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RE: Consumer Data Right Consultation

This submission is made by the Australian Privacy Foundation in response to the second-stage invitation by The Treasury regarding the draft Consumer Data Right (CDR) legislation and the designation instrument for the banking sector (Open Banking).

The document follows the preceding submission by the Foundation regarding the CDR. The Foundation appreciates the positive approach by The Treasury in consulting with civil society and other stakeholders, important for both the legitimacy and effectiveness of the CDR regime and its potential extension beyond banking to energy and other services.

The Foundation has made a separate submission to the Australian Competition & Consumer Commission (ACCC) as part of that body's consultation about the CDR Rules regime.

The Foundation

The Foundation is the nation's preeminent civil society organisation concerned with privacy. It is politically unaligned. Its board features experts from the legal, health, information technology, management and other sectors.

Detailed information about the organisation's objectives and constitution are available on its website at www.privacy.org.au. The site also features many of the submissions and position papers from the Foundation over the past thirty years.

General comments

<u>The status of the CDR Rules</u>

The CDR Rules are critical for the effectiveness and fairness of the CDR. There is a power to make the Rules in the Bill. However, we would contend this does not go far enough. The CDR Rules must be enforceable at law.

Recommendation:

1. **The CDR Rules must be enforceable at law and particularly in EDR**

Access to Justice

The ACCC has confirmed to us verbally that it will be compulsory for Accredited persons to be a member of an authorised External Dispute Resolution (EDR) scheme. In this case, the requirement for financial services providers there would be a requirement to join the Australian Financial Complaints Authority.

Access to justice is a key consumer right. The requirement to be in an EDR must be included in the Bill. It is not sufficient to put it in the CDR Rules. It is also important that there is a clear right under the law to claim compensation for a breach of the CDR Rules.

Trust and confidence with the CDR will be eroded completely if there is no access to justice for harm caused when using the CDR.

Recommendations:

1. **The requirement to be in EDR to be accredited must be stated clearly in the Bill**
2. **Consumers must be able to seek compensation in EDR or Court for a breach of the law or CDR Rules**

Getting free legal advice

Open banking is a significant change for Australia. It means that data will be transferred and shared freely and securely. The Government should recognise that this will mean that many people may need advice on their rights regarding the privacy of their information.

We recommend that the Government recognises the needs of the Australian people to be able to get free legal advice on the privacy aspects of open banking. In this way, if there is a problem people can call and get expert legal advice. It is noted that there is no community legal centre in Australia (or Legal Aid) that specialises in privacy advice. We suggest that a Privacy Legal Centre be set up to ensure that people (particularly low income people) have access to legal advice if needed.

The Revised Exposure Draft

The following paragraphs address the five proposals articulated in the September 2018 *Treasury Laws Amendment (Consumer Data Right) Bill 2018: Provisions for further consultation* documents before providing feedback regarding the proposed *Consumer Data Right (Authorised Deposit-Taking Institutions) Designation 2018*.

Proposal 1: Limiting Scope

The Foundation in considering direct and indirect benefits to consumers (through for example encouragement of innovation and meaningful competition in oligopolistic markets) cautions against exclusion of data and institutional responsibility through an inappropriately narrow Designation and overly-limited rule-making power.

The Foundation endorses the widening of the definition of consumer to encompass persons described in regulation and persons in relation to the supply of goods or services. The Foundation also opposes any change to limit the scope of the rule making power as this will affect the ability to the CDR Rules to cover all relevant situations. For example, a requirement to be in EDR in the Rules would not relate to use, accuracy etc.

The Foundation cautions against an overly-broad reading of intellectual property as a basis for exclusion. It envisages that finance sector businesses (and by extension other utilities) will seek to maximise the benefits of incumbency and inhibit competition, at odds with the objectives of the amended Act and the Open Banking reforms, by construing data about consumers as intellectual property. That is problematical given Australian law's current uncertainty about data as property and the disjunct between consumer protection, banking and intellectual property reform.

In previous advice to The Treasury the Foundation has noted concerns regarding algorithmic transparency. Given the rapidly increasing importance of algorithmic decision-making – rule by code rather than by individual corporate officer – the Foundation emphasises the need for a forward-looking approach that situates the CDR as a matter of how consumers are understood by corporations rather than merely raw (i.e. non-derived, non-value-added) account details.

