Submission

to the

Australian Consumer and Competition Commission (ACCC)

on the

Consumer Data Right Rules Framework

and the

Department of the Treasury

on the

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

12 October 2018

Joint submission by:
Communications Alliance
Australian Information Industry Association (AIIA)

TABLE OF CONTENTS

ASSOCIATIONS

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, equipment vendors, IT companies, consultants and business groups.

Its vision is to provide a unified voice for the telecommunications industry and to lead it into the next generation of converging networks, technologies and services. The prime mission of Communications Alliance is to promote the growth of the Australian communications industry and the protection of consumer interests by fostering the highest standards of business ethics and behaviour through Industry self-governance.

For more details about Communications Alliance visit http://www.commsalliance.com.au.

The **Australian Information Industry Association (AIIA)** is Australia's peak representative body and advocacy group for those in the digital ecosystem. AIIA is a not-for-profit organisation that has, since 1978, pursued activities to stimulate and grow the digital ecosystem, to create a favourable business environment and drive Australia's social and economic prosperity.

AIIA's members range from start-ups and the incubators that house them, to small and medium-sized businesses including many 'scale-ups', and large Australian and global organisations. While AIIA's members represent around two-thirds of the technology revenues in Australia, more than 90% of our members are SMEs.

For more details about AIIA visit https://www.aiia.com.au.

1. Introduction

Communications Alliance and the Australian Information Industry Association (AIIA) (Associations) welcome the opportunity to provide a submission to the Australian Consumer and Competition Commission (ACCC) on the *Consumer Data Right Rules Framework* (Rules Framework) and to the Department of the Treasury (Treasury) on the revised Exposure Draft and provisions for further consultation of the *Treasury Laws Amendment (Consumer Data Right) Bill 2018*.

Our industry recognises the rights of consumers to be informed and have appropriate access to their data and product data to make informed decisions regarding the purchase of products and service and to move between providers.

The telecommunications industry already provides very large amounts of data to consumers on their bills and through other mechanisms under law and co-regulatory instruments such as the *Telecommunications Consumer Protections Code*.

While we express our in-principle support for the recommendations put forward in the Productivity Commission's Report on *Data Availability and Use* (PC Report), this submission, which builds on our previous submission (dated 7 September 2018) and the Roundtable briefings recently convened by the ACCC, highlights a number of concerns with the proposed draft legislation and Rules Framework. Those relate to:

- the short timeframe for the development of the legislation and the Rules Framework and the resultant risk of adopting a sub-optimal approach for the sectors that are to follow the Open Banking regime;
- the application of a CDR regime to the telecommunications sector and the need to carefully evaluate costs and benefits on a per sector basis including an analysis of alternative approaches that could facilitate the achievement of the declared objectives of a CDR regime;
- pre-conditions, processes and criteria for a designation of a sector to ensure that a sector-specific analysis be undertaken, within a consultative framework and on the basis of adequate information;
- the proposed inclusion of derived and value-added data which threatens to significantly deter investment into data analytics, thereby risking running against the declared objective of fostering innovation;
- a complex dual privacy regime which will be very difficult to implement and is likely to be confusing for consumers and businesses;
- the implications of the extension of personal information to data that relates to an individual, including in the context of metadata and the proposed informed consent provisions; and
- the extended definition of a CDR consumer.

2. Concerns and Suggestions for Further Consideration

2.1 Timeframe for the Development of Legislation and Rules Framework

Government plans to implement the first stage of the Open Banking Consumer Data Right (CDR) by July 2019. This timeframe in turn dictates the timeframes for consultation, the legislative, rule-making and standards-development processes, all of which are, as a consequence, rushed.

It is important to develop a CDR regime that is capable of actually delivering the consumer benefits (where analysis has determined that such benefit would occur) that are the declared objective of the CDR. Given the far-reaching implications of a CDR regime, including on individuals' privacy, and the potentially high implementation and ongoing costs associated with it, it is not clear why such a short implementation timeframe has been chosen or would be justified.

In this context, it is particularly concerning that, as stated in the relevant Explanatory Materials (EM), the legislation and the Rules Framework are being developed with a banking focus although the legislation and Framework will apply to all sectors of the economy. If the process to develop an Open Banking regime (as the first sector to adopt the CDR) is already rushed and raises a large number of concerns with stakeholders, as evidenced in numerous submissions, it appears almost impossible to ensure that the legislation and associated rules are appropriately considered for other sectors of the economy which follow later in the process.

