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CONSUMER DATA RIGHT CONSULTATION

Submission to Treasury on the Treasury Laws Amendment (Consumer Data Right) Bill 2018 (second stage) and Designation Instrument for Open Banking

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.

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CONTENTS

INTRODUCTION	2
Recommendations	2
Proposal 1: Derived Information	4
Proposal 2: Interaction of the Privacy Safeguards with the Privacy Act	5
Proposal 4: Process for designation and rule-making	6
Proposal 5: Framework for changes for access to and use of CDR data	7

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)¹ in its second stage. In this submission, CHOICE provides comments on the *Treasury Laws Amendment (Consumer Data Right) Bill 2018: Provisions for further consultation*.²

CHOICE made a number of recommendations in our original submission to the consultation. We advocated for improving the ease with which consumers should be able to navigate the CDR, called for proactive measures to increase equitable access to CDR data, and requested the establishment of appropriate consumer protections.³ Additionally, CHOICE recommended that the Treasury require a statutory three year review of the legislation and the overall effectiveness of consumer protections related to the reform. This submission will not repeat in detail the recommendations from our first submission, but we urge the Treasury to revisit them prior to finalising the legislation.

Recommendations

1. Consumers should have free access to data that companies hold about them, including derived data that relates to them.
 - These provisions should be outlined in rules determined by the ACCC.
2. Consumer protections should be developed by the ACCC to ensure that CDR data, including derived data, cannot be used to discriminate against consumers in ways that would leave vulnerable groups unfairly disadvantaged.
3. Treasury should ensure that consumer and business education is a core part of the rollout of the CDR.
4. 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.

¹ Treasury Laws Amendment (Consumer Data Right) Bill 2018, Exposure Draft, [Provisions for further consultation](#), Canberra

² Treasury Laws Amendment (Consumer Data Right) Bill 2018, Consultation Paper, [CDR proposals for further consultation](#)

³ CHOICE (2018), [Submission to Treasury on the Consumer Data Right](#), p2

5. CHOICE supports Treasury's proposal for mandatory consultation periods, to clarify that a Regulatory Impact Statement (which includes a cost benefit analysis) must be undertaken prior to the designation of a sector.
6. Treasury should not limit the circumstances in which emergency rules may be made by the ACCC.
7. The ACCC should have the power to determine free and chargeable data sets.
8. The Treasury should implement a set of guiding consumer-centric principles to guide the nomination and delivery of CDR data sets in each sector.
9. The ACCC should have the power to set a price for data transfer and access.
 - Provided the ACCC is given this power, the ACCC should determine a cap for data access prior to the implementation of the CDR to ensure that consumers are not left out of the CDR system.

Proposal 1: Derived Information

CHOICE believes that CDR legislation must ensure that consumers can always have access to derived data that relates to them.⁴ Treasury is considering moving decisions about what data customers would be able to request to be disclosed to a Ministerial level and is considering 'a limitation on the rule-making power so that, where the information relates to a consumer, the access and transfer right will only apply to information that is in the designation instrument.'⁵ Consumers should have access to all derived data that relates to them, including data that has been anonymised and re-identified by overlaying external data sets. CHOICE believes that all information that 'relates to' a consumer should be able to be requested by a consumer. This is crucial to ensure that businesses are held accountable for their actions, and are not able to misuse data to the detriment of consumers.

There is a clear need for additional consumer protections to ensure that consumers are not exploited by businesses who will have access to new data sets, including derived data. There is a risk that access to new data may result in unfair price discrimination practices that may see certain cohorts of consumers unfairly excluded from access to products and services or targeted with harmful offers that are unsuitable to their circumstances. For example, if a consumer shared CDR banking data with an accredited third party that analysed a consumer's data. This third party may also provide payday lending services that the customer has previously used, providing payments for these services through another bank. The data that accredited third parties hold about consumers may include details such as their education level, or payment history, which may indicate their willingness to pay a certain interest rate. This data could be used by institutions to offer consumers poorer value products, for example a higher interest rate based on what they have inferred from their previous payment history.

