

20 November 2019



Office of the Australian Information Commissioner  
GPO Box 5218  
Sydney NSW 2001  
Via email: [consultation@oaic.gov.au](mailto:consultation@oaic.gov.au)

**Re: Draft CDR Privacy Safeguard Guidelines**

The Australian Communications Consumer Action Network (ACCAN) thanks the Office of the Australian Information Commissioner (OAIC) for the opportunity to provide feedback on the Draft Consumer Data Right (CDR) Privacy Safeguard Guidelines (the Draft Guidelines).

ACCAN is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards communications services that are trusted, inclusive and available for all.

ACCAN has an interest in the current consultation as the development and implementation of the CDR regime will influence the rollout of the CDR regime within the telecommunications sector. We have made previous submissions to the Treasury<sup>1</sup> and the Australian Competition and Consumer Commission (ACCC)<sup>2</sup> regarding the CDR regime, and will continue to monitor its implementation across different sectors in anticipation of its application to the telecommunications sector.

'Possible adverse consequences'

While we note that 'adverse consequences for a consumer' is referenced in the Draft Guidelines<sup>3</sup> as something for CDR entities to consider, ACCAN believes that there should be further guidance in relation to this throughout the Draft Guidelines. Additional examples or scenarios explaining the real life impact for consumers could help to ensure that different CDR entities have a more standardised understanding of a) what adverse consequences entail and b) the spectrum of circumstances that may affect whether not handling CDR data in accordance with the CDR regime will have adverse consequences for a consumer. ACCAN believes further examples or scenarios are important as 'possible adverse consequences for consumers' are

<sup>1</sup> See for instance ACCAN, 2018a 'Treasury Laws Amendment (Consumer Data Right) Bill 2018 Consultation – Submission by the Australian Communications Consumer Action Network', ACCAN, available:

<https://accan.org.au/our-work/submissions/1536-consumer-data-right-submission>

<sup>2</sup> See for instance ACCAN, 2018b 'Submission to the ACCC Consumer Data Right Rules Framework Consultation', ACCAN, available: <https://accan.org.au/our-work/submissions/1549-cdr-rules-framework>

<sup>3</sup> Chapter 1, page 8, paragraph 1.34

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referenced throughout the Draft Guidelines in relation to determining whether a CDR entity took ‘reasonable’ steps or actions.

### ‘Reasonable steps’

Throughout the Draft Guidelines it is explained that what is considered ‘reasonable’ for one CDR entity will differ to what’s considered ‘reasonable’ for another. Different entities will need to put in place different mechanisms, checks and balances to ensure that it is compliant with the CDR regime. Furthermore, the size, resources and complexity of the CDR entity, amongst other things (including possible adverse consequences for consumers, as mentioned above), will also impact on whether steps taken by a CDR entity are deemed reasonable.<sup>4</sup>

While some examples of reasonable steps are provided in chapter 11,<sup>5</sup> given the disparity in what is considered reasonable additional examples should be included in the Draft Guidelines detailing what may constitute reasonable steps. This must include guidance for the reasonable steps that a small business should take, as opposed to the actions a larger business or corporation may be able to implement.

In some instances, it may be beneficial for consumers if the reasonable steps are made more explicit. For instance, chapter 8 outlines what reasonable steps *may include* in relation to ensuring that overseas recipients of CDR data can comply with the CDR regime.<sup>6</sup> CDR consumers may be interested to know what steps their CDR entity takes to guarantee that the overseas recipient is able to meet the Privacy Safeguards in the handling of their CDR consumer data.

Finally, in regards to informing consumers about incorrect CDR data being disclosed, chapter 11 states that ‘it is not relevant whether the entity failed to take reasonable steps’<sup>7</sup> to prevent the disclosure of incorrect CDR data. However, in order to facilitate greater transparency within the CDR regime, ACCAN feels that CDR consumers have a right to know whether their data holder implemented, or is implementing, reasonable steps to ensure that their CDR data is accurate, up to date and complete. This may, for instance, impact on a CDR consumer’s loyalty to a data holder, and may impact on their decision to seek services from another entity.<sup>8</sup>

### Stronger language

In some instances in the Draft Guidelines, ACCAN feels that the use of the word ‘could’, which refers to good privacy practice that supplements minimum compliance, should be replaced with the word ‘should’. Many of these relate to chapter 1. For

