



CDR rules: consent and operational enhancement amendments

ACCC Submission

September 2024

Executive Summary

1. The ACCC supports the intent of proposed amendments to the *Competition and Consumer (Consumer Data Right) Rules 2020* (the CDR Rules), which are aimed at simplifying the consumer consent process whilst retaining key protections, and ensuring the CDR Rules are fit-for-purpose and supporting the policy aims of the CDR. Our submission provides suggestions for Treasury to consider as it finalises the proposed changes. These suggestions are intended to assist Treasury deliver the policy intent while maintaining important consumer safeguards. Our comments draw on the ACCC's experience as a CDR co-regulator, and our liaison with CDR participants.
2. The ACCC supports the aims of the consent review and supports in principle rule changes designed to better enable organisations to provide intuitive, informed, and trustworthy consent experiences.¹ The ACCC's submission emphasises the importance of ensuring any changes to streamline consent requirements do not inadvertently erode consumer protections. It is critical to ensure the principles behind CDR consents (that they are voluntary, express, informed, specific as to purpose, time limited and easily withdrawn)² continue to guide consumers' engagement with the CDR system. These consent principles are fundamental to the effective operation of the CDR. The overarching purpose of the CDR is to promote and facilitate a *consumer's* data right and accordingly, it is the consumer who should be in control.
3. We also support proposals designed to improve the operational efficiency of the CDR Rules. This includes amendments to strengthen and clarify obligations that apply to CDR representatives, and simplify the processes for a non-individual or partnership to appoint a nominated representative.
4. However, we suggest further consideration be given to the drafting of revised conditions under which an authorised deposit-taking institution may collect CDR data as an accredited person but hold it in their capacity as a data holder.
5. The ACCC notes that Treasury's operational enhancement design paper³ consulted on a number of proposals that have not been progressed in the exposure draft rules. The ACCC supported a number of these proposals, in particular potential changes to extend avoidance of harm rules to protect consumers, and further strengthening of the CDR representative model. We understand Treasury is giving further consideration to these proposals, and we would welcome the opportunity to provide further input at the appropriate time.

Introduction and Role of the ACCC

6. The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to comment on the Treasury's consultation on proposed consent and operational enhancement amendments to the CDR Rules.
7. The ACCC is an independent Commonwealth statutory agency that promotes competition, fair trading and product safety for the benefit of consumers, businesses, and the Australian community. The ACCC's primary responsibilities are to enforce compliance with the competition, consumer protection, fair trading, and product safety

¹ [CDR Consent Review - CDR rules and data standards design paper.](#)

² CDR Rules, rule 4.9.

³ [Operational Enhancements - Consumer Data Right rules design paper, August 2023.](#)

provisions of the *Competition and Consumer Act 2010* (Cth) (CCA), regulate national infrastructure and undertake market studies.

8. The ACCC's roles in the Consumer Data Right (CDR) include accrediting potential data recipients, establishing and maintaining a Register of Accredited Persons and associated database, assessing applications for exemption from CDR obligations, monitoring compliance with the CDR Rules and taking enforcement action in collaboration with the Office of the Australian Information Commissioner (OAIC), and providing guidance to stakeholders about their obligations under the CDR. The ACCC also plans, designs, builds, tests, manages and secures enabling technologies for the CDR.
9. In preparing this submission, the ACCC has considered the factors set out in section 56AD(1)(a) and (b) of the CCA⁴, including the likely effect of the proposed changes on the interests of consumers, and promoting efficiency and competition in the market.
10. We note that concurrent with Treasury's consultation on proposed changes to the CDR Rules, the Data Standards Body (DSB) has released Decision Proposal 350: August 2024 Rules.⁵ The decision proposal outlines proposed changes to the Consumer Experience (CX) and technical data standards that the DSB has identified may be needed to support the proposed rule amendments. The ACCC has taken this decision proposal into account in assessing Treasury's proposed rule amendments.

