



AUSTRALIAN  
SENATE

**Senate Standing Committee for the  
Scrutiny of Delegated Legislation**

Parliament House, Canberra ACT 2600  
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14 April 2021

The Hon Josh Frydenberg MP  
Treasurer  
Parliament House  
CANBERRA ACT 2600

Via email: [tsrdlos@treasury.gov.au](mailto:tsrdlos@treasury.gov.au)

CC: [committeescrutiny@treasury.gov.au](mailto:committeescrutiny@treasury.gov.au)

  
Dear Treasurer,

**Competition and Consumer (Consumer Data Right) Amendment Rules (No. 3) 2020  
[F2020L01688]**

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to these matters.

***Significant penalties in delegated legislation***

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This includes whether an instrument imposes significant penalties.

The instrument amends the Competition and Consumer (Consumer Data Right) Rules 2020 (principal instrument) to expand and build on the functionality of the consumer data right (CDR) regime, in line with the recommendations of the Open Banking Review.

Items 49 and 69 of Schedule 1 to the instrument insert new sections 5.34 and 9.3 into the principal instrument. These sections set requirements in relation to refraining from processing CDR requests and keeping and maintaining records relating to CDR data disclosure. Failure to comply with these requirements incurs a maximum civil penalty of \$50,000 (equivalent to approximately 225 penalty units) for an individual and \$250,000 (equivalent to approximately 1,125 penalty units) for a body corporate.

The committee considers that significant penalties should ordinarily be included in primary, rather than delegated legislation. This is to ensure appropriate parliamentary oversight of the scope of the penalty. Generally, the committee's view is that delegated legislation should not contain custodial penalties or pecuniary penalties exceeding a maximum penalty of 50 penalty units for individuals and 250 penalty units for corporations.

Where an instrument nevertheless imposes significant penalties, the committee expects a justification of why it is necessary and appropriate to include such penalties in delegated

legislation. In this instance, the explanatory statement to the instrument does not provide any information as to why the penalties are necessary and appropriate.

**The committee therefore requests your advice as to why it is considered necessary and appropriate to impose significant civil penalties in delegated legislation.**

#### ***Clarity of drafting***

Senate standing order 23(3)(e) requires the committee to scrutinise each instrument as to whether its drafting is defective or unclear.

Item 28 of Schedule 1 to the instrument inserts new subsection 2.4(6) into the principal instrument. This new subsection sets out the definition of 'disclosure document' for the purpose of disclosing product data in response to a product data request. This has the effect of broadening the category of documents which may prescribe required product data. These documents include a Product Disclosure Document within the meaning of the *Corporations Act 2001*, a key facts sheet within the meaning of the *National Consumer Credit Protection Act 2009*, or 'a similar document that is required by law to be disclosed to a customer prior to entering into a contract with that customer'.

The committee is typically concerned with instruments which are not drafted clearly to the extent that this affects the meaning or interpretation of the instrument. Instruments and their explanatory statements should be clear and intelligible to all persons interested in or affected by them, not only those with particular knowledge or expertise.

In the absence of further information on the face of the instrument or in its explanatory statement, it is unclear what 'a similar document that is required by law to be disclosed to a customer prior to entering into a contract with that customer' may include. The committee is particularly concerned in this instance, noting that failure to provide product data prescribed by such documents incurs a maximum civil penalty of \$50,000 for individuals and \$250,000 for corporations under section 2.5 of the principal instrument.

**The committee would therefore appreciate your advice as to what types of 'similar documents' may be prescribed within the definition of a 'disclosure document' under subsection 2.4(6).**

#### ***Conferral of discretionary powers***

##### ***Availability of independent merits review***

Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers. This includes instruments which confer discretionary powers on a person. In addition, Senate standing order 23(3)(i) requires the committee to consider whether an instrument unduly excludes, limits or fails to provide for the independent review of decisions affecting rights, obligations or interests.

