**Treasury Laws Amendment (Consumer Data Right) Bill 2018 Consultation**

Submission by the Australian Communications Consumer Action Network

10 September 2018

**About ACCAN**

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will represent the views of its broad and diverse membership base to policy makers, government and industry to get better outcomes for all communications consumers.

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Executive Summary

ACCAN would like to thank the Treasury for the opportunity to submit to its consultation on the exposure draft of the *Treasury Laws Amendment (Consumer Data Right) Bill 2018.*

Data and information can be powerful transformative forces in markets, and ACCAN supports measures to harness the collection and use of data to provide better outcomes for consumers. The proposed reforms have the potential to yield significant benefits for consumers, particularly in those markets characterised by high levels of concentration and weak competition. The benefits for consumers may be material and the consumer data right framework will in principle enable consumers to benefit from their data through reduced prices and more tailored service offerings.

In the telecommunications marketplace, these reforms have the potential to provide significant relief to those consumers on low incomes. Although the quality and variety of services on offer in Australia have increased significantly over time, and there have been improvements in affordability more generally, affordable communications continue to be a challenge for many consumers on low incomes (PC 2017, p. 24).

Optimism concerning the potential benefits of the proposed reforms, should however be tempered with a considered examination of the potential costs and risks. Although ACCAN is in principle supportive of the intent of the proposed reforms, ACCAN has concerns that the current drafting of the Bill does not adequately address certain issues including:

* consumer privacy and protection of consumer data;
* fundamental and entrenched information asymmetries;
* genuine and fully informed consent; and
* the potential for consumer data to be used for anti-competitive conduct.

ACCAN strongly supports the refinement of the current legislation to ensure that the proposed Consumer Data Right (CDR) framework maximises the potential benefits to consumers, while simultaneously addresses areas of potential risk. These refinements entail expanding the scope of privacy protections for consumers, providing consumers greater control over their information through a genuine consent requirement, and constraining the potential for data to be used to engage in anti-competitive behaviour.

The CDR is likely to reduce the cost of consumers communicating their information between providers (a transaction cost). Although this will provide some benefits, ACCAN has concerns that the CDR will not address the entrenched information advantages that service providers have over consumers, and the detriment that consumers face as a result. Unless these information asymmetries are addressed, the CDR and the benefits that it generates are unlikely to reach their potential. Accordingly we support further refinements to the CDR to address the material information asymmetries faced by consumers.

Recommendations

**Recommendation 1**

*That Treasury embeds ongoing requirements for rigorous cost-benefit analyses that are publicly released and made available to stakeholders prior to sectors being declared and rules being made.*

**Recommendation 2**

*That as part of a rigorous and public cost- benefit analysis Treasury articulates the fundamental problem that the consumer data right framework is aimed at addressing.*

**Recommendation 3**

*That as part of a rigorous and public cost benefit analysis, Treasury articulate the fundamental objectives the consumer data right framework is aimed at addressing, to ensure Treasury and stakeholders are able to assess whether the proposed framework has achieved its objectives as the reforms are implemented.*

**Recommendation 4**

*That as part of a rigorous and public cost benefit analysis, Treasury examines the costs and benefits of alternatives to the proposed consumer data right framework, to ensure that the policy option with the greatest net benefits is adopted and implemented.*

**Recommendation 5**

*That Treasury consider the potential for the CDR framework to both reduce transaction costs and resolve information asymmetries as part of a rigorous, and public cost-benefit analysis.*

**Recommendation 6**

*That Treasury considers the potential for the adoption of an economy wide principles-based framework for the regulation of consumer data and privacy as part of a rigorous and public cost benefit analysis.*

**Recommendation 7**

*That s56EF be amended to ensure that it protects consumers from the collection of their data without consent, and that collect and soliciting be appropriately defined so as to not place a general bar on the collection of data.*

**Recommendation 8**

*That the Bill be amended to impose requirements for compliance with the Privacy Safeguards under the principle of reciprocity,*

