Australian Government

Office of the Australian Information Commissioner

Report on the draft Consumer Data Right (Non-bank Lenders) Designation 2022

A report by the Australian Information Commissioner, pursuant to section 56AF of the Competition and Consumer Act 2010

30 September 2022

OAIC

Contents

Introduction

I welcome the opportunity to provide this report on the *Consumer Data Right (Non-Bank Lenders) Designation 2022* (the draft designation instrument). The draft designation instrument and its Explanatory Materials are available at (https://treasury.gov.au/consultation/c2022-300402), having been published by the Department of the Treasury (Treasury) for a period of public consultation from 19 August – 16 September 2022.

As Australian Information Commissioner (Information Commissioner) this report is produced in fulfilment of my obligation under s 56AF of the *Competition and Consumer Act 2010* (CC Act). Section 56AF requires me, as Information Commissioner, to:

a) analyse the likely effect of making the draft designation instrument on the privacy or confidentiality of consumers' information, and
b) report to the Minister about that analysis.

As required by s 56AF(2) of the CC Act, this report will be published on the Office of the Australian Information Commissioner (OAIC) website. This report also constitutes evidence of the consultation required by s 56AD(3) of the CC Act, which provides that the Minister must consult the Information Commissioner before making an instrument designating a new sector as subject to the CDR.

If made, the draft designation instrument would have the effect of making the non-bank lending (NBL) sector a 'designated [CDR] sector' (see s 56AC of the CC Act) and enlivening the ability to make CDR rules allowing for the sharing of designated NBL datasets pursuant to the CDR (see Division 2 of Part IVD of the CC Act). The draft designation instrument does not, without applicable rules (*Competition and Consumer (Consumer Data Right) Rules 2020* (CDR rules)), allow for the sharing of NBL data pursuant to the CDR. The CDR rules can regulate the sharing of designated data to the extent that it is held by a 'data holder'. [1] The draft designation instrument provides that 'relevant non-bank lenders' are data holders for designated NBL data.[2] New or amended CDR rules would need to be made to allow the sharing of NBL data that falls within the scope of the draft designation instrument.

In producing this report, I have reviewed the Final Report of the Sectoral Assessment for Non-Bank Lending[3], produced pursuant to s 56AE of the CC Act (the sectoral assessment report), and the accompanying Privacy Impact Assessment (PIA).[4] I have reviewed the publicly available submissions to the March – April 2022 consultation on the possible designation of NBL as a CDR sector (the sectoral assessment consultation) which, along with my submission of 3 May 2022, are available on Treasury's website. [5]

OAIC staff attended the CDR Design and Strategy Forum on 13 September 2022 and have had ongoing engagement with Treasury to ensure a common understanding of the matters at hand. Staff have also

[1] See ss 56AC(2)(b), 56AJ, 56BC of the CC Act.

[2] See section 6 of the draft designation instrument

[3] Department of the Treasury, Consumer Data Right – Sectoral Assessment for Non-Bank Lending – Final Report, 19 August 2022

[4] Department of the Treasury, Consumer Data Right – Sectoral Assessment for Non-Bank Lending – Final Report, 19 August 2022, Attachment A, pp. 31 - 43

[5] See Submissions: https://treasury.gov.au/consultation/c2022-253782

engaged with relevant stakeholders in relation to the applicable privacy and confidentiality implications of the designation. This report does not consider datasets which are outside the scope of the draft designation instrument.

The sectoral assessment report recommends the designation of the NBL sector. It notes that while the intention is to designate similar datasets for the NBL sector to those already designated in the banking sector, there are some key differences in the NBL sector including the number of smaller non-bank lenders and the potentially more vulnerable consumer cohort. It also intends to consider whether there are additional consent protection mechanisms that could apply to high-cost products or if certain products should be excluded from the CDR.

