



21 October 2020

## SUBMISSION TO TREASURY CONSULTATION ON CONSUMER DATA RIGHT LEGISLATIVE AMENDMENTS

Submitted by email - [data@treasury.gov.au](mailto:data@treasury.gov.au)

The Consumer Policy Research Centre (CPRC) welcomes the opportunity to respond to Treasury's consultation<sup>1</sup> on amending the Consumer Data Right (CDR) regime legislation.

CPRC is an independent, non-profit, consumer think-tank that aims to create fairer, safer and inclusive markets by undertaking research and working with leading regulators, policymakers, businesses and community advocates. Data and technology issues are a research focus for CPRC, including emerging risks and harms and opportunities to better use data to improve consumer wellbeing and welfare.

The consultation proposes amendments that shift sectoral assessment and rulemaking functions away from the Australian Competition and Consumer Commission (ACCC) and into the Treasury. Below we raise three key issues regarding this change. This builds on the views we've expressed to Treasury in previous submissions, most notably our 2019 submission to Treasury's consultation on the ACCC Digital Platforms Inquiry Final Report.<sup>2</sup>

### **1. Placing consumers in control of their own data and information must remain the focus of CDR reforms**

The CDR reforms are intended to create a multi-sector data sharing system which consumers can have confidence in and trust.<sup>3</sup> For this to be the case it is absolutely critical that the consumer interest is a central consideration during sectoral assessment and rulemaking processes. Currently the ACCC must:

*"have regard to certain matters before making the rules, including the likely effect of the rules on the interests of consumers, the efficiency of relevant markets, the privacy and confidentiality of consumers' information, and the regulatory impact of the rules."*<sup>4</sup>

This requirement ensures that issues regarding consumer protection and privacy are robustly factored into policy processes. Moving sectoral assessment and rulemaking functions away from the independent ACCC and into a Ministerial department such as Treasury does open up the possibility of other factors influencing policy process, such as Government's other digital policy initiatives more focussed on supporting businesses and

<sup>1</sup> Treasury, "CDR – Legislative Amendments", (October 2020), <https://treasury.gov.au/consultation/consumer-data-right-legislative-amendments>

<sup>2</sup> CPRC, "Submission by CPRC to Australian Treasury consultation on the ACCC Digital Platforms Inquiry Final Report" (September 2019), <https://cprc.org.au/publications/submission-to-australian-treasury-consultation-on-the-accc-digital-platforms-inquiry-final-report/>

<sup>3</sup> This aligns with the Productivity Commission's view that increasing consumer trust in data access processes and protections is a key objective of reforms. See: Productivity Commission, "Data Availability and Use – Overview and Recommendations", (March 2017), 2, <https://www.pc.gov.au/inquiries/completed/data-access/report/data-access-overview.pdf>

<sup>4</sup> ACCC & Australian Energy Regulator, "Annual Report 2019-20", (October 2020), 63, <https://www.accc.gov.au/system/files/ACCC%20and%20AER%20Annual%20Report%202019-20.pdf>

economic growth, rather than consumers. CPRC understands that – consistent with Part IVD, Section 56AD of the *Competition and Consumer Act 2010*<sup>5</sup> and Section 56BP of the *Exposure Draft*<sup>6</sup> – the Minister (and therefore Treasury Secretary) must consider the same matters the ACCC would currently need to consider when assessing sectors and making rules. We strongly support this requirement and would welcome confirmation that our understanding of the *Exposure Draft* is correct (particularly in relation to the caveat contained in section 56BTA of the *Exposure Draft*).<sup>7</sup>

Furthermore, for the scheme to retain integrity and a focus on consumer outcomes, we encourage Treasury to adopt a transparent reporting framework of consumer experiences and outcomes associated with use of the CDR regime. CPRC has already proposed a Consumer Outcomes Measurement Framework as part of our research conducted for the Data Standards Body. An outcomes framework of this kind would provide a clear structure against which consumer outcomes arising from the CDR – such as those relating to Transparency; Choice and Control; Inclusion and Accessibility; and Trust – are measured and tracked through time.<sup>8</sup>

## **2. The importance of engagement and leadership when developing consumer policy reforms**

In recent years, the ACCC has conducted a number of extensive public consultations on consumer policy issues relevant to data and digital marketplaces. This includes CDR policy development, as well as policy issues relevant to the ad-tech sector, digital platforms, and loyalty schemes. The ACCC's work has produced recommendations regarding reforms that – if implemented – would substantially strengthen consumer and privacy protections for Australians while also enabling competitive digital marketplaces. At the same time, this work has seen the ACCC build expertise and experience engaging organisations that represent consumers on data and digital marketplace issues. This has allowed the ACCC to make substantial and timely progress implementing the CDR since it took lead of the reforms in 2018. Ahead of any reallocation of CDR functions – CPRC would encourage Treasury to carefully consider how it can build on the progress the ACCC has made and ensure the voice of consumers is able to effectively shape CDR policy into the future.

