

Chapter 7:

Privacy Safeguard 7 —

Use or disclosure of CDR data for direct marketing by accredited data recipients or designated gateways

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Key points

- Privacy Safeguard 7 prohibits the use or disclosure of CDR data for direct marketing by accredited data recipients and designated gateways, unless the use or disclosure is required or authorised under the Consumer Data Rules.
- Direct marketing involves the use or disclosure of CDR data to promote goods and services directly to a consumer.

What does Privacy Safeguard 7 say?

- 7.1 Privacy Safeguard 7 prohibits the use or disclosure of CDR data for direct marketing by accredited data recipients and designated gateways, unless the use or disclosure is required or authorised under the Consumer Data Rules.

Why is it important?

- 7.2 To provide a positive consumer experience and ensure consumer control over their data, consumers should not be subjected to unwanted direct marketing.
- 7.3 Privacy Safeguard 7 prohibits direct marketing in the Consumer Data Right (CDR) regime unless it is required or authorised under the Consumer Data Rules.

Who does Privacy Safeguard 7 apply to?

- 7.4 Privacy Safeguard 7 applies to accredited data recipients and designated gateways. It does not apply to data holders.

How Privacy Safeguard 7 interacts with the Privacy Act

- 7.5 It is important to understand how Privacy Safeguard 7 interacts with the *Privacy Act 1988* (Cth) (the Privacy Act) and Australian Privacy Principles (APPs).¹
- 7.6 Like Privacy Safeguard 7, APP 7 sets out when an APP entity is prohibited from using or disclosing personal information for the purpose of direct marketing.

¹ The Privacy Act includes 13 APPs that regulate the handling of personal information by certain organisations and Australian Government agencies (APP entities).

Summary of application of Privacy Safeguard 7 by CDR entity

CDR entity	Privacy principle that applies to CDR data
Accredited person	<p>Australian Privacy Principle 7</p> <p>Privacy Safeguard 7 does not apply to an accredited person who is not an accredited data recipient of the relevant CDR data.</p>
Accredited data recipient	<p>Privacy Safeguard 7</p> <p>Privacy Safeguard 7 applies instead of APP 7,² meaning APP 7 will not apply to CDR data that has been received by an accredited data recipient through the CDR regime.</p> <p>APP 7 will continue to apply to any personal information handled by the accredited data recipient that is not CDR data.³ This is because all accredited data recipients are subject to the Privacy Act and the APPs for any personal information, even if it is not CDR data.</p>
Designated gateway	<p>Privacy Safeguard 7</p> <p>Privacy Safeguard 7 applies instead of APP 7,⁴ meaning APP 7 will not apply to CDR data that has been received by a designated gateway through the CDR regime.</p> <p>APP 7 will continue to apply to the designated gateway where they are handling personal information in their capacity as an APP entity.</p>
Data holder	<p>Australian Privacy Principle 7</p> <p>Privacy Safeguard 7 does not apply to a data holder.</p>

Meaning of direct marketing

- 7.7 ‘Direct marketing’ is not defined in the Competition and Consumer Act. The term is also used in APP 7 but is not defined in the Privacy Act.⁵
- 7.8 For the purpose of Privacy Safeguard 7, ‘direct marketing’ takes its ordinary meaning, and involves an entity’s use or disclosure of CDR data to communicate directly with a consumer to *promote* goods or services.

² 56EC(4)(a). Section 56EC(4) provides that the APPs do not apply to an accredited data recipient of CDR data in relation to the CDR data. An accredited person who holds CDR data that was disclosed to the person under the Consumer Data Rules falls within the definition of ‘accredited data recipient’ for that data (unless they are a data holder or designated gateway for the data) (see s 56AK).

³ All accredited data recipients are subject to the Privacy Act and the APPs in relation to information that is personal information but is not CDR data. This means that non-CDR personal information handling by accredited data recipients is covered by the Privacy Act and the APPs, while the handling of CDR data is covered by the CDR regime and the Privacy Safeguards. See s 6E(1D) of the Privacy Act.

⁴ Section 56EC(4)(d).

⁵ For the purposes of APP 7, the phrase has been interpreted to take its ordinary meaning of marketing addressed directly to individuals (*Shahin Enterprises Pty Ltd v BP Australia Pty Ltd* [2019] SASC 12 [113] (Blue J)). It involves the use or disclosure of personal information to communicate directly with an individual to promote goods and services (Explanatory Memorandum, Privacy Amendment (Enhancing Privacy Protection) Bill 2012, p 81).

- 7.9 This means that ‘direct marketing’ requires an element of promotion, where goods and services are promoted to elicit or encourage a response from the consumer.
- 7.10 An entity does not ‘direct market’ where the offer of goods or services forms part (or all) of the goods or services requested by the consumer as part of the consumer’s valid request.⁶
- 7.11 For example, it is not direct marketing where:
- A consumer wishes to obtain suitable offers from multiple providers for a product and provides an accredited data recipient with a valid request to collect their CDR data for the purpose of providing tailored offers from various providers. In doing so, the accredited data recipient uses the CDR data to provide the requested good or service. This use is not direct marketing and Privacy Safeguard 7 does not apply. The accredited data recipient must comply with Privacy Safeguard 6.
 - A consumer is considering switching providers for a product. The consumer provides an accredited data recipient with a valid request to seek to collect their CDR data from their current provider (the data holder) and use that data to provide suitable offers in relation to the product. In doing so, the accredited data recipient uses the CDR data to provide the good or service. This use is not direct marketing and Privacy Safeguard 7 does not apply. The accredited data recipient must comply with Privacy Safeguard 6.

Interaction with other Privacy Safeguards

- 7.12 The prohibition against direct marketing in Privacy Safeguard 7 is complemented by Privacy Safeguard 6 (see Chapter 6 (Privacy Safeguard 6)). Privacy Safeguard 6 prohibits an accredited data recipient from using or disclosing data unless required or authorised under the Consumer Data Rules or another Australian law or court or tribunal order.

Interaction with other legislation

- 7.13 Under the Privacy Act, APP 7 does not apply to the extent that the *Do Not Call Register Act 2006*, the *Spam Act 2003* or any other legislation prescribed by the regulations applies (APP 7.8). There is no corresponding exemption under Privacy Safeguard 7.
- 7.14 This means that if an accredited data recipient or designated gateway engages in a form of direct marketing that may be permitted under another Act,⁷ and the entity uses or discloses CDR data for that purpose, the entity will be in breach of Privacy Safeguard 7 (unless that use or disclosure is required or authorised under the Consumer Data Rules).

⁶ For information regarding ‘valid requests’, see Chapter 3 (Privacy Safeguard 3).

⁷ For instance, a person may make telemarketing calls to a number registered on the Do Not Call Register if the relevant account-holder has consented to the making of the call (*Do Not Call Register Act 2006* (Cth), s 11(2)).