

Statutory Review of the Consumer Data Right

ISSUES PAPER SUBMISSION

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1.1 INTRODUCTION

Thank you for the opportunity to make a submission in response to the Statutory Review of the Consumer Data Right (CDR) Issues Paper. Our response is based on research conducted as part of the first author's PhD thesis which investigates the potential application of the CDR to the agricultural sector. In doing so, the research raises some potential challenges for future CDR development particularly in relation to the application of sectoral designation processes. These issues are considered below in relation to four of the questions posed in the Issues Paper.

1.2 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?

As the law currently stands, the object of Part IVD is strongly focused on the notion of enablement. Section 56AA(a) enables consumers in certain economic sectors to require information relating to them be disclosed by relevant service providers. Section 56AA(b) extends portability prospects to any person regarding data about goods or services that do not relate to any identifiable or reasonably identifiable consumers. Sections 56AA(a) and (b) currently serve different enablement purposes. The former regards CDR portability enablement as a means of empowering consumers in the digital economy, a key theme that has been a consistent policy objective of the CDR. The latter regards CDR portability enablement to service providers so they can enhance products or services based on non-personal information. Consequently, at the heart of the CDR's objectives, through its objects clause, is the goal of enabling a data powered digital economy in different ways.

However, we have concerns about the current limitations of section 56AA(a) and its overt focus on enablement within the scope of sectoral designation structures. In other words, to "...enable consumers in certain sectors..." limits the notion of consumer rights and reduces it to a sectoral rather than comprehensive

basis.¹ Consumer enablement in the context of the CDR pertains to a limited notion of portability pertinent to specific sectors, rather than the digital economy. We believe this is a limitation of the sector-centric approach adopted in the CDR.² Currently, the only sectors to receive designation are those which are determined to have economic potential after a careful and thorough sectoral assessment.³ Consequently, the scope of CDR data and CDR participants is determined based on sectoral assessment. Hence, the very notion of a CDR consumer is limited by the context of the sectoral designation in which it applies.

We believe that the sectoral-focused enablement approach will limit the potential benefits of the CDR for consumers. As the CDR regime currently stands, a person can be a consumer for goods and services across multiple sectors. Consumers are not limited to certain sectors⁴ and would therefore benefit by being empowered to port and aggregate data across different sectors seamlessly. A sector-based CDR is likely to facilitate basic comparison and switching for consumers within designated sectors, but we believe it will be limited in offering a portability mechanism universal to the wholesale digital economy. Limiting portability to consumers by sector could therefore inadvertently prevent consumers from maximising the true value of their

¹ *Treasury Laws Amendment (Consumer Data Right) Act 2019* (No. 63, 2019) s 56AA(a).

² *Review into Open Banking: Giving Customers Choice, Convenience and Confidence* (Commonwealth of Australia, December 2017) 115 <https://treasury.gov.au/sites/default/files/2019-03/Review-into-Open-Banking_-_For-web-1.pdf> ('*Review into Open Banking*'); *Consumer Data Right Overview* (Treasury, 2019) iv <https://treasury.gov.au/sites/default/files/2019-09/190904_cdr_booklet.pdf>.

³ *Inquiry into Future Directions for the Consumer Data Right* (The Australian Government the Treasury, October 2020) 207 <<https://treasury.gov.au/sites/default/files/2021-02/cdrinquiry-final.pdf>>; *Data and the Digital Economy* (Fact Sheets, Commonwealth of Australia, 6 May 2021) <<https://digitaleconomy.pmc.gov.au/fact-sheets/data-and-digital-economy>>.

⁴ Ross P Buckley, Natalia Jevglevskaia and Scott Farrell, 'Australia's Data-Sharing Regime: Six Lessons for the World' 67 *University of New South Wales Law Research Series* 49, 32–34; *Inquiry into Future Directions for the Consumer Data Right* (n 3) 34.

data. The sectoral approach could reduce the availability of information that would enable the development of holistic and portable data profiles. A consumer-centric approach that views the CDR comprehensively rather than sectorally could thus derive stronger benefits for individuals.

