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28 February 2019

Senate Economics Legislation Committee
Senator Jane Hume
Chair
Economics.Sen@aph.gov.au

Dear Senator,

RE: *Treasury Laws Amendment (Consumer Data Right) Bill 2019*

Thank you for providing Communications Alliance with the opportunity to make a submission in relation to the *Treasury Laws Amendment (Consumer Data Right) Bill 2019* (Bill) as introduced into the House of Representatives on 13 February 2019.

The telecommunications industry shares Government's vision, expressed in the recently launched Digital Economy Strategy: "That Australians enjoy an enhanced quality of life and share in the opportunities of a growing, globally competitive modern economy, enabled by technology."[1] In fact, it is fair to say that our industry is at the very forefront of enabling and driving Australia's digital economy.

Our industry recognises the rights of consumers to be informed and have appropriate access to their customer data and product data to make informed decisions regarding the purchase of products and services and whether to move between providers. We also continue to express our in-principle support for the recommendations put forward in the Productivity Commission's Report on *Data Availability and Use* (PC Report), released in May 2017.

However, as currently drafted and introduced into Parliament, the Bill raises a number of concerns for our sector. In this submission, we confine our concerns to four key aspects around the legislation but note that further concerns remain and refer you to our earlier submissions, most notably our submission to the Department of the Treasury and the ACCC, dated 12 October 2018. The submission can be found on the Communications Alliance website.

Timeframe for the Development of Legislation

We welcome the decision to postpone until February 2020 the implementation of parts of the first stage (i.e. the sharing of consumer data for credit and debit cards, deposit accounts and transaction accounts) of the Open Banking Consumer Data Right (CDR), and to invest more time into thoroughly testing the proposed sharing arrangements of such sensitive data.

However, our request (in previous submissions to the CDR consultation) to delay the implementation of Open Banking by at least 12 months was founded on the need to adequately evaluate the proposed CDR approach and draft legislation against the requirements of all sectors. In other words, a delayed implementation of the Open Banking CDR ought to allow for a more time to ensure that the underlying legislation is fit for purpose in a broader economic context (i.e. including the energy and telecommunications sectors).

Unfortunately, the part postponement of the Open Banking CDR does not remediate the issues with the Bill itself and any associated material.

[1] p.6, Australia's Tech Future, available online at https://www.industry.gov.au/sites/default/files/2018-12/australias-tech-future.pdf

Against this background we reiterate our concern that the Bill was developed with a banking focus although the legislation (and Rules Framework) will apply to all sectors of the economy. If the process to develop an Open Banking regime (as the first sector to adopt the CDR) is already rushed and raises a large number of concerns with stakeholders, as evidenced in numerous submissions, it appears almost impossible to ensure that the legislation and associated rules are appropriately considered for other sectors of the economy which follow later in the process.

This bears the very real risk that those later sectors will be forced to operate within a legislative and regulatory framework that has a distinct 'banking flavour' but lacks sufficient consideration of the particularities of other industry verticals.

The validity of our concerns is evidenced by the fact that much of the material and the discussion during the consultation period looked to the recommendations of the Open Banking Report without any apparent consideration of the recommendations made (and accepted by Government) in the PC Report. This is particularly concerning with regard to the decision to include value-added data within the scope of the legislation. (Also refer to our comments further below.)

In this context we also note that the material presented throughout the consultation process uses the Open Banking regime in the United Kingdom as a reference point and benchmark. However, we highlight that this regime only commenced in January 2018 and very little, or almost nothing, is known as to its effectiveness or economic impact.

Application of the CDR to the Telecommunications Sector

The declared objectives of the CDR regime can be summarised as:

- To "*give customers more control over their information leading, for example, to more choice in where they take their business, or more convenience in managing their money and services*"[2];
- A reduction of barriers from shifting between providers *and* "*better tailoring of services to customers and greater mobility of customers and greater mobility of customers as they find products more suited to their needs*"[3]; and
- Fostering innovation and business opportunities as "*new ways of using the data are created*"[4] as the result of consumers having access and being able to share their data.

The telecommunications industry already has a number of mechanisms that gives consumers access to a broad range of data that relates to them. Therefore, the assumption that the telecommunications sector ought to meet the overarching CDR objectives by adopting a very similar approach to the banking sector must be thoroughly tested. Such assessment would need to examine the costs and benefits associated with the proposed approach, the net consumer benefit and the alternative approaches that might be adopted.

