



21 March 2018

Review Into Open Banking in Australia  
The Treasury  
Langton Crescent  
PARKES ACT 2600

**By email:** [data@treasury.gov.au](mailto:data@treasury.gov.au)

Dear Sir / Madam

**Submission: Review into Open Banking Australia – Final Report**

Thank you for the opportunity to provide a submission in response to the recommendations made in the Final Report of the Review into Open Banking in Australia (“**Open Banking Final Report**”).

Data Governance Australia (“**DGA**”) is a not-for-profit association established to represent, support and assist Australian businesses with an interest in the end-to-end management of data as part of their business activities. DGA provides thought leadership, industry standards and benchmarks, and education to its members and industry generally to promote and foster an understanding of how data can be used responsibly to drive innovation and competitive advantage, while increasing consumer trust and confidence in the data-practices of its members and industry generally.

DGA was founded in 2016 and forms part of the *Australian Alliance for Data Leadership*,<sup>1</sup> which is a wider network of data-driven associations representing over 650 members in data-driven business activities across Australia. The members of DGA come from a cross section of Australian industry spanning all vertical sectors, including for example: Banking, Finance, Insurance, Health, ICT, Telecommunications, Aviation, and across all sizes of business

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<sup>1</sup> For more information see: <http://datagovanceaus.com.au/>

operating in Australia, from multi-national corporations through to small and medium enterprises.<sup>2</sup>

We note that the Review into Open Banking in Australia follows the *Productivity Commission's Inquiry into Data Availability and Use*,<sup>3</sup> which recommended various reforms, including establishing a Comprehensive Right,<sup>4</sup> which would in effect grant consumers 'joint-ownership' of their customer data. Open Banking is an early implementation of these reforms – specifically the introduction of a Consumer Data Right (“**CDR**”) – that is intended to be implemented economy-wide and on a sector-by sector basis. DGA notes that following the implementation of the CDR in the banking sector, the CDR will next be extended to the energy and telecommunications sectors, before the remainder of the economy.

DGA understands that the announcement on 26 November 2017<sup>5</sup> of the CDR by the Hon Angus Taylor MP, the then Assistant Minister for Cities and Digital Transformation, forms part of the Government's response to the Productivity Commission's *Inquiry into Data Availability and Use Final Report* (“**PC Final Report**”).<sup>6</sup> However, we note that to date the Government has not formally released its response to the Recommendations contained in the PC Final Report. This creates significant uncertainty to industry in relation to the implementation of a CDR across the economy and the Government's approach to policy reforms (if any) in relation to data. In addition, we note that there is significant overlap between the work with respect to the CDR in this Open Banking Review and the work within the Data Availability and Use Taskforce within the Department for Prime Minister and Cabinet. This leads to additional uncertainty for industry in relation to the approach to data policy reforms. We would welcome further clarity about the respective roles and responsibilities of the Departments in relation to any data policy reforms.

## 1. Customer Data Right

DGA notes that the CDR aims to “improve customer choice and convenience by allowing data to be shared with third parties,” and that this will in turn increase competition in participating sectors that would enable consumers to obtain greater value for money.<sup>7</sup> In addition, it is argued that the CDR will improve the flow of information in the economy and encourage the development of new products and applications that reach more consumers and are better tailored to their needs.<sup>8</sup> We will refer to these aims as the Stated Policy Outcomes throughout this response.

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<sup>2</sup> For more information about the DGA Board see: <http://datagovernanceaus.com.au/about/>

<sup>3</sup> Productivity Commission, *Inquiry into Data Availability and Use: Final Report*, No. 82, 31 (March 2017) available at: <https://www.pc.gov.au/inquiries/completed/data-access/report/data-access.pdf>

<sup>4</sup> *Ibid* at 33.

<sup>5</sup> Hon Angus Taylor, the then Assistant Minister for Cities and Digital Transformation, *Media Release: Australians to own their own banking, energy, phone and internet data* (26 November 2017) available at: <https://ministers.pmc.gov.au/taylor/2017/australians-own-their-own-banking-energy-phone-and-internet-data>.

