SUBMISSION PAPER:

Submission to the Australian Competition and Consumer Commission Consumer Data Right - Draft rules that allow for accredited collecting third parties ('intermediaries')

August 2020

This Submission Paper was prepared by FinTech Australia working with and on behalf of its Members; over 300 FinTech Startups, VCs, Accelerators and Incubators across Australia.

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About this Submission

This document was created by FinTech Australia in consultation with its Open Data Working Group, which consists of over 150 company representatives. In particular, the submission has been compiled with the support of our Working Group Co-leads:

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This Submission has also been endorsed by the following FinTech Australia members:

- Adatree
- Athena
- Basiq
- Banjo Loans
- Biza.io
- Brighte
- CoinJar
- Data Republic
- Firstmac
- Frankie Financial
- Get Capital
- Harmoney Australia
- illion
- Joust
- Loans.com.au
- Look Who's Charging
- Moneytree Financial Technology
- Monoova
- MoneyPlace
- OnDeck
- Intuit Australia Pty Ltd
- Prospa
- Proviso
- Reinventure
- Tanggram
- TrueLayer Limited
- Wisr

- Yodlee
- Zip Co

Submission Process

In developing this submission, our Open Data Working Group held a series of Member roundtables to discuss key issues relating to the Data Standards.

We also particularly acknowledge the support and contribution of K&L Gates to the topics explored in this submission.

Context: Open Banking in Australia

FinTech Australia has been a consistent advocate for policy reform to drive the implementation of an Open Financial Data framework in Australia. We have made numerous submissions to the Federal Treasury, the Productivity Commission, Open Banking Inquiry, the Australian Competition and Consumer Commission (**ACCC**) and Data 61 on the need for a framework for the sharing of financial data and on the details of that framework.

We are strongly supportive of the ACCC's efforts to accommodate intermediaries into the Consumer Data Right (**CDR**) framework.

Throughout this process, we have emphasised the need for a regime which is flexible enough to enable participation by third party service providers. Without this, we are concerned that the CDR regime will be under-utilised and may not generate the anticipated advancements. Such advancements have the potential to drive innovation, competition and consumer choice, through giving consumers increased control over their data. Allowing for fulsome participation by intermediaries and other service providers will pave the way for innovative CDR use cases. Without this, any entity looking to provide consumers with a CDR-powered tool would face the significant costs of accreditation and integration. For many, we expect these costs will be prohibitive.

The experience of other equivalent regimes around the world has also been that the greatest efficiencies can be gained by a small number of intermediaries providing the rails for data aggregation and sharing.

Participation of third party service providers

FinTech Australia welcomes the opportunity to put forward its position on behalf of members in relation to the participation of intermediaries / third party service providers in the CDR regime.

Accreditation for Principals and Providers

Despite the existing accreditation process being available and open for a long period, there are as yet only two accredited data recipients. FinTech Australia fears that, without substantial change, the CDR will remain underutilised compared to competing technologies and solutions.

From the outset, allowing for participation of intermediaries has been seen as a way to alleviate some of the barriers to utilising the CDR. The steps necessary to obtain accreditation are costly and, for a startup which has yet to prove its own use case, likely prohibitive. Building infrastructure to interact with the open banking APIs will also involve a significant outlay of time and money.

As it stands, the current proposal would significantly hinder entities which do not have the resources to become accredited at the "unrestricted" level. This high threshold to entry will ultimately prevent a vibrant and competitive market.

As previously stated, while FinTech Australia supports the introduction of intermediaries into the CDR environment, there needs to be more flexibility in the accreditation process.

We firmly believe that the introduction of an alternative to accreditation which is not as onerous to obtain would be highly desirable. Without this, we question the ability of Fintechs and other innovative smaller entities to engage fully in the CDR environment.

FinTech Australia considers a well-designed intermediary model would go a long way to addressing these issues. However, this potential benefit will only be realised if the intermediary changes are introduced alongside a new model for accreditation. Without this, there is little utility in making changes to facilitate participation by intermediaries. Changes to accreditation requirements are fundamental to the intermediary model and should not be seen as a separate project.

The draft Rules require both the Principal and Provider to be accredited to the unrestricted level. This is highly onerous and will vastly curtail the number of Principals that will choose to make use of this framework, and hinder innovation and access to the ecosystem.

