

28 August 2020

Submission to Consumer Data Right Energy Rules Framework Consultation Paper

Submitted online

The Consumer Policy Research Centre (CPRC) appreciates the opportunity to respond to the Australian Competition and Consumer Commission's (ACCC) Consumer Data Right (CDR) [Energy Rules Framework Consultation Paper](#) (the "**Consultation Paper**").

CPRC aims to create fairer, safer and inclusive markets by undertaking research and working with leading regulators, policymakers, businesses and community advocates. Data and technology issues are a research focus for CPRC, including emerging risks and harms and opportunities to better use data to improve consumer wellbeing and welfare.

Areas of focus for CPRC

CPRC has previously provided submissions to a number of CDR consultation processes that are relevant to the Consultation Paper, most notably:

- ACCC consultation paper on the [Economy Wide Rules Framework](#)
- ACCC consultation paper on [Data Access Models for Energy Data](#)
- Australian Treasury issues paper on [Future Directions for the Consumer Data Right](#)

Building off this past engagement, this submission outlines issues for the ACCC to consider when developing the energy rules framework (the "**Rules**"). In particular – this submission focuses on three areas relevant to the Rules:

- 1. Data sets and consumer experience**
- 2. Building inclusivity into the design of CDR in energy**
- 3. Privacy and consumer protections**

Throughout the submission we highlight areas of the CDR in energy Rules that need to be geared toward building consumer trust in data access processes and protections.¹ It is important to recognise that as consumer data begins to be amalgamated across the economy (initially in the banking and energy sectors) this will enable very detailed profiling of consumers that can lead to risks of harm, as well as be at odds with consumer expectations of how their data will be used.² The submission therefore concludes by drawing attention to strategic policy and regulatory actions – applying across the economy – that we consider are fundamental to the sustained success of the CDR reform programme.

We do not respond to all the questions set out in the Consultation Paper but where we feel that a point is relevant to a specific question we denote this in the footnotes.

¹ This aligns with the Productivity Commission's view that increasing consumer trust in data access processes and protections is a key objective of reforms. See: Productivity Commission, "Data Availability and Use – Overview and Recommendations", (March 2017), 2, <https://www.pc.gov.au/inquiries/completed/data-access/report/data-access-overview.pdf>

² ACCC, "Digital Platforms Inquiry – Final Report", (June 2019), 445, <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>

1. Data sets and consumer experience

Treatment of sensitive data sets

The inclusion of sensitive consumer data sets in the initial scope of the CDR in energy – such as concession, relief scheme or payment plan information, and information about payments or payment methods – needs to be subject to robust, effective safeguards.³ While this type of information can be used to benefit consumers, it can also be used to make inferences about a consumer's ability to pay and their potential value to a company. It could therefore be used to discriminate against and exclude consumers in ways which leave them worse off.⁴ Given energy is an essential service, it is absolutely critical that risks of such harms are appropriately managed. To do this, effective regulatory monitoring and compliance activities – particularly in relation to existing CDR Rules regarding the “Data minimisation principle” and “Restrictions on seeking consent” – will be key.⁵ In practice, we consider this will involve making sure that companies are:

1. Establishing a clear purpose behind the collection of sensitive data – with data only collected if a company has demonstrated that it is necessary for a use-case that delivers value to consumers (we discuss data recipient accreditation further on page 5)⁶
2. Bound by rules that stipulate that the sharing of sensitive data is subject to specific election within CDR consent processes
3. Ensuring consumers can make an informed choice about sharing sensitive data.

Regarding the broader question about whether energy data is less sensitive than banking data – we would stress that policy and regulatory decisions should be guided by consumer research and user testing regarding consumer attitudes to sensitive data sets.⁷ This allows for the diverse needs and attitudes consumers have regarding sensitive data and privacy to be factored into Rules design.

