COMMUNICATIONS ALLIANCE LTD

Communications Alliance Submission

in response to the Treasury's

Exposure Draft of the

Consumer Data Right (Telecommunications Sector) Designation 2021

and associated documents

13 December 2021

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INTRODUCTION

Communications Alliance is pleased to make this submission in response to the release in November 2021 by the Department of the Treasury of:

- the Consumer Data Right: Telecommunications sectoral assessment final report (Final Report);
- the Consumer Data Right (Telecommunications Sector) Designation 2021 exposure draft; and
- the Exposure Draft Explanatory Materials.

This submission comments on the elements of the potential designation that were canvassed in the earlier discussion paper, but have been changed or refined, to positive effect, as a result of the consultation between the Department, industry and other stakeholders that has taken place during recent months.

The submission also notes the issues and potential elements of the proposed designation that – if the designation is approved – will need to be further examined and clarified during the rule-making phase.

The Department and industry have engaged constructively together as the potential designation of the telecommunications sector has been assessed. The telecommunications sector will continue this engagement with the objective that – if the sector is designated – potential benefits to consumers can be maximised and the attendant regulatory burden on industry – and flow-on costs for consumers – can be minimised.

About Communications Alliance

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, equipment vendors, IT companies, consultants and business groups.

The most influential association in Australian communications, co-operatively initiating programs that promote sustainable industry development, innovation and growth, while generating positive outcomes for customers and society. To create a co-operative stakeholder environment that allows the industry to take the lead on initiatives which grow the Australian communications industry, enhance the connectivity of all Australians and foster the highest standards of business behaviour. For more details about Communications Alliance, see http://www.commsalliance.com.au.

Costs and cost/benefit equation – assessing benefits will benefit everyone

The Government has expressed a broad belief that the Consumer Data Right will deliver consumer benefits, including the potential of new and innovative products and services, but there is further work to do in assessing the particular benefits for Telecommunications. At this stage, we are unclear on the net benefits expected from sectoral designation of the telecommunications sector.

Undertaking this type of assessment would assist the sectoral assessment, the drafting of the designation instrument and the subsequent CDR Rules, if there was a clearer articulation of the benefits that will stem from applying CDR to telco – including at the data sets level and in relation to eligible customers.

We also note that the explanatory memorandum for the CDR Bill in 2019 identified the need for a regulatory impact statement (RIS) to be prepared- reflecting the net benefits of designation before a sector is designated (See Treasury Laws Amendment (Consumer Data Right) Bill 2019 – explanatory note – sections 1.51 and 1.52 – also schedule 1, item 1, paragraph 56AD(1)(b)). This was in recognition of the need to ensure that policy was measure and appropriate in delivering benefits to consumers and to shape policy scope to minimise unexpected costs to participants.

While the Final Report contains numerous high-level assertions about the potential benefits of designating the telecommunications sector, it does not attempt to quantify the projected benefits – an exercise that would help assess the appropriateness of telecommunications designation and to define the scope of application.

In relation to the projected costs, the report and the analysis undertaken by Grant Thornton offers some heavily caveated estimates of the cost to industry of the additional regulatory and operational burden that designation would bring. These estimates are differentiated between "small telco" and "large telco". Neither category of telco is defined as to the size of the entity being described. Neither is the number of entities in each category estimated nor calculated. While we acknowledge that part of the regulatory cost will depend on decisions that would be made during the rule-making phase, there is an opportunity to explore these scenarios at the sectoral assessment and designation stage, to try to establish whether the benefits will outweigh the costs.

Reflecting on the Grant Thornton estimates, the cost to industry during the first two years of operation of the CDR framework could look like the following (on the assumption that a low-regulatory-impact scenario results from decisions made at rule-making stage and that the costs of organisation-wide digital transformation projects to update legacy IT systems are excluded).

- *Assume eight large telcos – 8 x $5.58m build and run spend during first two years = $44.64m*
- *Assume 150 small telcos – 150 x $500k build and run spend during first two years = $75m*
- ***Total build and run spend cost during first two years = $119.64m***

The importance of fulfilling the RIS expectations under the CDR Bill is to ensure that cost to the sector for implementing the CDR will not outweigh the potential benefits delivered to customers, in line with the Government's broader commitment to strong evidence-based impact analysis and better-practice policy making.

Undertaking a post-implementation review of the banking sector costs/benefits would also help inform this process.

