



Australian Banking Association

19 October 2020

Department of Treasury
Via email: data@treasury.gov.au

Dear Daniel,

The Australian Banking Association (ABA) thanks the Federal Treasury for the opportunity to make a submission to the consultation on the exposure draft of the *Treasury Laws Amendment (measures for a later sitting) Bill 2020: amendments of the consumer data right*. The Consumer Data Right (CDR) is designed to provide consumers with increased access and control over the use of their data. The CDR will drive competition, innovation, and build the data economy.

The Bill represents a timely opportunity to refine and improve the functioning of the CDR. The ABA supports the Government's intention to centralise design and rulemaking functions and encourages further centralisation of other critical functions of the CDR.

The ABA suggests a number of recommendations for further refinement. These include the alignment of obligation dates with final proposed drafts of the Standards, and for APRA to review and sign-off the Rules and Standards in so far as those instruments have obligations which overlap with APRA's mandate. Other recommendations include the role of the Privacy Commissioner in a data emergency, public consultation on the selection of industry's for sectoral assessments, and the Treasury Secretary's delegation of functions.

The ABA would welcome the opportunity to discuss matters raised in this submission.

Kind regards,

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About the ABA

The Australian Banking Association advocates for a strong, competitive and innovative banking industry that delivers excellent and equitable outcomes for customers. We promote and encourage policies that improve banking services for all Australians, through advocacy, research, policy expertise and thought leadership.



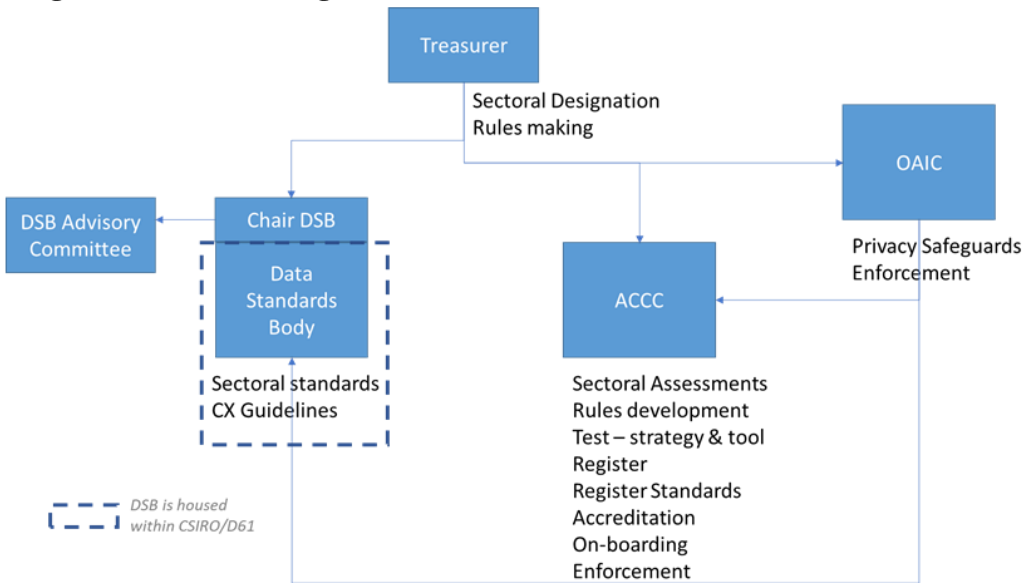
CDR governance model

Treasury taking over the oversight of the Rules, combined with the previously announced move of the Data Standards Body (DSB) from Data61 to Treasury, provides a critical opportunity to refine the governance and operating structure of the CDR as it matures. The ABA supports the co-location of the Rules and Standards teams as it will improve alignment and consistency across the development of Legislation, Rules and Standards.

Single point of accountability. The standing up of the CDR requires all aspects of the regime to be integrated and operating toward the common goal: to build and expand the data economy. Beyond the Rules and Standards¹ other CDR elements, (including ecosystem security, cyber security, registry services, participant on-boarding and ongoing support, enforcement, consumer education, participant disputes and complaints management), ought to be aligned under one operating and governance structure. The ABA notes that enforcement is not a function of the CDR and does not need to reside within the central CDR body.