As the Issues Paper highlights, the CDR should focus on “...broad innovation, and user journeys rather than simple switching use cases...”.⁵ We believe this is correct and reflects an emphasis on consumer empowerment and welfare that section 56AA(a) should more strongly reflect, rather than the current focus on enablement. An empowerment focus ties in with the broader objective of the *Competition and Consumer Act* (‘the Act’) to improve the economic welfare of Australians.⁶ In this respect, the objectives of Part IVD could be more strongly aligned to the broader objective of the Act as well as considerations within the CDR framework itself. For example, section 56AA(c) specifically highlights the objective of the CDR to create more choice for consumers by promoting competition between service providers. This has resulted in many inquiries that have investigated support for comparison and switching services.⁷ As the Issues Paper highlights, the focus on switching service is a narrower consideration compared to the broader objective of

⁵ *Statutory Review of the Consumer Data Right* (Issues Paper, The Australian Government the Treasury, March 2022) 6 <<https://www.cdr.gov.au/sites/default/files/2022-03/Statutory-Review-of-the-Consumer-Data-Right-issues-paper-2022.pdf>>.

⁶ *Competition and Consumer Act 2010* (Cth) s 2; Ian Harper et al, *Competition Policy Review* (Final Report, The Australian Government the Treasury, 2015) 7 (‘*Harper Review*’).

⁷ *Review into Open Banking: Giving Customers Choice, Convenience and Confidence* (n 2) 1; *Priority Energy Datasets Consultation* (Consulting report, The Australian Government the Treasury, 29 August 2019) 9; *Consumer Data Right Telecommunications Sectoral Assessment: Final Report* (Sectoral assessment, Commonwealth of Australia, November 2019) 7.

promoting consumer welfare at the heart of the Act or enhancing the interests of consumers, a key purpose of the CDR statutory factors application.⁸

We believe the emphasis on sector-centric designations may create more switching opportunities for consumers but may not be strong enough to legislatively support user portability across the whole of the Australian digital environment. Accordingly, the objects clause of the CDR scheme should broaden to specifically include consumer empowerment and to focus on consumer welfare as a means of supplementing a broader notion of portability at the heart of the CDR.⁹ In turn, we believe that this would assist the CDR to become a portability mechanism that is able to deliver a consumer-centric data lifecycle-based approach instead of the sector-centric approach, as currently envisaged.

Furthermore, policymakers have sought to encourage a broader range of providers to participate in the CDR framework by relaxing accreditation requirements. These changes enable consumers to share their CDR data with providers who might not even have accreditation.¹⁰ For example, Rule 1.10C provides flexibilities for trusted parties to receive CDR data on the direction of a CDR consumer. However, the scope of section 56AA(a)(ii) could be limiting as it provides that only accredited persons can access CDR data upon receiving consent from the

⁸ *Treasury Laws Amendment (Consumer Data Right) Act* (n 1) s 56AD(1)(a)(i); *Exposure Draft Explanatory Materials: Treasury Laws Amendment (Consumer Data Right) Bill 2018* (Treasury, 2018) 10 <https://treasury.gov.au/sites/default/files/2019-03/Consumer_Data_Right_EM_T316972.pdf>; *Consumer Data Right Overview* (n 2) 2.

⁹ *Inquiry into Future Directions for the Consumer Data Right* (n 3) 12; *Consumer Data Right Strategic Assessment: Outcomes* (The Australian Government the Treasury, January 2022) 3 <https://treasury.gov.au/sites/default/files/2022-01/p2022-242997-outcomes-report_0.pdf>.

¹⁰ *Exposure Draft Explanatory Materials - Competition and Consumer Act 2010 Competition and Consumer (Consumer Data Right) Amendment (2021 Measures No. 1) Rules 2021* (Exposure Draft Explanatory Materials, Minister for Superannuation, Financial Services and the Digital Economy, 2021) 14–18 <https://treasury.gov.au/sites/default/files/2021-06/187223-cdr_rules_amendments_em.pdf>.

CDR consumers. We suggest that section 56AA(a)(ii) could be amended to encapsulate this expanding notion of accreditation.

