
Submission to Ms Elizabeth Kelly PSM on the Statutory Review of the Consumer Data Right – Issues Paper

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Ms Elizabeth Kelly PSM
Secretariat Statutory Review of the Consumer Data Right
The Treasury
Parkers ACT 2600

By email: CDRstatutoryreview@treasury.gov.au

Dear Ms Kelly

The Consumer Data Right (CDR) reform has not focused on its core intention – **delivering benefits to consumers**. The scope of CDR applicability continues to grow while processes underpinning data sharing to enable basic transactions and comparisons within the banking sector (currently the most mature CDR regime) are not yet seeing benefits flow through to consumers.

We recommend that the Government use this review to consider the following to ensure a more consumer-centric implementation of CDR:

- Develop clear consumer-centric success metrics.
- Implement consumer protections that evolve beyond notification and consent and into placing obligations on businesses using consumer data. The CDR regime should not over-rely on disclosure or perpetuate consent fatigue among consumers.
- Adequately fund consumer representation to ensure consumer views are represented in the CDR consultative processes.
- Conduct a cost-benefit analysis that identifies direct benefits to consumers across the CDR ecosystem.
- Establish safeguards through economy-wide protections.
- Develop and implement clear enforcement outcomes that hold CDR entities accountable when they fail to operate within CDR rules.
- Consider a sector-neutral, use-case focussed economy-wide roll-out.

The Consumer Policy Research Centre (CPRC) welcomes the opportunity to contribute to the Statutory Review of the CDR.

CPRC is an independent, non-profit consumer research organisation. Our mission is to improve the lives and welfare of consumers by producing evidence-based research that drives policy and practice change. Data and technology issues are a research focus for CPRC, including emerging consumer risks and harms and the opportunities to better use data and technology to improve consumer wellbeing and welfare.

For further discussion regarding our research and the contents of this submission, please contact me via chandni.gupta@cprc.org.au.

Yours sincerely



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Question 1: Are the objects of Part IVD of the Act fit-for-purpose and optimally aligned to facilitate economy-wide expansion of the CDR?

One of the key objects in Part IVD is to enable consumers to require '*information relating to themselves in those sectors to be disclosed to them or to accredited persons*'. This has been failed to be delivered across any of the sectors where CDR capability exists thus far. The implementation fails to recognise and acknowledge that a government-endorsed consumer data regime needs to meet a higher standard of consumer protection and safety to build consumer trust and confidence. The original intention of the CDR regime was to provide a superior framework offering consumers a higher degree of control and protections over their data, not to mildly improve on current data harvesting and sharing practices which are already causing consumer detriment and are out of line with consumer and community expectations.

An example of this is the introduction of third-party access to CDR data outside the CDR ecosystem. Across our previous submissions, we have continuously raised concerns with "trusted advisers" gaining access to CDR data without having the same obligations as an Accredited Data Recipient (ADR), or indeed any privacy obligations as many entities will fall outside the weak existing protections provided by the Privacy Act – an Act which currently pre-dates the technology era. This further increases the risk of CDR data being used or shared outside of the regime without adequate protections.

While there may be cases where consumers may benefit from transferring their data to trusted advisers, it was unclear why Treasury did not proceed with the critical part of this regime to provide consumers direct access to their own data – putting consumers themselves in full control of who they share it with. Instead, "trusted advisers" have been enabled to directly approach an ADR to release CDR data, without pursuing the consent processes that apply to ADRs. This will result in a significant weakening of the scheme without sufficient protection and control for consumers. The current rules do not require the ADR to ensure that the CDR data would be protected in the same way as it would within the regime by the trusted adviser. The Treasury implies that fiduciary duties are adequate in protecting the consumer, even though CDR rules offer a superior protection of CDR data than fiduciary obligations alone.

Our research shows that only 12% of consumers feel that they have a clear understanding on how their personal information is collected and shared in a digital economy.¹ Placing the onus back on consumers to understand the implications of their data moving outside of the CDR regime and the impact of the types of data sharing tools or services that their choice of trusted adviser may be utilising seems contradictory to the protections that the CDR regime aims to offer Australian consumers.

Question 2: Do the existing assessment, designation, rule-making and standard-setting requirements of the CDR framework support future implementation of the CDR, including to government-held datasets?