This bears the very real risk that those later sectors are being forced to operate within a legislative and regulatory framework that has a distinct 'banking flavour' but lacks sufficient consideration of the particularities of the respective sector.

The validity of our concerns is evidenced by the fact that much of the Rules Framework cites the recommendations of the Open Banking Report without any apparent consideration of the recommendations made (and accepted by Government) in the PC Report. For example, the EM of the revised Exposure Draft states that "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"[1], thereby clearly demonstrating a bias towards provisions that are deemed suitable in an Open Banking context although those provisions have expressly been rejected by the economy-wide oriented PC Report.

This focus on Open Banking at this stage is only acceptable if the designation, rule-making and standards-development include requirements (rather than options) for transparent and genuine sector consultation, are guided by an evidence-based and transparent cost-benefit analysis and include a clear set of criteria that must be met for designation to occur or rules to be made. Under no circumstances ought the draft legislation to mandate aspects of the CDR that carry a 'banking bias' but have not been tested as being suitable for other sectors. We will elaborate on these matters further below.

In this context we also note that the material presented throughout the consultation process uses the Open Banking regime in the United Kingdom as a reference point and benchmark. However, we highlight that this regime only commenced in January 2018 and very little, or almost nothing, is known with regard to its effectiveness or economic impact.

We agree that it is infeasible to introduce a CDR regime for all sectors simultaneously and a staged approach appears sensible. It is also plausible to develop a CDR regime with an overarching legislation and associated regulation. Given these constraints (staged approached, overarching legislation) and the complexity involved in the development of a CDR regime, we request that the implementation of the first phase of the Open Banking

[1] p.4, Proposal 1, *Treasury Law Amendment (Consumer Data Right) Bill 2018 Provisions for further consultation*

regime be delayed by at least 12 months[2] to ensure that the overall framework equally suits all sectors of the economy.

2.2 Application of the CDR to the Telecommunications Sector

The declared objectives of the CDR regime can be summarised as:

- To "give customers more control over their information leading, for example, to more choice in where they take their business, or more convenience in managing their money and services"[3];
- A reduction of barriers from shifting between providers and "better tailoring of services to customers and greater mobility of customers as they find products more suited to their needs"[4]; and
- Fostering innovation and business opportunities as "new ways of using the data are discovered"[5] as the result of consumers having access and being able to share their data.

The telecommunications industry already has a number of mechanisms for consumers to have access to a large range of data that relates to them. For example, under the *Telecommunications Consumer Protections Code* (TCP Code), which is enforceable by the Australian Communications and Media Authority (ACMA), Carriage Service Providers (CSPs) must provide their customers with detailed billing data and itemised charges in a form that customers can read, understand, store and reproduce for up to six years.

The TCP Code and the *Telecommunications (NBN Consumer Information) Industry Standard 2018* both contain provisions that require CSPs to provide their customers with relatively standardised product information prior to sale.

Most providers also offer month-to-month plans, thereby minimising transaction costs when moving to another provider.

Most importantly, the enforceable *Mobile Number Portability Code* (and *Local Number Portability Code*) require CSPs to facilitate the porting of consumers' phone numbers, where technically possible. This allows consumers to move between providers with minimal effort, delay and transaction costs. This contrasts the banking industry where a transfer of account numbers from one bank to another is not possible, thereby creating significant barriers to moving between banking institutions.

Consequently, the Associations contend that, to a large degree, the CDR objectives are likely to be achieved, or are already being achieved, by existing Industry practice and legislative and regulatory obligations. It is recommended that any process to translate the Open Banking and general CDR regime into an 'Open Telecoms' regime commence with an analysis of already existing data access and sharing mechanisms in order to identify any potential gaps that may need closing to fully achieve the declared objectives of the CDR regime.

Where there are such gaps, it is imperative that the CDR regime is sufficiently focused on the achievement of the declared objectives rather than the specific means of achieving those.

