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5 June 2020

Secretariat
Inquiry into Future Directions for the Consumer Data Right
The Treasury
Email: data@treasury.gov.au

Dear Sir/Madam

TREASURY ISSUES PAPER: INQUIRY INTO FUTURE DIRECTIONS FOR THE CONSUMER DATA RIGHT

The Australian Industry Group (Ai Group) welcomes the opportunity to make a submission on Treasury's Issues Paper on its inquiry into future direction for the Consumer Data Right (CDR).

1. Introduction

Ai Group's membership comes from a broad range of industries and includes businesses of all sizes. For example, during the ACCC's Digital Platforms Inquiry, we received input on our submission from businesses in the IT, telecommunications, energy and retail sectors. However, the breadth of scope and impact of the Digital Platforms Inquiry was much broader than this, applicable to many sectors that have the capability of being a digital platform or business.

In this respect, the Terms of Reference for the CDR Inquiry includes having regard to the Government's response to the ACCC's Digital Platforms Inquiry. As we had specifically raised concerns with aspects relating to privacy and data regulation in the Digital Platforms Inquiry, we maintain these concerns, which are also applicable to the CDR Inquiry.

With the passing of legislation which established the CDR in August 2019,[1] the Australian Government decided that the banking sector will be the first sector subject to the CDR, followed by the energy and telecommunications sectors. Currently, the banking sector is due to commence implementation of the CDR in July this year, and the energy sector is in the process of being designated. For the purposes of this submission, our comments are focused on the broader application of the CDR across sectors.

Overall, industry recognises the importance of protecting customer information and data. We support a data and privacy regime that benefits both customers and businesses, including improved transparency and customer experience, irrespective of the specific regime. The regulatory environment should also be conducive to the promotion of digital investment, innovation and competition that benefits industry and the community in the long term. In principle, we support a regime where the CDR could be a solution if it delivers on these outcomes.

We strongly believe that any regulatory consumer-related initiatives considered for implementation be supported with adequate evidence and assessment. Any development of a solution including the CDR must be undertaken through stages of robust consultation and testing, which is to ultimately ensure an outcome where consumers receive the most benefit through increased opportunity to access competitive products and services. However, we would be concerned if initiatives such as the CDR were expanded more broadly to sectors without sufficient evidence, assessment, consultation and testing. As the current CDR framework is still in design phase, the model specifications will need to be changed and adapted across different sectors. Therefore, a generic expansion of the CDR could have unintended consequences. We are mindful of such consequences and unnecessary regulatory costs that could stifle business investment, innovation and competition, while providing little value to consumers.

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[1] The *Treasury Laws Amendment (Consumer Data Right) Bill 2019* (Cth), was passed through Australian Parliament and received Royal Assent in August last year. Its purpose was to amend the *Competition and Consumer Act 2010* (Cth), *Privacy Act 1988* (Cth), and *Australian Information Commissioner Act 2010* (Cth) to introduce the CDR and open banking.

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This will become an even more critical issue, once we emerge from the uncertainty and adverse impacts of the COVID-19 pandemic. It is being said that we are facing a health crisis and economic crisis, leading to massive economic dislocation and hardship unfolding. Proper measures will need to be in place to ensure that businesses remain sustainable and globally competitive, rather than hinder them such as creating unnecessary compliance costs for businesses that do not increase benefit to consumers.

To this end, this submission raises several issues that require proper consideration in the following areas: scope, future role and outcomes of the CDR; international context; consumer switching; read and write access functionality in the CDR; linkages and interoperability with existing frameworks and infrastructure, and leveraging CDR infrastructure; and consumer protection.

To help overcome some of these concerns, we have also recommended in our submission ways in which these could be addressed, including: following proper process for sectoral assessment and designation of the CDR that takes into account our issues; consideration of regulatory sandboxes and other alternative light-handed regulatory approaches (e.g. innovation hubs) to test innovative ideas associated with the CDR; further consideration of alternative CDR approaches such as a low-cost CDR for sectors where there may be only incremental benefits from an overly comprehensive approach; and improved coordination and alignment between the CDR work and various activities of the relevant bodies and agencies.

At this stage, we would like to provide preliminary views. As further consultation is undertaken, there may be additional matters raised. We would also welcome the opportunity to work closely with Treasury as the review progresses.

We would also welcome the opportunity to work with Treasury to bring together a range of industries who may be affected by this Inquiry to be consulted with further.

2. Scope, future role and outcomes of the CDR

Issues Paper:

- *We invite interested parties to make submissions on any or all issues raised by this Issues Paper or the Terms of Reference. This includes views on potential developments and expansions in CDR functionality, including their benefit and priority.*
- *The Inquiry invites submissions on the future roles that could be performed by the CDR, the future outcomes which could be achieved, and what is needed for this to happen.*

2.1 Proper assessment of issues and solutions

We note that the Issues Paper states that the CDR Inquiry "will be forward-looking, focussing on the future purpose, use and vision for the CDR, rather than its current implementation or the sectors to which it should be next applied". Nevertheless, the Issues Paper also states: "While the [CDR] Rules currently apply only to particular types of banking products and data holders, it is intended that they will progressively apply to a broader range of data holders and products throughout the Australian economy. With this in mind, the Inquiry is interested in receiving submissions from all sectors of the economy, not just those focussed on banking."