I have conducted my analysis of the likely effect of making the draft designation instrument on the privacy or confidentiality of consumers' information (per s56AF, CC Act) by reference to whether the applicable privacy and confidentiality implications are reasonable, necessary and proportionate. My analysis has been informed by a variety of factors, including:

- the potential benefits of expanding the CDR to the NBL sector, including increased opportunities for innovation and competition and the benefits of a flexible and future-focussed CDR which can readily adapt to embrace new and emerging use-cases, supported by robust privacy protections and safeguards
- the potential for CDR to enable consumers to form a better understanding of their financial situation and make more informed decisions about suitable financial products
- the level of maturity in privacy and data security awareness that will be required of NBL entities participating in the CDR
- the potential for consumers in vulnerable circumstances to access the CDR, noting the types of products NBL entities offer and the CDR use-cases which may arise in the NBL sector
- the role of the draft designation instrument in the broader CDR framework, noting the potential for the NBL designation to increase the volume and types of financial information about consumers available in the CDR, and for banking and NBL data to be aggregated with other datasets[6]
- the importance of ensuring the CDR is easily understood and operationalised so as to protect against misuse of information or risk of error in the application of privacy safeguards and protections, including:
    - the potential for some non-bank lenders to voluntarily participate in the CDR and their ability to comply with privacy and security requirements
    - the interaction between CDR and credit reporting obligations in the NBL sector.

As noted in Part 2 below, the sectoral assessment report flags a number of issues which will be further considered at the rule-making stage, including measures which may mitigate sector-specific risks.

[6] Noting that the ultimate impact of the draft designation instrument depends on provisions of the CC Act and CDR rules which govern the handling and protection of designated data

I will be required to analyse any new CDR rules before they are made, as required by s 56BR of the CC Act. At that point, I will consider and make any further recommendations to ensure the appropriate protection of privacy and confidentiality in the CDR's operation in the NBL sector.

Having considered the above factors, I have concluded that on balance the privacy and confidentiality impacts of designating NBL as a CDR sector are likely to be appropriately mitigated and managed within the CDR framework. To support the mitigation and management of privacy and confidentiality risks arising out of the designation and through the rule-making stage, a PIA should be conducted which implements the recommendations contained in this report.

My report recommends a PIA should be conducted to inform the CDR rule-making stage to:

- identify the impact that the sharing of NBL data might have on the privacy of individuals
- consider how the rules and standards will mitigate the privacy impacts identified in the sectoral assessment report, including the privacy impacts raised by stakeholders, and
- ensure the privacy and confidentiality impacts of the designation (in the context of the broader CDR framework) are reasonable, necessary and proportionate.

The PIA should also include an in-depth consideration of the privacy and security issues arising at the CDR rule-making stage, mapping information flows for different products and use-cases, and establishing how risks are to be managed. The PIA should also involve active consultation with relevant stakeholders to ensure information use cases are understood by and acceptable to the community, and culminate in a report setting out recommendations for managing, minimising and eliminating risks to individual privacy.[7]

Summary of recommendations

Recommendation 1

I recommend, to inform the rules making stage, a PIA be conducted in relation to how the rules and standards will mitigate the privacy impacts identified in the sectoral assessment report, including matters raised by stakeholders. This PIA should inform the development of the rules and standards and identify the impact that the designation and sharing of NBL data and rules and standards design may have on the privacy or confidentiality of individuals. The PIA should consider the following and other relevant matters which are identified during the PIA process:

(a) entities' regulatory maturity and capability to comply with mandatory obligations as a data holder when considering the de minimis threshold at the CDR rule-making stage
(b) ways to support non-bank lenders who choose to voluntarily participate in the CDR to understand and comply with their obligations as a data holder
(c) the products specific to the NBL sector, the use cases, risks and benefits associated with each product and whether any products should be excluded in the CDR rules
(d) stakeholder views on the impacts of the designation and sharing of NBL data on individual privacy, including proactive consultation with consumer advocacy groups about the types of use-cases which are likely to affect vulnerable consumers, the types of products that should

[7] Please refer to the OAIC's guide to undertaking privacy impact assessments for detailed guidance on the process for undertaking a privacy impact assessment, including consultation with key stakeholders during the PIA process.

be subject to additional restrictions or considered for exclusion and the effectiveness of proposed risk mitigation measures, such as supplementary CDR rules or changes to the consumer experience standards, and

(e) whether additional risk mitigation strategies are required in relation to high-cost products or direct marketing to mitigate against any risks that arise for consumers, including consumers in vulnerable circumstances.

