



12 October 2018

Consumer Data Right Rules Framework
Australian Competition and Consumer Commission
ACCC-CDR@acc.gov.au

Dear Ms Bunch,

ACCAN thanks the ACCC for the opportunity to submit to its consultation on the *Consumer Data Right Rules Framework* (the framework). Although supportive of many elements of the draft framework, ACCAN has concerns with respect to:

- the scope of consumer privacy protections;
- the accreditation of data participants; and
- the potential for consumer data to be used for anti-competitive conduct.

The framework sets out high level principles for the development of rules for the implementation of the Consumer Data Right (CDR) for the banking sector, starting with the four major banks. The first version of the rules has focused on what has been referred to as the 'minimum viable product' that is, the minimal workable form that the CDR may take. The ACCC has outlined an iterative process for further development of rules as the CDR is rolled out within and across industries.

The framework focuses primarily on the initial rollout of the CDR in the banking sector, starting with the four major banks. Accordingly, ACCAN has placed its emphasis on best practice principles where there are principles of relevance to the future rollout of the CDR in the communications sector.

ACCAN believes that when the CDR rules are drafted that the rules should provide for:

- broader privacy protections for consumers through privacy obligations on third parties;
- strict accreditation requirements; and
- the removal of accreditation and exceptional penalties where CDR data is used for price discrimination or anti-competitive conduct.

Below ACCAN sets out its concerns and proposed remedies for the ACCC's consideration.

Privacy

ACCAN supports the expansion of the scope of the privacy safeguards provided to consumers through the rule making process in order to ensure that the privacy of consumers is adequately protected. Privacy is important to consumers, and a loss of privacy can cause material detriment to consumers through a loss of personal security, direct and indirect financial loss and a loss of confidence. Consumers are entitled to have their privacy treated with respect and have the confidence that their personal information is only being used in accordance with their wishes.

The first version of the rules will only apply to the four major banks and does not expressly allow for the transfer of CDR data to third parties. As all of the four major banks are expected to be accredited participants within the scope of the CDR scheme the additional privacy protections articulated within the draft bill will apply to all participants.

The first version of the rules does not set out detailed principles for the extension of privacy safeguards and obligations to third parties. ACCAN cannot therefore provide substantive comments on the suitability of the framework at principle level for addressing the privacy risk that exists.

However, ACCAN believes that the privacy safeguards should be extended to all scheme participants, including third parties seeking to receive CDR data. In the absence of comprehensive privacy protections there is a material risk that malicious parties will seek to obtain CDR data from that part of the system with the weakest protections – third party recipients. For consumers this has the potential to result in significant loss of privacy, theft, loss or misuse of their data.

In the absence of comprehensive privacy obligations, third party data recipients will have limited incentives to invest in appropriate processes and technical measures to ensure that consumers' data is adequately protected. Accordingly, ACCAN supports the introduction of comprehensive privacy protections when the CDR scheme is extended to the telecommunications sector, and third-party entities become able to receive or collect consumer data.

Accreditation standards

ACCAN is supportive of strong accreditation standards in order to protect consumers from misuse or abuse of their data for the purpose of commercial gain. Accordingly, we are supportive of the proposed introduction of requirements that a party seeking accreditation is a 'fit and proper' person to receive CDR data.

The requirement that a party be 'fit and proper' draws upon existing legal principle that an individual is not 'fit and proper' if:

- they been engaged in dishonest, misleading or fraudulent conduct;
- the applicant (or its directors) have been charged with or convicted of a serious criminal offence, or an offence of dishonesty, against the law of the Commonwealth or of a State or Territory; and
- the applicant (or its directors) has been found to have contravened or have had civil proceedings commenced against the applicant alleging contravention of, a law relevant to the management of CDR data.¹

¹. Including the *Competition and Consumer Act 2010* (Cth) (inclusive of the Australian Consumer Law), the *Australian Securities and Investment Commission Act* (Cth) and the *Privacy Act 1988* (Cth).

A rigorous approach should be taken with respect to the assessment of accreditation against the stated criteria, and the market share and scale of an entity should not be a basis for entities having their accreditation automatically approved. The consumer data that is to be transferred under the CDR system is of immense economic value and has the potential to materially affect market outcomes for consumers. It is therefore inappropriate that this data is accessed, transferred or otherwise handled by parties that are not ‘fit or proper’ persons.