For example, consumers already hold a vast amount of data that relates to them and their usage of telecommunications services on their smart phones – note that Australia has one of the highest smart phone penetrations in the world. This data often goes well beyond the data that their CSP holds as it includes data from over-the-top applications, such as WhatsApp and Viber. It is well conceivable that access to the data types envisaged for access and sharing by the CDR regime could be facilitated through an app on the

[2] At the very least, the legislation ought to be reviewed after 12 months and prior to designating any further sectors.
[3] p.3, para 1.1, First Exposure Draft Explanatory Materials, *Treasury Law Amendment (Consumer Data Right) Bill 2018*
[4] p.3, para 1.3, First Exposure Draft Explanatory Materials, *Treasury Law Amendment (Consumer Data Right) Bill 2018*
[5] p.3, para 1.4, First Exposure Draft Explanatory Materials, *Treasury Law Amendment (Consumer Data Right) Bill 2018*

consumer's phone rather than a transfer solution via a (costly) application programming interface (API).

Overall it can be said, that the telecommunications sector is very competitive and, as highlighted above, already provides easy access to a range of types of data. In that context, the benefits of applying the CDR regime to the sector will lean more towards building trust in the sharing and use of data by public and private enterprises to enable the creation of new products and services, productivity improvements, and new and more efficient ways for customers to interact with suppliers.

2.3 Pre-Conditions to Designation

From the above it follows that for each sector of the economy a careful and transparent assessment should be required as to whether a particular implementation of the CDR for that sector would significantly enhance consumer welfare and whether that increase in welfare outweighs any attendant costs of effecting such improvements in welfare.

In each sector this assessment must include an investigation of different and possible unique characteristics of competition within that sector, the identification and analysis of any existing data access and portability mechanisms already in place within that sector, and empirical evidence as to whether then current information asymmetries with regards to holdings of particular data sets within that sector actually and measurably reduce consumer welfare.

Against this background, we note that the proposed regime does not include appropriate processes and safeguards that would be comparable to those developed over many years and many Inquires in relation to the creation of other access regimes to essential facilities of national significance. The designation of a CDR for a sector could have an even more profound impact by reshaping the competition in a sector of the Australian economy than the creation of an access regime under Part IIA of the *Competition and Consumer Act 2010* (CCA).

The high-level factors listed in Clause 56AD of the CDR revised exposure draft ought to be redrafted to ensure that, before any CDR designation is made, there is appropriate consideration and examination of:

- the economic reasoning and empirical evidence for making the designation in the form of a cost-benefit analysis to demonstrate that the quantified benefits (to consumers and other users of the scheme) outweigh the quantified costs (to entities required to participate in the scheme). The requirement to consider the "likely regulatory impact" is very broad and could potentially be satisfied with minimal consideration or analysis. We recognise that Treasury proposes to include clarification into the Explanatory Memorandum that accompanies the CDR Bill that such consideration constitutes a requirement to undertake a Regulatory Impact Statement (RIS).[6] However, it would be more appropriate to include this requirement into the legislation itself, including a requirement to publish this (long-form) RIS rather than merely an overview of the findings of the RIS.
- the class of data holders and scope of data to be subject to that designation (and including the appropriate delineation of derived data and value-added data);
- identification and analysis of any existing data access and portability mechanisms within the sector;
- identification of alternative means of facilitating the desired data access and sharing;
- at least in outline, the proposed consumer data rules and proposed data standards to apply to the particular designated sector (if designated); and
- a statement and analysis of the counter-factual – what is likely to be the outcome in the relevant industry sector if the proposed designation is not made.

[6] p.8, Proposal 4, *Treasury Law Amendment (Consumer Data Right) Bill 2018 Provisions for further consultation*

We submit that if the counter-factual cannot be fully articulated by the regulator with confidence and if the counter-factual would be reasonably likely be the outcome without a particular designation (as then articulated), it is not appropriate to make a designation.

2.4 Outline of Proposed Rules as Part of the Designation Process

The Associations are concerned with the designation process and the lack of information that is available at the time a designation is being made.

It is not appropriate for a designation to be made for a sector, which has not already been the subject of a detailed and transparent consultation process, when the proposed consumer data rules and proposed data standards are unknown: a designation cannot be properly evaluated for economic and social impact without knowing (at least in outline) the scope of consumer data rules and data standards to apply to the designated data sets.

