CONSUMER DATA RIGHT

PROVISIONS FOR FURTHER CONSULTATION

SUBMISSION TO THE TREASURY

12 October 2018

Public

EXECUTIVE SUMMARY

1. ANZ thanks Treasury for the opportunity to comment on the further provisions (**Further Provisions**) of the draft *Treasury Laws Amendment (Consumer Data Right) Bill 2018* (**Bill**) and the draft designation instrument for authorised deposit-taking institutions (**Instrument**). Terms used but not defined in this submission have the meaning given to them in the Bill and the Instrument.

2. ANZ supports economy-wide open data in the form contemplated by the Productivity Commission in its 2017 *Data Availability and Use* report (**PC Report**) and the Treasury's 2018 *Review into Open Banking* report (**Open Banking Report**). In response to the Government's 9 May 2018 announcement that it would implement a consumer data right (**CDR**) with banking the initial designated sector, ANZ has commenced the preparatory work to implement data access and transfer arrangements for its customers.

Key points

3. The Further Provisions are important refinements to the Bill. This is particularly so in relation to the clarification of how privacy safeguards work and the intended treatment of derived data. As Treasury finalises its drafting on the Bill, we had the following key points on the Further Provisions and the Instrument:

    a) The definition of 'CDR consumer' may benefit from further consideration to ensure that it does not have an unintended broad operation. As currently drafted, it is still possible that persons with only tenuous connections to the activity that created the data could be a CDR consumer in relation to it. We also think the concept of 'associate' as proposed may be too far-reaching to be capable of feasible implementation.

    b) The language used in the Instrument should more closely align with the concepts used in the Bill. This is particularly so in relation to clause 6 of the Instrument which would designate information for which there are no CDR consumers.

    c) The Instrument should also precisely specify what information is to be subject to the CDR. The Instrument currently defines specified information in a very broad manner and could capture information that Treasury may not intend to be caught. It would be more certain if the precise information fields were listed in the Instrument.

d) While the clarifications concerning the interaction of the Australian Privacy Principles (**APP**s) and the privacy safeguards are helpful, it may still be preferable to adapt the APPs to the CDR framework (an option we suggested in our submission on the Bill). There remains work to do to ensure there is an effective mechanism to switch between the APPs and the privacy safeguards.

COMMENTS ON SPECIFIC CLAUSES

CLAUSE 56AC

1. We wondered whether the concept of 'designated sector' is:

    a) Sufficiently defined; and

    b) Actually needed.

2. Currently, clause 56AC states that a 'designated sector' is defined by reference to the three concepts of 'classes of information', 'persons who hold such information' and the 'earliest holding day'. There is no actual economic activity that is referred to in the definition.

3. Thus, when considering the Instrument, clause 56AC may suggest that the designated sector is ADIs that hold certain information about banking products that arose after 1 January 2017. This reading would be based on the approach that the designated sector is all three concepts taken cumulatively.

4. An alternative reading may be that the designated sector extends broadly to any entity which holds the relevant information. This would be relevant when considering whether the 'designated sector' includes entities that make advances of money (one of the banking products) even if they are not ADIs. This disjunctive reading would be supported by the Instrument which separately lists 'products' as those connected with a banking business *or* one or more of three individually listed activities (which include making advances of money). Thus, the Instrument suggests that making an advance of money alone (without taking a deposit or otherwise engaging in banking business) constitutes part of the designated sector. This suggests a disconnection from the designated persons as those persons would all engage in banking business.

5. Because of this, clause 56AC and the Instrument leave the concept of 'designated sector' open to debate. This is of some importance as the 'designated sector' is the predicating concept for the Commission's rule making power under clause 56BA.

6. However, beyond being this predication, the concept actually does little else in the Bill. Further, it is clear that the Commission's rule making power is actually intended to extend beyond those persons designated under clause 56AC: The concept of 'data holder' now extends to include accredited data recipients.

7. As such, we wondered whether Treasury could dispense with the concept of designated sector and introduce concepts of 'designated information' and

'designated persons' instead. 'Designated information' would be subject to the earliest holding day concept and could also reference other qualifying criteria such as electronic format. A concept of designated information could then usefully be employed in clauses such as clause 56AF and clause 56AG. Such a concept could also be the predicating concept for the Commission's rule making power. This concept would be a clearer basis for the power than the current concept of 'designated sector'.

CLAUSE 56AD

8. We would repeat our comments on the prior draft of the Bill in respect of clause 56AD. Because of the importance of designation, clause 56AD would best be recast as a set of outcomes that the Minister must be satisfied that designation will achieve. Thus, for example, designation should only occur when the Minister is satisfied that it will generate positive outcomes for consumers, their privacy and the economy. This is a deliberately higher bar than the Minister merely having to 'consider' the factors listed in clause 56AD.