In this regard, we caution against considering applying the CDR to a range of sectors, without properly consulting on and assessing issues and underlying causes, as well as options to address these where the CDR could be a solution. For example, issues related to consumer data transfer are non-generic across sectors. Proper consultation of these issues is required before considering the CDR across sectors. That way, it can be properly identified whether the CDR can address the issues.

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2.2 Proper cost-benefit assessment

Rigorous investigation and a robust and considered cost-benefit assessment will be required relating to any recommendations that arise from this Inquiry. Broad recommendations cannot be applied uniformly across sectors without proper cost-benefit assessment undertaken for individual sectors. Otherwise, there is risk of the recommendations proving invalid. In absence of substantiated evidence to the contrary, it is difficult to comment at this stage on whether the CDR could be a solution for any given sector.

For instance, Government has estimated that the CDR "will increase compliance costs in the banking sector and for accredited parties by an average of $86.6 million per year, and in the energy sector by an average of $9.9 million per year, on an annualised basis".[2]

For the energy sector, we understand that a cost-benefit assessment was completed prior to developing relevant detail for the CDR framework (e.g. the data, data holders, technical standards, designated gateways etc). Therefore, the cost-benefit assessment for that sector needs to be properly reviewed.

Once further detail is known about the proposed CDR framework for a given sector, such as in energy, it would be prudent to conduct a cost-benefit assessment, including compliance costs. Compliance costs that are found to be not insignificant can act as a regulatory barrier to investment and innovation in Australia, especially in light of the economic impact of COVID-19. Government should consider ways to alleviate this regulatory burden.

2.3 Effectiveness of current CDR regimes

It is also important to properly assess the performance of the current CDR and the effectiveness of other similar existing mechanisms in place. As noted above, the banking sector is currently subject to the CDR, with the energy sector in the process of being the next designated sector.

For the banking sector, the first phase of the CDR is now scheduled to commence implementation in July this year. This has been delayed by six months due to "additional implementation work and testing to be completed and better ensure necessary security and privacy protections operate effectively".[3]

For the energy sector, testing is currently being conducted on a preferred data access model for sharing data with energy service providers through the Australian Energy Market Operator (AEMO) and ACCC. Demonstrating the complexity of implementing the CDR, we understand that there are fundamental definitional and application challenges with the development of the CDR for this sector. For instance, more clarification is needed to explain how the CDR framework will apply, particularly with the role of AEMO as a designated gateway.[4]

Given that the CDR has only just been established, still in its design phase with the process being tested, and not sufficiently matured, it would be prudent to delay any consideration of broadening the scope of the CDR at this stage. This will enable a better understanding of: whether there has indeed been anticipated benefits from the CDR, including consumer interest and uptake; and whether there are implementation and ongoing issues including actual costs.

It is also important to consider other more mature systems that are in place, especially international experiences. We discuss these further in section 3 below.

2.4 Industry-specific considerations

We appreciate that the concept of the CDR gained prominence from the 2016-17 Productivity Commission Inquiry into Data Availability and Use. Since that time, there has been several

[2] Explanatory Memorandum, Treasury Laws Amendment (Consumer Data Right) Bill 2019 (Cth).
[3] ACCC, "Consumer Data Right timeline update" (Media release, 20 December 2019).
[4] ACCC, "Next step for consumer data right in energy" (Media release, 29 August 2019).

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consultations, with a particular focus on the banking sector. And as noted above, Government has also announced plans to extend the CDR to the energy and telecommunications sectors.

From a regulator's perspective, there may be an assumption that a general "one size fits all" approach to the CDR would be administratively efficient. However, this may not be valid once it is applied across a number of sectors that have sectoral differences, which will require the CDR to be fit-for-purpose and provide a proportionate solution for consumers and businesses.

To this end, we understand that future sectors that will be subject to the CDR will be determined through the following process:[5]

- Future sectors are identified through ACCC sectoral assessments on its own initiative or requested by the Treasurer.
- The ACCC and Office of the Australian Information Commissioner (OAIC) have both been assigned responsibilities to advise the Treasurer regarding sector designation.
- The Treasurer has the ultimate power to determine whether a sector is designated as subject to the CDR.
- The Treasurer in making their decision about designating a sector has to have regard to whether there are net benefits, particularly the promotion of competition and data driven innovation in the Australian economy, taking into account a range of factors.[6]
- If the Treasurer decides to designate a sector, the ACCC has the power to make CDR Rules relating to rights and obligations for the sector, in consultation with the OAIC, public and relevant regulatory agencies. These Rules may be general rules or sector-specific, and are published subject to the Treasurer's consent.[7]
- The CDR Rules also refers to technical standards which specify how accredited parties within a sector complies with the Rules. These standards are divided into four areas, namely: application programming interface (API) standards; information security standards; consumer experience standards; and engineering. The Data Standards Body (DSB) is responsible for developing these standards.

