

Telecommunications Industry Ombudsman

Submission to the Senate Economics Committee Inquiry into the *Treasury Laws Amendment (Consumer Data Right) Bill 2019*

Contents

1. Introduction from the Ombudsman, Judi Jones	3
Summary of recommendations	3
2. Interaction between privacy and CDR	5
2.1 CDR recognition of Ombudsman schemes	5
2.2 Responding to consumers who request access to their entire TIO complaint file	5
3. Inter-sector complaints issues	7
3.1 Non-telco providers can receive telecommunications CDR data	7
3.2 Public sector agencies participating in the CDR system	7
4. Efficient and effective complaints management	9
4.1 Confirming the role of the regulator in supporting the industry-based Ombudsman scheme	9
4.2 Promoting a ‘no wrong door’ approach to complaints handling	9

1. Introduction from the Ombudsman, Judi Jones

I welcome the development of an economy-wide regulatory framework for the new Consumer Data Right (**CDR**).

The Government has announced the new CDR system will be introduced by enacting reform legislation to set the over arching regulatory framework. Detailed supporting rules may then be developed as designated CDR sectors are introduced, starting with open banking, energy and then followed by telecommunications services.

I recognise the Government wishes to leverage existing dispute resolution mechanisms for CDR complaints handling, including industry-based Ombudsman schemes like my office.

The comments in this submission seek to draw early attention to matters the Telecommunications Industry Ombudsman (**TIO**) has recently identified as relevant to complaints handling for the telecommunications CDR sector. My comments also consider Treasury's December 2018 *Privacy Impact Assessment for the CDR (Privacy Impact Assessment)*, which provides further insight into how the Government envisages the new CDR system will work.

The TIO supports a CDR system that:

- streamlines the interaction between privacy and CDR;
- deals appropriately with inter-sector complaints issues; and
- promotes the efficient and effective management of CDR complaints.

This Submission responds to the Senate Economics Committee Inquiry into the *Treasury Laws Amendment (Consumer Data Right) Bill 2019 (Bill)*.

Summary of recommendations

Recommendation 1: That the CDR framework be simplified so industry-based Ombudsman schemes like the TIO do not need to maintain dual recognition with two different regulators for privacy and CDR.

Recommendation 2: That similar to privacy, the CDR framework allow the TIO to charge for providing information in response to a complainant's request for their entire TIO complaint file.

Recommendation 3: That there be consideration of the governance implications for industry-based Ombudsman schemes like the TIO if persons outside the telecommunications sector can receive telecommunications CDR data.

Recommendation 4: That there be consideration of the complexities for complaints handling if an added overlay of Freedom of Information to CDR data sets is introduced.

Recommendation 5: That there be consideration of whether the regulator (the ACCC or the OAIC) will be sufficiently empowered to support industry-based Ombudsman schemes in terms of requirements to have early resolution processes, scheme membership and compliance with scheme decisions.

2. Interaction between privacy and CDR

The CDR framework 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 Safeguards¹.

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

2.1 CDR recognition of Ombudsman schemes

We encourage the Senate Economics Committee to consider the impact on industry-based Ombudsman schemes in having to maintain two separate recognitions through dual recognition², 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, on both privacy and CDR issues, given the complexity in having to work out which law applies.

For example, having to consider a parallel CDR regulatory system when personal information may be included in CDR data sets is more complex than applying a privacy framework extended to cover a new category of personal information for a new consumer data right.

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

The TIO complies with the Australian Privacy Principles access regime when responding to a consumer's request for their 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 excessive³. 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 charging⁴.

¹ *Treasury Laws Amendment (Consumer Data Right) Bill 2019*, Schedule 1, item 1, proposed section 56EC

² *Treasury Laws Amendment (Consumer Data Right) Bill 2019*, Schedule 1, item 1, proposed section 56DA; *Privacy Act 1998*, section 35A

³ *Privacy Act 1988*, Schedule 1, section 12.8; OAIC, *Australian Privacy Principles Guidelines* (2 March 2018)

⁴ *Treasury Laws Amendment (Consumer Data Right) Bill 2019*, Schedule 1, item 1, proposed section 56BT

From 2016 to 2018 the TIO received approximately 100 requests a year from consumers seeking access to personal information 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.