1.3 QUESTION 2 - DO THE EXISTING ASSESSMENT, DESIGNATION, RULE-MAKING AND STANDARD-SETTING STATUTORY REQUIREMENTS SUPPORT THE FUTURE IMPLEMENTATION OF THE CDR, INCLUDING TO GOVERNMENT-HELD DATASETS?

As noted above, the current approach to assessment, designation and rulemaking is based on a sector-centric approach.¹¹ As such, key implementation CDR considerations are undertaken on a sector-by-sector basis. We identify two issues that could obstruct the broader fulfilment of the CDR from this approach.

It is likely that different sectoral designations will eventually have conflicting provisions or scope as the CDR expands to more sectors. As noted, the CDR is only expanded to additional sectors after detailed consideration of the impact of designation for that sector.¹² This means that the scope of CDR data, the stakeholders covered, and the application of CDR Privacy Safeguards is determined by how a CDR designation could impact a particular sector. The designation instrument and specific sectoral rules are suited to the needs of that individual sector but may not be coherent in application across other sectors. This could lead to portability limitations result when cross-sectoral interaction is required by consumers in the CDR scheme.

Challenges could arise when designation issues in one sector are restricted in another sector. For example, individual sector Schedules can define product data,

¹¹ *Implementation of an Economy-Wide Consumer Data Right: Strategic Assessment* (Consultation paper No c2021-182135-strat, The Australian Government the Treasury, 2021) 15 <<https://treasury.gov.au/sites/default/files/2021-08/c2021-182135-strat.pdf>>.

¹² *Treasury Laws Amendment (Consumer Data Right) Act* (n 1) ss 56AD, 56AE.

consumer data and categorise certain types of data as excluded data.¹³ Allocation of information types to each category depends on the context of the sector under review. Issues could arise when a certain type of data is categorised as excluded data in one sector, but in another sector, it is considered CDR data. Location data, for instance, has been categorised as excluded data in the telecommunications designation instrument primarily due to the privacy sensitivities that can arise from its use.¹⁴ However, in other proposed sectors, for example the agricultural sector, location data could be important information to port for farmers and may need to be designated as CDR data. In the agriculture sector, the use cases for location data are plenty.¹⁵ Location data will be important for field mapping, setting boundary borders, and using automated machinery. CDR based access and sharing of location data in the agricultural sector is therefore likely to be beneficial.

As noted above, the CDR is implemented on a sectoral basis, but it is still intended to allow cross-sectoral data transfers.¹⁶ However, given the differences between excluded and CDR data across sectors, as highlighted above, portability could result in inconsistencies across the CDR system. If a consumer desired to share location data from the agriculture sector to the telecommunication sector, for

¹³ *Competition and Consumer (Consumer Data Right) Rules 2020* (Cth) rules 1.7, 2.1, 3.1, Schedule 3 clause 3.1 and 3.2, and Schedule 4 clause 3.1 and 3.2; *Consumer Data Right (Energy Sector) Designation 2020* (Cth) provision 11 ('*Energy Sector Designation Instrument*'); *Consumer Data Right (Telecommunications Sector) Designation 2022* provision 9 ('*Telecom Sector Designation Instrument*').

¹⁴ *Telecom Sector Designation Instrument* (n 13).

¹⁵ Prem Prakash Jayaraman et al, 'Internet of Things Platform for Smart Farming: Experiences and Lessons Learnt' (2016) 16(11) *Sensors* <<https://www.mdpi.com/1424-8220/16/11/1884>>; Emma Jakku et al, "'If They Don't Tell Us What They Do with It, Why Would We Trust Them?'" Trust, Transparency and Benefit-Sharing in Smart Farming' [2018] *NJAS - Wageningen Journal of Life Sciences* <<http://www.sciencedirect.com/science/article/pii/S1573521418301842>>; Tomislav Hengl et al, 'SoilGrids1km — Global Soil Information Based on Automated Mapping' (2014) 9(8) *PLoS ONE* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4149475/>>.