On its face, the above process should facilitate procedural fairness through proper consultation and assessment to determine whether a given sector should be designated under the CDR. It should provide a specific process to ensure robust regulatory reform occurs. Broadening recommendations generally without this process would be problematic. As noted above, it would be prudent to learn from the current CDR rollout first, and then consider further opportunities.

In addition, to ensure procedural fairness occurs in the above process, relevant considerations specific to that sector should be taken into account and given the appropriate weighting. Each sector is subject to their own unique regulatory regime and mechanisms associated with consumer access and data.

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[5] Treasury, "Consumer Data Right Overview" (Booklet, September 2019), pp. 11-13.

[6] These factors include: likely impacts upon consumers; likely impacts upon relevant markets, including upon market efficiency, integrity and safety; likely impacts upon privacy for individuals and confidentiality for businesses; likely regulatory impact of consumer data rules; likely impacts on intellectual property rights; and any other relevant matters.

[7] The rules may include: refinement of the coverage of the right in a given sector, within the bounds of the Treasurer's sector designation (i.e. affected data sets, the holders and recipients); consumer authorisations to transfer data from the original or subsequent data holders (including consumer identification and consent requirements); safe and efficient data transfer; consumer permissions to use data; security and confidentiality protections; accreditation requirements for data recipients and accreditation processes; alternative dispute resolution; breach mitigation and reporting requirements; interoperability across sectors and mutual recognition of other data access regimes; liability of participants; obligations to delete data; and record keeping.

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Sufficient weight should therefore be given to incumbent industry feedback, as they would have the relevant requisite knowledge about their sector, including the effectiveness of existing industry-specific mechanisms.

If a CDR regime were to be considered for a particular sector, sufficient time will be needed to ensure that it is properly assessed and tested, and resourced to manage any transition to a new regime. We are mindful of the risks of unintended consequences for businesses and the community arising from rushed regulatory decisions with limited consultation, as seen with the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth).

Further consideration could also be given to the use of regulatory sandboxes and other alternative light-handed approaches (e.g. innovation hubs) to test innovative ideas without fear of negative regulatory repercussions. For example, we understand that Government has recently passed laws to create a fintech regulatory sandbox, which could be used to test the CDR in this sector.[8] To maximise the utilisation of such sandboxes, participants should also be given the option of selecting a closed "one-on-one" environment between the relevant regulator and their business if they are concerned about protecting their intellectual property.

Taking into account the above, we note that the CDR Act exempts the energy sector from being consulted with about their designation if the Treasurer makes a designation before 1 July 2020.[9] Irrespective of this exemption, effective consultation is required to ensure that the most effective CDR regime is designed for implementation, which is in the best interest of consumers. Failure to consult industry could lead to adverse outcomes for consumers, as well as businesses.

For instance, the Treasurer's designation defines the datasets for the energy sector under the CDR. Datasets are key to determining the functionality of the CDR. Without definition of datasets and the establishment of the data sharing model, it is very difficult to provide practical opportunities for further development of the CDR.

Therefore, as a matter of good regulatory practice, we consider that the energy sector should be afforded procedural fairness and strongly encourage the relevant agencies to properly consult with the sector with respect to the CDR.

2.5 Definition of CDR data and consumer

The effectiveness of the CDR for consumers is dependent on the data defined. It is directly linked to both the value to consumer and cost to business.

In past consultations about the CDR, a point of contention for industry related to the scope of the CDR data. Issues were raised about the breadth and ambiguity of the data that would be captured (including value-added and derived data), and unintended consequences that could stifle business investment and innovation.

Each sector will also likely have varied definitions of consumers and data, in addition to industry-specific regulations, which may not necessarily be directly comparable between sectors. We appreciate that the sector designation process, as summarised above, may assist to provide safeguards against CDR data being too broadly defined for a given sector. In such a process, it is important to give sufficient weight to incumbent industry feedback, as they have the relevant knowledge about their industry including customers and data.

We understand that there is already significant potential broadening of the CDR scope through the CDR Rules. This needs to be taken into account when considering recommendations under this inquiry.

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[8] Senator the Hon Jane Hume, "New laws passed to drive fintech innovation and competition in the financial sector" (Media release, 11 February 2020).
[9] Treasury Laws Amendment (Consumer Data Right) Bill 2019, Schedule 1, Item 3.

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For example:

- With the definition of the CDR consumer in the energy sector, we have received anecdotal information that the ACCC is seeking whether a CDR consumer can be online and offline consumers. It is unclear how these customers can be validated, or how they can utilise the dashboards and other "control" mechanisms that help protect consumers under the CDR regime.