Item 49 of Schedule 1 to the instrument inserts new section 5.33 into the principal instrument. New subsection 5.33(1) provides that the Accreditation Registrar may take steps to prevent the Register of Accredited Persons and associated database from being used to make consumer data requests to a data holder, for a period of up to 10 days, if the Accreditation Registrar reasonably believes it is necessary to do so in order to ensure the security, integrity and stability of the Register or associated database.

This appears to require the Accreditation Registrar to exercise discretion in determining when it is necessary to exercise powers under subsection 5.33(1) and what subsequent steps to take. Subsection 5.33(2) provides that the steps taken by the Registrar may include amending the

information in the associated database relating to a data holder that is used to facilitate the making and processing of requests. However, the committee notes it does not provide a clear description of the full scope of the power.

The committee considers that instruments that confer discretionary powers on a person should set out the factors which the person must consider in exercising the discretion. The explanatory statement should also address the purpose and scope of the discretion and why it is necessary, and explain who will be exercising the discretion, including whether they possess the appropriate qualifications and necessary skills. The committee also expects the explanatory statement to explain the nature and source of any relevant limitations and safeguards, including whether they are contained in law or policy.

In this instance, while noting that subsection 5.33(2) provides an example of the types of steps that may be taken, the instrument does not provide clear limits on the exercise of this discretionary power. The committee's concerns with regard to the conferral of this discretionary power are heightened noting that exercise of the powers under subsection 5.33(1) will not be subject to independent merits review.

**In light of these matters, the committee requests your advice as to:**

- **whether there are any factors that the Accreditation Registrar must consider in exercising their discretionary powers under subsection 5.33(1); and**
- **whether any safeguards or limitations apply to the exercise of these powers or functions, and whether these safeguards are contained in law or policy.**

#### ***Compliance with Legislation Act 2003 - incorporation***

Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act and otherwise complies with all legislative requirements. This includes the requirement in paragraph 15J(2)(c) of the *Legislation Act 2003* (Legislation Act) that the explanatory statement to an instrument that incorporates a document contains a description of that document, including the manner in which it is incorporated and how it may be obtained. In addition, under Senate standing order 23(3)(f) the committee expects any incorporated documents to be freely accessed and used.

In this instance, the instrument appears to incorporate ASAE 3150 and the *CDR Accreditation Guidelines*. However, neither the instrument nor the explanatory statement indicates whether the documents are incorporated, and if so the manner in which they incorporated (that is, as in force from time to time or as in force at a particular time).

**The committee therefore requests your advice as to:**

- **whether ASAE 3150 and the *CDR Accreditation Guidelines* are incorporated by reference in the instrument, and if so;**
  - **the manner in which the documents are incorporated (that is, as in force at a particular time or as in force from time to time);**
  - **if the documents are incorporated as in force from time to time, whether there is the power in the enabling legislation or other primary legislation to incorporate the documents in this manner.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. Noting that the 15th sitting day after the instrument was tabled in the Senate is 11 May 2021, the committee has resolved to give a notice

of a motion to disallow the instrument on that day as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **28 April 2021**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,

**Senator the Hon Concetta Fierravanti-Wells**  
**Chair**  
**Senate Standing Committee for the Scrutiny of Delegated Legislation**



**THE HON JOSH FRYDENBERG MP**  
**TREASURER**

Ref: MS21-000890

Senator the Hon Concetta Fierravanti-Wells  
Chair  
Senate Standing Committee for the Scrutiny of Delegated Legislation  
Parliament House  
CANBERRA ACT 2600

Dear Senator Fierravanti-Wells

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation regarding the *Competition and Consumer (Consumer Data Right) Amendment Rules (No.3) 2020* (Amending Rules).

