Attorney-General

Reference: MC23-003741

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
Suite 1.111
Parliament House
CANBERRA ACT 2600

By email: Scrutiny.Sen@aph.gov.au

Dear Senator Smith

I refer to correspondence of 9 February 2023 on behalf of the Senate Standing Committee for the Scrutiny of Bills, regarding *Scrutiny Digest 1 of 2023* which contains comments on the Crimes Amendment (Penalty Unit) Bill 2022. The Committee has asked for further information on why it is necessary and appropriate to increase the amount of the Commonwealth penalty unit from $222 to $275.

The penalty unit was first instituted in 1992 and set at $100 and has been increased four times by legislative amendment and once by automatic indexation, to a total of $222. These increases represent an increase of 122% since establishment in 1992. In the same time period average incomes have increased by 137%.

Increasing the penalty unit over time in order to broadly align it with income levels ensures that fines remain an effective deterrent. This is vital given fines are the most common sentencing disposition imposed by courts in Commonwealth matters, occurring in 31% of sentencing matters in the 2020-21 financial year. Many of these sentences are imposed in the area of financial, tax, and fraud related crimes. The public expects that courts have appropriate punishments available to them when sentencing individuals and corporations. Particularly for corporations, penalties that do not have an appropriate maximum can be seen as a mere cost of doing business and cease to operate as a deterrent.

As previously noted, in sentencing an offender, the court is required to impose the most appropriate sentence, taking into account the relevant circumstances of each case. In this context, the maximum penalty will indicate the seriousness with which the offence is regarded by Parliament and the community but the actual fine imposed will in most cases be lower.

I trust this information is of assistance.

Yours sincerely

THE HON MARK DREYFUS KC MP
24 / 2 /2023

THE HON STEPHEN JONES MP

ASSISTANT TREASURER AND MINISTER FOR FINANCIAL SERVICES

Ref: MS23-000282

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Dear Senator

I am writing in relation to the Senate Standing Committee for the Scrutiny of Bills' comments about Treasury Laws Amendment (Consumer Data Right) Bill 2022 (the Bill) in Scrutiny Digest 1 of 2023. I note that Parliament has referred the Bill to the Senate Economics Legislation Committee.

Below are my responses to the Committee's questions about the Bill.

Why has subsection 56BN(2) been included as an offence-specific defence, rather than as an element of the offence?

This question relates to an existing feature of Part IVD of the *Competition and Consumer Act 2010* (CCA) and which also arose in relation to the Treasury Laws Amendment (Consumer Data Right) Bill 2019, which first legislated the Consumer Data Right (CDR). As noted in the response to the Committee in 2019, section 56BN of the CCA regulates misleading or deceptive conduct in a wide range of circumstances relating to the disclosure of CDR data, both in terms of the actors (for example, data holders, accredited data recipients and CDR consumers) and the provisions of the CCA and the *Competition and Consumer (Consumer Data Right) Rules 2020* (consumer data rules) in relation to which an offence may occur.

Subsection 56BN(2) includes an offence-specific defence where the misleading particular is not material, and as noted by the Committee, this mechanism places an evidentiary burden on the defendant. This is appropriate because the mitigating circumstance will often rely on information that is peculiarly within the knowledge of the defendant.

For example, when seeking consent to collect CDR data, an accredited person must be specific as to the purpose for which they may collect CDR data. Where proceedings for an offence arise relating to whether particular conduct fell within that purpose, the accredited person may argue that any differences in interpretation of that purpose were not misleading in a material particular. However, the evidence about the materiality would generally be peculiarly within the knowledge of the defendant, relating to the way the accredited person's business provides services with the use of CDR data.

It would be unduly onerous in this case to require the prosecution to prove the materiality in the absence of evidence from the defendant and, by comparison, relatively straightforward for the defendant to raise this evidence.

The offence in section 56BN is like equivalent offence provisions in the *Criminal Code* (sections 136.1 and 137.1). These *Criminal Code* provisions also contain offence-specific defences for circumstances where the misleading particular was not material. The consistency between section 56BN and the *Criminal Code* provisions is appropriate, as they seek to regulate similar kinds of conduct/circumstance.