**Recommendation 10**

*That attempts to use CDR data for the purposes of re-identifying individual consumers be explicitly banned, with criminal penalties imposed for attempted and successful re-identification of individuals.*

**Recommendation 16**

*That Treasury takes steps to quantify the potential costs of, or risks to consumers in economic and social terms, as the use of CDR data to engage in price discrimination as part of a rigorous and public regulatory impact assessment.*

**Recommendation 17**

*That Treasury takes steps to quantify the potential costs of, or risks to consumers from firms using consumer data to engaging in anti-competitive or collusive conduct within the identified markets.*

**Recommendation 18**

*That Treasury amend the Treasury Laws Amendment (Consumer Data Right) Bill 2018 to facilitate the initiation of class actions, by removing any potential cap on damages.*

**Recommendation 9**

*That the Bill be amended to allow for the ACCC to develop regulations for the imposition of reciprocal duties for data recipients.*

**Recommendation 11**

*That all of the Privacy Safeguards set out within the draft legislation are applied to data holders.*

**Recommendation 12**

*That the Privacy Safeguards apply in parallel, or addition to the Australian Privacy Principles.*

**Recommendation 13**

*That Treasury takes steps to quantify the potential costs of, or risks to consumers in economic and social terms, as a result of losses of privacy, as part of a rigorous and public regulatory impact assessment.*

**Recommendation 14**

*That the Bill be amended to require genuine consent from consumers for the transfer of their data under the CDR framework.*

**Recommendation 15**

*That s56BG(a) be amended to allow for the transfer of data concerning consumer consents, and to require that consumers be notified of their existing consents when such information is to be transferred.*

First principles regulation

ACCAN supports best practice regulation, and the development of targeted and proportionate regulatory interventions to address material policy problems. The principles of best practice regulation are well established and have been outlined by the Organisation for Economic Cooperation and Development (2012) and the Department of Prime Minister and Cabinet (2014).

As the current consultation has been undertaken with a view to informing the creation of a regulatory impact statement to accompany the draft legislation, ACCAN has crafted its submission with this in mind. ACCAN notes that full consideration of the costs and benefits of the proposed reforms are essential, and that care should be taken to ensure that sufficient evidence has been obtained to inform the development and implementation of the consumer data right framework.

As ACCAN is the peak organisation representing telecommunications consumers, our approach is framed by this perspective. Inadequate information when developing regulatory frameworks is a well-established challenge, and not one that is unique to the field of telecommunications regulation. The problem of poor information and the absence of essential economic information when assessing the merits of regulation has been well documented internationally (Cecot et al. 2008; Hahn & Hird 1991; Hahn 1998; Hahn et al. 2000; Hahn & Dudley 2007; Hahn & Tetlock 2008) and in Australia (PC 2012, p. 11).

Given the significance of these proposed reforms, ACCAN believes that it is appropriate that a full cost-benefit analysis and regulatory impact analysis is undertaken concerning the proposal, and that the results of this cost-benefit analysis be made available for scrutiny.

**Recommendation 1**

*That Treasury embeds ongoing requirements for rigorous cost-benefit analyses that are publicly released and made available to stakeholders prior to sectors being declared and rules being made.*

**What is the problem?**

The first question, in the assessment of any regulatory proposal, is what is the fundamental problem that needs to be addressed by government intervention? At an economic level, there are several problems that currently exist within the markets (banking, energy and telecommunications) that may justify consideration of regulatory intervention to address them.

The problem in the telecommunications sector is that an abundance of market failures exist which provide a strong rationale for regulatory intervention. Market failure arises when the free market does not deliver efficient allocation of goods and resources.

In this instance, the problems that are relevant to the assessment of the Bill are:

* the potentially significant distortions associated with information asymmetries that exist within the identified markets (Akerlof 1970);
* the existence of potentially material transaction costs (Coase 1937), that may be impeding the efficient operation of the market;
* the extent to which incumbent operators may be able to avoid competitive pressures by exercising market power and increasing switching costs for consumers.
* the risks associated with the use of lower quality information proxies, as a substitute for direct customer information.

