



ASIC
Australian Securities &
Investments Commission

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and Investments Commission**

Office address (inc courier deliveries):
Level 7, 120 Collins Street,
Melbourne VIC 3000

Mail address for Melbourne office:
GPO Box 9827,
Brisbane QLD 4001

Tel: +61 1300 935 075
Fax: +61 1300 729 000

www.asic.gov.au

The Treasury
Langton Crescent
Parkes ACT 2600

By email: CDRRules@treasury.gov.au

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**Consumer Data Right Rules: consent and operational enhancement
amendments consultation**

The Australian Securities and Investments Commission (**ASIC**) is pleased to provide a submission in relation to the Consumer Data Right Rules: consent and operational enhancement amendments consultation.

The Consumer Data Right (**CDR**) was created to provide consumers with a right to safely access and share their data in designated sectors – for example, a consumer's banking transaction history or electricity usage. The CDR aims to help consumers find products and services that best meet their needs, based on their own data and product usage patterns, and to encourage competition in the markets that CDR applies to. The CDR is currently active in the banking and energy sectors.

ASIC does not have a role in administering or enforcing the CDR, and we are not a CDR participant. Our comments on the proposed changes are consequently limited.

However, ASIC does have a key role in acting against misconduct in the financial services sector. As such, ASIC has identified and addressed a considerable array of consumer harms and poor outcomes in this sector over many years, drawing on staff expertise in consumer behaviour and spanning fields including psychology, law, economics, communications, social science, market research and data analytics. ASIC combines consumer and behavioural research with ASIC's observations of conduct, and intelligence or data collected in other ways.

The consumer protection framework for CDR is primarily based around:

- Accreditation for data recipients; and
- Consumers providing informed consent to share their data.

Through the CDR consent process, consumers are given information on how their data will be collected and shared with firms, and can choose to provide their consent (or not) to a range of data sharing activities. ASIC's [Report 632 Disclosure: Why it shouldn't be the default](#) highlights the limitations of disclosure and the 'informed consumer' paradigm in advancing consumer protection.

It is in this context that we provide some observations on the proposed changes.

Consent changes

The changes to the consent framework proposed in the consultation paper are likely to make giving consent easier. As a whole, these changes will reduce frictions and will likely increase consumers' use of CDR, as intended by Treasury. In particular, our view is that the following proposals are likely to reduce frictions in the consent process:

- 1.1: Allowing a data recipient to bundle CDR consents, so that consumers can give multiple consents with a single action;
- 1.2: Allowing a data recipient to pre-select the elements of an individual consent that would be reasonably necessary for the data recipient to provide the good or service; and
- 1.3: Simplifying the information a data recipient is required to provide to the consumer at the time of consent.

In ASIC's experience, some friction in a system can be a positive thing. It can encourage consumers to engage more critically, which may be useful if the underlying consumer protection framework is not strong. The CDR relies heavily on disclosure and informed consent for consumer protection. Making consents easier to give may potentially undermine the effectiveness of these as a consumer protection mechanism despite improving the initial user experience of CDR.

One way to bolster the underlying consumer protection framework that applies to the CDR would be to introduce an economy-wide prohibition on unfair trading practices.

We note that Treasury recently consulted on options to address unfair trading practices in Australia, and ASIC supports a whole-of-economy prohibition. Our submission to the 2023 Treasury consultation on options to address unfair trading practices under the Australian Consumer Law noted that a well-framed general prohibition is likely to respond to the fast-paced digitisation of services, including:

- a) exploitative digital choice architecture that steers consumers towards making choices that are not in their best interests and
- b) digital engagement practices including dark patterns.¹

¹ See ASIC November 2023 submission, [Unfair trading practices - Consultation Regulation Impact Statement | Treasury.gov.au](#).

Given the flexibility in how CDR participant firms design and implement consumer-facing processes, there is a risk of firms using dark patterns to unfairly influence consumers' decisions during the consent process, while remaining technically compliant with the CDR rules and data standards.

In order to have an impact on the use of dark patterns by financial service providers in the context of the CDR, any proposed unfair trading reforms would need to be extended to the provision of financial products and services under the ASIC Act.

Operational enhancements

We do not have any comments to make on the proposed operational enhancements.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'S Court', is positioned below the text 'Yours sincerely'.

Sarah Court
Deputy Chair