



7 SEPTEMBER 2018

CONSUMER DATA RIGHT CONSULTATION

Submission to the Treasury on the Treasury Laws Amendment (Consumer Data Right) Bill 2018

ABOUT US

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

To find out more about CHOICE's campaign work visit www.choice.com.au/campaigns and to support our campaigns, sign up at www.choice.com.au/campaignsupporter

57 Carrington Road Marrickville NSW 2204

Phone 02 9577 3333 | Fax 02 9577 3377 | Email campaigns@choice.com.au | www.choice.com.au

The Australian Consumers' Association is a not-for-profit company limited by guarantee. ABN 72 000 281 925 ACN 000 281 925

CONTENTS

Summary of recommendations	2
Ensuring easy access for consumers to their data	3
Third party data use	6
Expanding the definition of consumer data	7
Empowering consumers within the CDR system	9
Evaluating the effectiveness of the CDR	11

INTRODUCTION

CHOICE appreciates the opportunity to provide the following comments to the Treasury on the *Treasury Laws Amendment (Consumer Data Right) Bill 2018* (the Bill).

CHOICE is strongly supportive of the spirit and the intention of the Consumer Data Right (CDR). The CDR was conceived to empower consumers through improved access to their data, and to facilitate consumer mobility between products and services. Providing consumers with relevant and accessible information about the products they consume and services they use should lead to both better individual consumer experiences and more competition in markets. Providing consumers with access to their own data in a convenient format should improve their ability to drive competition on the demand side by rewarding those businesses that best meet their needs or preferences, and consequently encourage the development of new products and services. In order to succeed however, the CDR must be consumer-focused, efficient, and fair.

A new system that involves consumers providing more data to third-parties must prioritise protections so that data is used to deliver positive consumer outcomes rather than used to charge people more or target them with poor-value products. A clear disclosure regime that lets people know how their data is used is important, but not enough. Telling individuals how data is used will not stop unscrupulous practices. The system should prevent poor practices before they emerge. Companies must be required to think about consumer protections and the best interests of consumers when they use consumer data. Otherwise, there is a risk that the implementation of the CDR will be used by companies to exploit consumers, rather than foster competition and lead to better products and services for consumers.

CHOICE is broadly supportive of the Bill, but offers some comments and recommendations to ensure that the implementation of the CDR improves consumer access to data while simultaneously protecting consumers from harm.

Recommendations

- The Treasury should implement a set of guiding consumer-centric principles to guide the nomination and delivery of CDR data sets in each sector.
- The ACCC must clearly establish which data sets must be freely accessed by all consumers to ensure that the CDR system is equitable. Given the evolving nature of data use, these data sets should be reviewed every three years, at a minimum.
- CHOICE's first preference is that consumers are not charged to access data that companies hold about them. If a fee is charged, the ACCC must ensure that any fee for

consumer data access requests must be capped at a minimal price to ensure that consumers are not left out of the CDR system.

- Treasury should require that a tiered accreditation system is consistent across sectors, and is simple and accessible for consumers.
- Treasury should amend the Bill so that the only non-accredited parties who are allowed to use and store CDR data are professionals who have a legal obligation to act in the best interests of a client, for example accountants or advisers.
- Treasury should amend the Bill to ensure that data relating to a product or service within the CDR cannot be used to the detriment of consumers.
- The ACCC should ensure that the consumer data rules restrict the use of derived data to guarantee a high level of protections for consumers.
- Treasury should amend the Bill or recommend other legislation to require that consumers must provide express consent to share their data with accredited third parties.
- The ACCC must ensure that extensive consumer comprehension testing is used to determine how accredited third parties should gain consumers' express consent.
- Treasury should ensure that consumer and business education is a core part of the rollout of the CDR.
- Treasury should amend the Bill or recommend other legislation that mandates the establishment of internal dispute resolution processes that meet the Australian Standard for complaint handling and appropriately independent and robust external dispute resolution (EDR) for CDR participants in every sector. This may involve expanding the scope of existing EDR schemes or creating new schemes as required.
- Treasury should amend the Bill to require a statutory three year review of the legislation and the overall effectiveness of consumer protections related to the reform.