In that letter, the Committee sought my advice as to:

- **Significant penalties in delegated legislation** – why it is considered necessary and appropriate to impose civil penalties that are above what the Committee considers reasonable in delegated legislation.
- **Clarity of drafting** – what are the types of “similar documents” that may be prescribed under subrule 2.4(6).
- **Conferral of discretionary powers - availability of independent merits review** –
  - whether there are any factors that the Accreditation Registrar must consider in exercising the discretionary powers under subrule 5.33(1); and
  - whether any safeguards or limitations apply to the exercise of these powers or functions and whether those safeguards are contained in law or policy.
- **Compliance with the *Legislation Act 2003 - incorporation*** – Whether ASAE 3150 and the CDR Accreditation Guidelines are incorporated by reference in the instrument, and if so:
  - the manner in which the documents are incorporated (that is, as in force at a particular time or as in force from time to time); and
  - if the documents are incorporated as in force from time to time, whether there is power in the enabling legislation or other primary legislation to incorporate the documents in this manner.

## **Significant penalties in delegated legislation**

The Committee noted that the Amending Rules inserted new rules 5.34 and 9.3 into the *Competition and Consumer (Consumer Data Right) Rules 2020* (the Rules) and that the penalties for failing to comply with the rules introduced by these new sections was a maximum of \$50,000 (approximately 225 penalty units) for an individual and \$250,000 (approximately 1,125 penalty units) for a body corporate. The letter stated that the Committee's general view was that delegated legislation should not 'contain custodial or pecuniary penalties exceeding a maximum of 50 penalty units for individuals and 250 penalty units for corporations.'

Under Part IVD of the *Competition and Consumer Act 2010* (the Act), the Rules may provide that specified provisions of the Rules are civil penalty provisions (see section 56BL of the Act). As the Consumer Data Right (CDR) is a regime that is intended to evolve and cover new sectors as designated. The Act provides for the making of new rules that accommodate those sectors and relatedly provide for the imposition of penalties.

The penalties imposed in relation to rules 5.34 and 9.3 are the lower maximum penalties available under the CDR regime (the maximum penalties are set out at section 76(1A)(b) of the Act and can be up to \$10 million or higher in certain circumstances). This reflects that a breach of these provisions is considered less serious than a breach of, for example, the consumer consent provisions.

In relation to rule 5.34, any direction issued by the Registrar must be necessary and temporary and is intended to facilitate a resolution to any risk posed to the register (see response to Issue 4 below). Nonetheless, a breach of rule 5.34 (the Registrar's direction) could potentially seriously impede the Registrar's ability to maintain and manage the integrity, security and stability of the register as used by all participants in processing consumer data requests. Given this potential impact on the CDR system, a penalty, albeit at the lower end of the scale, is considered appropriate and proportionate should there be a breach of the direction.

In relation to rule 9.3 concerning record keeping, the penalty is commensurate with other record keeping provisions and penalties and so aligns with the general approach under the CDR regime. Penalties at the lower end of the scale attach to certain record keeping provisions as this recognises that record keeping is fundamental to ensuring transparency and compliance.

## **Clarity of drafting**

The Committee noted that the Amending Rules inserted a new subrule 2.4(6) into the Rules, setting out a definition of 'disclosure document' for the purpose of disclosing product data in response to a product data request. The definition of disclosure document included 'a similar document that is required by law to be disclosed to a customer prior to entering a contract with that customer'. The Committee considered that it was unclear what might be included in this definition.

The purpose of rule 2.4 is to ensure that the product data to be made accessible under Part 2 of the Rules is as comprehensive as possible, and consistent across all products, so that persons accessing the data can easily compare and otherwise use the data. This includes ensuring that the product data provided in accordance with the standards is commensurate to the publicly available data in relation to that product.