9. We would suggest also that it would be helpful if the primary regulator for a designated sector is consulted before the designation occurs. Thus, while the Commission must consult with the primary regulator for a designated sector before making consumer data rules under clause 56BO(1)(c), it is arguable that the primary regulator's input would be equally relevant at the point of designation. This is because designation is the main mechanism by which the operation of a sector could be affected.

10. Further, Ministerial designations should be subject to some form of review mechanism. This is because designation would have a significant impact on consumers and an industry, including the competitive dynamics within it. It would be beneficial if any decision concerning CDR data were subject to review, possibly by the Australian Competition Tribunal. This would help ensure that the consumer data rules are well-adapted to specific policy objectives.

CLAUSE 56AF(3)

11. We appreciate the intent of the revised definition of 'CDR consumer' to create a tighter nexus between the person and the activity that caused the CDR data to be created. This has been done through requiring a supply to the CDR consumer or their associate.

12. However, Treasury may like to explore whether the drafting would still allow some odd consequences. For example, where a customer of Bank A uses their account to

transfer money in payment of a bill to the account of a utility provider at Bank B (and thus creates a transaction record that identifies the utility provider), it is clear that Bank A has provided a service to the customer. However, Bank B has also provided a service to the utility provider (providing the account), and it could be said that the reason the CDR data (ie the transaction record held at Bank A) *relates to* the utility provider is, in part at least, because of the provision of that service (as without that service, no transfer would have been possible).

13. If this interpretation were supported, then the utility provider would be a 'CDR consumer' in respect of the customer's transaction record as held by Bank A. We would presume that the utility company should only be a CDR consumer in respect of transaction records reflected in their own account with Bank B. This suggests that 'CDR consumer' may still have an overbroad operation.

14. Two other observations on this clause for Treasury's consideration are:

    a) We understand the policy reason behind capturing supplies to a person's 'associates'. However, because of the breadth and complexity of this concept, it may be difficult to implement. For example, it could be challenging for a data holder to understand that because of a supply to one party, another, distant party may now have a right in respect of data arising from that supply.

       The operation of 56AF(3)(b)(i) would preferably be limited to supplies that are made pursuant to a contract to which the CDR consumer is a party. If Treasury wished to capture data generated by supplies to persons connected with the putative CDR consumer, it would be able to do this via 56AF(3)(b)(ii) or the instrument designating the CDR data.

    b) The clause is currently constructed so that its primary definitional focus is 'relates'. Thus, the clause states that a CDR consumer for CDR data is a person to whom the CDR *relates* if paragraphs (a) through (d) are met. It could be more economically drafted by stating that a 'person is a CDR consumer for CDR data' if paragraphs (a) through (d) are met. The concept of 'relate' would then be relevant in paragraph (b).

CLAUSE 56AG

15. Clause 56AG(1)(b) (and clause 56AGA(b)) refers to data held by *or on behalf of* the data holder. While we understand the policy rationale of this drafting (to avoid the circumvention of obligations under the CDR by shifting data to a third party), the proposed formulation may operate too broadly. For example, it could capture data held by an arms-length commercial party that provides a service to the data

holder. That service may involve the generation of data identifying the CDR consumer. However, the data would not be directly relevant to the consumer. Further, the data holder may have limited contractual ability to access the data.

16. This issue may be avoided by the listing of the specific data fields that need to be made available to CDR consumers and/or having a clearer anti-avoidance provision that operates only to prevent data being moved outside of ADIs to defeat the consumer data right (rather than operating regardless of the intent).

CLAUSE 56ED

17. Treasury may like to consider whether privacy safeguard 1 should apply to accredited persons and not just data holders and accredited data recipients. This may be advantageous when considering the accreditation of such persons as they would need to have a policy in order to be accredited (rather than just receive the data). Consumers may also like to review the policy in advance of sending the data to the accredited person. Under the current construction of clause 56ED, the first consumer to send CDR data to an accredited person would not have the benefit of the policy (or at least the benefit of reviewing it in advance of the transmission).

CLAUSE 56EG

18. We would ask that privacy safeguard 4 allow the de-identification of data as a protective step. De-identification may be able to occur more promptly than destruction. See privacy safeguard 12 for this option. If Treasury wishes to ensure that unrequested CDR data is always destroyed, it may like to give recipients the option of de-identification as a step before destruction.