<sup>4</sup> See for instance chapter 11, page 8, paragraph 11.26

<sup>5</sup> Chapter 11, page 8, paragraph 11.28

<sup>6</sup> Chapter 8, pages 6-7, paragraph 8.25

<sup>7</sup> Chapter 11, page 9, paragraph 11.32

<sup>8</sup> Research has shown, for instance, that more consumers would consider changing providers if their mobile provider misused consumer data, as opposed to the number of consumers that would consider changing providers if their mobile provider was hacked. The same research found that consumers are uncomfortable with the ways in which businesses or organisations address their concerns about privacy and data security. For more information see: KPMG Australia, 2019 ‘Consumer Loss Barometer: The economics of trust’, available: <https://assets.kpmg/content/dam/kpmg/xx/pdf/2019/03/consumer-loss-barometer-2019.pdf>

instance, the suggestions within paragraph 1.25<sup>9</sup> regarding the establishment of robust and effective privacy practices, procedures and systems should be amended to be ‘should’ statements, rather than ‘could’ suggestions.

Similarly, in relation to the CDR Policy to be developed by CDR entities, ACCAN recommends that CDR entities be required to provide information about when the Policy was last updated and offer invitations for providing feedback on the Policy.<sup>10</sup> This would allow greater transparency, information and context for CDR consumers, as they will know when the CDR Policy was last updated and what opportunities they have to provide their feedback or comments. In relation to keeping documents and information up to date, clearer advice must also be offered regarding the timelines for reviewing and updating a CDR management plan. Currently the Draft Guidelines only require that this plan be ‘regularly’ reviewed and updated,<sup>11</sup> whereas other frameworks and documents are required to be reviewed or updated at least annually.<sup>12</sup>

#### Additional examples

Some additional examples would help to illustrate the different ways in which the Privacy Safeguards and the CDR Rules apply in certain situations. While we acknowledge that the examples provided in the Draft Guidelines are neither exhaustive nor prescriptive, we recommend that an example box be included in each chapter, in addition to the in-text examples. Additional examples or suggestions for implementation could be included within chapter 3 in particular, given that consent is so crucial to the CDR regime.

Different resources or links to more information could also aid comprehension of the Draft Guidelines, the Privacy Safeguards and CDR Rules. For instance, in chapter 1 a number of examples of possible practices, procedures and systems that could be implemented to meet Privacy Safeguard 1 are listed.<sup>13</sup> Additional resources may support CDR entities to develop these – for instance, the Draft Guidelines could link to a template for a CDR data management plan. Similarly, more practical examples or guidance could be provided around using the ‘De-Identification Decision-Making Framework’<sup>14</sup> or links could be provided to where practical examples or guidance is available through the OAIC or Data61.

It is important that all examples within the Draft Guidelines are reviewed to ensure that they are appropriate and aid understanding. For instance, the example used under paragraph 9.27<sup>15</sup> appears to relate to disclosure of government related identifiers; however its relationship to the preceding paragraph regarding regulations is unclear. In addition, within chapter 9 clarifications should be made in relation to the

<sup>9</sup> Chapter 1, page 7, paragraph 1.25

<sup>10</sup> Chapter 1, page 9, paragraph 1.41

<sup>11</sup> Chapter 1, page 6, paragraph 1.21

<sup>12</sup> For instance, the Information Governance framework as outlined in Chapter 12, page 11, paragraph 12.37(b)

<sup>13</sup> Chapter 1, page 5, paragraph 1.16

<sup>14</sup> Referenced in chapter 12, page 21, paragraph 12.91

<sup>15</sup> Chapter 9, pages 7-8, paragraph 9.27

differences between adopting, using or disclosing government related identifiers. More specifically, further examples or review could help differentiate between ‘adopting’ and ‘using’ these identifiers,<sup>16</sup> as currently the example appears to indicate little difference between these two terms.

In general, the Guidelines must be regularly reviewed to ensure that all content and examples remain relevant. Unforeseen issues may arise once the CDR is actually implemented, and such issues should be included in the Guidelines to help illustrate best practice or supplement existing guidance.

### Communication with consumers

In the Draft Guidelines, there are references to requirements for CDR entities to communicate with CDR consumers. In most instances, this must be done via electronic means, however different Privacy Safeguards have different requirements. While we understand that these differences are set out in the CDR Rules, from a CDR consumer’s perspective these inconsistencies in communication method may cause confusion or frustration.

