



Law Council  
OF AUSTRALIA

Office of the President

27 November 2019

Ms Angelene Falk  
Australian Information Commissioner and Privacy Commissioner  
Office of the Australian Information Commissioner  
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SYDNEY NSW 2001

By email: [consultation@oaic.gov.au](mailto:consultation@oaic.gov.au)

Dear Commissioner

### Draft Consumer Data Right Privacy Safeguard Guidelines

The Law Council of Australia welcomes the opportunity to provide this submission to the Office of the Australian Information Commissioner (**OAIC**) in relation to its consultation on the Draft Consumer Data Right Privacy Safeguard Guidelines (**Guidelines**).

The Law Council acknowledges the assistance of the Business Law Section's Privacy Law Committee in the preparation of this submission.

In August 2019, the Australian Parliament passed the *Treasury Laws Amendment (Consumer Data Right) Act 2019* (Cth) to insert new Part IVD into the *Competition and Consumer Act 2010* (Cth) (**Competition and Consumer Act**) to enact the Consumer Data Right (**CDR**).

Paragraph 56EQ(1)(a) of the *Competition and Consumer Act* permits the Australian Information Commissioner (**Information Commissioner**) to make 'guidelines for the avoidance of acts or practices that may breach the privacy safeguards'.

There are 13 Privacy Safeguards in the *Competition and Consumer Act* (**Privacy Safeguards**),<sup>1</sup> supplemented by the *Competition and Consumer (Consumer Data Right) Rules 2019* (Cth) (**CDR Rules**),<sup>2</sup> which seek to maintain the security and integrity of the CDR regime. As noted by OAIC, 'these privacy safeguards set out the privacy rights and obligations for users of the scheme, including the requirement for informed consent to collect, disclose, hold or use CDR data'.<sup>3</sup>

The Guidelines provide an outline as to how the Information Commissioner will interpret and apply the Privacy Safeguards when exercising related functions and powers.

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<sup>1</sup> *Competition and Consumer Act 2010* (Cth) pt IVD div 5.

<sup>2</sup> The Australian Competition and Consumer Commission, *Competition and Consumer (Consumer Data Right) Rules 2019* (Cth) (Proposed Rules at August 2019) pt 7.

<sup>3</sup> Office of the Australian Information Commissioner, 'Draft CDR Privacy Safeguard Guidelines' (Web page, 16 October 2019) <<https://www.oaic.gov.au/engage-with-us/consultations/draft-cdr-privacy-safeguard-guidelines/>>.

The Law Council considers that the Guidelines are complex, largely reflecting the complexity of the CDR scheme itself and the dual regulatory structure. The Law Council has previously provided feedback on the complexity of the CDR scheme, something that cannot of itself be addressed by the Guidelines.<sup>4</sup> The Law Council's concerns regarding complexity stand.

Nonetheless, the Guidelines can be a very useful document and can be improved by adding the following clarifications.

#### Application of the Guidelines

The Guidelines should include a clear statement as to the application of the Privacy Safeguards and the Guidelines. Specifically, that the data attracts the protection of the Privacy Safeguards under the Competition and Consumer Act once the consumer has made the election to participate and has provided consent to do so, as provided for by section 56EB of the Competition and Consumer Act. Section 56EB specifies the kinds of CDR data to which the privacy safeguards apply, namely the 'CDR data for which there are one or more CDR consumers'.<sup>5</sup>

At least one consumer (person or business) is to be identifiable, or reasonably identifiable, from the CDR data or from related information.<sup>6</sup> If no request for transfer of CDR data is received, the data, even though it is CDR data, will remain governed by the Australian Privacy Principles<sup>7</sup> (**APPs**) (see examples in the Explanatory Memorandum).<sup>8</sup> Once CDR data is provided to and is held by an 'accredited data recipient', it is, and continues to be, protected by the Privacy Safeguards until that data ceases to 'relate' to an identifiable or reasonably identifiable consumer.

The Privacy Safeguards, and hence the Guidelines, apply to information that relates to identifiable or reasonably identifiable CDR consumers, including business consumers who wish to participate in the system.

#### Validity of consent

The Guidelines should include a clear statement that where the consent is not valid because it is not specific enough under proposed rule 4.3 of the CDR Rules,<sup>9</sup> or fails to comply with the CDR Rules in some other way, the Privacy Safeguards apply to the data even though the transfer may not be effective or in breach of the CDR Rules.

In addition, it would be useful to reiterate that consent under the APPs may be express or implied,<sup>10</sup> whereas consent under the CDR regime can only be express as per rule 4.11 of the CDR Rules.<sup>11</sup>

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<sup>4</sup> Law Council of Australia, Submission No 2 to the Senate Standing Committee on Economics, *Treasury Laws Amendment (Consumer Data Right) Bill 2018* (27 February 2019) 3; Law Council of Australia, Submission to the Treasury, *Consumer Data Right Rules Draft Privacy Impact Assessment* (18 January 2019) 1 [3], 4 [22]; Law Council of Australia, Submission to the Treasury, *Exposure Draft – Treasury Laws Amendment (Consumer Data Right) Bill 2018* (7 September 2018) 2 [3], 4 [15], 5 [20].