¹⁶ *Inquiry into Future Directions for the Consumer Data Right* (n 3) 7–8; *Review into Open Banking: Giving Customers Choice, Convenience and Confidence* (n 2) 3; *Consumer Data Right Strategic Assessment: Outcomes* (n 9) 2.

example, it is currently uncertain whether it could be undertaken, even though it is likely that an individual could be a CDR consumer in both sectors, albeit in different contexts.

A similar problem could arise with regards to accredited data recipients. The universal level of accreditation requires high criteria to be met, which thus far is almost comprehensive in application. As noted above, recent amendments to the CDR have focussed on creating lower accreditation requirements so that more entities can participate in the scheme.¹⁷ However, issues could arise if accreditation criteria differ according to different sectors. This could limit the involvement of start-ups from receiving data from other sectors and effectively reduce participation in the complete CDR framework. An information disparity could emerge between larger corporations and smaller entities as the former would be eligible to access a broader range of CDR data. In this instance, the overt focus on sectoral segregation within the CDR could have an unintended anti-competitive impact that marginalises the very groups that the CDR is intended to encourage.

As noted above, we believe one of the main drivers for potential sectoral conflict is the narrow consideration of section 56AD(1)(a)(i). The provision requires consideration of consumer interest instead of consumer welfare. Further, the interest consideration is squarely focussed on a particular sector. Sectoral assessments are thus required to explore issues related to interests of consumers in a particular sector, as opposed to the general welfare of consumers as active participants of the digital economy. Welfare is a broader and more holistic concept.

¹⁷ *Accreditation Guidelines (Version 3)* (The Australian Government the Treasury, February 2022) 7 <<https://www.accc.gov.au/system/files/CDR-Accreditation-guidelines-version-3-published-16-February-2022.pdf>>; *Exposure Draft Explanatory Materials - Competition and Consumer Act 2010 Competition and Consumer (Consumer Data Right) Amendment (2021 Measures No. 1) Rules 2021* (n 10) 3.

A stronger consumer welfare consideration at the heart of CDR's objects clause and statutory factors could cement a broader and more holistic focus of consumer empowerment.

1.4 QUESTION 3 - DOES THE CURRENT OPERATION OF THE LEGISLATIVE SETTINGS ENABLE THE DEVELOPMENT OF CDR-POWERED PRODUCTS AND SERVICES TO BENEFIT THE CONSUMERS?

The second author has previously conducted research with Associate Professor Anna Huggins, Dr Alice Witt, Professors' Guido Governatori and Nic Suzor into the suitability of the CDR legal regime for conversion into machine executable code. Our research resulted in a favourably considered submission to the We converted a total of 71 CDR provisions of the Act, and the corresponding CDR Rules 2020 (Cth), that give effect to the CDR. Several legal and technical challenges were identified.

A key challenge was promoting alignment between the languages and logics of the statute and the encoded provisions, which is compounded by the complex interplay between different legislative and regulatory rules, and the lack of caselaw to guide interpretive choices. The absence of case law on the CDR was also significant because, under Australia's constitutional framework, only the judiciary can conclusively interpret the legal meaning of a statute. We also found that some types of statutory provisions were not well-suited to digitisation; for example, human interpretation is needed for discretionary and ambiguous terms that cannot be accurately translated into deterministic code, and for high stakes decisions, like those concerning offences, defences and penalties.

Fuller details of the research are detailed at the footnote below.¹⁸ Further research is required but we believe the current legislative and regulatory structure of the CDR may unintentionally make it more challenging for digitalised and automated solutions to develop, given the complexities of converting the CDR to machine executable code.

1.5 QUESTION 4 - COULD THE CDR LEGISLATIVE FRAMEWORK BE REVISED TO FACILITATE DIRECT TO CONSUMER DATA SHARING OPPORTUNITIES AND ADDRESS POTENTIAL RISKS?