Reliance on disclosure and consent – getting the balance right

One of the challenges as the CDR framework is applied across various sectors is its heavy reliance on disclosure and consent in an environment that is increasingly become more complex to navigate. This is an issue CPRC has raised across various digital reform submissions the over-reliance on disclosure and consent in the absence of protections which ensure safe and fair treatment. Safety and fairness should not be left to consumer choice – these are things which consumers expect the law to ensure regardless of choice.

¹ CPRC, "CPRC 2020 Data and Technology Consumer Survey", (December 2020), <https://cprc.org.au/cprc-2020-data-and-technology-consumer-survey/>.

Our research indicates that the proliferation of choice, while a positive for consumers, has also led to an increase in frustration and confusion. Choice becomes meaningless and even detrimental if it is not structured in a clear and easy way for consumers to navigate and act in accordance with their preferences.²

One example is the decision to enable one Joint Account Holder (JAH) to determine how and where a third-party can make decisions on behalf of both account holders.³ This not only violates the consent model, but could potentially result in consumers being switched to products or services that might leave both joint account holders financially worse off or receive other aspects of a service that do not meet both JAH preferences. While Treasury noted that this was implemented to help mitigate the risk to a JAH who is experiencing domestic violence from a partner, several consumer groups⁴ raised concerns that defaulting to a pre-approval option could give rise to a JAH financially controlling a partner in the same situation, where the partner is merely notified of the data sharing taking place and is unable to take an active role in the decision-making process. Establishing an opt-out solution further distances consumers from feeling empowered and in control of their data.

The JAH issue could be further exacerbated if the current read-access paradigm is intended to be “built-out” to enable a write-access paradigm in the future. The pre-approval default would fundamentally violate consumers’ ability to control their data and provide meaningful consent. Treasury’s approach would run contrary to a consensus view among consumer advocates that any future write-access regime requires two-to-authorise consent to avoid potential domestic abuse and harm.

Considering consumer voice and engagement

As CDR implementation expands, so does its complexity. As a result, the design of CDR use cases, products and interfaces are being driven primarily by commercial interests. Consumer advocates have raised concerns with CPRC that this will lead to some consumers being shut out of obtaining benefit from CDR, or that it may widen existing disparity of consumer access to some products or pricing.⁵

Another aspect that contributes to this is the lack of meaningful consultations with consumer representatives. While consumer groups have been actively engaged in CDR over a number of years, the burden placed on consumer groups during consultation is extensive and excessive. The current volume of inquiries is not possible for not-for-profit consumer groups to resource. There is currently no effective model to adequately support consumer representative engagement in CDR, and consumer representative participation is currently entirely voluntary. The ability for policymakers to fully consider the benefits and risks of a reform like CDR relies upon the ability for consumer organisations to effectively participate in such processes. CPRC strongly encourages the Australian Government to make provisions to adequately fund consumer representation to effectively participate in these processes.

Direct communication with consumers on the CDR ecosystem has been so far mostly absent, which fosters an environment where consumers remain passive participants of a reform that is meant to put them in control of their data. Apart from the initial communications by the ACCC⁶ released in 2020, there has been little to no engagement from Government with consumers directly to help raise their awareness and understanding of the CDR. We urge Treasury to implement a targeted, long-term integrated education and communication program that aims to raise consumer awareness and understanding of the CDR. As participating in a CDR-related process could occur at any time for a

² CPRC, “The Digital Checkout”, (December 2021), <https://cprc.org.au/publications/the-digital-checkout>.

³ *Competition and Consumer (Consumer Data Right) Amendment Rules (No. 1) 2021*, Retrieved from <https://www.legislation.gov.au/Details/F2021L01392>.

⁴ See joint submission on Consumer Data Right rules amendments (version 3) made by Financial Rights Legal Centre, Consumer Action Law Centre, Australian Privacy Foundation, Australian Communications Consumer Action Network and Public Interest Advocacy Centre: https://financialrights.org.au/wp-content/uploads/2021/07/210723_TreasuryCDRRulesUpdate_FINAL.pdf.

⁵ CPRC, “Consumer Data Right Report 4 – My data, My choices”, (April 2022), <https://cprc.org.au/consumer-data-right-report-4-my-data-my-choices/>.

