

The logo for Optus, consisting of the word "OPTUS" in a bold, teal, sans-serif font.

Submission in response to
Department of Treasury

**Consumer Data Right
Exposure Draft
Legislation**

Public Version

September 2018

EXECUTIVE SUMMARY

1. Optus welcomes the exposure draft legislation and explanatory material for the Consumer Data Right (CDR) enabling legislation (draft CDR Bill). The communications sector is to be the third industry to have a CDR developed, and as such, Optus has a strong interest in ensuring the enabling legislation best supports the recommendations of the Productivity Commission (PC) Inquiry into Data Availability and Use (the Inquiry), and the Government's Response to the Inquiry.
2. Optus acknowledges that the detail of the CDR will be consulted and decided upon through the industry-specific rules determined by the Australian Competition and Consumer Commission (ACCC). This enabling legislation sets out the process through which this is to occur.
3. Notwithstanding this, Optus submits the draft CDR Bill should take into account existing industry processes when assessing the need for data rules and when deciding upon the form of any rules. In the communications industry, there is a high level of customer switching, and well-established industry processes to facilitate porting of customer details across the retail market. The draft CDR Bill should make clear that industry rules only be imposed where there are no existing industry switching processes; or where there are existing processes, that the incremental benefit of the new rules outweigh the additional costs to industry and consumers.
4. In addition, there are aspects of the draft CDR Bill which are materially inconsistent with the Inquiry and the Government's Response, and which are directly counter to the conclusion and recommendations of the Inquiry.
5. Specifically, Optus does not support the following aspects of the draft CDR Bill:
 - (a) Extending data right beyond consumer and SMEs to large business; and
 - (b) Inclusion of imputed and derived value-added data into the CDR regime.
6. In both cases the Inquiry warned against such approaches. The Inquiry outcomes cannot be used to support the draft CDR Bill to include large businesses and derived value-added data into the CDR regime.
7. Importantly, there has been no justification put forward for the proposed extension in the draft CDR Bill. This is particularly concerning since the PC specifically recommended against extending the CDR to large businesses; and against including imputed and derived value-added data.
8. As currently drafted, Optus is concerned that the costs of the CDR will greatly exceed the proposed consumer benefit; and that the CDR would likely have a chilling effect on investment and innovation in the data analytics industry. Optus is particularly concerned that the inclusion of derived and value-added data into the CDR would undermine the intellectual property of data creators, thereby removing incentives to undertake data analytics.
9. Optus submits that the draft CDR Bill be amended to better reflect the recommendations of the Inquiry and the Government's response.

LIMITED BENEFIT OF CDR TO THE COMMUNICATIONS INDUSTRY

10. The policy aim behind the CDR is to promote competition and make it easier for consumers to switch between retail providers. The problem being address was limited access by consumers to key data, much of which is required to enable an efficient and effective comparison of retail products:

*Giving consumers better access to this data, and the ability to direct data be transferred to data recipients, would make it **easier for them to find a better deal** ... This in turn would **drive greater competition** between businesses to attract new customers.¹ [emphasis added]*
11. It is important that this key objective is not lost in the setting up of the CDR regime.
12. The Government has stated that the implementation of the CDR will begin in the banking, energy and communications sectors. The Government will work with each individual sector to determine the type of data consumers require to achieve choice and competition benefits.²
13. Optus understands there are issues around switching in the context of the banking and energy sectors. However, the communications sector is different with high levels of retail competition and the presence of long-term data portability regimes. We observe that many of the initiatives in Open Banking already exist in the communications industry and have done so for many years.
14. It is not clear what additional rights and benefits the draft CDR Bill would bring to communications consumers that they do not already have today – especially in relation to access to their personal information, the ability to correct and obtain data, or the ability to switch between providers. There are existing industry processes that allow communications consumers to gain access to digital copies of their usage information, and to easily transfer services between providers thanks to industry codes such as Local Number Portability and Mobile Number Portability.
15. It is not clear that the draft CDR Bill requires the Minister and the ACCC to pay sufficient regard to existing arrangements prior to designating an industry or to making data rules. Of most importance, the decision to impose regulated data rules should only be done after an assessment that existing industry processes do not achieve the objectives of the CDR regime; and where it can be demonstrated existing rules do not provide for customer switching and competition and cannot be amended to do so.
16. Optus acknowledges the intent of the draft CDR Bill is to grant the ACCC broad powers in making and designing the CDR rules. We accept that such flexibility is important in the legislation so that the rules “*can be tailored to vastly different sectors*”.³ The Explanatory Materials note that the regulatory burden of the CDR will be managed via this process.⁴
17. However, the factors to be considered by the Minister and the ACCC, as outlined in s.56AD(1), could be enhanced to explicitly consider existing industry processes. Optus recommends that a further part be added to s.56AD(1) that requires consideration of existing industry processes that relate to competition, privacy, and switching. New data rules should only be permitted where it can be demonstrated that they provide benefits

¹ Australian Government’s response to the PC Data Availability and Use Inquiry, p.1

² Ibid.