Consent review proposals

Bundling of consents

11. Under the current CDR rules, data recipients must not bundle consents with other directions, permissions, consents or agreements.⁶ Requiring consumers to separately engage with each consent is intended to ensure a robust CDR consent process where consumers have clarity about how their data will be collected, used and/or disclosed.
12. However, in practice, to provide a consumer with their requested service, a data recipient may need to seek multiple consents. Where more than one collection, use and/or disclosure consent is needed to provide a single service, a consumer would be required to give each consent through a separate action.
13. The draft rules would amend the CDR Rules to expressly permit data recipients⁷ to bundle collection, use and/or disclosure consents that are 'reasonably needed' for the provision of a requested service. That is, a data recipient could seek a bundled collection, use and disclosure consent in a single action where they are all 'reasonably needed' for the requested service to function.
14. The consultation paper indicates that 'reasonably needed' refers to situations where it would not be possible for the data recipient to provide the service to the consumer without the consumer giving each of the consents together.⁸ In response to stakeholder feedback that additional clarity is needed on the meaning of 'reasonably needed',

⁴ Section 56BR of the CCA requires the ACCC to consider these factors when consulted by Treasury under section 56BQ.

⁵ <https://github.com/ConsumerDataStandardsAustralia/standards/issues/350>.

⁶ CDR Rules, rule 4.10.

⁷ The [CDR rules: consent and operational enhancement amendments consultation paper](#) notes on page 7 that, in the context of the Consent Review, the term 'data recipient' refers to both accredited data recipients and CDR representatives (i.e. equivalent amendments apply). This submission uses the term accordingly.

⁸ [CDR rules: consent and operational enhancement amendments consultation paper](#), page 7.

Treasury is proposing to link this term to the data minimisation principle.⁹ We provide further comments about the concept of 'reasonably needed' on pages 4 and 5 of this submission. For the principles of consent outlined in paragraph 2 to be realised, it is critical that this concept is applied in a limited way, consistent with the intention outlined in Treasury's consultation paper.

15. The ACCC appreciates the intent of this change is to reduce the need for consumers to give multiple consents through separate actions in circumstances where this increases consumers' cognitive load without increasing real choice, thereby unnecessarily introducing friction. While allowing the bundling of consents could reduce 'consent fatigue', care will need to be taken to ensure this does not undermine the voluntary nature of a consumer's consent.¹⁰
16. This is particularly important noting data recipients would be able to bundle disclosure consents alongside other consent types. We consider this type of consent to have a higher risk profile, noting recent amendments to the CDR Rules have made it easier for data recipients to disclose CDR data outside of the CDR framework.¹¹ As Treasury noted in its August 2023 design paper, a consumer may consent to disclose data to third parties not affiliated with the data recipient or regulated by CDR, and who may not be subject to the Privacy Act.¹²
17. While requiring a separate consent for disclosures (as was consulted on in the August 2023 design paper) would build in a 'stop and pause' to encourage the consumer to consider the impact of a disclosure, we understand Treasury is no longer proceeding with this change. This position accentuates the importance of limiting the concept of 'reasonably needed', and the role of a strong data minimisation principle in providing a genuine and meaningful limitation on use and disclosure of CDR data.
18. Given this, we support the proposed expansion of the data minimisation principle to also require data recipients to not *disclose* CDR data beyond what is reasonably needed for a requested service (currently, the data minimisation principle only applies to the collection and use of CDR data).¹³
19. We note Treasury is also proposing a rule which would continue to prohibit the bundling of direct marketing, de-identification, or any other non-CDR consents (that is, consents that are not defined under the CDR Rules).¹⁴
20. We support this draft rule which would ensure consumers are prompted to 'stop and pause' before consenting to activities that may pose higher risks. Consumers may wish to acquire a good or service without consenting to their CDR data being used for direct marketing purposes, and requiring a separate consent for direct marketing activities will give a consumer more choice and control in this respect. This is consistent with the broader approach taken in the draft rules to promote an opt-in approach for direct marketing and de-identification consents. In addition, prohibiting the bundling of CDR consents with non-CDR consents should mean consumers are less likely to

⁹ CDR Rules, rule 1.8.

¹⁰ The OAIC recognises that bundling practices have "the potential to undermine the voluntary nature of the consent" – See the OAIC's [Australian Privacy Principle Guidelines – Chapter B: Key Concepts](#), B.49.