Information asymmetries

The telecommunications marketplace is characterized by a number of information asymmetries between consumers and service providers. These asymmetries stem in part from the incentives that service providers have to raise the complexity or cost of information in areas such as contracting as well as the genuinely higher information costs for consumers that arise due to the technical complexity associated with providing services. The existence of information asymmetries in the telecommunications and digital sphere are well documented in both Australia and internationally (OECD 2018).

Transaction costs

Transaction costs refer to the costs entailed in using the market, and may include a variety of costs including those associated with information, formation and enforcement of a contractual agreement (Coase 1937). Transactions costs are considerably broader than ‘ink costs’ - the cost of drafting contracts - and can be a barrier to the efficient operation of markets.

The existence of transaction costs may provide incentives for consumers to remain with existing service providers, despite facing detriment through higher prices or worse services. For consumers and markets the existence of significant transaction costs may result in poor outcomes, and consequently measures to reduce transaction costs should promote consumer welfare.

Market power and competition

Australia has a highly concentrated communications market with three entities accounting for almost 100% of the market (Grattan Institute 2017). Although concentration is but one of many indicators relevant in assessing the potential for anti-competitive activity, it is accepted that the level of concentration in the Australian communications market is well in excess of those observed in competitive markets that work well (ACCC 2018a).

The way in which concentration affects market functioning and consumer outcomes is best described by Professor Stephen King:

Market shares and concentration interact with competition through the structure of the market. All other things being equal, increased concentration due to an increase in the market share of a single firm will tend to increase that firm’s ability to raise its profits by raising its own prices, lowering its service levels or otherwise engaging in less competitive activity.

(King 2009, p. 265)

The lack of competitive pressure associated with this market structure has been identified as a potential driver of excess prices for telecommunications data and voice services and led to ‘extraordinarily high’ returns being achieved (Grattan 2017, p. 31). A lack of competition has also been reflected in poor service quality outcomes and a high incidence of complaints from consumers who have faced poorer outcomes than could be reasonably expected in a competitive market (ACMA 2018; TIO 2018).

The concentration of the communications sector results in individual firms having significant market power, and the ability to potentially set prices in excess of competitive levels. The markets identified for initial rollout of the consumer data right are characterised by high levels of concentration and comparatively low levels of competition. As a consequence the benefits of reforming these sectors may be material, but inversely the risks that firms may use consumer data to engage in anti-competitive conduct is similarly material.

ACCAN is not suggesting that there is currently clear conduct that would amount to anti-competitive behaviour in the telecommunications market, but rather that limited competitive pressures are leading to less than ideal outcomes for consumers. Moreover, a concentrated market reflects a level of risk that merits appropriate and ongoing regulatory scrutiny as well as sector-specific regulation to curtail the potentially significant losses that would accrue from anti-competitive conduct or less than perfect competition.

Proxies

The emergence of proxies is a new form of market failure, which arises when consumers or firms are assessed by reference to information that is not directly relevant to a transaction. ACCAN is particularly concerned about the emergence of proxies to assess consumers and profile consumer market segments for the purpose of setting prices at consumers’ maximum willingness to pay.

A proxy, in simple terms refers to the use of a piece of data that may be correlated with, but not causally linked to a consumer characteristic. For example, estimating the income and therefore capacity to pay for an individual may difficult, but average income information for a postcode, may be readily obtainable.

However, average income by postcodes does not reflect the disparities in income across a postcode area – and as a consequence reliance on this data would result in mispricing and loss for low income consumers residing in the area. The use of proxies as a substitute for accurate consumer data may in the future lead to material consumer detriment, depending on how proxy data is used, the robustness of algorithms, the quality of the underlying data and the inferences drawn.