The ABA recommended in its submission to the *Inquiry into the Future Directions for the Consumer Data Right* a single entity model for a single point of accountability for the CDR. The ABA supports the recommendation of the *Select Committee on Financial Technology and Regulatory Technology* for a single government entity to have oversight and to oversee the development of the CDR. The ABA firmly believes that a distributed governance model as currently exists (diagram 1) and as is envisaged in the draft legislation (diagram 2) does not support an efficient operation of the CDR.

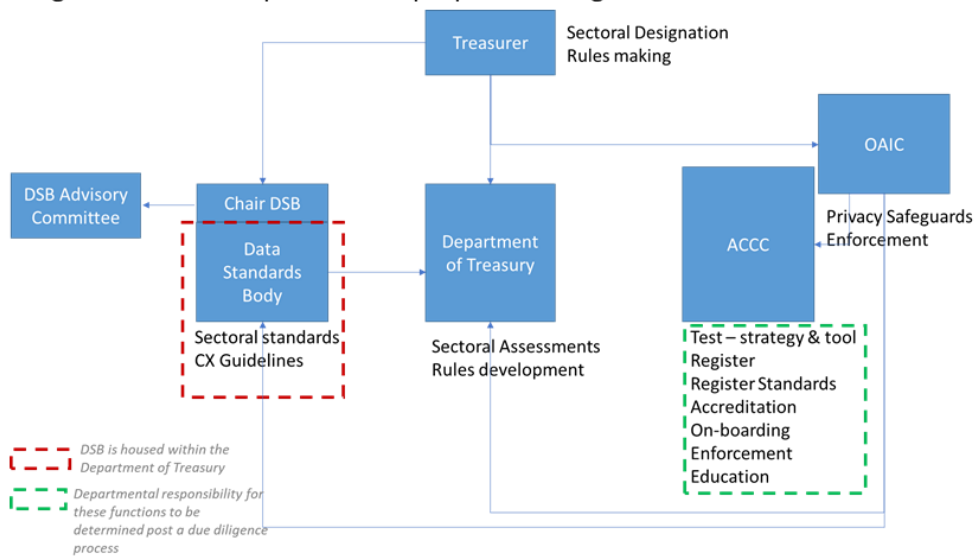
Diagram 1: Current CDR governance structure



¹ Here, the reference to 'Standards' refers to product reference data, customer reference data, non-functional requirements standards, and consumer experience standards and guidelines. The ABA notes that the other critical standards, those for the CDR register, are not under the remit of the DSB.



Diagram 2: ABA interpretation of proposed CDR governance structure



Operational opportunities and risks: The proposed move of the Rules function to Treasury and the rehousing of the DSB to Treasury introduces both opportunity and risk.

There is opportunity for Treasury to achieve the necessary synchronicity with the development of the Rules and Standards. As Treasury would be aware, interpretation of the Rules, interpretation of the Standards, and the way in which the Standards interpret the Rules has been extremely challenging for early participants in the CDR due to the asynchronism between, on the one hand, the Rules and obligation dates, and on the other hand, development of the Customer Experience (CX) Standards and Guidelines; the Standards, and on-boarding requirements (amongst other elements).

It is standard industry practice that a ‘business requirements gather and confirmation’ stage would be undertaken prior to Rules development. Rules would then be drafted only after the business requirements were agreed at a principle level. As the Rules are being developed, Standards development including customer experience testing would commence in parallel. Timelines for delivery are only set once Standards had been finalised and participants could estimate build effort. Applying standard industry practice in the future will minimise problems with interpretation, reduce rework and effort, and it will encourage a greater focus on delivery. With the Rules and Standards team soon to be reporting to Treasury, there is opportunity for Treasury to implement such a process for post phase-4 builds.

As Open Banking moves to encompass start-up FinTechs and smaller banks who have less resources than the major banks but seek to compete; Treasury can have a significant impact, by reducing the regulatory burden and unnecessary costs incurred by providing clarity, certainty and consistency in the Rules and Standards.

