

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

Submission in response to
Treasury consultation

**Consumer Data Right -
Telecommunications
draft designation
instrument**

Public Version

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EXECUTIVE SUMMARY

1. Optus welcomes the opportunity to provide a submission in response to the Treasury Department's consultation on the Exposure draft of the *Consumer Data Right (Telecommunications sector) Designation 2021* (the Draft Instrument).
2. Optus generally welcomes the Draft Instrument and commends Treasury for drafting an instrument that reflects the feedback from industry collected during prior consultation processes. Optus considers that the sectoral assessment demonstrates that Treasury has listened to industry feedback and adopted a measured approach to the development of the draft Instrument. In particular, Optus welcomes the exclusion of mobile coverage data, location data and broadband speed data from the scope of CDR data and considers this approach should result in a more realistic application of the CDR to the telecommunications sector.
3. That said, Optus reiterates that the CDR requirements must be implemented in a manner which ensures costs are minimised as the potential benefits are unknown. While the sectoral assessment reflects a sensible and considered general approach to the scope of the CDR for the telecommunications sector, it remains relatively devoid of evidence in support of the supposed beneficial impact for innovation, competition and consumers. Such evidence is crucial given the already low switching costs for consumers of telecommunications services and the fact that much CDR Data is already publicly. In this context, Optus continues to have concerns about the overall benefit of the CDR regime to telecommunications when weighed against the implementation costs.
4. In this context, Optus is particularly opposed to the proposal for 1 July 2020 to be the "earliest holding day" for information to which CDR obligations may apply. Optus submits that as a matter of principle, and to avoid the imposition of an undue administrative burden on data holders, the earliest holding day should be 1 July 2022.
5. Optus also remains concerned about the scope of specified classes of information proposed under the draft Instrument. Optus considers that the scope of section 6 of the draft Instrument is inappropriately broadened by the inclusion of information provided by an "associate...who has used or is using such a product".¹ Optus also considers the drafting relating to "materially enhanced information" remains unworkably vague, particularly as applied to information derived "wholly or partly" from "billing and account information about retail supplies of products" information.²
6. Optus notes that it has other concerns about the potential breadth of data captured, such as the potential scope of "other information about such supplies that is used for the purpose of billing" but appreciates that Treasury may intend to provide further detail on such information at the CDR Rules making stage. Notwithstanding this, Optus agrees with Treasury's characterisation of the importance of the draft Instrument as a "threshold" decision on the scope of the CDR scheme as applicable to the sector. Accordingly, Optus considers that the use of the term "associate" and "materially enhanced information" are sufficiently fundamental to setting the overall scope of the CDR scheme to warrant further attention before the designation Instrument is finalised.

¹ Section 6, draft Instrument designates "information about retail customers and users"

² Section 7, draft Instrument designated "billing and account information about retail supplies of products" – see the qualification in the Note under draft section 7(2)

7. Finally, Optus also wishes to highlight that it considers the sectoral assessment, while a useful document, raises some concerns in regards to Treasury's future intentions concerning "white label" data, information about or from enterprise customers, quality of service data and consistency of CDR obligations with Part 13 of the Telecommunications Act. Optus would welcome further clarity from the Department in regard to these matters in the final Explanatory Statement to accompany the designation Instrument.
8. Optus also wishes to correct any implication that we are of the view the CDR will assist investment in the telecommunications sector. Treasury quotes Optus that "competition in the mobile market is driven by investment and innovation, with mobile carriers investing in extended coverage and better capacity" and suggests in response that the CDR data sharing will ultimately reward those carriers that invest and innovate. The use of the Optus submission in this way mischaracterises our submission. To be clear – Optus submitted that Treasury presented no evidence to sustain its claim that there is a lack of competition in the mobile market and that the CDR would promote competition. In fact, we requested Treasury re-assess the expected impact CDR would have on competition.
9. Optus would welcome the chance to meet with Treasury to discuss its feedback in this submission and other matters relating to the final drafting of the designation Instrument and the future CDR Rules.

