

## the consumer data right commences operation

The Australian Parliament has recently passed legislation establishing the “Consumer Data Right”. This is a general right created for Australian consumers to have more control over who can have access to and use data about them, and strict technical protocols for the disclosure and transfer of that data. The Consumer Data Right gives customers/ consumers the right to direct how and to whom their personal information can be shared, in order to meet their consumer needs.

The Consumer Data Right will be rolled out progressively through designated Australian market sectors, commencing firstly with “Open Banking” in the banking, finance and fin-tech industries, then to be followed by the Energy and Telecommunications sectors as the next priorities, before broad application to other industries.

The Consumer Data Right has been developed based on the following guiding principles:

- giving Customers / Consumers greater Control over the use of their personal data
- promoting customer Confidence through the enforcement of stringent privacy practices
- fostering greater customer Choice and encouraging Competition within Australian markets
- promoting customer Convenience, by facilitating easier and quicker data portability in our fast-paced digital world
- encouraging Creativity through commercial innovation and new business opportunities.

### significantly expanded compliance obligations

The Consumer Data Right will significantly expand the compliance obligations required of affected Australian and off-shore entities that collect, hold, store, use, disclose and transfer data. For example:

- The Consumer Data Right has wider application than the current Australian Privacy Act
  - it applies to data held about small and large businesses, as well as individuals
  - it applies to all business participants in the designated sector, with no exclusions based on business turnover or type of data usage
  - it has wider extra-territorial impact, in that it applies to data ‘collected or generated in Australia’ without needing the ‘carrying on business’ Australian nexus.
- The Consumer Data Right overrides the Australian Privacy Principles (APP) (in large part)
  - it introduces the 13 Privacy Safeguards, which are more robust and more specific equivalents of the 13 APPs
  - it shifts from an often general assumption of implied consent, to impose far more stringent requirements to obtain the consumer’s voluntary, fully informed, specific, express, explicit, time-limited, unbundled and revocable consent, especially regarding ‘high risk’ matters such as overseas transfer of data, on-sale of data and/or use of data for marketing purposes
  - it imposes designated Rules and Standards to be followed, as opposed to individual business consideration and reliance on scalable ‘reasonable’ steps.
- The Consumer Data Right places more onerous privacy, data handling and general business operation obligations on participants in the designated sector (ie, data holders and data recipients)
  - it implements a graduated, risk-based accreditation process for participants
  - it requires businesses to implement internal and external dispute resolution mechanisms

- it requires compliance with very detailed rules, which specify digital and online dashboard requirements, right down to specific visual design and mandatory wording content for corporate policies and notifications statements
- it mandates compliance with very strict, technical and robust Standards, which cover data integrity mechanisms, data transfer processes and data security protocols.
- The Consumer Data Right increases the penalties and remedies available for breach
  - the penalties for breaches of the Consumer Data Right will mirror the penalties for breaches of Australian competition law, which can be:
    - **for companies:** the greater of AUD\$10M, three times the benefit received from the contravention, or 10% of annual turnover
    - **for individuals:** up to AUD\$500,000 or five years jail

The Australian Government has committed to AUD\$45M in additional regulator funding over the next 4 years, to be allocated as follows:

- \$20M to the ACCC
- \$13M to the Office of the Australian Information Commissioner (the Australian private sector privacy regulator)
- \$11.5M to Data61 (the interim appointed technical data standards body).

It is also contemplated that there will be approximately 45 new staff across each of the Regulators, each year, over the next four years.

## what your clients need to do

The first tranche of businesses to be impacted on a phase-in basis over the next two years in Australia are:

- the “Big 4” authorised deposit-taking institutions;
- credit reporting agencies;
- smaller banks;
- mortgage and loan financiers etc;
- aggregators, brokers and advisors etc;
- fintechs; and
- product comparison service providers.

The Consumer Data Right will dramatically change the Australian Privacy landscape, and adopts and approximates some of the requirements of the European Union’s General Data Protection Regulation (GDPR). However, the Australian regime presently stops short of exactly mirroring the GDPR – notably, the Consumer Data Right does not contain a right of erasure or deletion (although this has been subsequently recommended, amongst other things, in the ACCC’s recent report on the Digital Platforms Inquiry).

For further information or assistance regarding the Consumer Data Right and general Privacy matters in Australia, please contact your PrivacyRules contact Kelly Dickson.

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