



28 February 2018

# **CONSUMER DATA RIGHT CONSULTATION**

## Submission to the Economics Legislation Committee on the Treasury Laws Amendment (Consumer Data Right) Bill 2019

### **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.

To find out more about CHOICE's campaign work visit [www.choice.com.au/campaigns](http://www.choice.com.au/campaigns)

57 Carrington Road Marrickville NSW 2204

Phone 02 9577 3333 | Fax 02 9577 3377 | Email [campaigns@choice.com.au](mailto:campaigns@choice.com.au) | [www.choice.com.au](http://www.choice.com.au)

The Australian Consumers' Association is a not-for-profit company limited by guarantee. ABN 72 000 281 925 ACN 000 281 925

# CONTENTS

<b>INTRODUCTION</b>	<b>2</b>
Recommendations	3
Identifying gaps in the CDR legislation	4
Ensuring easy access for consumers to their data	5
Third party accreditation	8
Expanding the definition of consumer data	9
Empowering consumers within the CDR system	11

## INTRODUCTION

CHOICE appreciates the opportunity to provide the following comments to the Senate Economics Legislation Committee on the *Treasury Laws Amendment (Consumer Data Right) Bill 2019* (the Bill).

CHOICE is strongly supportive of the spirit and the intention of the Consumer Data Right (CDR). The CDR was conceived to empower consumers through improved access to their data, and to facilitate consumer mobility between products and services. Providing consumers with relevant and accessible information about the products they consume and services they use should lead to both better individual consumer experiences and more competition in markets. Providing consumers with access to their own data in a convenient format should improve their ability to drive competition on the demand side by rewarding those businesses that best meet their needs or preferences, and consequently encourage the development of new products and services. In order to succeed however, the CDR must be consumer-focused, efficient, and fair.

A new system that involves consumers providing more data to third-parties must prioritise protections so that data is used to deliver positive consumer outcomes rather than used to charge people more or target them with poor-value products. A clear disclosure regime that lets people know how their data is used is important, but not enough.

Telling people how their data is used will not stop unscrupulous practices. The system should prevent poor practices before they emerge. Companies must be required to think about consumer protections and the best interests of consumers when they use consumer data. Otherwise, there is a risk that the implementation of the CDR will be used by companies to exploit consumers, rather than foster competition and lead to better products and services.

We fully appreciate the potential benefits of CDR reform, if designed and implemented well. CHOICE is broadly supportive of the Bill, and is pleased to see many of the concerns we raised in earlier consultation processes have been addressed in the Bill. However, some concerns have yet to be addressed; this submission offers some further comments and recommendations to ensure that the implementation of the CDR improves consumer access to data while simultaneously protecting consumers from harm. Appropriate consumer protections are important to the success of the CDR, and must be in place prior to the implementation of this legislation. Given this, CHOICE is concerned about the aggressive timelines of this inquiry, and the implementation of the legislation, given that a number of major consumer concerns remain unresolved.

To ensure that the CDR delivers on its outcomes, we make the following recommendations and look forward to an improved process for consultation and policy development for the next stages of the CDR rollout across other sectors.

## Recommendations

- Treasury should commission a more comprehensive Privacy Impact Assessment, which will give consideration to the final Rules, Standards and insights from consumer testing.
- Treasury should fund additional consumer research. This should be undertaken prior to the ACCC Rules being finalised. Attention should be given to examining processes around revoking consent, managing consent, and the re-authorisation process.
- Treasury must provide clarity on the interaction between the standards, Rules and legislation with regard to comprehension, privacy, design of the payloads or data batches, accreditation and authorisation.
- Treasury should implement a set of guiding consumer-centric principles to shape the nomination and delivery of CDR data sets in each sector.
- The ACCC should be given the powers to clearly establish which data sets must be available freely for access by all consumers to ensure that the CDR system is equitable.
  - Given the evolving nature of data use, these data sets should be reviewed every three years, at a minimum.
- The ACCC should have the power to set a price for data 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.
- 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.
- Treasury should require that a tiered accreditation system is consistent across sectors, and is simple and accessible for consumers.
- The ACCC should ensure that the consumer data rules restrict the use of derived data to guarantee a high level of protections for consumers.
- The Committee should recommend the Bill be amended to ensure that data relating to a product or service within the CDR cannot be used to the detriment of consumers.
- Treasury should ensure that consumer and business education is a core part of the rollout of the CDR.

## Identifying gaps in the CDR legislation

As the first reform in Australia intended at empowering consumers with greater access to and portability of their own data, it is critical that the CDR builds confidence and enables consumers to participate and extract the intended value of such reforms. We fully appreciate the potential benefits of CDR reform, if designed well. We need to ensure that the CDR framework adequately protects, informs and empowers consumers with their data.