The first EM states:

> "The consumer data rule making powers provide substantial scope for the ACCC to make rules about the CDR. This is because it is important to be able to tailor the consumer data rules to sectors and this design feature acknowledges that rules may differ between sectors. Variance between sectors will depend on the niche attributes of the sector and consumer data rules will be developed with sectoral differences in mind in order to ensure existing organisational arrangements, technological capabilities and infrastructure are able to be leveraged and harnessed as appropriate. Regulatory burden will also be managed via this process."[7]
>
> and
>
> "As noted above, it is important that the ACCC be able to make rules that can be tailored to vastly different sectors. While in the initial roll out it is expected that the banking, telecommunications and aspects of the energy sector will become designated and subject to the CDR, in the future it is possible that insurance information or retail loyalty cards, and the value-added data relating to those cards, may be subject to the CDR system."[8]

Industry contends that such "tailoring" is not a matter of detail as to how to implement a designation of well-known and defined data holders and data sets, but rather goes to the heart of whether and if so, how, a particular sector may be designated and which data holders and which data sets form part of it. Consequently, it is of utmost importance that the consideration of such matters forms part of the designation process and are not left to the rule-making that succeeds the designation.

Against this background, Industry supports the proposal that a consultation be undertaken on the draft rules and designation of a sector prior to the designation of that sector.[9] We note that the consultation period ought to be 60 days instead of the suggested 28 days.

2.5 High-Level Factors for Designation of a Sector

The high-level factors listed in Clause 56AD might be better articulated as an examination of whether a proposed designation is likely to significantly increase consumer welfare (when compared to the counter-factual of absence of a designation but noting that the absence of a designation is not equal to the absence of any measures that may achieve the desired objectives of the CDR)

by:

[7] p.19, para 1.82, First Exposure Draft Explanatory Materials, *Treasury Law Amendment (Consumer Data Right) Bill 2018*
[8] ibid
[9] p.8, Proposal 4, *Treasury Law Amendment (Consumer Data Right) Bill 2018 Provisions for further consultation*

(1) facilitating comparison and switching between prospective providers of substitutable products and services by a significant number of customers; and

(2) promoting supply-side price and non-price competition between prospective providers of substitutable products and services;

without

(3) creating significant negative externalities such as:

a) loss of consumer trust in the data ecosystem, through creation of perceived or real privacy or security vulnerabilities or loss of customer control of data about them;
b) imposition of substantial and unjustified compliance costs on providers;
c) distorting fair competitive differentiation of product and service offerings by providers within a sector;
d) hampering investment and innovation into data analytics and associated forms of data manipulation and extrapolation;
e) impeding entry or expansion of providers within a sector; and/or
f) disadvantaging Australian providers to be subject to the CDR against offshore providers, new entrants or unconventional competitors such as product packagers.

In this context, we support the Proposal 4 contained in the *Treasury Law Amendment (Consumer Data Right) Bill 2018 Provisions for further consultation* to provide legislative assurance that the ACCC consult on draft rules (we suggest 60 days instead of 28 days) and that the ACCC advice regarding the designation of a sector to the Minister be published for 60 days prior to the Minister making a designation.

However, there is no legislated assurance that the ACCC will publish a draft report for stakeholder consultation and comment. The ACCC ought to be obliged to publish a draft report and to allow a reasonable period for public comment before finalising the its report and submitting it to the Minister.

The steps in the consultation process ought to include:

- an appropriately wide and transparent consultation that is specifically designated as canvassing the views on the designation of a sector for the purposes of the CDR conducted by the ACCC;
- publication of a draft report that expressly addresses the amended factors listed in Clause 56AD as described above;
- the ACCC requesting and considering further submissions and, after consideration of the feedback received through this consultative process, publishing a final report at the same time as it is provided to the Minister; and
- a minimum period of 60 days elapses before the Minister makes any designation.

It also appears that there is no express obligation upon the Minister to publish supporting reasons for designating a sector before making the instrument. While we acknowledge the instrument designating a sector is a disallowable instrument[3], the draft Bill should be amended to include a requirement that the Minister publish supporting reasons with sufficient period for comment prior to the instrument being tabled in Parliament. Supporting reasons should include details (not only an overview) of the cost benefit analysis demonstrating the increase in overall welfare.

