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TREASURY LAWS AMENDMENT (MEASURES FOR A LATER SITTING) BILL  
2020: AMENDMENTS OF THE CONSUMER DATA RIGHT

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EXPOSURE DRAFT EXPLANATORY MATERIALS



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# **Glossary**

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The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
ACCC	Australian Competition and Consumer Commission
CC Act	<i>Competition and Consumer Act 2010</i>
CDR	Consumer Data Right



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# **Chapter 1**

## ***Reallocating functions and miscellaneous amendments***

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### **Outline of chapter**

1.1 The exposure draft of these amendments amends the CC Act by reallocating the responsibility for conducting sectoral assessments and making CDR rules. Other miscellaneous amendments are also made to the CC Act to assist the clarity and efficiency of the CDR regime.

1.2 All references in this Chapter to legislation are to the CC Act unless otherwise stated.

### **Context of amendments**

1.3 The CDR regime in Part IVD enables individuals and businesses to efficiently and conveniently access information held by businesses about them as consumers and to authorise secure access to this data by specified third parties. Businesses are also required to provide public access to information on specified products they offer.

1.4 Under Part IVD, the Minister may make a legislative instrument that designates a sector of the Australian economy to be subject to the CDR regime. Banking and energy are the first two sectors to be designated.

1.5 Before making a sectoral designation, the Minister must complete a number of tasks, including consulting the ACCC. As part of this consultation, the ACCC must conduct an analysis of specified matters, consult the public and publish a report.

1.6 Part IVD also provides for the ACCC to make CDR rules which set out the means by which the CDR regime is applied across designated CDR sectors.

### **Summary of new law**

1.7 The exposure draft of these amendments amends the CC Act by reallocating the responsibility for conducting sectoral assessments and making CDR rules. Other miscellaneous amendments are also made to the CC Act to assist the clarity and efficiency of the CDR regime.

## Comparison of key features of new law and current law for the reallocation of functions

<i>New law</i>	<i>Current law</i>
<b>Sectoral assessment</b>	
Before designating a sector, the Minister must be satisfied that the Secretary of the Department has complied with the requirements to arrange a sectoral assessment.	Before designating a sector, the Minister must consult with the ACCC.
For the Minister to be satisfied that the Secretary of the Department has arranged a sectoral assessment, the Secretary must arrange for: analysis of the factors that the Minister must consider; consultation about those factors; and the preparation of a report for the Minister about that analysis and consultation.  The Secretary must also publish the report on the Department’s website.	When the Minister consults the ACCC, the ACCC must consider the factors that the Minister must consider, and consult the public about those factors. Once the consultation has concluded, the ACCC must report to the Minister about its analysis and consultation and publish that report on the ACCC’s website.
The Bill relies upon the existing ability for the Secretary of the Department to provide advice to the Minister on policy matters.	The ACCC may, on its own initiative, recommend to the Minister that a sector is designated, or that an existing instrument, designating a sector, is varied or revoked.
<b>CDR rule making</b>	
The Minister may make rules for designated sectors.	The ACCC may make rules for designated sectors.
Before making the consumer data rules, the Minister is required to consider the same matters that the Minister must consider before designating a sector (but not the factors the Minister considers when determining that data is chargeable), and be satisfied that the Secretary of the Department has arranged for consultation about those factors.	Before making the consumer data rules, the ACCC is required to consider the same matters that the Minister must consider before designating a sector (but not the factors the Minister considers when determining that data is chargeable).
For the Minister to be satisfied that the Secretary of the Department has arranged for consultation on the consumer data rules, the Secretary must arrange for consultation with:	The ACCC must consult with the public for at least 28 days on the consumer data rules, and must also consult the Information Commissioner, the primary regulator

