



Statutory Review of the Consumer Data Right

ACCC Submission

May 2022

1. Introduction

The Australian Competition and Consumer Commission (ACCC) appreciates the opportunity to make a submission to the Statutory Review of the Consumer Data Right (CDR).

The CDR is an important program for consumers and the economy. Over recent years there has been a growing appreciation of the extraordinary growth in data generation and a recognition that improved data access and use can enable new products and services that make everyday life easier and more convenient for consumers, enliven competition and contribute to efficiencies and productivity gains for the economy more generally.

Data portability is an essential aspect of this and for good reason a number of reviews recommended the creation of a data portability right for Australians.

The CDR is a central element in Australia's digital economy strategy – which seeks to deliver the right foundation to grow the digital economy and help Australia remain at the forefront in being able to adopt emerging technologies.

The establishment of the CDR has coincided with a period of material change in the Australian economy. The changing nature of the economy is presenting new challenges in balancing competition policy, consumer protection, data collection and privacy policy. The objective in getting this balance right is to create competitive, data-driven markets competing for well-informed consumers on all dimensions of price and quality.¹

Australia's implementation of the CDR will have a major role in progress toward this objective. Accordingly, the ACCC looks forward to making an ongoing contribution to the further delivery and development of the CDR.

2. The Legislative Backdrop

The success of a data portability right such as the CDR is dependent on a number of key design features. As outlined in the Explanatory Memorandum, these features have been incorporated into the statutory arrangements for the CDR, and include:

- mandating that companies (and other service providers) are required to give customers open access to their data, along with an ability for customers to direct that their data be shared with other service providers;
- the inclusion of strong privacy and information security provisions;
- establishing certain data standards which set out the format and process by which data needs to be provided to consumers and accredited data recipients within the CDR system;
- ensuring that entities are accredited before they are able to receive consumer data;
- the critical role of consumer consent – and requirements that consent is voluntary, express, informed, time limited and easily revoked;
- the creation of rules that provide the framework for how the CDR operates and functions including data sharing and accreditation requirements, defining the elements of consent and elaborating on the privacy and security elements of the scheme; and
- appropriate compliance and enforcement powers to ensure statutory requirements are met.

¹ ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 435.

Overall, the ACCC considers this statutory framework is sound. The regulatory regime supporting the CDR is robust and strong. It is paramount to the success of the CDR that this remains the case, particularly regarding the role of the consumer in driving data sharing through informed consent and the ongoing security of CDR data.

As outlined in further detail below, the CDR is a complex program with four government entities involved in its delivery, all of whom have statutory obligations and powers. As the system continues to evolve (and recognising that there will be ongoing maintenance requirements), consideration could be given to new arrangements that ensure that operational and implementation decisions are more clearly articulated and coordinated.

Consideration could also be given to consolidation or reallocation of roles and functions. The ACCC notes that sound regulatory practices typically support the separation of responsibilities for policy functions (including rule making), operations and enforcement.

3. The ACCC's role in CDR

The ACCC is an independent Commonwealth statutory agency that promotes competition, fair trading and product safety for the benefit of consumers, businesses and the Australian community. The overall responsibilities of the ACCC are to enforce compliance with the competition, consumer protection, fair trading and product safety provisions of the *Competition and Consumer Act 2010* (Cth) (CCA), regulate national infrastructure and undertake market studies.

Part IVD of the CCA outlines the ACCC's role and responsibilities in contributing to the implementation and operation of the CDR.

The ACCC's CDR roles include accrediting potential data recipients, establishing and maintaining a Register of Accredited Persons and Data Holders, monitoring compliance and taking enforcement action in collaboration with the Office of the Australian Information Commissioner (OAIC).

The ACCC provides an important role in providing guidance to stakeholders about their obligations under the CDR. The CCA also provides that the ACCC must be consulted before the Minister decides whether to make a legislative instrument designating a sector of the economy subject to the CDR. When consulted for this purpose, the ACCC must consider the same issues required to be considered by the Minister under section 56AD(1)(a)-(e) of the CCA.

4. The objects of Part IVD of the CCA

Broadly, the object of Part IVD of the CCA is to enable consumers in certain sectors to require information about them to be shared safely, efficiently and conveniently to:

- themselves, or
- accredited persons (subject to privacy safeguards) and
- enable any person to efficiently and conveniently access information about goods and services that do not relate to identifiable consumers and as a result create more choice and competition.

For the reasons outlined above the ACCC considers the objects of Part IVD of the CCA generally remain fit for purpose.

The ACCC is aware of concerns from some participants that the objects of Part IVD apply particular privacy provisions to CDR data that do not apply to other parts of the digital economy.

