



Law Council
OF AUSTRALIA

Office of the President

7 September 2018

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

By email: data@treasury.gov.au

Dear Mr McAuliffe

Exposure Draft - Treasury Laws Amendment (Consumer Data Right) Bill 2018

1. Thank you for the opportunity to provide comments on the Exposure Draft of the Treasury Laws Amendment (Consumer Data Right) Bill 2018 (**the CDR Bill**).
2. The Law Council acknowledges the assistance of the Law Society of New South Wales and the Privacy Committee of the Business Law Section of the Law Council in the preparation of this submission.
3. The Law Council's primary concerns, and suggested recommendations, are summarised as follows:
 - the Law Council is concerned the CDR Bill in its current form is overly broad, and the safeguards to be contained in the Consumer Data Rules are unknown. The Law Council recommends narrowing the scope of the Bill and prescribing matters to be addressed in the Consumer Data Rules;
 - the Law Council is of the view that the CDR Bill creates new definitions, new concepts and a new regulatory structure that requires multiple regulators to work together without clear demarcations. The Law Council recommends simplifying and aligning the Bill to existing regimes, with clear cross-referencing as relevant;
 - the Law Council considers there is no comparable international jurisdiction in relation to the CDR Bill. For example, there is vastly different data portable in the European Union and open banking regimes.¹ Given that most data traverses across borders, this lack of interoperability may impact upon the success and uptake of the regime. The Law Council recommends that if Australia is investing in a unique regime, active steps are required to simplify where possible, and

¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) [2006] OJ L 119/1, art 20.

educate the community. This is critical for the public's trust and confidence in the system; and

- the Law Council considers that the regime proposed in the CDR Bill is unnecessarily complex. The Law Council recommends the CDR Bill be amended to simplify the proposed provisions of the CDR Bill to improve accessibility of the proposed regime.

Consumer Data Rules

4. The Law Council notes that the CDR Bill empowers the Australian Competition and Consumer Commission (**ACCC**) to make rules (the Consumer Data Rules) for designated sectors. The proposed section 56BB of the *Competition and Consumer Act 2010* (Cth) (**CCA**) sets out matters which the Consumer Data Rules may deal with. The CDR Bill (if passed) sets out an extensive framework for rule making with limited details as to the content of the rules and how these would operate. This difficulty is exacerbated by the definition of a Consumer Data Right being very broad, as noted below.
5. The Law Council notes that those matters include the disclosure, use, accuracy, storage security and deletion of Consumer Data Right data (**CDR data**). CDR data will be a subset of personal information, the handling of which is already regulated under the *Privacy Act 1988* (Cth) (**Privacy Act**). The Law Council is concerned that the current drafting of the CDR Bill will empower the ACCC to override and undermine the protections of the Privacy Act in respect of CDR data. The Law Council suggests that it would be beneficial to legislate minimum privacy requirements that cannot be derogated from by the Consumer Data Rules, for example minimum storage and security requirements, minimum reporting and record keeping requirements, and a basic framework for the accreditation process. Consumer credit reporting information, as regulated under Part IIIA of the Privacy Act, will need to be expressly addressed. These issues are expanded on below.

Consultation processes and emergency designations

6. The Law Council submits that, due to the lack of detail in the CDR Bill in relation to the Consumer Data Rules, it is crucial that the ACCC engage in a robust public consultation process in respect of each designated sector (see proposed paragraph 56AE(1)(b) of the CDR Bill). The Law Council notes that proposed subsection 56BQ(1) of the CDR Bill states that the ACCC will have the ability to make Consumer Data Rules in an 'emergency' without consent of the Minister and without consultation with any of the parties listed in proposed section 56BO, with the exception of the Information Commissioner. Under the CDR Bill, an emergency is a situation where the ACCC is of the opinion that it is necessary, or in the public interest, to do so in order to 'protect the efficiency, integrity and stability of any aspect of the Australian economy' or 'to avoid imminent risk of serious harm to consumers'.
7. The Law Council notes that the Minister may make written directions for rules made in an emergency (refer to proposed paragraph 56BQ(2)(b)), and that the ACCC can also make Consumer Data Rules under proposed subsection 56BQ(4) without consulting the Information Commissioner in an emergency (although the Law Council notes that those rules cease to be in force six months after the date on which the rules were made).
8. The Law Council is concerned that there are a wide range of situations that could possibly 'justify' the protection of the 'efficiency, integrity and stability of any aspect of

the Australian economy', and that no detail has been provided in relation to what would constitute an 'imminent risk of serious harm to consumers'. The Law Council is also of the view that the CDR Bill should not in any circumstances provide an exception to consultation with the Information Commissioner.