³ Exposure Draft Explanatory Materials, p.19

⁴ Ibid.

greater than existing industry processes, sufficient to outweigh the additional costs imposed on consumers and industry; and that existing rules cannot be amended to address any short-comings.

THERE IS NO JUSTIFICATION TO EXTEND THE CDR TO LARGE ENTERPRISES

18. The draft CDR Bill proposes to apply the CDR to consumers, small and medium enterprises (SMEs), and large enterprises. The explanatory materials clearly state that the intention of the legislation is to apply the CDR regime to individuals, SMEs, and large businesses, it states:

*The CDR consumer is broader than the CC Act definition of a consumer. This is because the CDR system will apply to business consumers. The CDR consumer is a person, including a small, medium or large business enterprise.*⁵

19. The explanatory materials contain no further explanation or discussion on this issue. It could be implied by this lack of explanation that the wide definition of consumer was consistent with the Inquiry and the Government's Response.
20. However, upon review of these documents, it is clear that the Inquiry recommended, and the Government accepted, a definition of consumer that did not extend to large enterprises. In fact, the Inquiry specifically recommended against such a proposal.
21. The Inquiry recommended that the CDR extend to consumers and small business only:

*The Commission is recommending that Australia's consumers — both individuals and small and medium sized businesses (SMEs) — be afforded a new Comprehensive Right to the use of their digital data.*⁶

22. The Inquiry specifically recommended in Recommendation 5.2 that a consumer "for the purposes of consumer data should include a natural person and an ABN holder with a turnover of less than \$3m pa in the most recent financial year".⁷
23. The PC made this decision after careful and detailed consideration. Indeed, the Inquiry made it very clear that such a limit was intentional:

*The scope of businesses able to exercise rights as consumers under the Comprehensive Right would be considerably narrower than the scope of 'consumers' under Australian consumer law. **This is intentional.***⁸
[emphasis added]

24. The Inquiry made clear that the CDR was not the vehicle through which large business would improve access to data. More importantly, the Inquiry did not see "significant additional benefits in improved competition or innovation with data from allowing large businesses a Comprehensive Right to data."⁹
25. The Inquiry's Recommendation 5.2 was accepted by the Government in its response. The Government's Response stated it accepted Recommendation 5.2 and it would

⁵ Exposure Draft Explanatory Materials, p.13.

⁶ PC, 2018, Data Availability and Use, Final Report, p.15

⁷ PC, 2018, Data Availability and Use, Final Report, Recommendation 5.2

⁸ Ibid., p.198

⁹ Ibid., p.198

introduce a CDR to allow “*consumers to access particular data*”.¹⁰ There was no statement that the Government would extend the consumer right beyond that recommended by the Inquiry.

26. Optus observes that the Inquiry’s intent, and the Government’s acceptance of the recommendation, is clear. Namely, that the CDR regime should apply only to consumers and SMEs with an annual turnover of less than \$3 million. It is unclear why the draft CDR Bill proposed an approach that was not supported by the Inquiry and not endorsed by the Government in its response.
27. Optus does not support the inclusion of large business. We are particularly concerned that no analysis has been conducted justifying the inclusion of large business.
28. Optus recommends that the definition of *CDR Consumer* under s.56AF(4) be amended to give effect to the Inquiry recommendation and the Government’s response. Namely, that a CDR consumer is a “*single person, family groups or other groups resident at a single address in the data holder’s dataset, and any entity with an Australian Business Number (ABN) and turnover of \$3 million per annum or less.*”¹¹

INCLUSION OF IMPUTED AND DERIVED DATA

29. The draft CDR Bill proposes to enable wide discretion to define the actual type of data included within CDR data to the industry-specific instruments. On the face of it, this approach seems reasonable as the type of data to be included would likely vary significantly across the different industries.
30. However, the draft CDR Bill also proposes to extend CDR data to data that is *directly or indirectly derived* from other CDR data; and also, to include data that is *associated with* CDR data.¹²
31. The explanatory materials make clear the intention to include all data that are derived from CDR data, and includes “*value-added data which is derived from CDR data*”.¹³ Primary CDR data is explained to include data that:
 - (a) Relates to a CDR consumer;
 - (b) Provided by a CDR consumer;
 - (c) Relates to a consumer’s transactions; and
 - (d) Relates to a consumer’s products.¹⁴
32. Optus does not agree with such a wide definition of CDR data. The proposed wide definition is inconsistent with the Inquiry recommendation; and in parts directly contradicts the recommendation and views of the Inquiry.
33. The Inquiry made specific recommendations as to the type of data to be included within the CDR regime. Recommendation 5.2 of the Inquiry stated:

¹⁰ Australian Government’s response to the PC Data Availability and Use Inquiry, p.3.