- Economy-wide approach to various elements of the CDR has been contemplated in the course of CDR discussions relating to the banking and energy sectors. We understand this was raised as an option for the data access model in the energy sector, which eventually landed with the AEMO gateway model as the preferred approach (while the banking sector has adopted the economy-wide model).[10] An economy-wide approach has also been raised in discussions relating to "reuse of identity".[11]

Further, during the Digital Platforms Inquiry, we sought clarification between the scope of the ACCC's proposed privacy and data reforms and the CDR, including about personal information and CDR data. We consider that questions remain outstanding on how the ACCC's proposed changes to the definition of personal information will fit with other multiple forms of regulation in this area, including the CDR and industry-specific regulations. This is discussed further in section 6.2.

2.6 Multiple privacy and data regimes

With the introduction of the CDR, there now exists for the banking sector the Australian Privacy Principles (APPs) regime under the *Privacy Act 1988* (Cth) and the CDR Privacy Safeguards regime under the *Competition and Consumer Act 2010* (Cth). This effectively creates a dual privacy regime, with regulatory oversight of the CDR Privacy Safeguards by the ACCC and OAIC.

Such an outcome creates complexity and compliance costs for businesses that have to comply with both regimes, and also for small businesses who may not currently be subject to the Privacy Act and therefore not familiar with privacy regulatory regimes.[12]

To help clarify these new requirements, the OAIC has consulted with stakeholders about its CDR Privacy Safeguard Guidelines. The Government has also allocated $90 million in its 2018-19 Budget and 2018-19 MYEFO over five years for the OAIC and other relevant agencies to ensure that they can properly administer the new regime.[13]

However, more can be done to support industry. As noted above, proper cost-benefit assessments need to be undertaken including compliance cost impacts on industry. With respect to multiple privacy and data regimes, there may be no additional benefit of protecting the privacy and security of consumers through the CDR, while creating additional compliance burden on businesses. Government should consider ways to alleviate such regulatory burdens.

In addition, we understand that Treasury may be considering alternative low-cost CDR approaches for sectors where there may be only incremental benefits arising from an overly comprehensive CDR approach. For example, a CDR approach where only product information (and potentially other non-personal data) is shared in a consistent way, and consent, accreditation and privacy protections would not be required. In principle, such an approach merits further consideration if it provides a proportionate solution that benefits consumers. This should include adequate consultation and cost-benefit assessment for the given sector that it may be contemplated for.

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[10] ACCC, "Position paper: data access model for energy data" (August 2019).
[11] Data Standards Body Advisory Committee Banking Sector, Minutes of the Meeting (12 February 2020), p. 10.
[12] OAIC, "OAIC commences consultation on draft CDR Privacy Safeguard Guidelines" (Media release, 17 October 2019).
[13] Treasury, "Consumer Data Right Overview" (Booklet, September 2019), p. 6.

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For businesses subject to the European Union General Data Protection Regulation (EU GDPR), it will likely present greater complexity and compliance costs. We discuss the EU GDPR further in section 3.2.

2.7 Proper consideration of consumer views and expectations

The critical objective is to support consumers to take ownership of their data. If the CDR were to be developed for a given sector, it must be designed in a way that consumers will actually be supported to use. Therefore, it is important for Treasury to be cautious against making assumptions about consumers' views and expectations in this Inquiry. This was an issue that we identified during the ACCC's Digital Platforms Inquiry.

Despite best efforts and intentions in the ACCC's Digital Platforms Inquiry, the Inquiry demonstrated that identifying drivers of consumer behaviour is a complex process. It can be easy to unintentionally oversimplify or misrepresent consumer views. That is why it is so important to undertake thorough analysis of consumer behaviour.

In that Inquiry, the ACCC referenced consumer surveys to support some of its arguments on behalf of the consumer and recommendations relating to privacy and data regulation reform. Even so, we questioned whether the ACCC's issues and recommendations properly reflected consumers' views and expectations that are material in nature.

For instance, the ACCC's Digital Platforms Inquiry Final Report acknowledged the concept of the "privacy paradox":[14]

> *In essence, the privacy paradox refers to a perceived discrepancy between the strong privacy concerns voiced by consumers who, paradoxically, do not appear to make choices that prioritise privacy.*
>
> *One possible explanation for the privacy paradox is that consumers claim to care about their privacy in theory but, in practice, the value they derive from using a digital platform's services outweighs the 'price' they pay in allowing the collection of their user data. A further explanation is that, while consumer attitudes are often expressed generically in surveys, actual behaviours are specific and contextual, and therefore, consumers' generic views regarding privacy do not necessarily predict their context-specific online behaviours.*

Despite this, the ACCC did not appear to give much weight to this concept on the basis that the privacy paradox rests on the premise of consumers making informed decisions in their transactions with digital platforms. The ACCC was of the view that consumers may be prevented from making informed choices.

Notwithstanding the ACCC's views, we considered that the potential for a privacy paradox highlights a need to conduct more rigorous consumer interviews and dialogue to accurately identify the drivers of consumer perceptions. Without accurate identification of drivers, there is risk that recommendations made will not address potential underlying issues.