Consumer Data Right Data

9. The Law Council submits that it is unclear as to whether the Consumer Data Rules for each sector will have the ability to narrow the broad definition of CDR data in the proposed section 56AF. The Law Council notes that it is proposed that CDR data be defined as:

... information that:

(a) is specified in, or is within a class of information specified in, an instrument designating a sector...or

(b) is derived from [that designated sector information].

10. The Law Council notes that this cascading effect would likely capture an overly broad range of value-added data sets.
11. The Law Council submits that the definition of CDR should be narrowed to exclude information derived from CDR data or further derived information or that alternatively the ACCC be granted the power to limit the data that can be subject to the Consumer Data Right and the Consumer Data Rules. Similarly, clarity is required as to what is to be included in the definition of 'associated with', currently proposed by subsection 56AF(3).
12. The Law Council also notes that the stated object of the CDR Bill is to enable consumers to access their own CDR data and to enable 'others' in 'certain sectors of the Australian economy' who the consumer 'trusts' to access CDR data (proposed paragraph 56AA(a)). In the Law Council's view, 'trust' is a subjective term that will generate substantial operational difficulties for both the ACCC and industry to implement. Instead the object of the CDR Bill should be stated in objective terms – i.e. (A) to enable consumers to access their own CDR data and (B) to allow consumers to authorise other persons with a legitimate interest to access their CDR data. Limiting third-party CDR data access only to persons that are expressly and actively authorised by the consumer and who have a 'legitimate interest' in that data would substantially assist the ACCC and the Information Commissioner to minimise CDR data-misuse. This better aligns with the notion that the rights under the CDR Bill can only be exercised or triggered by consent.

Consumer Data Right Data and Credit Reporting Data

13. The Law Council notes that the type of data potentially covered under the CDR Bill may overlap with consumer credit reporting data as regulated under Part IIIA of the Privacy Act. Such data is not regulated under the Australian Privacy Principles (**APPs**) and is governed by the prescriptive provisions of Part IIIA including sanctions which attract civil penalty provisions.² Many of the obligations are triggered by the fact that entities are defined as 'credit providers' or 'credit reporting businesses'.³ The definitions are very

² *Privacy Act 1988* (Cth) ss 21 and 21F.

³ *Ibid* s 6P.

broad, and where the data analytics concerns the 'credit worthiness of the individuals',⁴ many of the entities conducting such activities will be automatically caught by the requirements of the requirements of Part IIIA.

14. The Law Council recommends that the provision in the CDR Bill dealing with Part IIIA (subsection 56EC(3)) of the Privacy Act be expanded to expressly address how these will operate in combination with the rights and obligations created under the CDR Bill and the rule-making power under the CDR Bill .

Privacy safeguards and interaction with the Privacy Act

15. The Law Council is unclear as to how the privacy safeguards division of the CDR Bill will interact with the provisions of the Privacy Act. The Law Council is also concerned that the provisions of the CDR Bill will create:

- (a) unnecessary complexity through the establishment of a second legislative regime of privacy requirements (through provisions of the CCA as well as the provisions of the Privacy Act), in addition to the provisions of any State or Territory legislation that may also apply (such as when organisations hold contracts with State or Territory agencies which compel them to also comply with State laws);
- (b) different classes of privacy protection depending on whether the relevant data is CDR data under the privacy safeguards or only personal information under the APPs;
- (c) a situation where the same data may be both CDR data and personal information and consequently must be dealt with under separate, and potentially in inconsistent, privacy regimes;
- (d) confusion as to the operation of Part IIIA of the Privacy Act;
- (e) additional uncertainty as to what is covered as personal information and what is covered as CDR data; and
- (f) unnecessary complexity as to the available remedies under the working combinations of the regimes.

