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Committee Secretary
Senate Standing Committees on Economics
PO Box 6100
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Dear Committee Secretary

Consumer Data Right

This is the Business Council of Australia's submission to the Senate Standing Committee on Economics' inquiry into the Treasury Laws Amendment (Consumer Data Right) Bill 2019 (the CDR Bill).

The Business Council supports the development of a consumer data right. Data portability has the potential to benefit customers through greater competition – driving businesses to offer new, better or cheaper goods and services – and by making information available about the performance of specific products applicable to the requesting individual, enabling better choices to be made on what products best suit customers' needs.

A consumer data right could also benefit businesses and customers together by allowing information required to satisfy regulatory requirements to be transferred between businesses easily and efficiently.

The Business Council has worked with the Department of the Treasury as the CDR Bill progressed through the exposure draft process and appreciates the open and constructive approach taken by the Department – the Business Council's submission to that process is at Attachment A.

The CDR Bill establishes a high level framework that:

- applies to *all* sectors of the economy
- potentially impacts *all* businesses operating in Australia
- establishes a new privacy and data access regime
- concerns the data of *all* consumers that is *directly or indirectly derived* from the supply of goods or services, and
- concerns data about the performance of products offered by businesses.

The CDR Bill is also world leading, driving data portability and disclosure further than in any comparable jurisdiction. By any measure the CDR Bill represents a major, economy-wide, systemic reform with potentially far-reaching implications. For this reason the legislation and its application warrants close scrutiny.

Success of implementation is critical to public trust

The Business Council's key request to the Committee is that it satisfy itself that the legislation, and rules made under the CDR framework can be implemented successfully in a way that maintains public trust.

Achieving the objective of the framework is reliant on maintaining the trust of consumers that their data will be safe, secure and put to good use should they exercise their rights under the scheme. For trust to be maintained all parties charged with implementing the scheme – regulators, industry (data holders and accredited recipients) and any designated gateways – need to understand their obligations, be fully prepared in terms of systems and processes, and demonstrate they can work together to protect consumers' privacy.

The experience of other programs in government and the private sector is that once trust is compromised in relation to personal data, it is very difficult to regain. Many elements of the scheme have not been tested in other countries and involve the transfer of potentially sensitive personal information.

Industry has participated constructively in the consultation process for the CDR and would like to see the scheme work. But the Business Council remains concerned about the preparedness of all stakeholders involved in implementation. This is because the objectives and structure of the scheme have evolved significantly – from a scheme about simple transactional data portability for consumers to one that covers performance information, derived data and includes businesses' transaction data as well as personal consumer data – with short consultation periods at each stage. In addition, multiple, complex, interlinked tranches of work have progressed concurrently while the framework was developed (the development of the CDR Bill, CDR Rules Framework and CDR Rules for the Energy Sector, for example, have all progressed on their own separate but concurrent tracks) and continues to develop through the parliamentary process.

Given the difficulty other jurisdictions have had in implementing similar schemes, the Committee should consider carefully the timelines for implementation.

Continuing concerns from inclusion of derived data

A major concern that the Business Council raised during the exposure draft process, and which still remains, is the CDR Bill's inclusion of derived data, which potentially captures proprietary value-added data. A related concern is the very wide delegation to the ACCC to make rules concerning the disclosure, collection, use, accuracy, storage, security and deletion of CDR data as well as a range of other matters.

Capturing value-added data in the CDR framework risks:

- discouraging investment or innovation in such data
- transferring proprietary data to competitors which could give insights into the strategic decisions of the provider; and raising contractual issues where derived data includes data (or is derived from data) obtained from a third party
- putting Australian companies at a disadvantage to their international competitors who can innovate freely in their home jurisdiction
- introducing questions about the requirements of the Australian Constitution for the compulsory acquisition of property to be on "just terms".

None of the previous reviews into data availability or use have recommended the wholesale inclusion of value-added data in the CDR (see Attachment A for more details).

We are grateful that Treasury has responded to some of the suggestions that we and others made in relation to these risks – the CDR Bill now requires the minister to consider and consult on a range of matters (section 56AD(1c) and 56AD(2) and (3)) with similar requirements placed on the ACCC when making CDR rules.