Government's interest in this area of reform relates to providing transparency and consumer value. However, the ACCC's proposed reforms that were based on these aspirations may instead lead to impractical outcomes for consumers such as information and communication overload, and lack of consumer interest and value, not ensuring consumer useability, as well as creating unnecessary regulatory costs and red tape for businesses to implement. There were also practical questions about: whether the consumer would actually go searching for information as a result of increased information and communication; and whether consumers will ultimately be disadvantaged by not getting access to, for example discounts or specials, as a result of the ACCC's proposed opt-in consent.

[14] ACCC, Digital Platforms Inquiry (Final Report, 26 July 2019), p. 384.

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We can see similar issues arising in the CDR Inquiry and caution against assumptions that could be improperly made about consumers' concerns and expectations. We discuss further this disconnect between assumptions about consumers and outcomes in section 3.1 below.

Ai Group recommendations:

- ***Given that the CDR has only just been established, not been adequately tested, and not sufficiently matured, it would be prudent to delay any consideration of broadening the scope of the CDR at this stage.***
- ***Before contemplating the CDR as a solution for any given sector, proper consultation, analysis and assessment of issues, underlying causes, and options to address these issues will be required. A robust and considered cost-benefit assessment for any recommendations will also be required.***
- ***If the CDR were to be considered as a solution to a wider range of sectors, proper assessment will need to be given to the circumstances specific to the given sector under consideration, including effectiveness of existing regulatory regimes, types of data and consumer, existing privacy and data regimes, and giving sufficient weight to incumbent industry knowledge.***
- ***A proper contextual analysis of consumer issues and expectations should be undertaken to assess the materiality of consumer concerns and expectations as it relates to the CDR for any given sector.***
- ***The CDR process for sectoral assessment and designation (as summarised above) should be followed, taking into consideration the issues that we have raised in this submission.***
- ***Consideration should be given to the use of regulatory sandboxes and other alternative light-handed regulatory approaches (e.g. innovation hubs) to test innovative ideas associated with the CDR.***
- ***Further consideration should be given to alternative CDR approaches such as a low-cost CDR for sectors where there may be only incremental benefits arising from an overly comprehensive CDR approach.***

3. International context

Issues Paper: The Inquiry invites submissions on how the CDR can be leveraged with international developments of the kinds described above to enhance opportunities for Australian consumers, Australian businesses and the Australian economy.

3.1 UK Open Banking and EU Payment Services Directive 2 experiences

There are similarities between the CDR, UK Open Banking and EU Payment Services Directive 2 (PSD2). Like the other regimes, the CDR currently applies to the banking sector as an open banking initiative, with the objective of empowering consumers by giving them access to and control over their data collected by businesses, which in turn policy makers consider will help consumers make informed choices, leading to increased competition and innovation. However, the CDR is intended to eventually apply economy wide.

Nevertheless, given the similarity of objectives, there are important lessons to be learnt from the UK Open Banking and EU PSD2 experiences which have now been operating for the last two years. Some progress has been made with these two regimes. However, the effect of the UK Open Banking on

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customer awareness and competition has been relatively low.[15] Similarly with the EU PSD2, consumers do not understand its benefits or purpose, and there has been slow adoption of open banking by EU banks because of costs to adapt legacy systems.[16]

With the consumer aimed to be at the centre of these initiatives, limited consumer awareness and understanding highlights a disconnect between the intention of policy makers and consumer needs. If not properly designed, these issues could similarly arise with the CDR, which may promise much but achieve little to assist consumers. If the CDR is extended to a wider range of sectors, caution needs to be given as to what it is hoping to achieve versus what will occur in practice. Of concern will be businesses subject to the CDR facing significant regulatory costs to comply with the CDR, while consumers see little benefit or interest.

It should be acknowledged that the UK and EU open banking regimes are still in their infancy of development. The CDR for the banking sector is even less mature, suggesting it would be premature to contemplate applying the CDR in other sectors, without a proper assessment of the current arrangements.

3.2 EU GDPR

As discussed above, there may be overlap between the CDR Privacy Safeguards and other privacy and data protection regimes including the APP and EU GDPR, which some companies may be subject to.[17]

A tempting solution may be to align the CDR and APP with the EU GDPR. For instance, a key feature of the CDR is the concept of data portability, which is similar to Article 20 of the EU GDPR. The ACCC took a similar approach in its Digital Platforms Inquiry Final Report, by including a number of recommendations that adopted privacy reforms similar to the EU GDPR. The ACCC had suggested it was not looking at wholesale adoption of the EU GDPR, but will look to more closely align with the EU GDPR.

In this regard, we highlighted the following issues with Government concerning the EU GDPR, which may be relevant to the CDR Inquiry:

- Some businesses may be subject to and compliant with the EU GDPR; if the privacy regime is changed to align with the EU GDPR, there may be an assumption that the regulatory burden would be minimal for businesses. But not all businesses, including smaller businesses, are subject to the EU GDPR and will likely see a greater regulatory burden and create a competitive disadvantage.

- For businesses compliant with the EU GDPR, there is a false economy if a recommendation varies from the EU GDPR. This was a particular issue that we identified in relation to the ACCC's proposal to introduce consent requirements, where the ACCC excluded a critical component from the EU GDPR.