Positive elements arising from the consultation

Industry is pleased to note that Treasury has taken note of some of the issues raised and arguments advanced in industry submissions and in discussions and has made some welcome modifications to the proposal/recommendation as a result.

These include:

- at section 5(2) of the exposure draft, clarification that carriers and carriage service providers are specified as the persons/entities that will be data holders of CDR data within the specified classes;
- narrowing/refinement of the recommended data sets – which will be essentially covered by electronic versions of billing/account data and Critical Information Summaries – and the exclusion of Quality of Service (QoS), including mobile coverage data, broadband speed data, location data etc, along with called party number data and location information; and
- the exclusion of wholesale suppliers, via the definition of "Supply" being limited to "a retail supply".

Elements that require further examination during rule-making phase

"Materially enhanced information"

The industry has significant concerns over the unclear exclusion of "materially enhanced information" from the scope of the CDR. "Materially enhanced information" is excluded, by subsection 7(2)(c) of the exposure draft, from the scope of information under section 7 of the exposure draft. However, the explanatory materials (at page 7) and the note to section 9(2) of the exposure draft then state that "materially enhanced material" is not excluded from the scope of information under sections 6 and 8 of the exposure draft.

Given that "materially enhanced information" would typically comprise confidential and commercially sensitive information that is derived through the application of proprietary processes and algorithms, it is unclear why "materially enhanced information" is not excluded from the scope of the CDR completely. We would note that in the context of privacy law and data portability rights, which the CDR ostensibly implements in Australia's context, "inferred data" or "derived data", which are approximately equivalent to the concept of "materially enhanced information", is typically not included in the scope of such rights in privacy regimes around the world[1].

[1] See, for example:

We recognise that similar language exists in respect of the designation instruments for the banking and energy sectors. However, it is not clear to us whether the confidential and commercially sensitive nature of such information was fully considered in the context of those sectors. We urge the Treasury to take the opportunity to re-examine this issue, especially in light of the Final Report expressly indicating that "*[t]he opportunity to provide input on the concept of materially enhanced information will be provided as part of consulting on any draft designation instrument*"[2].

Other Issues

The final report points to a range of issues and topics that will require further examination and/or clarification, should the Minister decide to support Treasury's recommendation for designation.

From industry's perspective, these issues include:

- the proposed definition of "Product" – inclusion of "a good or service that is offered or supplied to a person in connection with supplying a carriage service" should be clarified as to its scope and its potential to capture a wide variety of products or services for which a CDR framework will carry no consumer benefit;
- examination of billing elements to ensure that location information will not be disclosed;
- potential phasing of data sharing obligations;
- the issue of enterprise customers. In industry's view, this cohort should not be eligible CDR customers within the rules, given the lack of benefit that would accrue to them and the very sizeable regulatory burden that would be involved for service providers that would need to build additional systems and processes. Such customers could be excluded, for example, by excluding the following information:
    - (from section 6 of the exposure draft) information about enterprise customers and users; and
    - (from sections 7 and 8 of the exposure draft) information in respect of the supply of any product that is primarily offered or supplied to enterprise customers;
- whether there should be a service provider size threshold, below which the smaller telcos would not be captured or could participate in a CDR framework on an 'opt-in' basis, re-iterating our concern that the estimated costs may be prohibitive and force some smaller providers to exit the market, particularly in rural areas or where they provide specialised services;
- the potential need to exclude information about arrangements for payments to be made in response to bills (such as direct debit details, details about online payments and BPay details)

(1) the *Guidelines on the Right to Data Portability* (under the EU's General Data Protection Regulation) issued by the Article 29 Data Protection Working Party, which consider "inferred data" to be out of scope (copy available at https://ec.europa.eu/information_society/newsroom/image/document/2016-51/wp242_en_40852.pdf); and

(2) Singapore's *Personal Data Protection (Amendment) Act 2020*, which explicitly excludes "derived data" from scope of the data portability right (copy available at: https://sso.agc.gov.sg/Acts-Supp/40-2020/Published/20201210170000?DocDate=20201210170000).

[2] Section 4.5, page 15, of the Final Report.

- the eligibility of specific customer cohorts to make data-sharing requests and the conditions that would be applicable to each; and
- white-labelling – the circumstances under which entities supplying a white-label product could potentially be subject to data-sharing obligations.

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