CHOICE is concerned that the assessment process for the CDR legislation has not been sufficient and could leave gaps in consumer protections. CHOICE is concerned that:

- The CDR system relies heavily on the UK's data standards, but the UK's Midata scheme is tailored to suit a very different regulatory environment. This poses problems given the UK has stronger data protections in place than Australia;
- The proposed consumer research to inform the data standards, ACCC Rules and Privacy Impact Assessment is inadequate both in scope and scale, as it has not fully explored consumer understanding and engagement with consent. More extensive, iterative testing must be undertaken to ensure that consumers are empowered in the CDR system. CHOICE is concerned that this research may not be completed in time to inform the ACCC Rules or the Privacy Impact Assessment;
- No clear overarching framework has been provided to connect the technical standards to the ACCC Rules and policy intent of the reform.

Before the legislation is implemented, any gaps that may lead to consumer harm need to be properly identified, assessed and addressed. In order to do this, we recommend:

- A new Privacy Impact Assessment be conducted to include a more detailed consideration of the final Rules, Standards and insights from consumer testing;
- Adequately resourcing iterative consumer research prior to the ACCC Rules being finalised. Attention should be given to examining processes around revoking consent, managing consent, and the re-authorisation process.
- Treasury must provide clarity on the interaction between the standards, Rules and legislation with regard to comprehension, privacy, design of the payloads or data batches, accreditation and authorisation.

Introducing this reform without full consideration of these issues will create a system with loopholes that can enable businesses to harm consumers by unfairly discriminating and causing harm to consumers by targeting them with unsuitable products and services.

This reform was meant to be about addressing the power imbalance between consumers and businesses which currently hold data and use it to influence their customers or potential customers. The reform has to reset this balance of power. As it is, the CDR risks giving industry groups more ways to use data to target and harm people rather than for people to better navigate markets.

Given these concerns and the work required to address them, it is in the interests of consumers that the 1 July 2019 start date be extended.

## Recommendations 1, 2 and 3

- Treasury should commission a more comprehensive Privacy Impact Assessment, which will give consideration to the final Rules, Standards and insights from consumer testing.
- Treasury should fund additional consumer research. This should be undertaken prior to the ACCC Rules being finalised. Attention should be given to examining processes around revoking consent, managing consent, and the re-authorisation process.
- Treasury must provide clarity on the interaction between the standards, Rules and legislation with regard to comprehension, privacy, design of the payloads or data batches, accreditation and authorisation.

## Ensuring easy access for consumers to their data

The CDR aims to provide consumers with a 'right to efficiently and conveniently access specified data.'<sup>1</sup> In order for the CDR to deliver on this in a meaningful way, the types of data that data holders are required to provide should contribute to the broader goal of the CDR:

'to give customers more control over their information leading, for example to more choice in where they take their business, or more convenience in managing their money and services.'<sup>2</sup>

While this broader goal is sound, there need to be clearer, consumer-centric guiding principles enshrined in legislation to guide the ACCC's decisions on access to certain data sets. The method of transmission and the ways in which data sets can be accessed is also vital to ensuring that the CDR delivers value for consumers and the competitive process. Simply making data available will not result in better-informed consumers and more competitive markets – it is necessary that the data is also accessible and useable. The importance of the

---

<sup>1</sup> *Treasury Laws Amendment (Consumer Data Right) Bill 2019*, [Explanatory memorandum](#), pg.3

<sup>2</sup> *Ibid.* pg.3

end user experience cannot be understated; ‘one click’ processes for downloading and uploading data will aid in increasing usability for consumers.

The Bill should contain a set of guiding principles for determining relevant data sets and how they will be delivered to consumers. These principles should also ensure that the long-term interests of consumers will guide decisions about what data is made available. 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. These decisions cannot be ad-hoc, and should be driven by a set of principles that ensure that the design of the CDR across each sector is consistent. These principles should provide guidance on the types of data that data holders will need to provide and address overarching concerns to ensure that businesses act in the long-term best interests of consumers. Any short-term cost to business in reworking systems to provide this information must be balanced against the long-term gains for consumers.

At a minimum consumers should be able to request and use:

- Customer-provided data that is kept in digital form, including historical data, for the period that data holders are required to keep it;
- Usage data, including transaction data, that is generated as a result of a customer’s usage of a product or service;
- Detailed product data, including information on price, fees, rates and charges; and
- Data that companies hold about them, including derived data that relates to them.

For every sector, these provisions should be outlined in Rules determined by the ACCC.<sup>3</sup> Decisions in the future should be conducted under a framework that puts consumers’ interests first. These principles should be reviewed after three years, as part of the review of the CDR Regime, to ensure that they remain relevant in a rapidly changing data landscape.