As noted by Treasury in the *Review into Open Banking* (2017, p. 22) accreditation will allow consumers to determine whether a data recipient is compliant with the standards, and consequently can be considered trustworthy. The accreditation process protects consumers from malicious third parties and inspires confidence among consumers to share their data with recipients that they can trust.

The protection of consumers from detriment as a result of the misuse or abuse of their data is of paramount importance to the proposed reform, and should consumers’ trust be taken advantage of, confidence in the system and the reform is likely to falter. In those circumstances, ACCAN is concerned that the material benefits associated with the reform project may be forgone.

The criteria for the assessment of whether a party should be accredited, if rigorously applied, would preclude the accreditation of several of the major banks in the first version of the CDR on the basis that they have engaged in fraudulent or dishonest conduct, as outlined in the *Interim Report* of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Hayne 2018). The interim report details extensive misconduct on the part of the major banks and indicates that bank representatives on myriad occasions engaged in conduct that is evidence of dishonest or fraudulent conduct, including falsification of documentation, fraudulent uses of powers of attorney, forging of customer signatures, customer impersonation and falsely witnessing documents. In some instances, customer funds were found to have been transferred into the personal accounts of financial advisors working on behalf of financial institutions.

ACCAN would note given the extent of misconduct present in the banking sector and pending litigation that the four major banks may not meet the requirements of a fit and proper person. If the requirement that a person be ‘fit and proper’ is interpreted in the ordinary fashion,² it is unlikely that many of the entities intended to be captured within the CDR framework would meet the requirement. ACCAN believes this issue should be subject to serious consideration and does not support a reading down of this principle and the standards that may be implied from existing legal precedent.

In the telecommunications context, similar issues arise with respect to service providers that have engaged in misleading and deceptive conduct, have acted in breach of the Australian Consumer Law or who have provided undertakings to the ACCC with respect to conduct which may have had the effect of misleading consumers. As part of the rollout of the CDR to the telecommunications sector ACCAN supports the rigorous examination of whether service providers meet the proposed requirement to be ‘fit and proper’ in order to ensure that consumers are protected from the misuse of their data, and that providers who have engaged in dishonest conduct are barred from accreditation.

². *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, at 161-2; words of wide significance are only to be read down where a limitation is demonstrated or reflected in the text *Cody v J H Nelson Pty Ltd* (1947) 74 CLR 629 at 647; *Maunsell v Olins* [1975] AC 373, at 382; general words given legal meaning are to be interpreted in accordance with their accepted meaning *Sterling Nicholas Duty Free Pty Ltd v Commonwealth* [1971] 1 NSWLR 353.

Insurance as a requirement for accreditation

ACCAN is supportive of the rules framework providing a clear mechanism for the provision of compensation to consumers who suffer loss as a result of a breach of their privacy. However, care must be taken when examining the suitability of insurance to ensure that CDR participants do not rely upon insurance as a substitute for taking appropriate actions to preclude the loss, misuse or theft.³ Accordingly, we support the taking of enforcement action by regulators for any breaches of the privacy safeguards by CDR participants where they arise in order to provide strong incentives for participants to take appropriate precautions to protect consumer protection.

As part of the accreditation process ACCAN considers that it is appropriate to require insurance to provide consumers compensation should their privacy be breached. However, as part of this requirement it is preferable that the administration of the insurance payments and compensation be at arm's length from the CDR participants to prevent underpayment to affected consumers.

Consent

ACCAN supports the principles for consent articulated by the ACCC in the discussion paper, and believes that consent should be:

- Explicit;
- Specific to purpose;
- Unbundled;
- Easy to understand;
- Revocable; and
- Freely given.

Information should be provided in accessible formats to ensure that all consumers can benefit from the CDR. Providing information in a clear and easy to understand manner is essential to ensuring that consumers can maximise the benefits they receive from their data, without being presented with information in difficult to engage with formats that are designed to discourage their engagement.

As part of the development of draft rules concerning consent, ACCAN encourages the ACCC to draw upon existing Australian and international research about how consumers engage with information, behavioural biases (OECD 2018; Harrison, Hill & Gray 2016, pp. 10-21), and the potential for complexity to dissuade consumers from reading important documents (Ayres & Schwartz 2014; Bakos, Marotta-Wurgler & Trossen 2014; Ben-Shahar 2009).

