BCA

Business Council of Australia

Statutory Review of the Consumer Data Right

June 2022

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1. About this submission

This is the Business Council of Australia's submission to the Treasury on the Statutory Review of the Consumer Data Right (CDR), as required by the *Competition and Consumer Act 2010*. The Treasury is supporting the independent reviewer, Ms Elizabeth Kelly PSM.

The Business Council represents businesses across a range of sectors, including manufacturing, infrastructure, information technology, mining, retail, financial services and banking, energy, professional services, transport, and telecommunications.

2. Key recommendations

The Business Council recommends:

1. Government consider the cumulative regulatory burden associated with all of these reforms as it contemplates the CDR legislative framework.
2. Treasury work with other regulators to ensure the CDR regime is prioritised among other regulatory reforms, particularly for sectors which are managing a number of concurrent and substantial reforms.
3. Treasury consider whether the legislative framework means designation is being undertaken in a way that clearly addresses specific problems.
4. Designation begin with a minimum set of viable data holdings to address a clearly defined problem, rather than attempting to capture everything within a sector and narrowing down.
5. Improving the process for reviewing the costs and benefits of designation and rulemaking, including to allow for reassessment as the scope of a designation changes.
6. Clearly articulating and publishing both the key performance indicators for CDR as well as the data to assess success.

3. Key points

The Statutory Review of the Consumer Data Right comes at an important time. There have been a number of recent reviews and announcements, including the Inquiry into Future Directions for the CDR (and associated government response) and the Strategic Assessment to inform future expansion of the regime. The CDR has also been rolled out to the banking sector, with the energy sector being brought in from late 2022. The sectoral assessment and designation for the telecommunications sector is also being finalised, and government has announced its intention to expand CDR to 'open finance'.

In this context, it is appropriate the government considers the effectiveness of the CDR and whether the existing legislative framework supports the best outcomes for Australia. The CDR represents a fundamental reform, and it is critical to get the overall framework right as it is expanded across the economy.

It is worth noting the statutory review is occurring at a time of substantial change across the data policy ecosystem. As the Issues Paper notes, there are a number of complementary initiatives underway across the Commonwealth, including the Australian Data Strategy and the expansion of the Digital Identity System. Beyond those initiatives identified in the Issues Paper, there are many others currently underway across government (including the review of the Privacy Act, the Payment Systems Review, the Data Availability and Transparency Act, the reformed Security of Critical Infrastructure Act, various ACCC processes and inquiries into digital platforms services, and the proposed National Data Security Action Plan, among many others).

We recommend government consider the cumulative regulatory burden associated with all of these reforms as it contemplates the CDR legislative framework. Moreover, any changes to the CDR should avoid confusion or tension between regulatory frameworks across portfolios. It would not be helpful for any proposed changes to the Privacy Act to be at odds with the legislative framework or rules underpinning the CDR, for example. Similarly, the Payment Systems Review is also contemplating similar issues, including a right to action. We strongly encourage Treasury and all relevant portfolios work proactively together to ensure alignment between the various streams of related work.

Treasury needs to be mindful of not only the interactions with other reforms, but also the capacity of businesses to manage concurrent sectoral reforms. We recommend Treasury work with other regulators to ensure any CDR regimes are prioritised, particularly for sectors which are managing a number of concurrent and substantial reforms. In the energy sector, for example, businesses are already managing many sector specific reforms, such as those necessary to enable the clean energy transition. Businesses want to meet the regulatory requirements set by government, but do not have unlimited resources. Government needs to be mindful of their capacity to implement major reforms.

Overall, while we support the intention of the legislative framework governing the CDR, the Business Council considers there is an opportunity to further reform the overall framework. This includes through consideration of how the CDR can best achieve its aims, whether the current regulatory framework presents the most efficient option to achieve this, and what lessons we can learn from international experience.

The Issues Paper notes the CDR has the potential to empower consumers to direct that data be shared with accredited persons and trusted third parties so they can derive direct benefits. This could include allowing consumers to compare products, switch providers, or get a better deal from their current provider. In aggregate terms, this is intended to encourage competition and lower prices in the market.

While we support governments undertaking productivity enhancing reforms, it is important they are delivered in the most efficient and targeted way possible.