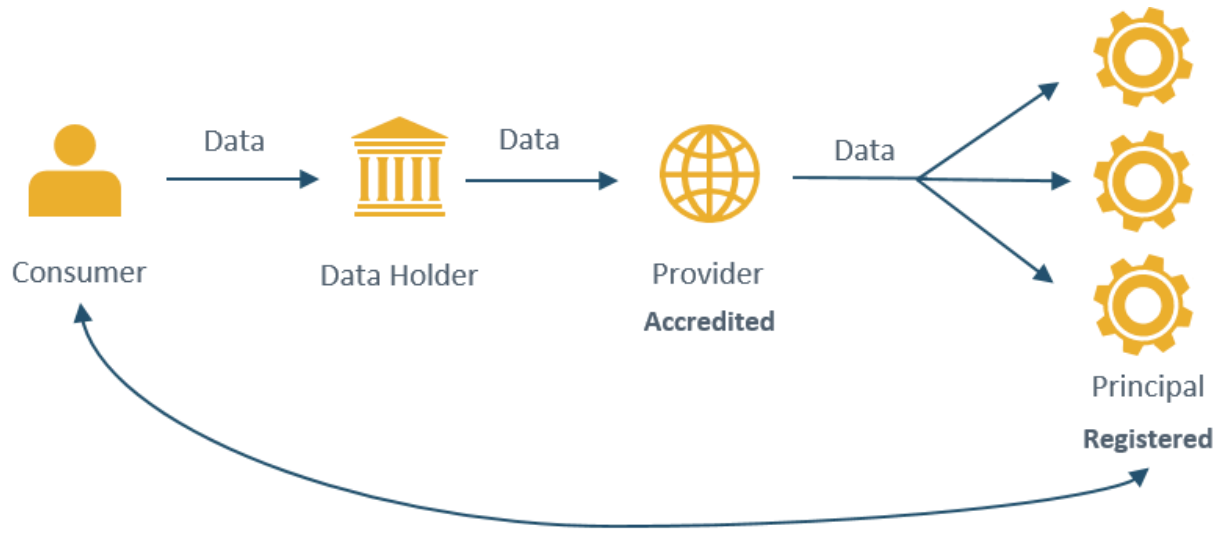
FinTech Australia proposes that:

- Providers should be required to be accredited to the unrestricted level. Providers will be interacting directly with the open banking APIs. As such, it is appropriate that they meet all of the security, insurance, dispute resolution, etc requirements which apply to accreditation.
- Principals which access open banking data via a Provider should not be required to be accredited. Principals do not interact directly with the open banking APIs, but only do so through a Provider. FinTech Australia does however see merit in a requirement for Principals to be "registered" with the ACCC in order to access the CDR. This would give the ACCC visibility over the entities receiving CDR data and the ability to exclude entities from the CDR where appropriate. We envisage that to become 'registered' the Principal would need to supply the following items ABN, list of directors, purpose of collecting the data, copies of relevant policies including PI insurance and Privacy Policy.

The model being proposed is somewhat similar to the existing approach to Australian Financial Services Licence holders and their authorised representatives. It should be possible for an entity accredited to the unrestricted level to authorise others to access CDR data by relying on their accreditation. Such "authorised representatives" could still be registered with the ACCC. The details of a model of this kind will need to be explored in greater detail, but some initial observations are as follows.

- When relying on the accreditation of another entity, an "authorised representative" would need to provide consumers with details of the authorising accredited entity. This is analogous to the information currently required to be included in a Financial Services Guide.
- As with the financial services licensing regime, an "authorised representative" should not need to be a member of the EDR. Rather, this responsibility should fall on the authorising accredited entity.

In this system there is room for smaller, innovative firms to engage with the process while maintaining the security and integrity of the CDR. This also facilitates participation in the CDR by businesses which could make effective use of the CDR data, but for whom this is not a core business activity (eg real estate agents advising landlords about leasing decisions).



Different Principals provide Consumer with value added product

Accreditation issues arise throughout the Rules. In line with the above, FinTech Australia considers that consequential changes would be needed throughout the Rules to move to a registration model for Principals who access the CDR through an intermediary. The remainder of this submission assumes that such changes are made.