However, CDR data continues to be defined to include derived data (s56AI) and, notwithstanding section 56BD, insofar as derived data comes within a class specified in the designating instrument, the ACCC can require its disclosure. A clear limit on the scope of a class is needed to give certainty to market participants.

Ultimately the legislation's definition of derived data still potentially captures value-added data. Businesses will need to factor in the risk and resulting uncertainty that proprietary information will be captured by the CDR Bill when making decisions on investing or innovating in data in the future.

The delegation of broad power to the ACCC to set prices for the transfer of data is concerning and goes far beyond the power delegated to regulators in other jurisdictions, such as the CMA in the U.K. Open Banking regime.

Central price setting in such a dynamic area of the economy risks undermining the incentives for companies to invest in new capabilities and services for consumers and would significantly disadvantage Australian companies competing against multinational Internet-based businesses – the opposite of what the CDR Bill seeks to achieve.

As presented in the Business Council's submission to Treasury (Attachment A), if derived data is to be included in the CDR Bill greater clarity should be provided around when, how such data should be included, and the fees that can be charged for such data. This could be achieved in a number of ways:

- The legislation should confirm that value-added data is not intended to be within scope, unless specific (named) datasets are expressly included in a minister's sector designation.
- Guidelines should be prepared for ministerial sector designations that set out the types of value-added datasets that should or should not be included. These could be regularly reviewed by the Productivity Commission.
- A simpler legislative definition of consumer data (based on the tested scope of the Privacy Act) would be a preferable starting position for the CDR, considering the risks associated with capturing value-added data. Amending the term 'relates' in clause 56AI(3a) to 'is about' would reflect the tested scope of personal data as currently set out in the Privacy Act 1988 and still allow broad and meaningful datasets to be provided under the CDR.
- Restricting the ability of the ACCC to intervene to set prices for the sharing of data, where that data is considered 'property' under the Australian Constitution.

Greater scrutiny of designation and CDR rules

Regardless of the view that the Committee takes on derived data, the Business Council considers that greater scrutiny must be applied to the processes for designating sectors and making CDR rules.

Given the scope of the CDR Bill – applying to all sectors, all businesses, most data, and all consumers – it is reasonable that parliament should have ongoing oversight of the application of the legislation and that the minister and regulators should be required to meet objective standards before designating sectors and making CDR rules.

The Committee should recommend that the CDR Bill be amended to require that:

- the minister **be satisfied** that the designation of a sector will achieve the objects of this Part (section 56AA) having considered the ACCC's report required under section 56AE.

The Bill delegates significant powers to the ACCC to design CDR rules which will include almost all operational aspects of the framework and many of the fundamental design features. For example, to our knowledge no other similar framework delegates to a regulator the power to price data, effectively pricing intellectual property.

This means that businesses who invest or innovate in data will need to account for the uncertainty built into future, as yet unknown, CDR rules.

The consultation required when designating sectors and making CDR rules does not alleviate this uncertainty. Particularly given that, as a result of the operation of sections 56AH and 56BQ, the minister's instrument or the ACCC's CDR rules are not invalidated should the consultation processes not be followed, that is, there is no consequence should the minister or ACCC not follow the prescribed consultation process.

In our view these significant delegated powers warrant significant oversight.

This is not a criticism of the ACCC or the minister. The nature of framework legislation such as the CDR Bill means that risks of unintended consequences are inherent – as the legislation creates a framework only, it is simply not possible to fully understand the risks arising from each future application of the legislation to various industries with their myriad data. Given this inherent risk we urge the Committee to act cautiously by proposing amendments that ensure the CDR rules made under the legislation meet the objects of the framework and are subject to appropriate parliamentary scrutiny. The Committee should recommend that the CDR Bill be amended to require that:

- the minister **be satisfied** that proposed CDR rules meet the objects of this Part (section 56AA) without creating any unacceptable outcomes
- the CDR rules be subject to the usual disallowance procedures for legislative instruments by way of the Legislation Act 2003
- the rules should lapse after a designated period, say three years, pending review and renewal
- there should be a strong appeals process available to data holders, consumers and recipients.

This is consistent with other legislation that delegates significant powers to regulators or other jurisdictions – for example the process for designating access to services under Part IIIA – Access to Services – under section 44H of the Competition and Consumer Act.