¹¹ For example, trusted adviser disclosure consents were introduced in October 2021 and business consumer disclosure consents were introduced in July 2023. Trusted adviser disclosure consents allow the disclosure of CDR data to certain categories of unaccredited parties such as accountants and lawyers. Business consumer disclosure consents enable businesses to consent to accredited data recipients sharing their CDR data with specified persons who are not accredited, like bookkeepers, consultants and other advisers who are not classified as trusted advisers under the current CDR Rules.

¹² [CDR Consent Review - CDR rules and data standards design paper](#), page 9.

¹³ CDR Rules, rule 1.8.

¹⁴ [CDR rules: consent and operational enhancement amendments consultation paper](#), page 7.

misunderstand the application of protections provided under the CDR or mistakenly attribute these to non-CDR consents.

Pre-selection of consent elements

21. Under the current rules, data recipients are prohibited from presenting pre-selected consent elements (such as datasets to be disclosed and over what period) to consumers when seeking consent. Instead, consumers must actively select these elements when providing consent. The ACCC understands the intention is to encourage consumers to separately engage with each consent element and consider their relative comfort with how the data recipient proposes to handle their CDR data.
22. The draft rules propose changes to allow data recipients to clearly indicate the consent elements to which a consent applies where they are 'reasonably needed' for the requested service to function. That is, a data recipient could pre-select these rather than requiring the consumer to actively select them.
23. This change is intended to address concerns that the requirement to actively select consent elements even where these must be selected to receive the requested service introduces a false choice and unnecessarily increases the cognitive load on consumers.¹⁵
24. A consent element that could be pre-selected would include the dataset/s the consent applies to, who the dataset will be disclosed to, what a data recipient is seeking to use the dataset for, and/or the duration of the consent.¹⁶ Where a consent element is not needed to provide a requested service, it must remain opt-in.
25. The draft rules appear to allow a data recipient to pre-select an option that would allow it to charge a fee for disclosure of CDR data, or pass on a fee charged by a data holder or data recipient for disclosure of CDR data to the consumer.¹⁷ This is not mentioned in the consultation paper and it is not clear whether this is intentional. The ACCC does not support allowing pre-selection for fees. Treasury should consider whether the rules need to be adjusted to ensure consumers remain required to actively select any consent element that relates to charging a fee.
26. Under the current rules, data recipients can already present pre-selected consent elements when inviting a consumer to amend a consent, and consumers are only required to actively select *new or changed* consent elements.
27. As the draft rules would allow data recipients to pre-select existing *and* new consent elements, there is a need for new data standards to ensure consumers can easily understand what elements of a consent are changing. We note the DSB is proposing a standard that would require data recipients to indicate where datasets, uses and durations are being amended. We support the intent of this new standard and will continue to provide feedback to DSB as it finalises the proposed standards and any associated CX Guidelines.

¹⁵ [CDR Consent Review - CDR rules and data standards design paper](#), pages 10 and 11; [CDR rules: consent and operational enhancement amendments consultation paper](#), page 8.

¹⁶ [CDR rules: consent and operational enhancement amendments consultation paper](#), page 8.

¹⁷ The ACCC is referring to the sorts of disclosures in Note 3 to rule 4.11(1) which makes clear that a data holder could charge a fee for disclosure of voluntary consumer data, while an accredited data recipient could charge a fee for the disclosure of any CDR data.

Concept of ‘reasonably needed’

