

**SENATE ECONOMICS LEGISLATION COMMITTEE**  
**INQUIRY INTO THE TREASURY LAWS AMENDMENT (CONSUMER DATA  
RIGHT) BILL 2019 [PROVISIONS]**

**Office of the Australian Information Commissioner (OAIC)**

**Senator Ketter asked the following questions on 6 March 2019:**

**Question 1**

**Senator KETTER:** If I understand your opening statement correctly, there are two opportunities to strengthen the framework that you've identified—have I got that right?

**Ms Falk:** Yes, that's right.

**Senator KETTER:** You've indicated that you've raised those two issues at an officer level with Treasury, but have you been involved formally in the consultation process as far as the exposure draft and the process in September last year?

**Ms Falk:** I have been involved from time to time. My involvement has spanned from meeting with the previous person who gave evidence from the data standards committee and the Data61 representatives, and I have meetings with the chair of the ACCC. Primarily, the matter has been run out of my office at a senior level in terms of my staff working through with the ACCC and the Treasury, and there are regular meetings scheduled that are occurring between those senior officers, and, accordingly, I'm briefed in relation to those matters.

**Senator KETTER:** But, with respect, this is the first we're hearing of these two issues. I think the stakeholders in the area would probably have appreciated knowing your views prior to now. Is this the first time your opportunities to strengthen the framework have become publicly available and known?

**Ms Falk:** It is the first time they've become known. In terms of my previous submission, I don't recall that it was a matter that I put clearly. So can I check that, please, and just take that on notice?

**Senator KETTER:** Okay.

**Ms Falk:** But it would be fair to say that partly these processes, I think, enable responses to matters that are raised before the committee, and some of the matters that have been raised through the evidence have led me to look very carefully again at the framework, to see if there is something that should be put forward in terms of addressing some of the issues that I've heard.

**The response to the honourable senator's question is as follows:**

The Commissioner raised two opportunities to strengthen the CDR framework in her Opening Statement,:

1. That the Bill require the rule-maker to make rules in relation to those elements that are critical for ensuring a strong and effective privacy protection framework (as drafted, the legislation states that the rule-maker ‘may’ make rules); and
2. That the Bill be amended to require the Australian Competition and Consumer Commission (ACCC) to have regard to the Commissioner’s submissions, and to further require the Minister to be satisfied that any privacy concerns raised by the Commissioner had been addressed before consenting to the making of the rules.

The first recommendation was raised in the OAIC’s submission to the Treasury on the exposure draft of the CDR legislation in September 2018. That submission states that “the rule-making powers in the Bill are expressed as ‘The Commission may...’ make certain rules. Given the level of detail being left to the rules, in our view it would be more appropriate for the rule-making power to be mandatory” (page 7).

In regards to the second recommendation, the OAIC had not raised this issue publicly prior to the Committee hearing. However, the OAIC and the Treasury had discussions in June 2018 concerning the Commissioner’s role in the making of the Rules and the OAIC put forward suggestions as to how the role could be strengthened.

## Question 2

**Senator KETTER:** And there has been a lot of criticism of the privacy impact assessment that was conducted by Treasury. Have you provided a response to that privacy impact assessment, or do you have a document that can be made available to us that details your response to it?

**Ms Falk:** I'd have to take that on notice, in terms of the documentation, but we have definitely engaged with Treasury at the officer level, and senior officers, in terms of the development and methodology of the privacy impact assessment. In terms of my office's role, it's for the Treasury to develop the privacy impact assessment and to deliver it. What we can offer is our experience in seeing other privacy impact assessments, on methodology, and pointing out areas for further inquiry.

### **The response to the honourable senator's question is as follows:**

The OAIC does not have a role in the development, review, endorsement or approval of the Privacy Impact Assessment (PIA) process under taken by agencies, however, may assist agencies with advice.

The OAIC provided the Treasury with comments and guidance on the PIA process and early drafts of the initial PIA on three occasions in September and November 2018. The OAIC:

- provided guidance on how to develop a PIA, including that a methodology and recommendations are required, and that the PIA process should be iterative.
- noted that the PIA should be clear as to how and when future PIAs should be developed, including by whom.
- noted that there may be benefits in conducting a PIA externally, particularly where there is a substantial privacy impact.
- suggested using the Guide to Undertaking Privacy Impact Assessments and the Privacy Impact Assessment eLearning module to guide the process, noting best practice regarding consultation of appropriate stakeholders.
- noted that PIAs should have fulsome discussion of privacy concerns and any consultations undertaken.
- noted that PIAs ought to acknowledge privacy-enhancing impacts of the CDR as well as privacy risks.
- noted that PIAs should include clear mapping of information flows under the CDR and should address governance risks.
- noted that a PIA should acknowledge that privacy risks can often be mitigated or managed, but not necessarily eliminated, especially in relation to projects of the scale of the CDR. Those mitigated or managed risks should also be clearly addressed in the recommendations, which should be clear and specific.
- recommended the Treasury consult with the established CDR working groups and other consultation avenues to assess the identified risks and their ratings.
- suggested reassessing the PIA's risk ratings, including for risks relating to fraud and cyber risks, unauthorised disclosure and consent issues.