

7 September 2018

Mr Daniel McAuliffe
Structural Reform Group
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Mr McAuliffe,

Review of the Treasury Laws Amendment (Consumer Data Right) Bill 2018

The Office of the Victorian Information Commissioner (**OVIC**) is pleased to provide a submission to the Treasury in relation to the review of the *Treasury Laws Amendment (Consumer Data Right) Bill 2018 (the Bill)*.

Established in September 2017, OVIC is the primary regulator for information privacy, data protection and freedom of information for the state of Victoria. As Information Commissioner I have a strong interest in matters that affect individuals' privacy, and one of my functions under the *Privacy and Data Protection Act 2014 (PDP Act)* is to make public statements in relation to such matters.

This submission outlines my office's views on the Bill and the proposed Consumer Data Right (**CDR**) framework, in particular, the privacy impacts on individuals and the practical operation of the CDR framework.

1. In principle, OVIC supports the introduction of the CDR framework in the context of empowering consumers to more effectively control data relating to them. OVIC supports the involvement of the Office of the Australian Information Commissioner (**OAIC**) in overseeing the privacy aspects of the CDR framework. The involvement of the OAIC is critical to maintaining the integrity of the CDR, given the notable volume and nature of the data that underpins its operation. OVIC also welcomes the extension of the Notifiable Data Breaches scheme to include privacy breaches involving CDR data.

Privacy safeguards

2. Based on discussions held at the roundtable session in Melbourne on 24 August 2018, at which an OVIC representative was present, several options were proposed regarding the applicability of the Australian Privacy Principles (**APPs**) to the CDR. OVIC is of the view that the APPs should be retained and should form the basis of privacy requirements under the CDR framework. We understand that the CDR framework will provide higher protections than the APPs, for example to remove exceptions for information sharing so that CDR data cannot be on shared, and to provide stricter rules around consent.

3. OVIC's preferred approach is for the higher privacy protections to be legislative, which would see privacy safeguards built into the Bill, with further guidance provided for key concepts in the Consumer Data Rules and the Data Standards. Retaining the APPs in addition to the CDR privacy safeguards would provide a strong principles-based foundation for the CDR framework. Were the APPs to be replaced by the Consumer Data Rules in this context, the ability for updated OAIC guidance and policy to affect the CDR would be lost; for example, updated guidance around 'reasonable steps' for the security of data under APP 11. Strong data security protections are imperative for the CDR to be effective and to instil consumer trust in the framework. The 'reasonableness' approach utilised by the APPs allows entities to continually improve their practices, taking into account new technologies and best practice as they develop. There are foreseeable privacy risks should the APPs be replaced by the Consumer Data Rules, as it may lessen the integrity of the CDR as a whole.
4. Under s 56EK of the Bill, overseas entities are capable of being accredited data recipients under the CDR framework. However, no detail is provided on the regulation of these entities and how their compliance with the CDR is to be monitored, reviewed and enforced. Further discussion on how overseas entities are required to operate within the framework, the role of Australian regulators, and whether or not overseas entities must comply with the privacy safeguards, would be a necessary addition to the Bill and the explanatory materials to ensure clarity for all parties involved.

Consultation

5. The Bill sets out a requirement for the Minister to consult with both the Australian Competition and Consumer Commission (ACCC) and the OAIC prior to making an instrument to designate a sector. Section 56AD(3) of the Bill states that when considering delegating a sector under the CDR framework, the Minister must consult with the OAIC on the likely effect on consumers' privacy. This provision does not specify whether the Minister is obliged to make their decision based on the outcome of the consultation, or if the OAIC's view is advisory only. OVIC notes that it would be worthwhile clarifying the intended purpose of the consultation and response. OVIC suggests that the requirement for consultation is essential, and the importance and utility of s 56AD is dependent on the outcome of these discussions.
6. Emergency rules provisions within the CDR framework outline an avenue to circumvent Ministerial consent if the decision to make a rule is in the public interest or will avoid imminent risk of serious harm to consumers. From discussions held at the roundtable in August, it is my understanding that the emergency rule making power under s 56BQ is intended to be used where there is an imminent risk of harm to consumers stemming from a privacy breach. However, this is not clear from a reading of the Bill. If it is the intention for s 56BQ to operate in the case of a serious privacy breach, OVIC suggests further clarity around these circumstances be included in the Bill and explanatory materials, along with what would constitute an 'emergency' situation under s 56BQ(1).

Delegation of powers

7. The dual regulatory approach of the CDR framework includes the power for the OAIC to delegate the Information Commissioner's functions or powers to the ACCC under s 56EW of the Bill. Further clarity would be useful regarding which functions or powers the OAIC is able to delegate, for what purposes, and for how long a delegation of power is valid.

8. Should a delegation occur under this provision, it may be unclear to consumers which of the ACCC or OAIC will assist them with their privacy or competition concerns. It is crucial that individuals are aware of which body they can engage with should they have an issue; the OAIC has the means for redress under the Commonwealth *Privacy Act 1988* (**Privacy Act**) and is, in my view, the appropriate body to receive privacy enquiries and complaints. As such, this should be clearly communicated to consumers. The right to privacy in Australia is an individual human right that extends to all Australians regardless of their consumption of services (as is the case with a consumer right). OVIC suggests this be reflected in the regulatory approach of the CDR.

Remedies

9. The discussion at the roundtable touched on further remedy provisions that are planned to be incorporated into the Bill. This included the intention for the Bill to mirror the provisions under the Privacy Act for non-economic action, which recognise a broader application of psychological harm. OVIC supports a mirrored approach to drafting the remedial sections of the Bill, to align with those provided for under the Privacy Act.

Thank you for the opportunity to comment on the draft Bill. OVIC will be watching the progress of the CDR with interest.

I have no objection to this letter being published by Treasury without further reference to me. I also propose to publish a copy of this letter on the OVIC website but would be happy to adjust the timing of this to allow Treasury to collate and publish submissions proactively.

If you have any questions concerning the above, please contact Emily Arians, Senior Policy Analyst at emily.arians@ovic.vic.gov.au.

Yours sincerely,

Sven Bluemmel
Information Commissioner