Consumer Experience Standards and CDR Rules

Positive consumer experiences are integral to building trust in data sharing processes. We therefore suggest that consumer experience requirements should be added to the list of “Data Standards that must be made”, specified under Part 8 of the CDR Rules (8.11). This would appropriately emphasise that the mandatory CX standards, issued by the Data Standards Chair, set enforceable expectations for clear, comprehensible and inclusive consumer experiences.⁸

Dashboards

Another area where research and testing is critical relates to consumer consent dashboards. Testing and research is needed to create tools that facilitate inclusion, understanding,

³ Refer to Question 2

⁴ Such data could potentially be used, without a consumer's knowledge and meaningful consent, to inform price discrimination that results in them paying higher prices. Consumers could also be excluded from offers if companies use this data to infer that the consumer belongs to an “undesirable segment”. See: ACCC, “Digital Platforms Inquiry – Final Report”, (June 2019), 445-447, <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf> and, ACCC, “Retail Electricity Pricing Inquiry – Preliminary Report”, (September 2017), 126, <https://www.accc.gov.au/system/files/Retail%20Electricity%20Inquiry%20-%20Preliminary%20report%20-%202013%20November%202017.pdf>

⁵ See rules 1.8 (Data minimisation principle) and 4.12 (Restrictions on seeking consent) in the [Competition and consumer \(Consumer Data Right\) Rules 2020](#).

⁶ Consumer research shows consumer opposition to companies collecting data that is not necessary for the product or service they've signed up for. A survey conducted by CPRC in March 2020 reveals that 88% of consumers consider this practice to be unfair (60% very unfair).

⁷ Refer to Question 34

⁸ Refer to Question 4

visibility, and consumer agency over their data consents.⁹ We do not have a firm preference regarding the three dashboard options outlined in the Consultation Paper.¹⁰ However, we are concerned that as the CDR expands to other sectors, the Rules could entrench a burden on consumers whereby they need to access multiple dashboards across sectors to maintain visibility of their consents. It is unrealistic to expect consumers will log into multiple dashboards in order to track the state of their data consents – nor is it practical as a comparison method to do so. We’ve previously proposed that the Data Standards Body could be responsible for managing a holistic consent dashboard¹¹, with associated rules to be set by the ACCC. A platform of this kind would improve the ability of consumers to comprehend and meaningfully assess how and where their data is being shared across the economy.¹² If this intervention is not preferred at this time, we’d encourage the ACCC to consider which of the dashboard options proposed in the Consultation Paper is best suited to being adapted into a holistic dashboard in future.

Availability of historical data

There are likely to be use-cases that could be strengthened from access to historical data. For example, a use-case that could benefit from data going back further than two years could be a consumer looking to better understand the payback period for solar panels. We support a Rules framework that is able to adapt and cater for use-cases that would assist consumers in making informed decisions about such investments.

2. Building inclusivity into the design of CDR in energy

CPRC’s recent report for the Australian Energy Regulator (AER) regarding approaches to consumer vulnerability underscores how vulnerability affects the choices and interactions consumers have with markets.¹³ It highlights areas where markets and providers may exacerbate harms, and pinpoints why a nuanced understanding of real-life experiences is necessary for creating inclusive market reforms. For the CDR to fit this bill – and meet the needs of a wide range of consumers, including those in vulnerable situations – it is key that the Rules governing CDR recognise the full spectrum of consumer rights, preferences and vulnerabilities, and provide a clear incentive for an inclusive design culture.

Offline consumers

We support the ACCC’s intent to facilitate the inclusion of consumers who do not have an online account.¹⁴ Not doing so risks entrenching digital exclusion, as well as exacerbating two-tier market issues that have characterised retail energy markets in recent years, where those who cannot or do not engage pay a “loyalty tax”. Avoiding these outcomes and ensuring all consumers can benefit from CDR will require investment – directly from and/or incentivised by government – that supports the design and application of “data for good” technologies that address the issue of digital exclusion and make technological solutions more inclusive and accessible. We also implore policymakers and regulators to think holistically about the digital exclusion issue, and carefully consider whether the changes the CDR generates creates a need for direct measures to protect digitally excluded consumers from poor distributional outcomes.

⁹ Refer to Question 24

¹⁰ Refer to Question 20

¹¹ Nina Lewis, “Submission to The Treasury - Inquiry into Future Directions for the Consumer Data Right: Issues Paper” (CPRC, May 2020), 3, https://cprc.org.au/wp-content/uploads/CPRC-Submission-to-Treasury_CDR-Future-Directions-Issues-Paper_signed-1.pdf

¹² Refer to Question 22

¹³ Emma O’Neill, Exploring regulatory approaches to consumer vulnerability – a report for the Australian Energy Regulator, (CPRC, 1 November 2019), <https://cprc.org.au/wp-content/uploads/Exploring-regulatory-approaches-to-consumer-vulnerability-A-CPRC-report-for-the-AER.pdf>