<sup>6</sup> Productivity Commission, *Inquiry into Data Availability and Use: Final Report*, No. 82, 31 (March 2017) available at: <https://www.pc.gov.au/inquiries/completed/data-access/report/data-access.pdf>

<sup>7</sup> *Ibid* at 33.

<sup>8</sup> Australian Government, The Treasury, *Consumer Data Right – Fact Sheet*. Available at: <https://static.treasury.gov.au/uploads/sites/1/2018/02/180208-CDR-Fact-Sheet-1.pdf>

<sup>9</sup> Australian Government, The Treasury, *Review into Open Banking in Australia – Final Report Public Consultation*, available at: <https://treasury.gov.au/consultation/c2018-t247313/>

DGA agrees with the latter proposition that increased information flows would encourage the development of new products and applications. Indeed, to unleash the benefits of digital data, we need more data and the ability to do increasingly sophisticated things with data, including applying new techniques and processes for analysis. In our view, the accuracy and usefulness of data and its insights can only increase through greater openness and cross-utilisation of data.

While the move to open data should be encouraged if Australia is to truly realise the full value of data to our society, DGA has reservations and concerns that a formally regulated CDR or similar customer data portability right is the most suitable or appropriate mechanism by which to achieve the Stated Policy Outcomes.

In addition, DGA remains concerned about the impact that a mandated CDR would have on businesses' investment into data, which may ultimately stifle innovation and value-creation, and weaken Australia's ability to compete globally. On this point, it is important to consider the significant investment made by business in the information and communications technology infrastructure, human capital, and data security to collect and protect customer data.

We note that our diverse membership includes corporations that have, as a matter of company policy, enabled 'data portability' to its consumers, as well as corporations for which such 'data portability' could seriously undermine their competitive advantage or viability of their core business. Our continued engagement with key industry stakeholders highlight and continues to reinforce the complexity and challenges associated with mandating an economy-wide CDR through regulation.

For this reason, DGA supports [Recommendation 1.1](#), which recommends that "open banking should not be mandated as the only way that banking data may be shared." DGA submits that it is essential to carefully consider whether a formally mandated CDR is the most effective and appropriate mechanism to achieve the Stated Policy Outcomes for individual sectors and consumers alike, and that alternative mechanisms, including self-regulation, should be considered. A regulated CDR should only be considered in cases where there is a serious market failure and where a mandated CDR will guarantee the Stated Policy Outcomes.

## 2. Sector-by-Sector and Economy Wide

DGA notes the intention for the CDR to apply economy wide on a sector-by-sector basis where this will increase competition and lead to greater consumer outcomes. There is significant uncertainty amongst business and industry as to the threshold requirements that may result in a Ministerial direction and corresponding designation of a sector to provide a CDR.

In addition, there are concerns in relation to determining which entities would fall within a nominated sector. This is particularly important as entities within a nominated sector will be required to participate in determining the scope of data that would be subject to a CDR for their respective sector. Many corporations are highly diversified and operate across various sectors. For example, some entities may *prima facie* belong to a traditional sector not currently nominated to provide the mandated CDR, yet provide products that fall within a sector nominated to provide the mandated CDR. In addition, new market entrants, disruptors, or platforms may not fit into traditional sector concepts.

DGA submits that careful consideration should be given to how a proposed sector-by-

sector CDR would operate in our global and highly diversified economy. In addition, we would caution against simply adopting a one-size-fits-all approach to an economy-wide CDR. This would likely stifle innovation and undermine competition, as well as Australian business' global competitiveness.

