

Consumer Data Right in the telecommunications sector – CDR rules and standards design paper Public Version

Commpete welcomes and appreciates the time the Department of the Treasury (**Treasury**) is taking to consult with stakeholders in relation to implementation of the Consumer Data Right (**CDR**) regime in the telecommunications sector. Commpete is grateful for this opportunity, and is pleased to provide its submission in response to the Treasury's CDR rules and standards design paper (**Paper**) below.

1. Introduction to Commpete

- 1.1 Commpete is an alliance representing some of Australia's non-dominant telecommunications service providers. Our members build, operate and provide, 4G, 5G, fixed wireless networks, retailing and wholesale fibre and mobile voice and data services across a range of customer segments, including residential / consumers, SME, corporate, and government, in our cities as well as rural, regional and remote regions across Australia.
- 1.2 Our members' operations span a variety of business models, with some acquiring access services from a range of wholesale suppliers and maintaining fixed line carrier interconnection arrangements in place with the major carriers, and some building their own mobile and fixed network infrastructure.
- 1.3 Dating back to early 2000's, our predecessor organisation, the Competitive Carriers Coalition, strongly advocated for a wholesale only, open access national broadband network to resolve structural issues that were impeding competition in Australia.
- 1.4 For over 20 years, Commpete and its members have advocated for telecommunications regulatory policy and legislative reforms that have increased competition and encouraged both challenger and incumbent telecommunication service providers to deliver more to their customers, including in regional Australia.
- 1.5 Today, Commpete remains firmly supportive of policy that supports a pro-competitive industry structure.
- 1.6 Commpete has been fortunate to have been part of the CDR journey in the telecommunications sector from early days and has enthusiastically taken part in the stakeholder consultation process run by the government. Commpete is certain that, if time is taken to properly consider relevant requirements for the CDR rules and data standards (including continued consultations with industry), this initiative will drive competition in the sector, leading to innovation in the industry and substantial benefit to

consumers.

- 1.7 We are pleased to see that since the sector was designated at the end of January 2022, the Treasury has been actively engaging with stakeholders to discuss how the CDR regime should apply to the sector. Commpete strongly encourages the Treasury to continue to engage with stakeholders as details for implementation of the CDR in the telecommunications sector continue to develop. The sector is incredibly complex (with a diverse range of providers potentially being captured by the regime), and therefore ongoing and consistent stakeholder consultation will be critical to ensuring the objectives of the CDR regime are met (especially in respect of fostering innovation and competition in the sector).
- 1.8 In our view, the success of the implementation of the CDR regime in our sector should be measured by the extent to which it supports the ability of all telecommunications market participants to deliver **value, flexibility and choice** for consumers and businesses (which is driven by increased competition in the market which will allow for innovation and bring about change).

2. Executive Summary

- 2.1 Commpete's members see great opportunities for the CDR regime in the telecommunications sector to deliver better choice to CDR consumers through facilitating consumer choice between a range of competitive providers.
- 2.2 Commpete considers that the key priority areas for Treasury to consider in respect of the design of the CDR rules and standards for the telecommunications sector are:
 - 2.2.1 fostering and prioritising genuine competition in the telecommunications sector through the CDR regime, which will lead to consumers being afforded more innovative solutions, greater choice and flexibility, and most importantly, greater value;
 - 2.2.2 adopting a de minimis approach, determining the relevant threshold through further consultation with industry to ensure that an appropriate measure is implemented for such a threshold that does not inhibit the ability of smaller providers to compete in the market;
 - 2.2.3 excluding enterprise products and enterprise customers from the CDR regime, and instead focusing on individual or consumer customers who are much more likely to benefit from participation in the regime;
 - 2.2.4 adopting a definition of "eligible CDR consumer" that aligns with the definition of "Consumer" under the *Telecommunications Consumer Protections Code (Industry Code C628:2019)*;
 - 2.2.5 excluding metadata from the regime and instead focusing on datasets that will assist consumers with identifying value for money;
 - 2.2.6 further consulting on white labelled products to ensure that the scheme

adequately deals with the complexity of such arrangements in the sector and does not create unintended anomalies;

2.2.7 adopting a staged implementation of the CDR regime in the sector (similar to the approach adopted in the banking sector), meaning in the first instance obligations to share CDR data will fall on the dominant 3 providers (who hold 91% market share in the mobile market and hold 85% of the data that would be covered under the CDR regime).

