

ARCA Feedback

Mandatory vs Recommendation: The rules of the Australian Financial Complaints Authority (AFCA) provide that it will apply 'good industry practice' when determining a complaint. If AFCA was to treat the non-mandatory guidelines as being indicative of good industry practice and, therefore, indicative of mandatory obligations, it would significantly impact a lender's use of Open Banking for risk and responsible lending purposes (see below). **Recommendation:** (i) each of the 'recommendations' be reviewed in light of this probability to assess whether those 'recommendations' would continue to be appropriate if treated as 'mandatory' by AFCA; and (ii) ACCC to provide guidance on the application of the 'recommendations' that confirms that they should not be treated as indicative of 'good industry practice'.

Consent as precondition of service recommendation (2.5.2), alternative options (p.41), Selecting types of data (2.8.1), How far back in time (2.10.1, 2.10.2): (1) It is not practical for all businesses to maintain processes that can deal with the level of inconsistent data that will be delivered based on these requirements/expectations. Further, some businesses may base their business model on an online-only, CDR-only bases. Requiring those businesses to maintain multiple channels for data collection will be inefficient and reduce innovation (which will particularly impact smaller start-ups). (2) It will also mean that the consumer may be required to supply the same data through other channels that are not subject to the Privacy Safeguards. (3) Lenders and other businesses may not be able to provide the service unless all data is supplied. For example, a lender may have decided that particular data is required to comply with its responsible lending requirements and that it cannot meet its obligations without that data, or a product comparison service (particular one regulated by the Corporations Act or NCCP) may not be able to provide an accurate service unless they receive all relevant data from the consumer. **Recommendation:** (i) The guidelines to recognise and support data recipients presenting the request on an 'all-or-nothing' basis, i.e. a consumer needs to consent to giving access to all required accounts, data clusters and purposes (see below) or the data request cannot progress; and (ii) the second sentence in recommendation 2.5.2 be removed as, in many circumstances, it is appropriate that the consumer's "genuine choice" is reflected in the ability to give consent to the data request as presented by the data recipient, or choose not to apply for the product (particularly noting our comment above regarding AFCA's treatment of 'recommendations').

Bundling purposes (1.1.2) and Selecting specific purposes (2.8.2): these requirements will require additional guidance from the ACCC and, subject to that guidance, may not

be appropriate. Risk and responsible lending uses will include the following related uses (i) verifying information supplied by the consumer (e.g. income and expenses); (ii) identifying relevant information that was not disclosed/was withheld by the consumer; and (iii) creating a behavioural score for the consumer. In addition, the lender will de-identify the data in order to use that data to (iv) build, develop and monitor the scoring model/algorithm. It will significantly impact a lender's use of Open Banking data for risk and responsible lending purposes if the lender cannot use the data for all four uses. Noting the requirement to explicitly obtain consent for de-identifying data, it seems that there are at least two separate purposes (i.e. (i) – (iii) as one purpose and (iv) as a separate purpose). However, it may also be considered that (i), (ii) and (iii) are distinct purposes. **Recommendation:** (i) ACCC confirm that, specifically, uses (i) – (iv) described above can be treated as one 'purpose'; and (ii) ACCC to provide guidance that supports the view that closely related uses can be treated as reflecting one "purpose".

De-identifying data (2.12): The proposal to regulate when a data recipient can de-identify the data during the consent period (i.e. to require the data recipient to obtain the consent to de-identify) appears to treat the process of de-identifying data as being a "use" of data (i.e. so that it is subject to Privacy Safeguard 6). **Recommendation:** ACCC and OAIC confirm that the process of de-identifying the data is actually a "use" of data.

De-identifying or deletion of data (2.13.1; 2.13.3): We note the comment on the bottom of page 54 relating to consumer's expectations that data will be completely destroyed once sharing had stopped. In addition, we note the announcement yesterday that there will be a "right to delete" embedded into the CDR regime. Regardless, of whether there is a requirement to "deidentify" or "delete" the data, we caution against placing too much emphasis on this in the consent process. In practice, a lender or any business providing an advisory service will need to retain an identified copy of the data received through the CDR regime in order to demonstrate compliance with the law (e.g. responsible lending, Chapter 7 of the Corporations Act and the conditions and warranties implied by the Australian Consumer Law). In practice, the data will often not be deleted or de-identified completely; rather it will be isolated and not used (other than for purposes such as responding to complaints).