7 September 2018

By email: data@treasury.gov.au

Dear Treasury,

Submission on the Exposure Draft of Treasury Laws Amendment (Consumer Data Right) Bill 2018

American Express Australia Limited (***American Express***) remains fully supportive of the introduction of an Open Banking scheme in Australia and more broadly, the introduction of the consumer data right.

Submissions on the Consumer Data Right Bill

Whilst the objective of the Consumer Data Right Bill is to introduce the right across multiple sectors of the Australian economy, our submissions relate largely to the manner in which the consumer data right will operate within an Open Banking context consistent with the recommendations of the Farrell Report. We note that much of the detail relating to the proposed consumer data right in respect of the Banking Sector will be left to the Consumer Rules and Data Standards, but we believe that the bill requires clarity on some aspects however relating to derived data and reciprocity. We make the following observations and submissions:

PRIVACY STANDARDS

1. The proposed Privacy Safeguards duplicate existing privacy laws and obligations in Australia. This approach creates a parallel privacy framework for CDR data which is at odds with how personal information is regulated in comparable jurisdictions.

2. Australia has an omnibus privacy law covering private and public entities in Australia. The Privacy Act distinguishes between two types of data: i) *personal information*; and ii) *sensitive personal information*. This is in line with comparable jurisdictions in Europe, the UK, Canada and New Zealand and is in contrast to sectoral approaches, for example in the US.

3. Omnibus privacy laws provide certainty and consistency for consumers and businesses alike, and ensures a level playing field across the economy. This is critically important at a time of convergence and disruption, where competition is not restricted to traditional sector designations.

4. Introducing a separate standard for CDR Data creates operational complexity which in practice would require CDR Participants to quarantine CDR Data and manage it separately.

5. This approach may be confusing to customers. For example, a CDR Participant will be required to have 2 Privacy Policies (one in respect of Personal Information and another in respect of CDR Data). In some instances, both Privacy Policies will apply simultaneously.

6. Given the operation of s56EC, whereby the Privacy Safeguards will prevail over the APPs, CDR Participants are likely to be forced to simply comply with the higher Privacy Safeguards in respect of all personal information they hold for reasons of operational efficiency. This will likely have the effect of introducing a new privacy law for the Banking sector by stealth.

7. This sectoral approach creates a competitive asymmetry in two ways:

    a. Under the proposed approach, a Data Recipient and a Data Holder will be subject to different standards in respect of the same data. In practice, a Data Recipient will be subject to the more onerous Privacy Standards. This seems to run counter to the fundamental principle of Open Banking. For Open Banking to be truly 'open', all CDR Participants should have the same rights and obligations in relation to CDR Data.

    b. To the extent that participants in CDR are forced to adopt the higher Privacy Standards in respect of all personal information held by the business, this creates a broader competitive issue. Non-CDR sectors will be able to handle and use data under the lower APP standard, despite the fact that those organisations hold equally or even more sensitive data.

    For example, a company that holds a person's entire browsing history, emails or social media activity would be subject to lower privacy standards than a Data Recipient that holds a person's name and their last 30 days of credit card transactions. This is less of an issue where those two companies do not compete with each other, but given the disruption and convergence we see across industries, competition increasingly ignores sectoral designations.

8. There is no principled reason for singling out CDR Data from other types of personal information.

9. American Express believes that the existing Australian Privacy Principles (APPs) and Privacy Act, properly enforced, provide adequate protection for personal information in Australia – including CDR Data.

10. To the extent that there are concerns about compliance with the Privacy Act and APPs by Data Recipients, this should be managed as part of the Accreditation Process and where appropriate, strong monitoring and enforcement of the APPs by the OAIC.

RECIPROCITY & EQUIVELANT DATA SHARING

11. There are essentially two 'reciprocity' concepts contemplated by the Farrell Report on Open Banking:

a. The obligation on a Data Recipient to onwards-share CDR Data that it has received through the system following a request by a CDR Consumer;

b. The obligation on a Data Recipient to share data that is 'equivalent' to CDR Data (as per recommendation 3.9 of the Farrell Report) following a request by a CDR Consumer.

12. The CDR Bill and accompanying memorandum make reference to the first concept, but appear silent in respect of the second concept of equivalent data sharing under Recommendation 3.9.

13. Whilst the intent may be to empower the ACCC to enable equivalent data sharing via the CDR Rules, we believe that it is important for the CDR Bill and the Designating Instrument to expressly provide for that possibility to ensure that the ACCC has sufficient power.

14. The Act empowers the ACCC to make rules binding upon classes of persons in a designated sector pursuant to s56BA, but that power does not appear to extend to classes of persons outside of that sector. This is problematic, because Accredited Data Recipients will be from outside the sector.

15. As currently drafted, the ACCC would not strictly be empowered to make CDR Rules in respect of 'equivalent data' held by non-ADI lenders. This would preclude non-ADI lenders from sharing data within the CDR Framework.

16. This would be problematic, because the ability to share 'equivalent data' within the CDR Framework provides scalability and certainty for non-ADI participants in Open Banking and CDR Consumers. It ensures that all CDR Participants are subject the same rights and obligations on matters like data standards, liability, complaints, privacy standards etc in respect of 'equivalent data'.

17. To ensure that the ACCC has sufficient power to create Consumer Rules necessary to enable data sharing of 'equivalent data', the Designating Instrument should clearly provide that:

c. The term 'CDR Data' includes equivalent data held by a Data Recipient;
d. Section 56BA(1) be expanded to give the ACCC power to make rules for designated sectors and 'data recipients outside of the designated sector'.
e. Section 56AC(2) be expanded to allow the Minister to specify information that is 'held by data recipients outside of the designated sector'.

DERIVED DATA

18. Recommendation 3.3 of the Farrell Report was unambiguous that '*data that results from material enhancement by the application of insights, analysis or transformation by the data holder should not be included in the scope of Open Banking*'.

19. The inclusion of derived data in the manner contemplated by the CDR Act is far too broad and effectively unworkable; 56AF (1)(b) creates a class of derived data that would include infinite types and sets of data.

20. American Express strongly recommends against inclusion of derived data within CDR for the reasons set out in the Farrell Report and previous submissions. Sharing of derived data poses a range of contractual, intellectual property, competition and constitutional law issues.

21. The ability for CDR Participants to generate and create value added insights, products and services through aggregation and algorithmic processes is one of the key reasons for creating Open Banking. Including derivative data in the way proposed, risks removing the key commercial incentives for such innovation and competition by forcing companies to share derived data for free (or for a nominal fee).

22. Given the recommendation of the Farrell Report, we assume that the inclusion of derived data within the CDR Bill is intended to allow the Minister and the ACCC to nominate specific derived data sets on a sector by sector basis. This would for example, allow the eventual inclusion of ID verification at a future point for Open Banking.

23. To the extent that the CDR Act is intended to empower the Minister and the ACCC to include specific derived data sets on a sector by sector basis, the current drafting does not achieve that end. As drafted, all derived data would be automatically included by operation of section 56AF(1)(b) for all sectors.

24. Given that 'derived data' is simply a class of data, s56AF(1)(a) is sufficient of itself to allow the Minister to designate derived with more specificity for each sector via the Designating Instrument. As such, we would recommend simply deleting s56AF(1)(b) and all other references to 'derived data'.

We are happy to discuss any part of our submission in more detail, if you wish. Please contact Julian Charters at julian.d.charters@aexp.com for further information.