

Proposed Changes to the CDR Rules

Submission to the Australian Competition and Consumer Commission

29 October 2020

1. Introduction

We understand that the Australian Competition and Consumer Commission (**ACCC**)'s intent of the proposed changes to the Competition and Consumer (Consumer Data Right) Rules 2020 (**CDR Rules**) is to encourage the growth and functionality of the Consumer Data Right (**CDR**), and allow for a greater number and type of businesses to participate in the CDR.

Our submission sets out our comments and observations relating to these areas where we consider there could be challenges around commercial or legal compliance. Any terms used but not defined in our submission have the meaning given under the *Competition and Consumer (Consumer Data Right) Rules 2020 (Consultation Draft: Comparison, 30 September 2020)* and the *CDR Rules Expansion Amendments – Consultation Paper*.

2. Levels of accreditation

We consider that the discrete kinds of restricted accreditation could assist in lowering the barriers to entry for participants and that such a proposal is broadly consistent with the intent of the CDR. However, we note that:

- (a) Limited data restriction requires a person to meet accreditation criteria,¹ which includes membership to a recognised external dispute resolution scheme and compliance with the applicable information security requirements.²

These particular accreditation criteria may still pose barriers to entry for smaller businesses with less resources to allocate to compliance. We suggest that the level-based approach proposed for affiliate restriction should also be applied to limited data restriction,³ to remove the requirement for membership to a recognised external dispute resolution and to reduce the applicable information security requirements depending on which lower risk data sets are proposed to be collected by the accredited data recipient.

- (b) Affiliate restriction requires the sponsor, an accredited data recipient at the unrestricted level, to certify that a person meets the accreditation criteria and to

¹ *Competition and Consumer (Consumer Data Right) Rules 2020 (Consultation Draft: Comparison, 30 September 2020)*, Rule 5.5.

² *Competition and Consumer (Consumer Data Right) Rules 2020 (Consultation Draft: Comparison, 30 September 2020)*, Schedule 2.

³ Australian Competition and Consumer Commission, *CDR Rules Expansion Amendments – Consultation Paper*, 17.

take reasonable steps to ensure that an affiliate complies with its obligations as an accredited data recipient.⁴

We query whether there should be further consideration around how these obligations would effectively interact with banking sector accredited data recipients' obligations under other relevant regulations, such as APRA's CPS 231 on outsourcing and CPS 234 on information security.

3. Consent

3.1 Types of consent

We understand that the proposed changes introducing types of consent⁵ and categories of consent⁶ seeks to 'unbundle' the way in which consumers provide consent in relation to the collection, use, and disclosure of CDR data. However, we suggest that there may be limited practicality in separating consent for 'collection' and 'use' of CDR data on the basis that:

- (a) an accredited person cannot collect CDR data without a consumer's valid request;⁷ and
- (b) a valid request is linked to the provision of goods or services to a consumer.⁸

On this basis, there can be no collection of CDR data permitted unless there is a valid use involved. Nonetheless, we agree that the 'unbundling' of consent should apply to use and disclosure.

This approach is consistent with the development of consent as a concept in other jurisdictions and legislative frameworks, such as the European Union (**EU**) and the General Data Protection Regulation (**GDPR**). We refer in particular to the approach taken by the Commission Nationale de l'Informatique et des Libertes (**CNIL**) in relation to Google,⁹ which indicates that:

- (a) consumers should be provided adequate detail around the proposed use and disclosure of their personal information, and supplying a broad range of activities will be 'too generic and vague'; and
- (b) consumers should be able to give 'unambiguous' and 'specific' consent.

⁴ *Competition and Consumer (Consumer Data Right) Rules 2020* (Consultation Draft: Comparison, 30 September 2020), Rule 5.1D(3)(c).

⁵ *Competition and Consumer (Consumer Data Right) Rules 2020* (Consultation Draft: Comparison, 30 September 2020), Rule 1.10A(1).

⁶ *Competition and Consumer (Consumer Data Right) Rules 2020* (Consultation Draft: Comparison, 30 September 2020), Rule 1.10A(2).

⁷ *Competition and Consumer Act 2010* (Cth), section 56EF(1)(a).

⁸ *Competition and Consumer (Consumer Data Right) Rules 2020* (Consultation Draft: Comparison, 30 September 2020), Rule 4.3.

⁹ Commission Nationale de l'Informatique et des Libertes, *Deliberation of the Restricted Committee SAN-2019-001 of 21 January 2019 pronouncing a financial sanction against Google LLC* <<https://www.cnil.fr/sites/default/files/atoms/files/san-2019-001.pdf>>.

The European Union experience in relation to managing consent is instructive. There are various examples¹⁰ of organisations overly relying on consent as a basis to process personal data (the EU equivalent to personal information under the *Privacy Act 1988* (Cth) (**Privacy Act**). In 2019, the Greek Data Protection Authority (**Greek DPA**) imposed a €150,000.00 fine on PricewaterhouseCoopers for the wrongful use of consent as a basis for processing employee data. Whilst the privacy framework is different to that in Australia, the Greek DPA noted that consent of data subjects in the context of employment relations cannot be regarded as freely given due to the clear imbalance between the parties. The Greek DPA in this circumstance had particular regard to the relationship between the parties.

We consider that the relationship between relevant parties is an important factor that should also be taken into account within the updated CDR Rules in the context of consent. Whilst a vast majority of relationships between individual consumers and their accredited data recipients will be on a commercial and arm's length basis, there will always be vulnerable or at risk individual consumers. It is these individual consumers whether in the banking and finance sector, energy sector or telecommunications sector who may need additional consideration from a consent perspective. Such additional consideration may be accommodated within a consumer dashboard provided there is sufficient linkages to the underlying consumer's account status as a vulnerable consumer.