<p>the public for at least 28 days; the ACCC; the Information Commissioner; the primary regulator of the particular designated sector and any other person prescribed by the regulations.</p> <p>The Secretary must also arrange for the preparation of a report for the Minister about that analysis and consultation.</p>	<p>of the particular designated sector and any other person prescribed by the regulations.</p>
<p>The Minister is unable to make the consumer data rules for at least 60 days after the day the public consultation arranged by the Secretary of the Department begins.</p>	<p>The ACCC is unable to make the consumer data rules for at least 60 days from when the rules were released for public consultation.</p>
<p>N/A</p>	<p>The ACCC must, except in emergency circumstances, obtain the Minister's consent prior to making rules.</p>
<p>The Minister may make consumer data rules in emergency situations after consulting with the Information Commissioner, but need not conduct consultation beyond this.</p>	<p>The ACCC may make consumer data rules without the Minister's consent in emergency situations after it has consulted with the Information Commissioner, but need not conduct consultation beyond this.</p>

## Reallocation of functions

### Sectoral assessment

1.8 The Minister has a number of tasks before designating a sector. These amendments replace the requirement for the Minister to consult with the ACCC, with a requirement that the Minister must be satisfied that the Secretary of the Department has arranged for a sectoral assessment. *[Schedule xx, item 2, section 56AD]*

1.9 For the Minister to be satisfied that the Secretary of the Department has arranged for a sectoral assessment, the Secretary must arrange for analysis of the factors that the Minister must consider prior to making a designation, and consult with the public about those factors. In practice, this analysis and consultation may be undertaken by a range of Commonwealth entities. For example, this analysis and consultation could be conducted by the Treasury, or the ACCC. This requirement could be satisfied by a review conducted by a Commonwealth agency that includes the considerations necessary for a CDR sectoral assessment, for example,

a Productivity Commission review with sufficient terms of reference. *[Schedule xx, item 3, sections 56AE and 56AEA]*

1.10 The public consultation must take place for at least 28 days and include making information on the proposed designation available on the Department's website.

1.11 The consultation arranged by the Secretary must include consultation with the ACCC, Information Commissioner, the primary regulator of the sector the instrument would designate (if there is one) and any persons prescribed by the regulations. When the ACCC is consulted it must analyse the factors the Minister must consider prior to making a designation.

1.12 Once the consultation has concluded, the Secretary of the Department must report to the Minister about the analysis and consultation, and publish the report on the Department's website.

1.13 After the report on the analysis and consultation has been published on the Department's website, the Minister must wait at least 60 days before making a designation instrument. *[Schedule xx, item 2, section 56AD]*

1.14 Due to the operation of the *Acts Interpretation Act 1901*, the same process must be followed when an existing instrument is varied or revoked.

1.15 The ability for the ACCC to recommend a sector is designated has been removed. Instead, the Secretary may arrange for a sectoral assessment to be conducted other than at the direction of the Minister, and the Minister may choose whether to act on the information provided. *[Schedule xx, item 3, section 56AE]*

1.16 The amendments are sufficiently flexible to allow the conducting of sectoral assessments to remain with the ACCC, but provide greater flexibility as to who may do so. Responsibility for ensuring a sufficient sectoral assessment occurs before any sectoral designation now lies with the Secretary of the Treasury.

## **CDR rule making**

1.17 The Minister is provided with the power to make rules. *[Schedule xx, items 11 and 12, section 56BA]*

1.18 Before making the consumer data rules, the Minister is required to consider the same matters that the Minister must consider before designating a sector (but not the factors the Minister considers when determining that data is chargeable), and be satisfied that the Secretary of

the Department has arranged for consultation, and reporting, on those factors. *[Schedule xx, item 14, section 56BP]*

1.19 For the Minister to be satisfied that the Secretary of the Department has arranged for consultation on the consumer data rules, the Secretary must arrange for public consultation to take place for at least 28 days and make information on the proposed consumer data rules available on the Department's website. *[Schedule xx, item 14, section 56BQ]*

1.20 The consultation arranged by the Secretary must also include consultation with the ACCC, Information Commissioner, the primary regulator of the particular designated sector (if there is one) and any persons prescribed by the regulations. When the ACCC and Information Commissioner are consulted, they must analyse the factors the Minister must consider prior to making the consumer data rules. *[Schedule xx, item 14, sections 56BQ and 56BR]*

1.21 The Secretary may arrange for consultation and the preparation of a report to be conducted by an agency other than Treasury. This could include arranging this to be conducted by the ACCC (thereby largely preserving the status quo). However, the new provisions provide greater flexibility as to who may be arranged to carry out these tasks, while assigning responsibility for ensuring these matters occur to the Secretary.