Recommendations 1 and 2

1. Consumers should have free access to data that companies hold about them, including derived data that relates to them.
 - These provisions should be outlined in rules determined by the ACCC.
2. Consumer protections should be developed by the ACCC to ensure that CDR data, including derived data, cannot be used to discriminate against consumers in ways that would leave vulnerable groups unfairly disadvantaged.

⁴ Treasury Laws Amendment (Consumer Data Right) Bill 2018, [Explanatory Materials](#), p13

⁵ Ibid. p4

Proposal 2: Interaction of the Privacy Safeguards with the Privacy Act

CHOICE appreciates the Treasury providing additional information about the interaction of the Privacy Safeguards with the Privacy Act. The interaction between these laws is of considerable complexity, particularly in cases where a third party data recipient will have to comply with the Privacy Safeguards in some cases (where they are receiving, storing, and processing consumer data), and the Privacy Act in others (where they are generating data outside of the CDR, and are considered a data holder).⁶

CHOICE is concerned by the level of complexity that this system will introduce for consumers. People should be able to easily understand their rights under privacy legislation and seek appropriate redress in instances in which it is breached. The interaction between the Privacy Act and the Privacy Safeguards creates a web of protections that would be difficult for the average person to understand.

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. 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 to 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. Data holders and accredited parties must also receive appropriate education in order to understand their new responsibilities within the CDR regime.

CHOICE also suggests that Treasury amends the Bill or recommends other legislation that mandates the establishment of internal dispute resolution (IDR) processes that meet the Australian standard of complaint handling; and appropriately independent and robust external dispute resolution (EDR) for CDR participants in every sector. The CDR will have a profound impact on how consumers use their data, and it is important to preempt some of the challenges that they may result from accessing data, or sharing it with third parties. Consumers must have clear touchpoints for IDR and EDR that can be easily identified and accessed in relation to the CDR.

⁶ Treasury Laws Amendment (Consumer Data Right) Bill 2018, Consultation Paper, [CDR proposals for further consultation](#)

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.

Recommendations 3 and 4

3. Treasury should ensure that consumer and business education is a core part of the rollout of the CDR.
4. 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.

Proposal 4: Process for designation and rule-making

Treasury acknowledges that 'given the importance of a sectoral designation, there should be minimum consultation requirements prior to a sector being designated or rules being made.'⁷ Given the diverse data sets generated within each sector, it is extremely important that designation and rule-making processes are tailored to suit the needs of consumers. CHOICE supports Treasury's proposal for mandatory consultation periods, to clarify that a Regulatory Impact Statement (which includes a cost benefit analysis) must be undertaken prior to the designation of a sector, and to require the OAIC to provide public advice to the Treasurer on the privacy impacts of designation or the proposed rules.

The circumstances in which the ACCC may make rules regarding fees for transfer and use of information should not be limited, as detailed in Proposal 5.⁸ The Treasury proposes to limit these to circumstances in which the 'ACCC is of the opinion that an emergency rule is necessary to avoid imminent risk of serious harm to the efficiency, integrity and stability of the Australian economy, or to consumers.'⁹

Consumer safety should be at the forefront of any rulemaking, and for this reason, any emergency rulemaking powers should ensure that consumer protection is the central goal, not

⁷ Treasury Laws Amendment (Consumer Data Right) Bill 2018, Consultation Paper, [CDR proposals for further consultation](#), p8

⁸ Ibid. p8

⁹ Ibid. p8

merely a consideration. The emergency rule provisions should be rewritten to reflect this. A limitation on the ACCC's rulemaking powers is a significant constraint on the ability of the regulator to rapidly make rules to enhance consumer welfare. The case for changing the rulemaking process so that it is slower and less responsive to change by requiring these powers be exercised at a Ministerial level has not been made. The ACCC should be able to make rules to protect consumers without delay.

Recommendations 5 and 6

5. CHOICE supports Treasury's proposal for mandatory consultation periods, to clarify that a Regulatory Impact Statement (which includes a cost benefit analysis) must be undertaken prior to the designation of a sector.
6. Treasury should not limit the circumstances in which emergency rules may be made by the ACCC.