Further, there is an opportunity for Treasury to future-proof the CDR under the new operating model. For example, by:

- Ensuring that the findings from reviews such as the Post Implementation review for the Phase 1 Launch are considered.
- Considering appropriate industry representation models for the Rules and Standards developments as the CDR becomes multi-sectoral.
- Supporting the future extensions in functionality to be recommended by the *Inquiry into the Future Directions for the Consumer Data Right*.



The partial centralisation of the CDR also brings new risks to the operating cadence of the regime. Both the ACCC and DSB have developed significant capability and knowledge over the past two years. Changes to the operating structure of the CDR; to key staff; and to the way in which different functions of the CDR operate could interrupt this cadence during a tight delivery schedule in 2021. The ABA encourages this knowledge and capability to be retained as best as possible through the transition.

Sectoral assessments

The explanatory memorandum notes the ‘Secretary may arrange for a sectoral assessment to be conducted other than at the direction of the Minister, and the Minister may choose whether to act on the information provided’ (para 1.15). The basis on which any given sector is nominated for assessment by the Treasurer or the Secretary is unclear. The ABA recommends that the Treasurer and the Secretary undertake public consultation on potential sectors to be considered for sectoral assessment. This will support a market driven expansion of the CDR.

CDR rule making

Consultation of the consumer data rules (para 1.19)

Paragraph 1.19 notes that the Secretary is to arrange for the consultation on the CDR rules. As noted above, much of the challenge in implementing the CDR has come from a lack of procedural alignment between the Rules and Standards.² It is not possible to determine build times without the Standards being final as the Rules do not apply in isolation.

This is evidenced by the commentary contained in the Consultation Paper³ to Draft Rules 2.0. The document contains significant discussion relating to the way in which the CDR Standards will operate and how the proposed Rules can be understood (take for example Table 1 on page 12). A further example is contained in the proposed compliance dates consultation document.⁴ The document proposes July 2021 compliance dates for functional deliveries for which Standards have yet to be developed. It is not possible to commit to compliance dates without knowing the final Standards (i.e. PDR, CRD, NFR, Register, CX) and ideally the CX guidelines.

The ABA strongly recommends that ‘target’ compliance dates are subject to the final proposed draft of the Standards. The compliance date could be recommended by the DSB once build scale has been assessed and quantified in consultation with CDR participants who have assessed the final proposed draft of the Standards. Should the Standards change, then the changes to the target compliance date should follow.

The above is an area where Treasury can have a significant impact, by reducing the regulatory burden and unnecessary costs incurred by industry participants (Banks, FinTechs, etc) as they play their role in growing the CDR.

Lead regulator consulted (para 1.20)

A concern of the ABA is that the information security as required by APRA’s CPS 234 *Information Security* have been diminished by the proposed intermediary models in the draft Rules 2.0. Authorised Deposit Taking Institutions (ADIs) are obligated to maintain data standards as per CPS 234. Under draft Rules 2.0 the ACCC has proposed that subsets of this data are less sensitive and can therefore be accessed by unaccredited persons. The ABA does not believe that it is permissible for ADIs to select subsets of ‘less sensitive’ data, Treasury will need to discuss this proposed requirement with APRA. Further, as future plans are made for write access, the potential for data security standards in banking

² Further, the responsibility for the standards has been spread between the DSB and the ACCC as noted in FN(1).

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<https://www.accc.gov.au/system/files/CDR%20rules%20expansion%20amendments%20-%20consultation%20paper%20-%202030%20September%202020.pdf>

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<https://www.accc.gov.au/system/files/CDR%20Roadmap%20-%20Proposed%20compliance%20dates%20for%20Consumer%20Data%20Right%20-%202030%20September%202020.pdf>



to be further diminished through data transfers. The ABA strongly supports the requirement for the Rules (and Standards) to be reviewed by the lead regulator of the designated sector. Ideally, the legislation would be amended such that the lead regulator, APRA in the case of the banking sector, has sign-off authority on the relevant Rules and Standards to ensure no conflict or risk to systemic stability or confidence in the banking sector.

Timeframe for making the rules (para 1.23)

As per our above feedback on paragraph 1.19. The ABA reiterates that obligation dates should be determined by the Standards requirements relevant to the Rules (including the Standards and CX guidelines).