Rule 2.4 applies in respect of banking products that are listed in clause 1.4 of Schedule 3 to the Rules. This list covers a range of products of varying types, some of which are products for which a Product Disclosure Statement (PDS, a term defined in the *Corporations Act 2001*) is required to be disclosed to a consumer and others for which a key fact sheet within the meaning of the *National*

*Consumer Credit Protection Act 2009* must be disclosed to consumers. The reference to PDS and to the key fact sheet clarify for participants what information is to be made accessible via their product data request service. However, there will be some products of a type for which neither a PDS nor a key fact sheet is required by law to be provided to a consumer and for which ‘a similar document that is required by law’ applies. The phrase is to be interpreted narrowly, in that the information contained in such a document will be of a similar kind to that contained in a PDS or key fact sheet for a product, and will be in a document ‘required by law’ to be provided to consumers. So the information is in all cases the kind of information that ordinarily must be made available (that is other than via the CDR) to consumers.

There is also a fundamental constraint on the kind of product data that is required to be disclosed (as distinct from voluntary product data that a data holder chooses to disclose). The definition of ‘required product data’ is limited to the scope as defined in the Act (section 56BF(1)) so the Rules cannot require the disclosure of data unless it is about the eligibility criteria, terms and conditions, price, or already publicly available information about availability or performance of a product.

Rule 2.4(3)(a)(ii) also provides that any disclosure of required product data must be “in accordance with the data standards” (and the same applies to the disclosure of voluntary product data). The data standards set parameters and provide guidance as to how such data is to be provided.

### **Conferral of discretionary powers – availability of independent merits review**

The Committee noted that the Amending Rules inserted a new Rule 5.33 into the CDR Rules. The rule provides that the Accreditation Registrar (currently the ACCC), may take steps to prevent the Register of Accredited Persons and associated database from being used to make consumer data requests to a data holder for a period of up to ten days, if the Accreditation Registrar believes it is necessary to do so. This is in place in order to ensure the security, integrity and stability of the register or associated database. The Committee was concerned that the instrument did not provide clear limits on the exercise of this discretionary power.

The register is used by all participants in the processing of consumer data requests. The register has evidentiary value in any proceedings (see section 56CF of the Act). The register is a cache of information that is constantly updated with information used by participants to transfer consumer data securely. This rule recognises that the nature of the register, as an electronic means of recording data that is accessed by participants via technical means, may require the Registrar to take immediate action should there be any risk to the register.

The Registrar may only issue a written notice to refrain from processing consumer data requests if the Registrar reasonably believes it is necessary to do so in order to ensure the security, integrity and stability of the register or associated database. Any belief of the Registrar therefore must be based on the Registrar’s understanding of the impact on the register and any effect on the processing of consumer data requests. The Registrar’s actions are confined to this purpose, consistent with the scope of the Registrar’s responsibility under the Act and the Rules for maintaining the register including functions relating to the context, administration and operation of the register (see section 56CE of the Act and the Rules). The direction must also be “necessary” to address the particular matter that is impacting the register.

The period of any such direction is limited to a maximum of 10 days, and could be for a lesser period of time depending on what is necessary to resolve the matter. This limited time period minimises the impact on participants while allowing affected participants, for example, to make any technical corrections which may be posing a risk to the operation of the register. The Registrar must provide participants with a reasonable opportunity to be heard in relation to any such direction. For context, participants have access to the Registrar and ordinarily engage with the register via their portal account and have certain responsibilities in relation to that account.

The provision balances the Registrar's responsibilities, and the technical nature of the register, with the responsibilities of participants who are to use the register to process consumer data requests.

### **Compliance with *Legislation Act 2003* - Incorporation**

The Committee noted the requirement in paragraph 15J(2)(c) of the *Legislation Act 2003* that the Explanatory Statement to an instrument that incorporates a document contains a description of that document, including the manner in which it is incorporated and how it may be obtained. It also noted that under Senate Standing Order 23(3)(f), the Committee expects any incorporated document to be freely accessed and used. The Committee stated that it was unclear whether ASAE 3150 and the CDR Accreditation Guidelines were incorporated and if so, whether it was incorporated as in force from time to time, or at a particular time.

