



Treasury Laws Amendment (Consumer Data Right) Bill 2018: Provisions for further consultation

Proposals

24 September 2018

© Commonwealth of Australia 2018

This publication is available for your use under a [Creative Commons Attribution 3.0 Australia](http://creativecommons.org/licenses/by/3.0/au/legalcode) licence, with the exception of the Commonwealth Coat of Arms, the Treasury logo, photographs, images, signatures and where otherwise stated. The full licence terms are available from <http://creativecommons.org/licenses/by/3.0/au/legalcode>.



Use of Treasury material under a [Creative Commons Attribution 3.0 Australia](http://creativecommons.org/licenses/by/3.0/au/legalcode) licence requires you to attribute the work (but not in any way that suggests that the Treasury endorses you or your use of the work).

Treasury material used 'as supplied'.

Provided you have not modified or transformed Treasury material in any way including, for example, by changing the Treasury text; calculating percentage changes; graphing or charting data; or deriving new statistics from published Treasury statistics — then Treasury prefers the following attribution:

Source: The Australian Government the Treasury

Derivative material

If you have modified or transformed Treasury material, or derived new material from those of the Treasury in any way, then Treasury prefers the following attribution:

Based on The Australian Government the Treasury data

Use of the Coat of Arms

The terms under which the Coat of Arms can be used are set out on the Department of the Prime Minister and Cabinet website (see www.pmc.gov.au/government/commonwealth-coat-arms).

Other uses

Enquiries regarding this licence and any other use of this document are welcome at:

Manager
Media and Speeches Unit
The Treasury
Langton Crescent
Parkes ACT 2600
Email: medialiaison@treasury.gov.au

Contents

- Contentsiii**
- Consultation Process1**
 - Request for feedback and comments1
- Treasury Laws Amendment (Consumer Data Right) Bill 2018: *Provisions for further consultation*2**
 - Introduction/Background.....2
 - Purpose.....3
 - Proposal 1: Derived information4
 - Proposal 2: Interaction of the Privacy Safeguards with the Privacy Act6
 - Proposal 3: Reciprocity.....7
 - Proposal 4: Process for designation and rule-making.....8
 - Proposal 5: Framework for charges for access to and use of CDR data.....9
 - Draft designation instrument for Open Banking.....11

Consultation Process

Request for feedback and comments

The exposure draft of the *Treasury Laws Amendment (Consumer Data Right) Bill 2018: Provisions for further consultation* builds on the exposure draft of the *Treasury Laws Amendment (Consumer Data Right) Bill 2018* that was released for consultation on 15 August 2018.

Treasury is undertaking a second stage of consultation to incorporate stakeholder views as previously proposed by Treasury at roundtables during the first consultation.

Closing date for submissions: 12 October 2018

Email	data@treasury.gov.au
Mail	Daniel McAuliffe Structural Reform Group The Treasury Langton Crescent PARKES ACT 2600
Enquiries	Enquiries can be initially directed to Daniel McAuliffe
Phone	02 6263 2804

The principles outlined in this paper are not yet law. As a consequence, this paper is merely a guide as to how the principles might operate.

Treasury Laws Amendment (Consumer Data Right) Bill 2018: *Provisions for further consultation*

Introduction/Background

The exposure draft of the *Treasury Laws Amendment (Consumer Data Right) Bill 2018: Provisions for further consultation* builds on the exposure draft of the *Treasury Laws Amendment (Consumer Data Right) Bill 2018* that was released for consultation on 15 August 2018.

Treasury is undertaking a second stage of consultation to incorporate stakeholder views as previously proposed by Treasury at roundtables during the first consultation.

The primary aim of the Consumer Data Right (CDR) is to give consumers the ability to access more information about themselves, and about their use of goods and services, in a manner that allows them to make informed decisions about both themselves and their participation in the market. By doing so, the CDR aims to increase competition in any market, enable consumers to fairly harvest the value of their data, and enhance consumer welfare. This should be done in a manner that fairly considers incentives for all participants.

Purpose

Treasury is seeking views on the following proposals in response to issues raised by stakeholders in submissions on the first exposure draft of the *Treasury Laws Amendment (Consumer Data Right) Bill 2018*.

Reflected in revised sections of the exposure draft legislation are the following measures:

- Proposal 1: Limiting the scope of the Bill in regard to rule-making powers requiring access to derived data.
 - Rules can now only require data holders to allow customers access to derived data that relates to a customer where the derived data is specifically included in a designation instrument; and
 - Rules can now only require data holders to provide access to data that does not relate to a customer where that data is about the product.
- Proposal 2: Clarifying the interaction of the Privacy Safeguards with the Privacy Act, and narrowing their application to Data Holders so that they only apply in respect of the disclosure of data; and
- Proposal 3: Clarifying the operation of reciprocity.