Recommendation 2

Noting there may be increased opportunities for types of credit information subject to Part IIIA of the *Privacy Act 1988* (Privacy Act) to be shared in the CDR following the designation of the NBL sector, the PIA (discussed in Recommendation 1) should also consider how the sharing of CDR data interacts with the credit reporting regime and the obligations of credit providers under Part IIIA. This should include the following matters and other relevant matters including those arising out of consultation arising under Recommendation 3:

(a) how the proposed exclusion of financial hardship information intersects with requirements to disclose financial hardship information under Part IIIA of the Privacy Act

(b) how the potential regulatory gap associated with Buy Now Pay Later (BNPL) products impacts on the privacy of consumers and whether any risk mitigation measures are required to protect consumers, including vulnerable consumers

(c) proactive consultation with industry and consumer stakeholder groups on compliance risks associated with dual obligations under the CDR and credit reporting system, including in relation to financial hardship information

(d) how participants can be supported to ensure compliance under the CDR and credit reporting system and whether any amendments to the CDR rules, consumer experience standards or other risk mitigations are required to better enable participants to understand and comply with their obligations under the two regimes

(e) whether the sharing of financial information in the CDR not ordinarily subject to Part IIIA reporting requirements may enable credit providers to undertake credit assessments which are supported or supplemented by financial information not subject to the protections under Part IIIA, and

(f) whether additional CDR rules or protections are required for consumers where financial information, or aggregated CDR data, is used to assess a person's credit worthiness outside of the scope of Part IIIA.

Recommendation 3

To support its consideration of the interaction between the CDR and Part IIIA of the Privacy Act, and the increased potential for credit information subject to Part IIIA to be shared following the designation of the NBL sector, Treasury should engage with the Attorney-General in relation to the consultation on the review of credit regulation under Part IIIA.

Part 1: About the OAIC and our role in the CDR system

The OAIC is Australia's independent regulator for privacy and freedom of information. The OAIC co-regulates the CDR scheme together with the Australian Competition and Consumer Commission (ACCC). The OAIC enforces the privacy safeguards (and related CDR rules) and advises on the privacy implications of CDR rules and data standards. The OAIC is also responsible for undertaking strategic enforcement in relation to the protection of privacy and confidentiality, as well as investigating individual and small business consumer complaints regarding the handling of their CDR data.

Our goal in regulating the privacy aspects of the CDR system is to ensure that the system has a robust data protection and privacy framework, and effective accountability mechanisms to ensure consumers are protected.

Part 2: Scope of the draft designation instrument

The making of the draft designation instrument would have the effect of increasing the number of data holders that can participate in the CDR. This consequently increases the privacy and confidentiality risks given the increased amount of personal and lending information that will be able to flow through the CDR, upon the making of applicable CDR rules.

The sectoral assessment report recommends a broad approach to designation in relation to both the definition of 'relevant non-bank lender' as data holders, and the datasets that are proposed for designation. As presently drafted, these proposed product datasets effectively mirror those in the banking designation instrument.[8] However, as explored in Part 4 of this report, the sectoral assessment report indicates specific issues relevant to the NBL sector are to be considered at the CDR rule-making stage. These include:

- the application of a de minimis threshold for mandatory participation by data holders in the CDR[9]
- consideration of risk mitigation measures to address sector-specific risks for vulnerable consumers, such as:
    - the operation of direct marketing consents
    - restrictions in relation to high-cost products
    - exclusion of particular NBL products from the CDR[10]
- exclusion of hardship information (to be designated but excluded at the rule-making stage, consistent with approach in the Energy sector and as proposed in the Telecommunications sector)[11]
- whether bespoke products designed for large corporate customers should be included in the CDR[12]

[8] Consumer Data Right (Authorised Deposit-Taking Institutions) Designation 2019 (legislation.gov.au)

[9] Sectoral assessment report, p 19

[10] Sectoral assessment report, p 19

[11] Sectoral assessment report, p. 14

[12] Sectoral assessment report, p. 25

- whether further clarification is required in relation to securitisation models, noting it is intended that the data holder should only be the originator of a loan[13]
- a potential de minimis threshold for new products, allowing lenders to trial new products prior to mandatory CDR obligations applying[14]
- amending the CDR rules for banking to mandate the sharing of BNPL data, to achieve consistency between the two sectors[15]
- the timing and implementation of CDR in the NBL sector and the degree to which a phased rollout will be implemented[16]
- whether the definition of 'eligible consumer' under the CDR should be narrowed at the rule-making stage for NBL to reflect the definition in the banking sector (that is, an account holder or secondary user for an account that is open and accessible online).[17]

Data holders as 'relevant non-bank lenders'

The draft designation instrument defines data holders as 'relevant non-bank lenders'[18] by way of reference to the definition of 'registrable corporation' under section 7 of the *Financial Sector (Collection of Data) Act 2001*, but without the $50 million threshold in that Act applying to the definition of data holder.[19]