### 3. Layered Regulatory Approach

DGA notes that the CDR is intended to be administered by multiple regulators, including the *Office of the Australian Information Commission* (“**OAIC**”) and the *Australian Competition and Consumer Commission* (“**ACCC**”). In addition, many sectors have dispute resolution bodies, for example the *Financial Ombudsman Service* and the *Australian Communication and Media Authority*. DGA recommends further consideration into the proposed Multiple Regulator Model, and in particular, how the respective roles and responsibilities of each will be aligned to ensure clarity for businesses and industry with respect to their regulatory obligations and regulatory requirements.

### 4. Scope of CDR

DGA supports **Recommendation 3.3 – value added customer data** and **Recommendation 3.5 – aggregated data**. We submit that these recommendations are essential to protect the significant investment made by industry into data, to support innovation, and to safeguard Australian business' global competitiveness.

DGA is concerned that **Recommendation 3.11 – no charge for customer data**, does not adequately account for the resources and costs involved with businesses providing customer data to an individual following a CDR request. DGA submits that it would be appropriate for businesses to recover costs associated with complying with a CDR request, provided these are not excessive.

Such an approach is consistent with APP 12.78, which allows organisations to charge reasonable costs associated with an access request pursuant to the *Australian Privacy Principles*<sup>9</sup> (“**APPs**”). Relevantly these charges include, staff costs in searching for, locating and retrieving the requested personal information, and deciding which personal information to provide to the individual, or the use of an intermediary to provide access to the requested personal information.<sup>10</sup>

The Open Baking Final Report provides no clarity on how the inconsistency with **Recommendation 3.11** and APP 12.78 will be resolved. For example, an APP entity may be permitted to recover reasonable charges for staff costs in searching for, locating and retrieving personal information in relation to an access request pursuant APP 12.78, yet will not be able to do so for the same information pursuant to a CDR request. If it is intended that **both Recommendation 3.11** and APP 12.78 operate concurrently, reasonable charges associated with costs to provide access to personal information pursuant to APP12 could be avoided by phrasing the request as a CDR request. This could place an unreasonable burden and cost on business associated with access requests.

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<sup>9</sup> Australian Privacy Principles, Schedule 1, *Privacy Act 1988* (Cth).

<sup>10</sup> Australian Privacy Principle 12, Schedule 1, *Privacy Act 1988* (Cth). For more information see the Office of the Australian Information Commission (OAIC), *Australian Privacy Principle Guidelines: Chapter 12* at 12.72, available at: <https://www.oaic.gov.au/agencies-and-organisations/app-guidelines/chapter-12-app-12-access-to-personal-information#access-to-personal-information>

## 5. Consumer Privacy

DGA submits that careful consideration needs to be given to how the CDR will balance the Stated Policy Outcome with consumer privacy concerns. We note that DGA will be releasing its research into consumers' attitudes towards privacy in April 2018. This research is a global study undertaken in partnership with the Global Alliance of Data-driven Marketing Associations and Axciom. This research suggests that trust and transparency are the most important factors for a healthy data-exchange landscape and points to a growing awareness of privacy issues by consumers.

## 6. Safeguards to Inspire Confidence and the DGA Code of Practice

Addressing consumer concerns about their privacy and ensuring community expectations about data-practices are met will be key to moving into the future. The extent of data innovation and the value that will ultimately be generated depends on the ability for governments, and industry alike, to foster greater consumer confidence and trust in the data-practices of governments and industry.

DGA supports the following **Chapter 4 Recommendations**:

- **Recommendation 4.1 – application of the Privacy Act** to all data recipients under Open Banking. DGA submits that any entity subject to a CDR or recipient of customer data pursuant a CDR request, must be subject to the *Privacy Act 1988* (Cth) (“**Privacy Act**”).

We note that a range of entities are currently exempt from the Privacy Act,<sup>11</sup> including businesses with a revenue of AUD \$3mil or less, which raises significant concerns for the implementation of an economy wide CDR, especially with respect to protecting and safeguarding consumers' privacy.