Treasury is also seeking views on the following proposals that are not yet reflected in revised sections

- Proposal 4: Introduction of further legislative consultation requirements for sectoral designation and rule-making; and
- Proposal 5: Introduction of limitations on the rule-making power in regards to charges for access and use of data.

Treasury is also seeking views on the draft designation instrument for the banking sector (Open Banking).

Proposal 1: Derived information

The Government's policy is that the scope of information that could be included in the Consumer Data Right is as recommended in the Open Banking Review.

The Open Banking Review recommended that, as a general rule, 'data that results from material enhancement by the application of insight, analysis or transformation'¹ should not be included in scope, but that 'there can be exceptions to, or qualification of, this broad principle'².

As such, the legislation needs to be drafted in a manner that allows for:

- As a general rule, the inclusion of data that has been enhanced, but not materially so. For example, account balances.
- On an exceptions basis, data that has been materially enhanced, and could in some circumstances be considered to be intellectual property, such as the outcomes of Know-Your-Customer verifications.

The legislation also needs to be capable of protecting customers' information once it has been disclosed. As such, the policy intent remains that, once CDR data has been disclosed to an accredited recipient, so long as the data relates to the identifiable, or reasonably identifiable customer, it should retain the protections of the Privacy Safeguards. To adequately protect customers, this includes when the information that is being protected is information derived from the CDR data that was originally received.

The first draft of the Bill sought to achieve the above policy outcomes by allowing the rules to narrow the scope of what data customers would be able to request to be disclosed. Following stakeholder feedback, Treasury is seeking views on the amended sections, which move this decision to the Ministerial level by introducing the following:

- a limitation on the rule-making power so that, where the information relates to a consumer, the access and transfer right will only apply to information that is in the designation instrument (s56BC);
 - : This means that derived data that relates to an identifiable or reasonably identifiable consumer would need to be specifically included in a designation instrument to be within scope of the access and transfer right. Designation instruments are disallowable by Parliament.
 - : The second limb of the definition of CDR data means that the rule-making power (other than mandatory access or transfer) and Privacy Safeguards will apply to data that is 'derived' from data in the designation instrument, once it has been disclosed to an accredited recipient.
- a limitation on the rule-making power so that, where the information relates to a consumer, the rules can only require a CDR participant to transfer information to an accredited data recipient (s56BC);

¹The Australian Government the Treasury, (December 2017), *The Report of the Review into Open Banking in Australia*, page 38, Recommendation 3.3.

²The Australian Government the Treasury, (December 2017), *The Report of the Review into Open Banking in Australia*, page 38, text immediately following Recommendation 3.3.

- a limitation on the rule-making power so that where the information does not relate to a consumer, the access and transfer right can only apply to information if it is about the eligibility criteria, terms and conditions, or price of a product, other kind of good, or a service (s56BD);
 - : This means that data that does not relate to an identifiable, or reasonably identifiable consumer, such as algorithms and anonymised results of analysis of aggregated data sets are not within scope of the access right.
- redefinition of CDR consumer to persons that information relates to because of a supply of a good or service to the person or that person's associate, or to persons prescribed in regulation (s56AF);
- a new requirement for the Minister to consider the likely effect of making a designation on any intellectual property in the information to be covered by the instrument (s56AD).
 - : Intellectual property remains potentially within scope to address potential loopholes and uncertainty that could otherwise arise. However, it is not anticipated that it would be likely for any intellectual property to be designated for most sectors. Where intellectual property is proposed to be designated, Treasury proposes that the Minister must address the further factors as described in Proposal 5 below.

Further proposal (1a)

Treasury is seeking views on the further proposal below, which is not yet incorporated in amended sections:

- a limitation on the rule-making power so that, in respect of data holders, rules can only be made regarding use, accuracy, storage or deletion of CDR data where this relates to the disclosure of CDR data.
 - : This limitation would be included in both sections 56BC and 56BD.

Proposal 2: Interaction of the Privacy Safeguards with the Privacy Act

A range of submissions suggested that it was unclear from the exposure draft of the Bill whether and when they would need to comply with the Privacy Safeguards, the Privacy Act, or both.

