

Submission by the Consumer Policy Research Centre to the Australian Government - Review into Open Banking - Final Report

Submission attachment to remain in confidence until 14th May 2018

23rd March 2018

By email: data@treasury.gov.au

Dear Secretariat,

Consultation Paper: Review into Open Banking—Final Report

The Consumer Policy Research Centre (CPRC) would like to thank you for the opportunity to comment on the final report on Review into Open Banking. CPRC recognises the significance of consumer data sharing for driving innovation and competition. It is without question that effective regulation and data security is essential to establishing consumer trust and participation in Open Banking, in particular through more accurate and simple comparisons of products and services. Equally important is consumer's trust in companies and the system, and real informed consent for Open Banking to work effectively.

As the first major step in Australia towards a system to enable the transfer of consumer data, ensuring that adequate protections are in place now will assist in building consumer and community trust. Without consumer trust, this may jeopardise the many future benefits to flow from the growing field of 'big data' and associated digital advancements.

While the Open Banking consultation process itself has not had scope to more deeply explore emerging issues for consumers from data amalgamation, consumer profiling and the growing international evidence of the risks of discrimination, CPRC requests that the Australian Government, ACCC and OAIC establish a process to explore policy analysis and consultation on these issues. The issues of data amalgamation and the sale of consumer data is relatively new phenomenon crossing the portfolios and disciplines. 'Big data' as it relates to consumer markets, has the potential to significantly transform the consumer experience in both positive and negative ways. Increasing information asymmetry between suppliers and consumers, along with highly developed 'screening' practices to determine eligibility or price discrimination practices have significant implications. As mentioned above, the clear benefits to flow from consumer data need to be balanced with such emerging risks if the community is to derive maximum benefits from reform and innovation.

In relation to the Review into Open Banking consultation, CPRC would like to further comment on:

- Genuine consumer consent and control
- Data asymmetry—consumer trust and choice
- Consumer protections against unfair use of data
- Consistent approach across sectors

The report highlights some important recommendations that we would like committed to by the Government in the final decision. However, some further considerations are still required which are highlighted in the discussion below.

Genuine consumer consent and control

Consumer data and well-functioning markets

The Review rightly highlighted that customers will only use Open Banking if they understand and trust it.

The UK Competition & Markets Authority¹ highlights that in order for consumers and businesses to benefit from consumer data, consumers must be able to trust businesses so that they would continue to provide data. They argue that consumer data can be used to support well-functioning markets if:

- 1) consumers know when and how their data is being collected and used, and have some control on whether and how they participate.*
- 2) businesses are using the data to compete on issues that matter to the consumer.*
- 3) the use of consumer data benefits both consumers and businesses.*
- 4) rights to privacy is protected through the regulation of data collection and use.*
- 5) there are effective ways to fairly manage non-compliance with regulation.*

Lack of genuine consent and control by Australian consumers

CPRC conducted a recent research study surveying 1004 Australians—the results from this study is yet to be released. We kindly ask that that the results used to support this submission remain in confidence until 14th May 2018. The results show that 33% of Australians admit to not reading a Privacy Policy or Terms and Conditions when signing up for a product or service in

¹ Competition & Markets Authority (CMA). (2015). The commercial use of consumer data: Report on the CMA's call for information. Competition & Markets Authority, London, United Kingdom. Retrieved from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/435817/The_commercial_use_of_consumer_data.pdf

the past 12 months, more than that found in the study conducted by OAIC which reported 12% of Australians never read the Privacy Policy before providing their personal information². Of 67% who read these documents, two-thirds (67%) indicated that they still signed up for one or more products *even though they did not feel comfortable* with the policies.

When asked why they still accepted the Privacy Policies or Terms and Conditions, the most common reason was that it was the only way to access the product or service (73%). This suggests that consumers are lacking sufficient control over the type of data being collected and used, and how they participate. They feel they have no choice but to accept the terms of service or are otherwise denied access to products or services.