<sup>5</sup> *Competition and Consumer Act 2010* (Cth) s 56EB(1).

<sup>6</sup> *Ibid* s 56AI(3)(c).

<sup>7</sup> *Privacy Act 1988* (Cth) sch 1.

<sup>8</sup> Explanatory Memorandum, *Treasury Laws Amendment (Consumer Data Right) Bill 2019* (Cth).

<sup>9</sup> The Australian Competition and Consumer Commission, *Competition and Consumer (Consumer Data Right) Rules 2019* (Cth) (Proposed Rules at August 2019) r 4.3.

<sup>10</sup> *Privacy Act 1988* (Cth) s 6, definition of 'consent'.

<sup>11</sup> The Australian Competition and Consumer Commission, *Competition and Consumer (Consumer Data Right) Rules 2019* (Cth) (Proposed Rules at August 2019) r 4.11(1)(c).

## Notification

An ‘accredited person’ is required under the CDR Rules to provide two notifications to the ‘CDR Consumer’.<sup>12</sup> One notification is to be via the relevant individual’s ‘consumer dashboard’ as soon as practicable after CDR data is collected.<sup>13</sup> Another notification (known as a CDR receipt) is required to be provided by some other means (e.g. by email or SMS) as soon as practicable after the consumer provides consent to the collection and use of their CDR data.<sup>14</sup> The CDR Rules provide for the ‘minimum matters’ that must be notified.<sup>15</sup>

However, Chapter 5 of the Guidelines has missed an opportunity to suggest additional information that could be included in notices to assist consumers and promote understanding of privacy. An example is information about individual rights which is particularly important in the situations where Privacy Safeguard 5 applies instead of Australian Privacy Principle (**APP**) 5.

The Law Council is of the view that it is important that notices include information about how consent can be withdrawn, and what it means in practice if consent is withdrawn. This is an important feature of any regulatory regime that is based on consent. Withdrawal of consent is referenced in the chapter on consent in the Guidelines (see at paragraph C.35) but is absent from Chapter 5 of the Guidelines and its discussion of notifications.

Similarly, guidance about the ‘associates’ of the relevant CDR Consumer (who the CDR data may also relate to) would be helpful. Notifications could encourage the CDR Consumer to pass on information to their associates and thereby promote awareness and transparency. The Law Council considers that guidance about this in Chapter 5 would be helpful. By contrast, the *Australian Privacy Principles Guidelines (APP Guidelines)* provide that if an individual may not be aware of their personal information being collected (due to the use of a particular technology for example), they should at least be made aware of the method of collection.<sup>16</sup> In this context, CDR receipts could suggest to the CDR Consumer that they make their associates aware that they are participating in the CDR scheme.

In addition, transparency about the ‘data holder’ (which includes the ‘accredited person’) could also be encouraged, such as by including contact details in notifications. Where APP 5 applies, the contact details of the entity collecting personal information also need to be notified (and the APP Guidelines include guidance about what to notify).<sup>17</sup> The Law Council considers that it would be helpful if there was express guidance about this in Privacy Safeguard 5 of the Guidelines.

Paragraphs 5.18 and 5.20 of the Guidelines require redrafting because of potential confusion in the current wording. On one hand, paragraph 5.18 states that assessing what is ‘soon as practicable’ will depend on circumstances, and identifies factors that may be relevant, including time and cost involved. However, paragraph 5.20 then states that an ‘accredited person is not excused from providing notification by reason only that it would be time consuming or costly’. The Law Council suggests that it would be helpful if paragraph 5.18 made it clear that ‘time and cost’ is only a relevant factor when it is combined with another relevant factor or factors.

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<sup>12</sup> Ibid r 4.18.

<sup>13</sup> Ibid r 4.18(4).

<sup>14</sup> Ibid r 4.18(1), (4).

<sup>15</sup> Ibid r 4.18(2).

<sup>16</sup> Office of the Australian Information Commissioner, *Australian Privacy Principle Guidelines: Privacy Act 1988* (at July 2019) [5.11] <<https://www.oaic.gov.au/assets/privacy/app-guidelines/app-guidelines-july-2019.pdf>>.

<sup>17</sup> Ibid [5.9].

Finally, the cross references to the Data Language Standards and Consumer Experience Guidelines would be more helpful if relevant examples were included.<sup>18</sup> The Guidelines would be more helpful if they are able to be read on their own without the reader needing to have other documents open at the same time.

### Disclosure

It is important that the Guidelines include additional clarifications regarding the disclosure provisions.<sup>19</sup> The Law Council considers that the following clarifications in respect of the disclosure provisions should be included.