For instance, in relation to Privacy Safeguard 11, notices regarding incorrect CDR data being disclosed must be provided via electronic means such as email or through the CDR consumer’s consumer dashboard. Similarly, Privacy Safeguard 13 requires correction notices to be provided electronically and in writing, including via email or through the CDR consumer’s consumer dashboard. However, upon receiving a *request* from a CDR consumer to correct CDR data, data holders and accredited data recipients must acknowledge that they have received the request as soon as practicable, yet this does not need to be provided in writing or through the CDR consumer’s consumer dashboard. This could, for example, be provided via the telephone.<sup>17</sup>

Consumers who are typically contacted via their CDR consumer dashboard or email for other purposes may be confused if they are contacted via phone in relation to an acknowledgement of a correction request. In order to alleviate the possibility of such confusion, and to also ensure greater transparency and trust with CDR consumers, it is vital that CDR entities provide clear information to CDR consumers regarding what communications they will receive, and how they will receive CDR-related information. Given frequent references to notifications and information being provided ‘as soon as practicable,’ and that the CDR Rules also include timeframes ranging from 5 to 10 business days for the provision of notices, this information for CDR consumers must also include clear timeframes within which they can expect to receive information or notifications from the CDR entity. References to ‘as soon as practicable’ must therefore be removed in favour of firm timeframes.

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<sup>16</sup> Chapter 9, page 6, paragraphs 9.17-9.20

<sup>17</sup> As outlined in the Draft Guidelines chapter 13, page 6, paragraph 13.15

CDR entities should be required to include a section in their CDR Policy about communicating with consumers. This should include clear and easy to understand information about expected timeframes; what communication methods are available to CDR consumers (within the limitations set by the CDR Rules); how CDR consumers can request a specific type of communication method from the CDR entity; and what steps the CDR entity will take to ensure that all communications with the CDR consumer will abide by their identified preferences. This information must also specify that communications with consumers must be in plain English, and must be available in a range of accessible formats (within an expected and appropriate timeframe). Similarly, the CDR Policy itself must not only be clearly expressed, easy to understand and easy to navigate,<sup>18</sup> but must also be provided in accessible formats and using plain English.

### Accessibility

It is important that the information and communication provided to CDR consumers is accessible, clear and easy to understand. Although there are two references in the Draft Guidelines to the ‘individual needs of the consumer (for example, additional steps required to make the content accessible)’,<sup>19</sup> this is offered as a factor that may influence a determination of whether notifications are occurring ‘as soon as practicable.’ As such, more could be done to ensure greater accessibility of the CDR regime.

For instance, in respect to paragraph 1.43,<sup>20</sup> we understand that a range of formats may be used to communicate an entities’ CDR Policy. However, ACCAN is concerned to ensure that CDR Policies are provided in accessible formats, meaning that any infographics must have alternative text; any animations or videos must be audio described, captioned and Auslan interpreted; and any text versions must be written in plain English to maximise comprehensibility. Additionally, in relation to Privacy Safeguard 10 regarding notifying consumers about what CDR data was disclosed, CDR entities should be required to have regard not only to the Data Language Standards<sup>21</sup> but also the accessibility of the language they are using.

Finally, ACCAN recommends that the text of paragraph 1.56<sup>22</sup> should be changed<sup>23</sup> so that it reads as follows:

‘Appropriate accessibility measures should be put in place so that the policy may be accessed by consumers with *accessibility requirements* (such as consumers with vision impairment, or consumers from a non-English speaking background). While these accessibility measures would not necessarily have to be available online or in

<sup>18</sup> Chapter 1, page 9, paragraph 1.40

<sup>19</sup> As stated in chapter 5, page 5, paragraph 5.18 and chapter 10, page 4, paragraph 10.16

<sup>20</sup> Chapter 1, page 9, paragraph 1.43

<sup>21</sup> As outlined in chapter 10, page 5, paragraph 10.21

<sup>22</sup> Chapter 1, page 13, paragraph 1.56

<sup>23</sup> Primarily to remove reference to the term ‘special needs’ – for more information around inclusive terminology see: <https://www.and.org.au/pages/inclusive-language.html>

a mobile application (*such as braille, for instance*), there needs to be a clear and accessible method to contact the entity and request this information.'

Please do not hesitate to contact us should you require clarification or additional information on any of the issues raised in our submission.

Yours sincerely,

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