To clarify the interaction between these laws, Treasury proposes that most of the Privacy Safeguards will not apply to data holders. Further, only the Privacy Safeguards (and not the Privacy Act) will apply to data recipients, in respect of the CDR data that they have received.

Treasury is seeking views on amended sections of the Bill, which clarify the following:

- Only Privacy Safeguards 1 (transparent management of CDR data), 10 (notification of disclosure), 11 (quality of CDR data), and 13 (correction of CDR data) will apply to data holders. Privacy Safeguards 10, 11 and 13 will only apply once a disclosure request has been made, and only to the particular data that has been transferred;
- The Privacy Safeguards will substitute the Australian Privacy Principles (APPs) for data recipients, in respect of the CDR data that they have received. (s56EC); and
- Data recipients, in respect of CDR data they have collected or generated themselves and not as a result of the CDR, will be included in the definition of data holders, (s56AG. See also Proposal 3 - Reciprocity below);
- To include a note clarifying that, where the Privacy Safeguards apply to data of a natural person, this gives effect to the privacy rights of those persons arising under international agreements, and to the extent to which the Safeguards apply to the information of other persons, they create statutory rights to confidentiality.

Application of Privacy Safeguards by CDR participant

<i>CDR Participant</i>	<i>Privacy Safeguard that applies</i>
Data holder	<p>PS 1 – Applies concurrently to APP 1</p> <p>PS 10 - Applies to the disclosure of CDR data and there is no similar requirement under the Privacy Act</p> <p>PS 11, PS 13 – Apply to the disclosure of CDR data and substitutes for APPs 11 and 12 in respect of disclosed CDR data</p>
Accredited person	<p>PS 1, PS 3, PS 4, PS 5 - The APPs apply concurrently, but with the more specific Privacy Safeguards prevailing.</p>
Accredited data recipient	<p>PS 2, PS 6, PS 7, PS 8 , PS 9, PS 10, PS 11 –</p> <p>The Privacy Safeguards apply and substitute for the APPs.</p> <p>The APPs do not apply to an accredited data recipient of CDR data in relation to the CDR data that has been received or data derived from that data.</p>

Proposal 3: Reciprocity

Submissions acknowledged that s56BC(1) of the exposure draft was capable of achieving the principle of reciprocity as stated in the Open Banking Review that

‘entities participating in Open Banking as data recipients should be obliged to comply with a customer’s direction to share any data provided to them under Open Banking, plus any data held by them that is transaction data or that is the equivalent of transaction data.’

However, many also expressed the view that the that the Bill could highlight the principle of reciprocity to a greater extent for the lay reader. Treasury is therefore seeking views on amended sections which try to highlight the principle of reciprocity and how it can operate:

- Reciprocity operates to allow the ACCC to write rules requiring data recipients to provide customers access to data, or the ability to request disclosure of data to accredited parties:
 - : **Equivalent data – designed entity:** Data of a class within a designation instrument that an accredited recipient has generated or collected themselves, where the accredited recipient themselves falls within a designated class, but there is no rule requiring that accredited recipient to provide access to that designated data. An example of this would be that a rule could be written to require a small ADI to disclose banking information at a consumer’s request before 1 July 2020, if the small ADI had received CDR data [s56AG(3)]; and/or
 - : **Equivalent data – not designated entity:** Data of a class within a designation instrument that an accredited recipient has generated or collected themselves, where the accredited recipient themselves does not fall within a designated class. An example of this would be that a rule could be written to require a non-bank lender who is an accredited recipient to disclose lending information at a customer’s request [s56AG(3)]; and/or
 - : **Received data:** Data that recipients have received through the CDR [s56BC(1)(a)]
- Where reciprocity has the effect that an accredited recipient is required to provide customer’s the right to access equivalent data, they are able to be treated as a data holder for the purpose of the rules and Privacy Safeguards.

Proposal 4: Process for designation and rule-making

Submissions raised that, given the importance of a sectoral designation, there should be minimum consultation requirements prior to a sector being designated or rules being made.