Ensuring easy access for consumers to their data

The CDR must achieve its goal of ensuring that consumers have a 'right to efficiently and conveniently access specified data.'¹

In order for the CDR to deliver meaningful consumer outcomes, the types of data that data holders are required to provide should contribute to the broader goal of the CDR: 'to give customers more control over their information leading, for example to more choice in where they take their business, or more convenience in managing their money and services.'² While this broader goal is sound, there need to be clearer, consumer-centric guiding principles enshrined in legislation, which will guide the ACCC's decisions concerning the merits of facilitating access

¹ *Treasury Laws Amendment (Consumer Data Right) Bill 2018*, [Explanatory Materials](#), pg.3

² *Ibid.* pg.3

to certain data sets. The method of transmission and the ways in which data sets can be accessed is also vital to ensuring that the CDR delivers value for consumers and the competitive process. Simply making data available will not result in better-informed consumers and more competitive markets – it is necessary that the data is also accessible and useable. The importance of the end user experience cannot be understated; ‘one click’ processes for downloading and uploading data will aid in increasing usability for consumers.

Treasury should develop a set of guiding principles for determining relevant data sets and how they will be delivered to consumers. CHOICE believes that these principles should also ensure that the long-term interests of consumers will guide decisions about what data is made available. In the energy sector, the provision of tariff product information has the potential to help consumers compare energy data, and make better and more informed choices about energy products and services. HoustonKemp was engaged by the Council of Australian Governments (COAG) to develop a series of recommendations for how the CDR should function in the energy sector, and concluded in their report *Facilitating access to consumer energy data* that tariff product and pricing information would be too costly to provide.³ Tariff data is currently collected,⁴ but may not be made available to consumers if this recommendation is adopted. CHOICE strongly disagrees with this approach. Any short-term cost to business in reworking systems to provide this information must be balanced against the long-term gains that would be delivered to consumers. At a minimum, consumers should be able to expect that they can receive information about the price they are paying for a service.

Decisions that determine which data is provided to consumers must be made with a clear vision in mind, and one that is consistent across the CDR system. These decisions cannot be ad-hoc, and should be driven by a set of principles that ensure that the design of the CDR across each sector is consistent. These principles should provide guidance on the types of data that data holders will be obliged to provide, and address overarching concerns to ensure that business act in the long-term best interests of consumers. At a minimum, consumers should be able to request and use customer-provided data that is kept in digital form, including historical data, for the period that data holders are required to keep it. Consumers must also be able to request and use usage data, including transaction data, which is generated as a result of a customer’s usage of a product or service. It is also vital for consumers to be able to access detailed product data, including information on price, fees, rates and charges. Decisions in the future should be conducted under a framework that puts consumers’ interests first. These principles should be reviewed after three years to ensure that they remain relevant in a rapidly changing data landscape.

³ Houston Kemp (2018), [Facilitating Access to Consumer Energy Data](#), Commissioned by COAG Energy Council, Canberra. p.20

⁴ Ibid. pg.17

The *Exposure Draft Explanatory Materials* suggest that ‘the consumer data rules may also establish that a fee is payable in relation to the disclosure of certain class or classes of information.’⁵ While this fee is yet to be determined by the ACCC, CHOICE is concerned that the introduction of a fee will undermine the goal of the CDR - to empower consumers to access their data. It is vital that as a first step, the ACCC makes clear which data sets must always be free for consumers to access, in order to prevent businesses from exploiting consumers who are seeking to exercise their powers in the CDR system. At a minimum, these free data sets should include data that relates specifically to a consumer’s individual use of a product or data that is integral to the use of a product. For example in the banking sector, this would mean data holders could not charge customer for access to their transaction data. In the energy sector we would expect that consumers would be able to get free information about tariffs. Secondly, data holders should not be allowed to charge for data that would be necessary for a consumer to dispute a bill or raise a complaint with their service provider.

If fees are to be introduced for access to certain data sets under the CDR, it is important that the ACCC establishes a clear cap (per service) for these fees within the consumer data rules. Additionally, the ACCC should consider enabling consumers to gain access to non-essential data sets for free at least once a year, to ensure that consumers who are unable to pay for value-added data are not at a disadvantage. The regulator may wish to allow businesses to charge a fee only once consumers have exceeded the number of times that they are able to access data for free. It is important for the ACCC to consider how consumers suffering financial hardship will access their data, and suggests that businesses be required to waive data access fees for those who cannot afford to pay them.

