

Summary of proposals – Open Banking Designation Instrument

The second stage of consultation on the Open Banking Designation Instrument responds to concerns raised in the first stage of consultation regarding the scope of information about the use of a product by carving out information about use the use of a product that meets the test of having been materially enhanced.

The data sets which are currently in the draft rules and standards do not meet the test of having been materially enhanced.

The concept of materially enhanced information refers to data which is the result of the application of insight, analysis or transformation of data to significantly enhance its useability and value in comparison to its source material. The intention is that information whose value has been largely generated by the actions of the data holder will be carved out by the ‘materially enhanced’ test. Data holders may not be required to disclose materially enhanced data under the CDR, but nonetheless may be authorised to disclose it through the CDR if they so wish.

The Designation Instrument includes an example list of banking data sets that are not materially enhanced, while the explanatory statement includes an example list of data sets that are materially enhanced. Treasury is specifically seeking examples to add to each of these lists. If you believe additional data sets should be included in these lists, please specify in your submission what you would like to see included.

What data will Open Banking and the CDR apply to?

The CDR will initially apply to the banking sector (where it is referred to as Open Banking), energy sector, and telecommunications sector. The right will be rolled out to other sectors in the economy following assessments of the benefits and costs of doing so.

The CDR can be applied to data that relates to individual consumers, as well as business consumers – such as a customer’s banking transaction data.

It can also be applied to information on goods and services on offer – such as the pricing and terms of all mortgages on offer.

For Open Banking, the data that a customer can ask to share will include:

- data the customer has provided to the bank;
- transaction data such as records of deposits or withdrawals, interest earned or fees and charges;
- account balance data; and
- product data about the pricing and terms of products.

This will apply to a broad range of accounts, including savings accounts, transaction accounts, credit card accounts, mortgages, and other loans.

Why is derived data included in the CDR regime?

The regime must be able to apply to some sets of data that has been processed by the data holder ('derived' or 'value added' data), and not merely data that has been collected or observed by the data holder ('raw' data).

Derived data is a term that already exists in the Privacy Act 1988 and means any data that is not 'raw'. For example, if you collect data on a birthday in the form of 1 January 1970 and convert it into the format 1/1/1970, that data is now derived.

If derived data were not included in the CDR regime data holders may be able to avoid their obligations to make data available to consumers and to protect consumers by making most if not all data that they hold 'derived'.

The Open Banking Review recommended that as a general principle only collected data (e.g. raw transaction data) and immaterially derived data (e.g. calculated account balances, interest rates and interest accrued on accounts, eligibility of a customer to obtain an account) should be subject to mandatory rights of access. However, it stated that in exceptional cases the regime should be able to apply to materially value added data sets (e.g. outcomes of Know Your Customer assessments).¹

The Government accepted these recommendations, and this is reflected in the Bill.

While the Bill allows for more materially value added data sets to be specified (eg outcomes of Know Your Customer assessments), such data sets have not been specified in the designation instrument for Open Banking.

There is a spectrum of materiality of derivation of data: from where in essence it is still raw personal data, if not technically so; to derived data not giving rise to intellectual property rights; through to data containing intellectual property.

- Where it is appropriate to draw the line must be assessed on a data set by data set basis, balancing consumer and commercial interests.

The CDR Bill provides a number of **safeguards against access rights to derived data becoming too broad:**

- Access rights to derived data can only occur if the Minister specifies that data in the sectoral designation instrument (a disallowable legislative instrument). For future sectors this will only occur after public consultation by the ACCC on the proposed designation and provision of publicly available advice to the Minister. The Open Banking Review and Treasury conducted this consultation for Open Banking.
- The Bill sets limits on the possible scope of access requirements to derived data. For example, the regime cannot require access to algorithms or anonymised statistical insights.

¹ The Australian Government the Treasury, (December 2017), 'Report of the Review into Open Banking in Australia', see discussion at page 38.

- Further, when considering inclusion of any derived data the Minister must consider and may determine whether access should be subject to payment. Where there is intellectual property in derived data, payment of full fair value must be provided for.

Some stakeholders are concerned that the inclusion of value added data will have a negative impact on competition and incentives to innovate and invest. Some have proposed that the CDR legislation should generally exclude value-added data but instead list all specific value-added data sets that will be included. Such an approach would require amendments to the legislation each time the CDR is expanded to a new sector.