Other matters

Additionally there needs to be consistency and alignment of processes to benefit consumers and market participants and avoid risk and unnecessary complexity; for example the definition of 'consumer' should be revised as the reference to 'associates' is unduly broad (through s318 of the Income Tax Assessment Act) and allows for inclusion of relatives of the recipient of goods or services. This may not be in line with community expectations and have unintended consequences.

Finally, there should also be additional consideration of the protection from liability afforded to participants. As currently drafted s56GC(1) requires compliance with Part IVD, the consumer data rules and regulations. This threshold is inappropriate given the lack of clarity regarding the data rules and standards and unavailability of regulations. Requiring companies to prove compliance with all aspects of the CDR is impracticable.

Thank you for considering this submission.

Yours sincerely

Matt Garbutt

Associate Director and Company Secretary



SUBMISSION

Response to the Treasury Laws Amendment (Consumer Data Right) Bill 2018 (second stage)

October 2018

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ABOUT THIS SUBMISSION

This submission is the Business Council's response to the *Treasury Laws Amendment (Consumer Data Right) Bill 2018 (second stage)*. It supplements an earlier submission from the Business Council, in response to the first draft of the legislation.

EXECUTIVE SUMMARY

The Business Council supports the concept of a Consumer Data Right (CDR) but the previous draft of the CDR legislation raised, in our view, serious risks to business innovation and investment in data, Australia's competitiveness and – most importantly – the privacy and security of consumers' data.

Several amendments are proposed in the revised draft legislation, which appear to be intended to address concerns raised by the business community.

There are some welcome changes, including:

- the proposed changes to the Australian Competition and Consumer Commission's (ACCC) powers and delegations,
- the clarity around the reciprocity principle for equivalent data, and
- greater scope for CDR fees to be set by commercial negotiation rather than regulatory intervention.

Further amendments are required to address the Business Council's most pressing concerns:

- Notwithstanding amendments in the revised draft legislation, the legislation's application to value-added data requires greater clarity and precision.

We appreciate Treasury's acknowledgement that, even though the legislation grants the Minister powers to capture materially value-added data, it is not intended to be in scope. There remains, however, the risk that the broad scope could discourage data-related innovation and investment, at the margin, because businesses who invest or innovate need to account for the possibility of inclusion of their value-added data in future.

While the Business Council would prefer the wholesale exclusion of value-added data, we appreciate the need for legislation that can apply across the economy. If the government proceeds with capturing value-added data, there should be greater precision and clarity in the legislation. There are a number of options that could bring greater precision and clarity, including changes to the legislation, guidelines for Ministerial decision-making, or a strong indication of the intent in the explanatory memorandum or second reading speech for the legislation.

- The draft legislation has introduced some simplifications to the privacy safeguards, and narrowed the scope of privacy safeguards to data disclosure. But the privacy safeguards remain complex, confusing and a potential risk to consumers' privacy and security.

The Business Council continues to hold the view that further amendments are required to reduce the potentially major risks raised by the current draft of the legislation.

KEY RECOMMENDATIONS

1. If the government decides to leave value-added data within the scope of the legislation, there is a need for greater precision and clarity on the scope of value-added data that could be captured under the Consumer Data Right.

Possible options for bringing greater clarity and precision could include (these are not mutually exclusive):

- inserting greater clarity in the legislation that value-added data is not intended to be within scope, unless expressly included in a Minister's sector designation.
 - establishing guidelines around Ministerial designation of value-added datasets (that ought be regularly reviewed by the Productivity Commission).
 - emphasising strongly and clearly in the legislation's supplementary material (the explanatory memorandum and second reading speech) the intent of the legislation is generally not to capture materially value-added data.
2. Treasury should progress with its proposal to limit the rule-making power so that rules regarding use, accuracy, storage or deletion of CDR data only relate to the disclosure of CDR data. This would target rule-making towards the point of the CDR process at which there is the greatest level of risk.
 3. The privacy safeguards should be amended, to provide a simpler and clearer set of protections for consumers.
 4. The proposed minimum consultation requirements for designation of sectors should proceed, and should be expanded to apply to rule-making by the ACCC more generally (i.e. not just the first time the ACCC makes rules for a particular sector).
 5. The timeframe for developing and introducing the legislation should be extended, so all interested parties can properly assess the implications of the legislation and the risks and costs to consumers.