This means that businesses who use unregulated data sharing methods such as screen-scraping have a lower regulatory burden than those whose businesses involve CDR data. When un-regulated information is bundled with CDR data, the whole bundle is subject to the higher regulatory standard. The ACCC understands that this has discouraged some firms from adopting the CDR. Nonetheless, the ACCC considers that the CDR's approach to data sharing is appropriate and necessary for broader adoption of the program.

To address participant concerns there may be merit in creating uniformity by applying stronger data privacy protections across the whole digital economy.

5. The existing CDR framework

The existing assessment, designation, rule-making and standards-setting framework relies on four separate government entities to implement and support the operations of the Consumer Data Right. The ACCC remains broadly supportive of the statutory requirements as set out in the CDR legislation and the CDR Rules. However, there are some challenges that could be addressed and other areas that warrant further consideration.

The Data Recipient Accreditor

The ACCC currently fulfils the role of the Data Recipient Accreditor (Accreditor) as set out in the CCA and the CDR Rules.

The success and ultimately the benefits flowing to consumers from the CDR will be intrinsically linked to establishing a vibrant ecosystem of accredited data recipients and other participants. The CDR Rules were recently amended to provide new pathways into the CDR program on the accredited data recipient side. This includes sponsored accreditation, a CDR representative model and recognising the potential use of outsourced service providers.

In addition, a trusted adviser model has also been introduced whereby consumers are able to nominate trusted advisers to whom an accredited data recipient can disclose, with a consumer's consent, their consumer data.

These new pathways into the CDR system should help promote more innovative CDR offerings to consumers.

Pursuant to section 56 CA of the CCA, the ACCC may accredit a person if satisfied that the person meets the criteria for accreditation. The CDR Rules set out in more detail this criteria, including a number of specific obligations that must be met.

In particular, under rule 5.12 of the Rules, the ACCC must assure that the party:

- meets the information security requirements;
- has internal dispute resolution processes;
- is a member of the Australian Financial Complaints Authority;
- has adequate insurance or a comparable guarantee;
- is a fit and proper person to manage CDR data; and
- has an address for service of documents.

The ACCC believes the accreditation arrangements remain broadly fit for purpose and are adequately rigorous and timely. The ACCC has generally received positive feedback to date regarding its responsibilities in its role as Data Recipient Accreditor.

Under the current accreditation arrangements, there is no formal requirement for the Data Recipient Accreditor to consider applicants' proposed use case for CDR data. As the CDR expands into new sectors, and in order to preserve the integrity of the CDR ecosystem, there would be merit in revisiting this issue with consideration as to whether and to what extent the Accreditor is required or able to also assess or take into account the suitability of an applicant's use case.

Accreditation Registrar

As Accreditation Registrar (Registrar), the ACCC is the entity responsible for maintaining the Register of Accredited Persons, as set out in various sections of the CCA.

In fulfilling this role, the ACCC plans, designs, builds, tests, runs and secures enabling technologies for the CDR. The ACCC also assists the onboarding of data recipients and data holders, and generally supports the operations of the CDR.

The legislation and the rules provide the ACCC with a sufficient degree of discretion in fulfilling its powers and functions here.

Section 56CL(2) of the CCA provides that the ACCC, as Registrar, has the power to do all other things necessary or convenient to be done for or in connection with the performance of the Accreditation Registrar's functions.

Similarly, Division 5.3 of the CDR Rules outline the rules relating to the ACCC's role in relation to the Register of Accredited Persons. This includes maintaining the security, integrity and stability of the Register and associated database including undertaking or facilitating any testing by CDR participants for that purpose.

The build, continued development, maintenance and operation of the Register is a complex and technical role. It has required a rapid expansion of the ACCC's capabilities and systems. While the register does not in itself facilitate the flow of an individual's consumer data, it does enable the flow of permissions and authorisations needed before data can be shared and is a critical point of continuity and security for the CDR system.

The ACCC has successfully built and continues to deliver a well-functioning register. This role has required the ACCC to substantially increase the skill set of its staff and has required adjustments to the ACCC's governance framework.

In order to deliver and maintain this register, the ACCC's employment of IT and security contractors has expanded materially. This has presented new challenges for the agency in terms of oversight requirements and technical capability. Existing limitations on the number of senior executives has exacerbated challenges associated with providing the requisite managerial oversight.

As the CDR program continues to expand, consideration should be given to whether this responsibility, skill set and capability are best aligned with the ACCC as regulator, or some other organisation.

Program Coordination

Given the various statutory requirements and application to the different CDR agencies, the successful delivery of the CDR program requires strong coordination between agencies.

CDR Rules are made by the Minister responsible for the CDR, with this Minister also responsible for the Instruments which designate sectors of the economy for the purposes of the CDR.