Key Definitions

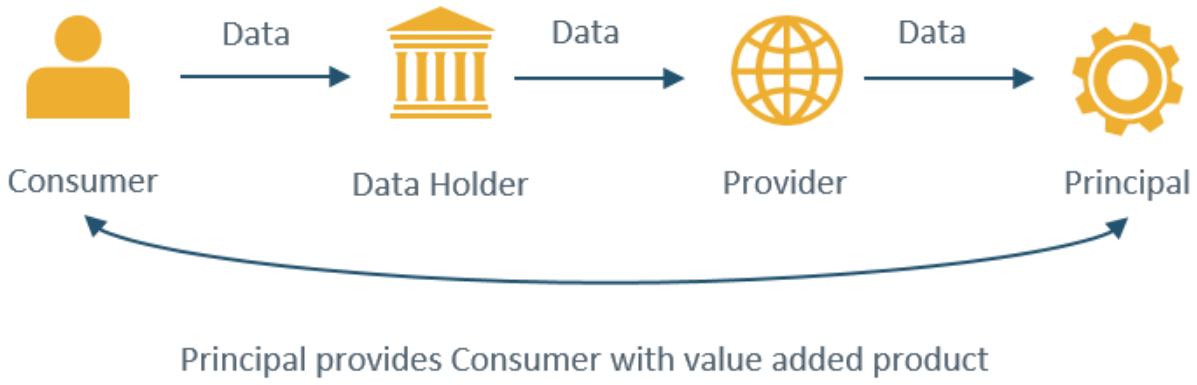
Principal

The definition of Principal is acceptable to FinTech Australia.

Provider

There appears to be only one form of model contemplated. The Explanatory note to the draft Rules states that:

> *"the principal and its branded goods and services will always be the consumer-facing entity with whom the CDR consumer has a contractual relationship. A provider can only provide services to the CDR consumer on behalf of the principal"*



It is not at all clear why this needs to be the case. Rather, we would like to see an ecosystem where there are a number of different options available to Principals and Providers.

For example, an entity may wish to provide a service of advising consumers about the best personal loan and then a separate service of assisting them to apply for that loan. On the assumption that such an entity may not wish to integrate directly with the open banking APIs, this would involve:

- Entity engages an intermediary to access open banking APIs.
- Consumer provides the entity with consent to access their transaction data using the intermediary.
- Entity provides recommendations about the most suitable personal loan product to the consumer.
- Entity assists the consumer apply for this product, including by providing the consumer's transaction data to the lender.

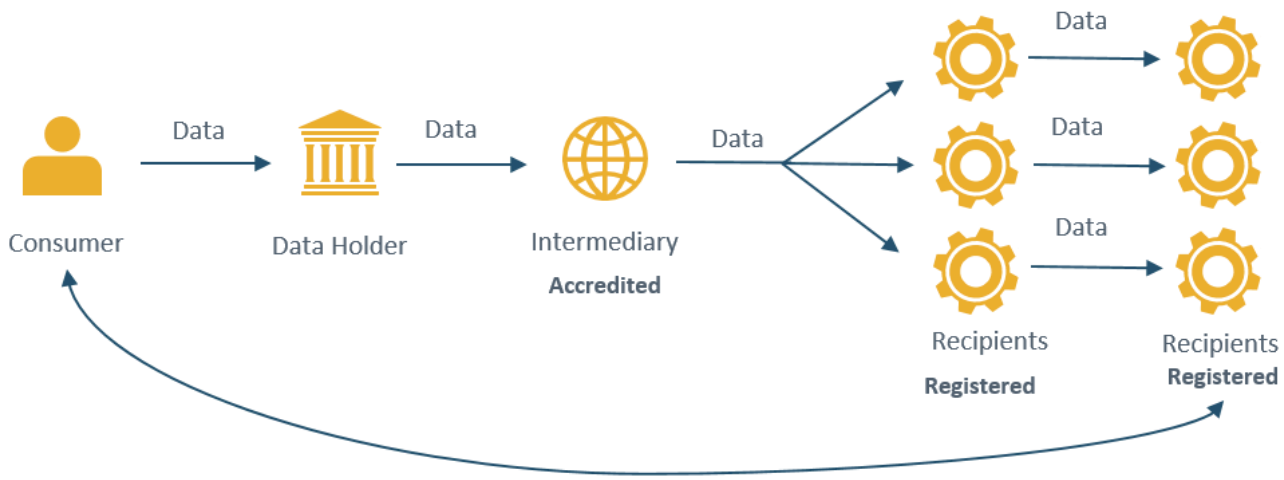
The role of the entity in this simple example changes over time. The draft Rules introduce unnecessary complexity to this relationship and introduce artificial constraints (such that the principal must be the consumer-facing contract party and the provider must act on behalf of the principal).

There are many other use cases (such as providing information to an accountant or accounting tool) where the consumer wishes to centralise their data, then share some or all of it with a selection of service providers. The requirement in the draft Rules of a 1:1 correlation between Principal and Provider excludes these.