- The EU GDPR operates in a very different legal framework than Australia's Privacy Act and relies on different administrative and enforcement structures. For these reasons, it cannot simply be implemented in Australia.

- Given the EU GDPR is relatively new, the Centre for Information Policy Leadership identified unresolved issues and challenges with the EU GDPR one year after it commenced operation,

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[15] Financial Times, "Britain's retail banking reform has fallen short" (Article, 16 January 2020).
[16] Fintech Futures, "PSD2 turns two: Where do we go from here?" (Article, 11 February 2020); Tink, "Inside the minds of Europe's bankers" (Article, June 2019); Tink, "What a missed PSD2 deadline says about the challenge of implementation" (Article, 21 March 2019).
[17] Corrs Chambers Westgarth, "Australia builds its open data economy: Consumer Data Right passes parliament" (Article, 14 August 2019).

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"where organisations feel the Regulation has not lived up to its objectives and has presented practical difficulties, despite their dedication to implementing the new requirements".[18] The International Association of Privacy Professionals also found more work is still required for companies to comply with the EU GDPR.[19]

- The potential impact of any EU GDPR type reforms to Australian businesses must also be carefully assessed. We should learn from the successes and failures of the EU GDPR and consider the real impact EU GDPR has had on individuals and businesses in Europe and elsewhere. We should not simply align to EU GDPR where the scope and potential impact of EU GDPR is unclear or untested, or where requirements are overly cumbersome with limited positive impact on privacy protection.

Ai Group recommendation: Before further consideration of extending the CDR regime to other sectors, international lessons should be properly taken into account.

4. Switching

Issues Paper: The Inquiry invites submissions on how the CDR could be used to overcome behavioural and regulatory barriers to safe, convenient and efficient switching between products and providers, whether those barriers are sector-specific or common across industries.

Generally, evidence and analysis should always be required prior to the implementation of regulatory reform. As the CDR is still in design phase, it is not clear whether evidence will be available to support the assumption that consumers will switch as a result of the CDR. This is an issue when seeking to roll out a regime across a range of sectors, especially concurrently.

The international experiences with the UK Open Banking and EU PSD2 demonstrate that their implementation has neither incentivised many consumers to switch nor incentivised many businesses to adapt to open banking. Given that the CDR has not yet commenced, it is yet to be seen whether Australia will face a similar problem.

As noted above, we have also cautioned against making improper assumptions regarding consumers' views and expectations. This was an issue that we identified during the ACCC's Digital Platforms Inquiry and may be applicable to the CDR Inquiry.

If it is the intention that the CDR would enable consumer switching, but there is no material evidence to support that consumers will switch as a result of the CDR, it would be inappropriate to create a new regulatory burden on businesses in other sectors. We would be especially concerned if the CDR were to be introduced to other sectors based on aspirations and assumptions (rather than evidence) that were of little interest for consumers while creating unnecessary regulatory costs for businesses to implement, with smaller businesses placed with a heavier regulatory burden.

Ai Group recommendation: Before deciding whether to proceed with the CDR for other sectors, further work will be required to properly assess whether the CDR will provide material consumer benefit such as switching.

[18] Centre for Information Policy Leadership, "GDPR One Year In: Practitioners Take Stock of the Benefits and Challenges" (White Paper, 31 May 2019).
[19] International Association of Privacy Professionals, "GDPR compliance: Hits and misses" (Article, 30 May 2019).

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5. Read access and write access

Issues Paper:

- *Read access: The Inquiry welcomes input from interested parties on these topics – including their benefits and costs – as well as any other 'read' access functionality that the Inquiry should consider.*
- *Write access: The Inquiry is interested in interested parties' views on these issues. In the context of Open Banking, the Inquiry is particularly interested in interested parties' views on how the CDR could best enable payment initiation.*

At this stage, as the CDR is yet to be extended to other sectors, it may be too early to comment in detail on the inclusion of read or write access being applied to other sectors. However, there may be diverse views between businesses as to whether the CDR should include – in particular – write access. Each sector may also have different needs that should be taken into consideration.

For instance, considering that frameworks for consent are a primary focus at the moment, it is difficult to ensure how opportunities for "write" access fit within consent models which are currently being reviewed and complied with. This requires additional detailed consideration.

In the case of the energy sector, we wish to bring to Treasury's attention that the ACCC has been grappling with risks related to consumer consents in retail electricity pricing – Treasury should be conscious of this in its Inquiry. The ACCC's Retail Electricity Pricing Inquiry made specific comments about third parties having the power to give consent to switch customers.[20] The ACCC noted that there are risks for consumers if third parties have the power to give consent on their behalf, and recommended that the National Energy Retail Law be amended to require third parties to obtain consent from the consumer.

Another issue for further consideration is where mandating write access could be particularly disruptive to businesses' current operations and also to any future process innovation businesses might undertake. For instance, allowing third parties to change customers' plans would require consideration of security and trust issues. If a business wanted to innovatively change the way they process orders, a question that arises is whether that would require a change to CDR Rules and standards, which may be an unworkable approach in practice.

