

The logo for Optus, consisting of the word "OPTUS" in a bold, teal, sans-serif font.

Submission in response to  
ACCC Exposure Draft

**Competition and Consumer  
(Consumer Data) Rules  
2019**

Public Version

May 2019

## EXECUTIVE SUMMARY

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1. The ACCC is currently undertaking consultation on the proposed Competition and Consumer (Consumer Data) Rules 2019 (the draft rules). However, the enabling legislation has not passed Parliament and the proposed Bill has now lapsed with the calling of the 2019 Federal election.
2. It is not clear to Optus why the ACCC is persisting with consultation on the draft Rules when the final form of the enabling legislation is not known and is uncertain. Optus submits the better course of action is to suspend this consultation until more is known about the timing of the enabling legislation. We are concerned that the current process is not best practice in the current circumstances.
3. This brief submission contains Optus' views on the current process, and notwithstanding our view that the consultation on the draft rules should be suspended, some initial comments on the draft rules.
4. Optus submits:
  - (a) The Rules should be consulted on after the passage of the enabling legislation;
  - (b) The scope of the rules should be clarified, and specifically, the ACCC should explain in more detail how it plans to apply CDR rules to other industries; and
  - (c) Timeframes should be reasonable and clear.

## RULES SHOULD BE CONSULTED ON AFTER PASSAGE OF ENABLING LEGISLATION

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5. The proposed enabling legislation was contained in the Treasury laws Amendment (Consumer Data Right) Bill 2019 (the CDR Bill), introduced to the House of Representatives on 13 February 2019.<sup>1</sup> However, the CDR Bill had not passed Parliament at the time of the Federal election was called. As consistent with Parliamentary practice, all bills being considered by Parliament at the time a Federal election is called lapse when Parliament is dissolved. This means any proposed legislation dealing with a framework for a consumer data right would need to be introduced to Parliament again and go through proper Parliamentary process of being considered and passed by both Houses of Parliament.
6. We note that the CDR Bill was referred to the Senate Economics Legislation Committee on 13 February 2019 for the Committee's consideration. While the Committee recommended passage of the CDR Bill, additional comments by Labor Senators raised some important concerns about the policy process and substance of the proposed CDR Bill and framework.<sup>2</sup> We consider it presumptuous of the ACCC to assume the Bill will be introduced again in its current form, without waiting for the result of the Federal election and reintroduction of the Bill once Parliament has resumed.

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<sup>1</sup> [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r6281](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6281)

<sup>2</sup> Senate Economics Legislation Committee, Treasury Laws Amendment (Consumer Data Right) Bill 2019 [Provisions], March 2019 – Additional comments by Labor Senators, pp. 27-43.

7. There have been a number of stakeholder submissions expressing concern that aspects of the policy development process have occurred concurrently (for example, the draft CDR rules being developed at the same time as the enabling legislation is being developed). Optus shares the concerns that the policy development process has been and continues to be rushed and disjointed. Optus considers there are still major deficiencies with the substance of the CDR Bill that should be addressed before any reintroduction of the CDR Bill to Parliament and before any CDR Rules are developed.
8. We understand the desire for the CDR framework to be in place as soon as possible. However, this should not compromise policy and consultation processes. A poorly drafted framework will not achieve the outcomes originally intended and is likely to represent a much greater burden to industry than any benefit flowing to data recipients, particularly where some industry sectors, such as telecommunications, already make large amounts of data available to customers. We appreciate the ACCC has been subject to time pressures with the ambitious timelines for implementation, but these timeframes will not be met and as such, the consultation process of the draft rules should be updated to reflect these changes.
9. We note any new CDR Bill reintroduced to Parliament may have changes and however minor those changes, any rules the ACCC makes should be based on the legislation that finally passes Parliament. The proper process would be for the enabling legislation to pass Parliament and for the ACCC to then consult on the CDR rules.
10. We consider it would have been open to the ACCC to suspend this consultation once it became clear the CDR Bill would lapse at the calling of the Federal election and require reintroduction. If the ACCC persists in consulting on the draft rules prior to the enabling legislation passing Parliament we consider this could be an unsound process.
11. It is Optus' view that the proper course of action is for this consultation to be suspended until the enabling legislation passes Parliament and its final form is known.

### **The structure of the rules should be clear**

12. Notwithstanding Optus' views this consultation should be suspended and recommenced once the final form of the enabling legislation is known and has passed Parliament, Optus has some comments on the draft rules.
13. Optus considers there should be greater clarity about the structure and operation of the draft rules and the proposed industry sectors that are intended to be subject to the CDR regime.
14. Government has been clear that the banking sector is to be subject to the CDR regime first, to be followed by the energy and telecommunications sectors. Yet, it is unclear whether all of the rules proposed in the draft Rules are to apply to all sectors. The ACCC's previous documents (the Consumer Data Right Rules Outline published in December 2018 and the Consumer Data Right Rules Framework, published September 2018) clearly discuss that the banking sector will be the first industry subject to the Rules and the ACCC's website refers to these rules as "CDR Draft Rules (banking)"<sup>3</sup> and describes them as "[t]he CDR draft rules cover issues central to the implementation of CDR in banking".
15. However, Parts 1 – 9 of the CDR Draft Rules appear to contain general rules not specific to banking. Banking sector related provisions are set out in Schedule 2 to the draft rules. Therefore, we assume that Parts 1-9 are to apply across all industries and additional

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<sup>3</sup> <https://www.accc.gov.au/focus-areas/consumer-data-right-cdr-0/cdr-draft-rules-banking>

industry-specific rules for other sectors (such as, energy and telecommunications) would be added in subsequent schedules appended to these Draft Rules.

