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Australian Competition & Consumer Commission (ACCC)
GPO Box 3131
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Reference: Consumer Data Right (CDR) rules consultation June 2020

Submission

The ACCC is seeking views on draft rules and accompanying draft Privacy Impact Assessment that authorise third parties who are accredited at the 'unrestricted' level to collect CDR data on behalf of another accredited person. This will allow accredited persons to utilise other accredited parties to collect CDR data and provide other services that facilitate the provision of goods and services to consumers.

Moneytree submits the following recommendations to the ACCC regarding the CDR draft rules, specifically in regard to draft rules relating to the accreditation process (division 5.2) and privacy safeguards (division 7.2.3).

Overarching recommendations

Recommendation 1

The rules are amended to authorise the full disclosure of CDR data to intermediaries.

Recommendation 2

The rules introduce a tiered CDR accreditation model for data recipients.

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Recommendation 3

CDR data should be legally treated the same as all other data and should be subject to existing privacy and consumer protection arrangements rather than subject to a separate legal regime.

Recommendation 4

Where a consumer wishes to share data from a data recipient with a third-party that is not part of the CDR regime, a fully accredited data intermediary and the third party may create a bilateral data sharing contract.

Recommendation 5

All bilateral data sharing contracts must have the explicit consent of the consumer.

Comments

On rules relating to the accreditation process (division 5.2)

The draft rules:

- authorise the disclosure of CDR data to a service provider only on behalf of another data recipient
- require all participants to be CDR accredited to the highest level
- require segregation of CDR data from data acquired any other way.

These rules are restrictive and will significantly curtail the effectiveness of the CDR regime in Australia.

The draft rules would prevent most potential participants outside of the largest financial institutions from participating in and bringing innovative ideas to market. However, the greatest negative impact will be on the consumer's lack of ability and incentive to participate in the CDR regime (open banking) due to limited players and use cases in its ecosystem.

The CDR's purpose is to provide Australians with control over their data so they can use it for personal benefit. Data intermediaries are a key part of making this purpose a reality; they enable different companies - regardless of size - to use CDR data as part of a service and this, in turn, encourages greater competition and innovation.

The proposed combined accredited person (CAP) arrangement, as outlined in the draft rules, is too restrictive. The CAP may be viewed as a natural expansion of a providers' role; however, this does not equate to the role of a 'true' data intermediary as is needed by the market.

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Data intermediaries are value-adding entities which connect data holders and eventual data recipients. Intermediaries add value by providing services to all CDR participants - data holders, data recipients, and consumers. To function properly, data intermediaries are expected to act as a hybrid of data holders and recipients and should be enabled to act as separate entities in the ecosystem rather than simply as extensions of existing participants.

Moneytree notes the ACCC has strongly acknowledged the importance of data intermediaries in collecting CDR data from data holders in its consultation. However, the importance of swiftness to include proper data intermediaries and enabling these intermediaries to bring CDR data to a greater market to successfully facilitate innovation has been overlooked in the draft rules.

The proposed rules will have a number of unintended consequences, including:

1. limiting choices for Authorised Deposit-taking Institutions (ADIs) and other participants with whom to partner to deliver the CDR regime to consumers;
2. forcing all participants to become fully CDR accredited, which will unnecessarily slow down participation in the CDR regime, and;
3. delaying the entry of new financial services providers, thereby holding back innovation.

Issue 1: Limiting choices for ADIs and other participants

The draft rules do not authorise the disclosure of CDR data to accredited data intermediaries but allow for fully accredited service providers to fully support accredited recipients.

In the proposed CDR rules, an outsourced service provider is defined as a ‘behind-the-scenes’ provider for data recipients. The drafted amendment to the CDR rules introduces the CAP arrangement to enable accredited participants to provide a greater range of services for CDR participants with greater transparency (the providers in CAP arrangements are no longer behind the scenes).

However, even with the amended rules, the range of possible services of these providers are limited and do not bring the CDR regime the breadth of services and experience at an affordable price (i.e. due to the lack of economies of scale) that data intermediaries can provide.

A data intermediary can simplify connections and consent management, reduce the burden of regulatory reporting and compliance costs, and further enrich ‘basic’ data provided by the CDR. These services are of great value to ADIs and other CDR participants. Many of Australia’s major financial institutions have publicly stated they are supportive of the full participation of

intermediaries in the Australian CDR ecosystem if appropriate security requirements are in place.

The limitation on how CDR data can be used by providers in a CAP arrangement (i.e. the shared CDR data may only be exclusively used within the CAP arrangement itself) would prevent these providers from providing their services at an affordable price due to the lack of economies of scale. This limitation stems from the CAP arrangement as an exclusive relationship between a principal and a provider instead of as a separate entity that bridges data holders and data recipients. The minimum added values from the CAP arrangement would discourage most participants from setting this arrangement and, anticipating this, discourage potential seasoned data intermediaries from entering the market. This would ultimately result in limiting the partnering choices for all participants.

Issue 2: All participants must be fully CDR accredited

The CAP arrangement requires all participants to be fully accredited, creating significant additional barriers to entry.

For Australians to derive the greatest value from the CDR regime, consumers need to have the ability to use and share their CDR data at their discretion. As the rules are currently drafted, Australians will be unable to take common-sense actions, such as sharing their CDR data with their accountants and financial planners who are very likely unable to gain the required accreditation to be part of the CDR regime.

If participating in the CDR regime is beyond the reach of a majority of businesses, the market will likely be motivated to find alternative solutions and therefore, undermine the stated goals of the CDR regime.