3.1 Sectoral designation

The Issues Paper asks whether the existing statutory requirements for assessment, designation, rule-making and standard-setting support future implementation of the CDR.

We consider that the designation process could be improved to better account for the costs and expected benefits of designation under the CDR framework.

As it stands, designation under CDR creates substantial costs for data holders. The banking sector have already incurred significant implementation costs, including costs of aligning core APIs to data standards. It's estimated that the banking sector has collectively invested over $1 billion in building and operating the open banking platforms. Future designations will mean significant costs for data holders, who will have to invest to bring their data into alignment with any potential standards set under CDR. Future data holders will need sufficient lead time for implementation, including to account for different firm sizes.

Going forward, we recommend Treasury consider whether the legislative framework means designation is being undertaken in a way that clearly addresses specific problems. For example, it is not clear consumer concerns around fixed term contracts, or complex plan and price structures are generally applicable outside some of the sectors already designated. It remains unclear, for example, what problems are being solved in the telecommunications sector.

Moreover, as CDR goes forward, it is likely it will expand into sectors that have hundreds (if not thousands) of businesses in scope. Given the high costs of compliance, this could create substantial regulatory costs across the economy, including for SMEs. Many of these businesses will be much more resource constrained and may not have the same level of organisational maturity to ensure compliance.

We also recommend reforming the way sectoral designations are undertaken more broadly. The existing trend is to try and capture as much as possible within a sector, and within tight timeframes. For example, for the designation of the telecommunications sector the sectoral assessment was undertaken over a four-week period. Moreover, the process sees data holders required to refute the inclusion of data sets, which can see a designation capturing a large number of data holdings irrelevant to any consumer issues.

A more sensible approach would be to begin with a minimum set of viable data holdings to address a clearly defined problem identified by Treasury. This would help ensure the costs associated with designation are kept at a minimum. As part of this, it might be helpful to contemplate

It may also be worth contemplating whether the principle of reciprocity could be re-examined or implemented more rigorously, per recommendation 6.9 of the Farrell Inquiry into Future Directions for the CDR. If implementation of reciprocal obligations for Accredited Data Recipients are not limited by the sectoral designations, but instead apply where they hold equivalent data on sectors which are not designated, it may help maintain competitive neutrality. As the Explanatory Memorandum for the legislation implementing CDR explains, reciprocity is also an important component of creating a CDR system that is more vibrant and dynamic and 'imports elements of fairness'. This should be pursued in accordance with recommendation 6.10 of the Farrell Inquiry, with equivalent data excluding materially enhanced data and voluntary data sets.

We also recommend the Treasury consider whether the existing processes for reviewing costs and benefits could be improved. As it stands, the Act requires the Treasury to prepare a report contemplating the costs and benefits (among other matters) of designating a sector (section 56AE). However, a mechanism needs to be included to create checkpoints where the scope of a designation might change. If the designation is expanded (eg to include business customers where previously excluded), it can change whether the marginal benefits of designation remain positive.

3.2 Supporting innovation and measuring success

Ensuring the problem being addressed and costs and benefits are clearly understood is critical to ensuring future rollouts actually deliver benefits to consumers. As the Issues Paper notes, CDR is also intended to support the creation of new products and services for consumers. While we strongly support the development of new products and services to improve the lives of Australians, we also note that designations made in the hope of spurring innovation may not be warranted where they create high costs and could perhaps be considered as transferring the costs of innovation onto data holders.

Instead, to support innovation, we encourage Treasury to consider whether the existing frameworks appropriately balance confidentiality with the ethical use of data. For innovators to bring their products to market, they need to be sure there is confidentiality about the products or services being developed. However, this also needs to be balanced with the public's interest in ensuring data is being used in an ethical way. It would be worthwhile contemplating whether the legislative framework helps ensure this balance is struck.

To this end, it may be also worthwhile looking at how Australia measures success for CDR. Australia's CDR reporting dashboard only reports on the availability and average response times for some active Data Holders. We recommend government consider how it can establish higher quality metrics demonstrating how CDR is being used and the level of uptake. Other jurisdictions that have implemented reforms like the CDR, such as Open Banking in the UK, have more clearly articulated and report against key performance statistics, such as the number of API requests (including both successful and failed calls) and successful payments, among others. These metrics of success are an important marker to weigh against the potential costs involved in rolling out a broader CDR regime.

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