On that basis the Foundation the considers that The Treasury should contemplate access by the ACCC in the first instance to algorithms that are used by deposit-taking institutions and by other entities such as Equifax in decision-making that affects consumers who are covered by the CDR (i.e. individuals and small enterprises). Such access is a matter of the regulator being empowered to look within the 'black box' on behalf of consumers in general. It should not be precluded by claims of intellectual property and trade secrets. It does not require an individual consumer to receive a copy of the code that embodies the algorithm and determines decision-making. It does not require a specific corporation to licence or otherwise disclose the code to competitors.

Recommendations:

1. **Ensure that the definition of consumer is defined widely to cover all relevant consumers.**
2. **The proposed rule change to limit the rule making power to use, accuracy storage and deletion of CDR data is opposed.**
3. **The ACCC must be empowered to ensure that algorithms on data do not inhibit competition or standardisation of data.**

Proposal 2: Clarifying the Safeguards

The Foundation endorses clarification of the interaction of the CDR privacy safeguards with the *Privacy Act 1988* (Cth). It reiterates past concerns regarding the operation of that Act, given the permissive (in practice 'lowest common denominator') interpretation of the Act in the Office of Australian Information Commissioner (OAIC) Guidelines and the regulatory incapacity of that Office (a matter of corporate culture, over-reliance on expertise provided by entities the OAIC is meant to regulate, and ongoing under-funding). As previously indicated there is a strong public policy rationale

in providing clearer and stronger safeguards for consumer data than are offered under the Privacy Act regime.

The Foundation endorses clarification to provide a statutory right of confidentiality.

The consultation documents refer to rights for natural persons under 'international agreements'. It is important to recognise that there are a range of agreements referring to privacy. In practice some of those agreements are merely aspirational and for example do not provide Australian consumers with readily identifiable and justiciable rights. On that basis it is imperative that the CDR offers meaningful protection through the amendment of the *Competition & Consumer Act 2010* (Cth) and through sustained vigorous action by the ACCC, underpinned by community education.

A weakening of the powers of the ACCC and protection under the 2010 Act that were proposed in the initial consultation is accordingly strongly opposed by the Foundation.

Finally, the right to delete data is a critical right. At the moment, the Privacy laws in Australia do not give people a right to delete. In contrast, the General Data Protection Regulation does give European citizens a right to delete. The right to delete is important because there are consistent problems with data breaches and the re-identification of data. The CDR Bill should specifically set a right to delete in the Bill so that consumers have more control of their data.

Recommendations:

1. **The Foundation strongly supports a statutory right of confidentiality.**
2. **A weakening of the powers of the ACCC and protection under the 2010 Act that were proposed in the initial consultation is accordingly strongly opposed by the Foundation.**
3. **The CDR Bill should contain a specific right to delete**

<u>Proposal 3: Clarifying Reciprocity</u>

The Foundation is concerned about embedding principles of reciprocity in the CDR. We see a large potential for misuse where a data holder is forced under reciprocity to share data when they have concerns about the recipient. Consumers regularly get preyed on by companies seeking to profiteer on their desperation. For example, see ASIC's campaigns on Debt Vultures.[1] The CDR Rules will need to be drafted carefully to deal with this. It is essential that there are limits on reciprocity so that consumers are protected from predatory businesses seeking to mislead them about their own data in order to move them to another financial services provider. In our view, reciprocity should not be introduced at all unless there is a demonstrated (with evidence) problem.

The Foundation endorses a positive (consumer-centric) approach in rule-making and overall authorisation to facilitate understanding of the new regime by consumers and by other entities. The Foundation considers that community education – encompassing consumers, small businesses, large corporations, regulators and other entities such as legal aid offices and community legal centres – is a fundamental facilitator of that regime. In particular, consumers need to be aware that they have rights under the CDR and are aware of how to exercise those rights. Regrettably, as demonstrated throughout the hearings of the Hayne Royal Commission (and in litigation by the ACCC under the

[1] See https://asic.gov.au/about-asic/news-centre/find-a-media-release/2018-releases/18-163mr-asic-warns-consumers-about-paying-high-fees-for-credit-repair-and-debt-advice-services/

2010 Act), it is clear that a range of businesses – including leading entities that should represent models of corporate best practice –have egregiously misled and otherwise disregarded consumers.