At paragraph 6.7, the Guidelines note 'Like Privacy Safeguard 6, APP 6 relates to the use or disclosure of personal information'. As 'personal information' bears specific meaning under the *Privacy Act 1988* (Cth),<sup>20</sup> this term should either be generalised in the Guidelines, or this note should be expanded upon to account for the fact that while APP 6 relates to personal information, Privacy Safeguard 6 relates to CDR data.

Regarding the table at paragraph 6.7 of the Guidelines, the Law Council makes two observations. In respect of 'accredited data recipients', the Law Council recommends qualifying the second paragraph to read 'APP 6 will continue to apply to any personal information that is not CDR data, handled by the 'accredited data recipient' in their capacity as an APP entity'. This would be consistent with the point that follows in respect of 'designated gateways'. In respect of 'designated gateway', a footnote should reference paragraph 56EC(4)(d) of the Competition and Consumer Act at the end of the second paragraph for consistency with the reference to paragraph 56EC(4)(a) regarding 'accredited data recipients'.

Paragraphs 6.39 and 6.40 of the Guidelines are made without any evident obligation on the 'accredited data recipient' arising from the Competition and Consumer Act or the CDR Rules. In light of this, the Law Council recommends moving the point made at paragraph 6.42 above 6.39, so that those points can be made in light of 6.42.

The Law Council also recommends amending paragraphs 6.39 and 6.40 to reframe those matters to be brought in line with the lack of hard obligation. The Law Council proposes two possible options to replace paragraphs 6.39 and 6.40:

1. *'an accredited data recipient who discloses CDR data to a person under a CDR outsourcing arrangement should ensure that the person complies with its requirements under the arrangement, as any use or disclosure of the person is taken to be a use or disclosure by the accredited data recipient'* [proposed rule 7.6(2) of the CDR Rules]; or
2. *'in order to meet this requirement, the accredited data recipient should ensure that the relevant CDR outsourcing arrangement requires the outsourced service provider to adhere to the accredited data recipient's Privacy Safeguard obligations'*.

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<sup>18</sup> Australian Office of the Information Commissioner, *Draft Privacy Safeguard Guidelines (Combined)* (Complete Version of the Consultation Draft, October 2019) [5.23].

<sup>19</sup> *Ibid* ch 6.

<sup>20</sup> *Privacy Act 1988* (Cth) s 6, definition of 'personal information'.

### Other general comments

The Law Council makes the following general comments:

- 'deidentifying data' has been added at paragraph 6.11 of the Guidelines as an example of 'use' where it is not an example given in the APP Guidelines;<sup>21</sup>
- there is no reference to the distinction between a 'use' and 'disclosure' as is done in the APP Guidelines;<sup>22</sup>
- the example of disclosure by publication on the internet at paragraph 6.15 of the Guidelines omits the additional requirement found in the APP Guidelines that the published material must be 'accessible by another entity or individual';<sup>23</sup>
- the example given in relation to MinYin (following paragraph 6.20 of the Guidelines) should contain more information as to why MinYin needs to analyse Elizabeth's frequent payees to identify those who use the app. It is unclear why this is the case and whether this is potentially a collection which breaches the data minimisation principle of the CDR Rules;<sup>24</sup>
- the reference to the requirement of making a note of how the 'accredited data recipient' has used the CDR data at paragraph 6.51 of the Guidelines is too broad, and does not in its terms relate to the purpose of the written note which is to make a written note of the use or disclosure required or authorised by law or Court/Tribunal Order (see paragraph 6.47 of the Guidelines); and
- the details of to whom the CDR data has been disclosed at paragraph 6.51 of the Guidelines should arguably be limited to disclosure pursuant to the law or order.

### Further review of the Guidelines

The Law Council appreciates that many of the issues under the CDR scheme have yet to be tested and that can only occur once the data sharing is activated or utilised in practice. The Law Council recommends that the Guidelines be formally reviewed within 12 months of implementation to address the issues (if any) in the context of actual industry practice and any trends or patterns emerging from early uptake of the CDR scheme. Such a review should be informed by further public consultation.

The Law Council also recommends that specific guidance be drafted for the express benefit of consumers. Such guidance should similarly be the subject of review and based on public consultation.

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<sup>21</sup> Office of the Australian Information Commissioner, *Australian Privacy Principle Guidelines: Privacy Act 1988* (at July 2019) [B.143].

<sup>22</sup> *Ibid* [B.63]–[B.69] (disclosure), [B.142]–[B.144] (use).

<sup>23</sup> *Ibid* [6.10].

<sup>24</sup> The Australian Competition and Consumer Commission, *Competition and Consumer (Consumer Data Right) Rules 2019* (Cth) (Proposed Rules at August 2019) r 1.8.

In the first instance, please contact Dr Natasha Molt, Director of Policy, on (02) 6246 3754 or at [Natasha.molt@lawcouncil.asn.au](mailto:Natasha.molt@lawcouncil.asn.au), if you would like any further information or clarification.

Yours sincerely

A handwritten signature in black ink, appearing to read 'A. Moses'.

**Arthur Moses SC**  
**President**