10 May 2019

Australian Competition & Consumer Commission
Level 17, 2 Lonsdale Street
Melbourne VIC 3000

Email: ACCC-CDR@accc.gov.au

Dear Sir/Madam

Consumer Data Right draft rules consultation

Telstra welcomes the opportunity to respond to the ACCC's consultation on the Consumer Data Right (**CDR**) draft rules.

Telstra has previously expressed its support for reforms aimed at improving data availability and use in Australia, including the CDR. Data reforms of this kind have the potential to promote consumer interests, and drive competition and innovation, as well as helping to establish and normalise a safe and trusted environment in which data is used to benefit consumers and the economy.

The CDR regime – comprising framework legislation, rules and technical standards – is being designed to apply across the economy, but is being rolled out on a sector-by-sector basis. The Government has stated that the first sector to which the CDR will apply is banking, followed by energy and telecommunications. For that reason, Telstra has been engaging with both Treasury and the ACCC in relation to the regulatory framework underpinning the CDR.

The CDR draft rules released by the ACCC represent the first iteration of the rules, and relate to the implementation of the CDR in the banking sector. Because the draft rules are for banking, Telstra has not reviewed them in detail at this stage; nor have we sought to provide detailed comments about how this set of rules might apply to the telecommunications sector. For the reasons discussed below, to do so would be premature.

Instead, our response to the ACCC's consultation sets out some high-level comments focused on the process for developing CDR rules for sectors other than banking.

Applying the CDR beyond banking

For the CDR regime to apply to a sector, the Minister must designate the sector, and the ACCC must make rules governing the implementation of the CDR in that sector.

The designation and rule-making processes are inter-dependent. For any given sector, the CDR rules cannot be prepared or considered in isolation from the designation process for that sector.

The designation process requires the Minister to consider a range of matters before making a designation instrument. Matters to be considered include the likely effect of designation on the interests of consumers, the efficiency of relevant markets, the privacy or confidentiality of consumers' information, the promotion of competition, the promotion of data-driven innovation, any intellectual property in the information to be covered by the instrument, and the public interest.[1] In addition, the

[1] Treasury Laws Amendment (Consumer Data Right) Bill 2019 (**CDR Bill**), section 56AD(1).

Minister may consider any other matters s/he believes relevant, which could include whether there are existing processes that are efficient, convenient and safe, and allow consumers to access their data.[2] The Minister must consult the ACCC on these issues, and in turn, the ACCC must consult the public.[3]

In our view, it is critical when considering the application of the CDR to a new sector to give detailed consideration to the CDR's objectives, the extent to which existing regulatory or other processes already achieve those objectives and, in that context, the "work" the CDR should be required to do in relation to that sector. Without considering these factors, neither the CDR designation instrument nor the CDR rules can be appropriately formulated or consulted upon.

Specifically for the telecommunications sector, we have previously discussed the need to take account of existing industry and regulatory frameworks – including the Telecommunications Consumer Protections (**TCP**) Code and the Mobile Number Portability Code – in order to determine whether the sector needs to be designated and, if it does, what "gaps" are left by existing arrangements which the CDR can help to fill. In particular, the TCP Code and the Mobile Number Portability Code already require the provision of detailed information to telco customers, and facilitate switching between providers. In addition, the data logged by mobile devices about calls, messages and data usage often exceeds the level of information available from telco service providers. These kinds of factors must inform any Ministerial decision to designate the telco sector, as well as the content of the CDR rules to be made for the telco sector.

At this stage, there has been no detailed consideration about whether and how the CDR should apply to the telecommunications sector. Accordingly, it would be premature to seek or express any detailed views about what the content of the CDR rules should be for the telco sector.

We look forward to further engagement with the ACCC when it comes time to consider the telco-specific application and implementation of the CDR.

CDR rules must only require implementation in the least cost way

The Explanatory Memorandum for the CDR Bill states (at 1.159 and 1.160) that:

> *"The consumer data rule making powers provide substantial scope for the ACCC to make rules about the CDR. This is because it is important to be able to tailor the consumer data rules to sectors and this design feature acknowledges that rules may differ between sectors. Variance between sectors will depend on the niche attributes of the sector and consumer data rules will be developed with sectoral differences in mind in order to ensure existing organisational arrangements, technological capabilities and infrastructure are able to be leveraged and harnessed as appropriate. Regulatory burden will also be managed via this process.*
>
> *Nevertheless, when making rules, the ACCC should seek to ensure that rules between sectors are as consistent as possible to allow for interoperable standards. Consistency and interoperability will facilitate the emerging data transfer system and ensure consumers are able to navigate the emerging data economy as active participants."*

For the reasons outlined above, we would have some concerns if, in seeking to strike a balance between making sector-specific rules and making consistent rules across sectors, the ACCC simply added sector-specific schedules to the back of the CDR rules, and otherwise treated the general rules in the body of the current CDR draft rules as broadly applicable across sectors.

[2] CDR Bill, section 56AD(1)(e); Explanatory Memorandum for CDR Bill, at 1.49.
[3] CDR Bill, sections 56AD(2) and 56AE(1).

This approach would run the risk of requiring all sectors to comply with CDR rules that have been framed only with the first designated sector in mind. For example, the current CDR draft rules require significant IT investment to establish and continually update a Consumer Dashboard. However, for sectors other than banking, there has been no cost-benefit analysis in relation to the introduction of possible IT systems, and it is unclear whether all of the requirements set out in the current CDR draft rules would be necessary for every designated sector going forward.

To illustrate this example, consider a scenario where designated telco data includes monthly call, messaging and data usage. In those circumstances, it would not appear necessary for participating telcos to put in place the same (costly) IT machinery being proposed for the banks. Rather, telcos could be required to send the relevant CDR data directly to customers, who could then use that data as they wished.

Overall, the ACCC must ensure that, in making general rules applicable across sectors, it only includes those rules necessary for Data Holders and Accredited Persons / Accredited Data Recipients to implement the CDR in the least cost way. If particular sectors have additional or more complex requirements, those requirements should be included in appropriate sector-specific rules.

The CDR rules must be clear and workable in practice

It is important that the requirements contained within the CDR rules are clear and workable in practice.

For example, we support the inclusion in the CDR rules of appropriate record-keeping and reporting requirements. However, we have some concerns about the workability of requiring CDR participants to maintain records about, and prepare reports summarising, CDR complaint data.

"CDR consumer complaint" is defined in broad terms to mean *"any expression of dissatisfaction made by a CDR consumer to a CDR participant: (a) that relates to the CDR participant's obligations under or compliance with: (i) Part IVD of the Act; or (ii) these rules; or (iii) binding data standards; and (b) for which a response or resolution could reasonably be expected"*.[4] The broad definition of "CDR consumer complaint", coupled with the diverse range of channels through which customers may deal with their service providers (e.g. in store, online, through call centres), may present a challenge in terms of capturing and reporting on all "CDR consumer complaints" as that term is currently defined.

To improve the workability of these record-keeping and reporting requirements, they could focus on complaints lodged through the processes required to be included in CDR participants' CDR policies.[5]

Please contact Iain Little on [redacted] or by email at [redacted] if you have any queries about the matters raised in this letter.

Yours sincerely

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[redacted]

[4] CDR draft rules, rule 1.7.
[5] CDR draft rules, rule 7.2(3).