



**Australian
Privacy
Foundation**

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16 October 2020

Treasury

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Consumer Data Right – Legislative Amendments

This submission from the Australian Privacy Foundation (APF) responds to the Treasury Laws Amendment (Measures for a later sitting) Bill 2020: amendments of the consumer data right (the Bill).

General comments

The Foundation remains concerned that there continues to be a series of amendments to the consumer data right (CDR) when the world is in a pandemic and no one seems to be using the CDR. The rate of amendments and expansion of CDR has been prolific when there is no demand from consumers. The CDR has been exclusively driven by industry and it is hard to understand why the CDR is a priority at all.

The Foundation could not recommend that any person in Australia should use the CDR given the appalling consultation process and the inadequate privacy protections.

The continuous expansion of CDR

The APF has been concerned throughout this entire consultation process that there are risks for people in using the consumer data right including:

1. That third party data holders will use the consumer data right to get access to customer bank information and mislead people into poor financial decisions. As demonstrated by the Financial Services Royal Commission, people can have a great deal of difficulty getting justice for poor financial advice and the damage can be substantial.
2. The data being obtained is more valuable than the service being promised which can mean the person receives little value for their data. The ACCC comprehensively demonstrated this problem in their inquiry into customer loyalty schemes.
3. Data breaches are a near certainty. It is not if but when. The current protections in place do not adequately protect people in the event of a data breach. The protections are inadequate because:
 - a. Compensation for loss is difficult to prove and obtain;
 - b. There is no process in place to automatically delete data and de-identified data can usually be re-identified;
 - c. There are no legislated or enforced security standards; and
 - d. There is little or no enforcement or fines for data breaches which means there is little incentive for security by small intermediaries that hold data.
4. The legislative protections for privacy in Australia remain inadequate. The ACCC has recommended reforms to the Privacy Act following the Digital Platforms Inquiry. Those reforms should be legislated.

None of the above problems has been resolved. Despite this, Treasury has continued to expand the CDR. It makes no sense to continue an expansion of a scheme that has inadequate consumer protections and is experiencing no demand.

Designating further sectors

As already covered above, the addition of the energy sector to the CDR has failed to meet basic standards for consultation. The PIA does not meet the requirements set by the OAIC as it did not include meaningful or adequate consultation. The PIA must be independent rigorous PIA conducted in a transparent manner. We again express our concern regarding

inhouse PIAs, which do not result in confidence that all significant matters have been identified and addressed. Best practice requires an arms-length and expert evaluation that results in a published report that can be scrutinised by regulatory bodies, civil society and fintech experts.

Any ministerial right to designate further sectors must include the following requirements that must be included in the legislation:

1. A new independent PIA for the new sector and an update of an overarching PIA that covers the entire CDR across all sectors.
2. The PIA must meet the OAIC PIA standards
3. The requirement to consult with the ACCC should remain and also include the OAIC
4. The ACCC must retain the rule making powers

The Foundation objects completely to any attempt to make sector designation or rule making powers to be solely in the hands of the Minister. The ACCC is the regulator with the expertise and knowledge to ensure that rules and designations are completed with procedural fairness. The OAIC should also be involved.

Sectoral assessment

It is unclear what a sectoral assessment involves. As stated above, we oppose any attempt to change the decision-making process for any sectoral assessment from the ACCC. The ACCC must be the lead regulator to ensure adequate consultation and regulatory overview on any assessment.

CDR Rule making

The ACCC and the OAIC must be involved with and lead any rule making process. The ACCC should be the lead regulator but the OAIC must remain involved. We again object to any process that is not driven and led by the ACCC.

Any changes to the CDR Rules must include a PIA.

Emergency CDR Rules

The Foundation objects to any emergency rule making powers. As we have outlined above, the current CDR Rules remain unsafe for use by consumers. We remain concerned that any emergency rules risk making the CDR more unsafe.

If this power was retained then the ACCC and the OAIC must be consulted and approve the emergency rules before they proceed.

Conclusion

The proposed legislative amendments should not proceed and are not supported.

Future expansion of the consumer data right should be put on hold pending further testing and work on privacy protections which includes:

- A comprehensive review and implementation of privacy improvements as recommended by the ACCC
- Commonwealth human rights laws that cover privacy should be enacted
- A statutory tort for the invasion of privacy should be legislated as recommended by the ALRC
- The current implementation of the consumer data right operates for two years past the end of the pandemic and is independently evaluated at the end of the two years before any expansion
- The consumer data right includes a clear and automatic deletion of data and this process is audited.

If you have any questions please do not hesitate to contact Kat Lane.

Yours sincerely



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About the Australian Privacy Foundation

The Australian Privacy Foundation (APF) is the primary national association dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues that pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions. The APF's primary activity is analysis of the privacy impact of systems and proposals for new systems.

The APF makes frequent submissions to parliamentary committees and government agencies. It publishes information on privacy laws and privacy issues. It provides continual background briefings to the media on privacy-related matters. Where possible, the APF cooperates with and supports privacy oversight agencies, but it is entirely independent of the agencies that administer privacy legislation, and regrettably often finds it necessary to be critical of their performance. When necessary, the APF conducts campaigns for or against specific proposals. It works with civil liberties councils, consumer organisations, professional associations and other community groups as appropriate to the circumstances. The Privacy Foundation is also an active participant in Privacy International, the world-wide privacy protection network.