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Daniel McAuliffe
Consumer Data Right Team
Structural Reform Group
The Treasury
Langton Crescent
Parkes ACT 2600

Sent by email to: data@treasury.gov.au
cc: Daniel.McAuliffe@Treasury.gov.au

Dear Daniel

Treasury consultation on Privacy Impact Assessment – Consumer Data Right

I welcome the opportunity to inform Treasury's consultation on the *Privacy Impact Assessment for the Consumer Data Right (December 2018)*.

While the Assessment focuses on reforms for open banking, it covers the broader regulatory framework proposed by the *Treasury Laws Amendment (Consumer Data Right) Bill 2018*, also applicable to CDR for the telecommunications service sector, and associated requirements for complaints handling.

Please find attached the TIO's submission which may be made publicly available.

If you have any questions regarding this letter or our submission, please feel free to contact me, or my Senior Policy Advisor, Ai-Lin Lee on (03) 8680 8403 or Ai-Lin.Lee@tio.com.au.

Yours sincerely,



Judi Jones
Ombudsman
Telecommunications Industry Ombudsman

Telecommunications Industry Ombudsman Ltd ABN 46 057 634 787

PO Box 276 Collins Street West
Vic 8007

Tel freecall* 1800 062 058
Fax freecall* 1800 630 614
Telephone 03 8600 8700
Fax 03 8600 8797

Email tio@tio.com.au
Web www.tio.com.au

* calls from mobile phones may incur charges

TIO SUBMISSION TO TREASURY'S CONSULTATION ON PRIVACY IMPACT ASSESSMENT – CONSUMER DATA RIGHT

The Telecommunications Industry Ombudsman (TIO) supports a Consumer Data Right (CDR) system that:

- promotes a 'no wrong door' approach to complaints handling;
- deals appropriately with inter-sector complaints issues;
- confirms the role of the regulator in supporting the industry-based Ombudsman scheme;
- streamlines the interaction between privacy and CDR.

1. 'No wrong door' approach to complaints handling

Treasury's Privacy Impact Assessment appears to move away from a 'no wrong door' approach to an OAIC triage model for complaints handling. The Assessment appears to provide that the OAIC would first respond to the complaint and then redirect the individual or small business consumer to the relevant industry-based Ombudsman scheme.

It is not clear to us whether industry-based Ombudsman schemes (such as the TIO) would be expected to refer the consumer who complains directly to them to the OAIC. If we are expected to redirect the consumer to the OAIC, this could create delays and result in the consumer feeling frustrated by an inefficient process.

Under current OAIC Guidelines for scheme recognition¹, consumers can complain directly to the TIO and have all their issues considered in the one forum. This is intended to avoid the fragmentation of a complaint between bodies if the issues were split along service delivery and privacy lines. Once CDR issues are combined, it would be inconsistent with OAIC recognition if a scheme had to separate the service delivery issues to refer aspects of the complaint to the OAIC.

2. Inter-sector complaints issues

2.1 Public sector agencies can participate in the CDR system

We are interested in whether Treasury has considered the complexities of an added overlay of Freedom of Information (FOI) to CDR data sets if public sector agencies participate in the CDR system².

The latest version of the CDR framework allows State or Territory public sector agencies to participate in the CDR system, to the extent they hold CDR data when providing consumer goods or services. Participation by the public sector agencies is also subject to the agency being declared by the Minister as being able to participate. We understand this is directed at the energy sector, so consumers who receive their energy supply from a State or Territory government agency can also benefit from the consumer data right.

Federal agencies may also participate in the CDR system, without restriction. Other than for the Australian Energy Market Operator (AEMO), it is not clear to us why Federal public sector agencies can participate in the entire CDR system, without any similar limitation to State or Territory public sector agencies.

Industry-based Ombudsman schemes like the TIO are a company limited by guarantee and not subject to FOI legislation.

¹ OAIC, *Guidelines for recognising external dispute resolution schemes* (September 2013), 1.15 – 1.20

² *Treasury Laws Amendment (Consumer Data Right) Bill 2018* (version released Dec 2018), Schedule 1, item 1, sections 56AR, 56AS and 56AT; *Explanatory Statement to Treasury Laws Amendment (Consumer Data Right) Bill 2018* (version released Dec 2018), para 1.73 – 1.74 and 1.97 – 1.98

2.2 Non-telco providers can receive telecommunications CDR data

With the telecommunications sector being flagged for designation after open-banking and energy, Treasury anticipates a diverse range of persons who are not part of the regulated telecommunications service sector being able to receive telecommunications CDR data.