For example, under the *Telecommunications Consumer Protections Code* (TCP Code), which is enforceable by the Australian Communications and Media Authority (ACMA), Carriage Service Providers (CSPs) must provide their customers with detailed billing data and itemised charges in a form that customers can read, understand, store and reproduce for up to six years.

The TCP Code and the *Telecommunications (NBN Consumer Information) Industry Standard 2018* both contain provisions that require CSPs to provide their customers with relatively standardised product information prior to sale.

[2] p.5, para 1.1, Explanatory Memorandum, *Treasury Law Amendment (Consumer Data Right) Bill 2019*
[3] p.5, para 1.4, Explanatory Memorandum, *Treasury Law Amendment (Consumer Data Right) Bill 2019*
[4] p.5, para 1.5, Explanatory Memorandum, *Treasury Law Amendment (Consumer Data Right) Bill 2019*

Most providers also offer month-to-month plans, thereby minimising transaction costs when moving to another provider.

Most importantly, the enforceable *Mobile Number Portability Code* (and *Local Number Portability Code*) require CSPs to facilitate the porting of consumers' phone numbers, where technically possible. This allows consumers to move between providers with minimal effort, delay and transaction costs. This contrasts the banking industry where a transfer of account numbers from one bank to another is not possible, thereby creating significant barriers to moving between banking institutions.

Consequently, our industry contends that the CDR objectives are likely to be achieved, or are already being achieved, by existing Industry practice and legislative and regulatory obligations. It is recommended that any process to translate the Open Banking and general CDR regime into an 'Open Telecoms' regime commence with an analysis of already existing data access and sharing mechanisms in order to identify any potential gaps that may need closing to fully achieve the declared objectives of the CDR regime.

Where there are such gaps, it is imperative that the CDR regime is sufficiently focused on the achievement of the declared objectives rather than the specific means of achieving those.

For example, consumers already hold a vast amount of data that relates to them and their usage of telecommunications services on their smart phones – note that Australia has one of the highest smart phone penetrations in the world. This data often goes well beyond the data that their CSP holds as it includes data from over-the-top applications, such as WhatsApp and Viber.

It is well conceivable that access to the data types envisaged for access and sharing by the CDR regime could be facilitated through measures such as an app on the consumer's phone rather than a transfer solution via a (costly) application programming interface (API). This would truly put the customer at the centre of the CDR regime, by providing them with the data to which they have a right.

Overall it can be said that the telecommunications sector is very competitive and, as highlighted above, already provides easy access to a range of types of data. In that context, the benefits of applying the CDR regime to the sector will lean more towards building trust in the sharing and use of data by public and private enterprises to enable the creation of new products and services, productivity improvements, and new and more efficient ways for customers to interact with suppliers.

We recognise that the Bill delegates a number of key issues (including those that are or may be sector-specific) to the Minister for declaration and/or the ACCC for rule-making. While this approach may look appealing in theory to deal with the complexities involved in developing legislation that covers all sectors of the economy, it also bears the real risk that sectors adopting a CDR regime later in the process, such as the telecommunications industry, will be, deliberately or as an unintended consequence, assessed against the background of existing rules and practices and with a desire to create uniformity across sectors for uniformity's sake. It also exposes these later sectors to the risk that the designation of sectors and their data sets may go beyond what is needed to meet the overall CDR objectives.

It would be, therefore, preferable to enshrine certain aspects of the CDR into the legislation rather than leaving them open for later assessment. This, however, requires appropriate timeframes for the development of the legislation as outlined above.

Value-Added Data

We acknowledge that the CDR Bill limits access to derived data, or data that is derived from such derived data, to data specified in the designation instrument. We assume that the concept of derived data still includes value-added data which is derived from CDR data.

While this limitation is certainly preferable to the wide discretion left to the ACCC to include such data in the CDR rules that was proposed in the first Exposure Draft, we still strongly object to the fact that such data can be included in the CDR regime at all.

We do not agree with such a wide definition of CDR data on the basis that it would be detrimental to Industry, innovation and, consequently, also to consumers. Derived and value-added data is likely to be proprietary information of the data holder and any other party seeking access to such derived data should invest themselves to acquire the information.[5]

The mere fact that the CDR Bill (through declaration of the respective data set by the Minister) allows for the potential inclusion of value-added data is likely have a large detrimental impact on the data analytics industry and the development and use of data analytics by other industries (such as communications). Where organisations investing resources into data analytics are incurring uncertainty as to the viability of making a commercial return from their investment, (or where they are actually prevented from making that return), the investment is unlikely to occur. We note that it would be contrary to the stated objectives of the regime if the CDR regime decreased innovation and decreased data use.