It is thus important for the CDR regime to address concerns that entities will escape appropriate regulation on the basis that rules under the amended Act are too narrow (for example not covering particular entities). The emphasis should be on data custodianship and consumer autonomy.

Recommendation:

1. **Reciprocity should not be introduced until there is a demonstrated problem with competition.**
2. **The CDR Rules need to protect consumers from being forced or misled into sharing information.**
3. **If reciprocity is introduced there needs to be a clear exception when the data holder is reasonably concerned about misconduct and predatory behaviour.**

Proposal 4: Legislative Consultation Requirements

The Foundation strongly welcomes the statutory enshrinement of minimum consultation requirements regarding rule-making and sectoral designation. That enshrinement is fundamental to the legitimacy of the CDR regime and will offset the regulatory capture (and institutional incapacity) that is evident in the implementation of the *Privacy Act 1988* (Cth) by the OAIC and its predecessor.

The Foundation endorses the proposed replacement of s 56AE (6) to foster consultation.

The Foundation expresses concern regarding the proposed discretion by the OAIC regarding provision of confidential advice. Regrettably, the OAIC has consistently relied on 'confidentiality' to obfuscate legitimate civil society scrutiny of its operation, to the point that several of its reports do little more than indicate an investigation was undertaken. Its interpretation of the 1988 Act, in for example the making of Determinations, has been closely shaped by interests which it is chartered to regulate (a capture exacerbated by both the OAIC's culture and lack of in-house expertise in areas such as genomics and telecommunications). The Foundation is well aware of the importance of confidentiality for commerce and private life; it is not appropriate however for public accountability to be substantively weakened through special arrangements regarding the OAIC.

We strongly believe that the ACCC's powers to make emergency rules should not be limited in any way. The ACCC would justifiably be criticised for a failure to protect consumers from serious misconduct.

Recommendations:

1. **The Foundation expresses concerns about confidential advice being given by the OAIC. It should be public.**
2. **ACCC needs wide powers to make emergency rules to protect consumers from imminent serious harm.**

Proposal 5: Limitations on Charges

The Foundation endorses The Treasury's proposal that data set designation instruments identify whether a data set is free or chargeable, with the ACCC having power to determine a reasonable price (drawing on ss 44CA and 44ZCA of the 2010 Act).

The Foundation observes that people are very unlikely to use the CDR unless it is free. The Foundation strongly endorses banking designation data sets as non-chargeable.

It endorses the proposed factors for use by the Minister in considering chargeability.

The Designation Instrument

The Foundation endorses a staged implementation of the CDR through establishment of successive sectoral Designations under the amended *Competition & Consumer Act 2010* (Cth).

That endorsement reflects both overarching principle-based coverage of consumer data *per se* (enabling high-level cross-sectoral consistency), consideration of the capacity of regulatory and dispute resolution bodies in the public and private sectors, the characteristics of specific sectors and scope for innovation, and – importantly – the potential for consumer understanding if the CDR is rolled out on a staged basis.

The Foundation is of the view that such understanding is fundamental to consumer agency and the legitimacy of the CDR regime, which must be construed in terms of benefits for consumers (and thereby the national economy) rather than advantaging incumbent utility providers or emergent fintech services.

Legitimacy is salient given disclosures through the Hayne Royal Commission about egregiously inappropriate (and in some instances criminal) practice in the banking and insurance sectors and through litigation by the ACCC against energy and other utilities over the past five years. It is indisputable that leading commercial entities have not met consumer expectations, that self-regulation has been inadequate and that the performance of gatekeepers such as ASIC and Australian Prudential Regulation Authority faces substantive criticism.

The Foundation is overall supportive of the proposed *Consumer Data Right (Authorised Deposit-Taking Institutions) Designation 2018*, endorsing for example the categorisation in sections 6 through 8 of the *Designation.*

Given patterns of misbehaviour across the banking and insurance sector, most notably evident in the Hayne Royal Commission, the Foundation notes the importance of clarity regarding data sets for which fees can be applied and those for which fees are inapplicable. The Foundation considers that the imposition of fees in some circumstances is appropriate but notes that disproportionate transfer costs will potentially inhibit innovation and advantage large incumbent institutions in a sector where – as with most utilities – a handful of national corporations have an overwhelming share of the market.

Yours sincerely

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