12 October 2018

Daniel McAuliffe
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The Treasury
Langton Crescent
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By email: data@treasury.gov.au

Dear Mr McAuliffe

**Treasury Laws Amendment (Consumer Data Right) Bill 2018: Provisions for further consultation**

I write in relation to Treasury's consultation *Treasury Laws Amendment (Consumer Data Right) Bill 2018: Provisions for further consultation* (the current consultation).

AFMA welcomes the second round of consultation by Treasury in relation to the Exposure Draft and generally supports the changes that are proposed. We remain concerned that the process for introducing the scheme which involves building the standards, rules, and legislative framework at the same time, while requiring banks to build systems to comply with this as yet to be finalised framework by mid-2019 is far from optimal and will increase the risk of insufficiently considered design elements and increased technical risk. This approach has also added to the complexity of responding to the consultations as the ACCC's consultation on the rules framework was based on the original Exposure Draft released by Treasury which became out of date during the course of the consultation.

The risks arising from the present timetable would suggest that it would be prudent to change the start date for the program and restructure the regulatory design process to come to a sound landing before firms are required to build software to meet the demands of the scheme. We would suggest that a 12 month delay should be sufficient to move the program to a sounder footing and sufficiently reduce the risks around policy and technical implementation.

While we welcome the changes proposed in the current consultation which respond to some of the key concerns raised by industry, we remain of the view that further changes to the legislation are required, as outlined in our previous submission. We would welcome more development of the framework legislation along the lines in which the current consultation is heading to better define and structure the scheme. Increased legislative structure will increase certainty around the likely

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outcomes and direction of the scheme and will assist consumers, participating firms, and the regulators in developing and responding to the rules as they are implemented.

We also highlight the appropriateness of regulations which are contemplated in the legislation but from our interactions with the regulator we understand there are no plans in place to develop. Regulations to restrict and refine the scope of the regulatory envelope are an area we would encourage Treasury to review particularly in the event the Government's implementation timetable prevents full appropriate implementation in the legislation.

We are concerned that if the current proposals represent the main substantive changes that Treasury intends to make before the Government introduces the legislation then it risks not being a well-developed and fully-formed framework for Open Banking or the wider Consumer Data Right and this will have long-lasting and far-reaching implications for the economy.

Noting this context we respond below to the proposals in the current consultation on the following pages.

In relation to the Designation Instrument we request that the recommendation of the Open Banking Review as supported by the Government of excluding branches of foreign banks be implemented in that instrument and not be left to the rules with the uncertainty that would entail. This would require a change to section 5 as follows:

> (2) For paragraph 56AC(2)(b) of the Act, authorised deposit-taking institutions, **except those that are foreign ADIs** , are specified as persons who hold such information, or on whose behalf such information is held.
>
> And add to Section 4:
> **foreign ADI** has the meaning given by subsection 5(1) of the Banking Act 1959.

We commend Treasury on its responsiveness in the first round of consultation in relation to the drafting and thank you for the opportunity to comment on these further provisions. We look forward to continuing to assist Treasury in the development of the scheme over the coming year.

Yours sincerely

Damian Jeffree

## Proposal 1 Derived Information

In general we note the amendments proposed effectively separate out the definition of data for the different purposes – i.e. rulemaking versus privacy, a point that was raised in consultation responses and is supported by AFMA.

AFMA supports the following proposal:

> "a limitation on the rule-making power so that, where the information relates to a consumer, the access and transfer right will only apply to information that is in the designation instrument (s56BC);
>
> : This means that derived data that relates to an identifiable or reasonably identifiable consumer would need to be specifically included in a designation instrument to be within scope of the access and transfer right. Designation instruments are disallowable by Parliament.
>
> : The second limb of the definition of CDR data means that the rule-making power (other than mandatory access or transfer) and Privacy Safeguards will apply to data that is 'derived' from data in the designation instrument, once it has been disclosed to an accredited recipient."

A key concern of industry was the uncertainty around derived data that would likely have been produced by the rule-based approach proposed in the earlier draft. Moving this decision to the Ministerial level will go a long way to ensuring that businesses know which information is to be included in the derived data concept. We have not identified any issues in the drafting relating to this point at 56BC (3) (a).

AFMA supports the following proposal:

> "a limitation on the rule-making power so that, where the information relates to a consumer, the rules can only require a CDR participant to transfer information to an accredited data recipient (s56BC);"

AFMA holds concerns about the proposed scheme design element that would allow and indeed facilitate data leaving the scheme to non-accredited persons including those outside the jurisdiction. There should be no requirement that obliges firms to provide data (at the request of a consumer) to firms outside the scheme as this could facilitate the sharing of market sensitive information including inside information and prudentially sensitive information. We also note for completeness that consumers may be unaware of the full extent of sensitive personal data that is included in banking transaction data including data relevant to political and personal interests and activities. We have not identified any issues in the drafting relating to this point at 56BC (3) (b).

AFMA supports the following proposal:

> "a limitation on the rule-making power so that where the information does not relate to a consumer, the access and transfer right can only apply to information if it is about the eligibility criteria, terms and conditions, or price of a product, other kind of good, or a service (s56BD);

: This means that data that does not relate to an identifiable, or reasonably identifiable consumer, such as algorithms and anonymised results of analysis of aggregated data sets are not within scope of the access right."