ACCAN's concerns regarding the substance of consent requirements, have been broadly addressed in the framework which sets out the ACCC's in principle approach to rules development.⁴ A notable exception to this, is the proposed extension of the Consumer Data Right to minors, a particularly vulnerable consumer group.

³. This is known as the moral hazard problem and emerges when a party has insurance and having shifted the risk to the insurer no longer has an incentive to take adequate precautions, if they cannot be observed (Pauly 1968; Arrow 1968; Shavell 1982; Mirrlees 1999).

⁴. These concerns were set out in detail in ACCAN's submission to Treasury concerning the Treasury Laws Amendment (Consumer Data Right) Bill 2018, pp. 24-25, and available at <<http://accan.org.au/our-work/submissions/1536-consumer-data-right-submission>>.

ACCAN supports the exclusion of minors from the CDR due to their potential to be exploited and would note that the law has typically extended exceptional protections to minors to preclude exploitation.⁵ The inclusion of minors at a future point in time may be appropriate in the event that comprehensive and exceptional safeguards are provided to ensure that minors can benefit from their data without facing undue risk of exploitation.

The CDR has risks

The current formulation of the framework seeks to promote the communication of product, service and presumably price information between entities in concentrated market places in order to allow consumers to elicit better offers. However, rather than offering consumers a better deal business may use this information for the purpose of profiling individuals and sub-markets of consumers in order to extract the maximum possible economic rent.

The consumer data right creates a process for the frequent porting of detailed information concerning individuals, transactions, locations, products, services and prices potentially on a real-time basis. Although likely to provide material benefits to consumers, the porting and communication of this data possess significant risks if it is misused, lost or stolen.

ACCAN is supportive of measures to provide consumers with information to add comparison and the selection of better services.⁶ However the current framework would entail the transfer of detailed price and service information on a potentially real time basis to service providers that are in direct competition with one another. The use of this consumer data by firms to develop comprehensive models of consumer preferences, maximum willingness to pay and competitor pricing strategy may allow firms to implicitly collude or price-match rather than engender real competition.

In concentrated markets such as telecommunications and financial services (Grattan Institute 2017), the incentives to engage in vigorous pricing competition are more limited. In the finance sector this has resulted in clustering (PC 2018, p.12) of prices, with banks leveraging their market power (PC 2018, p. 9) to set prices (thus maintaining their margins) rather than engage in price competition.

For market participants engaging in price matching or ‘clustering’ it falls short of tacit collusion but may still be feasible when service providers have access to detailed real-time data concerning their competitors’ market offerings. This has the potential to result in significant loss to consumers through elevated average prices within markets, but still amount to conduct that is insufficient to result in regulatory intervention.

The current drafting of the rules framework does not countenance the possibility that firms operating within the CDR system may have incentives to use greater access to consumer data to price discriminate or collude in the course of maximising their profits (Varian 1989, p. 1–2). This is concerning, given the well-established incentives at play in the financial services sector where such data may allow for firms to set prices well above competitive market levels and engage in price discrimination.

⁵. The law has typically provided additional protections to minors, by allowing them to void non-beneficial contracts e.g. *Minors (Property and Contracts) Act 1970* (NSW) s 31.

⁶. That is to reduce search costs (Stigler 1961).

In the telecommunications sector similar incentives may exist, and service providers may be in a position to use CDR data in order to develop comprehensive pricing models that increase prices for specific groups, to their detriment. Although such conduct is not illegal, the potential for consumer data to be used for this purpose is concerning and will result in potentially material detriment to consumers.⁷

In order to dissuade service providers and data participants from using consumer data for anti-competitive purposes ACCAN believes that it is appropriate to establish exceptional penalties for such conduct and for accreditation to be revoked at a minimum. In the absence of a credible threat of sanction, service providers may have incentives to engage in behaviour to the material detriment of consumers, particularly those that are financially vulnerable.

ACCAN thanks the ACCC for the opportunity to comment on the rules framework. Should you wish to discuss this submission further please do not hesitate to get in contact.

Yours Sincerely,

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⁷. In principle price discrimination may benefit consumers if, and only if it increases total output – that is, services are offered that match the needs of underserved groups (Schmalensee 1981; Varian 1985, p. 2). ACCAN has concerns, however, that models of price discrimination may be developed, not with a view to providing services to underserved consumers (that is the marginal consumer) but rather to extract maximum rents from all consumers.

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