ASAE 3150 and the CDR Accreditation Guidelines are incorporated by reference in Part 2 of Schedule 1 to the Rules (Default conditions on accreditations). Section 56BG of the Act provides that the rules may make provision by applying, adopting, or incorporating any matter contained in any other instrument or writing as in force or existing at a particular time or as in force or existing from time to time. ASAE 3150 and the CDR Accreditation Guidelines are incorporated as existing from time to time. The definition of "ASAE" in Part 2 of Schedule 1, defines a standard as that "issued by the Auditing and Assurance Standards of the Australian Government" which will be the standard in place as it exists from time to time. Similarly, the Guidelines are those as issued by the ACCC. The Guidelines state that they may be updated from time to time. The details for accessing the most up to date versions are included in the Note for the definition of 'assurance report'.

Thank you for bringing the Committee's concerns to my attention.

Yours sincerely

~~THE HON JOSH FRYDENBERG MP~~

28 April 2021





AUSTRALIAN  
SENATE

Senate Standing Committee for the  
Scrutiny of Delegated Legislation

Parliament House, Canberra ACT 2600  
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13 May 2021

The Hon Josh Frydenberg MP  
Treasurer  
Parliament House  
CANBERRA ACT 2600

Via email: [tsrdlos@treasury.gov.au](mailto:tsrdlos@treasury.gov.au)

CC: [committeescrutiny@treasury.gov.au](mailto:committeescrutiny@treasury.gov.au)

Dear Treasurer,

**Competition and Consumer (Consumer Data Right) Amendment Rules (No. 3) 2020 [F2020L01688]**

Thank you for your response of 28 April 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instrument. The committee considered your response at its private meeting on 12 May 2021 and has resolved to seek your further advice about the issues outlined below.

***Significant penalties in delegated legislation***

In relation to this matter you advised that under Part IVD of the *Competition and Consumer Act 2010* (the Act), the rules may provide for civil penalty provisions and that the penalties in rules 5.34 and 9.3 are 'the lower maximum penalties available' under the Consumer Data Right (CDR) regime. The maximum penalties inserted are a maximum of \$50,000 (approximately 225 penalty units) for an individual and \$250,000 (approximately 1,125 penalty units) for a body corporate.

In relation to the penalty in rule 5.34, you advised that the penalty, which you describe as being 'at the lower end of the scale', is appropriate and proportionate to the potential impact on the CDR system if the rule was breached.

In relation to the penalty in rule 9.3, you advised that the penalty is consistent with penalties for similar offences, is consistent with the CDR regime and that penalties at 'the lower end of the scale' for certain record keeping provisions recognise the importance of record keeping for ensuring transparency and compliance.

While noting this further information, the committee continues to have scrutiny concerns in relation to the inclusion of these penalty provisions, which significantly exceed what the committee considers appropriate for inclusion in delegated legislation. The committee's views in relation to this matter align with the guidance set out in the *Guide to Framing Commonwealth Offences* published by the Attorney-General's Department.

While also noting the explanation that the inclusion of penalty provisions in the rules are enabled by the Act, from a scrutiny perspective, the committee remains concerned with the inclusion of such significant penalties in delegated legislation.

**The committee therefore requests your further advice as to:**

- **why it is considered necessary and appropriate to include these significant penalty provisions in the rules (not merely why it is necessary for the Act to enable penalties to be set out in rules);**
- **whether including these penalty provisions in primary legislation was considered when the CDR regime and rules were being developed; and**
- **whether the *Guide to Framing Commonwealth Offences* was considered when including these penalty provisions in the rules.**

#### ***Clarity of drafting***

Thank you for your explanation of what is meant by 'similar documents' and the limitations of that term in relation to this instrument.

You advised that 'similar documents' is 'to be interpreted narrowly, in that the information contained in such a document will be of a similar kind to that contained in a PDS or key fact sheet for a product, and will be in a document 'required by law' to be provided to consumers' and that the information required to be provided is the kind of information that must ordinarily be made available to consumers.