In this context – and consistent with our submission to Treasury in 2019 – we consider that sufficient funding of civil society that ensures balanced and inclusive policy discussion is a priority.<sup>9</sup> Also key to the consumer voice being able to shape CDR reforms will be ensuring there is both appropriate transparency of consultation processes, and adequate engagement with consumer and community organisations during this process. We would therefore welcome clarification on what form Treasury consultation with the ACCC and other organisations will take (mentioned in Sections 56AE and 56BQ of the *Exposure Draft*<sup>10</sup>). Transparency of such consultations (as is the case for public consultations undertaken by the ACCC) would assist stakeholders in gaining a deeper understanding of policy issues that are critical to the CDR being a sustainable reform that delivers benefits to consumers.

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<sup>5</sup> Australian Government, "Competition and Consumer Act 2010", (February 2020), <https://www.legislation.gov.au/Details/C2020C00068>

<sup>6</sup> Australian Treasury, "CDR – Legislative Amendments – Exposure Draft", (October 2020), [https://treasury.gov.au/sites/default/files/2020-10/amendments\\_to\\_the\\_consumer\\_data\\_right\\_-exposure\\_draft.pdf](https://treasury.gov.au/sites/default/files/2020-10/amendments_to_the_consumer_data_right_-exposure_draft.pdf)

<sup>7</sup> Section 56BTA of the Exposure Draft states that "a failure to comply with section 56BP, 56BQ or 56BR does not invalidate consumer data rules made under subsection 56BA(1)". See: *Ibid*, 8.

<sup>8</sup>CPRC, "Stepping towards trust – Consumer Experience, Consumer Data Standards and the Consumer Data Right" (September 2020), 39, [https://consumerdatastandards.gov.au/wp-content/uploads/2020/09/20200902\\_CPRC-Report-1\\_Publication.pdf](https://consumerdatastandards.gov.au/wp-content/uploads/2020/09/20200902_CPRC-Report-1_Publication.pdf)

<sup>9</sup> CPRC, "Submission by CPRC to Australian Treasury consultation on the ACCC Digital Platforms Inquiry Final Report" (September 2019), 4-5.

<sup>10</sup> Australian Treasury, "CDR – Legislative Amendments – Exposure Draft", (October 2020), 2, 6.

Establishment of a Consumer Advisory Group with specific representation by independent and not-for-profit organisations representing consumers, along with public reporting of consumer outcomes associated with the CDR regime's performance, could also enhance engagement.

### **3. The need for a consumer protections framework to take Australia into the digital age**

We understand that a key reason for reallocating CDR functions from the ACCC to the Treasury is to ensure the CDR regime is developed in a coordinated way with Government's broader digital policy initiatives, such as those announced in the Government's Digital Business Plan.<sup>11</sup> We appreciate there may be benefits to such coordination. In particular, we consider that efforts to drive digital transformation need to be complemented by, and coordinated with, reforms that significantly strengthen consumer protections. Such reforms include a general safety provision<sup>12</sup>, unfair trading practices prohibition and unfair contract terms prohibition<sup>13</sup> being added to Australian Consumer Law, and Privacy Act reforms.<sup>14</sup>

Just as the Government's Cyber Security Strategy<sup>15</sup> sets out a vision, plan and actions for ensuring "Australians will have greater confidence that essential systems are protected" – a clear vision, plan and – most importantly – actions that strengthen consumer protections will ensure consumers can have greater confidence in digital marketplaces. At the moment, Australians are currently at the mercy of analogue laws and regulations that do not provide effective protection or deterrence against problematic data practices and business conduct in digital marketplaces.<sup>16</sup> Nor are Australians currently afforded privacy protections that are suitable for a highly data-driven future.<sup>17</sup> In order to ensure Australia's consumer protections framework does not fall further behind, Government must prioritise the development and implementation of economy-wide consumer protection reforms, to be introduced alongside the operation of the CDR scheme.

CPRC would welcome opportunities to further engage on the above matters if that would be useful to Treasury. For discussions regarding our research or this submission, please contact Andrew Thomsen, Senior Research and Policy Manager, at [andrew.thomsen@cprc.org.au](mailto:andrew.thomsen@cprc.org.au)

Yours sincerely,



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<sup>11</sup> Prime Minister Of Australia, "Digital Business Plan to Drive Australia' Economic Recovery", (September 2020), <https://www.pm.gov.au/media/digital-business-plan-drive-australias-economic-recovery#:~:text=%E2%80%9COur%20Digital%20Infrastructure%20package%20is,to%20regional%20Australia%20each%20year.%E2%80%9D>

<sup>12</sup> ACCC, "Unsafe goods should be illegal to sell", (March 2019), <https://www.accc.gov.au/media-release/unsafe-goods-should-be-illegal-to-sell>

<sup>13</sup> ACCC, "Digital Platforms Inquiry – Final Report", (June 2019), Chapter 7, 373-501, <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>

<sup>14</sup> Ibid, 34-36.

<sup>15</sup> Australian government, "Australia's Cyber Security Strategy 2020", (August 2020), 8, <https://www.homeaffairs.gov.au/cyber-security-subsite/files/cyber-security-strategy-2020.pdf>

<sup>16</sup> ACCC, "Digital Platforms Inquiry – Final Report", (June 2019), 23-25.

<sup>17</sup> Productivity Commission, Data Availability and Use, Final Report, 31 March 2017, p. 130. <https://www.pc.gov.au/inquiries/completed/data-access/report/data-access.pdf>