Ai Group recommendation: Further detailed consideration will be required of read access and write access under the CDR regime before it can be considered in other sectors. Specific requirements for individual sectors will also need to be properly accounted for.

6. Linkages and interoperability with existing frameworks and infrastructure, and leveraging CDR infrastructure

Issues Paper:

- *The Inquiry welcomes input from interested parties on the above, including potential linkages and interoperability with other consumer-directed domestic and international data portability regimes, and accreditation frameworks that focus on data risk management.*

[20] ACCC, "Restoring electricity affordability and Australia's competitive advantage" (Retail Electricity Pricing Inquiry Final Report, June 2018), pp. 283-284.

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- *The Inquiry welcomes views on the above as well as any broader role that other aspects of the CDR regime could play in supporting productivity and data security in the digital economy.*

6.1 Leveraging existing industry standards and business practices

For a range of sectors, it will be important to have regard to existing industry standards and business practices that may be unique to each sector. There should also be: alignment with international standards and global international best practices (where possible); and proper consultation with a wide range of affected stakeholders.

For instance, we would like to bring to Treasury's attention of international forums such as ISO/IEC and NIST that have developed standards relevant to the operation of the CDR. These include:

- ISO 10000 family, including ISO 10001:2018 *Quality management – Customer satisfaction – Guidelines for codes of conduct for organizations*, and ISO 1002:2014 *Quality management – Customer satisfaction -- Guidelines for complaints handling in organisations*
- ISO 20488:2018 *Online consumer reviews — Principles and requirements for their collection, moderation and publication*
- ISO/IEC 27000 series of standards
- ISO/IEC 27701:2019 *Security techniques – Extension to ISO/IEC 27001 and ISO/IEC 27002 for privacy information management – Requirements and guidelines*
- ISO 31000:2018 *Risk management – Guidelines*
- ISO/IEC 38500:2015 *Information technology – Governance of IT for the organisation*
- NISTIR 8228 *Considerations for Managing Internet of Things (IoT) Cybersecurity and Privacy Risks* (Jun 2019)
- Draft NIST SP 800-53 Revision 5 *Security and Privacy Controls for Information Systems and Organizations* (Aug 2017)

6.1.1 General comment about standards

More broadly, standards are fundamental to promoting digitalisation because they can enable an ecosystem for technological innovation, competition, international trade and interoperability. Standards, when called up by regulation, offer a mechanism to quickly respond to changing markets. Australia's regulatory and standards framework needs to be sufficiently flexible to accommodate rapid changes in technologies that lead to new types of business models and competition, while also protecting consumers' interests.

Much global standards work seeks to address broad systems approaches to significant challenges, including privacy, data and cyber security. These challenges require a new level of coordination and effort, and development of new ways to exchange knowledge between the public and private sectors, academia, standards and conformity institutions.

It is vital that Australian industry and consumers have support and access to all international forums involved in standards development to ensure our national interests are preserved. This will allow for effective contribution to standards development at an ideal stage in which products and services are still under development. Australia is generally known to play a strong role in standards development. Accelerating technological change makes this role even more important to facilitate fast adoption of new technology and realisation of its benefits.

More generally, Australia should strive for a more judicious and effective mix of standards and regulation in lifting public safety, consumer confidence and business performance.

There is considerable potential for the more effective use of consensus-developed standards in addressing a range of economic and social opportunities and challenges. In some cases, standards can work alongside formal regulatory approaches (such as when standards are called up in regulatory instruments) and at other times as a lower-cost substitute for formal regulation.

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There has been a tendency for government to move away from the use of Australian standards. While international consistency and efficiency have clear value, international standards development processes may be unduly influenced by particular interests without adequate opportunities for Australian input reflecting domestic expertise, local conditions and needs. The Australian Government should continue to help fund Australian involvement in international standards development and it should ensure that an Australian filter is applied before the adoption of international standards in Australia.

There is also a disturbing inclination for Australian government agencies to forego the well-regarded model of the transparent, consensus approach to the development of standards in favour of rules and regulations developed by the agencies themselves (e.g. with respect to product energy efficiency). Government agencies typically do not have the technical expertise, the practical experience or the proficiency in effective and structured consultation with industry and others in the community. The result is often sub-standard, and Government should be more willing to back and expedite the use of the more transparent consensus driven standards development model.

6.2 Concurrent consultations and reviews

Government has a leadership role to set a vision for the nation, ensure that public policy is conducive to digital investment and competition that benefits industry and the community in the long term, and allay business and individuals' fears of "Digital Darwinism" by preparing the community to prosper in an increasingly technology-driven era.

Notwithstanding this, we have observed a growing trend of multiple concurrent consultations by different Government agencies, which appear to be addressing similar or overlapping issues, albeit with different objectives. While we appreciate diversity of perspectives, we are concerned about the potential for fragmented and conflicting regulation or legislation that could arise in absence of proper coordination between these multiple bodies. We therefore support a need for improved coordination between the various agencies around policy issues that arise from new and emerging technologies.