This is a sensible limitation of the access right. On a broader point we note again that the framing of access to product information in terms of a 'consumer right' is inappropriate and a more appropriate framework should be constructed. This is because this information is intellectual property that by definition does not relate to a consumer and has been created by the firm involved at their expense. It is not appropriate to create a right of consumers to access firm intellectual property to which they have no connection. Consumers should of course be able to access the terms and conditions of the products they use.

AFMA supports the following proposal:

"redefinition of CDR consumer to persons that information relates to because of a supply of a good or service to the person or that person's associate, or to persons prescribed in regulation (s56AF);"

AFMA supports the following proposal:

"a new requirement for the Minister to consider the likely effect of making a designation on any intellectual property in the information to be covered by the instrument (s56AD).

: Intellectual property remains potentially within scope to address potential loopholes and uncertainty that could otherwise arise. However, it is not anticipated that it would be likely for any intellectual property to be designated for most sectors. Where intellectual property is proposed to be designated, Treasury proposes that the Minister must address the further factors as described in Proposal 5 below."

This proposed reform is consistent with the concerns raised by AFMA and others on the potential for intellectual property to be inadvertently caught in the regime. We understand that intellectual property should not be available as a shield to get around the privacy and other restrictions, but as a general principle the scheme should be oriented not to pick up intellectual property as data to which a consumer right attaches.

AFMA supports the following proposal:

"a limitation on the rule-making power so that, in respect of data holders, rules can only be made regarding use, accuracy, storage or deletion of CDR data where this relates to the disclosure of CDR data.

: This limitation would be included in both sections 56BC and 56BD."

This is another sensible restriction on the rule-making power. AFMA would support further enhancements of the rule-making power along these lines.

### Proposal 2 Interaction of the Privacy Safeguards with the Privacy Act

AFMA supports the efforts to clarify the application of the privacy safeguards.

### Proposal 3: Reciprocity

AFMA's submission was aligned with those referenced in the current consultation paper in relation to reciprocity and we welcome the proposal to add to the Bill to highlight the importance and expectations around reciprocity. We have raised with ACCC our concerns that their Rules Framework consultation paper does not appear to have the same view of the structural significance of reciprocity as a mechanism to balance the indirect benefits and costs of the scheme. Without reciprocity the indirect beneficiaries of the scheme are firms, potentially largely foreign data firms, who receive the consumer's data, while the costs and competitive disadvantage fall on the Australian ADIs.

We expect that further highlighting of the expectations could be of benefit to setting a framework for the regulator to work to that is more in line with the scheme design envisaged by the Open Banking Review.

In relation to this section:

> "Equivalent data – not designated entity: Data of a class within a designation instrument that an accredited recipient has generated or collected themselves, where the accredited recipient themselves does not fall within a designated class. An example of this would be that a rule could be written to require a non-bank lender who is an accredited recipient to disclose lending information at a customer's request [s56AG(3)]; "

We would seek to ensure that what is equivalent data is understood more broadly than is suggested in this example. If too narrow a characterisation is used then there is the potential for data firms to never have any 'equivalent' data to ADI data, despite consumer data being core to their business model, and the aim of reciprocity would then not be achieved.

### Proposal 4: Process for designation and rule-making

AFMA supports all the proposed changes in relation to the process for designation and rule-making.

We agree that the process for designation is likely to be sensitive both politically and economically and should be subject to a balanced appraisal by the government of the day with due regard for both the potential benefits for consumers and the certain costs for businesses and potentially the economy. This should take place without a public recommendation being generated and put forward by government agencies. These agencies may not be best placed to consider the balance of factors across the breadth of the economy and may tend to overweight the benefits, risking outcomes that may not be efficient. There is a key role for Treasury to play in this regard, in its capacity as adviser to the Government.

As such we again note our concerns raised in the last submission that future governments may not think highly of the design element proposed of a right for the consumer regulator to publish a recommendation for a sector to be designated prior to the Ministerial decision. The current process should not create an agency driven decision making process that does not leave clear air for the government of the day to consider the potential implications of a sector designation.

The Government is best placed to make these decisions and as such the proposed framework should be amended.

### Proposal 5: Framework for charges for access to and use of CDR data

AFMA welcomes the proposed restrictions on the government price-fixing arrangements proposed in the further provisions as improvements on the previous design, although we continue to note concerns about governments setting prices firms may charge for services, particularly where those prices are set at zero and the services cost money to provide.

We again note our preference to allow market forces to work and determine all prices as being the most compatible with the arrangements in a market-based economy.

At this point we note the scheme has not yet been formed, and there is no market-pricing failure that needs to be addressed by regulation. We see no reason to expect that the market cannot supply consumers with data at competitive rates and there has been no evidence presented by Treasury as to why a failure of market pricing should be expected.

The provision of these services must be paid for by the relevant businesses and these costs will have to be recovered elsewhere or borne by shareholders or staff costs.

Treasury appears to be moving to a 'sandboxed' market pricing mechanism, with regulations positioned to prevent certain pricing levels. It is not an appropriate approach for the Australian government given our free market economy. Treasury should look to re-assert the benefits of market pricing for its economic advantages.