A data intermediary can gather data, enrich and improve it, on behalf of the data recipient, and then share it to another service with the consumer's permission.

Data intermediaries are a critical part of open banking systems overseas to encourage robust participation.

In the UK, open banking rules allow data recipients that wish to receive data to become 'agents' of an accredited data intermediary (application information service provider in the UK nomenclature). UK open banking presents opportunities for fintechs and third parties to build the API themselves or purchase a solution. The options are dependent on cost, speed to market and regulations.

In Japan, registered data intermediaries are able to gather data on behalf of a consumer, at which point it becomes “regular” data, protected by the Personal Information Privacy Law, terms of service, and other relevant legal protections. This enables data intermediaries to provide a broad range of services that are *already* available via non-transparent bilateral data sharing arrangements. Such bilateral arrangements are also common and available in Australia and represent a significant competitor to the CDR.

Enabling the full participation of data intermediaries in the CDR regime in Australia from the outset and introducing a tiered accreditation model for data recipients would significantly accelerate uptake and innovations.

Data recipients who use the services of an accredited data intermediary should be subject to an appropriate tiered set of accreditation criteria. While data recipients will still be holding CDR data, this is not unique. Many Australian consumers already have the ability to obtain their own bank data (for example, in the form of downloaded statements) and share it with various third parties. Where they do so, the third party recipient must hold that information in accordance with general privacy laws and any arrangements agreed between the third party and the consumer.

Therefore, it is not necessary for all of the accreditation criteria to apply to a data recipient that receives information through an intermediary.

Accreditation for data recipients who use an intermediary could be achieved by the ACCC adopting a subset of requirements for those data recipients. For example, depending on the use cases (e.g. which data scope is requested and/or whether the data recipient holds/stores data), data recipients who use an intermediary could be exempted from some accreditation requirements, such as the need to maintain the specified level and type of professional indemnity insurance and dispute resolution membership. This will reduce compliance costs and therefore a barrier to entry.

An alternative would be to place rules on recipients obtaining data from intermediaries in line with those expected of general accounting firms, notably adherence to the Privacy Act and its associated provisions for mandatory data breach notifications.

We anticipate all accredited data recipients would need to comply with all of the remaining aspects of CDR Rules, especially as they relate to consumer consent and other interactions with consumers.

Finally, instead of requiring accreditation from the ACCC, accreditation for these data recipients could rather involve them satisfying the relevant accredited intermediary that they are a fit and proper person to receive CDR data. Intermediaries would need to make this assessment with regard to criteria determined by the ACCC. In some ways, this exercise could be seen as an

extension of the due diligence exercises conducted by the intermediaries on technology vendors.

Issue 3: Delaying the entry of new financial services providers

The cost of gaining CDR accreditation with “unrestricted” access level is a significant financial investment for any business that wants to participate in the CDR regime. This cost is in addition to development costs for creating a service to consume and use data.

Therefore, it could be inferred that the rules - even with the drafted amendment - still provide an unfair advantage to Australia’s largest businesses and financial institutions in the CDR regime, thereby holding back innovation and competition.

Data intermediaries reduce development, regulatory, and security assurance costs for participants, enabling smaller players to participate in the CDR regime. This makes it easier for companies of all sizes to use CDR data as part of a service and this, in turn, encourages the development of more innovative services and solutions for consumers.

To illustrate, in June, Moneytree successfully switched 1.7m consumers in Japan from screen-scraping to APIs on behalf of 60+ data recipients, half of which were fintechs. This example from one intermediary demonstrates the impact that multiple intermediaries could have in the uptake and value of the CDR regime and there is no doubt the participation of data intermediaries in the CDR would encourage similar transitions and developments in Australia. This is of particular importance now as greater industry participation in the CDR regime, aided by intermediaries, could assist Australian consumers and businesses in the post-COVID-19 recovery.

On rules relating to dealing with CDR data (subdivision 7.2.3)

The sharing of data obtained through the CDR regime with non-accredited third parties should be subject to the overall privacy and consumer protection arrangements. The CDR regime is designed to secure the transfer of data at the consumer’s discretion between data holders and data recipients, not restrict the way consumers may use their data.

If there is a view that financial data, or all personal information, requires additional protection, this should be dealt with through amendments to Australia's established privacy and consumer protection laws.

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Moneytree is concerned by any attempts to effect unnecessary complexity to Australia's existing privacy and data security laws by expanding the application of the CDR rules. If data sourced through the CDR regime is subjected to greater privacy and other consumer protections than those already established, it is likely that many innovative businesses which would otherwise have used CDR-compliant APIs will find other ways to obtain the *same* data via other means including non-transparent bilateral sharing arrangements, screen scraping, and directly gathering from a consumer.

Currently, any two companies can create a bilateral data sharing agreement outside the CDR. The CDR should serve as a superior option, which enhances transparency and consumer control, while still enabling the services that consumers use today and new, innovative services that arise.

The CDR rules should include the requirement that any bilateral contract for sharing CDR gathered data with a third-party that is not CDR accredited must have the explicit consent of the consumer and the same transparency requirements before disclosure.

Having been directly involved in the development and evolution of the CDR regime overseas, Moneytree makes the above recommendations and comments to encourage a robust and innovative CDR ecosystem that will be of great benefit to Australians.

We thank the ACCC for the opportunity to comment on the draft rules. We will continue to publicly advocate for the full disclosure of CDR data to intermediaries and a tiered CDR accreditation system, as well as to engage on broader issues in relation to the CDR regime.

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