THE EARLIEST HOLDING DAY

11. Section 5 of the Draft Instrument defines the “earliest holding day” as 1 July 2020. The effect of this is to deem that all information specified under the designation Instrument is “held” by a data holder for the purposes of the CDR from that date. Optus considers that this proposed date may result in unintended compliance issues and implementation costs. Optus suggests that Treasury reconsider the holding day to ensure that it reflects reasonable and proportionate implementation costs having regard to the scope of information captured under the final designation Instrument.
12. Optus acknowledges that section 56AC(4) of the Competition and Consumer Act (CCA) provides that the “earliest holding day” may be up to two years before the calendar year in which a designation instrument is made. However, Optus submits that the proposed approach is unsatisfactory for a number of reasons.
13. Optus considers that backdating the “holding day” raises the prospect of a potential compliance gap in the event that Optus is not able to identify and/or retrieve all the CDR data held from 1 July 2020 onwards, depending on the specific data specified in the rules. By the time the rules come into effect, much of the data captured will be over 2 years old and may have been archived or perhaps deleted (subject of course to any other record keeping or retention obligations). This could be quite costly to retrieve and/or make available and is likely to impose a disproportionate regulatory burden on operators when balanced against any benefit to consumers.
14. Grant Thornton, to prepare the regulatory impact assessment that accompanied the sectoral assessment has identified that the telecommunications “industry readiness” for the CDR is low and will result in significant systems build and development costs to industry.³ They have specifically identified a potentially high regulatory burden arising if the “historic data requirement is for a longer period of time (eg over 1 year)”. Optus agrees with this assessment and accordingly recommends that the earliest day be adjusted to allow industry a longer lead time to implement the changes necessary to capture the specified classes of information that are to be subject to the CDR scheme. A forward-looking approach may also allow industry to reduce implementation costs by considering the degree to which systems changes may be incorporated into existing digital transformation initiatives. Given the low and uncertain benefits that could arise from CDR, Treasury should focus on minimising the compliance costs of CDR. Removing the prospect of historical data being included in CDR will help to minimise these costs.
15. Optus submits that the “earliest holding day” should ideally align with the date from which the scope of the information is sufficiently clear, in order that the scope of the implementation task and cost be clearly understood. Optus submits that while this is likely to be at the time the CDR rules are finalised, an additional alternative “earliest holding day” could be 1 July 2022.

SCOPE OF SPECIFIED CLASSES OF CDR DATA

16. The three classes of information specified in the draft Instrument are:
 - (a) Information about retail customers and users (section 6);

³ Sectoral assessment, p.11

- (b) Billing and account information about retail supplies of products (section 7) and;
 - (c) Other information about retail offers or supplies of products (section 8).
17. Optus considers that the scope of CDR data captured under the draft Instrument, while narrower than forecast in earlier consultation processes, remains too broad. This is due to the wide scope afforded to section 6 information by the reference to “associate” as well as the scope of “derived” information and the draft exception for “materially enhanced information” which in Optus’ view is currently rendered ineffective by the draft wording.

Associate

18. Optus considers that the inclusion of “associate” under section 6(a)(ii) of the Draft Instrument inappropriately broadens the scope of information about retail customers and users that is subject to the CDR.
19. The Explanatory Statement states that “[t]he expression associate is used in the designation so that, where a product is supplied to multiple persons, information about each of those persons and their use of the product is captured by the designation. This may occur where the product has more than one account holder, or where the primary account holder has given access to other persons such as a relative or spouse.”⁴
20. The definition introduces a wide range of associates for individuals, including relatives and trustees, not to mention an extremely broad range of company associates.⁵ Optus considers that information that is about “an associate” of a person or entity supplied with a product “who has used or is using such a product” presents an unjustifiably broad range of persons about which CDR information must be held.
21. The scope is particularly problematic given the potentially large number of end-users of even an individual telecommunications service, such as may be the case in the supply of retail services to small business customers. For example, it’s unclear if it is intended that CDR data capture all call records relating to customer support for the service, regardless of the individual? Optus also is concerned that the definition may inadvertently capture all enterprise customer information (note further comments on enterprise customers below).