In relation to the $50 million threshold, the sectoral assessment report proposes removing this from the definition of 'relevant non-bank lender' in the draft designation instrument to ensure NBL entities below that threshold could participate in the CDR. However, the Exposure Draft Explanatory Materials propose that a threshold of $50 million or higher would be reimposed at the rule-making stage, to recognise the impact of the introduction of CDR obligations and compliance on smaller entities including start-ups: '(T)*he result of omitting the threshold at designation stage and reimposing it at rulemaking stage is that those entities under the threshold could participate in the CDR voluntarily, but only those entities who exceed it [the threshold] would be compelled*'. [20]

The effect of making the draft designation instrument, using the proposed definition of 'non-bank lender', would have the impact of bringing more entities within scope of the CDR. In my submission to the sectoral consultation, I raised concerns about the different functions and purposes of the NBL sector and the capacity of smaller entities to comply with the privacy safeguards and broader privacy law, especially in relation to the size and regulatory maturity of some entities in the NBL sector. This might include, for example, the capacity of smaller entities to distinguish between their credit reporting obligations under Part IIIA of the Privacy Act and their separate obligations under the CDR.

[13] Sectoral assessment report, p. 21

[14] Sectoral assessment report, p. 12

[15] Sectoral assessment report, p. 20

[16] Sectoral assessment report, p. 24

[17] Sectoral assessment report, p. 27

[18] See ss 4 and 6 of the draft designation instrument

[19] Section Financial Sector Collection of Data Act 2001

[20] Exposure Draft Explanatory Materials, Consumer Data Right (Non-Bank Lenders) Designation 2022, see p 4

I acknowledge the intent to, at the CDR rule-making stage, find a balance between designating all NBL entities and encouraging competition and innovation from start-ups and growth of smaller non-bank lenders, by enabling voluntary participation in the CDR.

As noted in Recommendations 1(a) and (b), in addition to the cost of regulatory compliance, it is critical to consider entities' capability and regulatory maturity to comply with the privacy safeguards as holders of CDR data in assessing and ultimately deciding on an appropriate de minimis threshold. I also encourage consideration of ways to support entities who fall under any de minimis threshold who decide to voluntarily participate in the CDR.

Part 3: Exclusions

I appreciate that there are several factors for consideration when assessing whether to exclude certain datasets from the draft designation instrument. However, an important aspect of this assessment is the identification of privacy risks associated with datasets proposed for designation.[21]

Proposed exclusions

The draft designation instrument designates information about NBL products, information about the use of a product and information about the user of a product. The draft designation instrument proposes to exclude two categories of information from the scope of designated data: materially enhanced information and credit information.

Materially enhanced information

The concept of 'materially enhanced information' refers to data that is the result of the application of insight, analysis or transformation to significantly enhance its usability and value in comparison to its source material.[22] Data holders cannot be required to disclose materially enhanced data about the use or sale/supply of products under the CDR but may be authorised to disclose it through the CDR on a voluntary basis.

The draft designation instrument excludes materially enhanced information from the class information about a use of a product.[23] This means that data holders are not required to disclose CDR data that has been materially enhanced, however consumers can authorise data holders to disclose the information.[24]

Credit information

The draft designation instrument also excludes the sharing of certain types of credit information, as defined in the Privacy Act:

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[21] Consumer data right: Telecommunications sectoral assessment – Final Report, p15 <https://treasury.gov.au/sites/default/files/2021-11/p2021-225262.pdf>.

[22] Explanatory statement, Consumer Data Right (Authorised Deposit-Taking Institutions) Designation 2019 <https://www.legislation.gov.au/Details/F2019L01153/Explanatory%20Statement/Text>.

[23] Clause 8(4)(c) of the draft designation instrument excludes from the definition of materially enhanced information, information derived to meet a regulatory requirement.

[24] Department of Treasury, Exposure Draft Explanatory Materials, Consumer Data Right (Non-Bank Lenders) Designation 2022, p. 7

- a statement that an information request has been made in relation to the individual by a credit provider, mortgage insurer or trade insurer (s 6N(d))
- court proceedings information about the individual (s 6N(i))
- personal insolvency information about the individual (s 6N(j))
- the opinion of a credit provider that the individual has committed, in circumstances specified by the provider, a serious credit infringement in relation to consumer credit provided by the provider to the individual (s 6N(l))
- new arrangement information (a statement that the terms or conditions of consumer credit have been varied, or that the individual has been provided with the new consumer credit) (s 6S(2)).