Further, the legislation should provide for an adequate transition period before old Rules are phased out and new Rules are phased in. The ABA does not support a 'hard cutover of the Rules' because of the time it takes to develop and finalise the Standards and then for participants to build, test and deploy the code. In respect to timeframes, as noted above, experience has shown that it is the Standards and not the Rules which drive the complexity of the build and therefore the timeframes. The ABA recommends that obligation dates be determined, with industry, based on factors such as: build size and complexity (as per the final-proposed draft Standards); the number of ecosystem participants impacted; and the number of customers impacted. For example, the build for 1 November 2020 is significantly larger than the four-month timeframe allocated by the Rules, thereby introducing unnecessary cost and risk into the CDR.

Finally, the draft Rules 2.0 are significant in breadth and complexity and much of the content of the draft Rules, such as the proposed Accreditation Rules, are previously unseen. In some parts the Rules are expressed as concept in other parts the Rules embed (and therefore pre-empt) the Standards solution. The ABA recommends that the current four-week public consultation period for the Rules be extended to enable deeper consideration of critical issues and to increase likelihood of affected parties making submissions.

Information commissioner not consulted under emergency situations (para 1.26)

The ABA is concerned that the Information Commissioner will not be consulted in emergency situations. The success of the data/digital economy is predicated on trust that people's data and privacy will be protected. The ABA recommends that the Information Commissioner, as the nation's senior privacy authority, should have input into the development and implementation of emergency procedures.

Delegation by the secretary

The ABA notes that the power given to the Secretary to delegate powers to a departmental employee (para 1.27) further devolves the lines of responsibility and accountability for the CDR. The ABA recommends that a single point of responsibility be nominated for the oversight of the CDR.

Agents acting on behalf of CDR entities

In respect to the amendment to section 56BD(1)(b): this amendment provides that the rules can now require disclosure of a consumer's CDR data to a person acting on behalf of that CDR consumer. This would enable rules to be made allowing a third party to access a consumer's CDR data via a data holder's 'direct request service' on behalf of that consumer.

The ABA suggests that the circumstances in which a third party could exercise this right should be tightly constrained to avoid undermining the security of the CDR regime, trust and confidence is key to the success of the CDR. The ABA recommend that Treasury set out some context for this aspect of the amendment to 56BD(1)(b) in the explanatory memorandum. For example, if this is intended only to



enable a secondary user/nominated representative to collect data on behalf of a CDR consumer using the data holder's 'direct request service' (rather than authorising an ADR to collect data).⁵

Privacy safeguards

The ABA notes the amendments to requirements for fixing out-of-date or incorrect data (para 1.39). ABA members undertake updates of customer data as per normal course of business. These actions are considered 'updates' and not an 'error correction'. For clarity, an example of an update is a customer change of name due to marriage; an example of a data error is transposing the customer's date of birth (where 1 February 1980 may be incorrectly noted in the system as 2/1/80).

The ABA recommends that updates which are undertaken as part of a normal interaction with customers should not be categorised as 'incorrect data' and there should not be an obligation for a data holder to automatically update Accredited Data Recipients with which a customer is interacting. However, where a data error has occurred, it should be incumbent on the Data Holder to correct incorrectly disclosed information in accordance with the Privacy Safeguards and associated Rules.

OSP accreditation

The ABA believes that Outsource Service Providers (OSPs) should comply with relevant information security, privacy and other obligations imposed upon their principal, and that Treasury should have the ability to impose other appropriate protections in relation to OSPs handling of CDR data. Therefore, The ABA recommends that a regulation making power should be provided for, to enable obligations to be imposed directly upon Outsource Service Providers (OSPs).

The ABA notes banks relationships with OSPs are highly regulated. For example: APRA's CPS 234 and CPS 231, the Privacy Act, and the GDPR all regulate banks' commercial arrangements with OSPs. Further, the banks retain liability for the OSPs actions in relation to CDR data. Therefore, the ABA does not support the requirement that express consent be required from consumers for an accredited data recipient which is a bank to use an OSP.

Exposure Draft: insertion of (4A) after 56EN(4)

The ABA requests clarification of section 4A of 56EN - Privacy safeguard 11 as the meaning of this section is not clear.

⁵ Specific reference is s56BD(1)(b)(v) a person acting on behalf of a person referred to in subparagraph (i)