The proposed definition is also inconsistent with the PC Report recommendations; and in parts directly contradicts Recommendation 5.2 of the PC Report. Recommendation 5.2, which was accepted by Government, specifically states that:

> *"Data that is solely imputed by a data holder to be about a consumer may only be included with industry-negotiated agreement. Data that is collected for security purposes or is subject to intellectual property rights would be excluded from consumer data."*[6]
>
> *"Data that is not able to be re-identified to a consumer in the normal course of business within a data holder should not be considered consumer data."*[7]

We note that neither the original Explanatory Memorandum (EM) nor the revised EM contain any explanation, let alone cost-benefit analysis, as to why an extended application of the CDR beyond the recommendations of the PC Report has been proposed or would be beneficial.

Consequently, we request that the definition of CDR data should also explicitly state that data that is imputed, derived or value-added data not be considered CDR data and cannot be part of the data specified in the designation. Further, data that is not able to be re-identified to a consumer in the normal course of business within a data holder should not be considered CDR data.

As it currently stands, the most radical regulatory intervention globally to create a consumer right to data portability is Article 20 of the European Union (EU) *General Data Protection Regulation*, as interpreted in the *Guidelines on the right to data portability* (16/EN WP 242 rev.01 dated 5 April 2017) as adopted by the former Article 29 Data Protection Working Party and now taken up by the replacement EU data regulator.

This right specifically excludes inferred data or derived data as created by a service provider, but potentially includes cleansed data and customer-specific aggregations and representations of transactional, customer-volunteered or customer-provided, and provider-observed data. As these regulations were only implemented in May 2018, we have not had sufficient time to determine the impact of this right on consumers in Europe and whether in fact it is leading to an increase in consumer welfare.

It appears that the authors of the legislation seek to retain maximum flexibility on the basis of the inherent complexity ('too hard basket'), but by no means impossibility, to delineate between

[5] p.17, Productivity Commission, 2018, *Data Availability and Use*, Final Report
[6] Recommendation 5.2, Productivity Commission, 2018, *Data Availability and Use*, Final Report
[7] Ibid.

data that is merely a representation of data about a person versus derived and value-added data. Similarly, it is also not appropriate to retain this degree of flexibility on the ground that it 'may come in handy' at a later time. Organisations require certainty for their investment decisions and the mere possibility that a designation may contain derived and value-added data is likely to be sufficient to have significant chilling effects on the data analytics industry.

Extending CDR to Large Businesses

The Bill proposes to apply the CDR to consumers, small and medium enterprises (SMEs), and large enterprises. The EM clearly states that intention:

> *For the purposes of the CDR a consumer can be an individual or a business. The existing definition in the CC Act is narrower and so the Bill inserts a new definition of CDR consumer into the CC Act for the purposes of the CDR which means that the ordinary broader meaning of consumer applies for the CDR.*[8]

The EM further explains that the definition of CDR consumer can be narrowed on a sector-by-sector basis through the designation process. Importantly, the EM notes that the intention for the banking sector is to not extend the CDR to large customers who have bespoke arrangements.

This is an important caveat, as it is only the Open Banking Inquiry which proposed the inclusion of large consumers.

Communications Alliance questions the proposed wide definition of CDR consumer noting that the only sector for which the wide definition has been recommended will not utilise the definition.

We also observe that the EM makes no reference to the economy-wide CDR PC Report in its discussion of the definition of CDR consumer and one could be led to believe that the wide definition of consumer was consistent with the PC Report and the Government's Response. However, this is not the case: upon review of these documents, it is clear that the PC Report recommended, and the Government accepted, a definition of consumer that did not extend to large enterprises. In fact, the PC Report specifically recommended against such a proposal:

> *The Commission is recommending that Australia's consumers – both individuals and small and medium sized businesses (SMEs) – be afforded a new Comprehensive Right to the use of their digital data.*[9]

The PC Report specifically recommended in Recommendation 5.2 that a consumer "*for the purposes of consumer data should include a natural person and an ABN holder with a turnover of less than $3m pa in the most recent financial year*".[10]

