



Australian
Retailers
Association

Consumer Data Right Consultation

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ARA response to the Treasury Consultation on the *Treasury Laws Amendment (Consumer Data Right) Bill 2018*

September 2018

About the ARA:


The Australian Retailers Association (ARA) is the retail industry's peak representative body representing Australia's \$310 billion sector, which employs more than 1.2 million people. The ARA works to ensure retail success by informing, protecting, advocating, educating and saving money for its 7,500 independent and national retail members, which represent in excess of 50,000 shopfronts throughout Australia. The ARA ensures the long-term viability and position of the retail sector as a leading contributor to Australia's economy.

Members of the ARA include Australia's most trusted retailers, from the country's largest department stores and supermarkets, to specialty retail, electronics, food and convenience chains, to mum-and-dad operators.

Executive Summary:

Retail is arguably one of Australia's largest consumer-facing industries. As the largest peak body for Australia's largest private employer, the ARA has a significant interest in the ways that consumer data can be managed effectively, for the benefit of consumers, competition, and retailers.

In responding to the Exposure Draft of the *Treasury Laws Amendment (Consumer Data Right) Bill 2018* (the draft Bill), the ARA has considered key drivers of the proposed Consumer Data Right (CDR). Namely, the 2016 Productivity Commission



(PC) *Inquiry into Data Availability and Use* (the Inquiry), as well as the *Review of Open Banking in Australia* (the Review), have guided the data conversation in recent times.

The Explanatory Memorandum proposes the Australian Competition and Consumer Commission (ACCC) and Office of the Australian Information Commissioner (OAIC) as the regulatory bodies which will determine the sector-specific standards for the CDR. The ARA does not agree, and is supportive of the PC's draft recommendations, specifically that 'the private sector is likely to be best placed to determine sector-specific standards for its data sharing.'

Like all industries in Australia, the retail industry, has become increasingly reliant on data to compete in an ever more globalised and technologically-advanced environment. In reviewing the materials provided by the Treasury, the ARA has concerns that regulations originally intended for the banking, telecommunications and electricity industries, will be overly prescriptive elsewhere.


The retail industry is significantly different to the initial targets, in that data held by retailers is neither attached pecuniary or financial products and services, nor to the provision of utilities and vital services.


While the ARA supports the notion of a 'comprehensive right' for data sharing, it is of vital importance to balance these rights with the rights of businesses to protect commercial-in-confidence information and prevent unforeseen instances of competitive disadvantages.

1. Data Categories, Competition and the CDR:

Treasury should give greater consideration and weighting to the effects that the CDR may have on intellectual property (IP) created by data-holding organisations and business investment in data capability.

The ARA understands that specific categories of datasets have been excluded from the current draft Bill, including aggregated datasets. However, the explicit inclusion of value-added, or 'derived' data under (s56AF(1)(b)) and (s56AF(2)) in the draft Bill is an unwelcome and unnecessary development for retailers. We do not believe that





Treasury has considered the unintended consequences of including 'derived' data in the draft Bill.


It is important for any new regulatory imposition to strike a balance between innovation and investment against competition. The inclusion of derived data is a clear misstep which contradicts the CDR's express intention to promote competition. We submit that mandatory sharing of 'derived' data will be negative for future digital investment and business innovation. This will ultimately have detrimental flow-on effects to competition.


A significant implication of the inclusion of 'derived' data in the draft Bill exists for current or planned investment in proprietary data modelling by businesses. Under the CDR, there is a high risk for consumer data to be used by competitors to target their own customers, without the need to invest or undertake their own modelling. This places the original data-holder at a significant competitive disadvantage. Such IP has been developed through significant outlays in analysis and insight investments. While the concept of reciprocity is purportedly championed in the drafting of this Bill, the ARA and our members remain unconvinced of its capacity to protect or promote competition.

We anticipate that its inclusion and loose definition will lead to a cascading effect by capturing information derived from existing derived data. This may see the CDR capture a far greater swathe of value-added data sets held by an organisation, including commercially sensitive information and IP.

We are opposed to the inclusion of unspecified or undefined value-added or 'derived' data in the CDR. This would have a significant impact on investment in data analysis services, which would reduce the range of goods and services available to consumers and hinder innovation by Australian businesses in a globally competitive context.

The ARA accepts that consumers will benefit when financial products and essential services such as utilities are concerned. However, open access to derived data will significantly harm all other businesses who have invested and re-structured their business models to respond and adapt to data-driven competition. The impact to retailers is likely to be significant as both compliance and competition costs increase, which will be detrimental for consumers.





Increased competition and consumer switching, encouraged by data portability, may be promoted by the CDR in sectors with low price transparency, and in which consumers tend to exhibit a reluctance to exit long-term service agreements. However, the proposed benefits of the CDR for competition and innovation are inexact for other sectors characterised by transparent pricing and customers who do regularly switch or use multiple, competing providers.


- **Recommendation 1:** The ARA recommends exempting value-added, or 'derived' data from the regulations. The loose definition contained within the draft Bill will give effect to a CDR which stifles innovation, damages investment, and depresses competition through the unintended sharing of commercial information and IP attached to this data.


