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CDR Rules Team
Australian Competition and
Consumer Commission
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Canberra ACT 2601

By email: ACCC-CDR@accc.gov.au

SUBMISSION PAPER:

Submission CDR Rules consultation

This Submission Paper was prepared by Prospa Group Limited (ACN 625 648 722). www.prospa.com.au

Prospa Group Limited ("Prospa") welcomes the opportunity to provide a submission on the *CDR Rules Consultation.*

1. A little about us – "Prospa"

Prospa is currently Australia's #1 Online Small Business Lender[1], operating out of our Sydney headquarters. Prospa has supported small businesses with funding of more than $1.4 billion and employs over 200 people in Australia.

Prospa offers Small Business Loans between $5,000 to $300,000 and a Line of Credit for up to $100,000, as our standard product offering. Further, Prospa is a participating lender in the Government's Coronavirus SME Guarantee Scheme. We also offer funding of up to $250,000 through a Back to Business Loan and a Back to Business Line of Credit, as part of the Scheme.

All customers of Prospa are small businesses with all funding decisions achieved by assessing well over 450 data points, including turnover, profit & loss, business tenure, size and industry sector.

[1] Market position for online balance sheet lenders to Australian small businesses, based on Prospa's volume as a percentage of total market volume in 2017 as reported in KPMG "The 3rd Asia Pacific Region Alternative Finance Industry Report", November 2018; USDAUD FX rate of 0.767.

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Prospa uses a sophisticated risk-based scoring methodology developed over our more than seven years of lending to small businesses. We verify the specifics of every small business applicant using data from sources such as (but not limited to): ASIC's website, Equifax, bankstatements.com and the Australian Tax Office.

2. Prospa's impact on the Australian economy

A recent independent study conducted by RFi Group and the Centre for International Economics on behalf of Prospa, revealed the positive economic impact of Prospa's lending to small business in Australia. See full report here: https://www.prospa.com/wp-content/uploads/2019/01/prospa_economic-impact-report_2019.pdf.

Based on the results of this study, as at 31 December 2019, Prospa has contributed $5.6 billion in total to Australian nominal GDP and helped maintain 80,000 annual FTE positions since 2013. These findings demonstrate that by providing small business owners with fast, simple access to finance, Prospa is not just directly contributing to its customers' revenue and jobs, but to the wider Australian economy.

3. Executive summary

In summary, we make the following recommendations in relation to the draft Consumer Data Right ('CDR') Rules:

- The definition of "eligible" in the CDR Rules should be expanded so as to enable all small businesses, and not just sole traders, to exercise the CDR;
- The CDR Rules should include bespoke obligations pertaining to the management of customer consents as between the principal and provider. At minimum, where the provider collects or manages customer consents on behalf of the principal, the provider should be required (under regulation) to keep the principal updated on any new consents or changes to existing consents, in a timely manner;
- Rule 9.3(2)(i) should be removed as the obligation is disproportionate to the risk it seeks to address. Further, complying with this rule would require each party to police and record the conduct of the other. This would be onerous and counter the efficiencies created by an intermediary arrangement.

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- The principal should not be liable for the breaches of the provider (or any other conduct of the provider).

We have provided submissions on the draft CDR Rules in their entirety, and not limited our comments to the amendments pertaining to intermediaries. We have also referred to the following documents in our submission:

- Draft Update 1 to Privacy Impact Statement ("PIS"); and
- Explanatory note – CDR Rules Consultation ("Explanatory note").

4. Background: CDR and small businesses

Fintech small business lenders facilitate the financial inclusion of small businesses

Small businesses have niche and varied needs with respect to commercial credit. The business models of fintech small business lenders are tailored to meeting these needs. By meeting the varied needs of small businesses with respect to credit, fintech small business lenders ensure the financial inclusion of small businesses.

The use cases for CDR data that are specific to fintech small business lending

We highlight that the use cases for CDR data that are specific to fintech small business lending typically include (amongst others) the following:

- Third parties such as brokers may collect CDR data and other data with the purpose of introducing a prospective applicant to a fintech small business lender who ultimately provides the service to the customer;
- CDR data may be collected for applicants who are approved as well as applicants who are declined;
- Fintech small business lenders may collect data under both the auspices of the CDR regime and outside the regime (for instance, through screen scraping), from multiple entry points;
- CDR data may be combined with other data to derive a picture of the financial circumstances of the applicant;
- CDR data may be collected on a continuous basis, over a period of time exceeding 12 months.

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5. Expanding the definition of “eligible” for the banking sector beyond sole traders

We refer to item 2.1(2), Schedule 3 of the CDR Rules. On our interpretation, item 2.1(2) has the effect of limiting the exercise of the Consumer Data Right within the banking sector (Open Banking) to sole traders. The amendment therefore excludes small businesses that are operated through a different entity (such as a corporate entity or partnership). We are particularly concerned that no alternative timeframe for expanding the definition of “eligible” (to include business entities other than sole traders) has been announced.

We recommend that the wording of item 2.1(2) revert to the definition contained in item 2.1, Schedule 3 of the version of the Rules in force as at 6 February 2020.

In our view, the amendment is a major limitation of the scope of Open Banking. It is inconsistent with the original intent of Open Banking, being to enable small, medium and large businesses to exercise the Consumer Data Right. It limits the benefits of Open Banking for small businesses, inherently reduces the incentives for smaller fintechs to participate and places a constraint on the ability of the regime to foster competition and innovation.

Further, the measure gives sole traders an arbitrary advantage over small businesses operated through other business vehicles. It means that innovative goods and services that will be available as a result of Open Banking will only be available to sole traders and not to other small business entities. This has the effect of financial exclusion for small businesses that are not sole traders.