The *Explanatory memorandum* states that the Bill introduces the idea of ‘chargeable data’, which is the ‘data that a person is required to disclose where the Minister has stated in the designation instrument that specific persons can charge a fee, either for the use or disclosure of the data, or both.’<sup>4</sup> CHOICE believes that the ACCC is the most appropriate body to make decisions on chargeable data sets. The ACCC has the resources, expertise and flexibility to designate datasets in the interests of consumers. 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 these powers sitting with the Minister. The legislative framework that governs data must be

---

<sup>3</sup> The [ACCC Rules Outline](#) explains that these provisions will be present in the banking sector, as outlined in the relevant designation instrument. It is important that consumers are able to request and use detailed data sets across every sector covered by the CDR.

<sup>4</sup> *Treasury Laws Amendment (Consumer Data Right) Bill 2019*, [Explanatory memorandum](#), p.26

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 providing remedies following harm. The regulator is best placed to design, modify, and enforce this framework. The ACCC must be able to make rules to ensure that relevant data sets are accessible by consumers as new data technologies continue to emerge.

CHOICE is also concerned that the Bill will allow businesses to set their own prices for data access. The Bill does not grant the ACCC powers to set a price for data access but instead enables the regulator to intervene in instances where a fee for data access is unreasonable. This may place an unfair burden on consumers who are hit with disproportionate data access fees and have to wait for the regulator's intervention before receiving a remedy.

The scope of chargeable data sets is yet to be fully understood - as are the consumer benefits of accessing these data sets. It is CHOICE's first preference that data access is free but 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. While the specifics of fees for data access are yet to be determined, CHOICE is concerned that the introduction of a fee will undermine the goal of the CDR - to empower consumers to access their data. It is vital that as a first step, the legislation makes clear which data sets must always be free for consumers to access in order to prevent businesses from exploiting consumers who are seeking to exercise their powers in the CDR system. These free data sets should include data that relates specifically to a consumer's individual use of a product or data that is integral to the use of a product. For example in the banking sector, this would mean data holders could not charge customers for access to their transaction data. In the energy sector we would expect that consumers would be able to get free information about tariffs. 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 consumers.

CHOICE strongly opposes businesses being given the power to set their own prices for chargeable data sets with the ACCC intervening only when the price is deemed unreasonable or excessive. The system should proactively consider how to deliver equitable outcomes rather than function as a response to business behaviour that exploits consumers. Additionally, Treasury must consider how consumers suffering financial hardship will access their data.



Businesses should be required to waive data access fees for those who cannot afford to pay them.

## Recommendations 4, 5, 6, and 7

- Treasury should implement a set of guiding consumer-centric principles to shape the nomination and delivery of CDR data sets in each sector.
- The ACCC should be given the powers to clearly establish which data sets must be available freely for access by all consumers to ensure that the CDR system is equitable.
  - Given the evolving nature of data use, these data sets should be reviewed every three years, at a minimum.
- The ACCC should have the power to set a price for data 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.
- 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.

## Third party accreditation

The Bill outlines three key types of participants in the CDR system: data holders, accredited data recipients and CDR consumers. CHOICE supports the nomination of the ACCC as the Data Recipient Accreditor, which will require the regulator to undertake a rigorous process to establish third parties' suitability to become an accredited data recipient. The *Explanatory memorandum* suggests in Section 1.76 that the consumer data rules will allow for third party 'accreditation to be provided at different levels taking into account the different risks associated with the kind of activities undertaken within that designated sector or the kinds of applicants.'<sup>5</sup> A tiered accreditation system is designed to segment accreditation processes according to varying levels of risk, and would require certain types of accredited entities to meet higher standards than others. There is a risk that a tiered system of accreditation may be hard to navigate for consumers, who will have to bear the burden of differentiating between various tiers of accreditation to understand which types of data certain providers can access. Consumers will be faced with the challenge of understanding different tiers of accreditation that vary between sectors unless efforts are made to ensure these are consistent. It is important to simplify the accreditation process as much as possible to ensure that the CDR system is easily accessible for consumers, while still ensuring a high level of protection.

---

<sup>5</sup> *Treasury Laws Amendment (Consumer Data Right) Bill 2018*, [Explanatory memorandum](#), p.34

## Recommendation 8

- Treasury should require that a tiered accreditation system is consistent across sectors, and is simple and accessible for consumers.

## Expanding the definition of consumer data

The CDR must have a clear, functional definition of consumer data that is easily understood by all participants in the CDR. This definition will be important in establishing which data sets should be collected and shared by data holders and will lay the groundwork for accredited third parties gaining express consent from consumers to use or receive this data. In order to achieve this the Bill has expanded upon the definition of consumer data.