Derived information and materially enhanced information

22. “CDR data” is defined under section 56AI(1) of the CCA as information that:
- (a) *is within a class of information specified, as described in paragraph 56AC(2)(a), in an instrument designating a sector under subsection 56AC(2);*
 - (b) *is not covered by paragraph (a) of this subsection but is wholly or partly derived from information covered by:*
 - (i) *paragraph (a) of this subsection; or*
 - (ii) *a previous application of this paragraph.*

⁴ Explanatory Statement, p.3

⁵ Section 318 of the Income Tax Assessment Act

23. Optus remains concerned about the potential scope of “derived information” that may fall within the scope of CDR data. Section 56AI of CCA defines “derived” information as information not falling within a specified class of information but “wholly or partly derived” from such information (or derived from such derived information and so on). Optus notes that it understands that derived information for which there is a CDR consumer cannot be required to be disclosed under the rules.⁶
24. That said, Optus notes that the definition still captures a potentially very wide range of information that is directly or indirectly derived from the specified classes of information and which therefore may be very difficult or impossible for data holders to identify comprehensively, thereby opening up a potential compliance gap.
25. More specifically, Optus is concerned about the drafting of the proposed exclusion for “materially enhanced information” under section 9. While this exclusion is welcome, Optus is concerned that it is restricted only to information that was “wholly or partly derived” through the application of insight or analysis to “billing and account information about retail supplies of products” (section 7).
26. This means that materially enhanced information of information under section 6 and section 8 may be CDR data – in other words, any information wholly or partly derived through insight or analysis of “information about retail customers and users” or “other information about retail offers or supplies of products” may be captured. This would appear to potentially capture a very broad range of what may be proprietary information. Such an approach appears inconsistent with the approach taken in the banking and energy sectors and the stated position in the sectoral assessment.⁷
27. The drafting of the exclusion for materially enhanced information is unclear and, in Optus view, unworkable. The note under section 7(2) of the Draft Instrument states that “Paragraph (2)(c) means that materially enhanced information does not form part of the class of information specified by section 7. However, materially enhanced information may nonetheless be ‘CDR data’ due to paragraph 56AI(1)(b) of the CCA, which captures information that is wholly or partly derived from information that falls within a class of information specified in this instrument.’
28. Ultimately the delineating factor between what may be “materially enhanced information” and “derived” information appears to be whether the information has been rendered significantly more valuable than the source material (to be materially enhanced).⁸ The Explanatory Statement states that “[t]he concept of materially enhanced information refers to data which is the result of the application of insight, analysis or transformation of data to significantly enhance its useability and value in comparison to its source material...the test only requires the enhanced information to be significantly more valuable than the section 7 inputs.”
29. However, notwithstanding this clarification, Optus considers that the boundary between “materially enhanced information” and “derived information” remains unacceptably vague for the purposes of a meaningful application of the exemption to the broad range of telecommunications data that may fall within specified classes of information.
30. Optus considers that this uncertainty is further compounded by the Explanatory Statement indicating that “while data holders are not required to disclose materially enhanced information under the consumer data right, customers can still authorise data holders to disclose this information through the consumer data right, where this is authorised under the consumer data rules.” This appears to mean that data holders

⁶ see note 3 under section 56AI definition, Competition and Consumer Act

⁷ Sectoral assessment, p.23

⁸ As per section 9(1)(b) of the Draft Instrument

should hold such information for CDR purposes based on the possibility that a consumer may authorise its disclosure.

31. If this interpretation is correct, this appears to be an unreasonable and vague regulatory obligation for which operators cannot possibly be expected to calculate an accurate implementation cost. In Optus view, if the issues with the application of “materially enhanced information” remains unaddressed, Optus foresees potential compliance and implementation delays and potentially onerous implementation costs.
32. Accordingly, Optus recommends that the Treasury:
 - (a) expand the scope of the exemption for “materially enhanced information” to all classes of specified information included in a final designation Instrument
 - (b) clearly explain what constitutes “significantly more valuable” for the purposes of contrasting “materially enhanced information” from “derived information”
 - (c) clearly explain when and what materially enhanced information operators may be required to disclose