DISCUSSION

This submission supplements the Business Council's earlier submission in response to the first draft of the *Treasury Laws Amendment (Consumer Data Right) Bill 2018*.

In our earlier submission, the Business Council affirmed our support for the concept of the CDR, and the design of the CDR as recommended by the Productivity Commission.

However, we expressed concern that the draft legislation was fundamentally and unexpectedly different to what had been proposed in previous reviews.

Treasury should be commended for the open approach to consultation undertaken for the CDR legislation, and the short timeframe in turning out revised draft legislation that aims to address concerns raised by the business community. The Business Council appreciates the consultation paper's acknowledgement of the concerns raised.

Although some of the Business Council's recommendations have been adopted, the revised draft legislation has not made sufficient progress on our most pressing concerns.

The primary changes include:

1. Value-added data remains within the scope of the CDR, but with a number of limitations, including:
 - moving responsibility for capturing value-added data from ACCC rule-making to Ministerial designation.
 - excluding value-added data from the access and transfer requirements in the CDR, if it does not relate to a consumer and is not reasonably identifiable.
 - proposing a limitation on the areas on which the ACCC can make rules relating to use, accuracy, storage or deletion of data, so that, in respect of data holders, these rules could only apply at the point in the CDR process where data is disclosed.
2. The revised draft legislation has intended to simplify the interaction between the privacy safeguards and the Privacy Act, so the privacy safeguards would generally apply to data recipients and the Privacy Act would generally apply to data holders.
3. The revised draft legislation has been clarified to emphasise the ACCC can make rules relating to the principle of “reciprocity” (that is, if a company is receiving data under the CDR, they should be obligated to share equivalent data).
4. The powers and delegations granted to the ACCC and responsible Minister have been tightened, with greater prescription around the process that must be followed for designating a new sector under the CDR, and making rules for that sector.
5. Much greater clarity is provided in the legislation about the process for determining upfront whether the transfer of specified datasets under the CDR can attract a fee.

Many of these changes are welcome.

- The Business Council strongly supports the amendments to delegations and powers, especially the minimum consultation requirements for sector designation. The revised process now establishes greater procedural fairness and brings the legislation back in line with the delegations and powers that could be expected of regulators and Ministers.

The Business Council recommends that the minimum consultation requirements should also apply where the ACCC makes a new rule for a sector that is already covered. Presumably, the future expansion of the CDR to any additional datasets in a sector that is already designated would need to be effected through rule-making.

Considering the potential impact of a new rule on the use and operation of existing datasets, it would not be unreasonable to expect the ACCC would consult for a minimum period to ensure future rules are well-drafted and well-considered (except in emergency situations, as defined in the legislation).

To ensure procedural fairness is available in all respects of rule-making, the legislation should establish an independent avenue for appealing ACCC rules and decisions that is not overseen by the ACCC.

- The Business Council welcomes the clarity around the potential to charge for datasets. We support the legislation drawing from the philosophy underpinning the

provisions in 44CA and 44ZZCA of the *Competition and Consumer Act 2010*: namely, that regulation of pricing should occur only after market participants have been unable to reach commercial agreement on their own. However, members of the Business Council have concerns that data is not sufficiently comparable to service facilities for the vertically integrated discrimination principle to be fully adopted.

We support the principles of pricing arrangements articulated in the consultation paper.

However, the Business Council's most pressing concerns around value-added data and the privacy safeguards remain. These are outlined in more detail below.

Value-added data

The CDR continues to capture value-added data¹, which is the primary example of investment and innovation in data and a key lever for Australian businesses to respond to fierce competition.

No previous review has recommended the wholesale inclusion of value-added data.²

We appreciate Treasury's acknowledgement that, even though the legislation grants the Minister powers to capture materially value-added data, it is not intended to be in scope. The draft legislation and consultation paper³ has indicated an intent to clarify and tighten the provisions capturing value-added data.

However, the overly broad and ambiguous scope could discourage data-related innovation and investment, at the margin, because businesses who invest or innovate would need to account for the possibility of inclusion in future.