In our view, what is required is simply the ability for:

- intermediaries to directly access the open banking APIs;
- intermediaries to share open banking data with registered recipients (with appropriate consents); and

- registered recipients to share open banking data with other registered recipients (with appropriate consents).



Different Recipients provide Consumer with value added product

Separately, it must be remembered that the CDR is intended to give consumers rights over their own data and any intermediary model needs to contemplate data being made available, either directly by the banks or through an intermediary, to the consumers themselves.

Combined Accredited Person (CAP) Arrangements

FinTech Australia is of the view that the proposed CAP arrangement does not provide sufficient flexibility and choice to structure commercial arrangements.

In addition to the concerns raised above, the CAP arrangement concept appears to limit the ability of intermediaries to:

- aggregate data about a consumer from multiple sources;
- enhance that data (eg improving data quality, adding insights, etc); and
- make that aggregated, enhanced data available to multiple recipients.

Specifically, we are concerned that the CAP model does not allow for the following example use cases. In each of these cases (and many others), the use of an intermediary is key to enabling the innovative consumer outcomes, but the CAP arrangement structure may prevent them. As such, we see the need for much greater flexibility in the design of the intermediary arrangements. We see no need for the level of prescription set out in the CAP arrangement concept. CDR data should be able to flow freely between entities who are permitted to receive

it (either through accreditation or registration, as described above), in circumstances where the consumer has given their consent to the particular use of data by those entities. Where both of these things are present (first, accreditation or registration and, second, consent), it should not matter which entity is contracting with the consumer, which entity first collects the data or which entity enriches or enhances the data.

Example Use Case - Mortgage brokers

At present mortgage brokers use data providers to access customers' transaction data (often via negotiated arrangements with banks or other information capture technologies). They do this in order to fully understand a customer's financial position in order to act in the customer's best interests. The transaction data is often categorised by the data provider and the mortgage brokers are able to assess income and expenditure. The same income and expenditure information can be securely shared with the credit provider ultimately chosen by the customer. The lender has a responsible lending obligation which requires assessment of similar income and expenditure information.

This example demonstrates not only the issues with the CAP arrangement, but also the current accreditation model as described above. It is not feasible that mortgage brokers would be in a position to become accredited in their own right, meaning that intermediaries would not be able to share CDR data with them.

In light of both of these issues, mortgage Brokers would not be able to use CDR data in their assessments. As mortgage brokers are responsible for over 50% of mortgages originated in Australia, this is a significant gap in CDR coverage and is likely to result in continued reliance on alternative information capture technologies.

Example Use Case - Using an intermediary to process loans

A lender may use an intermediary to help assess the credit worthiness of an individual (or business) by conducting an affordability assessment using CDR data. In this use case, the lender would integrate with an intermediary to handle the communication with the open banking APIs, the normalisation of data between the different banks and to conduct analysis on the acquired data. The lender integrates the intermediary into their core loan application flow which helps guide the customer in successfully connecting to their banks. The intermediary would also provide tools to the lender to help it satisfy the CDR requirements around consent capture, consent management, consumer dashboard and the governance that ensures the data is handed appropriately and inline with CDR requirements.

Example Use Case - Using an intermediary for a rewards program

A fintech may elect to implement a new cashback reward program, that uses bank transaction data to reward customers with cashback offers if they shopped at a particular merchant store. In this use case, the intermediary would provide the fintech with all of the necessary tools required to securely capture consent and provide the administration tools to manage consent thereafter - such as notifications every 3, 6 months that their data was being shared. The intermediary may also provide additional data services that enable the fintech to uniquely identify the merchants the customers transacted with, so that the Fintech can initiate the appropriate cash back rewards e.g. if a customer shopped at a particular supermarket they would get 2% cashback based on their total bill amount.

Example Use Case - Using an intermediary for a product comparison service

A product comparison service that offers customers the ability to compare financial products may use open banking to understand the customer's existing accounts / products and use this to provide personalised offers. For e.g. the customer connects their data via open banking, the product comparison service sees the customer has a Reward Maximiser account and is able to use this alongside competitor products to demonstrate to the customer how much they would be saving if they switched across to a new provider. In this use case, the comparison service would use the intermediary to be up and running quickly, and leverage the Accounts data to enable consumers to see personalised offers.