Recommendations 1, 2 and 3

- The Treasury should implement a set of guiding consumer-centric principles to guide the nomination and delivery of CDR data sets in each sector.
- The ACCC must clearly establish which data sets must be freely accessed by all consumers to ensure that the CDR system is equitable. Given the evolving nature of data use, these data sets should be reviewed every three years, at a minimum.
- CHOICE’s first preference is that consumers are not charged to access data that companies hold about them. If a fee is charged, the ACCC must ensure that any fee for consumer data access requests must be capped at a minimal price to ensure that consumers are not left out of the CDR system.

⁵ *Treasury Laws Amendment (Consumer Data Right) Bill 2018*, [Explanatory Materials](#), p.21

Third party data use

The Bill outlines three key types of participants in the CDR system: data holders, accredited data recipients, and CDR consumers. CHOICE supports the nomination of the ACCC as the Data Recipient Accreditor, which will require the regulator to undertake a rigorous process to establish third parties' suitability to become an accredited data recipient.

The *Exposure Draft Explanatory Materials*' section 1.47 states that 'in certain circumstances, CDR consumers can direct that their CDR data be provided to a non-accredited entity.'⁶ The example given refers to a CDR consumer transferring their data to their accountant, a non-accredited party. Australian accountants have strict professional and legal obligations to act in the interests of their customers, therefore despite an accountant's status as a non-accredited party they would be obliged to protect consumers' CDR data with rigour and respect, as stipulated within the *APES 110 Code of Ethics for Professional Accountants* and as required under the *Corporations Act 2001*.⁷ Should an accountant misuse customer data, whether obtained through the CDR or otherwise, they should be at risk of being penalised. This example shows a relatively low-risk situation where a consumer's data is less likely to be misused by a non-accredited party.

There needs to be consideration given to other, higher-risk scenarios. For example, if a consumer were to provide their CDR data to a non-accredited real estate agency, it may be able to utilise this data to discriminate against the customer to refuse a rental application. Another example would be a consumer providing CDR data to a non-accredited marketing agency that may use the data to better market harmful products such as payday loans. There is a risk that CDR data sets may be combined with purchased data sets from commercial marketing agencies, increasing information asymmetry and predatory marketing, which needs to be addressed. CHOICE recommends that CDR data should only be able to be requested, used and stored with express consumer consent and by non-accredited professionals in circumstances where those professionals have an obligation to act in the best interests of a client and would face legal penalties in instances where they breached this requirement. Non-accredited entities should only be able to request and use CDR data if they are providing a service to a consumer in a formal capacity whether the relationship is commercial such as with an accounting firm, or free of charge, such as through a financial counselling service.

⁶ Ibid., p.12

⁷Accounting Professional and Ethical Standards Board (2010), [APES 110 Code of Ethics for Professional Accountants](#).

The ‘certain circumstances’ to which Section 1.47 refers to are unclear and not defined in the Bill, and it is necessary to clarify what these circumstances may look like. The ability to transfer data outside of the CDR system to a non-accredited party poses risks to consumers, and these risks need to be mitigated through appropriate protections in the Bill.

For those parties that are accredited, the *Exposure Draft Explanatory Materials* suggest in Section 1.72 that there will be a ‘differentiation for accreditations with regard to different levels of risk.’⁸ A tiered accreditation system is designed to segment accreditation processes according to varying levels of risk, and would require certain types of accredited entities to meet higher standards than others. There is a risk that a tiered system of accreditation may be hard to navigate for consumers, who will have to bear the burden of differentiating between various tiers of accreditation to understand which types of data certain providers can access. Further, consumers will be faced with the challenge of understanding different tiers of accreditation that vary between sectors unless efforts are made to ensure these are consistent. It is important to simplify the accreditation process as much as possible to ensure that the CDR system is easily accessible for consumers, while still ensuring a high level of protection.

Recommendations 4 and 5

- Treasury should require that a tiered accreditation system is consistent across sectors, and is simple and accessible for consumers.
- Treasury should amend the Bill so that the only non-accredited parties who are allowed to use and store CDR data are professionals who have a legal obligation to act in the best interests of a client, for example accountants or advisers.

Expanding the definition of consumer data

The CDR must have a clear, functional definition of consumer data that is easily understood by all participants in the CDR. This definition will be important in establishing which data sets should be collected and shared by data holders, and lay the groundwork for accredited third parties gaining express consent from consumers to use or receive this data. In order to achieve this the Bill has expanded upon the definition of consumer data.