The Business Council would prefer the wholesale exclusion of value-added data in the legislation, and for the legislation to allow for the registration of voluntary, industry-led codes that determine the value-added datasets in scope. This would allow value-added datasets to be included in the scope of the CDR, while balancing the risks to consumers' privacy and security, business investment and innovation and Australia's competitiveness.

¹ Value-added data is defined as data that has been subject to analysis, transformation, de-identification or aggregation to the point that it is no longer in essence the raw personal data of an individual. The Business Council does not consider that value-added data includes: mere aggregation of personal and transaction data; cleansing of data; or convenient presentations of data. We intend our use of the term "value-added data" to hold much the same definition as the term "imputed data", as used by the Productivity Commission.

² The Business Council's previous submission sets out the previous discussion from the Productivity Commission's *Data Availability and Use* report and the Open Banking Review on value-added data.

³ *Treasury Laws Amendment (Consumer Data Right) Bill 2018: Provisions for further consultation, Proposals consultation paper.*

However, even if one accepts the need for inclusion of some value-added datasets in the legislation, the definition remains unnecessarily broad and ambiguous for the following two reasons:

- Some types of value-added data would be captured that are not necessary for data portability and could incur unintended consequences to business investment and innovation.

Despite the assurances that materially value-added data is generally not intended to be in scope, businesses who undertake data-related innovation or investment would need to account for the possibility that a future Minister has the discretion to capture any value-added dataset. As long as the CDR legislation contains broad discretion to capture value-added data, the CDR legislation has the potential to discourage innovation and investment in data, at the margin.

- The draft legislation excludes value-added data from the access and transfer requirements in the CDR, if it does not relate to a consumer and is not reasonably identifiable. The Business Council welcomes this change, as it excludes some datasets that are clearly proprietary, commercially-valuable and not relevant to consumers.

However, the legislation's definition still potentially captures a broad swathe of value-added data that is not necessary for data portability. In particular, the expansion of the legislative definition from data that is *about* a customer (as per the current Privacy Act) to data that *relates to* a customer will capture data generated in the normal course of a business' operations (including value-added data like consumer behaviour insights).

No evidence has been presented to justify the expansion, other than a desire to capture one type of dataset that was found to fall outside the scope of the Privacy Act.⁴

If the government would prefer capturing value-added data, we believe the government's objective could be delivered in a way that grants much greater precision and clarity, which would benefit businesses who are making decisions on investing or innovating in data in future.

A range of options are provided below to grant greater clarity and precision to the legislation's applicability to value-added data. These are not mutually exclusive.

- The legislation could confirm that value-added data is not intended to be within scope, unless specific datasets are expressly included in a Minister's sector designation.
- Guidelines could be prepared for Ministerial sector designations that sets out the types of value-added datasets that should or should not be included. These could be regularly reviewed by the Productivity Commission.
- A simpler legislative definition of consumer data (based on the tested scope of the Privacy Act) would be a preferable starting position for the CDR, considering the risks associated with capturing value-added data. Amending the term 'relates' in clause

⁴ I.e., metadata, as determined in *Privacy Commissioner v Telstra Corporation Limited* [2017] FCAFA4

56AF(3b) to 'is about' would reflect the tested scope of personal data as currently set out in the *Privacy Act 1988* and still allow broad and meaningful datasets to be provided under the CDR.

- Finally, the legislation's supplementary material (the explanatory memorandum and second reading speech) could express clearly and strongly the intent that the legislation is generally not intended to capture materially value-added data.

Our proposed alternatives would allow the Government to deliver its objective of data portability for consumers (and account for occasional instances where value-added data is in scope of the CDR), but also address the concerns raised by businesses about the breadth and ambiguity of the draft legislation as it applies to value-added data.

Privacy

The revised draft legislation responds to stakeholder criticism about the complexity, confusion and risk resulting from essentially re-writing the privacy regime through a set of privacy safeguards that would operate alongside, duplicate and – in some areas – conflict with the *Privacy Act* and the Australian Privacy Principles.