You also advised there is a constraint on the kind of product data that is required to be disclosed, as the definition of 'required product data' is limited to the scope defined in subsection 56BF(1) of the Act and the rules therefore, cannot 'require the disclosure of data unless it is about the eligibility criteria, terms and conditions, price, or already publicly available information about availability or performance of a product'. The committee understands this also limits what is considered a 'similar document'.

**The committee therefore requests that the Australian Competition and Consumer Commission amend the explanatory statement to the instrument to include the further information regarding 'similar documents' as outlined in your letter of 28 April 2021.**

#### ***Conferral of discretionary powers***

##### ***Availability of independent merits review***

Thank you for your advice regarding the limits to the Registrar's discretionary power. You advised that:

- the Registrar must only issue a written notice if they have a reasonable belief it is necessary to do so to ensure the security, integrity and stability of the register or associated database,
- a direction may only be issued for a maximum of 10 days; and
- that the Registrar is required to provide participants with a reasonable opportunity to be heard in relation to any direction (procedural fairness).

Based on this advice, the committee has concluded its examination of this matter.

#### ***Compliance with Legislation Act 2003 – incorporation***

Thank you for your advice that the ASAE 3150 and the CDR Accreditation Guidelines are incorporated as existing from time to time and this is permitted by section 56G of the Act.

**The committee therefore requests that the Australian Competition and Consumer Commission amend the explanatory statement to the instrument to include this further information, as outlined in your letter of 28 April 2021, including details of where both documents can be accessed, noting that this is a requirement of paragraph 15J(2)(c) of the *Legislation Act 2003*.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. Noting that the 15th sitting day after the instrument was tabled in the Senate was 11 May 2021, the committee gave notice of a motion to disallow the instrument on that day as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **27 May 2021**.

Finally, please note that, in the interests of transparency this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,

**Senator the Hon Concetta Fierravanti-Wells**  
**Chair**  
**Senate Standing Committee for the Scrutiny of Delegated Legislation**



**THE HON JOSH FRYDENBERG MP**  
**TREASURER**

Ref: MS21-001091

Senator the Hon Concetta Fierravanti-Wells  
Chair  
Senate Standing Committee for the Scrutiny of Delegated Legislation  
Parliament House  
CANBERRA ACT 2600

Dear Senator Fierravanti-Wells

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation requesting further advice regarding the *Competition and Consumer (Consumer Data Right) Amendment Rules (No. 3) 2020* (the Amendment Rules).

In that letter, the Committee sought my further advice in relation to the following:

- **Issue 1:** Why it is considered necessary and appropriate to include significant penalty provisions in rules 5.34 and 9.3 (not merely why it is necessary for the Act to enable penalties to be set out in the *Competition and Consumer (Consumer Data Right) Rules 2020* generally);
- **Issue 2:** Whether including these penalty provisions in primary legislation was considered when the Consumer Data Right regime (CDR regime) and *Competition and Consumer (Consumer Data Right) Rules 2020* (the Rules) were being developed;
- **Issue 3:** Whether the *Guide to Framing Commonwealth Offences* was considered when including these penalty provisions in the Rules.

**Issue 1: Inclusion of significant penalties in rules 5.34 and 9.3**

Rule 5.34 allows the Accreditation Registrar to make a temporary direction to an accredited person to refrain from making consumer data requests or to a data holder to cease disclosing consumer data in response to a request, where the Registrar reasonably believes it is necessary to ensure the security, integrity and stability of the Register of Accredited Persons (the Register) or associated database. The Register contains accreditation details of entities that are accredited under the CDR regime and information that is used by data holders to verify the identity of accredited persons to facilitate the secure sharing of consumer data.

Given the function performed by the Register, the accuracy and reliability of the information held in the Register are critical features of the CDR regime. For example, among other things, the Register is admissible as *prima facie* evidence such that where a person has taken the matters contained in the Register as being correct and acted on that basis, the person cannot be taken to be at fault.