The *Privacy Act 1988* considers consumer data to be data that is ‘about’ the consumer. The CDR regime aims to expand upon this, defining consumer data in the *Explanatory memorandum* as that which ‘relates to a consumer.’<sup>6</sup> CHOICE strongly supports this broader definition as it will expand consumer data protections, capturing new data types such as consumer metadata that relates to but is not explicitly about a consumer. This will go further to ensure that data is not misused by individuals and businesses. CHOICE recommends that this definition is clearly incorporated into CDR legislation.

In order for the CDR regime to provide appropriate consumer protections there need to be clear restrictions on the use of certain types of derived data. Though the *Explanatory memorandum* states that ‘[t]he definition of CDR data includes data that is ‘derived’ from data listed in the designation instrument. It means that the Privacy Safeguards continue to apply to CDR data that relates to a consumer even if it has been subsequently transformed in the hands of the accredited data recipient’, CHOICE is still of the view that the use of this data should be restricted.<sup>7</sup> Data that has been anonymised can be re-identified by overlaying external datasets. Without appropriate protections, this process poses a risk to consumers who may be reidentified and discriminated against by businesses. Some data points, when combined, may act as a proxy for race or other protected attributes.

The European Union’s General Data Protection Regulation (GDPR) defines the concept of “anonymous data” as data that is impossible to reidentify.<sup>8</sup> By contrast, “pseudonymised data” is defined as ‘the processing of personal data in such a way that the data can no longer be

---

<sup>6</sup> *Treasury Laws Amendment (Consumer Data Right) Bill 2018*, [Explanatory memorandum](#), p.22

<sup>7</sup> *Ibid.* p.23

<sup>8</sup> *General Data Protection Regulation*, European Parliament, Recital 26.

attributed to a specific data subject without the use of additional information.<sup>9</sup> The GDPR permits data recipients to use pseudonymised and anonymised data for purposes beyond which it was collected, so long as it is not reasonably likely that this data could be used to re-identify a person. Consumer data rules made by the ACCC should provide clarity around the use of derived data and ensure that appropriate restrictions are placed on its use.

The Bill will establish three categories of CDR data - data that relates to a CDR consumer including data that relates to a person's transactions, CDR data that relates to a product, and CDR data that is derived from these primary sources. The *Explanatory memorandum* states that 'where information is primarily about a good or a service, but may reveal information about a consumer's use of that good or service, it relates to the consumer.'<sup>10</sup> This does not specify what 'a consumers' use' means in this context and this needs to be clarified in the legislation.

CHOICE is particularly concerned that product or service information may be used to identify consumers or cohorts. For example, a consumer may be matched with a particular energy product that they access through a hardship program. When a consumer accesses a product or service, the resulting data will reveal which product is accessed and how it is accessed. The latter may include data relating to transactions which clearly falls within the definition of data that 'relates to' a customer in the CDR. It is unclear whether data about a consumer's access to a product or service is considered 'information about a consumer's use of that good or a service', and needs to be clarified in legislation. This will ensure that consumers are not at risk of being identified through seemingly general product information that may reveal information about their personal circumstances. These insights could be used by businesses to identify and discriminate against individuals or cohorts of consumers, For example if a person on a low income with a history of late payments could be identified through product data, they could be presented with a more costly energy deal that incorporates a discount for paying on time (that the energy company knows from the data will be unlikely to be utilised by this particular customer). There needs to be clear protections in the CDR legislation to ensure that data relating to a product or service within the CDR cannot be used to harm consumers.

## Recommendations 9 and 10

- The ACCC should ensure that the consumer data rules restrict the use of derived data to guarantee a high level of protections for consumers.
- The Committee should recommend the Bill be amended to ensure that data relating to a product or service within the CDR cannot be used to the detriment of consumers.

---

<sup>9</sup> Ibid.

<sup>10</sup> *Treasury Laws Amendment (Consumer Data Right) Bill 2018*, [Explanatory memorandum](#), p.22

## Empowering consumers within the CDR system

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. The *Explanatory memorandum* suggests that ‘the Information Commissioner may also conduct educational programs in order to assist participants in the CDR to understand their rights and responsibilities under the CDR regime.’<sup>11</sup> Education for consumers and businesses participating in the CDR should be a core part of the CDR rather than merely a possibility. Consumer education programs should be 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. It is also vital that data holders and accredited parties receive appropriate education in order to understand their new responsibilities within the CDR regime. Businesses should be encouraged to proactively let consumers know about their new rights.

### Recommendation 11

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

---

<sup>11</sup> *Treasury Laws Amendment (Consumer Data Right) Bill 2018*, [Explanatory memorandum](#), p.72.