28. The draft rules require data recipients (when seeking consent) to provide explanations of why a proposed collection is reasonably needed and relates to the shortest practicable time period, and/or why a proposed use or disclosure does not exceed what is reasonably needed to provide the requested service.¹⁸ Separately, the draft rules also require data recipients to explain why each pre-selected consent element is reasonably needed.¹⁹ As noted above, Treasury is proposing to link the term ‘reasonably needed’ to the data minimisation principle.²⁰
29. The data minimisation principle and the requirement to explain how a proposed collection/use of CDR data complies with this principle is not a new concept. These rules have been in place since the CDR Rules were made in 2020 and have largely remained unchanged.²¹ In brief, the data minimisation principle limits the CDR data that can be collected, the time period to which the collected CDR data can relate and how the collected data can be used. In all cases this must not exceed what is reasonably needed to provide the requested service.
30. We understand data recipients have adopted different approaches to explaining to a consumer how a particular collection or use is reasonably needed during the consent process.
31. In the context of the changes proposed in the draft rules, it will be critical to provide clarity to both CDR participants and CDR consumers on how the data minimisation principle is intended to operate and what ‘reasonably needed’ means. We recommend Treasury consider defining or clarifying the meaning of ‘reasonably needed’ in the CDR Rules. This would be preferable to relying on, for example, descriptions in data standards or guidance, which may be more susceptible to differing interpretations by stakeholders and would not be determinative of the approach to interpreting ‘reasonably needed’ in the CDR Rules. Any definition or clarification in the CDR Rules could be supported by further explanation in the Explanatory Statement.
32. Without clarity about what is meant by ‘reasonably needed’, there is a significant risk in practice that requests for consents are bundled, or pre-selected consent elements are presented that are merely *preferable/useful* for a particular service. As a result, some data recipients may end up bundling consents or pre-selecting consent elements (whether inadvertently or otherwise) where they are not in fact reasonably needed. This risk is heightened by the lack of commercial incentive for data recipients to minimise collection and use of CDR data, notwithstanding the data minimisation principle, and highlights the need for clear guardrails and a strong enforcement framework in the CDR Rules. Without this, data recipients that adopt an appropriately narrow approach may be at a competitive disadvantage, and inconsistency in approach may lead to poor consumer outcomes.
33. We note it will not always be obvious to a consumer why a particular consent or consent element is or is not needed for a requested service. Where the bundling of consents and pre-selection of consent elements is permitted, the consumer must still be presented with sufficient information about each consent and its purpose, as well as sufficient information about each pre-selected consent element, to be able to provide informed consent.

¹⁸ Draft rule 4.11(3)(c).

¹⁹ Draft rule 4.11(3)(caa).

²⁰ [CDR rules: consent and operational enhancement amendments consultation paper](#), pages 7 and 8.

²¹ CDR Rules, rules 1.8 and 4.11(3)(c).

34. In addition to clarifying what is meant by 'reasonably needed' in the CDR Rules, there would be benefit to the development of clear CX Guidelines by the DSB to provide guidance on how requirements in the CDR Rules to inform a consumer why something is 'reasonably needed' can be complied with. We appreciate the challenge in providing clear guidance that balances the need to provide sufficient information to consumers, with the desire to avoid introducing unnecessary friction and risking the consumer disengaging from the consent process. However, a lack of clear and specific information may diminish the ability for consumers to give informed consent. We will continue to work with the DSB as it considers the development of appropriate guidance.
35. It will be critical for Treasury and the DSB to continue to engage with consumers about their experience of the CDR consent process as proposed rule changes are implemented. This will help to ensure changes to streamline the consent process are aiding rather than reducing consumers' understanding.

Supporting parties

36. The ACCC supports the proposal to clarify requirements dealing with the provision of information to consumers about supporting parties such as sponsors, outsourced service providers (OSPs) and CDR representative principals. The proposed rule would require consumers to be notified as part of the consent flow about which supporting parties may access their CDR data (based on the relevant supporting parties at the time of consent). This would include a new requirement to identify any direct or indirect OSPs who may access the consumer's CDR data, as part of the consent flow.
37. The ACCC supports changes to ensure consumers receive upfront information about the supporting parties that may access their CDR data. However, we note there could be a long chain of OSPs who may access a consumer's CDR data.
38. Data recipients may engage any number of direct OSPs, and those OSPs may then engage further indirect OSPs in one or more CDR outsourcing arrangements further down the chain.²² Treasury should consider the extent to which extended OSP chains impact consumers' understanding as this new rule is implemented. The development of clear CX guidelines that set out how information about OSP arrangements can be presented in the consent flow to maximise consumer comprehension may be helpful.
39. We note Treasury is no longer proposing to consult on draft rules which would require data recipients to notify consumers where the list of supporting parties who may access the consumer's CDR data changes. We appreciate further consideration may need to be given to this proposal, including the utility to consumers as well as the implementation impact on data recipients. We support consideration of this proposed change as part of a future rules package, on the basis that a notification requirement could help consumers remain aware of all supporting parties who may access their data at any given time. This awareness could enhance consumer control over who has access to their data, and thereby promote trust in the CDR.