Recommendation 1: That the CDR framework be simplified so industry-based Ombudsman schemes like the TIO do not need to maintain dual recognition with two different regulators for privacy and CDR.

Recommendation 2: That similar to privacy, the CDR framework allow the TIO to charge for providing information in response to a complainant's request for their entire TIO complaint file.

3. Inter-sector complaints issues

3.1 Non-telco providers can receive telecommunications CDR data

With the telecommunications sector being flagged for designation after open-banking and energy, the Government 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, the explanatory memorandum to the Bill and the Privacy Impact Assessment suggest 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, or 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 effectively handle the vast majority of CDR complaints, and the whole of each complaint, in the relevant CDR sector⁵.

Having a realistic transitional period will assist the TIO make governance changes to 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; and
- 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 Reference⁶. The TIO Company Constitution requires a member vote to effect change. The TIO Terms of Reference can be changed by the TIO Board.

3.2 Public sector agencies participating in the CDR system

If public sector agencies participate in the CDR system, there may be an added overlay of Freedom of Information (FOI) to CDR data sets⁷.

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 public sector agencies are also subject to the agency being declared by the Minister

⁵ Australian Government, *Key Practices for Industry-based Customer Dispute Resolution* (February 2015), Benchmark 6: Effectiveness, 6.2(a)

⁶ See: <https://www.tio.com.au/about-us/terms-of-reference-and-company-constitution>

⁷ *Treasury Laws Amendment (Consumer Data Right) Bill 2019*, Schedule 1, item 1, proposed sections 56AR, 56AS and 56AT; *Explanatory Memorandum to Treasury Laws Amendment (Consumer Data Right) Bill 2019*, para 1.73 – 1.76 and 1.97 – 1.99

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, although 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.

Recommendation 3: That there be consideration of the governance implications for industry-based Ombudsman schemes like the TIO if persons outside the telecommunications sector can receive telecommunications CDR data.

Recommendation 4: That there be consideration of the complexities for complaints handling if an added overlay of Freedom of Information to CDR data sets is introduced.

4. Efficient and effective complaints management

4.1 Confirming the role of the regulator in supporting the industry-based 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 the regulator, and if the regulator would be one that is 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 statute⁸ 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.

Membership of the TIO is also supported by other complementary requirements which the ACMA can enforce, such as telecommunications providers having to be responsive to residential and small business consumer enquiries and also having a complaints handling process for first contact early resolution⁹.

4.2 Promoting a '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 Privacy Impact 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.

This suggests industry-based Ombudsman schemes (such as the TIO) would be expected to refer the consumer to the OAIC before the complaint is considered by the industry-based Ombudsman scheme. If the TIO redirects 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 recognition¹⁰, 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 dispute resolution bodies that would occur if the issues were split along service delivery and privacy lines. Once the new CDR is introduced, it would be inconsistent with OAIC recognition if a scheme had to separate the telecommunications service delivery issues to refer the CDR (and possibly also privacy) aspects of the complaint to the OAIC.

⁸ *Telecommunications (Consumer Protection Service Standards) Act 1999*, Part 6

⁹ ACMA, Media Release 17/2018 *ACMA rules kick in on telco complaints* (7 June 2018). See: <https://www.acma.gov.au/theACMA/acma-rules-kick-in-on-telco-complaints>; *Telecommunications Consumer Protections Code* (C628:2015, Incorporating Variation 1/2018), currently under review.

¹⁰ OAIC, *Guidelines for recognising external dispute resolution schemes* (September 2013), 1.15 – 1.20

Recommendation 5: That there be consideration of whether the regulator (the ACCC or the OAIC) will be sufficiently empowered to support industry-based Ombudsman schemes in terms of requirements to have early resolution processes, scheme membership and compliance with scheme decisions.