Improving conditions for consent for better consumer protection and control

Our research also suggests that the current process for obtaining consent through Privacy Policies and/or Terms and Conditions is flawed, because various permissions are bundled in the policy documents and therefore consumers cannot opt out of types of data collection or uses they are uncomfortable with. Nearly all of those surveyed (95%) said they wanted companies to give them options to opt out of certain types of information they can collect, use and/or share. Forty-four percent of consumers feel that it is not enough for companies just to notify them about how they collect, use and share data in the Privacy Policies or Terms and Conditions. Majority of Australians (73%) expect that the Government should mandate companies to provide consumers options to opt out. Surprisingly 19% of Australians wrongly believed that if a company has a privacy policy, it meant they will not share information with other websites or companies, and 22% did not know enough to answer this question. Additional efforts in educating consumers about privacy policies and consumer rights is needed.

Whilst 88% of consumers were aware that companies exchange information about them with third parties for purposes other than delivering the product or service, more detailed discussion in our focus group suggested that consumers are concerned because they do not know where their data goes and how it is used. It is evident that the ability to track and know what their data is being used for is important to consumers.

Australia should adopt the European Union's General Data Protection Regulation standard for consent. Article 7 GDPR³ outlines conditions for consent:

1. *Where processing is based on consent, the controller shall be able to demonstrate that the data subject has consented to processing of his or her personal data.*
2. *If the data subject's consent is given in the context of a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible*

² Office of the Australian Information Commissioner (OAIC). (2017). Australian Community Attitudes to Privacy Survey 2017. Office of the Australian Information Commissioner, Sydney, Australia. Retrieved from <https://www.oaic.gov.au/engage-with-us/community-attitudes/australian-community-attitudes-to-privacy-survey-2017>.

³ General Data Protection Regulation. Article 5 GDPR Conditions for consent. Available at <https://gdpr-info.eu/art-7-gdpr/>.

form, using clear and plain language. Any part of such a declaration which constitutes an infringement of this Regulation shall not be binding.

3. *The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. Prior to giving consent, the data subject shall be informed thereof. It shall be as easy to withdraw as to give consent.*
4. *When assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract.*

In other words, consent must be explicit, specific to purpose, unbundled, easy to understand, can be withdrawn, freely given, and not conditional if the data is not necessary for the provision of the service. Common practices such as pre-ticked consent boxes should not be allowed. Companies should not be allowed to unfairly deny customers access to products or services if consumers refuse to provide their data, particularly if the data is not essential to the provision of the products. The ACCC should work with OAIC to set the rules on how companies provide information and obtain consent based on these conditions. The ACCC and OAIC should consult with experts (e.g. legal experts, data ethicists and consumer groups) and test consumer comprehension to check the effectiveness of the consent process. This should be a pre-condition to reform.

'Recommendation 4.2- modifications to privacy protections', 'Recommendation 4.5- customer control', 'Recommendation 5.6- persistent notification' and 'Recommendation 5.11-transparency' should be adopted at the very least as a minimum level of consumer protection. Furthermore, CPRC supports the suggestion that control and consent in the Privacy Act extend to include small businesses as liable data holders so that consumers are better protected.

Response to key recommendations

- CPRC recommends that Consumer Data Right and Open Banking should adopt the European Union's General Data Protection Regulation standard for consent (GDPR Article 7). The ACCC and OAIC should consult with experts and test consumer comprehension to check the effectiveness of the consent process. This should be a pre-condition to reform.
- CPRC supports **'Recommendation 4.2- modifications to privacy protections'**, **'Recommendation 4.5- customer control'**, **'Recommendation 5.6- persistent notification'** and **'Recommendation 5.11-transparency'** at the very least as a minimum level of consumer protection.
- CPRC supports the Government extending the Privacy Act to include small businesses as liable data holders.

- Whilst CPRC agrees with '**Recommendation 4.6 - single screen notification**', it is critically important to test consumer comprehension from the introduction of this notification to ensure that they are providing genuine consent to what and how their data is collected and used. CPRC is also wary of broad legal statements of consent that may be unclear and could hide possible uses of data that could be detrimental to the consumer. Statements should be specific, meaningful and in Easy English. There should also be a means for further explanation if required by the customer. Furthermore, the required information for disclosure on single screen should have consideration of the materiality of harm to the consumer. Having consideration for materiality of harm may include prioritising the requirement of the disclosure of information based on potential harm or disadvantage that may be experienced by the consumer (such as consent to access by a third party to data over long periods of time, access to multiple parties or on-selling).
- CPRC supports '**Recommendation 6.4 - consumer education programme**'. We urge the Government to consult with organisations that work with vulnerable consumer groups to ensure that the information provided is appropriate for people who may have low literacy, for example Culturally and Linguistically Diverse (CALD) communities and Aboriginal and Torres Strait Islanders. Similarly, consideration should be given for consumers with limited digital literacy or access, as the majority of reforms will deliver benefits to those who are digitally enabled. Community organisations should also be engaged early during the design and implementation stage of this programme. This will help to ensure greater informed consumer participation.