6.2.1 Digital Platforms Inquiry

We raised in our submission to the ACCC's Digital Platforms Inquiry about the need to take into account concurrent activities such as the CDR that is currently being implemented for certain sectors, as well as industry-specific regulations. Without proper consideration of these other interrelated regulations, there is a strong risk of regulatory fragmentation, which will ultimately impact businesses.

The CDR Inquiry and Digital Platforms Inquiry are part of a series of reforms (largely arising from the Productivity Commission's 2017 Data Availability and Use Final Report), directed at unlocking the economic and social benefits of data. However, we are also operating in a changing environment. The impact of the proposed reforms in these inquiries needs to be viewed in this context and holistically with other regulations and reforms under way.

In the case of the CDR, the Digital Platforms Inquiry Final Report attempted to rationalise the scope of the CDR, and its relationship to the ACCC's privacy recommendations, as follows:[21]

> *... this [Digital Platforms] Inquiry's recommendations are forward-looking proposals for the Government to generally update and strengthen the overarching Australian privacy regulatory framework. In contrast, the CDR operates within the existing legislative framework to deal with certain types of data and mechanisms for accessing that data in specific sectors of the economy. The CDR privacy protections should therefore be viewed as extra protections applicable only to CDR data, as defined for the purposes of the CDR legislative framework.*

We do not consider this statement providing sufficient comfort or certainty. Outstanding questions remain as to how the ACCC's privacy reform recommendations will fit with other multiple forms of regulation in this area. We do not consider that a case was made in the ACCC's Final Report on

[21] ACCC, Digital Platforms Inquiry (Final Report, 26 July 2019), p. 437.

whether the other existing regimes have been effective or ineffective. As discussed above, there are also growing concerns about how the CDR will interact with the current privacy regime. Making changes to the current privacy regime will likely create additional complexity and uncertainty.

The separation of CDR data from consumer data discussed in the ACCC's Final Report does not seem realistic. It seems like a highly complex approach to assume that future CDR reforms to strengthen privacy regulation will be a separate consideration to legislative amendments made to protect consumers while sharing their data with third parties. We suggest that case study explanations should be provided of how this is expected to function so stakeholders could provide appropriate feedback. Further, the ACCC should require evidence or anecdotal information to support the approach to separate CDR data from consumer data.

As noted above, the current Government focus with the CDR has been for the banking sector. However, there has been limited consideration of the broader impact on other sectors if the CDR were to operate economy wide. In particular, there has been no consideration for existing consumer rights in relation to access to data where such rights are not currently used, as is the case in the energy industry.

In this regard, we understand that the priority datasets for the energy sector under the CDR are already being consulted on, with the ACCC and AEMO as noted earlier. The ACCC will undertake consultation on the authorisation and authentication models for the sharing of energy consumer data. We suggest that there should be a case study explanation and examples of how consideration of these CDR models will specifically interact with the ACCC's recommendations.

6.2.2 Other reviews

In addition to the Digital Platforms Inquiry, we note that there are interrelated issues to the CDR Inquiry with other reviews and initiatives associated with privacy, data use, cyber security and online safety. These reviews include: 2020 Cyber Security Strategy (Department of Home Affairs); voluntary Code of Practice on securing Internet of Things (IoT) for customers (Department of Home Affairs); Online Safety Act (Department of Infrastructure, Transport, Regional Development and Communications); various Artificial Intelligence (AI) initiatives (Australian Human Rights Commission; Data61; Department of Industry, Science, Energy and Resources; Standards Australia); Prime Minister's Digital Technology Taskforce; and Smart Demand Response Capabilities for Selected Appliances (Equipment Energy Efficiency (E3)).

7. Consumer protection

> *Issues Paper: The Inquiry invites submissions from interested parties on how to ensure that, as the CDR develops, it does so in a manner that is ethical and fair, as well as inclusive of the needs and choices of all consumers. This includes ways to encourage socially beneficial uses for the CDR.*

Industry clearly has commercial interests in ensuring that their business and customers' transactions and data are protected. When these protections are implemented, it should govern the requirements in the design and implementation of security and privacy in products and services that meets appropriate cyber security and privacy requirements. It is worth noting that consumers are also currently afforded protections under the Australian Consumer Law and Privacy Act.

Further, consideration of ethics has recently been developed by the Department of Industry, Science, Energy and Resources (through Data61) as part of its AI Ethics Framework. The work in Standards Australia in developing an AI standards roadmap also includes considerations relevant to consumer protection. Given data forms a significant component of AI, a framework may have already been developed for the purposes of the CDR Inquiry.

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Ai Group recommendation: The CDR Inquiry should coordinate and align its work with the relevant bodies and agencies, interrelated and concurrent reviews, existing industry standards and businesses practices, international standards and global international best practices.

If you would like clarification about this submission, please do not hesitate to contact me or our Digital Capability and Policy Lead Charles Hoang (02 9466 5462, charles.hoang@aigroup.com.au).

Yours sincerely,

Peter Burn
Head of Influence and Policy