- Under the Bill, Parliament would be able to disallow access rights for value-added data, if it saw fit, as part of the sectoral designation process.
- It is a better approach to undertake this disallowance through the sectoral designation process as this allows contextual consideration of the balance of rights between consumers and data holders.
- Due to the spectrum of derivation and materiality discussed above, all tests and definitions that were proposed by stakeholders and agencies through the number of consultation processes on this issue lacked sufficient legal certainty unless they were surrounded by a large number of sector specific examples. Given this, it is Treasury's view that this test better belongs in the designation instrument.

The revised draft of the Open Banking designation instrument explicitly excludes:

- any derived data which describes the consumer themselves; and
- any materially derived data which describing the consumer's use of a product.

What derived data will be included in Open Banking?

Technical standards setting out the exact data payloads subject to the first iteration of Open Banking were published by the interim Data Standards Body in December.

Examples of derived data that are within scope and are not treated as materially enhanced include:

- identifiers, including in relation to any persons, accounts, products, transactions, authorisation;
- classifications, according to categories commonly used throughout the banking industry in relation to online banking, such transaction types (e.g. payments, receipts);
- reference numbers, such as routing numbers, clearing house numbers, swift codes;
- calculated balances including the total of an account;
- interest earned or charged;
- fees charged;

- eligibility of a customer to obtain an account;
- expected amount at maturity;
- data on authorisations, including direct debit authorisations;
- transaction descriptions; and
- filtering or sorting by timing, amounts, classifications.

When can data holders charge fees for access to CDR data?

All initial data sets that banks are required to provide under Open Banking will be free to access and use.

We expect that as an overwhelming rule, consumers will be able to exercise their rights under the Consumer Data Right (CDR) without charge.

However, there may be situations in the future where it is suitable to allow a fee.

- Fees will only be able to be charged if the Minister positively determines in the sectoral designation that this should be the case.
- The Minister can only make such a determination after seeking the advice of the Australian Competition and Consumer Commission. The ACCC must conduct public consultations and assess impacts upon consumers prior to publicly providing this advice.
- If fees are chargeable, they must be reasonable and the ACCC has powers to intervene to impose fee arrangements if this is not the case.

The CDR includes the possibility of allowing fees for a number of reasons, including:

- Access to data for free might impact on incentives for data holders to continue to collect and manage data resulting in consumers would no longer be able to access data for their own benefit.
- Consumers may seek frequent access to data for which there is a high marginal cost for each disclosure, resulting in an unfair burden on business or resulting in other consumers bearing the costs of those consumers' intensive use of the CDR.
- Requiring access and permitting use of data may in rare cases involve an acquisition of property, such that the Constitution requires compensation on just terms.

Data holders may choose to provide additional data sets voluntarily through the system, or additionally provide data beyond the functional requirements set out in the rules and standards, for free or for a fee.

Current rights for individuals to access data about themselves under the Privacy Act 1988 allow data holder to charge reasonable fees for doing so.

What is the scope of the reciprocity principle in the CDR legislation?

The Open Banking Review recommended the adoption of a principle of reciprocity as part of the Consumer Data Right (CDR) regime. Reciprocity is the concept that those who receive data under the CDR should also be required to respond to customers' requests to disclose equivalent kinds of data they hold in relation to the customer.

- The Government accepted this recommendation, and it is reflected in the CDR Bill.

Reciprocity is directed at growing the system for the benefit of consumers and to ensure a level playing field between data holders and recipients.

The ACCC has proposed that, in the first version of the CDR rules, accredited data recipients that hold data that falls within a class of data covered by an existing CDR sectoral designation instrument will be required to share CDR data in accordance with the rules, in response to a valid request from a consumer.

- For example, a non-bank lender who accesses mortgage data through the CDR would also have to make their own mortgage data available if requested by the customer.

Some stakeholders support a broader definition, that is, interpreting 'equivalent' to mean data that is of equivalent importance to the business of the data recipient as banking information is to banks. Such an approach could, for example, require a social media platform to share its social relationship data, if they accessed any data through the CDR.

Under the proposed approach, distinctly different kinds of data to those already covered by the CDR cannot become subject to the CDR under reciprocity, until a normal sectoral assessment and ministerial designation process has been completed.

- This provides an opportunity to assess the impacts of the extension of the CDR to those datasets on: consumer welfare; privacy; competition; innovation; the operation of relevant markets; regulatory burdens; and intellectual property rights. Sectoral assessments involve analysis by the ACCC and the OAIC against these criteria, public consultations and the provision of publicly available advices to the Treasurer.
- For example, social media data would only be caught by the CDR after such an assessment.

Primarily relying on sectoral assessments to extend the range of the CDR also allows the Government, on the advice of the ACCC, to prioritise the rollout of the CDR to those sectors in which it will most benefit consumers and business.