¹¹ PC, 2018, Data Availability and Use, Final Report, p.198

¹² Subsections 56AF(2) and (3)

¹³ Exposure Draft Explanatory Materials, p.13.

¹⁴ Ibid.

In the relevant service or product context, consumer data is digital data, provided in machine-readable format, that is:

- *held by a product or service provider, and*
- *identified with a consumer, and*
- *associated with a product or service provided to that consumer.*¹⁵

34. The proposed draft CDR Bill goes well beyond that recommended by the Inquiry. Further, Optus observes that the draft CDR Bill appears to be directly counter to the Inquiry which made specific comments about the types of data that should not be included.

35. Of most concern to Optus is the proposed inclusion of value-added, derived and imputed data. This is counter to the views of the Inquiry which specifically recommended against inclusion of such data.

*Data that is only imputed by a data holder to be about a consumer — that is, data that has been created by a data holder through the application of insights or analysis such that it cannot reasonably be considered the consumer's data.*¹⁶

36. Recommendation 5.2, which was accepted by Government, and which the draft CDR Bill is purported to give effect to, specifically states that:

*Data that is solely imputed by a data holder to be about a consumer may only be included with industry-negotiated agreement. Data that is collected for security purposes or is subject to intellectual property rights would be excluded from consumer data.*¹⁷

37. And continued to state:

*Data that is not able to be re-identified to a consumer in the normal course of business within a data holder should not be considered consumer data.*¹⁸

38. The Inquiry was concerned about the chilling effect on investment and innovation of allowing imputed, derived and value-added within the CDR regime. The Inquiry highlighted that such data is likely to be proprietary information of the data holder entity, and that any other party seeking access to such derived data should invest themselves to acquire the information.¹⁹ Optus strongly agrees with this statement.

39. The proposal to allow derived and value-added data, that is created by the CDR data holder, to be shared without compensation is counter to accepted principles of intellectual property. Under intellectual property law, there is no assumption that other parties have rights to data besides the person or entity creating it. These laws exist to protect research and development, creative endeavours because it is acknowledged that otherwise insufficient incentives may exist to undertake such endeavours – to remove such protections risks undermining these incentives.

40. To require access to this data could remove incentives for companies to undertake such analytics, because it would result in the disclosure of potentially commercially sensitive

¹⁵ PC, 2018, Data Availability and Use, Final Report, Recommendation 5.2

¹⁶ PC, 2018, Data Availability and Use, Final Report, p.16

¹⁷ PC, 2018, Data Availability and Use, Final Report, Recommendation 5.2

¹⁸ Ibid.

¹⁹ PC, 2018, Data Availability and Use, Final Report, p.17

information and because there are costs associated with retaining, storing and providing such data on request.

41. The draft CDR Bill as proposed would likely have a large detrimental impact on the data analytics industry and the development and use of data analytics by other industries (such as communications). Where companies that invest money to undertake data analytics are prevented from making a commercial return on that investment, the investment is unlikely to incur. Optus notes that it would be a perverse outcome if the CDR regime decreased innovation and decreased data use.

42. As noted above, the Inquiry understood this trade-off and recommended against inclusion of value-added and derived data. The Inquiry noted that such derived data “*is not and was not at any point an individual’s data and so would not be considered consumer data*”.²⁰

43. Importantly, the Government accepted Recommendation 5.2 and stated:

The Australian Government will introduce a Consumer Data Right to allow consumers to access particular data, including transaction, usage, and product data.

44. This is consistent with the Inquiry’s recommendation 5.2. The Government did not state it wished to extend the definition beyond that put by the Inquiry; nor did the Government contradict the statements of the Inquiry against the use of imputed, derived and value-added data.

45. Optus is concerned that the draft CDR Bill is proposing a definition of CDR data that is inconsistent with the Inquiry and Government response. Moreover, such extension of definition, which is directly counter to the Inquiry’s recommendation, is being proposed without any further analysis or cost-benefit analysis.

46. Optus recommends that the definition of CDR data in s.56AF(1) make clear that derived data is not CDR data. It should be amended to state:

CDR data must be in machine-readable form and include all of:

- *personal information, as defined in the Privacy Act 1988 (Cth), that is in digital form*
- *information posted online by the consumer*
- *data created from consumers’ online transactions, Internet-connected activity, or digital devices*
- *data purchased or obtained from a third party that is about the identified consumer*
- *other data associated with transactions or activity that is relevant to the transfer of data to a nominated third party*

47. The definition should also explicitly state that data that is imputed or derived data not be considered CDR data. Further, data that is not able to be re-identified to a consumer in the normal course of business within a data holder should not be considered CDR data.

²⁰ Ibid., p.207