The PC Report made this decision after careful and detailed consideration. Indeed, the Inquiry made it very clear that such a limit was intentional:

> *The scope of businesses able to exercise rights as consumers under the Comprehensive Right would be considerably narrower than the scope of 'consumers' under Australian consumer law. This is intentional.*[11] [emphasis added]

The PC Report made clear that the CDR was not the vehicle through which large business would improve access to data. More importantly, the PC Report did not see "*significant additional benefits in improved competition or innovation with data from allowing large businesses a Comprehensive Right to data*."[12]

[8] p.21, Explanatory Memorandum, *Treasury Laws Amendment (Consumer Data Right) Bill 2019*
[9] p.15, Productivity Commission, 2018, *Data Availability and Use*, Final Report
[10] Recommendation 5.2, Productivity Commission, 2018, *Data Availability and Use*, Final Report
[11] Ibid., p.198
[12] Ibid., p.198

Recommendation 5.2 was accepted by the Government in its response. The Government's response stated it accepted Recommendation 5.2 and it would introduce a CDR to allow "*consumers to access particular data*".[13] There was no statement that the Government would extend the consumer right beyond that recommended by the Inquiry.

Communications Alliance observes that the PC Report's intent, and the Government's acceptance of the recommendation, is clear. Namely, that the CDR regime should apply only to consumers and SMEs with an annual turnover of less than $3 million. It is unclear why the Bill proposes an approach that was not supported by the PC Report and not endorsed by the Government in its response. And we observe is not intended to be utilised in the banking sector.

Communications Alliance does not support the inclusion of large business. We are particularly concerned that no analysis has been conducted justifying the inclusion of large business.

We recommend that the definition of *CDR Consumer* under s.56AI(3) be amended to give effect to the PC Report recommendation and the Government's response. Namely, that a CDR consumer is a "*single person, family groups or other groups resident at a single address in the data holder's dataset, and any entity with an Australian Business Number (ABN) and turnover of $3 million per annum or less*."[14]

Complex Dual Privacy Regimes

We note that Bill as introduced into Parliament is an improvement on earlier versions of the Bill. The amendments aim to create a less confusing privacy regime and to remove some of the complexity created by 'overlapping' privacy regimes, i.e. the Australian Privacy Principles (APPs) and the CDR Privacy Safeguards.

While this approach does go some way to resolving the 'overlapping' problem, it still fails to address the fundamental problem which is that the same data (say a transaction) can move in and out of the CDR regime over time. This occurs because the CDR participant can change from being a data recipient to being a data holder in respect of a single CDR consumer, or worse still, simultaneously be both a data recipient and a data holder in respect of the same CDR consumer despite the revised Bill's attempt to segregate the privacy regimes so only one applies at any one time.

While we appreciate the intention of clarifying and, to a certain extent actually simplifying, the applicable privacy obligations, we are of the opinion that the envisaged dual regime will still be very difficult to implement and is likely to be confusing for consumers and businesses.

In this context, we note that we were unable to provide a meaningful submission on the draft Privacy Impact Assessment (PIA) given its release on the evening of the 21 December 2018 with submissions due on 18 January 2019 (i.e. Christmas/New Year/holiday period).

While our organisation did not provide a response to the PIA, we note with concern that the banking sector raised a number of significant issues, finding the draft PIA's risk assessment being too optimistic. For example, the Australian Banking Association (ABA) notes that *"The ABA has identified aspects of the PIA where industry experience would suggest a higher risk likelihood is plausible." and that "Given [the ABA's] experience, ABA members would assess the likelihood of unauthorised access to consumer data by a third party is significantly higher than 'unlikely' […]."*[15]

The timing of the consultation and the short consultation timeframe are yet another testimony to the undesirable consequences of attempting to rush the CDR legislation through when far more

[13] p3, Australian Government's response to the PC Data Availability and Use Inquiry
[14] p.198, Productivity Commission, 2018, *Data Availability and Use*, Final Report
[15] Available online at: https://www.ausbanking.org.au/images/uploads/PIA_CDR.pdf

time would be required to ensure appropriate consultation and assessment of the impacts of the proposed legislation.

We look forward to engaging further with your Committee and other relevant stakeholders on the *Treasury Laws Amendment (Consumer Data Right) Bill 2019*. Please contact Christiane Gillespie-Jones or myself if you would like to discuss.

Yours sincerely,

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