2.6 Derived and value-added data

We acknowledge that the revised exposure draft of the CDR Bill limits access to derived data, or data that is derived from such derived data, to data specified in the designation instrument. We assume that the concept of derived data still includes value-added data which is derived from CDR data.[10]

[10] p.13, para 1.50, First Exposure Draft Explanatory Materials, *Treasury Law Amendment (Consumer Data Right) Bill 2018*

While this limitation is certainly preferable to the wide discretion left to the ACCC to include such data in the CDR rules that was proposed in the first Exposure Draft, we still strongly object to the fact that such data can be included in the CDR regime at all.

The Associations do not agree with such a wide definition of CDR data on the basis that it would be detrimental to Industry, innovation and, consequently, also to consumers. Derived and value-added data is likely to be proprietary information of the data holder and any other party seeking access to such derived data should invest themselves to acquire the information.[11] The revised CDR Bill would likely have a large detrimental impact on the data analytics industry and the development and use of data analytics by other industries (such as communications). Where organisations investing resources into data analytics are prevented from making a commercial return on that investment, the investment is unlikely to occur. We note that it would be contrary to the stated objectives of the regime if the CDR regime decreased innovation and decreased data use.

The proposed definition is also inconsistent with the PC Report recommendations; and in parts directly contradicts Recommendation 5.2 of the PC Report. Recommendation 5.2, which was accepted by Government, specifically states that:

> "Data that is solely imputed by a data holder to be about a consumer may only be included with industry-negotiated agreement. Data that is collected for security purposes or is subject to intellectual property rights would be excluded from consumer data."[12]
>
> "Data that is not able to be re-identified to a consumer in the normal course of business within a data holder should not be considered consumer data."[13]

We note that neither the original EM nor the revised EM contain any explanation, let alone cost-benefit analysis, as to why an extended application of the CDR beyond the recommendations of the PC Report has been proposed or would be beneficial.

Consequently, we request that the definition of CDR data should also explicitly state that data that is imputed, derived or value-added data not be considered CDR data and cannot be part of the data specified in the designation. Further, data that is not able to be re-identified to a consumer in the normal course of business within a data holder should not be considered CDR data.

As it currently stands, the most radical regulatory intervention globally to create a consumer right to data portability is Article 20 of the European Union (EU) *General Data Protection Regulation*, as interpreted in the *Guidelines on the right to data portability* (16/EN WP 242 rev.01 dated 5 April 2017) as adopted by the former Article 29 Data Protection Working Party and now taken up by the replacement EU data regulator.

This right specifically excludes inferred data or derived data as created by a service provider, but potentially includes cleansed data and customer-specific aggregations and representations of transactional, customer-volunteered or customer-provided, and provider-observed data. As these regulations were only implemented in May 2018, we have not had sufficient time to determine the impact of this right on consumers in Europe and whether in fact it is leading to an increase in consumer welfare.

It appears that the authors of the legislation and Framework seek to retain maximum flexibility on the basis of the inherent complexity ('too hard basket'), but by no means impossibility, to delineate between data that is merely a representation of data about a person versus derived and value-added data. Similarly, it is also not appropriate to retain this degree of flexibility on the ground that it 'may come in handy' at a later time. Organisations require certainty for their investment decisions and the mere possibility that a designation

[11] p.17 Productivity Commission *Data Availability and Use*, Final Report
[12] Recommendation 5.2, Productivity Commission *Data Availability and Use*, Final Report
[13] ibid.

may contain derived and value-added data is likely to be sufficient to have significant chilling effects on the data analytics industry.

2.7 Complex Dual Privacy Regime

We note that Proposal 2 of the *Treasury Laws Amendment (Consumer Data Right) Bill 2018: Provisions for further consultation* and the respective provisions in the revised Exposure Draft of the CDR Bill seek to create a less confusing privacy regime and to remove some of the complexity created by 'overlapping' privacy regimes, i.e. the Australian Privacy Principles (APPs) and the CDR Privacy Safeguards.

While this approach does go some way to resolving the 'overlapping' problem, it still fails to address the fundamental problem which is that the same data (say a transaction) can move in and out of the CDR regime over time. This occurs because the CDR participant can change from being a data recipient to being a data holder in respect of a single CDR consumer, or worse still, simultaneously be both a data recipient and a data holder in respect of the same CDR consumer despite the revised Exposure Draft's attempt to segregate the privacy regimes so only one applies at any one time.