In addition, the exemptions for certain entities under the Privacy Act also raises significant challenges for the proposed Multiple Regulator Model with an economy wide CDR. For example, the OAIC would not have oversight of small business operators in respect of consumer privacy under a mandated CDR. The ACCC is the only regulator in the Multiple Regulator Model with current oversight of small businesses, and would likely lack the expertise independently, required to adequately balance consumers' privacy with the Stated Policy Outcomes of the CDR. This could lead to adverse consumer outcomes, including a growing sense of a lack of control over their privacy.

- **Recommendation 4.3 – right to delete out of scope**
- **Recommendation 4.6 – single screen notification** with respect to notification of a CDR request, transfer of customer data at customer's own risk, and notification limited to a single screen or page.

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<sup>11</sup> The Australian Privacy Principles apply to an APP entity (s.15, Div 2, *Australian Privacy Principles, Privacy Act 1988* (Cth)), which includes an organisation that is not a small business operator, registered political party, a State or Territory authority, or a prescribed instrumentality of a State or Territory (s. 6C *Privacy Act 1988* (Cth)). A small business operator is a small business if its annual turnover is \$3,000,000.00 or less (s. 6D *Privacy Act 1988* (Cth)).

With respect to the ability for the consumer to select the **possible (as opposed to probable)** uses of the data following a CDR request, DGA submits that this would be impractical.

While providing such choice for consumers with respect to '**probable uses**' may be considered as best practice, it is at this point in time – considering the maturity of Australia's data economy – highly aspirational. Such a requirement is likely to be practically and technically challenging and costly for entities and may inadvertently stifle innovation and value-creation.

- **Recommendation 4.9 – allocation of liability**

As part of our on-going effort to set leading industry standards, DGA released its Code of Practice ("**DGA Code**") in November 2017 ([attached at Annex 1](#)), which aims to promote a culture of best practice, and to drive innovation by increasing consumer confidence and trust in the data-practices of our members and industry generally. The DGA Code represents the foundations of a self-regulatory regime that provides industry benchmarks and guidelines for the responsible and ethical use, collection and management of data for Australian businesses.

The DGA Code was developed through extensive consultation with 12 major Australian corporations representing a wide cross-section of industry and a range of data practices, including major banking and financial institutions, insurance companies, leading retailers, law firms, real estate corporations, aviation and specialist data suppliers including technology, software and consulting service providers. In addition, the DGA Code was also subject to a period of public consultation to all interested industry, consumer and government stakeholders. This extensive consultation throughout the development of the DGA Code has given DGA unique insights into the complexities and challenges with developing a CDR and associated sector-specific data portability schemes.

The DGA Code sets leading industry standards and benchmarks for responsible and ethical data-practice through 9 core principles, including for example, establishing a no-harm rule, increasing honesty and transparency in relation to data-practices, mandating a consideration of fairness and community expectations in relation to data-practices, and providing consumers with greater choice.

Under the no-harm rule, organisations which sign up to the DGA Code must take reasonable steps to ensure they do not cause harm to consumers as the result of their data-practices. In addition, organisations cannot exploit the lack of knowledge or inexperience of individuals, must act with integrity, and ensure that data is not used for unethical purposes.

The DGA Code requires organisation to consider the fairness of their data-practices to consumers, as well as evolving community expectations with respect to data-practices, and ensure that they act accordingly. This increases consumer protections and alleviates concerns about privacy and unethical data-practices.

The DGA Code also mandates greater transparency and honesty by organisations, requiring organisations to be clear and upfront about their data-practices, including data combination and disclosure practices. This is further supported by mechanisms for greater choice, including data portability. Most noteworthy to this consultation is that the DGA Code enables DGA to facilitate the development of sector-specific data portability



schemes through a self-regulatory model. The DGA Code is further bolstered by setting leading industry standards for the accuracy of, and access to consumer data, as well as data safety, security, de-identification and greater accountability for consumer data.

