

The logo for Optus, consisting of the word "OPTUS" in a bold, teal, sans-serif font.

Submission in response to

**Treasury Laws  
Amendment (Consumer  
Data Right) Bill 2018:  
Provisions for further  
consultation**

Public Version

October, 2018

## EXECUTIVE SUMMARY

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1. Optus welcomes and supports the provisions proposed in the further consultation on the Treasury Laws Amendment (Consumer Data Right) Bill 2018. While the further proposed provisions are an improvement, Optus submits the legislation retains too great a focus on the banking sector and reliance on banking-specific terms and justifications, rather than adopting provisions that are better suited to the economy-wide sectors that are to be included within the CDR regime.
2. The provisions proposed in the further consultation document address some of the concerns raised by Optus in response to the first proposed provisions, specifically:
  - (a) Proposal one – clarifying the scope of the inclusion of use of derived data within the CDR regime.
  - (b) Proposal four – making clearer the process to be undertaken for designation and rule-making.
  - (c) Proposal five – introducing a framework for charge for access and use of CDR data. Importantly, we support the recognition that a price of zero is unlikely to be an efficient charge where the CDR imposes costs on industry.
3. While Optus supports the proposed changes, Optus recommends that further changes be made to ensure that the legislation achieves better outcomes for all of the sectors to be included within the economy-wide CDR regime, not just banking. Specifically:
  - (a) The definition of CDR data should also explicitly state that data that is imputed, derived or value-added data not be considered CDR data and cannot be part of the data specified in the designation; and
  - (b) Remove large businesses from the definition of CDR Customer, as per recommended by the Productivity Commission.
4. Finally, Optus recommends that provisions should be included in the proposed Bill that require the Minister and the ACCC to give regard to existing industry processes when making the declaration and rule-making instruments. Optus submits that any process to translate the Open Banking and general CDR regime into an 'Open Telecoms' regime should commence with an analysis of already existing data access and sharing mechanisms in order to identify any potential gaps that may need closing to fully achieve the declared objectives of the CDR regime.
5. Optus supports the submission lodged by Communications Alliance and the AIIA.

## COMMENTS ON PROPOSED PROVISIONS

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6. This section provides Optus' views on some of the specific proposals outlined in the further consultation. In addition to these specific comments below, Optus supports the submission by Communications Alliance and the Australian Information Industry Association (AIIA).
7. The central concerns raised in the industry submission, supported by Optus, is that the drafting of the CDR appears to be too focused on the initial application to banking (and the concept of Open Banking) rather than the economy-wide implications of the CDR to other industries.
8. To that end, we repeat that the legislation should be primarily guided by the Productivity Commission's report on Use of Data and the Government's response to that inquiry. Of most significance, Optus supports the approach recommended by the Productivity Commission and the Government to:
  - (a) Not extend CDR to derived and value-added data; and
  - (b) Not extend CDR to large businesses.
9. This economy-wide analysis should have primacy over the banking-specific Open Banking report. The draft legislation should not mandate aspects of the CDR that carry a 'banking bias' and which have not been tested as being suitable for other sectors.
10. With regards the proposals put forward by Treasury, Optus wishes to make specific comments on the following proposals:
  - (a) Proposal 1 – Derived information;
  - (b) Proposal 4 – Process for designation and rule-making;
  - (c) Proposal 5 – Framework for charges for access to and use of CDR data.

### **Proposal 1 – Derived information**

11. Optus highlighted that the original drafting would have had a material negative impact on the communications industry. Specifically, there was a risk that the inclusion of derived data, as originally drafted, would have removed the incentive to undertake data analytics and reduced innovation and technology development.
12. We support the proposed provisions that would have the effect of limiting the rule-making power so that the access and transfer rights will only apply to information that is specifically identified in the designation instrument.<sup>1</sup>
13. Optus supports the changes proposed in relation to:
  - (a) Section 56BC, which limits the rule-making power so that, rules can only require a CDR participant to transfer information that relates to a consumer to an accredited data recipient; and