3. Driving competition in the telecommunications sector through the CDR regime

3.1 Under Part IVD of the *Competition and Consumer Act 2010* (Cth):

3.1.1 a key objective of the CDR regime is to create more choice and competition by giving consumers greater control over and access to information (including their information, and information about products or services); and

3.1.2 before designating the telecommunications to the CDR regime, the Minister needed to consider, amongst other things, the likely effect of making the designation instrument on promoting competition.

3.2 It is therefore paramount that the CDR rules and standards for CDR in the telecommunications sector be designed in such a way that promotes genuine competition in the market, which will then further innovation and productivity in the sector (leading to significant benefits for consumers).

3.3 Prior to designating the sector, the Treasury held consultation roundtables to facilitate discussion about whether or not to designate the telecommunications sector to the CDR regime. During these consultations, there was significant discussion by both the larger and smaller providers that implementation of the CDR regime in the telecommunications sector would significantly and disproportionately impact on smaller providers (especially given the high cost burden of compliance and limited resources of such small providers).

3.4 Commpete is of the view that this concern still remains critically important. Unless this power imbalance of the smaller providers against the bigger providers is addressed appropriately in the design of the CDR rules and standards, implementation of the regime in the sector could have a material adverse impact on smaller providers. This will mean that not only will the CDR regime fail to create more competition in the market (as is its objective), but the negative impact on smaller providers' abilities to compete in the market, where the balance is already tipped in favour of larger players, will actually reduce competition.

3.5 Commpete is still deeply concerned about the lack of effective competition in the telecommunications sector. Telecommunications has never been more important in the everyday lives of consumers. The use of telecommunications dominates our personal and business life in a way which could barely have been imagined even 15 years ago. The existence of a dynamic and competitive market for telecommunications services is therefore absolutely critical.

- 3.6 With the development of new technologies such as 5G and Government initiatives such as the CDR regime (which is designed to foster competition), there are unparalleled opportunities to drive innovation and diversity in the mobile sector. The current environment, in which, the main telecommunications providers face limited competitive challenges, will not drive innovation and enhanced competition. There is increased potential for smaller providers to take an active role in driving innovation in the sector, which will lead to better outcomes for consumers.
- 3.7 Sadly competition in the sector has failed to develop at a comparable pace to the technological developments in the industry – for example, mobile competition in Australia is in a similar position to that which prevailed 25 years ago when the current regulatory arrangements were first implemented. Three telecommunications providers continue to dominate the mobile market (or rather two providers with limited competition from the third) with very little ability for others to challenge their position.
- 3.8 The market share of smaller providers has failed to grow significantly over that period and in fact has recently fallen in recent years from approximately 14% to about 9%, as Telstra and Optus have acquired smaller providers, reducing competitive pressures in the market. This has resulted in the **big providers (being Telstra, Optus and TPG) holding an approximately 91% share of the mobile market.**
- 3.9 Recent events have further threatened competition in the telecommunications sector – for example, the recently announced deal between Telstra and TPG will potentially see competition reduced even further meaning that we will effectively see the number of mobile networks in Australia go from (potentially) 4 prior to the TPG/Vodafone merger, down to effectively only 2½. This will lead to consumers paying more for their mobile plans to the remaining 2½ dominant providers (without receiving any additional value), due to lack of effective competition in the mobile market.
- 3.10 It is critical that the Government prioritises achieving greater competition in the sector through its implementation of the CDR regime. If there is greater competition in the sector, consumers and businesses will be afforded more innovative solutions, greater choice and flexibility, and most importantly, greater value.

4. De minimis approach regarding data holders required to share CDR data (questions 1 & 2)

- 4.1 Commpete strongly supports implementing a de minimis threshold, as it will assist in fostering innovation in the sector. This particularly makes sense when 85% of the data that has been designated as CDR data is held by the big 3 telecommunications providers. Commpete considers that if this de minimis approach is implemented, subject to appropriate consideration and consultation, it can assist with driving competition in the telecommunications sector, which will lead to innovation and better outcomes for consumers.
- 4.2 To determine the appropriate threshold, Treasury should consult further with industry. Rather than choosing an arbitrary number or measure, it will be important that this threshold be thoughtfully considered before it is implemented in the sector (noting the build implications and significant cost burden on smaller providers with limited

resources).