A breach of rule 5.34 could seriously impede the Registrar's ability to maintain and manage the security, integrity and stability of the Register, given the critical nature of the information it contains. Therefore a maximum penalty that underlines the seriousness of the obligations provided in rule 5.34 is appropriate and proportionate.

Subrules 9.3(1) and (2) set out obligations on data holders and accredited data recipients to keep and maintain records of a range of specified matters relating to disclosure of CDR consumers' data. The CDR regulators (Office of the Information Commissioner (OAIC) and Australian Competition and Consumer Commission (ACCC)) may require data holders and accredited data recipients to provide copies of these records, as needed in the performance of their statutory functions. CDR consumers may also require data holders and accredited data recipients to provide them with copies of certain kinds of records required to be kept by rule 9.3.

Compliance with these record keeping requirements is critical to support effective enforcement of the CDR obligations by the ACCC and OAIC, and to enable consumers to obtain records to enable them to engage the dispute resolution processes available under the CDR regime to take direct action against a CDR participant. These obligations reflect the importance of the availability and accuracy of records to enable the effective operation of the CDR regulatory framework and the maximum penalties in relation to these obligations reflect the importance of compliance and are therefore appropriate and proportionate.

The *Competition and Consumer Act 2010* (the Act) provides that where a civil penalty does apply to a breach of the Rules, the Rules may specify a lower penalty amount than the default maximum. If the Rules do not specify an amount, then the maximum civil penalty is as per the amount worked out under paragraph 76(1A)(b) of the Act. The penalties that attach to rules 5.34 and 9.3 are examples of where a lower penalty amount than the default maximum has been specified.

## **Issue 2: Consideration given to including the penalties in primary legislation**

The enforcement and remedy regime under the CDR is applied through obligations and penalty provisions contained in both the Act and the Rules.

Under the CDR framework, key elements of the regime are governed by the Rules including turning on a consumer's rights to access and disclose CDR data in designated sectors. The rule making power is intentionally broad to enable the Rules to be tailored to different sectors of the Australian economy and to leverage off existing organisational arrangements, technological capabilities and infrastructure. The Rules are a key mechanism for the protection of consumers and their data, as well as ensuring that the competition elements of the CDR, such as the right to access and transfer CDR data, are able to be enforced.

Obligations that relate to more specific aspects of the regime such as the Registrar's management of the Register in rule 5.34, and the maintenance of records in rule 9.3 were considered more appropriate to be included in the Rules. Given this, it is important that the Rules also contain appropriate penalties for serious breaches of these specific obligations.

Only some of the obligations that may attract civil penalties are provided in the Act. These are typically higher-level obligations that have general application across the whole CDR regime, for example, engaging in misleading or deceptive conduct in relation to requests for disclosure of CDR data (s.56BN) or holding out that a person is accredited when they are not (ss.56CC and 56CD).

More broadly, the balance between specifying civil penalties in the Act and the Rules was carefully considered when the CDR framework was developed. The Explanatory Memorandum to the *Treasury Laws Amendment (Consumer Data Right) Act 2019* states that:

1.412. The consumer data rules may specify that a civil penalty applies to breaches of the rules. Where a civil penalty does apply to a breach of the rules the rules may also specify a lower penalty amount than the default maximum. If the rules do not specify an amount, then the maximum civil penalty is as per the amount worked out under section 76 of the CC Act.

1.413. This is considered necessary because the consumer data rules are a key mechanism through which consumers and their data are protected (in conjunction with the Privacy Safeguards). This will also ensure that the competition elements of the CDR, such as the right to access and transfer CDR data, are able to be enforced.

