

An update on the proposed consumer data right – August 2018

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1 What is the Consumer Data Right and what is the DCR Bill all about?

On 15 August the Australian (Federal) Government released as an 'Exposure Draft' the *Treasury Laws Amendment (Consumer Data Right) Bill 2018* (**CDR Bill**), for public comments and submissions closing 7 September 2018.

The Consumer Data Right (**CDR**) (if enacted, with effect from 1 July 2019) "will provide individuals and businesses with a right to efficiently and conveniently access specified data in relation to them held by businesses; and to authorise secure access to this data by trusted and accredited third parties".

The CDR will also require businesses to "provide public access to specified information on specified products they have on offer". So the CDR will also have an element of mandatory product disclosure.

The CDR aims to facilitate 'apples with apples' comparison of products and portability of data to facilitate switching between providers. The Government's stated policy rationale for the CDR is "through requiring service providers to give customers open access to data on their product terms and conditions, transactions and usage, coupled with the ability to direct that their data be shared with other service providers, the Government expects to see better tailoring of services to customers and greater mobility of customers as they find products more suited to their needs".

Although expressed as a consumer right, the CDR will also be exercisable by businesses of any size.

The responsible Minister (the Australian Treasurer) may designate a sector *by specifying information within that sector that is held by specified persons (or a specified class of persons)*.

The *Treasury Laws Amendment (Consumer Data Right) Bill 2018* (**CDR Bill**) (when enacted) will enable the Treasurer to confer the right sector by sector, without limitation as to which sectors may be designated.

Importantly, the draft CDR Bill proposes to enable the Treasurer (when conferring the right in relation to a particular sector) to designate (1) categories of information within that sector that is subject to the right, and (2) particular businesses within that sector holding that information.

There will broadly be three categories of CDR data – CDR data that relates to a CDR consumer or has been provided by the consumer, including CDR data that relates to a person's transactions; CDR data that relates to a product (such as product information data like that contained in a product disclosure statement); and CDR data that is derived from these 'primary' sources.

The CDR Bill does not limit information that may be specified to confer the right sector by sector, without limitation as to categories of data. Although the already developed proposal in relation to the CDR in the retail banking sector lists particular retail banking products and basic transactional data sets in relation to each of

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those products, the CDR Bill does not restrict the nature of data sets that might be mandated as subject to the CDR to (say) basic customer record data and transaction data sets.

Accordingly, the Treasurer could designate data sets which include value added data and other derivative data including inferred customer attributes, modelled scores, linked data and imputed or inferred data.

Although the Government states “further sectors of the economy may be designated over time, following sectoral assessments by the ACCC in conjunction with the OAIC”, the Treasurer will have broad discretions. The Treasurer may or may not follow the ACCC’s advice. That noted, the Treasurer is required to ‘consult’ with the competition regulator (the ACCC) and the privacy regulator (the OAIC, being the Office of the Australian Information [Privacy] Commissioner) before specifying a sector, information within that sector, or persons to whom the CDR will apply.

The ACCC may also make a recommendation to the Minister to designate a sector of the economy, provided that the ACCC has first undertaken public consultation in relation to the impact and benefits of the CDR to the sector and consumers within the sector.

The ACCC and the OAIC are responsible for implementation rules for each designated sector.

The draft Explanatory Memorandum states:

“The consumer data rule making powers provide substantial scope for the ACCC to make rules about the CDR. This is because it is important to be able to tailor the consumer data rules to sectors and this design feature acknowledges that rules may differ between sectors. Variance between sectors will depend on the niche attributes of the sector and consumer data rules will be developed with sectoral differences in mind in order to ensure existing organisational arrangements, technological capabilities and infrastructure are able to be leveraged and harnessed as appropriate. Regulatory burden will also be managed via this process.

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As noted above, it is important that the ACCC be able to make rules that can be tailored to vastly different sectors. While in the initial roll out it is expected that the banking, telecommunications and aspects of the energy sector will become designated and subject to the CDR, in the future it is possible that insurance information or retail loyalty cards, and the value-added data relating to those cards, may be subject to the CDR system.”

A new Data Standards Body is responsible for development of data standards. Data61 is the interim Data Standards Body.

There are also detailed privacy rules included in the draft CDR Bill, designed to overcome any objection that the Australian Privacy Principles (**APPs**) may not apply to some data subjects (such as businesses, not being individuals protected by the APPs), data recipients or data sets within the scope of operation of the CDR. The interaction of these proposed detailed privacy rules with the APPs raises issues of significant complexity.

The current Federal Government has committed to applying the CDR to the banking, energy and telecommunications sectors.

The CDR related to banking data is commonly referred to as the “Open Banking” initiative and is running to an advanced timetable.

Given political sensitivity as to retail energy prices, the Federal Government is likely to seek to accelerate the timetable for the energy sector to ensure that the Government has politically attractive announcements sector to make before the next Federal election as to increasing price competition in the retail energy.

However, the CDR will not commence in operation in any sector before 1 July 2019.

2 What is the status of the CDR, 'open banking' and 'open data' reforms?

The current streams are:

Open banking

Categories of banking transactional data to be subject to the right to be as recommended in the (now completed) Scott Farrell Review.

Detail as to data sets, including data standards, now under development by Data 61 as interim Data Standards Body.

ACCC to be empowered to make a recommendation to the Treasurer as to the banking sector, banking transactional data sets, in the case (unlike all other sectors) without any public consultation.

Implementation depends passage of the CDR Bill and action by the Treasurer.

This process is now driven by Treasury, in consultation with ACCC.