Proposal 5: Framework for changes for access to and use of CDR data

CHOICE is particularly concerned about the proposed framework for charges for access to and use of chargeable data sets.¹⁰ The ACCC should be empowered to determine free and chargeable data sets. As technology continues to evolve, CDR regulation must evolve with it in order to cater to emerging data types. The regulator is best placed to determine CDR data sets for each sector by conducting regular review processes and facilitating effective consultation with relevant stakeholders.

The Treasury has proposed that the designation instrument for data sets should be used to determine which data sets are free, and which data sets can attract a fee for access. There is no compelling reason to elevate these powers to the Ministerial level rather than have them sit with the regulator. In the absence of any clearly demonstrated benefits associated with this approach, CHOICE does not support the proposal.

The legislative framework that governs data must be flexible, adaptive, and responsive in order to ensure that it caters to the changing needs of consumers. Legislation must be proactive, and seek to protect consumers from harms before they emerge, rather than just provide remedies following harm. The regulator must be able to make rules to ensure that relevant data sets are accessible by consumers as new data technologies continue to emerge.

¹⁰ Ibid. p9

CHOICE again recommends that Treasury should develop a set of guiding principles for determining relevant data sets and how they will be delivered to consumers.¹¹ These principles should also ensure that the long-term interests of consumers are taken into account and should act as an appropriate guide to inform the ACCC's decisions about what data is made available and how it can be accessed. Decisions that determine what data is provided to consumers must be made with a clear vision in mind and one that is consistent across the CDR system. 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.

CHOICE is concerned about the Treasury's approach to charging consumers for access to data. The introduction of unregulated fees for data access will likely undermine the goal of the CDR - to empower consumers to access their data. CHOICE believes that customer data, product data, and transaction data should always be freely available to consumers. Preventing free and easy access to these types of consumer data would create an inequitable system where the only consumers who benefit from the sharing of these data types would be those who can afford it. The Open Banking report, with input from relevant stakeholders, supported the view that these data types should be freely available.¹² The Treasury is currently developing legislation with the banking sector in mind, and the appropriateness of this approach for other sectors is yet to be fully interrogated. Given this, it is crucial that the nomination of free data sets be tailored specifically to the needs of consumers in each sector. The ACCC is best placed to play the lead role in making these determinations.

CHOICE is also concerned about removing the ACCC's powers to set a price for data access, which Treasury believes should be determined through a market-based approach.¹³ The scope of chargeable data sets is yet to be fully understood - as are the consumer benefits of accessing these data sets. While it is CHOICE's first preference that data access is free, if fees are to be introduced for access to certain data sets under the CDR, it is important that clear caps (per service) are established within the CDR system. Consumers should be able to gain access to non-essential data sets for free at least once a year, to ensure that people who are unable to pay for value-added data are not at a disadvantage. An alternative approach is 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.

CHOICE strongly opposes Treasury's approach to allow businesses to set their own prices for chargeable data sets and let the ACCC intervene only when the price is seen to be excessive. The system should proactively consider how to deliver equitable outcomes, rather than function

¹¹ CHOICE (2018), [Submission to Treasury on the Consumer Data Right](#), p2

¹² Treasury (2017), [Review into open banking: giving customers choice, convenience, confidence, Canberra](#), pg.xvi

¹³ Treasury Laws Amendment (Consumer Data Right) Bill 2018, [CDR proposals for further consultation](#), p9

as a response to business behaviour that exploits consumers. Additionally, Treasury must consider how consumers suffering financial hardship will access their data. CHOICE suggests that businesses be required to waive data access fees for those who cannot afford to pay them.

Data holders should not be allowed to charge consumers for access to data that would be necessary for a consumer to dispute a bill or raise a complaint with their service provider, regardless of whether this data is freely available, or is typically available at a cost to the consumers.

Recommendations 7, 8 and 9

7. The ACCC should have the power to determine free and chargeable data sets.
8. The Treasury should implement a set of guiding consumer-centric principles to guide the nomination and delivery of CDR data sets in each sector.
9. The ACCC should have the power to set a price for data transfer and access.
 - Provided the ACCC is given this power, the ACCC should determine a cap for data access prior to the implementation of the CDR to ensure that consumers are not left out of the CDR system.