Further, given the prosecution is also required to establish that the conduct leads to the result that a person is, or is likely to be, misled or deceived about the use or disclosure of CDR data under the scheme (paragraph 56BN(1)(c)), there would be limited circumstances in which the defence will likely arise.

Will material incorporated from time to time be made freely and readily available to all persons interested in the law?

Currently under section 56GB of the CCA, certain CDR-related instruments may incorporate extrinsic material as in force from time to time. The Bill seeks to extend the listed instruments to include CDR declarations for types of actions.

The Committee has requested advice as to whether such material will be freely and readily available to all persons interested in the law.

Given the wide range of industries and sectors of the economy to which the CDR can apply, the ability to incorporate extrinsic material is necessary. This includes industry material such as standards and codes, as well as State and Territory legislation and instruments made by agencies such as the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC).

A CDR instrument may refer to publicly available material, such as that contained in State or Territory legislation, or instruments made by agencies such as the ACCC and ASIC. Where a CDR instrument does refer to information in another instrument or writing, the location where a person may access it will be clear in the CDR instrument. Where the information is in State or Territory legislation or instruments made by agencies such as the ACCC and ASIC, there will be no charge for access, in accordance with the publication policies of these entities.

However, there may be circumstances where it is necessary for a CDR instrument to refer to material such as an industry standard that may not be publicly available, for example because there is a fee for access. This is unlikely to be a frequent occurrence, but where it is necessary, the costs to affected persons to access the materials will be relatively minor and far outweighed by the costs they would incur by needing to comply with bespoke standards rather than adopting existing ones.

Data standards developed by the Data Standards Body itself will continue to be publicly available at no cost, with publication occurring under creative commons licences - see section 56FC of the CCA.
The introduction of any standards, or similar documents, occurs in consultation with stakeholders primarily through the GitHub platform and the Data Standards Body Advisory Committee.

Why is it necessary and appropriate to confer immunity from civil and criminal proceedings on a potentially broad range of persons, so that affected persons have their right to bring an action to enforce their legal rights limited to situations where a lack of good faith is shown?

Under the existing CDR data sharing regime, CDR participants (data holders and accredited data recipients) have protection from liability under section 56GC of the CCA. To receive protection from liability, CDR participants must comply with the CCA and all relevant rules and standards, and they must act in good faith. The intention behind section 56GC is that, for example, if the consumer suffers a loss for reasons other than the participant complying with the requirements of the CDR, the CDR should not displace ordinary rules of liability and allocation of loss.

The Bill introduces two new types of key participants in the action initiation framework (action service providers and accredited action initiators) who are collectively referred to in proposed section 56AMD as 'CDR action participants'. The proposed immunity to CDR entities is an extension of the current arrangements for CDR data sharing. This is consistent with recommendation 4.20 from the Final Report of

the *Inquiry into the Future Directions for the Consumer Data Right*, led by Dr Scott Farrell, to extend the principle underpinning the general liability framework in section 56GC of the CCA to action initiation.

The protection from liability afforded only to persons who are both acting in good faith, *and* in compliance with CDR obligations – in practice, this significantly limits the liability protection. Further, proposed paragraph 56GC(1)(c) enables the regulations to prescribe additional laws that participants must comply with to receive the protection (this could include, for example, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*). This power enables the regulations to provide further safeguards where the identification of action-specific risks has occurred.

Considering the above, I am of the view there is sufficient justification for the liability protection enabled by the proposed section 56GC.

Why does subsection 56GC(2) reverse the evidential burden for a CDR entity establishing they have acted in good faith in compliance with CDR provisions?

If a person provides CDR data to another person or allows that person to access CDR data, the person providing the information receives protection from liability if:

- the person provided the information in good faith; and
- the person complied with their CDR obligations.

This means a complainant cannot take an action against the person, whether civil or criminal, for or in relation to the provision of the CDR information in question. A person seeking to rely on this protection bears an evidential burden of proof under subsection 56GC(2).