Direct marketing consents

40. The ACCC supports proposed changes to the CDR Rules which would strengthen the current opt-in approach for direct marketing consents.

²² The Competition and Consumer (Consumer Data Right) Amendment Rules (No. 1) 2023 introduced rule 1.10AA(3)(b), which now also allows CDR representatives to engage OSPs.

41. The draft rules propose changes that would require a data recipient to advise a consumer of the marketing activities they will undertake when seeking a direct marketing consent.²³ This change should make it easier for consumers to give informed consent, by requiring greater transparency about the types of marketing activities that would be undertaken with their CDR data.
42. Similarly, we support the proposal to prohibit direct marketing consents from being bundled with other CDR consents or pre-selected by data recipients when seeking consent (see paragraph 19).²⁴ This should reduce the likelihood of a consumer inadvertently consenting to receive direct marketing materials.

Operational enhancements proposals

Nominated representatives

43. Non-individuals and partners in a partnership can participate in the CDR through a nominated representative. The current rules require a data holder to provide a service that can be used to nominate a representative to give, amend and manage authorisations to disclose CDR data and to revoke this nomination.
44. The nominated representative provisions in the CDR Rules are principles-based and non-prescriptive. As a result, they provide a high degree of flexibility for data holder implementation. While this allows data holders to implement processes tailored to the needs of their business customers, it has resulted in a large degree of variation in nominated representative processes.
45. The ACCC's engagement with data holders on processes for nominated representatives supports the observations in the consultation paper. That is, some nomination processes create unnecessary barriers, including by requiring lengthy or convoluted processes to be completed or through the use of paper-based forms.
46. The ACCC supports amendments designed to streamline nominated representative processes and make them more efficient by requiring data holders to:
 - provide a process for consumers to appoint a nominated representative that is prominently displayed, simple and straightforward to use, and
 - offer a simple and straightforward online process for allowing account administrators to be authorised as nominated representatives.
47. In relation to the second limb of the proposals, we note the October 2023 design paper canvassed an approach in which account administrators would be deemed to be nominated representatives. We support the revised approach, which instead requires data holders to obtain a conscious nomination by business consumers. This 'opt-in' approach is preferable, noting businesses grant different levels of authority to employees. Authority for an employee to make transactions on an account does not necessarily align with authority to share data on behalf of the business.
48. Treasury is proposing to defer commencement of these obligations for 12 months from when the rules commence. While the ACCC supports deferring commencement, we note these changes will have implementation impacts and associated costs will impact smaller and larger data holders differently. The ACCC would support a phased

²³ Draft rules 4.11(3)(da) and 4.20E(3)(ga).

²⁴ Draft rules 4.10, 4.20D, 4.11(2) and 4.20E(2).

implementation approach that takes the size of data holders into consideration and allows smaller data holders longer to comply. This will ensure smaller data holders have sufficient time to implement the changes.

CDR representative arrangements

49. The CDR representative model allows eligible persons to become CDR representatives (and therefore participate in the CDR scheme) without having to become accredited, where they enter into a CDR representative arrangement with an unrestricted accredited person. Currently, a CDR representative is indirectly regulated through the CDR representative arrangement with its CDR representative principal. This is a private contract which is required by the CDR rules to contain particular terms. Unlike data holders and accredited persons, CDR representatives are not directly regulated under CDR legislative provisions.²⁵ This creates barriers to investigation and enforcement in relation to non-compliance.
50. We appreciate the CDR representative model has encouraged new participants to enter CDR and been a significant driver of CDR uptake.²⁶ We support this expansion, but consider this should not be at the risk of harm to consumers or at the expense of trust and confidence in the CDR.
51. The ACCC supports the proposed changes to the CDR rules to strengthen and clarify requirements on CDR representative principals. The draft amendments clarify that:
- a CDR representative principal must ensure their CDR representatives comply with consumer experience standards as if they were an accredited data recipient, and
 - a CDR representative principal will be in breach of its obligations where a CDR representative fails to comply with required terms of its CDR representative arrangement, irrespective of whether the required term is included in the written contract between the CDR representative principal and CDR representative.
52. These changes may assist CDR representative principals to understand their obligations and reduce the likelihood of non-compliance.²⁷
53. However, the design paper consulted on a broader set of changes to the CDR representative model. The changes under consideration included giving powers to the ACCC to prevent data being shared with a CDR representative in specified circumstances, strengthening insurance requirements and requiring CDR representative principals to conduct a fit and proper person assessment of prospective CDR representatives. The ACCC supported these proposals in principle, on the basis that they could reduce risk of consumer harm by requiring CDR representative principals to conduct due diligence on prospective CDR representatives, and allowing the ACCC to take action where it identifies bad actors. The ACCC also suggested Treasury give further consideration to the need for direct regulation of CDR representatives.
54. We understand Treasury is giving further consideration to broader changes that should be made to the CDR representative model. The ACCC welcomes the opportunity to

