders, already provide 'banking'-like services to consumers – i.e. an ACL holder can provide a mortgage to a consumer, even though it is not an ADI, and an AFSL holder can offer insurance policies, payment products etc. From the perspective of consumers there is little substantive difference between a mortgage provided by one of the four major banks and an ACL holder. The Law Council strongly recommends that the ACCC ensure that the rules do not have the effect of excluding these non-ADI entities from participating in Open Banking.

Recommendation

- **The ACCC should ensure that the rules do not have the effect of excluding non-ADI entities such as the AFSL and ACL holders, from participating in Open Banking.**

Dispute Resolution in the Framework

26. The rules in relation to the Dispute Resolution in the Framework are set out in Chapter 15:

Summary of proposed rules

In relation to internal dispute resolution, the ACCC proposes to make a rule requiring that all CDR participants have in place internal dispute resolution procedures that comply with the requirements specified in the rules.

In relation to external dispute resolution, the ACCC proposes to make a rule requiring that all CDR participants be a member of the external dispute resolution scheme recognised by the ACCC for Open Banking. The ACCC proposes to recognise the AFCA.

In relation to complaints by larger businesses or disputes between CDR participants, the ACCC does not intend to make rules relating to alternative

dispute resolution in these situations in the first version of the rules. However, the ACCC welcomes stakeholder views on this issue.[11]

27. The first issue is the classification of a consumer, which is likely to have a broad definition. This is canvassed in the Framework:

> *The draft legislation includes a definition of 'CDR consumer', specifying that a CDR consumer for 'CDR data' (also a defined term) is a person to whom the CDR data relates, if the person is identifiable or reasonably identifiable from the data. The draft explanatory materials note that this definition is broader than the definition of 'consumer' under* the Competition and Consumer Act 2010 *(Cth) because it includes business consumers as well as individuals. This approach is consistent with the recommendations of the Open Banking review.*[12]

28. For most consumers there will be a two-step dispute resolution process:

- **Internal Dispute Resolution Process:** It is appropriate that all CDR participants adopt the ASIC Regulatory Guide which requires the organisations to adopt appropriate dispute resolution processes including the possibility of an external dispute resolution scheme. Where the scheme is referred to an external dispute resolution party, it is essential that the dispute resolution party be independent. This can occur if an independent mediator is appointed.
- **External Dispute Resolution Process:** The ACCC intends to recognise the AFCA as the External Dispute Resolution Scheme. This scheme will apply to most disputes involving consumers. The logic behind this decision is that AFCA, a recently established body with banking complaints jurisdiction is the appropriate body to hear complaints which will largely arise out of the Banking Industry.

  Many CDR participants in Open Banking are likely to already be members of AFCA as a result of existing regulatory requirements at the time that the CDR regime commences.[13]

  This provision requires consideration and review of the AFCA Rules. This is discussed further below.

  It is essential that any External Dispute Resolution Scheme be seen as independent. Consumer confidence will be eroded unless transparency between the dispute resolvers and the CDR participants is strictly maintained. There is a risk that if the consumers may believe that the External Dispute Resolution body or its appointed representatives will become too familiar with the processes adopted by the Banks and therefore the independence is lost. Any scheme must ensure that there is the ability to appoint independent Dispute Resolution Practitioners including mediators.

  The ACCC may subsequently recognise other bodies if a demand is established.

[11] Ibid 59-62.
[12] Ibid 15.
[13] Ibid 61.

> *As other sectors of the economy are designated under the CDR regime, the ACCC will consider the appropriate external dispute resolution schemes for those sectors as part of the broader consideration of the need for variation of the rules to accommodate new sectors. The ACCC may subsequently recognise other bodies if a demand is established.*[14]

29. Any consideration of other appropriate external dispute resolution schemes must ensure that the independence of the appointed representatives is maintained.

30. There is a different proposal for larger business consumers and disputes between CDR Participants:

> *The ACCC implicitly acknowledges that the AFCA scheme may not be suitable to disputes between larger business consumers or disputes between CDR Participants (i.e. both data holders and accredited data recipients).*[15]

31. It is not expected that there would be many disputes which fall into these categories. It is expected that the 'consumers' in these categories will have sufficient resources to protect their own interests.