Example Use Case - Data Storage & Deletion - Industry/Product specific considerations e.g. Accounting (record keeping)

Some business system data models need to be re-designed in order to support ACCC requirements around data deletion & storage and this will likely increase as more participants and industries come onboard with CDR. Regardless of whether participants can redesign their data models, some industries only derive value-add and compliance from storing data. This will be more evident in industries and product/service offerings where historical data is required to be stored, and use of which further strengthens the customer/supplier relationship or supports regulatory compliance e.g. historical data allowing the offering of discounts or additional more suitable products, through to storage of financial accounting records and establishment of a Chart of Accounts. Furthermore, whilst systems are often designed with flexibility in mind even aside from catering for CDR requirements, the reliance on data to form historical and statistical modelling is becoming more of a trend across multiple industries with the proliferation of business analytics reporting tools and methodologies. The shift to platforms which support this approach is increasing rapidly, and perhaps the solution is to manage this through a revised

accreditation and registration process, with additional due diligence around system security. Note: anecdotally, CDR ecosystem security itself has provided a level of reassurance to all participants.

Liability

FinTech Australia believes that the prescriptive approach to liability in the draft Rules is unnecessary and will often be an inappropriate allocation of risk.

In circumstances where an accredited Provider accesses the open banking APIs and shares data with a registered recipient, we do not believe that it is appropriate for the Principal to be responsible for the conduct of, and breaches by, the Provider. The Provider has the ability to control their own actions and they should, subject to any contractual arrangements, be responsible for their own conduct.

The only possible exception to this should be where a recipient is not accredited but is appointed as an "authorised representative" of an accredited entity (as described above). In that situation, it would be an appropriate starting point for the accredited entity to be liable for the conduct of their authorised representative recipients. This is consistent with the Australian Financial Services Licensing approach.

Beyond these principles, we believe that this is an area where parties should be free to allocate responsibility as they see fit through their contractual arrangements.

Our view is that both parties should play a role in ensuring that the obligations under the CDR are met.

Again, it is the view of FinTech Australia that there should be some flexibility allowed to the parties to ensure that the CDR obligations are able to be met by firms of various sizes and financial capacity. This would take the form of allowing parties to apportion liability and requirements between each other.

Transparency and consent

FinTech Australia strongly believes that consumers should be aware of what is happening with their data. The requirements set out in the proposed Rules which require consent being sought by the Principal, or a Provider on behalf of a Principal, is an approach we approve of. However,

we would suggest expanding the concept to allow a Provider to obtain consent on their own behalf and to later seek the consumer's consent to share the data with another entity.

Record Keeping

We do not have any issues with the record keeping requirements in the proposed Rules.

Information Security

For the most part, we consider that the additional information security controls are appropriate and welcome the changes made to Schedule 2.

However, we consider that the segregation of data is an area where further clarification is required.

It appears the intention of the rules is that CDR data stored on behalf of one recipient is segregated from CDR data stored on behalf of another recipient. While we are comfortable with this in principle, FinTech Australia is concerned to ensure that this does not lead to any unintended consequences (for example in relation to derived data).

Data segregation could also mean segregation of CDR data from non-CDR data. One of the key potential benefits from the CDR is the ability to derive meaningful insights for consumers about their own data. The intermingling of CDR data with other data will result in a broader view of a consumer's position and this will enable entities to provide more meaningful insights to consumers. We do not consider that the source of data (e.g. open banking APIs) should forever change the character of data and require it to be segregated and treated differently than data (which may be equally sensitive) obtained in different ways. This has the potential to create long term negative consequences, such as: significant costs around data governance because an additional data classification is needed, historical use cases (such as tax preparation, accounting, past spending comparisons, etc) are impacted because of the ability to request deletion, which may be inconsistent with these use cases. Data governance issues are not unique to CDR and should be dealt with on an economy / sector wide basis, rather than having different regimes for different data sources. Otherwise, all other methods of collection (including bilateral arrangements, manual information capture, etc) will remain less onerous than the CDR. This creates incentives against adoption of the CDR and entrenches the position of incumbents who have already put in place bilateral arrangements.

Conclusion

FinTech Australia thanks the ACCC for the opportunity to provide inputs and recommendations on the development of the draft rules and Privacy Impact Assessment. We will continue to engage on broader issues in relation to Open Banking.

About FinTech Australia

FinTech Australia is the peak industry body for the Australian fintech Industry, representing over 300 fintech Startups, Hubs, Accelerators and Venture Capital Funds across the nation.

Our vision is to make Australia one of the world's leading markets for fintech innovation and investment. This submission has been compiled by FinTech Australia and its members in an effort to drive cultural, policy and regulatory change toward realising this vision.

FinTech Australia would like to recognise the support of our Policy Partners, who provide guidance and advice to the association and its members in the development of our submissions:

- DLA Piper
- Hall & Wilcox
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- Baker McKenzie