The *Privacy Act 1988* (Privacy Act) considers consumer data to be data that is ‘about’ the consumer. The CDR regime aims to expand upon this, defining consumer data in the *Exposure Draft Explanatory Materials* as that which ‘relates to a consumer.’⁹ CHOICE strongly supports this broader definition, as it will expand consumer data protections, capturing new data types

⁸ *Treasury Laws Amendment (Consumer Data Right) Bill 2018*, [Explanatory Materials](#), p.17

⁹ *Treasury Laws Amendment (Consumer Data Right) Bill 2018*, [Explanatory Materials](#), p.13

such as consumer metadata that relates to, but is not explicitly about a consumer. This will go further to ensure that data is not misused by individuals and businesses. CHOICE recommends that this definition is clearly incorporated into CDR legislation.

Treasury must clarify whether value-added data which is created by a data holder through the application of insight or analysis¹⁰ and aggregated data generated from multiple data sets, will be treated as data that 'relates to' a consumer. This is extremely important as aggregated data sets such as smart meter data collected from someone's home in regular intervals could be used to infer certain behaviours such as when and how often they use their washer and dryer, which hours they work, when they take a shower, and when they watch television. These inferences can in turn permit intimate deductions about a person's lifestyle including their occupation, religion, health and financial circumstances.¹¹

The Bill will establish three categories of CDR data - data that relates to a CDR consumer, including data that relates to a person's transactions, CDR data that relates to a product, and CDR data that is derived from these primary' sources. The *Exposure Draft Explanatory Materials* explain that 'where information is primarily about a good or a service, but may reveal information about a consumer's use of that good or service, it relates to the consumer.'¹² This does not specify what 'a consumers' use' means in this context, and this needs to be clarified in the legislation.

CHOICE is particularly concerned that product or service information may be used to identify consumers or cohorts. For example, a consumer may be matched with a particular energy product that they access through a hardship program. When a consumer accesses a product or service, the resulting data will reveal which product is accessed and how it is accessed. The latter may include data relating to transactions which clearly falls within the definition of data that 'relates to' a customer in the CDR. It is unclear whether data about a consumer's' access to a product or service is considered 'information about a consumer's use of that good or a service', and needs to be clarified in legislation. This will ensure that consumers are not at risk of being identified through seemingly general product information that may reveal information about their personal circumstances. These insights could be used by businesses to identify and discriminate against individuals or cohorts of consumers, For example if a person on a low income with a history of late payments could be identified through product data, they could be presented with a more costly energy deal that incorporates a discount for paying on time (that

¹⁰ Treasury (2017), *Review into open banking: giving customers choice, convenience, confidence*, Canberra, pg.37

¹¹ Privacy International (2018), "Privacy win! US court says Fourth Amendment protects smart meter data", *Privacy International*", blog, 24 August, accessed 05 September 2018 <https://privacyinternational.org/blog/2234/privacy-win-us-court-says-fourth-amendment-protects-smart-meter-data>

¹² *Treasury Laws Amendment (Consumer Data Right) Bill 2018*, [Explanatory Materials](#), p.13

the energy company knows from the data will be unlikely to be utilised by this particular customer). There needs to be clear protections in the CDR legislation to ensure that data relating to a product or service within the CDR cannot be used to harm consumers.

In order for the CDR regime to provide appropriate consumer protections there need to be clear restrictions on the use of certain types of derived data. Data that has been anonymised can be re-identified by overlaying external datasets. Without appropriate protections, this process poses a risk to consumers who may be reidentified and discriminated against by businesses. The European Union’s General Data Protection Regulation (GDPR) defines the concept of “anonymous data” as data that is impossible to reidentify.¹³ By contrast, “pseudonymised data” is defined as “the processing of personal data in such a way that the data can no longer be attributed to a specific data subject without the use of additional information.”¹⁴ The GDPR will permit data recipients to use pseudonymised and anonymised data for purposes beyond which it was collected, so long as it is not reasonably likely that this data could be used to re-identify a person. Consumer data rules made by the ACCC should provide clarity around the use of derived data, and ensure that appropriate restrictions are placed on its use.

Recommendations 6 and 7

- Treasury should amend the Bill to ensure that data relating to a product or service within the CDR cannot be used to the detriment of consumers.
- The ACCC should ensure that the consumer data rules restrict the use of derived data to guarantee a high level of protections for consumers.