Other categories of credit information as defined under s 6N of the Privacy Act, such as consumer credit liability information, repayment history information and financial hardship information are not excluded in the draft designation instrument. However, the sectoral assessment report, that it intends to exclude financial hardship information at the CDR rule-making stage.[25]

The purpose of the exclusion of certain types of credit information appears to be to reduce the regulatory overlap between the CDR and the Privacy Act.[26]

Additional proposed exclusions at the rule-making stage

While the sectoral assessment report broadly concluded that the CDR framework contains appropriate mitigation strategies for the handling of consumers' financial information, the PIA accompanying the sectoral assessment report recommended consideration be given at the rule-making stage to:

- whether particular NBL products should be excluded from the CDR system for privacy reasons
- whether additional supplementary CDR rules or particular consumer experience standards for consent were necessary to mitigate against any sector specific risks, particularly for vulnerable consumers, and
- the operation of direct marketing consents and whether additional restrictions are required in relation to certain high-cost products.[27]

The sectoral assessment report acknowledged that the NBL sector specialises in providing loans for 'non-conforming borrowers' i.e. consumers with credit profiles who do not meet the authorised deposit-taking (ADI) banking sector standards.[28] It is likely the NBL sector will comprise a greater proportion of consumers experiencing financial hardship or other types of vulnerability than the banking sector.

[25] Sectoral assessment report, p. 14

[26] Department of the Treasury, Consumer Data Right – Sectoral Assessment for Non-Bank Lending – Final Report, 19 August 2022, p.8.

[27] Privacy Impact Assessment (Attachment A to sectoral assessment report) pp. 33-34

[28] See Joint Submission from the Financial Rights Legal Centre, Financial Counselling Australia and Consumer Action Law Centre

In this respect, I note submissions to the sectoral assessment consultation raised concerns about risks to consumers including predatory behaviour from some non-bank lenders. The extension of CDR to the NBL sector should, in theory, help consumers make more informed lending decisions and greater product optionality. However, as I have noted in my submission to the sectoral assessment, consumers in vulnerable circumstances, such as those in financial hardship or those unable to access finance from the banking sector, may feel more reliant on services or payments may feel a loss of control over their personal information and unable to make meaningful choices about the collection, use and disclosure of their data.

At present, the privacy safeguards prohibit accredited data recipients (ADRs) and designated gateways from using or disclosing CDR data for direct marketing, unless the consumer consents and such use or disclosure is required or authorised under the CDR rules.[29] However, in light of the heightened concerns regarding consumers in vulnerable circumstances in the NBL sector, I agree there is a need to consider additional consumer protection measures, such as options for direct marketing consents on certain high-cost products and I recommend this is considered through the PIA process.[30]

Noting the intention to more closely consider products and appropriate consents, I consider there would be a benefit in seeking specific feedback during the PIA process from consumer groups about the effectiveness of different risk mitigation strategies to ensure the measures are likely to assist more vulnerable consumers and address any sector-specific risks associated with particular NBL products.

Similarly, consumer groups may have useful information and feedback around high-risk products and use cases in the NBL sector and may assist in exploring the types of products that should be considered for exclusion at the rule-making stage.

Financial Hardship Information

The sectoral assessment report notes that, while there may be future use-cases for financial hardship information as the CDR ecosystem evolves, at present these are insufficient, and financial hardship information[31] should be excluded at the rule-making stage. The report notes that this approach is consistent with the approach taken in the Energy sector and as proposed in the Telecommunications sector.[32]

There should be close consideration of the benefits and risks associated with the designation of financial hardship information at the rule-making stage. There may be circumstances where including this information in the CDR may help consumers experiencing hardship or vulnerability access financial products and services that suit their specific circumstances. There may also be situations where credit providers, as defined in in the Privacy Act, are required to provide this information as

[29] See ss 56EJ of the CC Act.

[30] [30] Department of the Treasury, Consumer Data Right – Sectoral Assessment for Non-Bank Lending – Final Report, 19 August 2022, p.15.

