

Question on Notice – Treasury Laws Amendment (Consumer Data Right) Bill 2019

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CHAIR: The Office of the Australian Information Commissioner has suggested an amendment to the legislation—it was pretty small and technical, but it has quite significant implications, I suppose. I can't remember the words she specifically used, but, when the rules are developed, essentially there was an implication that her recommendations would be followed as opposed to having regard to them. That might come as a bit of a surprise. Had you heard of the amendment that she has suggested?

Mr McDonald: I hadn't personally heard of it. It might have been raised at officer level as a thing. I heard the Office of the Australian Information Commissioner's evidence earlier, but I haven't had the benefit of reading through exactly what the proposal is. As I heard it, there were two parts to it. One was around whether the rule maker 'must' make rules or whether they 'may' make rules. I'd want to get a bit of legal advice about the implications of saying somebody must do something and how exactly that works. The other thing that sprang to my mind in listening to the evidence was that nothing can happen in the regime unless the rule maker does make rules. So, if the ACCC were never to try to make a rule, no data would be able to be shared. On the question of whether they must make a rule or may make a rule, it's hard to understand exactly what that adds. We'd want to see exactly what they're proposing and look at it properly.

CHAIR: I haven't got the words in front of me that the Information Commissioner had suggested; they were in her opening statement. We did ask for a copy, but we couldn't get one quickly. Could you have a look at the implications of the amendment she has suggested and come back to us on notice with Treasury's position on that?

Mr McDonald: I'm very happy to take that on notice.

OAIC Proposal: Section 56BA of the *Treasury Laws Amendment (Consumer Data Right) Bill 2019* (the Bill) should be amended to provide that the ACCC 'must' make rules rather than 'may' make rules.

Section 56BA provides the general power for the ACCC to make rules under the regime. Different rules may be required (or not required) in relation to different persons, data sets and circumstances. This general power is therefore couched in terms of rule 'may' being made.

This aligns with the drafting practice in other similar rule making powers, such as section 901A of the *Corporations Act 2001* in relation to derivative transaction rules and section 798G of the *Corporations Act 2001* in relation to market integrity rules.

Similarly, in relation to various Privacy Safeguards (in Division 5 of the Bill), rules will be required to give effect to various provisions and may provide further detail than that provided for in the Bill. Importantly, the Privacy Safeguards provide that data cannot be collected, disclosed, used or held without authorisation. In the absence of some other law or court order providing such an authorisation, the Privacy Safeguards are drafted so that

authorisation cannot occur in the absence of relevant rules being made. A delay in making such rules (or the hypothetical scenario of rules not being made) results in no collections, disclosures, uses or holding of data under the regime, thereby preserving the status quo.

Once a sector is designated the ACCC will make rules to turn on a consumer's right to access or require disclosure of data. The use of 'may' also affords the ACCC with some degree of flexibility in the timing of implementation. In particular, an iterative approach is being taken to rolling out the CDR for each sector, under which some functionality will be introduced at later stages (and therefore some rules are only made at later stages).

Amending the Bill to provide that the ACCC must make rules, while also providing for flexibility to not make rules or to delay making rules in some circumstances, would increase the complexity of the legislation without providing any substantial benefit.

OAIC Proposal: The Bill should require that the ACCC must have regard to any privacy concerns raised by the Information Commissioner.

The Bill as drafted requires the ACCC to have regard to any privacy concerns raised by the Information Commissioner.

Section 56BQ provides that the ACCC must publicly consult on any proposed rules. Subparagraph 56BQ(1)(b)(i) specifically provides that the ACCC must consult with the Information Commissioner. It is open to the Information Commissioner to make any submissions to the ACCC publicly available.

It is inherent in the concept of consultation that the ACCC must not only seek feedback but consider that feedback, particularly in light of section 56BP.

Section 56BP of the *Treasury Laws Amendment (Consumer Data Right) Bill 2019* requires the ACCC to consider a range of criteria when making any rules under the legislation. These criteria, set out in section 56AD, include the privacy or confidentiality of consumers' information.

On 20 August 2018, an MOU was entered into between the ACCC and OAIC regarding their functions under the CDR. Article 4.1 commits the parties to develop processes and protocols on the nature and extent of consultation where either party has or is expected to have a formal role under the CDR framework. This MOU will be further developed as implementation progresses on the CDR.

In practice, the ACCC has and will continue to consult with the OAIC on matters affecting privacy, as part of its consideration of proposed rules under the regime.

OAIC Proposal: The Bill should require that the Treasurer be satisfied that any privacy concerns raised by the Information Commissioner have been addressed before consenting to the making of any rules.

It is a precondition for the exercise of the ACCC's rulemaking power that the Minister consents to the making of the rules. This requirement in section 56BR is subject to limited exceptions in section 56BS in emergency situations when immediate rulemaking is necessary to avoid the risk of serious harm to the economy or the interests of consumers. In such an emergency scenario, section 56BR still requires the ACCC to consult with the OAIC. If

this exception is used the Minister may subsequently direct that the rule be repealed or varied.

It is an inherent consequence of this requirement that the ACCC must submit to the Minister the text of any proposed rules for consent. Treasury will then advise the Minister on whether to consent to the rules. This advice will include an assessment on whether the statutory preconditions for making rules have been met. This will include advice on whether the Information Commissioner has been consulted in accordance with subparagraph 56BQ(1)(b)(i).

The CDR regime currently contemplates (but does not legislatively provide) that any differences in the views of the ACCC and OAIC as to the privacy protections to be contained within the rules will be resolved as follows:

- It is expected that the ACCC and the OAIC will work together to develop common positions on rules that appropriately address privacy concerns, supported by the statutory arrangements requiring consultation and consideration of privacy impacts. In practice, both agencies are currently working cooperatively to determine appropriate privacy setting in the rules.
- In the event that any differences cannot initially be resolved at agency level, advice and assistance would be available from the Treasury and the Attorney-General's Departments.
- In the unlikely event that a difference of opinion still remains unresolved, it can be resolved at Ministerial level. It is open for the OAIC to raise any concerns with the Attorney-General, who may then engage directly with the Treasurer as to whether consent should be given to the rules in the form proposed by the ACCC. Rulemaking is ultimately a law making function. It is appropriate that the CDR law enables the Minister and the Parliament to be the ultimate arbiter of whether a rule should or should not be made, balancing the various considerations, without creating a requirement that the views of any one agency ought to prevail over the other in this process.
- Ultimately, all rules are legislative instruments that are disallowable by Parliament.

On 20 August 2018, an MOU was entered into between the ACCC and OAIC regarding their functions under the CDR. This MOU will be further developed as implementation progresses on the CDR. The ACCC and OAIC have indicated as part of the further development of the MOU, that consideration will be given to putting in place mechanisms to ensure that any privacy concerns raised by the OAIC are drawn to the attention of the Minister and Treasury as part of the process for obtaining consent to any rules.