1.22 Once the consultation has concluded, the Secretary of the Department must report to the Minister about the analysis and the consultation. *[Schedule xx, item 14, section 56BQ]*

1.23 The Minister is unable to make the consumer data rules for at least 60 days after the day the public consultation arranged by the Secretary of the Department begins. *[Schedule xx, item 14, section 56BP]*

### ***Emergency rules***

1.24 The Minister may make emergency rules where the Minister is of the view that making the rules is necessary to avoid a risk of serious harm to the efficiency, integrity and stability of any aspect of the Australian economy or interests of consumers. For example, given the nature of the CDR regime, a significant data breach could be considered to cause serious harm to the interests of consumers. *[Schedule xx, item 14, section 56BS]*

1.25 Before making emergency rules, the Minister must consider the same kinds of matters the Minister considers when making rules in ordinary circumstances. The Minister must also consult the Information Commissioner before making the emergency rules but need not conduct other consultation beyond this.

1.26 A failure to consult the Information Commissioner does not invalidate the emergency consumer data rules. However, if the Minister does not consult the Information Commissioner before making the

emergency rules, the rules will cease to be in force 6 months after the day they were made. *[Schedule xx, item 14, sections 56BS and 56BT]*

### **Delegation by the Secretary**

1.27 The Secretary of the Department may, in writing, delegate all or any of the Secretary’s functions or powers to an SES employee, or an acting SES employee, in the Department. *[Schedule xx, item 41, section 56GAA]*

1.28 In performing a delegated function or exercising a delegated power, the delegate must comply with any written directions of the Secretary.

### **Disclosure of information to the Secretary**

1.29 The CC Act is amended so that the ACCC can disclose information to the Secretary of the Department, or an employee of the Department or consultant assisting the Secretary in performing the Secretary’s functions, or exercising the Secretary’s powers, relating to Part IVD. The information may only be used for the purpose of the CDR and the functions and powers given to the Secretary as part of the CDR regime. *[Schedule xx, item 42, section 157AA]*

### **Miscellaneous amendments**

1.30 The exposure draft of these amendments makes a number of amendments to the CC Act to assist the clarity and efficiency of the CDR regime.

### **Earliest holding date for CDR data**

1.31 The scope of information that may be subject the CDR regime has been clarified to ensure information of continuing use and relevance that is critical to the effective operation of the CDR is captured.

1.32 The designation instrument specifies the ‘earliest holding day’ applicable to the sector for ‘holding’ the designated information, rather than ‘beginning to hold’ the information. If a person holds CDR data on or after the earliest holding date then the person will be a data holder for that data if it is of continuing use and relevance (such as an account number that is still current), and is not about the provision before that earliest holding day of a product or service by (or on behalf of) the person (for example, a transaction on an account). *[Schedule xx, items 1, 6 and 7, sections 56AC and 56AJ]*

## Fee-free data

1.33 The amendments clarify that if data is not listed as chargeable data, and the consumer data rules require the data to be disclosed, then a data holder cannot charge a fee for the data. Where a data holder discloses data voluntarily but pursuant to the consumer data rules, the data holder is permitted to charge a fee for that data. Where a data holder discloses a package of data that includes both fee-free CDR data and CDR data that is provided voluntarily, the data holder is permitted to charge a fee for the data that it discloses voluntarily. *[Schedule xx, item 8, section 56AM]*