Data asymmetry—consumer trust and choice

Consumer access to 'value-added data' in Open Banking

As highlighted in the Review report, the key principle of Open Banking is to improve competition as well as to reduce data asymmetry, to enable consumers to make better decisions that suit their circumstances. Value-added data is defined in the report as 'data that has been created by the data holder through the application of insight, analysis or transformation of a customer's transaction data to enhance its usability and value.' Recommendation 3.3 suggests that value-added customer data should not be included in Open Banking. The reason presented was that the value of this data has largely been generated by the actions of the data holder, and that they risk breaching intellectual property rights if this information is shared. However, this restricts the benefits to flow onto consumers by maintaining data asymmetry.

CPRC believes further consideration of what is considered 'value-added data' needs to be undertaken. For example, if a company has acquired additional data about that consumer from other organisations – is this also considered value-added data? Consumers should presumably have a right to the information and data that a company holds that may influence the products or services that they are offered, or as the case may be excluded from. The very wide practice of

data sharing is currently occurring across multiple platforms, sectors and this is not always transparent to customers as to which companies hold what data relating to their preferences, payment profile, interests or behaviour.

Simply giving customers access to their personal and transaction data through Open Banking is alone, not adequate to reduce data asymmetry. Depending on how it is defined, value-added customer data can give companies more information than the consumer to influence consumer outcomes because it can determine if customers are targeted or excluded from offers for products or services, impacting consumer choice. Withholding this information from consumers for their own use effectively means that data asymmetry will continue to exist. Consumers similarly have no way of knowing or rectifying this data upon which decisions have been made about who they might be. CPRC's quantitative research suggest that 92% of Australians want companies to be open about how they use data to assess their eligibility. A customer-focussed approach would be to give consumers the right to know how companies have classified them in order to adjust their own behaviour for better outcomes or challenge incorrect classifications, ultimately having more control about the options available to them and level the playing field. However, consumers should not be obliged by competitors to transfer this information. Confidentiality rules should also apply to these data which are considered 'non-personal' under the Privacy Act. Transparency on how companies use the data to make decisions about the customers can facilitate trust, and make the market more fair and equitable.

Furthermore, without improving informed and unbundled consent among consumers more generally, significant data asymmetry would still exist because companies are often able to transfer, collect and combine data about their customers from third parties or customer's social media without the direction or knowledge of the consumer, as these permissions are bundled in their Privacy Policies or Terms and Conditions⁴. Our qualitative research shows that customers find it reasonable to directly provide some level of information to companies with their expressed and informed consent for products such as loans or insurance, however they do not agree with companies collecting information about them from third parties without their knowledge. Our quantitative research has shown that 87% of Australians find it unacceptable for companies to collect data about them *without their knowledge* to assess their eligibility or exclude them from a loan or insurance. Current practices that do this can negatively impact the trust and relationship the companies have with their customers.

Inclusion of 'aggregated data' in Open Banking

The Review report also recommends against including aggregated data in the scope of Open Banking. CPRC suggests further consideration of 'Recommendation 3.5- aggregated data' because providing *averaged de-identified* data would be useful for competitors to gather information without having to generate this by collecting detailed identifiable information from individual consumers. The current proposed model of Open Banking suggests that competitors must rely on individual consumers to provide detailed and identifiable information in order to compete and innovate. If aggregated data was provided, it is possible that companies may only feel the need to request individual level data where the individual would like tailored services.

