



12 October 2018

Kathryn Wardell
The Treasury
Data@treasury.gov.au

Dear Ms Wardell,

ACCAN thanks the Treasury for the opportunity to submit to its consultation on the further provisions of the exposure draft of the *Treasury Laws Amendment (Consumer Data Right) Bill 2018*. The revisions to the draft legislation have addressed some of ACCAN's concerns with respect to the clarity of drafting, however many of the concerns set out within our initial submission remain. We encourage the Treasury to consider further revisions for the final bill.

As noted in our initial submission, there are issues with respect to:

- the extent to which the bill addresses fundamental and entrenched information asymmetries;
- the potential for consumer data to be used for anti-competitive conduct; and
- the scope of consumer privacy protections.

(ACCAN, 2018)

ACCAN's concerns regarding the substance of consent requirements have been broadly addressed in the *Consumer Data Right Rules Framework* which sets out the ACCC's in principle approach to rules development. ACCAN will comment further on the suitability of the draft rules when they are released.

The Consumer Data Right (CDR) has the potential to provide significant benefits, particularly to those consumers with limited financial resources. Although supportive of the proposed CDR reforms, ACCAN considers that further refinement of the legislation is required to address asymmetrical information, prevent the use of consumer data for price discrimination or targeted price rises and prevent breaches of consumers' privacy through the loss, theft or misuse of their data.

ACCAN believes that these risks can be addressed through comprehensive privacy protections including clear obligations for third party data recipients, targeted policy interventions to prevent emerging information asymmetries, and an exemplary penalties framework for use of consumer data for anti-competitive purposes. ACCAN also calls for the legislation to ban the use of CDR data for re-identification of individuals in order to prevent

consumers facing undue loss of privacy and health and safety risks as a result of malicious parties having access to detailed information about their habits and movements.

The CDR has potential benefits

The CDR has the potential to provide material benefits for consumers. It can empower them to use their data to attain access to service at lower costs, or obtain services that are more suited to their needs. For those consumers on low incomes, the potential benefits are significant; given these consumers typically spend a greater proportion of their income on telecommunications services. Households in the lowest 10% of income earners spend on average just under 10% of their disposable incomes on communications services whereas the average household spends approximately 3.5% (BCAR 2017, p. 27).¹

Transaction costs and information asymmetries are not the same

The proposed reforms benefit consumers by reducing the costs of communicating and transmitting data associated with their commercial activities to different service providers. In technical terms, this is a reduction in *transaction costs* (Coase, 1937). However, the CDR does not entail concrete measures to address entrenched information asymmetries that consumers face when seeking to purchase services. That is, sending data to a different provider does not guarantee it will inform me of the best offer available to me) (Akerlof, 1970). Rather, it merely means that the cost of collecting or examining information has been reduced for the service provider. This is a particular problem in concentrated sectors such as telecommunications where businesses with market power have the incentive to exploit or create information asymmetries (Beales et al., 1981, p. 507).

Although the reform is likely to be beneficial for consumers, it should not be assumed that the CDR will address the material information asymmetries consumers face. In the telecommunications context, recent measures have been implemented to address information asymmetries that had historically resulted in significant consumer detriment. These measures include:

- *Telecommunications (NBN Consumer Information) Industry Standard 2018;*
- *Telecommunications Service Provider (NBN Service Migration) Determination 2018;*
and
- Monitoring of broadband performance by the ACCC.

Early indications are that these actions, which go to the source of addressing information asymmetries, are likely to protect consumers from detriment and result in better market outcomes. Moreover, these measures are likely to address the emerging trust deficit with service providers that went to the heart of the ongoing stability and viability of the nbn service market.

¹. The second lowest decile of income earners similarly spend above the household average of 3.5% and typically spend around 6% of their disposable income on communication services

ACCAN is supportive of further refinements to the CDR legislation and accompanying rules to address material information asymmetries, and to preclude the use of consumer data by service providers to the detriment of consumers. As part of this process consideration of the potential for service providers to disclose information relevant to consumer decision making e.g. detailed network coverage and throughput data, in accessible formats should be considered. The provision of relevant information to consumers, in conjunction with policies to constrain information asymmetries to maximise the benefits for consumers from the CDR system, has the potential to enhance competition and increase economic efficiency.

The transfer of consumer data has risks

The CDR creates a process for the frequent porting of detailed information, potentially on a real-time basis, concerning individuals, transactions, locations, products, services and prices. Although likely to provide material benefits to consumers, the porting and communication of this data poses significant risks if the data is misused, lost or stolen.

The bill does not address the risk that consumer data may be used for anti-competitive purposes (ACCAN, 2018, pp. 17–30). Although the risk that CDR data may be used for price discrimination or anti-competitive conduct to the detriment of consumers in the communications sector is low, the potential losses are significant. The risk of such conduct in the banking sector is however very high and likely losses are several orders of magnitude greater.²

In order for consumers to suffer loss through anti-competitive conduct, businesses merely need to set prices at or near the same levels for specific markets or sub-groups of consumers, they do not need to explicitly collude. This ‘clustering’ can more easily occur when service providers have access to detailed information concerning consumer characteristics, pricing and product information that is frequently updated, and is a feature of the existing banking market (PC 2018, p. 8).

The incentives to price discriminate are material, given the highly concentrated market structure and the capacity for service providers to exercise market power to achieve ‘extraordinarily high’ returns (Grattan Institute 2017, p. 31). The potential for consumer data to be used to provide the evidence base for price discrimination is significant, and ACCAN is concerned that this may result in material detriment to consumers through high prices for services.