²⁵ This includes the Competition and Consumer (Consumer Data Right) Rules 2020, Part IVD of the CCA and certain regulations under the Competition and Consumer Regulations 2010.

²⁶ As of 14 August 2024 there are 149 active CDR representative arrangements spread over 8 accredited data recipients (Basiq Pty Ltd, Adatree Pty Ltd, Fiskil Pty Ltd, Mastercard Asia/Pacific Pte. Ltd., Yodlee, Inc., Activate Wych Pty Ltd, Biza Pty Ltd, and SKRIPT PTY LTD). In comparison there were a total of 41 unrestricted and sponsored accredited data recipients (40 accredited data recipients and 1 sponsored accredited data recipient).

²⁷ In December 2023, the ACCC and OAIC released joint [guidance for CDR representative principals on ensuring compliance of their CDR representatives](#).

continue engaging with the Treasury on the future state of the CDR representative model.

Accredited ADIs holding CDR data as a data holder

55. The current rules allow an authorised deposit-taking institution (ADI) that is accredited to collect CDR data and hold it in their capacity as a data holder rather than an accredited data recipient, where a CDR consumer has:

- acquired a product from the ADI
- consented to the ADI holding the CDR data as a data holder, rather than as an accredited data recipient.²⁸

56. The ability to hold CDR data as a data holder rather than an accredited data recipient is significant because it means the ADI does not have to comply with the more stringent CDR obligations that apply to accredited data recipients. For example an accredited data recipient's use or disclosure of CDR data is regulated by the Privacy Safeguards, whereas a data holder's use or disclosure of CDR data is regulated by the Australian Privacy Principles, which are less strict. Data holders are also not subject to stringent CDR consent obligations, the data minimisation principle, or the requirement to delete or de-identify redundant CDR data.

57. The draft rules propose to expand the conditions under which an accredited ADI can hold CDR data as a data holder. They would allow an accredited ADI to hold data as a data holder where:

- a CDR consumer has sought to acquire a product from the ADI (as opposed to only being able to do so where the consumer has actually acquired a product)
- the accredited ADI notifies the CDR consumer before the collection of CDR data that it will hold the data as a data holder rather than an accredited data recipient (rather than requiring consent from the CDR consumer).

58. We understand the proposed changes are intended to reduce complexities associated with accredited ADIs having to apply different business rules to data they receive through the CDR compared to data they receive outside of the CDR. Removing this discrepancy could make the CDR more attractive to banks as a mechanism to promote switching use cases, and therefore support competition amongst accredited banks.

59. However, this proposal presents a significant policy shift, and the rationale for such a significant change should be well explained. This proposal was not consulted on in detail in the October 2023 design paper. To avoid compromising the consumer protections offered by the CDR accreditation framework, some aspects may require further consideration before the rules are finalised. We highlight some issues for Treasury's consideration below.

Removal of the need for consent

60. The proposed changes create a pathway for ADIs to hold certain data as a data holder rather than an accredited data recipient by notification rather than with the consumer's consent. The accredited ADI need only inform the CDR consumer of this fact before collection. Under the current drafting, it appears this notification (together with other required information about how the CDR data will be handled) can be made after a

²⁸ For example, a CDR consumer has a transaction account with bank A. They apply to bank B for a home loan and as part of the application, use the CDR to share their bank A transaction data. If the home loan application is successful, bank B may hold this transaction data as a data holder rather than accredited data recipient if the CDR consumer consents.

collection consent has been given, so long as it is made before collection. A consumer may not have sufficient opportunity to stop the collection of data after receiving this notification, and in any event is unlikely to fully appreciate the implications for the way their data is handled.