- 4.3 Commpete considers this consultation process with industry to be important to determine whether services in operation (**SIOs**) is an appropriate way to measure the threshold, and if so, what that number should be, noting:
- 4.3.1 '30,000 SIOs' for the purposes of the Telecommunications (*Consumer Complaints*) *Record-Keeping Rules 2018* (**Rules**) is an arbitrary number, with no real rhyme or reason; and
- 4.3.2 the term 'SIO' is ambiguous and there is uncertainty as to what falls within/outside of the definition of SIOs under the Rules. In particular, the term does not distinguish whether the SIO is in relation to a consumer type product or enterprise product, and it could also potentially capture millions of internet of things (**IOT**) devices – there is no clear distinction between IOT devices versus other SIOs.
- 4.4 Commpete is of the view that the number of '30,000 SIOs' as the minimum threshold is not appropriate for the purposes of the CDR regime and is extremely unclear. The CDR regime needs to be used as a tool for creating flexibility in the sector for the smaller providers, as opposed to imposing costly compliance obligations. As noted above, the dominant providers hold 85% of the designated data and about 91% of the market share – implementing the CDR regime for these dominant providers would be at a small cost to them.
- 4.5 As such, Commpete proposes in the first instance that the de minimis threshold be implemented for any telecommunications providers that are not the dominant 3 providers (being Telstra, Optus and TPG) (i.e. any providers that are not these 3 providers are excluded from mandatory sharing obligations). This is because, as noted above, 85% of the data is held by these providers and the cost of implementing the regime will be disproportionately onerous for smaller providers.
- 4.6 If this is not possible and the Treasury were minded to define this by number of SIOs, Commpete submits:
- 4.6.1 the term 'SIO' would need to be clearly defined (to specify for example this is only in relation to consumer type products as opposed to enterprise products); and
- 4.6.2 if it were to suggest a number, the threshold should be a minimum of 100,000 SIOs in relation to consumer type products only. Anything lower than this number would not be an effective measure nor metric, and instead would arbitrarily divide the non-dominant, smaller providers. This is especially noting the point above in paragraph 4.3.2 that potential inclusion of IOT devices could significantly increase the number of SIOs a provider has, meaning they are caught by the sharing obligations under the regime.
- 4.7 It is key to note that for smaller providers, the cost of implementing the regime would be disproportionate and unjustified. Instead, it would only exacerbate problems faced

by such smaller providers by imposing a costly compliance burden when they are already struggling to compete in a market held tightly by the three dominant providers. The CDR regime should therefore focus on driving competition and redistributing the market share held tightly in the mobile and fixed market by the dominant providers, Telstra, Optus and TPG, as opposed to inhibiting smaller providers' ability to compete even further.

- 4.8 To assist the Treasury with determining an appropriate SIO number, it may wish to calculate the cost of implementation of the CDR regime against the number of SIOs of the provider, to calculate the burden of implementation on a 'per SIO' basis – this will assist the Treasury in identifying the appropriate number for the de minimis threshold whilst ensuring that the regime does not conflict with furthering competition in the sector (by, for example, disproportionately burdening smaller providers with additional costly compliance obligations).
- 4.9 Commpete supports permitting any data holders excluded because of the de minimis threshold to be able to share data through the CDR regime on a voluntary basis, as this assists with achieving the competition objective.
- 4.10 In addition, Commpete supports a de minimis threshold being implemented in respect of consumer data sharing obligations only.
- 4.11 It is important that Treasury appropriately considers this threshold, as Commpete is strongly of the view that the CDR regime should create flexibility so as to minimise the impact on smaller providers (including in relation to the cost of compliance), to genuinely increase competition and innovation in the telecommunications sector.

5. Enterprise customers and products, and definition of “eligible CDR customer” (questions 5 & 29)

- 5.1 Commpete supports excluding products offered to enterprise customers from product reference data sharing (especially in circumstances where these commercial contracts may be highly negotiated).
- 5.2 Commpete also supports excluding all types of enterprise customers from the definition of an eligible CDR consumer for the telecommunications sector. This is because the CDR regime should focus on providing benefits to everyday customers, as opposed to big businesses (who are much less likely to change providers given the bespoke nature of the services they are receiving).
- 5.3 In addition, with respect to how “eligible CDR consumer” should be defined for the telecommunications sector, Commpete proposes that this definition should mirror the definition of “Consumer” under the *Telecommunications Consumer Protections Code (Industry Code C628:2019)* as opposed to that under the *Competition and Consumer Act 2010*, which is as follows:

Consumer

means:

- (a) an individual who acquires or may acquire a Telecommunications Product for the primary purpose of personal or domestic use and not for resale; or
- (b) a business or non-profit organisation which acquires or may acquire one or more Telecommunications Products which are not for resale and, at the time it enters into the Customer Contract, it:
 - (i) does not have a genuine and reasonable opportunity to negotiate the terms of the Customer Contract; and
 - (ii) has or will have an annual spend with the Supplier which is, or is estimated on reasonable grounds by the Supplier to be, no greater than \$40,000, or, in the 5 months following Code commencement, an annual spend of \$20,000.