Other concerns relating to the scope of CDR Data

33. Optus is also concerned about references in the sectoral assessment to the further refinement of information that does not appear to necessarily fall within one of the classes of information specified under the draft Instrument. Optus is particularly concerned about statements to the effect that a number of areas of information will be further refined at the CDR Rules making stage. This includes information related to enterprise customers, performance or quality of service data and white labelled products.
34. Optus has specific concerns about the potential inclusion of these matters in the designation instrument. Where the benefits are not clearly known, it is important to minimise implementation costs by ensuring the parameters in the designation instrument are clearly and appropriately set.
35. There is very little benefit to be gained from including enterprise customers within the scope of the designation instrument. Given that enterprise customers (large corporate and government organisations) commonly have bespoke products and arrangements the potential implementation costs are likely to be significant and the potential benefit is even more unclear than that for consumers.
36. One of the reasons for the CDR regime is to enable consumers (or an authorised third party) to obtain information regarding their service to assist in potential purchasing decisions. The usual definition of ‘consumer’ in telecommunications is essentially:
 - (a) an individual who acquires a service with the primary purpose of personal or domestic use and not for resale; or
 - (b) a business or non-profit organisation which acquires a service not for resale and which at the time it enters the contract does not have a genuine and reasonable opportunity to negotiate the terms and has an estimated annual spend of less than \$40,000.
37. Such a definition of consumer is found, for example, in the Telecommunications Consumer Protection Code and the ACMA’s nbn consumer experience regulations. Services to consumers are supplied on standard terms and are subject to a Standard

Form of Agreement. If there are benefits to be had from the CDR regime, this is the class of persons/organisations who are likely to receive such benefits.

38. In contrast, it is common for large corporate and government organisations to tender for their telecommunications services across multiple providers. In such cases, these organisations usually have a strong understanding of their telecommunications needs already and tenders are a competitive process to ensure these organisations achieve value for money.
39. It would seem that there would be little benefit to applying the CDR regime to these customers and certainly not sufficient benefit to justify the complexities of implementing the CDR regime for the bespoke arrangements for these organisations.
40. Optus considers section 6 should be amended to be clear that the specified class of information is that belonging to 'consumers' who have been or are being supplied a product, with 'consumer' being defined consistently with other telecommunications legislation to be:
 - (a) an individual who acquires or may acquire a telecommunications service with the primary purpose of personal or domestic use and not for resale; or
 - (b) a business or non-profit organisation which acquires or may acquire a telecommunications service not for resale and which at the time it enters the contract:
 - (a) does not have a genuine and reasonable opportunity to negotiate the terms of the contract; and
 - (b) has or will have an annual spend with the retail carriage service provider which is, or is estimated on reasonable grounds by the retail carriage service provider to be, no greater than \$40,000.
41. Optus also has concerns regarding any requirements to include standardised performance or quality of service information as CDR data. This would drive significant implementation costs when there already is (or soon will be) publicly available information about, for example, typical busy period speeds for nbn services and nbn technology limitations (that is, industry is currently in the process of implementing upfront information that a consumer will receive at point of sale prior to entering into a customer contract (what is known as Dynamic Service Qualification) for nbn services with technology limitations (FTTN/B/C)). These are simply two examples of publicly available information.
42. The service performance or quality of service that a consumer could experience can be influenced by a number of factors, including many outside the control of the RSP, for example, underlying infrastructure (such as the type, line length or quality of underlying nbn infrastructure); internal premises wiring; signal interference (including in respect of internal wifi signals); age and quality of customer hardware/software; number of connected devices; location of the data/content being accessed (e.g. if off-shore or if the server is not able to cope with demand) and network congestion (in peak periods).
43. Treasury has failed to identify any quality of service or performance data that could be required to be shared.⁹ It is unclear what performance or quality of service information could be contemplated in future but given the large variety of factors that can influence

⁹ Treasury, Consumer data right: Telecommunications sectoral assessment – Final report, November 2021. p.24

service performance it is unlikely to be meaningful enough to justify the costs involved as part of a CDR regime.

44. Optus considers that currently publicly available information, in combination with new proposed section 8 under the Draft Instrument will be more than sufficient to support product comparison on non-price elements of telecommunications services.
45. Optus also notes that the scope of “[o]ther information about such supplies that is used for the purposes of billing” under section 7(f)) appears to be an unacceptably broad catch all for any “billing and account information about retail supplies of products” and should preferably be removed.