61. This approach removes the ability of the consumer to make an informed decision about the handling of their CDR data, including whether it must be held subject to the CDR Privacy Safeguards applicable to accredited data recipients. This undermines the ability of the consumer to remain in control of their CDR data, and could compromise trust in the CDR system.²⁹

Removal of the need to acquire a product

62. Under the revised drafting a CDR consumer need only have applied or be applying to acquire a product from an accredited ADI for the ADI to hold the data as a data holder. This means an ADI may receive the benefit of using or disclosing a CDR consumer's data in a way that would otherwise not be permitted under the CDR, without the consumer ever acquiring a product from the ADI. For example, a bank may receive a CDR consumer's transaction data to assess a home loan application. The bank may deny the application but may still be able to retain the data and use it for consumer analytics.

Potential to decrease competition

63. While the new conditions may simplify data management practices for ADIs, and could increase competition between accredited ADIs, there may be a risk the change could disadvantage the financial technology sector. Fintechs who are not ADIs may be at a competitive disadvantage, as they must continue to handle all CDR data as accredited data recipients, with no route to handle the data as data holders. While fintechs do not compete with banks to provide typical ADI services, such as taking deposits, they may compete with banks in the provision of products or services such as budgeting applications and other financial technology solutions.³⁰
64. In addition, we note that the rules don't specify what 'product' means in this context. For example, it is not clear whether the word takes its ordinary meaning or would be limited to products in scope for CDR³¹ and/or within the scope of the relevant designation instrument.³² Our view is that the term should be limited to the meaning of product set out in the designation instrument. A narrow definition could mitigate (but not remove) competition concerns as it would confine the operation of this amendment to products provided only by ADIs, such as home loans, and not products which may be offered by fintechs and ADIs, such as personal finance management or comparison services.

²⁹ Paragraph 364 of the Explanatory Statement to the Principal Rules emphasised the importance of the CDR consumer remaining in control and being able to make an informed choice about whether an ADI can hold their data as a data holder.

³⁰ For example, a CDR consumer has a transaction account with bank A. They apply to bank B for a home loan and as part of the application, use the CDR to share their bank A transaction data. They also share their CDR data with fintech X who offers a homeloan comparison service. Bank B rejects their homeloan application and fintech X advises they would be unlikely to obtain a homeloan due to their current financial situation. Under the draft rules, Bank B would be able to retain the transaction data as a data holder without the consumer's consent if the required notice had been given. Bank B may then access a revenue stream by performing consumer analytics on the data. However fintech X, as an accredited data recipient, is subject to an accredited data recipient obligation to delete (or at least de-identify) the data, and is therefore unable to access an equivalent revenue stream.

³¹ See clause 1.4 of Schedule 4.

³² See section 2 of the Consumer Data Right (Authorised Deposit-Taking Institutions) Designation 2019. This instrument defines 'product' by reference to services provided by persons in connection with specified activities typically only undertaken by ADIs.

Potential for targeted exceptions

65. The consultation paper notes that one of the reasons for proposing this change is to reflect feedback from ADIs that being required to hold data as an accredited data recipient requires them to act “contrary to their usual data management practices for fraud control and analytics”.³³ The CDR contains exceptions to certain requirements where strict compliance would result in a breach of another Australian law or judicial order. For example, CDR data deletion requirements do not apply where an Australian law or court/tribunal order requires retention of particular CDR data.³⁴ Similarly, there are exceptions to prohibitions on the use/disclosure of CDR data where that use or disclosure is required by an Australian law or court/tribunal order.³⁵
66. Treasury may wish to consider whether a similarly targeted exception could be crafted to allow ADIs to hold CDR data as a data holder for specific purposes such as fraud control. This may have the benefit of improving operational efficiency for accredited ADIs without unnecessarily eroding existing protections.

³³ CDR rules: consent and operational enhancement amendments consultation paper, page 11.

³⁴ See sections 56BAA(2), 56EG(1)(b) and 56EO(2)(b) of the CCA.

³⁵ See section 56EI(1)(c) of the CCA.