The DGA Code is enforced by the independent *AADL Code Authority*,<sup>12</sup> which is responsible for resolving disputes and complaints in relation to compliance with the DGA Code. The objectives of the AADL Code Authority are to advance ethical, open and transparent data-driven activities in business. It provides consumers with access to timely and effective redress in relation to non-compliant data-practices or organisations. The AADL Code Authority comprises equal members of industry and consumer representatives, and an independent chair- currently Christopher Zinn.

We welcome the opportunity to discuss our learnings from our consultations, as well as the views of our members. Should the Treasury seek further information about our membership or related matters, or have any questions about this submission, please contact Amanda Noble, General Manager – DGA at [Amanda.Noble@datagovanceaus.com.au](mailto:Amanda.Noble@datagovanceaus.com.au), or Irene Halforty, Legal & Regulatory Affairs Manager at [Irene.Halforty@datagovanceaus.com.au](mailto:Irene.Halforty@datagovanceaus.com.au)

Kind regards,



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**Irene Halforty**  
Legal & Regulatory Affairs Manager

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<sup>12</sup> For more information on the AADL Code Authority, see ADMA Code Authority: <https://www.adma.com.au/compliance/code-authority/about>.



23 March 2018

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**By email:** [data@treasury.gov.au](mailto:data@treasury.gov.au)

Dear Sir / Madam

**Submission: Review into Open Banking Australia – Final Report**

Thank you for the opportunity to provide a submission in response to the recommendations made in the Final Report of the Review into Open Banking in Australia (“**Open Banking Final Report**”). This submission is supplemental to our response submitted on 21 March 2018 (“**Original DGA Submission**”).

The Original DGA Submission noted “significant overlap between the work with respect to the CDR in this Open Banking Review and the work within the Data Availability and Use Taskforce within the Department for Prime Minister and Cabinet.”<sup>1</sup> As addressed during the Original DGA Submission, this approach has created uncertainty to industry with respect the implementation of a CDR across the economy and the Government’s approach to policy reforms (if any) in relation to data.

DGA understands that the work of the Data Availability and Use Taskforce within the Department for Prime Minister and Cabinet has now concluded and that the Government has decided in favour of implementing a CDR across the economy.<sup>2</sup> We also note the Review

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<sup>1</sup> Data Governance Australia, Submission No [TBC] ‘*Data Governance Australia Submission to Recommendation of the Open Banking Final Report*’ to The Treasury of the Australian Government, *Review into Open Banking*, 21 March 2018, 2.

<sup>2</sup> Hon Angus Taylor, the then Assistant Minister for Cities and Digital Transformation, *Media Release: Australians to own their own banking, energy, phone and internet data* (26 November 2017) available at: <https://ministers.pmc.gov.au/taylor/2017/australians-own-their-own-banking-energy-phone-and-internet-data>.



into Open Banking in Australia is intended to inform the implementation of the CDR across the economy.

DGA is concerned that the consultation in its current form, with respect to an economy-wide CDR, may unintentionally lead to a lack of engagement by broader industry. This concern stems from the framing of the consultation as a Review into Open Banking in Australia, and not a review into, or consultation with respect to, a suitable mechanism or framework for the implementation of an economy-wide CDR. Although the consultation is open to all interested stakeholders, many industry stakeholders (or other stakeholders) may not appreciate the nature or extent of the consultation and its likely impact on their respective interests.

DGA is of the view, and recommends that, further consultation on the economy-wide CDR be required so as to ensure stakeholders, which may fail to appreciate the extent and application of the Review into Open Banking in Australia on their respective interests, are afforded with an opportunity to present their respective views.

Should the Treasury seek further information, or have any questions about this submission, please contact Amanda Noble, General Manager – DGA at [Amanda.Noble@datagovernanceaus.com.au](mailto:Amanda.Noble@datagovernanceaus.com.au), or Irene Halforty, Legal & Regulatory Affairs Manager at [Irene.Halforty@datagovernanceaus.com.au](mailto:Irene.Halforty@datagovernanceaus.com.au)

Kind regards,



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