⁶ See Consumer Data Right video released by the ACCC in June 2020: <https://www.youtube.com/watch?v=nwJTSqLCCSg>.

consumer, a one-off campaign run for only a specific period of time is unlikely to dramatically increase awareness and understanding. A sustained approach could result in an increase in consumer awareness and understanding while also empowering them to actively engage in the regime.

Question 3: Does the current operation of the statutory settings enable the development of CDR-powered products and services to benefit consumers?

To truly realise whether a reform is delivering products and services that benefit consumers, key metrics need to be in place to adequately measure and reflect on the deliverables of the reform. To date there has not been a cost-benefit analysis of the current implementation approach nor have consumer-centric success metrics been established, despite these being recommended by consumer organisations via previous submissions.

Cost-benefit analysis that identifies direct benefits to consumers

CPRC strongly recommends that a cost-benefit analysis be undertaken to truly identify the value that an economy-wide roll-out of CDR will bring and to whom it will benefit the most – consumers, or entities with a commercial interest in gathering the data. A key element of the cost-benefit analysis should also give due consideration to factors that contribute to a consumer experiencing vulnerability. Our research on vulnerability for the Consumer Data Right regime notes the importance of integrating vulnerability principles in the work program and developing clear aims, indicators and measures that are specific to consumer vulnerability.⁷ This is also a concept that is currently being applied in the UK Office of Gas and Electricity Markets where cost-benefit analysis now includes a specific weighting for vulnerability.⁸

Clear consumer-centric success metrics

Australian consumers expect the laws governing the collection, sharing and use of their data to deliver the following:

- **Fairness** – entities do not collect, share and use data in a way which is unfair, exploitative or extractive.
- **Safety and security** – entities are obligated to keep consumers safe.
- **Choice and control** – consumers are provided with genuine, meaningful control and choice over their data.
- **Transparency** – entities are required to be transparent about why, what and how data is being collected, shared and used with consumers and citizens.
- **Accountability** – entities and individuals are held to account for data misuse, enforcement is effective, and remedies are easily obtained.
- **Inclusion** – consumers are not excluded nor receive detrimental outcomes as a result of data collection, sharing and use by entities.⁹

CPRC has also noted in previous submissions the importance of clear consumer-centric success metrics as CDR continues to expand. CPRC has also previously suggested the following high-level success metrics to Treasury for consideration:

- **Consumer wellbeing:**
 - Ability to secure products and services that genuinely improve their lives without comprising data protection.

⁷ O'Neill, E, "Consumer Data Right Report 1: Stepping towards trust Consumer Experience, Consumer Data Standards, and the Consumer Data Right", Consumer Policy Research Centre, (February 2021), [Consumer Data Right Report 1: Stepping towards trust Consumer Experience, Consumer Data Standards, and the Consumer Data Right - CPRC](#).

⁸ Presentation by Meghna Tewari, Head of Retail Market Policy (Ofgem) at the 2021 ACCC/AER Regulatory Conference (Session 2B – Consumer vulnerability and market design).

⁹ CPRC, "CPRC 2020 Data and Technology Consumer Survey", (December 2020), [CPRC 2020 Data and Technology Consumer Survey - CPRC](#); and CPRC, "Report Summary: Consumer Data and the Digital Economy", (July 2018), [Report Summary: Consumer Data and the Digital Economy - CPRC](#).

- Extent to which consumers are reporting that they are better-off as a direct result of the protections offered through the regime.
 - Identification of real-life, specific use cases that are relatable and show a direct consumer benefit that's measurable.
- **Empowerment and choice:**
 - Extent to which consumers clearly comprehend the information and adequately understand how their data is used.
 - Ability to offer genuine choice to consumers on products and services, where a superior product/service is not offered at the expense of weakened protection measures for consumer data.
 - Extent to which consumers are reporting that they feel they are in genuine control of their data and that the infrastructure is set up in a way to ensure this at all times.
 - Extent of products and services that are accessible and inclusive across the customer base.
- **Safety and security**
 - Ability to protect consumers against data breaches, scams and fraud.
 - Implementation of a dispute resolution scheme with an appointment of a Digital Ombudsman.
 - Capacity and capability to provide a clear pathway for consumers to notify issues and disputes and have those effectively resolved without placing significant onus on the consumer.
 - Ability to effectively audit and enforce the framework to identify rogue entities and make them accountable.
- **Building trust**
 - Extent to which consumers feel they can trust those participating in or linked with others participating in the regime.
 - Extent of open and transparent reporting of the regime.
 - Identification of real-life, specific use cases that are relatable and show a direct impact on trust that's measurable.