6. Datasets in scope of the CDR regime (questions 4, 11, 12 & 15)

6.1 In addition, Commpete does not support including metadata as part of billing data, as it does not consider this metadata to be useful for consumers. In Commpete's experience, consumers are most interested in their total spend across any products and services they have purchased as they can then identify the value they have received for the dollars they have spent. This should be a priority rather than more granular metadata (such as dates and times of communications), which may be of little to no value to consumers.

6.2 It is important to consider "information overload" and the risk of overwhelming a consumer by offering them too many options in respect of what types of data they can request, when such data has little to no value to the consumer. Commpete supports adopting a higher level and more limited approach to billing data, rather than including more granular data (such as metadata) that is required to be shared under the CDR regime. This is because it is critical that the Treasury prioritises including datasets that will genuinely show value to consumers and drive competition in the sector – consumers want to understand what they are paying for and ensure they are receiving value for money (rather than less meaningful data such as time and date of communications).

6.3 Commpete also supports including usage data to the extent that such data is captured on consumers' bills – Commpete considers this will assist consumers to understand their actual usage against their permitted usage under their service plan. This will support fostering innovation in the sector, allowing consumers to readily understand the amount of data, for example, they actually require as opposed to what they are paying for.

7. White labelled products (question 33)

7.1 Commpete does not support adopting a cross-sectoral approach to white labelling to

be suitable to the telecommunications sector. In the telecommunications sector, this issue is not simple, and arrangements are varied and complex.

- 7.2 There is a difficult tension because neither the brand owner nor the white labeller will hold the entire dataset requested by the CDR consumer (and in fact, there may be a whole chain of providers involved in order to fulfil a consumer data request).
- 7.3 There needs to therefore be cooperation across the supply chain, so that the parties work together to provide the relevant data in response to a consumer data request.
- 7.4 As mentioned below in section 8, providers involved with white labelled products need to be provided with sufficient time to implement structures to allow for compliance with the requirements of the CDR regime, noting the complexities involved with such arrangements. In addition, provision of white labelled products makes up significantly less than 9% of the market share (which is a very nominal amount when considering the significant market share held by the big three providers).
- 7.5 Given these complexities, Commpete strongly suggests that Treasury consult further with industry to understand how these white label arrangements operate in the telecommunications sector (including when considering the proposed de minimis approach in respect of data holders who are required to share data under the regime), in order to determine appropriate rules or measures for the sector (that will achieve the purpose of the regime whilst also reflecting the complexities of the sector).

8. Staged implementation of the CDR regime in the telecommunications sector (question 38)

- 8.1 Commpete strongly supports CDR being implemented in a phased manner – this is particularly because the smaller providers will require time and resources to implement the technical capabilities to participate in the CDR regime (which will be a much heavier burden than it will be on the three dominant providers, who have significantly more resources (noting their 91% market share)).
- 8.2 This will also align with the approach taken in the initial implementation in the banking sector, where the initial data holders were determined to be the four major banks as the CDR rules phased in authorised deposit-taking institutions based on their size – similarly in the telecommunications sector, as noted extensively in this submission, the three dominant providers hold a significant share of the mobile and fixed markets. Therefore, Commpete supports the Treasury’s proposal to adopt a phased approach for the telecommunications sector, similar to the approach it adopted for the banking sector.
- 8.3 This is particularly because implementing the CDR regime will be costly for smaller providers (as significant system changes and upgrades may be required). This means the timing of the rollout to the smaller providers will be critical – implementation of the CDR regime should not impact on the ability of smaller providers to compete in the market (who will also face a significant cost burden to prepare for the regime).
- 8.4 Given the complexities involved with white label arrangements, providers involved with

white labelled products need to be provided with sufficient time to implement structures to allow for compliance with the requirements of the CDR regime. As such, Commpete proposes that data sharing in relation to these arrangements be implemented in the final phase of the rollout to the sector (noting white label arrangements make up a tiny portion of the market in comparison to the 85% of the big 3 telecommunications providers).

- 8.5 If the CDR regime is to genuinely promote competition and foster innovation and productivity in the telecommunications sector, it will be key that the Treasury ensure the design of the CDR rules and standards do not inadvertently impact on smaller providers' ability to compete. Instead, the CDR regime should be used as a tool to enhance competition and provide great choice to the majority of consumers who are currently being served by the dominant market players, which will in turn lead to consumers being provided increased choice and innovative solutions.

Commpete again thanks the Treasury for this opportunity to provide its comments on the issues discussed in the Paper.

If you would like to discuss any other matter raised in this submission (including to discuss our feedback in further detail), please do not hesitate to contact us.

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