As outlined above, the data standards play an important role in establishing the format and process by which data needs to be provided to consumers and accredited data recipients within the CDR system. The data standards are determined and set by the Data Standards Chair, on advice from the Data Standards Body. As noted in the Explanatory Memorandum, the Data Standards Chair is able to make data standards about:

- the format and description of CDR data;
- the disclosure of CDR data;
- the collection, use, storage, security and deletion of CDR data;
- de-identifying CDR data; and
- matters included in regulations.

Data standards must be published and, under the legislation, participants are able to enforce contractual rights under the CDR to access data in a format and manner consistent with the data standards.

As the CDR is rolled out and introduced into new sectors there is a step-change in the complexity and velocity of developments in the ecosystem. This is presenting challenges.

Enforcement and compliance

As noted above, under the existing statutory arrangements the ACCC and the OAIC have compliance and enforcement responsibilities in relation to the CDR.

The legislation and the CDR Rules make clear the obligations on CDR participants when it comes to complying with the requirements of the CDR.

The key aims of the ACCC when it comes to its compliance and enforcement responsibilities are:

- to ensure CDR consumers can trust the security and integrity of the CDR regimes and to signal that the ACCC will take appropriate and proportionate compliance and enforcement action;
- to ensure that as many consumers as possible can benefit from the CDR by having all data holders in designated sectors live in the CDR ecosystem with the functionality to share consumer data; and
- to ensure that all CDR participants are aware of the ACCC's compliance approach.

As the CDR is a new, complex and evolving regulatory regime it has been apparent that data holders, accredited data recipients and other stakeholders are still learning to navigate the CDR environment.

Accordingly, the ACCC has used a risk-based approach to monitoring and assessing compliance matters and taking enforcement action. As set out in the ACCC/OAIC Compliance and Enforcement Policy a non-exhaustive list of factors have been established to influence the appropriate enforcement approach.²

² ACCC, [ACCC/OAIC Compliance and Enforcement Policy for the Consumer Data Right](#), May 2020

This policy also sets out the range of enforcement options available to respond to and resolve breaches of the CDR legislation (including the Privacy Safeguards, Rules and Data Standards). These include:

- administrative resolutions;
- infringement notices (ACCC);
- court-enforceable undertakings;
- the suspension or revocation of accreditation (ACCC);
- determinations and declaration power (OAIC); and
- court proceedings.

A number of areas of priority conduct have been identified which could result in significant detriment to consumers and the integrity of the CDR regime. This includes the repeated refusal of data holders to disclose or frustrate data sharing; misleading or deceptive conduct; the collection of CDR data without a valid consumer consent; the misuse or improper disclosure of CDR consumer data; and insufficient security controls.

In line with the broader compliance and enforcement policy, the ACCC has reserved the use of formal enforcement for conduct that directly impacts consumers' use of the CDR. To date, the ACCC has administratively resolved a number of specific instances of non-compliance by Data Holders with the CDR obligations through an agreed rectification schedule, and published this schedule on the CDR website for the benefit of all CDR users. We have also undertaken detailed investigations of some organisations that have not complied with their CDR obligations over an extended period.

As more data holders enter the CDR ecosystem, the ACCC has sharpened its focus on ensuring that high quality data is shared by CDR data holders, recognising that this is crucial to the effective functioning of the CDR.

The ACCC has also undertaken a number of enforcement investigations, including several that remain underway.

6. Future implementation of the CDR

The growth and expansion of the CDR beyond open banking will have a significant influence on the advancement of Australia's digital economy. However, as acknowledged above, the complexity that comes with delivering the CDR is substantial and has been under-estimated by many participants.

The growth of the CDR

The continued delivery, roll out and uptake of the program will take some time and create a different set of challenges to those that have been encountered thus far. This requires a strategic, considered approach.

The initial period of growth in the CDR is expected to be driven from the 'supply side'. Fintechs and other Accredited Data Recipients rightfully see the CDR as an opportunity to offer new and innovative products that will be attractive to consumers who consent to sharing their data.

The ACCC expects that as more participants enter the CDR system new – and often unexpected - value propositions will emerge which enable consumers to leverage the opportunities that come with sharing their data. The range of possibilities will be expanded

as new sectors come into the regime, as well as opportunities that will come from the extension of the CDR into payment initiation. Over time this should precipitate a significant expansion on the 'demand side' of the CDR, as consumers adopt these innovative products.

As this expansion occurs, the ACCC is learning from the challenges of the CDR's initial phases, in order to inform subsequent phases as the CDR expands into new sectors of the economy.

The ACCC understands that in its formative stages, expansion of funding for the CDR program has necessarily been iterative, as the size and scope of roles has been explored and developed. This iterative funding approach does, however, generate challenges in terms of planning and retention of capability. The ACCC encourages the development of a longer-term resource plan to support CDR agencies to deliver the program.