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<sup>1</sup> Treasury, 2018, Treasury Laws Amendment (Consumer Data Right) Bill 2018: Provisions for further consultation, 24 September 2018, p.4

- (b) Section 56BD, that limits rule-making power so that information that does not relate to a consumer can only be accessed or transferred where it is about the eligibility, terms and conditions or price of a good and service.
- 14. Further, we support the proposed new requirement for the Minister to consider the likely effect of making a designation on any intellectual property in the information to be covered by the instrument. We address our view on the new proposal five below.
- 15. In saying that, however, there is merit to specifically exclude derived data from the CDR regime. While we acknowledge that minor derived data in the banking industry (e.g, summary data, or account totals) is an issue for some in the banking industry, derived data has a wider meaning in other industries. As such, Treasury should take a broader approach to assessing whether including derived data is beneficial. Optus submits there are most efficient and effective ways to delineate between data that is merely a representation of data about a person versus derived and value-added data, rather than allowing derived data to be included.
- 16. We again note that the Productivity Commission advised against including derived data. We also observe that the Open Banking recommendation to include derived data did not extend to inclusion of the type of innovative analytics being undertaken in the data analytics industry. For example, DSpark, Singtel's global data analytics company, is able to aggregate rich anonymised data captured from mobile networks, such as commuter demographics or common travel routes to provide in-depth, actionable perspectives on the condition of Australian urban infrastructure, such as road and train systems; the economy, like tourism and trade activities; and the general state of our population.<sup>2</sup> Optus repeats that such analytics would not occur if analytics companies were forced to share their derived data under the CDR regime.

#### Further proposal 1A

- 17. Optus supports the further proposal to limit the rule-making power so that rules with regards to the use, accuracy, storage or deletion of CDR data where this relates to the disclosure of CDR data.
- 18. We assume that this would limit any rule relating to use, accuracy, storage or deletion to the specific data designated in the designation instrument, similar to the proposed limitations in s.56BC.

#### **Proposal 4 – Process for designation and rule-making**

- 19. Optus supports the approach proposed to specify the minimum consultation requirements prior to the designation of a sector or associated rules. We agree that given the very real, and potentially significant, costs imposed by the CDR regime, an equally rigorous consultation process is warranted.
- 20. Optus agrees with the proposals to:
  - (a) Set a minimum consultation of 28 days for draft rules and designation of a sector;
  - (b) Require the Minister to wait for 60 days after ACCC advice about sectoral designation has been made public before making the designation instrument;
  - (c) Require a period of 60 days after the ACCC's proposed rules have been made public before the rules are made;

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<sup>2</sup> <https://www.optus.com.au/enterprise/accelerate/technology/how-can-big-data-transform-transport>

- (d) Clarify the text of s56AE(6) to deem consultation to be sufficient if there was a minimum of public 28 day consultation, and a 60 day wait after publication of advice or rules;
- (e) Limit the scope for ACCC to make rules regarding fees for transfer and use of information; and
- (f) Limit the circumstances in which ACCC can make emergency rules.

#### **Proposal 5 – Framework for charges for access to and use of CDR data**

- 21. Optus agrees with the proposal that the designation instrument for data sets to identify whether a data set is fee free or the data holder can impose charges for use and access.
- 22. Optus also agrees with the proposal to include a specific charging principles framework, which would require the Minister to consider the following factors:
  - (a) Whether the data set constitutes property for the purpose of the Constitution;
  - (b) Whether the data holder currently charges consumers for access to that data set;
  - (c) The impact on incentives for data holders to generate, collect, hold or maintain that data set if access rights were provided without charge; and
  - (d) The marginal costs to data holders of disclosing the data.
- 23. Optus would also support clear legislative provision that enacted the commitment to allow data holders of no charge data sets, to be able to incorporate the cost of disclosing data into their cost base for provision of the original good or service.
- 24. Further, Optus supports the introduction of a test that existing pricing arrangements must be unreasonable before the ACCC may step in to regulate the price of a chargeable data set. Optus also agrees with the statement that the pricing rules would be largely reflective of s.44ZZCA in the CCA.