Treasury proposes the following:

- To explain in the Explanatory Memorandum that a requirement to consider the likely regulatory impact is a statutory requirement to undertake a Regulatory Impact Statement (RIS), which includes a cost-benefit analysis;
- To require that public consultations about the draft rules and designation of a sector be undertaken for a minimum of 28 days;
- To require the OAIC to provide public advice to the Treasurer on privacy impacts of designation or the proposed rules. The OAIC would be given the discretion to provide confidential advice where this would impact on the privacy of a person, the confidentiality of a business, or would compromise an ongoing investigation;
- To require that the Minister wait 60 days after the ACCCs advice about sectoral designation has been made public before making a designation instrument;
- To require a period of 60 days after the ACCCs proposed rules have been made public before the rules are made;
- To replace the text of s56AE(6) which stated that a failure to consult would not invalidate an instrument, and instead to state that consultation is deemed to be sufficient if there was a minimum of public 28 day consultation, and a 60 day wait after the publication of advice or rules;
- To limit the circumstances in which the ACCC may make rules regarding fees for transfer and use of information (see Proposal 5 – Charging framework, below); and
- To limit the circumstances in which emergency rules may be made to when the ACCC is of the opinion that an emergency rules is necessary to avoid imminent risk of serious harm to the efficiency, integrity and stability of the Australian economy, or to consumers.

Proposal 5: Framework for charges for access to and use of CDR data

Submissions requested that detail regarding the framework for charges for access and use of CDR data be delineated in the legislation as opposed to the rules.

In summary, Treasury proposes that the designation instrument for data sets should identify whether a data set is fee free or the data holder can impose charges for access and use (a chargeable data set). Where fees may be imposed, market based pricing would be the initial pricing approach. The ACCC would have powers to determine a reasonable price for access if data holders impose excessive fees (taking account of a range of factors, similar to current access regimes).

- As recommended by the Open Banking Review, the data sets in the banking designation instrument would not be chargeable data sets.

Treasury proposes to include sections that reflect the following charging framework principles in the Bill.

In determining whether a data set is a chargeable data set, the Minister would consider the following factors in regards to charging:

- whether the data set constitutes property for the purpose of the Constitution;
- whether the data holder currently charges consumers for access to that data set;
- the impact on incentives for data holders to generate, collect, hold or maintain that data set if access rights were provided without charge; and
- the marginal costs to data holders of disclosing the data.

These factors would be in addition to the general factors the Minister must consider when designating data sets.

For no charge data sets, data holders would be able to incorporate the cost of disclosing data into their cost base for provision of the original good or service.

Data holders would be able to determine the appropriate charge where they voluntarily provide access or services that are beyond what is required under the CDR.

Pricing of chargeable data

Where the Minister designates a data set as being a chargeable data set, each data holder of that data set may adopt their own charging strategy. Data holders will not be required to introduce a charge for chargeable data sets - they will have the option to do so.

Data holders would be required to make information about any charge for access and use to chargeable data sets publicly available, in accordance with the consumer data rules.

ACCC declaration of prices for chargeable data

Treasury proposes to introduce a test that existing pricing arrangements are unreasonable before the ACCC may step in to regulate the price of a chargeable data set.

Treasury proposes that the proposed criteria below would apply in addition to the normal rule-making criteria and process.

It is currently proposed to draw heavily upon sections 44CA and 44ZZCA of the *Competition and Consumer Act 2010* in the design of this power. However, as these sections relate to access to service facilities, it is not possible to adopt these sections directly.

Treasury therefore proposes that pricing arrangements could only be imposed after consideration of whether:

- the existing charging arrangements for access and use to the data are unreasonable; and
- the objects of the Consumer Data would be promoted by a pricing declaration; and
- pricing arrangements would promote the public interest; and
- the effect of imposing pricing arrangements on investment in collecting, generating, holding and maintaining the data set; and markets that depend on access to the service that underlies the data set.

Any pricing arrangements would have to be designed to ensure:

- that regulated prices account for the efficient costs and risks of providing access and use to the data; and
- price structures that allow price discrimination when it aids efficiency; and
- that price structures don't allow vertically integrated data holders to discriminate in favour of its downstream operations; and
- proper incentives to reduce costs or otherwise improve productivity.

Access and transfer prices for data that is intellectual property will always need to reflect at least just terms for that data.

Treasury particularly seeks views on whether data is sufficiently analogous to service facilities that the vertically integrated discrimination principle should be adopted.

Draft designation instrument for Open Banking

Designation instruments turn on the rule-making power in respect of specific data sets and data holders. Designation instruments are disallowable legislative instruments and must be recorded on the Federal Register of Legislative Instruments and then tabled in Parliament so that they may potentially be disallowed.

Treasury is seeking views on the *Consumer Data Right (Authorised Deposit-Taking Institutions) Designation 2018* and its associated Explanatory Statement.

This designation instrument would enable rule-making for the 'banking' sector. For the purpose of the Treasury Laws Amendment (Consumer Data Right) Bill 2018 the banking sector is the data sets and data holders defined in this instrument.