The revised draft seeks to provide greater clarity around the interaction of the privacy safeguards and the *Privacy Act*. It proposes that most of the privacy safeguards will generally not apply to data holders and that only the privacy safeguards will apply to data recipients in respect to the data they have received.

This does not address the most fundamental concerns with the privacy safeguards for the following reasons:

- The distinction between data holders and data recipients is likely to quickly become obsolete. Shortly after the commencement of the CDR, the majority of participating companies will likely be both data holders and recipients. Even though the two privacy regimes would apply at different parts of the transfer process, firms would ultimately still be required to comply with two separate privacy regimes at the same time – potentially for the same data.
- Establishing different privacy and security standards for different CDR participants runs the risk of unintended consequences, as the same dataset is treated differently depending on relevant circumstances.
- Applying two different regimes to different parts of the transfer process *increases* the complexity and opaqueness of the privacy regime for consumers.

It would be near impossible under this system for consumers to understand what rights and protections they can expect. This is contrary to the notion of informed consent and has the potential to harm consumers.

A simpler and clearer privacy regime is ultimately the best way to serve the interests of consumers.

- While customer consent remains a valuable tool for managing sensitive data uses, the regime runs the risk of "consent fatigue" and consumer disengagement.

Overloading consumers with a greater number of complex consent requests will not improve their engagement with their privacy settings.

The amendments to the privacy safeguards in the revised draft legislation assist in some regards in clarifying and narrowing the provisions.

However, despite the amendments, the privacy safeguards remain not fit-for-purpose. There remain a series of unanswered and unclear questions about the safeguards, including:

- why the legislation introduces new requirements about anonymity and pseudonymity, which compel a CDR participant to allow consumers not to be identified (privacy safeguard 2), when the definitions of the CDR scheme are designed around data where a consumer is identified or reasonably identifiable.
- the potential disruption to supply chains or data flows due to the requirements about disclosure of CDR data (privacy safeguard 6) to suppliers or third parties in the normal course of business (for example, IT providers or call centre operators).
- the implications for cross-border data flows (which could potentially contravene provisions of trade agreements that prohibit data localisation measures), under privacy safeguard 8.
- the prohibitions on government-related identifiers for managing consumer data, under privacy safeguard 9.

Privacy regulation is an enormously complex area and careful, considered design is required to protect the privacy and security of consumers through a regime that is efficient and practical.

When the Privacy Act was last reformed, it was subject to a process that lasted over six years. The current model of the MyHealth record has been under consideration since the commencement of a review five years ago, and policy makers were still not able to foresee all privacy and security concerns.

The Business Council believes the introduction of the CDR necessitates stronger privacy and security protections for the points in the CDR process with the highest risk (disclosure or receipt of consumer data, at a consumer's request).

But there are simpler and safer ways to achieve the same objective (such as updating the Australian Privacy Principles in the Privacy Act) than the operation of multiple, concurrent privacy regimes.

As a starting point, the Australian Privacy Principles would be a tested and more considered starting point than the development of an entirely new regime. Where the Australian Privacy Principles may not entirely align with the intent of the CDR (for example, businesses are not included in the definition of consumers), amendments could be brought forward in future, once the CDR has been initially implemented.

Timeframe

The Business Council has raised concerns about the very short timeframe for developing and consulting on a policy change of this magnitude.

It has been challenging to analyse the overall operation of the CDR – and the impact of this tranche of amendments – within a short consultation period. We imagine it has been even more difficult for small businesses, consumer groups and consumers to properly consider the breadth of the legislation’s ramifications in such a short period of time.

It appears that the amendments will have a major impact on the ACCC’s CDR Rules Framework, which has been available for consultation at the same time; however, it is not clear how the two processes impact each other. This is no reflection on Treasury or the ACCC; it is an inevitable hazard of progressing multiple, interlinked streams of work concurrently.

There is also no cost-benefit analysis publicly available, against which the public could assess the proposed CDR design. Without an understanding of the impact on investment or the broader economy, stakeholders’ feedback cannot fully account for the entire potential impact of the CDR.

There may be additional complications from the draft legislation that could impact consumers’ privacy and security that could not be fully identified or considered in the time allowed. We note, for example, that similar schemes in the United Kingdom and European Union have faced implementation issues.

BUSINESS COUNCIL OF AUSTRALIA

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