Relevant staff within the Department of Prime Minister and Cabinet (**PM&C**) responsible for CDR policy have been transferred to Treasury.

Open banking data standards

Industry consultations led by Data61 are now underway. The first Data61 workshop minutes were released on 21 August 2018. There is expected to be exposure drafts released by Data61 progressively over the next few months.

The draft Standards are likely to be significantly influenced by UK standards and recent proposals by the Hong Kong Monetary Authority.

Energy sector

No consultations have been announced to date.

Telecommunications sector

No consultations have been announced to date.

CDR Bill

The CDR Bill is the legislative implementation platform for all CDR initiatives.

Passage of the CDR Bill is necessary to effect implementation of the CDR in all sectors, including banking.

New Australian Government Data Sharing and Release Legislation and establishment of the National Data Commissioner

This initiative relates to Federal public sector data and open government data initiatives and is intended to provide a simpler, more efficient data sharing and release framework for data sets held by Federal government departments and agencies.

This is likely to be particularly important in relation to health sector data, but will also require coordination with State and Territory Governments as many health data sets involve both Federal and State regulated data.

A consultation paper as to this initiative released in July 2018 called for input by 1 August 2018. This consultation process is being led by PM&C.

3 More details about declaration of a CDR right for a sector

Prior to making a designation, “the Minister must consider a range of factors in order to inform his or her decision and ensure that the designation of the sector is appropriate. The ACCC will be responsible for advising the Minister on these matters”.

These factors include the likely effect of the instrument on (i) consumers; (ii) the efficiency of relevant markets; (iii) privacy and confidentiality of information about consumers (iv) promoting competition; (v) promoting data driven innovation; and the likely regulatory impact of allowing the consumer data rules to impose requirements on data holders.

The Treasurer must consult with the ACCC and OAIC and commission a report from each of them about the proposed declaration. There is no minimum period prescribed for this consultation.

The ACCC (note: not the Minister, or the OAIC) must conduct a public consultation before finalising the ACCC’s report to the Minister.

The reports of each of the ACCC and OAIC must be published, but not necessarily before the Minister makes her or his declaration. Accordingly, the only assured opportunity for prior public consultation is in response to the ACCC’s call for submissions in relation to development of the ACCC’s report to the Minister.

4 Accredited data recipients

“Accredited data recipients” are entities holding CDR data as a result of that CDR data being disclosed to them at the direction of a CDR consumer under the consumer data rules.

CDR data held by accredited data recipients can also include data derived from consumer CDR data (including de-identified or aggregate data which is derived from CDR data).

In order to have had CDR data relating to a CDR consumer disclosed to it, the entity must hold an accreditation. Accreditation will initially be managed by the ACCC, who will be the Data Recipient Accreditor.

Data holders within the CDR system will only be treated as accredited data recipients if they seek to participate in CDR as recipients of CDR data or if the consumer data rules mandate that outcome.

When in possession of a consumer’s CDR data, an accredited entity can also be directed by a consumer to provide that data to other CDR participants. This is referred to as the principle of reciprocity.

A person does not have to be an Australian citizen nor a permanent resident in order to apply for accreditation.

Examples given include:

A UK Fintech offers a budgeting app, which takes into account transaction data available under the UK Open Banking regime. They hold a UK Account Information Service Provider licence in order to do so under that regime. They wish to provide a similar service in Australia utilising account transaction data accessed under the Australian ‘Open Banking’ CDR system.

They must obtain accreditation under the CDR.

Kathryn moves to the USA and wishes to transfer her banking and telecommunications information to Berkeley Bank, an American bank. Berkeley Bank is an accredited recipient under the CDR and offers to

help Kathryn find the best telecommunications services in the USA for her needs. Kathryn is able to establish a line of credit in the USA using her Australian banking information, and Berkeley Bank helps her find internet and phone plans that allow her to call home as often as she did in Australia.

CDR consumers may also direct that their CDR data be provided to a non-accredited entity. Data that has been derived from CDR data, such as financial reports compiled from transaction data, may also be transferred by a CDR consumer out of the CDR system: for example, a data transfer to Xero, or to a consumer's accountant.

5 Key observations

The CDR Bill (if enacted) will effect be a very substantial expansion in the discretions and powers of both the Australian Treasurer and the ACCC, an independent statutory authority but closely aligned with the Australian Treasury.

The CDR Bill is quite different from existing competition powers of the ACCC. These existing powers are largely after-the-event powers to order remedies for misuse of market power or other demonstrated failures of competition in a particular industry sector. These existing powers do not enable the ACCC to shape supply-side competition in an industry sector (in the case of the CDR Bill, by regulatory mandate of data flows to address what the ACCC regards as information asymmetries that impede switching between service providers).

There is no analogous regulatory power in comparable jurisdictions. In this respect Australia is 'going it alone' in both the potential breadth of operation of the CDR and the discretions conferred upon regulators as to whether, how and when the CDR is declared.

The CDR Bill does not limit sectors, entities or categories of information in relation to which the CDR may be declared. The Treasurer could designate data sets which include value added data and other derivative data including inferred customer attributes, modelled scores, linked data and imputed or inferred data. The current Australian Treasurer has said that it is not intended to extend the CDR to value added derived data sets, but the draft Bill does not limit exercise of the Treasurer's discretions in any relevant way. And the requirements for public consultation are minimal.

The CDR Bill may well be enacted, relatively soon, in some form. With a tight timetable the draft CDR Bill could be revised and introduced into Parliament in Q1 2019. Passage of the CDR Bill is necessary to effect implementation of the CDR in all sectors, including banking.

Public comments and submissions on the Exposure Draft CDR Bill close on 7 September 2018.

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