As the Committee will be aware, the fact that it is difficult for a complainant to prove a particular matter has not traditionally by itself justified placing the burden of proof on a defendant. However, matters may justify placing the evidential burden on a defendant where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

As explained in the explanatory memorandum to the Treasury Laws Amendment (Consumer Data Right) Bill 2019, the person in question will know whether they received evidence of a valid consent or request and have otherwise met the obligations.

It would also be unduly onerous in this situation to require the complainant to disprove good faith compliance with CDR provisions, in the absence of evidence by the defendant, and by comparison, relatively straightforward for the defendant to raise this evidence. It would be significantly more costly and time consuming for the complainant to gather the resources to access the defendant's information than for the defendant to demonstrate that they were acting in good faith and compliance with CDR provisions.

Why is it considered necessary and appropriate to provide a broad power to grant exemptions from the operation of the consumer data right scheme, including within delegated legislation?

Part IVD of the CCA currently contains two exemption making powers relating to the CDR. Section 56GD allows the ACCC to exempt a person from some or all the provisions of Part IVD of the CCA, and section 56GE provides a regulation making power to modify and exempt from the operation of the primary law. The Bill does not provide new powers to grant exemptions, but instead expands these existing exemption powers in correlation with the expansion of the CDR to action initiation.

The explanatory memorandum to the Treasury Laws Amendment (Consumer Data Right) Bill 2019 explained that the power to modify by regulations (section 56GE) is important to ensure that the CDR system is dynamic and able to adapt quickly to a changing economy and the varied sectors within it.

The CDR applies very broadly across sectors of the economy in such a way that generally applicable requirements may lead to an unintended result for particular participants. The same is true with the CDR's extension to action initiation, which will apply across action types in the economy. Enacting exemptions in the primary law to deal with such unintended results may not always be practicable. It would also increase the complexity of the primary law for all users despite only affecting a limited number of participants.

Experience since the 2019 enactment of the CDR has borne this out. The power in section 56GE to exempt or modify by regulations used sparingly and only to implement targeted solutions to emergent or unforeseen issues.

The same rationale applies for the extension of the modification power to CDR action initiation, which ensures the CDR system is dynamic and able to adapt quickly to a changing economy and the varied sectors and action types that are relevant.

In relation to the ACCC's exemption power (section 56GD), the explanatory memorandum to the Treasury Laws Amendment (Consumer Data Right) Bill 2019 explained that it provides the ACCC with the ability to ensure that the CDR system does not operate in unintended or perverse ways in exceptional circumstances in relation to individual participants. The memorandum added that the power provides the ACCC with the scope to ensure that the CDR system works in the best way possible for consumers and the designated industry.

Again, this rationale is equally applicable for the extension of the ACCC's exemption power to CDR action initiation.

Can the bill be amended to include appropriate safeguards on the exercise of the discretionary power to provide those exemptions?

I consider the existing settings for both exemption powers to be appropriate, including for example that the regulations made under the exemption power in section 56GE are disallowable instruments and therefore subject to Parliamentary scrutiny.

In relation to the ACCC's exemptions power under section 56GD, the ACCC's guidance on this power sets out a series of factors the ACCC may consider in its assessment of exemption applications:

- impact on the CDR objectives to enable safe, efficient and convenient disclosure of consumer data and efficient and convenient access to product data, so as to create more choice, competition and to promote the public interest;
- the nature and scope of the proposed exemption sought;
- potential for any unintended or perverse consequences to arise if the proposed exemption were not granted;
- impact of the proposed exemption on the CDR ecosystem;
- the extent to which the applicant has previously met its CDR obligations and the level of engagement with the ACCC on CDR matters; and
- evidence provided to support exemption.

The guidance also states that '[i]n some circumstances, exemptions may be granted on the condition that applicants notify the ACCC in a timely manner of any material changes that may affect the exemption.'

These existing criteria and guidelines reduce the need to be prescriptive in the primary law about how the regulator should manage exemptions.

I trust that this information provides further context about the drafting of the Bill and assists with the Committee's deliberations. I will also consider the report of the Senate Economics Legislation Committee in due course.

Yours sincerelv

The Hon Stephen Jones MP