Australian Banking Association

Mr Daniel McAuliffe
Structural Reform Group
The Treasury
via email: data@treasury.gov.au

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Dear Mr McAuliffe

# Consultation on Open Banking designation instrument (2nd round)

The Australian Banking Association (**ABA**) welcomes the opportunity to comment on the Consumer Data Right (Authorised Deposit-Taking Institutions (ADIs)) Designation 2019 (**the Instrument**). The ABA recognises the Consumer Data Right (**CDR**) as a significant infrastructure for the economy which will facilitate innovation through the empowerment of customers to direct their data.

Banking will be the first sector to apply the CDR and the ABA supports the participation of more sectors over time to achieve an economy-wide open data regime. The ABA and its members have appreciated the consultative approach of Treasury and the ACCC as we work together to ensure the success of Open Banking and the larger Consumer Data Right regime that sits over Open Banking.

This submission addresses several points relating to clauses 6,7, and 10. It also makes a representation about the importance of an economy-wide CDR.

## Clause 6: Specified classes of information – information about user of product

### Ambiguity caused by reference to definition of 'associate' in the ITAA

Clause 6(1)(a)(ii) of the Instrument operates to specify classes of information to which the CDR applies. This captures information about a person who is an 'associate' (in reference to s138 of the *Income Tax Assessment Act 1936 (Cth)* (**ITAA**)) which includes joint, trustee, power of attorney and subsidiary account holders of personal accounts and the account holders of business accounts. The use of s138 ITAA in defining the term 'associate' broadens the scope of data subject to the CDR.

Section 138 ITAA considers situations not applicable to the CDR. It is arguable that only s138(1) applies for the purposes of the designation instrument as this refers to associates of a natural person.

The ABA notes that the designation instrument refers to 'associate', whereas the draft Rules refer to joint accounts. Under the Rules, joint account holders will cover a broader group than that referenced by s138 ITAA. For example, two friends as joint account holders will be captured under the draft Rules but not under s138 ITAA. The designation instrument appears to capture banking relationships beyond joint (or even subsidiary) account holding and this will have privacy implications (covered below).

An alternative option is to change the drafting of cl6 of the Instrument to limit its applicability to the first subclause, that is to s138(1) ITAA.

### Access to consumer data without permission

The premise of the CDR is to provide consumers with the ability to control the use of their data, by allowing consumers to consent to sharing data with parties that they trust. ABA members have previously raised concerns with the transmission of Personal Identifiable Information (PII) through the CDR, even in the context where the consumer has consented to the transfer of the data.

Clause 6 of the Instrument appears to capture an associate's PII as a class of information for the purposes of the CDR. However, there appears to be no mechanism by which the associate can consent to this disclosure.

The inclusion of associates' PII, who have not given permission for the transfer of data, is problematic and seems contrary to the intent of the CDR.

For example, this includes, where the primary account holder has given consent through the CDR for the data on the account to be accessed by an accredited data recipient (**ADR**). The current drafting of the designation instrument would make is permissible for the subsidiary account holder's information to be included as part of the permission. This raises a privacy concern, whereby the subsidiary account holder will have their PII entered into the CDR, irrespective of whether they have given permission and irrespective of whether they have been informed that data which identifies them is being accessed by third parties.

An appropriate drafting of the Instrument will enable the Rules to be developed in accordance with the need for parties to consent to having their data subject to the Regime.

## Clause 7: Specified classes of information – information about use of product

Clause 7(1) references the 'use' and 'supply' of a product. Clarity on the meaning of and distinction between these two concepts is needed in order to understand the scope of this clause. For instance, does use of a credit card by a subsidiary card holder amount to 'a product supplied to the associate'?

The ABA notes that authorisations to *use/access/view* information relating to the account (cl7(2)(d)(i)) have not previously been in scope and are not addressed in the Rules or Standards. The ABA would like clarity as to the reason for its inclusion at this late stage of consultation. From a practical perspective some of this data is not held digitally or is not readily accessible therefore banks may not be able to comply with the requirements.

Members have previously raised concerns regarding the requirement to provide authorisation for others to transact on an account (e.g. direct debits and third party authorisations) (cl7(2)(d)(ii) as the bank is not always the data holder for this information. However, the ABA highlights the privacy concerns for third party transactors whose information will become part of the transfer of information, most likely without their knowledge or consent. For further information, the ABA refers to our previous submission (23 October 2018) on this issue.

## Clause 10 Exclusions from specified classes of information – materially enhanced information

The ABA acknowledges the work which has gone into further clarification of the term 'materially enhanced information' by way of example. The industry notes the examples provided of materially enhanced data sets and not materially enhanced data sets in the exposure draft.

By their very nature, data sets will evolve and change over time in response to developments in data analytics. For that reason, rather than specifying additional data sets which may overtime be superseded, it would be helpful for the definition of 'materially enhanced information' to be developed so that related concepts such as 'significantly more valuable' could be baselined.

One area where the definition might be improved is in the measurement of the effort required to undertake analysis. For example, an insight which might appear relatively minor could be the culmination of significant human thought, financial expenditure and information technology processing effort. The ABA recommends an additional qualifying mechanism for 'materially enhanced information' be added after cl10(1)(b)(ii) to cover the circumstances where significant processing effort is required. Example drafting is provided with additions italicised:

> Cl10(1)(b)(ii) rendered the information significantly more valuable than the source materials ***or***
>
> ***(iii) is the outcome of significant processing effort, whether human, financial, automated or other, by the data holder.***

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## Other matters relating to designation

### Reciprocity

ABA members have previously noted that reciprocity is needed in order to create a level playing field for all participants under the CDR. Recommendation 3.9 in the Open Banking Review supported reciprocity and data recipients also providing customer data at a customer's direction, including 'any data held by them that is transaction data or that is the equivalent of transaction data'.

The designation instrument reflects a limited form of reciprocity, whereby the principle only applies to ADRs with data sets specified in the designation instrument. ABA members acknowledge the challenge of determining what constitutes 'equivalent transaction data'. However, enabling full reciprocity from the beginning will give consumers more choice and opportunity to participate in the CDR and support the growth of the data economy. To that end, ABA members request that reciprocal obligations apply to all holders of 'equivalent transaction data' who seek to become ADRs.

### Economy-wide designation timetable

The 'Summary of proposals' paper notes:

> *The CDR will initially apply to the banking sector (where it is referred to as Open Banking), energy sector, and telecommunications sector. The right will be rolled out to other sectors in the economy following assessments of the benefits and costs of doing so.*

The purpose of the CDR is to provide an ecosystem which delivers opportunities for competitive advancement and innovation. Further, the provision of an ecosystem that generates innovation cannot be subjected to a narrow cost-benefit analysis – the ecosystem must be present first to enable creative and competitive synergies to take place. The ABA requests that Treasury reconsider its position and outline its plans for an economy-wide rollout of the CDR beyond the sectors which have been nominated.

With the active participation of its member banks in Australia, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services. The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and community. It strives to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.

Kind Regards,

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