As noted throughout our submission, enhancing data sharing opportunities for consumers could require broadening the CDR's approach to data portability. The current CDR model implements a competition-based approach to data portability.¹⁹ Consequently, the scope of the current framework is still partially determined by the needs of the market and thus the powerful players within the market. We believe consumer benefits from the CDR could be enhanced if the data portability mechanism focuses more on empowerment and consumer welfare, as outlined above. A different type of data portability model predicated on personhood could

¹⁸ Huggins, Anna, Witt, Alice, Suzor, Nicolas, Burdon, Mark, & Governatori, Guido (2021) *The Legal and Coding Challenges of Digitising Commonwealth Legislation: Select Senate Committee on Financial Technology and Regulatory Technology Issues Paper Submission*. Parliament of Australia, Canberra < <https://eprints.qut.edu.au/210128/>>.

¹⁹ Peter Swire, *The Portability and Other Required Transfers Impact Assessment (PORT-IA): Assessing Competition, Privacy, Cybersecurity, and Other Considerations* (No Research Paper No. 3689171, 8 September 2020) 9–14; Simonetta Vezzoso, 'Competition Policy in Transition: Exploring Data Portability's Roles' (2021) 12(5) *Journal of European Competition Law & Practice* 357, 366–369 ('Competition Policy in Transition'); Sampson Yoseph Esayas and Angela Daly, 'The Proposed Australian Consumer Right to Access and Use Data: A European Comparison' (2018) 2(3) *European Competition and Regulatory Law Review (CoRe)* 187, 187–191 ('The Proposed Australian Consumer Right to Access and Use Data'); Mark Burdon and Tom Mackie, 'Australia's Consumer Data Right and the Uncertain Role of Information Privacy Law' (2020) 10(3) *International Data Privacy Law* 222, 222.

shift the underlying policy motives of the CDR to a more defined welfare and empowerment focus.

The notion of personhood in the digital context regards comprehensively recognising the status of a digitalised person in the online world. In other words, digital personhood can be considered as extension of an individual's personality into the digital realm.²⁰ Digital personality is a significant issue regarding consumer empowerment in the digital sphere due to the ever-expanding online presence that is driving the digital economy.²¹ An individual's online presence is akin to a digital avatar that can emulate a person in the digital context. The digital presence can exhibit real-world behavioural and personality contexts, as well as fulfilling human enablement in the digital space.²² In this regard, digital personhood is closely related to the protection of fundamental human interests rather than a core component of a competition-based portability model.

The foundations of data portability based on personhood thus lie in free development of human personality. In the context of digitalisation, a personhood portability model could better empower consumers to protect and manage their

²⁰ G Zanfir, 'The Right to Data Portability in the Context of the EU Data Protection Reform' (2012) 2(3) *International Data Privacy Law* 149, 150–152; Stefan Uhlmann and Artur Lugmayr, 'Personalization Algorithms for Portable Personality' in *Proceedings of the 12th International Conference on Entertainment and Media in the Ubiquitous Era - MindTrek '08* (ACM Press, 2008) 117, 117–118 <<http://portal.acm.org/citation.cfm?doi=1457199.1457225>>; Serdar Biroğul, Emre Küçükayvaz and Önder Murat Erol, 'Shop Marketing Scenario Using Context Based Digital Personality' in *2011 International Symposium on Innovations in Intelligent Systems and Applications* (2011) 536, 536.

²¹ Ken Jordan, Jan Hauser and Steven Foster, 'The Augmented Social Network' (2003) 8(8) *First Monday* <<https://firstmonday.org/ojs/index.php/fm/article/download/1068/988?inline=1>>; Matthew Rowe and Fabio Ciravegna, 'Getting to Me – Exporting Semantic Social Network Information from Facebook' in *1st Social Data on the Web Workshop* (2008) 43, 43 <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.357.2652&rep=rep1&type=pdf#page=43>>.

²² Mary Rundle et al, *At a Crossroads: 'Personhood' and Digital Identity in the Information Society* (Organisation for Economic Co-Operation and Development, 2007) 4.

identities in the digital and the physical world.²³ The Bill of Rights for Users of the Social Web was one of the first charters that advocated for data portability to enable development of an individual's personality in the digital space.²⁴ Data portability was perceived as a suitable mechanism that could enable users to access and exercise control over their data in a personhood context. It was seen as an empowerment mechanism for individuals, as it could ensure free movement for digital human representations seamlessly in the online sphere.²⁵

A greater emphasis on personhood-based portability could enable greater benefits for consumers. Under the personhood concept, data portability recognises the digital rights of individuals and is therefore much more in keeping with the welfare and empowerment foundations of the Act. A personhood-based CDR mechanism may provide a data portability framework that is more attuned to the overarching legislative goal to empower the individual consumer. A personhood perspective may ameliorate the types of sectoral limitation outlined above that appear to arise from a competition-based model of data portability, especially one founded on the additional requirements of sectoral designation.