¹⁴ Refer to question 8 – customers who do not have an online account

Joint account holders and nominated persons

First and foremost in relation to joint accounts, CPRC strongly supports the ACCC ensuring a consistent approach with the energy sector regarding protections for consumers affected by family violence.¹⁵ CPRC also recognises that, for the Rules regarding joint accounts, there is a tension that needs to be managed regarding protecting the privacy of personal information, while also looking to provide beneficial functionality to as many consumers as possible. Given the early stages of the CDR, and the need to build trust across a diverse range of consumers, our inclination would be to provide greater privacy protections, while also maintaining an ability to iterate these protections in future if the evidence demonstrates this would be beneficial. Therefore, while we would like to see eligible CDR consumers in energy defined in a way that enables a wide range of stakeholders in shared consumer data to have the ability to access usage data¹⁶, CPRC also supports the ACCC adopting a rule¹⁷ that does not permit one joint account holder to request or authorise the disclosure of another joint account holder's customer data (which is information that identifies or is about a person). On a related matter, we also support the [Supplementary Privacy Impact Assessment](#) (SPIA) recommendation that Rule 4.12(3)(b)¹⁸ be reviewed so there are appropriate protections regarding the privacy of an individual who may not be the CDR consumer. It is prudent to consider privacy risks for consumers who may not be CDR consumers, and this should include consumer research and testing with residents or tenants of premises who are not account holders.

Consumers who are minors

CPRC supports the ACCC consultation position for the initial scope of the CDR in energy to not include persons under 18 years of age as eligible CDR consumers. Given the very small number of these consumers – and the real risks associated with minors potentially not understanding what they are consenting to, or being subject to exploitative practices – it is prudent to build a better understanding of the nuances of these consumer use-cases before extending CDR eligibility to them.¹⁹ We note, however, that persons under the age of 18 who are living outside the family home often face significant personal and financial hardship and as such may be among the consumers who could derive benefits from socially responsible use-cases for CDR in energy in the future.

3. Privacy and consumer protections

Privacy by design

CPRC strongly supports recommendations 1 and 8 of the SPIA regarding further assessments of privacy impacts for the CDR in energy reform as policy and regulatory positions become clearer over time. Considering privacy outcomes for consumers should occur on an ongoing basis – and be reflective of the fact that different consumers will have different attitudes toward privacy. Building understanding of consumer attitudes on an ongoing basis is key to upholding some of the fundamental principles of a “Privacy by Design” approach.²⁰ Notably, it will enable a user-centric approach to consumer privacy and allow for user testing insights to contribute to strong privacy defaults, appropriate consents and notices, and user-friendly features that empower consumer choice and control. CPRC

¹⁵ Refer to question 10

¹⁶ Stakeholders in shared consumer data could include co-tenants or co-residents of a premises, or persons subject to embedded networks (such as consumers residing in residential parks and aged care homes).

¹⁷ We note this Rule can be similar to Schedule 3, paragraph 3.2(3)(b) of the Rules in place for the CDR in banking.

¹⁸ Rule 4.12(3)(b) prohibits accredited persons from seeking consent from a CDR consumer to use or disclose their CDR data for the purpose of identifying, compiling insights in relation to, or building a profile in relation to an identifiable person who is not the CDR consumer who made the consumer data request (for example, other identifiable persons living at a premises).

¹⁹ Refer to question 8 – including minors as eligible CDR consumers

²⁰ Phuong Nguyen & Lauren Solomon, “Consumer data and the digital economy”, (CPRC, 17 July 2018), 44-45, https://cprc.org.au/wp-content/uploads/Full_Data_Report_A4_FIN.pdf

recommends the ACCC follow a “Privacy by Design” approach when considering issues relating to the gateway rules, standards and privacy safeguards.²¹

Consumer authentication model options

CPRC is broadly supportive of a single, redirect authentication model for CDR in energy, given that it provides a high initial degree of privacy protection that will help foster trust in the CDR, as well as facilitate interoperability and consistency across CDR sectors.²² We have not undertaken analysis to offer evidence on the costs or benefits of authentication model 1 or 2 – or the “limited version of the CDR” also mentioned in the Consultation Paper²³ – and therefore do not have an informed preference regarding these models.²⁴ We agree with the ACCC that it is prudent to be extremely mindful of the risks in respect to privacy and information security associated with an authentication model – as this will be important for building trust in CDR. Also important for building trust will be delivering a familiar authentication experience for consumers across sectors. The ACCC could consider the merits of trialling the different authentication models – to determine how privacy, information security and cross-sectoral consistency factors should be taken into account.²⁵