[31] As defined by s 6QA(4) of the Privacy Act

[32] As noted in clause 1.3 of Schedule 5 of the Exposure draft CDR rules < https://treasury.gov.au/sites/default/files/2022-09/c2022-315575-ed.pdf>.

part of their credit reporting obligations under Part IIIA of the Privacy Act when participating in the CDR.[33]

As noted in my report on the draft Telecommunications designation instrument, information about financial hardship is particularly sensitive and can reveal, amongst other things, sensitive information about a person's health and financial situation.[34] Accordingly, inclusion of this information should be carefully considered to ensure both consistency with credit reporting obligations and to maintain the privacy and confidentiality of consumers' financial information.

As noted in Recommendation 2(a) and 2(d), the PIA should examine how the proposed exclusion of financial hardship information intersects with disclosure requirements under Part IIIA of the Privacy Act and whether any amendments to the CDR rules, consumer experience standards or other risk mitigations are required to ensure participants understand and comply with their obligations under the two regimes.

Buy Now Pay Later & other emerging products

There is a risk with some NBL products that, where financial hardship information is excluded from the CDR, and where a lender uses repayment information in the CDR to decide a consumer's credit worthiness, that assessment may not accurately reflect the consumer's financial situation. For example, a consumer may experience a temporary incapacity or illness which affects their repayment history but does not reflect a broader incapacity to pay.

The sectoral assessment report noted that, in many cases, lenders are subject to responsible lending obligations under the *National Consumer Credit Protection Act 2009* (Credit Act), which require them to consider the circumstances of a borrower before providing credit. However, these obligations do not apply uniformly to CDR participants, noting for example that not all Buy Now Pay Later (BNPL) lenders are subject to the Credit Act.

I recently published my *2021 Independent review of the Privacy (Credit Reporting) Code* (the Review), which discusses the development of new and emerging credit products, such as BNPL products.[35] Noting the potential for BNPL products to disrupt the credit reporting regime, the Review concludes that the regulation of BNPL is a policy issue for Government which should be considered as part of the Review of Part IIIA of the Privacy Act.[36] On 12 July 2022, the Assistant Treasurer also announced that the Government will be consulting on options to improve the regulation of credit in Australia, including BNPL.[37]

As noted in Recommendation 2(b), noting the potential regulatory gap associated with products such as a BNPL, the PIA should consider whether designating this product in the CDR may generate privacy risks for consumers and whether any risk mitigation measures are required to protect consumer, including vulnerable consumers. As noted in Recommendation 3, it would be beneficial to engage with the consultation on credit regulation, and with the Attorney-General, when considering which

[33] See s 21EA of the Privacy Act

[34] OAIC, Report on the draft Consumer Data Right (Telecommunications Sector) Designation 2021, p. 12

[35] Office of the Australian Information Commissioner, *2021 Independent review of the Privacy (Credit Reporting) Code*, 20 September 2022

[36] *2021 Independent review of the Privacy (Credit Reporting) Code*, pp. 39-41

[37] See: Address to the Responsible Lending and Borrowing Summit, Sydney | Treasury Ministers.

products should be prescribed or excluded at the CDR rule-making stage, and whether any risk mitigation measures are necessary to protect consumers.

Part 4: Interaction with Part IIIA of the Privacy Act

Part IIIA of the Privacy Act and the *Privacy (Credit Reporting) Code 2014* regulate the handling of personal information in the consumer credit reporting system. The objective of Part IIIA is to ensure an efficient credit reporting system, while ensuring that the privacy of individuals is respected.[38] Under Part IIIA, the situations in which credit information may be collected, used and disclosed, are specifically prescribed and limited.

The consumer credit reporting system is a closed system, focussed on the disclosure of information between credit providers (CPs) and credit reporting bodies (CRBs). Unlike CDR, it is notice-based and consent is generally not a basis for collecting, using or disclosing credit information.

The CDR and the consumer credit reporting system both involve the sharing of financial information between entities, and so there is potential interaction between the systems, with credit providers such as banks and, in the future, non-bank lenders, utilities and telecommunications companies able to participate in the CDR as data holders or data recipients.

Section 56EC(3) of *Competition and Consumer Act 2010* provides that the CDR does not limit Part IIIA of the Privacy Act, although there is the potential for CDR Regulations to limit specified provisions of Part IIIA. In principle, this enables the two systems to operate consistently, with the credit reporting obligations contained in Part IIIA applying to credit reporting information shared within the CDR and prevailing to the extent of any inconsistency. There are also a number of exclusions to 'authorised or required by law' exceptions in the Privacy Act, ensuring consent-based collection of information under the CDR cannot be used to undermine Part IIIA.