The problem is compounded by the ACCC's ability to create rules in relation to the Privacy Safeguards (but of course not in relation to the APPs). Consider, for example, Privacy Safeguard 2: section 56EE of the revised Exposure Draft stipulates that data recipients must allow consumers to use a pseudonym whereas the ACCC's draft CDR rules for the banking sector exclude this option.[14] Alternatively, consider data deletion for which the ACCC is contemplating a rule that would allow CDR consumers to request (and data recipients and data holders to comply with that request) CDR data be deleted as a part of Privacy Safeguard 11[15], which is one of the four Principles that applies to both data holders and data recipients.

While the Associations appreciate the intention of clarifying and, to a certain extent actually simplifying, the applicable privacy obligations, we are of the opinion that the envisaged dual regime will still be very difficult to implement and is likely to be confusing for consumers and businesses.

2.8 Personal Information in the Context of Metadata and Consent

Both Exposure Drafts propose an extension of the definition of personal information from information <u>about</u> an individual to include personal information that <u>relates to</u> an individual. However, the intended effect of this extension has not been sufficiently articulated. For example, would a communication by a third party that describes another individual be enough to justify disclosure to that individual? How would the operator of a communications platform for example identify such a communication in seeking to respond to a CDR request? How would this apply to public figures who are regularly the topic of conversation and communication?

Significant issues also arise in relation to the proposed consent provisions as a consequence of the extended definition of personal data to data relating to an individual, thereby potentially allowing for the inclusion of metadata into the regime.

In the Rules Framework, the ACCC appears to still consider whether metadata ought to be included in the rules for the banking sector.[16] However, the EM to the revised Exposure Draft clearly notes that "CDR data is data that 'relates' to a CDR consumer. The concept of 'relates to' is a broader concept than information 'about' an identifiable or reasonably

[14] p.53, ACCC, Consumer Data Right Rules Framework
[15] p.56, ACCC, Consumer Data Right Rules Framework
[16] p.20, ACCC, Consumer Data Right Rules Framework

identifiable person under the Privacy Act. The term 'relates' has a broader meaning than 'about' and is intended to capture, for example meta-data".[17]

Telecommunications metadata, which is currently subject to strict use and disclosure rules under the *Telecommunications Act 1997* and the *Telecommunications (Interception and Access) Act 1979*, has the potential to reveal a substantial amount of information that relates to an individual. Such information not only relates to the CDR consumer who requests the disclosure and transfer of the information following informed consent rules but may also include information relating to another individual (for example a telephone number that was called by the CDR consumer) who has not necessarily given consent to the access of such information that relates to him/her.

In this context we note that in 2017, Government conducted a review to consider whether data retained solely for the purposes of the data retention scheme (metadata) should be available for use in the civil justice system, and if so, in what circumstances. The review concluded that civil litigants ought not be allowed to access the data. In reaching this conclusion, Government considered evidence, amongst other issues, on the privacy of communications and the regulatory burden on the telecommunications industry in providing this data. It has not been articulated why the CDR regime ought to override those privacy considerations. As previously noted, a detailed cost-benefit analysis would also be required to justify the significant attendant costs of making this data available. Consequently, we request that the legislation itself clarify that (communications) metadata be excluded from the CDR regime. This could be done by using the more limited definition of personal data, i.e. personal data being confined to data about an individual.

In summary, the proposed extension would introduce unnecessary confusion with regards to the application of now judicially considered and reasonably understood principles as to what constitutes personal information about an individual and, accordingly, when personal information can be considered deidentified. In the absence of a clear and convincing explanation of the benefits of this extension, the CDR Bill should not include this extension of personal information.

2.9 Definition of CDR consumer

The revised CDR Bill proposes to apply the CDR to consumers, small and medium enterprises (SMEs), and large enterprises. The PC Report, however, recommended (and Government accepted) a definition of consumer that did not extend to large enterprises. In fact, the PC Report specifically recommended against such a proposal and highlighted that the limitation to SMEs is intentional:

> "A consumer for the purposes of consumer data should include a natural person and an ABN holder with a turnover of less than $3m pa in the most recent financial year".[18]
>
> "The scope of businesses able to exercise rights as consumers under the Comprehensive Right would be considerably narrower than the scope of 'consumers' under Australian consumer law. *This is intentional*."[19] [emphasis added]

Unfortunately, the EM does not contain any explanation or cost-benefit analysis that would shed light on the reasons for this deviation from the PC Report's recommendation.