DESIGNATION INSTRUMENT

CLAUSE 6

19. We note that the construction of this clause is quite different from, and significantly broader than, the definition of CDR consumer in clause 56AF(3):

    a) Clause 6 allows that the information be about an associate, which would capture an extremely broad range of data that may have little connection to the 'person'

    b) Clause 6 does not require the product to have been supplied to the associate (the concept of supply is only used in relation to the 'person')

    c) Clause 6 does not require the information to identify or reasonably identify the person

20. Because clause 6 is broader than 'CDR consumer', it is conceivable that there could be information designated under the Instrument for which there are no CDR consumers. This is because the information could be about an associate of a person (and thus fall within clause 6) but the person would not be identifiable from the information (as required by clause 56AF(3)). The lack of a CDR consumer, however, would not stop the information being CDR data for the purposes of Part IVD. We would encourage Treasury to ensure that clause 6 is consistent with the definition of CDR consumer in clause 56AF(3).

21. It is also not clear what 'observed' means in clause 6(1)(b), particularly when it is observed *by* the person. It is difficult to understand how a data holder would know what a person had observed about their use of a product or to conceive of information that had been so observed but not *provided* to the data holder.

CLAUSE 7

22. Clause 7 evidences a similar disconnect from the definition of CDR consumer as clause 6 does. Thus, under clause 7, the associate simply has to use a product, not be supplied it. We are not sure how data holders will be able to discern if an associate of the CDR consumer merely used a product (eg a credit card holder allows their son or daughter to use the card on a temporary basis, without them becoming a formal signatory). Subject to our comments above in relation to clause 56AF(3), we would suggest that Treasury use the construct of clause 56AF(3) to craft clause 7.

23. We also note that clause 7 and clause 8 do not distinguish between products that are broadly available and those that are bespoke to a customer (as contemplated by the Farrell Report and paragraph 1.60 of the Explanatory Materials). It would be preferable if the Instrument drew this distinction as otherwise Part IVD would apply to such information (particularly the privacy safeguards) even if the Commission does not pass consumer data rules requiring the transfer of it.

CLAUSES 6, 7, 8

24. The construction of clauses 6, 7 and 8 is to state a very broad definition of specified information but then provide indicative instances of that definition. These indicative instances do not constrain the very broad operation of the general definition.

25. Thus, when considering the operation of clause 56BC(3), it is clear that the information specified would capture an extremely wide range of data. This is particularly so when considering clause 7(1) which merely requires that the

information be about the use of a product by a person or the person's associate. It is easy to see how this definition may capture 'derived' data.

26. We would strongly encourage Treasury to dispense with the general definitions in the Instrument and definitively state the categories of information to which the Instrument applies. This would avoid the ambiguities and difficulties raised by attempting to state a general definition (see our comments on clause 6 above).

PROPOSAL 2

27. As we noted in comments on the Bill, it may be a feasible option to rely on the APPs extended as appropriate for the CDR framework.

28. That said, the issue of when received CDR data may revert to being subject to the APPs is better resolved by the Further Provisions. There is a clear framework under which this could occur (ie clause 56AG(4)).

29. The principles stated at paragraph 1.44 of the Explanatory Materials for determining when received CDR data could be treated as being held as a data holder (and not as an accredited data recipient) seem appropriate. We would prefer to see these principles captured in the legislation.

30. We would also note that example 1.3 of the Explanatory Materials does not seem entirely consistent with the principles explained in paragraph 1.44. For example, whether data is used for the purposes of a bank's ordinary business would not seem contingent on whether the CDR consumer transfers their banking business to the receiving bank. Providing offers to, and assessing the suitability of, prospective customers are activities that are clearly part of a bank's ordinary business.

31. We would suggest that example 1.3 is not appropriate. It does not provide the bright-line test that industry participants will need to design their compliance frameworks. Thus, what would happen if the customer in example 1.3 was already a customer of the receiving bank (ie they already held a transaction account with the bank)? There would be no concept of 'switching' here. Or, the customer may switch part of their banking business to the receiving bank (for example, a credit card) while leaving their home loan with the sending bank. The broader principles in paragraph 1.44 are preferable to example 1.3.

PROPOSAL 4

32. The proposals for the process of designation and rule-making are helpful and should make the CDR a better policy.

33. However, we would reiterate our points on clause 56AD that the Minister should be required to be satisfied that outcomes will be achieved, rather than simply needing to consider a list of factors.

34. We would also reiterate our points on the need for the banking sector to be subject to the appropriate process as well.

PROPOSAL 5

35. We would ask that in designing the fee framework, Treasury consider how intermediaries may operate within the consumer data right. Even for sets of CDR data that Treasury may consider are not appropriate for charging by data holders, intermediaries may offer services in respect of that data that justify a fee.

36. We are not sure the vertically integrated discrimination principle, as stated in section 44ZZCA of the *Competition and Consumer Act 2010* (Cth), should apply to CDR data. The principle applies to 'terms and conditions'. The terms and conditions of access to CDR data will likely be prescribed by the CDR framework.

37. This leaves 'price' as the sole dimension. Given that internal users of the data would unlikely pay for it, it would seem that they would always be favoured on this dimension. As such, the principle may have little relevance.

ENDS