While there are specific exclusions to the types of credit information, as defined under s 6N of the Privacy Act, that can be shared in the CDR, other credit information that is not specifically excluded, may be shared via the CDR.[39] In the banking sector, this may include information such as repayment information on a home or car loan. The proposed expansion of the CDR to the NBL sector is likely to see a substantial increase in the range of credit reporting information, or information equivalent to credit reporting information, which is shared within the CDR, with consumers able to share financial information about their use of non-traditional lending products such as payday loans and BNPL products, some of which may not be subject to Part IIIA.

While the two regimes are able to operate concurrently, as the number of credit providers and credit reporting bodies participating in the CDR expands, and as the amount of credit reporting information in the CDR increases and is combined within CDR data not subject to Part IIIA, there is a risk that credit providers and credit reporting bodies may face difficulties complying with the differing obligations of each system and will find compliance a more onerous and complex exercise. For example, while both the CDR and Part IIIA contain obligations in relation to the quality, correction and destruction of data and direct marketing, the obligations under each regime are not uniform. Further, while the CDR permits ADRs to share CDR data with an outsourced service provider for the purposes of storing or housing CDR data, there is no corresponding permission under Part IIIA. This might mean, for

[38] See s 2A(e) of the Privacy Act.

[39] Provided it does not fall within the materially enhanced information exception in the Draft DI under clause 8(4).

example, that an ADR which ordinarily houses its CDR data with an outsourced service provider would be required to separate and separately store CDR data, that might also be credit reporting information, which is subject to Part IIIA.

The prohibitions on the use and disclosure of credit reporting information in Part IIIA reflect the particularly sensitive nature of credit reporting information. Accordingly, while there are benefits to credit information being shared within the CDR, it is important to ensure that, in practice, the limitations on using and disclosing credit reporting information in Part IIIA are applied where that information has the potential to be shared in the CDR and that CDR participants are aware of their obligations, and are supported to comply with both systems.

As noted in Recommendation 2(c) and (d), the PIA should involve consultation with industry and consumer stakeholders about potential compliance risks associated with dual obligations under the CDR and credit reporting systems, and how participants can be supported to ensure compliance under both systems.

Stakeholders have also raised concerns about the potential for data that is not credit reporting information, but which provides information about an individual's financial situation and may contribute to an assessment of their credit worthiness, to be shared in the CDR. Stakeholders have raised concerns that sharing such information, including aggregated data from a number of different sources, may enable lenders to assess an individual's credit worthiness outside of the credit reporting framework.

While no specific use-cases or examples to demonstrate how this may occur have been identified in the sectoral assessment consultation, the OAIC is aware that some providers appear to be operating as 'non-participating credit providers'.[40] This means that they are not using and disclosing credit reporting information, and are exempt from many of the provisions in Part IIIA. If such providers were to share data in the CDR that reveals the equivalent information about an individual's credit worthiness, but that is not subject to the protections in Part IIIA, there is a risk that the credit reporting framework in the Privacy Act could be undermined.[41]

One of the benefits of the NBL designation contemplated in the sectoral assessment report is enabling the sharing of financial information which would not ordinarily be captured by the credit reporting system, giving lenders a more complete picture of a consumer's financial position.[42] This also allows consumers to make more informed decisions about suitable products. However, it is important that in doing so, the objectives of Part IIIA are maintained, and the purpose of the credit reporting framework is not undermined. Noting that the use cases and products, including product innovations, that may be captured by the NBL designation are yet to be fully explored, I recommend the interaction between the CDR and credit reporting obligations under Part IIIA be further examined at the rule-making stage.

As noted in Recommendation 2(e) and (f), the PIA should consider whether the sharing financial information in the CDR not ordinarily subject to Part IIIA reporting requirements may enable credit

[40] Certain BNPL providers are not subject to Part IIIA as they do not disclose or collect credit information.

[41] Under section 6 of the Privacy Act, a 'non-participating credit provider' is a provider that has not disclosed, is not likely to disclose or has not collected, credit reporting information or credit eligibility information about an individual to or from a credit reporting body or another credit provider.

[42] Sectoral assessment report, p 14

providers to undertake credit assessments which are supported or supplemented by financial information not subject to the protections under Part IIIA. Consideration should also be given to whether additional CDR rules or protections are required for consumers where financial information, or aggregated CDR data, is used to assess a person's credit worthiness outside of the scope of Part IIIA.