Without key metrics on how CDR is delivering benefits for consumers, the reform risks becoming a data-harvesting opportunity for businesses, instead of a reform that works in the interest of consumers.

Question 4: Could the CDR statutory framework be revised to facilitate direct to consumer data sharing opportunities and address potential risks?

The CDR statutory framework needs to ensure that safety and security remain the core focus to enable direct to consumer data sharing opportunities that do not place additional risks to consumers or their data.

Establishing safeguards through better protections and penalties

We agree with the Financial Rights Legal Centre's recommendations in its submission to ban screen-scraping and other unsafe data access practices and to introduce penalties for firms using data obtained via the CDR without accreditation.

In addition to the above measures, CPRC has consistently urged the need to implement reforms to the Privacy Act to ensure the environment surrounding the CDR provides sufficient protection for consumers as their data continues to open-up. A new Privacy Act that addresses the increasing ubiquity of data collection, use and disclosure in the economy would also help inform parts of the CDR regime that intersect with these elements.

Clearer market stewardship is required from government to ensure that emerging digital markets both work for and deliver benefits for Australian consumers.

Enforcement outcomes that hold entities accountable

For a regime like CDR to be effective in its delivery and in addressing potential risks, it needs to be supported by regular surveillance and enforcement. Currently it is unclear how and by whom the regime will be audited or enforced. CPRC has raised this in numerous submissions and consultations. This becomes particularly problematic as implementation continues towards the economy-wide roll-out and the introduction of various actors that sit outside of the CDR regime who can now access CDR data.

There is an urgent need to progress with transparent consultation regarding the audit and enforcement model that is being proposed for the CDR regime. If the rules are not enforceable, then they cannot be relied upon to provide sufficient protection for consumers.

What will the regulator model look like in an economy-wide approach? How will the regulator, for example, ensure that data that has been shared is being used by entities in line with the consent that has been provided by the consumers? This includes the practicality of any proposed audit trail with any non-accredited entities to identify practical implications of monitoring the CDR landscape.

[Question 5: Are further statutory changes required to support the policy aims of CDR and the delivery of its functions?](#)

Sector-neutral, use-case focussed economy-wide roll-out

We have continued to urge Treasury to reconsider the sector-by-sector approach for the economy-wide roll-out, and instead consider implementing a sector-neutral model where the focus is on seamless implementation of specific use cases. Attempting to solve 'all sectors for all use cases' at the same time creates an extremely complex environment for all involved, regulators and consumers included. It also means that some use cases are continuously retrofitted as each new sector is introduced.

As there are likely to be similarities in use cases across several sectors, ensuring use cases are practical and sector neutral would assist in fast-tracking measurable outcomes for consumers. For example, a staged implementation could focus on refining the delivery of set use cases at each stage that could be applied simultaneously across multiple sectors. This would give consumers the opportunity to gain tangible benefits and help build confidence and trust in the regime. It is likely to also increase consumer engagement and with more consumers participating in the regime. Their lived experiences of the use cases in each stage could help enhance other use cases in future stages.

Economy-wide reforms to enlist stronger protections for consumers

To deliver an economy-wide CDR regime that adequately holds entities participating in it accountable across all sectors, the follow reforms must be prioritised:

- Reform of the Privacy Act to bring Australia's protection framework into the digital age through a coherent, economy-wide consumer protection.
- Introduction of an unfair trading prohibition to protect consumers from data extraction and digital misuse.
- Introduction of technology/data impact assessments for government reforms to data and technology, which include a cost-benefit analysis to truly identify the value of new digital innovations and to whom will it benefit the most – consumers, or entities with a commercial interest.
- Increased enforcement resources for regulators within a complex digital environment and clear pathways for consumers to access support when experiencing digital harms.
- Establishing a 'best interests' duty to add a level of accountability on entities on how consumer data is treated and how choice architecture is presented and implemented. This could significantly reduce the likelihood of consumer harm and lead to pro-business benefits by increasing consumer trust in those entities that actively build this into their business model.