⁴ Kemp, K. Big Data, Financial Inclusion and Privacy for the Poor. (Accessed 16th March 2018). Available at <https://www.dvara.com/blog/2017/08/22/big-data-financial-inclusion-and-privacy-for-the-poor/>

However, aggregate data does not come without risks. For example, recent de-identified location data from Strava recently revealed sensitive information about U.S. military bases and could be used to re-identify individuals⁵. If aggregate data was to be made available, there should be a formalised process where the Data Standards Body or other suitable body are able to review possible negative implications of the data for consumers and manage the release of aggregated data based on proposed uses.

CPRC supports 'Recommendation 3.11-no charge for customer data transfers'. Any charge for customer data transfer can pose as a barrier for Open Banking participation.

Response to key recommendations

- CPRC recommends that greater consideration on '**Recommendation 3.3.-value-added data**'. Consumers should have the right to know how companies have classified them in order to either adjust their own behaviour for better outcomes or challenge incorrect classifications, ultimately having more control about the options available to them and level the playing field. Withholding this information effectively means that data asymmetry will continue to exist and grow, with the benefits flowing disproportionately to providers. However, CPRC acknowledges the value generated by companies through the development of insights and analysis from consumer data, thus we recommend that consumers should not be obliged by competitors to transfer this information. Confidentiality rules should also apply to these data which are considered 'non-personal' under the Privacy Act.
- CPRC suggests further consideration on '**Recommendation 3.5- aggregated data**' because providing *averaged de-identified* data would be useful for competitors to gather information without having to generate this by collecting more sensitive detailed identifiable information from individual consumers. However, if aggregate data was to be made available, there should be a formalised process where the Data Standards Body or other suitable body are able to review and manage the release of aggregated data based on proposed uses. There have been multiple examples of where assumed *de-identified* data has been able to be *re-identified*. Ensuring regulators have adequate discovery powers and technical knowledge to assess this will be crucial.
- CPRC supports '**Recommendation 3.11-no charge for customer data transfers**'. Any charge for customer data transfer can pose as a barrier for Open Banking participation.

⁵ Bogle, A. Strava has published details about secret military bases, and an Australian was the first to know. Updated 20th Jan 2018 (Accessed 16th March 2018). Available at <http://www.abc.net.au/news/science/2018-01-29/strava-heat-map-shows-military-bases-and-supply-routes/9369490>

Consumer protections against unfair use of data

The Consumer Data Right regulatory model needs to provide consumers with adequate protections against irresponsible management and unfair use of their data.

Whilst the review suggested that accreditation based on 'use cases' may limit future innovation (under Recommendation 2.7- Accreditation section). CPRC recommends that 'use cases' for accreditation should be reviewed at a high level to ensure they meet ethical principles. This will help to ensure that data holders and data recipients are accountable to protect consumers from harm. Setting accreditation requirements based on data ethics will facilitate consumer trust otherwise consumers may quickly retract the use of the data if they felt their data was being misused. CPRC's quantitative research indicated that 82% of Australians find it unacceptable for companies to collect information about their payment behaviour to assess their eligibility or exclude them from essential products and services such as electricity, gas or telecommunications. Sixty-seven percent of Australians indicated that Government should develop protections to ensure consumers are not unfairly excluded from essential products or services based on their data and/or profile.

'Recommendation 2.10 customer complaints and remedies' is an important recommendation to adopt to provide consumers a means for redress. However, this alone is inadequate in protecting consumers because it is a reactive approach and relies on the consumer to have transparent knowledge of the issue (which can be unobtainable if hidden in algorithms), sufficient resources, literacy skills and power to effectively seek redress. This further supports the need to include a preventative approach to include rules outlining conditions for obtaining consent and accredit companies based on uses that align with ethical principles to minimise harm. Algorithm assessments as a component of accreditation should be considered to ensure that companies do not breach anti-discrimination, consumer protection, competition, and privacy laws. These laws can only be effective if there are means to check compliance and address problems. Companies should be accountable for the algorithms they implement that would unfairly exclude consumers or unfairly limit consumer choices. This should apply to both data holders and data recipients under Open Banking and the broader Consumer Data Right. Legal experts, data ethicists and consumer groups should be involved in consultations for developing rules on consent conditions and principles of ethical uses to protect consumers from unfair uses of data.