Finally, we are concerned that the inclusion of sole traders and the exclusion of other types of business entities implies that sole traders are considered to be consumers for the purposes of regulation. We believe sole traders and other types of business entities have different needs, behaviours and characteristics to individual consumers and should not be conflated with individual consumers for the purposes of regulation.

Given that discussions to *expand* the CDR are underway, we are concerned about the limitation being placed on the scope of Open Banking at this late stage of the reforms, particularly as banking is the pilot industry for the CDR. We are also concerned that this limitation will delay the timeframe for developing a more fulsome

open data regime for Australia, as it will, for instance, delay the testing of use cases that are specific to entities involving multiple individuals.

6. CAP arrangements

Our views on the roles of principal and provider under CAP arrangements

We refer to page 3 of the Explanatory Note. We recommend that the ACCC provide further clarification on the intended roles for the principal and provider.

We believe that in order to capture the widest range of innovative business models and maximise the benefits for small businesses, CAP arrangements should conceive of the roles of principal and provider as follows:

- **Principal** is the person accredited to the "unrestricted" level that:
    - provides the services to the consumer using the CDR data (i.e. the services to which the data minimisation principle applies);
    - has the contractual relationship with the consumer in relation to *those* services; and
    - is the consumer-facing entity in relation to *those* services.
- **Provider** is the person accredited to the "unrestricted" level that assists a principal to provide goods or services to consumers. A provider may engage directly with the consumer in accordance with any applicable terms and conditions in relation to that engagement.

We note, in particular:

- CAP arrangements should allow for the provider to also be a consumer-facing entity, but the principal will always be the consumer-facing entity for the purposes of the goods or services for which the CDR data is being collected.
- We can envisage business models within fintech small business lending where both parties may have a contractual relationship with the consumer, but the principal will always hold the contractual relationship relating to the goods or services for which the CDR data is being collected.

The Rules may otherwise operate to exclude potential innovative business models.

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The need for bespoke obligations pertaining to the management of customer consent where a CAP arrangement is in place

We emphasise the need for bespoke obligations pertaining to the management of customer consents as between the principal and provider. At minimum, the CDR Rules should mandate that, where the provider collects or manages customer consents on behalf of the principal under a CAP arrangement, the provider must keep the principal updated on any changes to those consents in a timely manner. There should be sufficient safeguards in the rules to ensure that the principal has accurate and complete consumer consent information pertaining to any CDR data covered by the CAP arrangement, at all times.

These obligations are important to ensuring that customers, including small businesses, have certainty and continuity with respect to their consents and the integrity of their consents is maintained even where the CAP arrangement may be disrupted.

We refer to our submission of 30 March 2020 to the ACCC consultation on the participation of intermediaries in the CDR regime. That submission sets out our recommendations on a shared consent management regulatory framework for intermediaries, in more detail.

In the context of CAP arrangements, and noting Rule 5.17, the Rules should also clarify the processes for managing consent where the accreditation of either party has been suspended, including, for instance, the status of any changes to a particular customer's consent during the period of suspension. On our interpretation of the draft Rules, as the consent is provided to the principal, the principal should be able to continue to rely on a customer's consent where the provider's accreditation has been suspended. Conversely, on our interpretation of the draft Rules, a provider cannot rely on a customer's consent where either party's accreditation has been suspended.

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7. Liability structure under CAP arrangements

Our general views on the liability of principals and providers

We are supportive of both the principal and provider having a high level of accreditation. We are also supportive of:

- the principal and the provider being able to discharge obligations under the CDR Rules, such that where one party has discharged an obligation the other party does not need to do so; and
- the principal and provider each being liable for discharging their obligations as accredited data recipients, in accordance with the CAP arrangement.

The principal's liability for the conduct of the provider

We believe it is not appropriate to require the principal to be responsible for breaches of the CDR Rules by the provider (or any other conduct of the provider), for the reasons set out below.

<u>The liability structure effectively creates an unfettered agency relationship</u>

This liability structure effectively places the principal and provider in a de facto agency relationship. This type of relationship would normally be governed by duties that are imposed by regulation and would be limited. The current draft Rules impose a broad and unfettered liability on the principal for the conduct of the provider. By deeming the principal liable for the conduct of a provider, including where the provider is operating outside the scope of the CAP arrangement, would subject the principal to a disproportionate and unusually high level of risk. This would likely deter prospective data recipients from participating in the CDR regime through CAP arrangements.

<u>The liability structure undermines many of the efficiencies created by intermediary services</u>

Separately, the liability structure requires the principal to police the conduct of the provider, countering many of the efficiencies that would otherwise be created by the use of an intermediary.

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The liability structure would warrant bespoke obligations relating to the management of customer consent where a CAP arrangement is in place, and this has not been provided for in the Rules

We believe the liability structure, whereby the principal assumes a very high degree of liability, would warrant a regulatory obligation on the provider to keep the principal updated on customer consents, through an appropriate consent management system (as between provider and principal), and other material information (for instance, security breaches). This has not been provided for in the Rules.

8. Record-keeping obligations

We note that draft Rule 9.3(2)(i) requires principals and providers to keep and maintain records that record and explain, amongst other matters, the use and management of CDR data by the other party. We recommend that this obligation be removed from the Rules.

We believe this obligation:

- counters many of the efficiencies created by the use of intermediary services as it requires the parties to monitor and record the conduct of the other; and
- is disproportionate to the risk it seeks to address (i.e. risks to the security and privacy of CDR data), given that both parties are subject to regulatory obligations by virtue of being accredited.

Kind regards,

[redacted]

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If you would like more information regarding our submission, please contact:
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