Empowering consumers within the CDR system

The Consumer Data Right must enable consumers to understand their right to access data, identify an accredited third party, and successfully gain access to their data. Consumers must be able to provide express consent about the types of data they then provide to third parties, and must understand the limitations of how this data can be used. The *Exposure Draft Explanatory Materials* suggest ‘it is expected that if consent is required for the disclosure of a type of CDR data, that consent will be express.’¹⁵

CHOICE believes that express consent is necessary for the disclosure of CDR data and recommends that the requirement that third parties obtain express consent be set out in the Bill. At a minimum, accredited third parties must be required to provide a clear indication of how

¹³ *General Data Protection Regulation*, European Parliament, Recital 26.

¹⁴ *Ibid.*

¹⁵ *Treasury Laws Amendment (Consumer Data Right) Bill 2018*, [Explanatory Materials](#), p.13

consumers' data will be used, how long it will be retained, and the limitations concerning the sharing or on-selling of data. Treasury must also consider how non-accredited third parties could obtain express consent when accessing CDR data.

Extensive consumer comprehension testing should be used to determine how third parties should gain consumers' express consent. Article 4 of the European Union's GDPR defines consent as 'any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.'¹⁶ CHOICE believes that the ACCC should define consent similarly. Effective conditions for consent are thoroughly detailed in Article 7 of the EU's GDPR. These should be drawn upon when designing standards of consent within the CDR.¹⁷

The CDR introduces a new system for consumers to navigate, and it will take time and resources to educate consumers about their rights within this new system. The *Exposure Draft Explanatory Materials* suggest that 'the Information Commissioner may also conduct educational programs in order to assist participants in the CDR to understand their rights and responsibilities under the CDR regime.'¹⁸ CHOICE is concerned that education for consumers and businesses participating in the CDR is merely a possibility, rather than a core part of the CDR. It is crucial that consumer education programs are appropriately funded, designed, implemented and evaluated in order to ensure that consumers are able to reap the benefits of the CDR. Special attention should be paid to educating consumers about accredited parties under the CDR, as well as dispute resolution mechanisms that are available to them. It is also vital that data holders and accredited parties receive appropriate education in order to understand their new responsibilities within the CDR regime. Businesses should be encouraged to proactively let consumers know about their new rights as they relate to the products and services that they're providing them with, and be given access to appropriate tools to assist them with the process.

CHOICE notes that the *Exposure Draft Explanatory Materials* state that 'the consumer data rules may require CDR participants to have internal or external dispute resolution processes that either relate to the consumer data rules or meet criteria which are outlined in the consumer data rules.'¹⁹ It is crucial that the establishment of internal and external dispute resolution processes is not left to chance. CDR rules must require CDR participants to provide access to effective dispute resolution processes so that consumers have appropriate safeguards in place.

¹⁶ *General Data Protection Regulation*, European Parliament, Article 4.

¹⁷ *General Data Protection Regulation*, European Parliament, Article 7.

¹⁸ *Treasury Laws Amendment (Consumer Data Right) Bill 2018*, [Explanatory Materials](#), p.43.

¹⁹ *Ibid.* pg.23

Recommendations 8, 9, 10 and 11

- Treasury should amend the Bill or recommend other legislation to require that consumers must provide express consent to share their data with accredited third parties.
- The ACCC must ensure that extensive consumer comprehension testing is used to determine how accredited third parties should gain consumers' express consent.
- Treasury should ensure that consumer and business education is a core part of the rollout of the CDR.
- Treasury should amend the Bill or recommend other legislation that mandates the establishment of internal dispute resolution processes that meet the Australian Standard for complaint handling and appropriately independent and robust external dispute resolution (EDR) for CDR participants in every sector. This may involve expanding the scope of existing EDR schemes or creating new schemes as required.

Evaluating the effectiveness of the CDR

We cannot predict with certainty the full extent of the benefits or the potential for problems that may arise after the implementation of the CDR across sectors, but we anticipate that consumer protections may need to evolve following its implementation. To facilitate this, CHOICE proposes that Treasury include a statutory three-year review of consumer protections relating to the Consumer Data Right in the Bill.

Recommendation 12

- Treasury should amend the Bill to require a statutory three year review of the legislation and the overall effectiveness of consumer protections related to the reform.