For example, this could include:

- accredited persons such as a fintech comparator; or
- intermediaries, whether accredited or not, such as a financial adviser, IT interface system provider, cloud storage device provider and financial counsellor.

We anticipate this could raise a number of governance issues for industry-based Ombudsman schemes like the TIO. In particular, it raises the issue of ‘who should join’ the scheme to ensure the scheme is able to be effectively handle the vast majority of CDR complaints, and the whole of each complaint, in the telecommunications CDR sector³.

Having a realistic transitional period will assist the TIO to work through making governance changes if we apply for CDR recognition.

The types of governance issues the TIO will need to turn its mind to, depending on how the Minister describes the telecommunications CDR sector and its participants on designation, include:

- whether to create a new category of membership and funding;
- changes to the TIO Company Constitution;
- changes to the TIO Terms of Reference.

The rules for participating in the TIO scheme are set out in the TIO Company Constitution and TIO Terms of Reference. The TIO Company Constitution requires the current membership’s vote to effect change⁴. The TIO Terms of Reference can be changed by the TIO Board.

3. The role of the regulator in supporting the Ombudsman scheme

If an existing industry-based Ombudsman scheme were to apply for CDR scheme recognition, it is unclear whether the ACCC or the OAIC would be a regulator, sufficiently empowered to support the scheme.

We are interested in whether the proposed CDR complaints framework, largely dependent on ACCC-made rules, would sufficiently support the TIO for new CDR members who are not currently part of the telecommunications service sector.

The TIO is currently supported by the ACMA who is empowered by statute⁵ to require providers in the telecommunications service supply chain to join the TIO (e.g. network operators, aggregators, wholesalers, and retail service providers). The ACMA can also enforce compliance with the scheme rules and the Ombudsman’s decisions.

4. Interaction between privacy and CDR

The CDR system proposes a complex interaction between existing privacy rights and the new CDR Privacy Safeguards, with a default override of existing privacy rights in the event of an inconsistency with the CDR Privacy Safeguards⁶.

³ Australian Government, *Key Practices for Industry-based Customer Dispute Resolution* (February 2015), Benchmark 6: Effectiveness, 6.2(a)

⁴ See: <https://www.tio.com.au/about-us/terms-of-reference-and-company-constitution>

⁵ *Telecommunications (Consumer Protection Service Standards) Act 1999*, Part 6

⁶ *Treasury Laws Amendment (Consumer Data Right) Bill 2018* (version released Dec 2018), Schedule 1, item 1, section 56EC

This could create complexity for the TIO in responding to requests from consumers for their entire TIO complaints file. It also raises questions about whether the dual recognition system for industry-based Ombudsman schemes is practically workable.

4.1 Responding to consumers who request access to their entire TIO complaint file

Existing privacy laws allow the TIO to charge for providing access to information, such as the customer's TIO complaint file, so long as the charge is not excessive⁷. This balances an individual's right to access with the commercial reality that some organisations, such as the TIO, cannot absorb all costs.

It would be desirable if the CDR framework mirrored the privacy framework in allowing the TIO to charge for providing information.

The TIO does not generally charge consumers for accessing their information. However, the TIO does impose some charges where responding to the request would result in the TIO having to absorb significant costs for finding and retrieving the information, and reproducing it to send to the consumer.

Information in a TIO complaint file is likely to contain information protected by both existing privacy laws and the new CDR. It is unclear whether the TIO will be able to continue charging consumers when they request access to their entire TIO complaint file, especially if the CDR framework does not permit charging⁸.

From 2016 to 2018, the TIO received approximately 100 requests a year from consumers seeking access personal information held on their TIO complaint file. In a very small number of requests, the consumer may request all personal information held by the TIO and not be prepared to limit the scope of their request. When responding to these requests, we comply with the existing Australian Privacy Principles access regime and redact relevant information to meet our privacy obligations to others.

4.2 CDR recognition of Ombudsman schemes

We encourage Treasury to consider the impact on industry-based Ombudsman schemes in having to maintain two separate recognitions through dual recognition, compared with extending the existing OAIC recognition system to cover CDR complaints handling.

It would be preferable for a scheme like the TIO to only have to report to one regulator, in respect of both privacy and CDR issues, given the complexity in having to work out which law applies.

⁷ *Privacy Act 1988*, Schedule 1, section 12.8; OAIC, *Australian Privacy Principles Guidelines* (2 March 2018)

⁸ *Treasury Laws Amendment (Consumer Data Right) Bill 2018* (version released Dec 2018), Schedule 1, item 1, section 56BT