Similarly, while early focus has understandably been on successful roll-out of the CDR, the ultimate measure of success will be the expansion of innovative use cases by data recipients and the take up of products and services by increasing numbers of consumers. While it will not be the role of government to develop this, the ACCC considers it will be important for there to be a step-up in engagement with businesses and consumers to support this expansion in the next phase of CDR.

The regulatory framework

Notwithstanding the significant delivery challenges, the broader statutory framework for Australia's CDR regime remains sound. The four government entities involved in its delivery all have statutory obligations and powers, that are balanced against their broader organisational priorities. As the system continues to evolve, consideration should be given to arrangements that ensure that operational and implementation decisions are more clearly coordinated. Consideration should be given to consolidation or reallocation of some of the CDR's roles and functions.

The ACCC is supportive of a specialist agency being tasked with the implementation of the CDR. Further, the ACCC is supportive of a functional separation of the entities responsible for the rule-making, operations and enforcement. This mirrors the regulatory principles in many other mature markets, such as energy, and the UK's open banking regulatory framework.

In many regards, the roll-out and approach of the CDR is world leading and other countries seeking to introduce data portability policies are following developments in Australia with interest. The ACCC looks forward to making an ongoing contribution to this program, which will fundamentally improve outcomes for consumers and enliven competition. It is important to ensure, however, that the statutory arrangements are sufficiently supported by more coordinated delivery arrangements.



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Statutory Review of the Consumer Data Right

ACCC Supplementary Submission

June 2022

Background

The Australian Competition and Consumer Commission (ACCC) lodged a submission to the Statutory Review of the Consumer Data Right on 20 May 2022. That submission provided comments on the ACCC's experience with the current Consumer Data Right (CDR) framework and suggested some improvements to assist the future implementation of the CDR.

The ACCC has also recently made a submission to Treasury's Sectoral Assessment of Non-bank Lending where, amongst other things, the ACCC suggested consideration be given to the need for a fiduciary interest test in the CDR legislative framework.

This suggestion was made in recognition of the potential for there to be a materially higher proportion of non-bank lending customers who find themselves to be in vulnerable circumstances. This is particularly the case given the range of non-bank lenders that specialise in providing loans to 'non-conforming borrowers' such as those who may be self-employed, have a poor credit history or are experiencing financial hardship, and who otherwise struggle to obtain finance from the banking sector.

We appreciate that consideration of a fiduciary interest test may be better considered as part of the wider Statutory Review of the CDR. We support consideration of the need for a fiduciary interest test that would apply across all CDR sectors and note that the introduction of such a test would likely require an amendment to Part IVD of the *Competition and Consumer Act 2010* (Cth).

Consideration of a fiduciary interest test

The ACCC believes there is merit in considering amendments to the CDR legislative framework that would require CDR participants to use consumers' CDR data *in the consumer's best interests* when providing them with a good or service. The test could include elements such as a duty of care to the consumer, and requirements to ensure confidentiality and avoid conflicts of interest.

Over recent years academic studies have highlighted the importance of data-related fiduciary tests, in acknowledgement of the trust that consumers place in organisations that handle their data, and their subsequent vulnerability to harm if their data is misused.¹ In the Australian context, there has also been concern that existing legal rules preventing organisations from unfairly taking advantage of consumers' data (such as the prohibition of unconscionable conduct under the Australian Consumer Law) are inadequate in the face of the increasing use and reliance on personal and consumer data for commercial transactions.²

The ACCC believes the introduction of a fiduciary interest test could support consumer uptake of the CDR by providing consumers with a greater level of confidence that their data will be used securely and in their best interests. Further consideration is needed to assess how a fiduciary interest test could be drafted to ensure that, in addition to protecting consumers, it improves consumer choice and competition in designated sectors without imposing an excessive regulatory burden. Consideration will need to be given to the content of any fiduciary interest test and which CDR participants will be subject to the duty. These are complicated questions that will require further analysis, including through a rigorous consultation process.

¹ See e.g. Ariel Dobkin, 'Information Fiduciaries in Practice: Data Privacy and User Expectations' (2018) 33(1) *Berkley Technology Law Journal* 1; Jack Balkin, 'The Fiduciary Model of Privacy' (2020) 134(1) *Harvard Law Review Forum* 11; and Neil Richards and Woodrow Hartzog, 'A Duty of Loyalty for Privacy Law' (2021) 99 *Washington University Law Review* 961.

² Moshood Abdussalam, 'Regulating advantage-taking in the formation and renewal of contractual relations in the technology management age: A focus on consumer contracts' (2021) 28 *Competition and Consumer Law Journal* 335.