Protecting vulnerable and disadvantaged consumers

CPRC recommends further consideration of the impacts of Open Banking on vulnerable and disadvantaged consumers including:

- *Women experiencing domestic violence*- 'Recommendation 4.7-joint accounts' requires authorization of data transfer and notification of data requests by each joint account holder. Whilst this would enable greater transparency for the account holders, alternative approaches or exemptions should be considered for women experiencing domestic violence as this could pose a risk to their safety. Government should consult with key experts in the field of domestic violence to develop guidelines for best practice approaches.

- *Consumers without online banking accounts*- CPRC supports 'Recommendation 5.9- access without online banking' to ensure that those who do not use online banking are not excluded from the benefits of Open Banking, as they still contribute to data through their banking activities. However, those who are unable to access online banking may also face other barriers such as low literacy, digital literacy and financial literacy (e.g. the elderly and CALD communities). Consumer representatives supporting these groups should be involved in the consultations for reviewing rules around consent conditions and accreditation criteria to ensure that these consumers are not exploited.
- *Minors under 18 years of age*- Do those under 18 have full control of their data or will they require parental authorisation? There should be additional considerations on consent for this group. We can look to GDPR Article 8 for some guidance⁶.

Response to key recommendations

- As a minimum for accreditation, CPRC recommends that 'use cases' for accreditation should be reviewed at a high level to ensure that companies meet ethical principles. Legal experts, data ethicists and consumer groups should be consulted on the development of the principles of ethical uses of data to protect consumers from unfair uses of data.
- CPRC recommends further consideration of the impacts of Open Banking on vulnerable and disadvantaged consumers including women experiencing domestic violence, minors under 18 years of age, consumers who do not use online banking (e.g. those with low digital literacy such as the elderly and CALD communities), to ensure they are adequately protected from data misuse and exploitation.

Interoperability and consistent approach across sectors

CPRC commends the report for considering interoperability to other sectors. We support Treasury in leading this process to ensure consistency across sectors, as flagged, energy and telecommunications sectors are likely to be the next iteration that the Consumer Data Right will apply.

Issues currently most pertinent in the energy sector is the ability (or lack thereof) of consumers to adequately compare energy plans and switch providers. Data portability to enable more accurate comparison and facilitate switching is essential to improve consumer outcomes. Key data to enable a consumer to compare products and services in the energy sector includes: current retail tariff information, consumption data and National Metering Identifier (NMI). Together, these three pieces of data enable comparison of current plan with potential plan.

⁶General Data Protection Regulation. Conditions applicable to child's consent in relation to information society services. Available at <https://gdpr-info.eu/art-8-gdpr/>

CPRC strongly supports a consistent approach to the establishment of a Consumer Data Right across the three sectors, with the full consultation and consideration of data standards, adequate protections and consent requirements. At the very least, existing consultations processes in the Australian and Victorian Government in relation to energy data hubs should not result in the locking in of a technology or platform solution ahead of adequate consultation by Treasury and the ACCC on the rules and appropriate data standards on the Consumer Data Right.

CPRC supports 'Recommendation 2.5- The standards' to include transfer standards (for uniform transfer mechanisms), data standards (for integrity, accuracy and consistency), and security standards (for cyber protection). Given that different sectors such as energy and telecommunications may have different needs and challenges for transferring their datasets, it would be worth expanding working groups to include representatives from these sectors when developing the standards to ensure interoperability.

Lastly, CPRC has embarked on an extensive research program in relation to consumer data in 2018. This includes: undertaking market research; funding a \$100,000 interdisciplinary research grant exploring the impact of data amalgamation, consumer profiling and the associated benefits and risks; and a forthcoming report reviewing international research and reforms in relation to big data and the impact on consumer markets. We would welcome discussions with policymakers and regulators as the Consumer Data Reforms evolve throughout the coming year.

If you have any queries about this submission, please don't hesitate to contact Phuong Nguyen on 03 9639 7600 or phuong.nguyen@cprc.org.au.

Yours sincerely,



Lauren Solomon

Chief Executive Officer

Consumer Policy Research Centre

About Consumer Policy Research Centre

CPRC is Australia's first consumer-focussed policy think tank, established by the Victorian Government in December 2016. Our vision is to deliver a fair outcome for all consumers. We believe that consumer confidence when engaging with businesses and markets is central to the long-term sustainability of those markets. We work with business, the community sector and policy markets to develop, translate and promote evidence-based research to inform practice and policy changes.