16. In the Law Council's view, the proposed privacy safeguards are not adequate as currently drafted. In particular, the Law Council is concerned about the potential misuse of CDR data, including de-identified aggregated CDR data, for direct marketing purposes. The proposed privacy safeguard in proposed section 56EJ is not sufficient to cover this risk. One measure that could address that risk would be to legislate a definition for 'valid consent' – for example, consent must be current (no less than 12 months old etc.), expressly provided and relevant to the service provided by the access seeker to the consumer. The CDR Bill could also prohibit holders of de-identified CDR data from cross-matching that information with other databases in a manner that would allow a de-identified, aggregated data set to be re-associated with a particular identifiable individual.

17. The Law Council further considers that segregating the regulation of privacy (including the APPs and privacy safeguards) between the Office of the Australian Information Commissioner and the ACCC in relation to CDR data and personal information will likely result in confusion for consumers. The Law Council is of the view that if the structure of the CDR Bill remains in its current form, a comprehensive public education campaign will need to be conducted to minimise that confusion.

⁴ Ibid s 6.

Personal Information, Consumer Customer Data and other information

18. Personal information is defined by section 6 of the Privacy Act and has been the subject of litigation and debate.⁵ The emphasis is what information is said to be 'about an individual'. By contrast, the CDR Bill references information that is in *relation* to certain matters. Similarly, the privacy safeguards are said to apply to 'relating to identifiable, or reasonably identifiable, consumers'.⁶ Given that CDR data will by necessity include personal information and broader categories of information about or relating to entities and various commercial matters, clarity is needed as to what types of data are in scope of regulation and the consequences of the categorisations.
19. The Law Council is of the view that these are important threshold issues that will impact on the practical operation of the regime. The Law Council recommends that the operative definitions be expanded to address the existing ambiguities. Similarly, the Consumer Data Rules need to articulate what data is in scope and therefore what protections are to apply (or not as the case may be). Consideration is to be given to articulating standards of confidentiality applicable to all data (personal information or not), in addition to the privacy safeguards.

Complexity and timing

20. The Law Council notes that the complexity being created by multiple regimes regulating data is a matter of substance that may have a negative impact on the success of the future of the regime as envisaged. In part, this is because the regime is said to be driven by consent. Consumers or customers (whether individual or corporates) are more likely to avail themselves of the benefits envisaged by the regime if there is certainty as to how the Rules and related instruments will operate and what protections are afforded.
21. Further, the Law Council submits that foreseeable abuse of the CDR might be forestalled if the objects included a clear expectation that CDR Rules would include limits on the circumstances in which those third parties can seek consent to access the consumer's data and limits on the legitimate uses to which the CDR data may be put. For example, there could be types of consumer detriment if consumers could be encouraged to provide consent in exchange for a chance to win some benefit or to earn a transitory discount on some transaction.
22. Related to the uncertainty is the lack of clarity as to how the regime will impact on a variety of emerging data practices such as 'screen scraping'. For example, it is unclear whether such practices will be expressly regulated by the new CDR regime or remain largely outside formal regulatory structures.

Thank you for the opportunity to provide these comments.

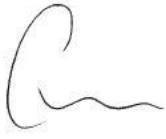
The Law Council would be pleased to elaborate on the above issues, if required.

Please contact Dr Natasha Molt, Director of Policy, Policy Division (02 6246 3754 or at natasha.molt@lawcouncil.asn.au), in the first instance should you require further information or clarification.

⁵ Note the decision of *Telstra Corporation Limited and Privacy Commissioner* [2015] AATA 991 and the fact that the matter was decided under the definition as it was prior to March 2014.

⁶ Exposure Draft of the Treasury Laws Amendment (Consumer Data Right) Bill 2018 Part IVD.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Morry Bailes', with a large initial 'M' and a cursive style.

Morry Bailes
President