

Senate Economics Legislation Committee
Treasury Laws Amendment (Consumer Data Right) Bill 2019
Questions on Notice from Public Hearing on 5 March 2019

Communications Alliance
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Question on Notice (Senator Ketter)

"Do you have a view as to what informed consent should look like?"

Response:

Note:

We suggest using the term 'express consent' or 'explicit consent' instead of 'informed consent' in line with the terminology used by the OAIC in relation with the *Privacy Act 1988* and in other jurisdictions, including the Open Banking in the UK and the GDPR of the European Union, and to delineate the consent required in the CDR regime from the consent models of the health sector where consent is typically called 'informed consent'.

Context and timing of consent:

It is important to recognise that there are context-specific elements to consent which means that there are certain times and/or places where individuals can provide more express consent than at other times/places. Determining the validity of consent should take context into account. An over-reliance on consent or use of consent in instances that do not adequately consider the relevant consent context will likely affect the quality of the consent obtained and users' attention and reaction to consent windows.

While some form of express consent will be required at a specific point in time to allow for use and flow of data and, where inseparable, the provision of a specific service, it is also important to not only view consent (or the absence of it) as a once-only event that occurs at a single point in time. Instead, we ought to look at consent as a continuous ability to express consumer choice. Offering users the ability to exercise choice with regards to different aspects of their consent over a period of time via user or account-based settings is likely to be a stronger foundation for consent than a single once-only approach to consent which seeks to cover a large range of aspects that many consumers may not be able or willing to contemplate (for lack of knowledge/ understanding or due to time constraints) at that specific point in time.

Interaction with the user and ability to obtain consent:

Consent should only be required when it is reasonable to expect that the organisation can in fact obtain such consent. For example, obtaining consent from a person who has no interaction with the service provider is not possible, and thus should not be mandated. Such scenarios are well conceivable in an online context where consumers may simply use a platform or technology to obtain information (i.e. they are users) without being a customer of the organisation providing the platform or technology. It will require careful thought and analysis as to which forms of use could potentially require consent and, if at all, how such consent could be obtained in such cases.

Equally, consent may be impossible to obtain where transactional or usage data forms part of the CDR. While the account holder (or even potentially the user) of a service may consent to their usage data being transferred to a data recipient, it will be impossible to seek consent for the sharing of data that also relates to other individuals (e.g. the telephone number of the party that has been called by the consenting account holder/user).

For telecommunications providers (and we suspect also for providers of many other services) it is also impractical to identify all users relating to an account holder. For instance, a telecommunications provider might provide mobile services to the entire workforce of an organisation. While the employer might consent for the usage data (or other relevant data) of each employee to be provided to a third party, its employees may not. This problem also applies to other services and other types of customers such as student accommodation sharing broadband services, family households, etc.

It is also not straight forward to ensure that the consent is provided by the appropriate person. Often multiple people have access to account information and log-ins (e.g. families) but it may not be appropriate for all users of the account, such as children, to provide the consent on behalf of the family.

In a (mobile) communications and IT environment users of services are often under-age teenagers or even children. Careful consideration will need to be given with regards to the age limitations as to when express consent can be given.

Outcomes-based consent approach:

Any form of consent model must be practical, principles-based and outcomes-oriented rather than seeking to enshrine a prescriptive approach of how to obtain consent. For example, while consumers ought to be able to provide their consent without having to read through lengthy information or Terms and Conditions, it would be unhelpful to prescribe a font size equivalent or measure of how much screen space a request for consent is to consume. Any approach that seeks to prescribe the specific means of seeking consent is likely to fail to take into account the large variety of audiences, circumstances of time and location of the consent and data types and use cases, and is unlikely to be sufficiently flexible in a highly dynamic digital environment.

Arguably, the EU GDPR sets a high bar for consent and whether the approach ought to be replicated in an Australian context needs to be carefully assessed. However, it is worth noting that "The GDPR does not prescribe the form or shape in which information must be provided in order to fulfil the requirement of informed consent." (p. 13, Article 29 Working Party *Guidelines on consent under Regulation 2016/679*, file:///C:/Users/Christiane/Downloads/20180416_Article29WPGuidelinesonConsent_publishpdf.pdf).