32. Therefore, it is appropriate that a dispute resolution process be established which includes various forms of dispute resolution which may be conducive for the resolution of the underlying dispute. This may include Mediation, Arbitration or Expert Determination. It is submitted that the parties should maintain the right to nominate the form of dispute resolution process and to choose their own Dispute Resolution Practitioner.

33. It may be appropriate for the parties involved in the dispute to be required to engage in a form of dispute resolution before proceedings are instituted. If this proposal is accepted, it will be necessary for the ACCC to establish guidelines for the appointment of independent persons to conduct the dispute resolution process.

Consideration of AFCA Dispute Resolution Processes

34. In June 2018 AFCA published its draft Rules and completed a consultation process in July 2018.[16] The Law Council was not requested to prepare any submissions on these Rules. However, the Law Council considers that the Rule could be enhanced in their application to consumer CDR disputes as discussed below.

35. AFCA will replace the three existing external dispute resolution schemes of the Financial Ombudsman Service, the Credit and Investments Ombudsman and Superannuation Complaints Tribunal.[17]

36. The Complaint Resolution Scheme Rules have been published and will be operative from 1 November 2018.

37. An ASIC announcement about AFCA is noted on the Financial Ombudsman Service (**FOS**) website in a section entitled: 'AFCA information for members' as follows:

---

[14] Ibid.
[15] Ibid 63.
[16] the Consultation Paper is available at:
https://www.afca.org.au/custom/files/docs/afca-rules-consultation-paper.pdf
[17] Australian Competition and Consumer Commission, *Consumer Data Right Rules Framework* (September 2019), 60.

ASIC will also publicly consult on new internal dispute resolution (IDR) and mandatory reporting requirements that are also contained in the AFCA legislation – but this consultation will not take place until after AFCA commencement.[18]

38. As noted above, AFCA commencement (i.e. 'operational and ready to receive complaints') is noted as 1 November 2018. If this consultation process is commenced by ASIC, the Law Council would be pleased to review and prepare submissions.

39. Broadly speaking AFCA has adopted the processes which were previously undertaken by the FOS. In summary the scheme requires the financial provider to have its own dispute resolution processes which must be undertaken before a complaint can be made to AFCA. Once a complaint is made AFCA must act as an independent party. The processes to be adopted are set out in the Rules:

A.8 Complaint Resolution Approach:

A.8.1 AFCA will generally try to resolve a complaint by informal methods. This includes, for example, by:

a) facilitating negotiations between the parties; or
b) conciliating a complaint, for example, by conducting a conciliation conference.

If reasonable attempts to resolve a complaint by these methods do not succeed, AFCA may then:

c) provide a preliminary assessment in accordance with rule A.12; or
d) proceed to determine the complaint.

A.8.2 Alternatively AFCA may proceed immediately to determine a complaint, for example, if it thinks the complaint is unlikely to be resolved by other means.

A.8.3 AFCA may decide that it is not appropriate to continue to consider a complaint, in circumstances such as:

a) the complaint is without merit;
b) the Complainant has suffered no loss (or has been appropriately compensated for such loss and AFCA would not award any further amount); or
c) the Financial Firm has committed no error.

If so, AFCA will follow the process for excluding a complaint set out in rules A.4.5 and A.4.6.I

40. Historically FOS has conducted these processes in-house and has used its assessors in an attempt to resolve the disputes. It is inevitable that any assessor will have constant dealings with offices of the financial institution. This may create the impression of familiarity and possibly favouritism. Steps should be taken to ensure that the AFCA process adopted is independent and is seen by the consumer as independent. This can occur if an independent mediator is also able to be appointed.

[18] Financial Ombudsman Service Australia, *AFCA information for members,* available online: https://www.fos.org.au/members/afca-information-for-members/.

41. The Designation Instrument currently contemplates that ADIs will only need to transfer data collected or generated from 1 January 2017. The ACCC should consider whether this has the potential to provide a fragmented image of one's financial history.

Recommendations

- **The ACCC make regulations requiring parties involved in *disputes between larger business consumers or disputes between CDR Participants* to engage in a form of alternative dispute resolution before proceedings are instituted. If this proposal is accepted, it will be necessary for the ACCC to establish guidelines for the appointment of independent persons to conduct the dispute resolution process.**
- **The dispute resolution provisions of the AFCA rules be amended to provide for or permit independent mediation of disputes, to avoid the risk of an impression of over-familiarity and possible favouritism.**