While we recognise that specific sector rules may serve to limit the scope of the definition of CDR consumer, we disagree with the flexibility that the underlying legislation allows with regards to this definition. In the absence of convincing arguments for this extended definition of a CDR consumer in the legislation, Industry does not support the inclusion of large business in the definition of a CDR consumer.

[17] p.10, para 1.56, Explanatory Materials, *Treasury Law Amendment (Consumer Data Right) Bill 2018 Provisions for further consultation*
[18] Recommendation 5.2, Productivity Commission *Data Availability and Use*, Final Report
[19] ibid

2.10 Charges for CDR Data

Proposal 5 of the EM for the revised Exposure Draft proposes that the designation instrument for data sets identify whether a data set is free of charge or the data holder can impose charges, along with a power for the ACCC to set a reasonable price should it find the prices charged by a data holder to be unreasonable.[20]

The Associations agree that it would be preferable to include such charging principles into the designation instrument rather than leaving those to the ACCC's discretion provided that the consultation processes and the criteria that have to considered by the Minister when making a designation are amended as suggested in this submission.

Industry also contends that, as a general principle, a 'zero-fee approach' is likely to be economically inefficient and ought not be adopted unless compelling reasons have been presented on a sector-specific basis. Instead, we suggest that an approach similar to the one taken for requests under Freedom of Information legislation could be used as a benchmark for charges for data under the CDR regime.

2.11 Other issues

The Associations also suggest some more specific improvements to the CDR Bill as currently drafted.

We note in this regard that we do not consider that addressing any of these matters ought to be delegated to the EM as each of the suggested changes are fundamental to ensuring transparent and consistent legislation and regulation.

Reciprocity:

We agree that the matter is highly complex and potentially poorly understood as some of the commentary to the first Consultation Draft already suggested. We have noted Proposal 3 contained in the document *Treasury Law Amendment (Consumer Data Right) Bill 2018* Provisions for further consultation but feel that we cannot provide adequate feedback in the allocated timeframe.

Consumer data rules and data standards:

An outline of the proposed consumer data rules and proposed data standards intended to apply to the particular designated sector should also be contained the ACCC's published report that is required prior to designation and published for consultation as outlined above.

All proposed consumer data rules and data standards must be subject to a requirement of extensive public publication including consultation on an exposure draft of the sector rules and standards.

Extraterritorial reach:

The CDR framework seeks to apply to data collected outside of Australia by or on behalf of an Australian citizen. How does the Government envisage the accreditation application process working for organisations established outside of Australia?

Implementation impact for smaller service providers:

The Associations are concerned that the cost of complying with the CDR regime may represent a larger burden (as a proportion of company size) for smaller service providers. This risks driving smaller players out of the market and acts as a disincentive for new small service providers entering the market, thereby reducing choice for consumers, which is likely to be more harmful for rural and remote areas where many smaller providers are competing very effectively.

[20] .9, Proposal 5, *Treasury Law Amendment (Consumer Data Right) Bill 2018 Provisions for further consultation*

It is important to bear these considerations in mind when developing rules on the ability of data holders to set fees for the data that they provide.

3. Conclusion

The Associations look forward to continued engagement with Government, the ACCC and other relevant stakeholders on the mutual objective to ensure consumers are informed and have appropriate access to their data and product data to make informed decisions regarding the purchase of products and service and are enabled to move between providers.

As highlighted in our submission, the Associations believe that the revised Exposure Draft of the CDR Bill and the Rules Framework require further consultation and work to ensure that the legislation and Framework are fit for purpose for *all* sectors, enshrine adequate consultative mechanisms and impact assessments for future sector designations and do not diminish Industry's incentives to invest into the creation of derived and value-added data to the detriment of Industry and consumers.

We urge Government and the ACCC not to rush the development of the CDR Regime in the pursuit of deadlines and to further engage with all relevant stakeholders.

For any questions relating to this submission please contact Christiane Gillespie-Jones on 02 9959 9118 or at c.gillespiejones@commsalliance.com.au.