Issues relating to accreditation

We consider that having a level of accreditation that is comparable to banking accreditation (“unrestricted level”) could be beneficial for the initial phase of the CDR in energy – as this may help to build up consumer trust in the CDR during its formative stages and maintain a level of consistency across sectors. We are also supportive of considering lowering accreditation for subsequent phases, and believe that decisions to lower accreditation must be based on a thorough understanding – built through consumer research and user-testing – of what this would mean for consumers, in terms of both risks and benefits.²⁶ More broadly, we consider that all CDR accreditation processes across sectors should require companies to outline to the regulator the data they will be collecting and why this is necessary for the consumer use-case/s they are looking to satisfy. This would oblige data recipients to think carefully about the consumer outcome they are aiming to achieve, thereby embedding a consumer-centric approach into their data practices. It would also mean there is a clear audit trail for holding companies to account if their practices are non-compliant with CDR rules, like the “Data minimisation principle” rules. We do not consider that this requirement would impose a disproportionate burden on companies, as having a clear plan for using data in a consumer-centric way is (or should be) fundamental to their business.

Dispute resolution

We welcome the ACCC’s acknowledgement that a uniform dispute resolution approach may need to be adopted for the CDR and consider that now is the time to start developing a coherent approach across sectors.²⁷ While relying on sector-specific dispute-resolution schemes may be expedient in the short-term, we consider this runs the risk of entrenching systems and processes that may be challenging to adapt in future, while also increasing the risks of poor outcomes for consumers who have issues that stretch across sectors. Poor outcomes like this have the potential to erode trust in the CDR as a whole. To address these risks and, just as importantly – facilitate the early and effective identification of systemic

²¹ Refer to question 3

²² Refer to question 13

²³ As set out on p. 32 of the Consultation Paper, we understand this limited version would permit specific data sets to be shared when a person is able to provide the NMI, postcode and the name of the current retailer for a premises for authentication.

²⁴ Refer to questions 16 & 17

²⁵ Refer to question 18

²⁶ Refer to question 36

²⁷ Refer to question 26

consumer issues²⁸ across sectors – we strongly encourage regulators and policymakers to begin developing a uniform dispute resolution framework.

Priority considerations for government and regulators

The Consultation Paper references the economy-wide nature of the CDR reforms and the need for these reforms to enable positive consumer experiences and outcomes through data-driven innovations. In order to achieve this objective – and leverage the opportunity for the CDR to contribute to a fairer, more inclusive economy post the COVID-19 crisis – CPRC considers that progress in two key areas is urgently required:

1. **Reforms to outdated economy-wide consumer protections need to be progressed as a priority.** CPRC is a strong supporter of the reforms proposed by the ACCC Digital Platforms Inquiry in relation to the Privacy Act²⁹ and reforms to Australian Consumer Law, regarding both a prohibition of unfair practices³⁰ and a general safety provision.³¹ Without a stronger economy-wide consumer protection framework, there is a heightened risk that the CDR could in future be enabling many “frictionless” transactions that lead to new risks and harms for consumers once these outcomes are outside the jurisdiction of CDR rules. This outcome will ultimately lower the trust consumers have in the CDR.
2. **A coherent economy-wide approach to inclusivity and vulnerability.** The data infrastructure and ecosystems being created through the CDR must be designed with the full spectrum of consumer needs and vulnerabilities in mind. This is an even greater priority given the amplified difficulties many consumers are facing due to the economic fallout from the COVID-19 pandemic. Recognising consumer needs and vulnerabilities is especially important in an essential service market such as energy. CPRC therefore urges regulators and policymakers to develop a more strategic approach to inclusivity and vulnerability across CDR sectors, as this will ensure the CDR is given the best chance to succeed in meeting the needs of all consumers into the future.

Further engagement

We'd welcome opportunities to provide further input to the ACCC's consultation process. For discussions regarding our research or this submission, please contact Andrew Thomsen, Senior Research and Policy Manager, at [REDACTED]

Yours sincerely,



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²⁸ CPRC, “Building Customer Trust – A Principles and Practice Guide”, (June 2017), 26, https://cprc.org.au/wp-content/uploads/CPRC_BCTR_WEB.pdf

²⁹ ACCC, “Digital Platforms Inquiry – Final Report”, (June 2019), 34-36, <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>

³⁰ Ibid, 497-501.

³¹ ACCC, “Unsafe goods should be illegal to sell”, (March 2019), <https://www.accc.gov.au/media-release/unsafe-goods-should-be-illegal-to-sell>