1.414. High penalties reflect the importance of consumer data rules (together with the Privacy Safeguards) to the core protections for consumers and their data. It is through the rules that the ACCC will be able to enforce the data standards that are a fundamental element of those protections. Significant penalties recognise the potential damage where contraventions expose sensitive personal data and provide flexibility as other sectors are brought within the regime and the potential to include derived or value-added data.

1.415. It is also appropriate for the high maximum penalties to apply equally to small business and large multi-nationals. The application of such penalties has been successfully managed by the ACCC and the courts for other contraventions and has not had the effect of deterring normal business conduct. It would align with the introduction of higher penalties under the Australian Consumer Law.

1.416. The CC Act allows the ACCC the discretion to determine the appropriate enforcement tool to apply to small businesses and multi-nationals who may have engaged in misconduct. In selecting the appropriate enforcement tool, the ACCC considers a range of factors including: the size of the business, the capacity of the business to benefit from the misconduct, and the sophistication of the business' compliance strategies. If the ACCC successfully litigates against a business, the court decides the appropriate penalty amount up to the maximum. The court considers similar factors including:

- the nature and extent of the contravening conduct;
- the amount of loss or damage caused;
- the circumstances in which the conduct took place;
- the size of the contravening company;
- the degree of power it has, as evidenced by its market share and ease of entry into the market;
- the deliberateness of the contravention and the period over which it extended;
- whether the contravention arose out of the conduct of senior management or at a lower level;
- whether the company has a corporate culture conducive to compliance with the CC Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention; and
- whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the CC Act in relation to the contravention.

1.417. It is appropriate that the court retain the discretion to impose a penalty that is appropriate in the particular circumstances. Those circumstances will cover a broad range of conduct and may vary significantly across different sectors. It is expected that the maximum penalty would be imposed in the most serious of circumstances, and not in circumstances involving, for example, honest mistakes.

### **Issue 3: Consideration of the *Guide to Framing Commonwealth Offences***

The *Guide to Framing Commonwealth Offences* was considered when the penalty provisions were included in the Rules. However, given the civil penalty scheme that applies to the CDR regime, and having regard to the objective of deterring non-compliance, it was deemed appropriate to include these penalties for rules 5.34 and 9.3.

## **Explanatory Statement for the Rules**

In addition to the request for further advice on the above issues, the Committee requested the ACCC amend the explanatory statement to the Rules to include:

- additional information about the kinds of “similar documents” that could contain product data a data holder might need to include as part of a product data request under rule 2.4; and
- information about how to access the documents (ASAE 3150 and CDR Accreditation Guidelines) incorporated by reference in clause 2.1 of Schedule 1 to the Rules, in compliance with paragraph 15J(2)(c) of the *Legislation Act 2003*.

The ACCC has undertaken to lodge a replacement explanatory statement that will include the requested information.

Thank you for bringing the Committee’s concerns to my attention.

Yours sincerely

~~THE HON JOSH FRYDENBERG MP~~

27 May 2021

CC: Minister for Superannuation, Financial Services and the Digital Economy



AUSTRALIAN  
SENATE

**Senate Standing Committee for the  
Scrutiny of Delegated Legislation**

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17 June 2021

The Hon Josh Frydenberg MP  
Treasurer  
Parliament House  
CANBERRA ACT 2600

Via email: [tsrdlos@treasury.gov.au](mailto:tsrdlos@treasury.gov.au)

CC: [Committeescrutiny@treasury.gov.au](mailto:Committeescrutiny@treasury.gov.au)

Dear Treasurer,

**Competition and Consumer (Consumer Data Right) Amendment Rules (No. 3) 2020 [F2020L01688]**

Thank you for your response of 27 May 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 16 June 2021. On the basis of your advice and the Australian Competition and Consumer Commission's undertaking to lodge a replacement explanatory statement, the committee has concluded its examination of the instrument. The committee has also resolved to withdraw the notice of motion to disallow the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

**Senator the Hon Concetta Fierravanti-Wells**  
Chair  
Senate Standing Committee for the Scrutiny of Delegated Legislation