We also note that there is presently a misalignment between the CDR Rules and the Privacy Act. However, this misalignment will likely be addressed with amendments to the Privacy Act to strengthen consent requirements, as recommended by the ACCC in its Digital Platforms Inquiry final report.¹¹ We note that these strengthened consent requirements are moving in the same direction as the EU and GDPR.

We consider that the time leading up to and during the transition period for the amendments to the Privacy Act will be challenging not only for participants in the CDR, but also businesses and organisations generally, as they grapple with new compliance requirements. We suggest that further guidelines should be developed in consultation with the Office of the Australian Information Commissioner in order to:

- (a) provide certainty around the level of granularity required under the CDR for accredited data recipients to procure use and disclosure consents;
- (b) provide clarity on accredited data recipients' obligations leading up to and during the transition period for the amendments to the Privacy Act strengthening consent requirements; and
- (c) mitigate consent fatigue.

3.2 Asking CDR consumer to give consent

We refer to the amendments clarifying that consumers' express consent is required for each of the category of consents.¹²

There are stricter consent requirements under the CDR Rules in respect of CDR data than under the Privacy Act. For example, under the Privacy Act, consent must be express or

¹⁰ Hellenic Data Protection Authority, *Summary of Hellenic DPA's Decision No. 26/2019* <[https://www.dpa.gr/pls/portal/docs/PAGE/APDPX/ENGLISH_INDEX/DECISIONS/SUMMARY%20OF%20DECISION%2026_2019%20\(EN\).PDF](https://www.dpa.gr/pls/portal/docs/PAGE/APDPX/ENGLISH_INDEX/DECISIONS/SUMMARY%20OF%20DECISION%2026_2019%20(EN).PDF)>.

¹¹ Australian Competition and Consumer Commission, *Digital Platforms Inquiry – Final Report*, 464-465.

¹² *Competition and Consumer (Consumer Data Right) Rules 2020* (Consultation Draft: Comparison, 30 September 2020), Rule 4.11(1)(c).

implied, as compared to 'voluntary, express, informed, specific as to purpose, time limited, and easily withdrawn'¹³ under the CDR Rules.

There is presently a misalignment with how consent is procured from consumers under the CDR Rules and the Privacy Act. However, under the recommendations for the amendments to the Privacy Act, the definition of consent is proposed to be updated to require 'a clear affirmative act that is freely given, specific, unambiguous and informed,'¹⁴ which is relatively aligned with the CDR Rules.

As noted in section 3.1, there will be challenges for businesses and organisations to transition to these stricter consent requirements, and further guidelines may be able to assist in achieving compliance.

4. Transfers

4.1 Transparency of commercial arrangements

We refer to the query whether commercial arrangements around the transfer of CDR data between accredited recipients should be made transparent to consumers. While the confidentiality of commercially sensitive or valuable information is not designated as a key consideration under the CDR,¹⁵ we consider that the protection of the confidentiality of businesses' and organisations' commercially sensitive or valuation information should be balanced against the actual benefit that consumers would receive in requiring the disclosure of certain commercial arrangements.

If there should be transparency of commercial arrangements around the transfer of CDR data, then we suggest that the level of transparency should have regard to:

- (a) the confidential information involved in such commercial arrangements;
- (b) the protection of trade secrets and other intellectual property rights that may be created from or involved in such commercial arrangements; and
- (c) whether there should be a delineation of the requirements for transparency for commercial arrangements involving:
 - (i) raw CDR data; and
 - (ii) CDR data that have been aggregated and anonymised.

4.2 Disclosure to trusted advisors

We understand the concept of allowing disclosure to trusted advisors, and we agree with the approach to set out the classes at a high level to have flexibility to include other classes of trusted advisors going forward.

We suggest including a clarification that those trusted advisors themselves do not need to be accredited under the CDR nor comply with any accreditation criteria in order to receive

¹³ *Competition and Consumer (Consumer Data Right) Rules 2020* (Consultation Draft: Comparison, 30 September 2020), Rule 4.9.

¹⁴ Australian Competition and Consumer Commission, *Digital Platforms Inquiry – Final Report*, 466.

¹⁵ *Competition and Consumer Act 2010* (Cth), section 56AF(1)(a).

CDR data, to limit incongruences around the handling of such CDR data set out in the relevant profession's regulatory regime.

5. Extending the CDR to more consumers

The proposed approach to include non-individual consumers under the CDR may require further consideration. In particular, we note that there could be scope for fraud where nominated representatives are granted the ability to control the non-individual consumer's activities. It would be reasonable to put in place authorisation checks, such as requiring at least two nominated representatives' consensus, prior to any dealing with the non-individual consumer's CDR data.

6. Conclusion

The scope of the proposed changes to the CDR Rules is extensive and raises complex issues in relation to effective implementation, compliance and the commercial practicalities of rolling out a legislative regime that will change the way organisations obtain, manage, store and use consumer data. Our final observation is that the proposed changes to the CDR Rules are not something that should be rushed through. The expected changes to the CDR Rules are anticipated to be put in place in December 2020 (a month or so after the closing date for submissions). This is ambitious and we would hope and expect there to be further consultation with the affected sectors and relevant interest groups to properly work through the myriad issues raised during the consultation process. Taking the time now to account for these issues will set the CDR up for success and encourage the support and buy-in so critical for its effective implementation.

Gadens thanks the ACCC for the opportunity to comment on the proposed changes to the CDR Rules. Please feel free to contact the authors listed below should you require further information or have any further queries.



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