16. The ACCC should make clear in its consultation the structure of the rules and how these will apply across all affected industries so that affected stakeholders can participate in consultations before the rules are finalised. Affected parties should be given an opportunity and due process should be followed to allow them to comment on rules that will apply to them.

### **Timeframes should be reasonable and clear**

17. Clauses 3.5 and 4.7 both deal with refusals to disclose CDR data in response to CDR requests from either a CDR consumer or an accredited person. Both clauses contain requirements that the data holder must, within 24 hours, inform the Commission of such a refusal and reasons for such a refusal (cl. 3.5(2) and 4.7(2)).
18. We assume the 24 hour timeframe to notify the Commission referred to in the rules starts at the point the data holder makes the decision to refuse, and not from the point of time that the CDR request is made. If it is the latter, Optus is concerned this is insufficient time to consider what are clearly serious grounds for refusal (if disclosure could create a real risk of harm or abuse to the individual or adversely impact the security, integrity or stability of ICT systems related to data requests). Optus' view is that the data holder should have more time to consider the implications and undertake a relevant assessment of the criteria where a refusal may be warranted.
19. Alternatively, if the 24 hour timeframe is simply the timeframe in which a data holder must inform the Commission after making such a refusal, Optus requests that wording be added to these sections to be clear that this is what is meant.
20. Clause 7.7 deals with rules relating to privacy safeguard 11 – quality of CDR data. It deals with the action a data holder must take when it becomes aware it has disclosed incorrect information under a CDR request. Optus considers the drafting of this clause a could be improved and the timeframe is insufficient to provide the information required to the CDR consumer.
21. The clause states "...If a data holder makes a disclosure of a kind referred to in paragraph 56EN(3)(a) and (b) of the Act...". However, this reference is confusing. We note section 56EN(3)(a) and (b) simply sets out the circumstances that must arise for the data holder to have to advise the CDR consumer that incorrect data was disclosed. We consider the wording at the introduction of the clause could be set out more clearly.
22. Further, clause 7.7(1) refers to the "data holder" and clause 7.7(3) refers to "the CDR participant". We note that 'CDR participant' is defined more broadly in the proposed CDR Bill than 'data holder' (a CDR participant could include a data holder or accredited data recipient: s. 56AL(1)). It is therefore unclear if clause 7.7 of the Draft Rules is intended to apply to just data holders or more broadly to CDR participants. We request clarification of this point.
23. Finally, the 24 hour timeframe in cl. 7.7(3) in which to provide such notice as contemplated by clause 7.7(1) to the CDR consumer, is too short. The notice is required to identify the CDR data that was incorrect in the sense referred to in section 56EN(3)(b), which states that "some or all of the CDR data was incorrect when it was disclosed because, having regard to the purpose for which it was held, it was inaccurate, out of date or incomplete".
24. We note that a data holder may become aware that incorrect information has been disclosed, but, depending on the scope and complexity of the original CDR request, to

identify and determine which of the disclosed data was inaccurate may take longer than 24 hours (for example, if the scope of the CDR request relates to data from a number of months and the data holder becomes aware data from one month was inaccurate, data relating to other months would need to be checked to determine if it was also inaccurate).

25. If the most important objective is to provide notice to the CDR consumer as soon as possible that inaccurate data has been disclosed, it would be preferable for the data holder to have a general obligation to provide “a general description of the CDR data that was incorrect” in the notice which should be provided to the CDR consumer by the end of the next business day where it is not possible for the data holder to identify the incorrect data within 24 hours. In that case, the data holder should then be obligated to identify the incorrect CDR data as soon as possible and within a longer nominated timeframe (for example, 5 business days).

#### 24 hour timeframes should be expressed in business days

26. References to 24 hour timeframes should be deleted and replaced with timeframes expressed in business days (such as, ‘by the end of the next business day’). This is usual practice when obligations are drafted for businesses (in industry standards, codes or commercial contracts) and we query the usefulness and necessity of providing information on a weekend or public holiday, particularly to the Commission (as per cl. 3.5 or cl. 4.7).

#### Guidelines should accompany the Rules

27. Optus considers it would be beneficial for the rules to be accompanied by Guidelines setting out detailed explanation and interpretation of the Rules to assist interpretation and understanding. For example, this may assist in understanding the level of detail required in a notice to be provided under cl. 7.7.