

Questions on Notice – Sydney hearing 19 February 2020

Baker McKenzie

CHAIR: The other thing was in relation to data policy coordination. As you identify, there are many different agencies doing many different things. Is there a good model you think we should import from another jurisdiction, as Senator Scarr canvassed in his question? What is the best model? If you don't know, feel free to take it on notice. It may be a good one to take back and float with the partners. I'm happy to have more people's views.

Ms Whale: There's obviously something that's generated over time. The multiple entities and new entities being brought out to try to do specific things have resulted in 'many cooks' in the way data policy is handled. But I don't think we have an immediate point of reference for international experience to reflect on that.

CHAIR: We'd be grateful for any thoughts.

Answer

The Committee did ask, in relation to data policy coordination and the existence of "different agencies doing many different things" whether there is a good model that should be imported from another jurisdiction.

The presence of multiple data regulators has less impact on fintechs than the multiplicity of financial services regulators. However fintechs are affected by the increased regulatory burden and lack of clarity that arises from separate regulators, with different priorities, regulating the use of data.

The model in Australia - where the Australian Competition and Consumer Commission (ACCC) and the Data Commissioner operate alongside the Office of the Australian Information Commissioner (OAIC), and the Australian Communications and Media Authority (ACMA) has responsibility for the SPAM Act and Do not call Register Act - is not one that has arisen in other territories. The ACCC's developing role as a data regulator results from (i) the Productivity Commission's recommendation (in its Data Availability and Use report) that a consumer data regime be implemented and that the ACCC co-ordinate of that regime; and (ii) the ACCC's own recommendations in its "Digital Platforms" report of an enhanced role for it in regulating data policy, digital platform operators and complaints about digital platforms. The potential impact of the ACCC's expansion into data regulation is accentuated because it is a significantly larger and better resourced regulator than the OAIC. It also has a different perspective on personal information - viewing it from a consumer protection rather than a privacy perspective.

The ACCC's proposed "consumer data right" regime does increase the compliance burden of participating fintech's because it imposes independent requirements implements a separate set of privacy obligations that are similar to, but at least in some respects distinct from, the Australian Privacy Principles under the Privacy Act.

The involvement of new and existing regulators in the management of data does not have direct parallels in other jurisdictions, where competition regulators are not as directly involved in creating policy for the use of data (although they increasingly focus on data as a merger control issue).