Our research is still ongoing as to whether a personhood-based portability model would be suitable for the CDR, and if so, how it could operate, particularly in the agricultural sector. It would clearly give rise to challenges with the current system in relation to who should be a CDR consumer, the application of a sectoral

²³ Zanfir (n 20) 150–151; Barbara Van der Auwermeulen, 'How to Attribute the Right to Data Portability in Europe: A Comparative Analysis of Legislations' (2017) 33(1) *Computer Law & Security Review* 57, 58 ('How to Attribute the Right to Data Portability in Europe').

²⁴ Van der Auwermeulen (n 23) 58.

²⁵ Kurt Opsahl, 'A Bill of Privacy Rights for Social Network Users', *Electronic Frontier Foundation* (19 May 2010) <<https://www.eff.org/deeplinks/2010/05/bill-privacy-rights-social-network-users>>.

designation process and the operation of the CDR Privacy Safeguards. We will be able to report on research findings by the end of 2022.

1.6 QUESTION 5 - ARE FURTHER LEGISLATIVE CHANGES REQUIRED TO SUPPORT THE POLICY AIMS OF CDR AND THE DELIVERY OF ITS FUNCTIONS?

Further to the considerations above, we recommend reviewing the scope of s56AA(a)(ii) as it only enables accredited persons to receive CDR data. Considering recent efforts to include a broader range of participants in the CDR, including trusted advisors, who could be unaccredited, this should be changed to support recent developments. A clearer nexus should be drawn between s56AA(a)(ii) and CDR Rule 1.10C.²⁶ As currently drafted, we believe that s56AA(a)(ii) could have a restrictive effect on rule 1.10C.

As noted above, the following component of section 56AA(c) “...to create more choice and competition...” could be amended to encapsulate the broader policy objectives of the Act relating to consumer empowerment and welfare. It could also be desirable to amend s56AD(1)(a)(i). This provision mandates taking into consideration the interest of consumers prior to designating a sector. Broadening the focus from interests to welfare, could make the application of the CDR statutory factors more in line with the overarching policy objective of the CDR, as an intrinsic part of the Act.

²⁶ Rule 1.10C (1) provides that a CDR consumer could nominate one or more persons as trusted advisor. The classes of trusted advisors are prescribed under sub-rule (2). These could include qualified accountants, admitted legal professionals, registered tax agents etc. The list of trusted advisors could be expanded as more sectors get designated.

1.7 CONTRIBUTING AUTHORS

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Bikalpa Rajbhandari is interested in research related with data portability, governance of data and technology law. In his research, he is exploring data portability rights in the context of Australian Digital Agriculture. The legal right to data portability could be underpinned by different considerations. It could be underpinned by the notion of personhood, objective to enhance competition or as a mechanism of data protection. Each of these approaches has its own considerations. This makes the right to data portability a complex concept. Given the advancements in Australia, EU and US data portability laws, this is a contemporary subject. He is also interested in exploring issues related with the CDR as a data portability mechanism in the context of Australian Digital economy.

Mark Burdon

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Mark Burdon's primary research interests are privacy, information privacy law and the regulation of information security. He focuses on the complex privacy issues that arise from the sensorisation of everyday devices and infrastructures. These issues are explored significantly in his new book, *Digital Data Collection and Information Privacy Law*, published by Cambridge University Press. The relationship between privacy and power is a consistent theme in his work. He has recently researched the implications of converting Commonwealth legislation into machine executable code, including challenges arising from encoding the CDR. He has also

examined the information privacy law challenges underpinning the CDR which was published in the leading data protection law journal, International Data Privacy Law.