2. Privacy and Data Protection:

The implications of the proposed approach to the CDR, along with the inclusion of derived data also extends to data receivers.

The ARA is concerned that the CDR may enable data receivers to accrue significant holdings of disparate data and information collected on behalf of consumers. This increases the likelihood of data breaches, identity theft and fraud instances as such companies multiply. Under the current regime, companies which hold consumer data understand its inherent value, and are incentivised to protect it. Increasing access and portability of data will negatively influence the degree to which companies will be incentivised to protect consumer data, which has significant risks.

We are also concerned that the 'privacy safeguards' included in the information provided by Treasury duplicate the majority of the *Australian Privacy Principles* which operate under the *Privacy Act 1988*, albeit with stricter requirements including:

- A requirement for a CDR data collection, disclosure and use;
 - Integrity, security and correction requirements;
 - Extra requirements encompassing business data protection as well as individual data protection.
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The ARA and our retail members believe that this proposed approach extends beyond the recommendations of the Inquiry and the Review, and risks creating additional red tape and conflicting compliance regimes.

- **Recommendation 2:** The ARA recommends prioritising additional and broad consultation to develop stronger privacy and data security safeguards which are crucial for public (and business) trust and protection.


3. Extension and Application:


When viewed from an economy-wide perspective, the ARA is concerned that the draft Bill is lacking in significant detail with respect to many of the regulatory and operative provisions under the CDR. On the basis of the information provided by the Treasury, the ARA understands that the vast bulk of this detail, including consent requirements, accreditation, and security will be specified on a sector-by-sector basis by the ACCC.

Given the motivations behind the CDR lie in the Inquiry, and the Review, the ARA is not convinced at the suitability of this Bill to extend economy-wide regulation from laws intended for the banking sector. The ARA does not support the proposition in the draft Bill which would allow the application of the CDR to other sectors merely on the ad-hoc advice of the ACCC.

This is especially concerning given the proposition in the draft Bill to allow the relevant Minister to make CDR regulations for other industries under the edict of the ACCC. This provides little-to-no opportunity for review or accountability to Parliament. The ARA does not support granting the ACCC unjustified market intervention powers such as those to which this draft Bill would give effect.

Its extension to other industries should not be determined only by the principles related to open banking principles. This point extends to industries such as retail and its associated loyalty schemes, which do not provide pecuniary or financial products and services to their customers. The sensitivity and material value of consumer data is lessened as a result, and as such, retrofitting banking regulations to other industries is unadvisable.





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- **Recommendation 3:** The ARA recommends the exemption of retail loyalty schemes from the CDR, as the sensitivity and material value of the related consumer data is low. Consequently, the negatives for retail businesses, in the form of significant cost and compliance burdens, will be significantly greater than the consumer benefit.
 - **Recommendation 4:** The ARA recommends prioritising further consultation with industry to develop a CDR approach which incorporates views from all industries. An economy-wide CDR which has its roots in the banking industry, and from which its guiding principles stem, will have a negative and direct effect on competition and innovation across the broader economy.

Recommendations and Conclusion:

While broadly supportive of the concept of a CDR as outlined by the Productivity Commission, the ARA does not support the draft Bill in its current form. The ARA has significant concerns about the framework which the Bill provides for regulators such as the ACCC and OAIC to extend the CDR to other industries.

Significant concerns also exist regarding the explicit inclusion of ‘derived’ data in the draft Bill, as well as privacy, application, and operative concerns. The ARA has outlined recommendations in this submission, which will assist with alleviating the retail industry’s concerns, including:

- **Recommendation 1:** The ARA recommends exempting value-added, or ‘derived’ data from the regulations. The loose definition contained within the draft Bill will give effect to a CDR which stifles innovation, damages investment, and depresses competition through the unintended sharing of commercial information and intellectual property attached to this data.
 - **Recommendation 2:** The ARA recommends prioritising additional and broad consultation to develop stronger privacy and data security safeguards which are crucial for public (and business) trust and protection.
 - **Recommendation 3:** The ARA recommends the exemption of retail loyalty schemes from the CDR, as the sensitivity and material value of the related consumer data is low. Consequently, the negatives for retail businesses, in the form of significant cost and compliance burdens, will be significantly greater than the consumer benefit.
 - **Recommendation 4:** The ARA recommends prioritising further consultation with industry to develop a CDR approach which incorporates views from all industries. An economy-wide CDR which has its roots in the banking industry, and from which its
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guiding principles stem, will have a negative and direct effect on competition and innovation across the broader economy.

- **Recommendation 5:** The ARA recommends incorporating into further consultations a review of the CDR's interaction with any extra-jurisdictional reach of the General Data Protection Regulation from the EU, for any Australian businesses which have global reach.

The ARA is grateful to the Treasury for the opportunity to be involved in this consultation and we would be pleased to discuss this submission further, at your convenience.

Please contact ARA Director of Policy, Government and Corporate Relations, Heath Michael at heath.michael@retail.org.au for further comment.

Kind regards,



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