## Agents acting on behalf of CDR entities

1.34 It is intended practice for CDR entities to be able to engage other persons to act on their behalf for data handling activities, subject appropriate controls imposed by the rules. Subdivision F of Division 1 of Part IVD clarifies that for the purposes of Part IVD and the consumer data rules, conduct done by or to an agent, officer or employee of a CDR entity who is acting within the scope of their actual or apparent authority or employment, is taken to also be done by or to the CDR entity. The agent etc. of the CDR entity may be an accredited person, but it is not necessary for them to be accredited. The rules impose requirements on outsourced service provider arrangements that accredited data recipients may enter into to ensure that consumer data is kept safe and secure. Section 56AU clarifies this further by ensuring that the CDR entity is ultimately responsible for the actions done by or to their agents. *[Schedule xx, item 10, section 56AU]*

1.35 The consumer data rules can only require a disclosure of CDR data for which there are one or more CDR consumers if the disclosure is to one or more of those CDR consumers, an accredited person or a designated gateway (section 56BD(1)(b)). In line with ensuring the use of agents by CDR entities is clearly dealt with, the situation where disclosure to persons acting on behalf of accredited persons and designated gateways is included within the scope of permitted disclosure. Also included is disclosure by a designated gateway to a data holder of the data, in recognition of the fact that in some circumstances CDR data will need to flow in both directions between data holders and designated gateways (for example, when authenticating the identity of a consumer that has made a request for CDR data). *[Schedule xx, item 13, section 56BD]*

## Privacy safeguards

1.36 Provisions dealing with when the privacy safeguards begin to apply to entities that deal with CDR data, and how they apply, have been amended to ensure they clearly reflect the legislative intent and best practice operation of the safeguards.

1.37 An accredited person should be ready to comply with Privacy Safeguard (PS) 1 (about requirements for a CDR entity’s data management policies) as soon as they receive CDR data. Consequently, PS1 is intended to apply to all accredited persons rather than only to accredited data recipients, to ensure that all compliance measures have been completed before the entity actually begins to receive any CDR data. Similarly, on the basis that consumers should be able to instruct that their identity be kept unknown from the time they first consent to collection of their data, PS2 (about anonymity/pseudonymity of CDR consumers’ identity) is intended to apply to all accredited persons rather than only to accredited data recipients. *[Schedule xx, items 23 to 27, sections 56ED and 56EE]*

1.38 Since PS5 (about notification of collection of CDR data) can only apply once CDR data has been collected in accordance with PS3, PS5 is amended to clarify that it applies to accredited data recipients. *[Schedule xx, item 28, section 56EH]*

1.39 Data holders are obliged to ensure CDR data they disclose under the consumer data rules is accurate, up to date and complete (section 56EN(1)) and CDR participants must advise CDR consumers, in accordance with the rules, when they become aware of data being disclosed that was inaccurate, incomplete or not up to date (section 56EN(3)). The participant may then be requested by the consumer to fix the incorrect data and disclose corrected data (section 56EN(4)). Section 56EN is amended so that the consumer’s request for correction and the subsequent disclosure of corrected data must be in accordance with the consumer data rules. The rules will cover the requirements for these steps, as well as circumstances in which the CDR participant is not required to comply, such as when the accredited data recipient no longer provides relevant services. *[Schedule xx, items 29 to 31, section 56EN]*

1.40 The Information Commissioner may assess whether a CDR participant or designated gateway is complying with the Privacy Safeguards in relation to their handling of CDR data (section 56ER). Section 56ER is amended to allow this function to be performed in relation to accredited persons who are subject to PS1 following the amendment of that provision to apply to accredited persons. *[Schedule xx, items 32 and 33, section 56ER]*

## **Commonwealth entity data holders and gateways**

1.41 Commonwealth entities may be specified as data holders and/or gateways in a designation instrument. In order to be authorised to undertake work to fulfil their obligations as data holders and/or gateways under the CDR regime, such entities are deemed to have the functions necessary to do this. *[Schedule xx, item 9, section 56AR]*

## **Application and transitional provisions**

1.42 Any ACCC sectoral assessments that began before these amendments commence will continue to be able to be relied on to support the Minister's designation of a sector. *[Schedule xx, item 44(1)]*

1.43 Further, consumer data rules in force prior to these amendments commencing will continue to apply after that commencement as if they were rules made by the Minister under the amended section 56BA. *[Schedule xx, item 44(2)]*