However, in principle price discrimination may benefit consumers if, and only if, it increases total output – that is, services are offered that match the needs of underserved groups (Schmalensee, 1981; Varian, 1985, p. 2). ACCAN has concerns, however, that models of price discrimination may be developed, not with a view to providing services to underserved

². In our initial submission ACCAN (2018 p. 29-30) estimates the potential losses for consumers in the telecommunications sector as a result of price discrimination or cartel behaviour, and outlines the continued risks in the finance sector in light of recent enforcement action by ASIC for interest rate fixing.

consumers (that is the marginal consumer) but rather to extract maximum rents from all consumers.

Although this condition is more likely to be met in the telecommunications sector, it may entail considerable losses by the rest of the consumer population through higher prices. Recent analysis undertaken by the Productivity Commission (2018, p. 12) indicates that this criteria cannot be met within the banking sector without a material increase in the total quantity of loans on offers.

In order to address the risk that CDR data is misused, ACCAN supports the creation of a framework of exemplary penalties to be included within the legislation that bar the use of CDR data for anti-competitive purposes. In the absence of strong financial incentives for CDR participants to act competitively, there is the potential for consumers to face worse outcomes in terms of price and service offerings under the CDR than are available in the marketplace now.

Privacy safeguards – the weakest link

ACCAN welcomes revisions to the legislation that clearly set out the applicability of the privacy safeguards to each type of CDR participant. However, the current form of the legislation does not provide a comprehensive framework to address the privacy concerns of consumers. In particular:

- the current framework of protections only apply when data is transferred;
- the framework provides for limited protections of consumer data once it is transferred out of the system to non-accredited entities;
- the framework does not provide for any penalties for seeking to re-identify consumers; and
- the framework, in effect, creates a two-tiered or possibly three-tiered system of privacy protection.

Although providing materially better privacy protections for consumer data within the system, once data leaves the system consumers face the prospect of losing the enhanced protections that they have been provided. This is concerning as the absence of clear and comprehensive privacy obligations for third party recipients will reduce or eliminate recipients' incentives to take appropriate measures to protect consumer data.

In the absence of the comprehensive application of the Privacy Safeguards, there are genuine risks that malicious individuals and organisations will target the weakest link in the privacy framework – third parties covered by the Australian Privacy Principles. For consumers this has the potential to result in material loss as they may transfer significant volumes of their data to otherwise trusted third parties (e.g. accountants or tax agents) and subsequently find that their data has been stolen, lost or otherwise compromised. This risk was identified by

Treasury as part of its *Review into Open Banking* (Treasury, 2017, p. 22), and continues to be a weakness in the legislation.

Although the draft legislation does empower the ACCC to create rules to impose additional privacy obligations on third party recipients of consumer data, it has not committed to doing so at this point. As the initial rules framework has focused on accredited entities commencing with the four major banks there is little guidance as to how non-accredited third parties may interact with the system or receive consumer data.

A ban on re-identification of individuals is an essential privacy measure

The data to be transferred under the CDR is an exceptionally rich source of information, and would allow for individuals to be identified based on their patterns of expenditure, personal information, services that they use and geographic data. This data may be used to identify behavioural patterns or identify where and when a consumer is likely to be based on transactional or geographic data, enabling malicious parties to target vulnerable individuals. Accordingly ACCAN supports a ban on the use of CDR data for re-identification of consumers and would support exemplary penalties being imposed to dissuade the use of CDR data for this purpose.

The imposition of civil and criminal penalties for attempting to or successfully re-identifying individuals is an important measure to protect individuals from loss of privacy and potential harm. ACCAN supports an explicit ban on the use of CDR data to re-identify individuals, and considers that there are significant risks to individual privacy and welfare should the legislation fail to ban such conduct.

Privacy breaches are a risk to the CDR framework

Privacy is an essential human right, and how consumers' data is managed, protected and used shapes how they interact with service providers and the digital world. A breach of privacy is a significant issue for consumers, and when breaches occur consumers face material detriment, through loss at a personal and economic level (Acquisti et al., 2013). A loss of privacy also diminishes consumer confidence and trust in service providers and is a material barrier to digital engagement (OECD 2018, p. 45).

The development of comprehensive privacy obligations is essential as the CDR is rolled out across industry sectors and third parties are allowed to access and receive consumer data. In the absence of comprehensive privacy protections, the prospect of data theft or loss is material, and should such events occur confidence in the CDR scheme may be lost and the benefits of reform forgone.

Consent

In our initial submission ACCAN articulated concerns that the bill did not set out material obligations for system participants to genuinely engage with consumers when seeking their consent to collect or transfer their data. Following the release of the *Consumer Data Right Rules Framework* ACCAN is pleased to see that many of the substantive principles raised concerning consent will be reflected in the forthcoming draft rules.

Further redrafting should be undertaken

ACCAN commends the Treasury for redrafting several provisions of the draft legislation to address technical drafting problems that emerged in the course of consultation, including those outlined in our earlier submission.³ However, on broader amendments to the bill to address material policy issues, we note that there has been less revision.

Further redrafting should be undertaken to address the significant gaps in the applicability of the privacy safeguards and to ensure that consumers have comprehensive privacy protections. In the absence of these protections, it is likely that consumers will be adversely affected through theft, loss or misuse of data and that as a consequence confidence and trust in the CDR system will be diminished. This may result in the potentially significant benefits of the CDR being forgone for a prolonged period of time until these privacy issues are addressed, and confidence is re-established.

ACCAN thanks the Treasury for the opportunity to comment on the draft exposure bill. Should you wish to discuss this submission further please do not hesitate to get in contact.

Yours Sincerely,

Gareth Downing

Senior Policy Analyst

³. Notably recommendation 7 concerning the operation of s 56EF and its potential to ban data collection.

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