The use of proxies to inform pricing and market strategy is of concern, as these proxies often do not have an appropriate causal relationship to consumers and can result in consumers facing higher prices or poorer access to services based on flawed models. Although a greater problem for consumers seeking access to financial services or credit, it is important to note that many consumers in the communications marketplace similarly face issues with respect to access to credit for communications products and services.

What is the test for intervention?

Each of these above four issues may result in less than desirable levels of competition and overall worse outcomes for consumers. However, in order for the proposed CDR framework to be justified there must be evidence that the Bill identifies a clear objective that targets or addresses each of these issues, and that the proposed intervention provides greater benefits to society than costs (Kaldor 1939; Hicks 1939).

**Recommendation 2**

*That as part of a rigorous and public cost- benefit analysis Treasury articulates the fundamental problem that the consumer data right framework is aimed at addressing.*

**What is the objective?**

The objective of regulatory intervention should be to maximize social benefits, which ACCAN believes is best achieved by improving consumer outcomes and providing incentives to service providers to offer competitive services and products. Achieving this objective entails implementing tailored policy interventions that address the fundamental sources of market failure and consumer detriment.

In the context of the consumer data right, there has been little guidance given concerning the fundamental objectives of reform, beyond a broad statement of intent to address existing market failures and enhance competition. As part of the ongoing work of drafting, ACCAN supports consideration of what the core objectives of the reforms are, to ensure that the legislation is drafted with targeting of these goals in mind.

This is important. Although the CDR framework may in part facilitate the eliciting of better offers for consumers, and a reduction in transaction costs, it is not clear that it will be an effective measure in improving information asymmetries in relevant markets. This is because a consumer who has transferred or offered their data to a service provider may still face information asymmetries, and get a less than optimal deal, albeit one that is more attractive on the face of it than existing arrangements.

**Recommendation 3**

*That as part of a rigorous and public cost benefit analysis, Treasury articulate the fundamental objectives the consumer data right framework is aimed at addressing, to ensure Treasury and stakeholders are able to assess whether the proposed framework has achieved its objectives as the reforms are implemented.*

**What are the options?**

There are several alternative options available including:

* doing nothing and implementing no reforms to consumer data;
* implementing the CDR framework as drafted;
* reforming elements of the proposed framework;
* adopting a comprehensive approach to the management of individuals’ data.

Maintain the status quo – do nothing

One option in any first principles assessment of regulatory reform is to do nothing and leave regulatory settings in place (DPMC 2014). Often the hardest option for government, doing nothing may represent the best response where the costs associated with government intervention in any form are likely to exceed the benefits of government action.

In some instances this may represent the best option given that costs are inherently entailed in changing existing regulatory settings and transitioning to a new form of regulation (Marneffe & Vereeck 2011). As part of considering this option, it is important to examine the suitability of existing settings.

On the basis of the market failures outlined above, it is clear that doing nothing is unlikely to be an appropriate option to address the significant challenges that exist within the identified markets. In particular the emerging use of proxy information within markets is unlikely to be addressed by the maintenance of the status quo, where such information would remain entirely unregulated. However, this is not to say that the current proposal as drafted necessarily represents the best option.

Adopting the consumer data right framework as drafted

This option would entail adopting the framework as currently drafted. ACCAN has concerns that this would not adequately address issues of consent, privacy and the potential for data to be used for anti-competitive purposes.

On the basis of available evidence, it is not clear that the proposal as drafted would provide sufficient protections for consumers, such that they could have confidence and trust in the CDR system. If consumers lack confidence in the framework, uptake is likely to be low, and as a consequence, the estimated benefits associated with the framework may not meet expectations or be sustained.

ACCAN submits that as drafted, the legislation is unlikely to pass a cost benefit test. Identifiable costs are the drafting of the legislation and significant ongoing regulatory costs, risks to consumer privacy and potential for anti-competitive behaviour. Although the CDR will provide net benefits insofar as it reduces the transaction costs associated with switching, the sharing of consumer data will not sufficiently rectify information asymmetries present across the identified sectors. As a consequence, much of the purported benefits may not be realized as the reduction in transaction costs will be marginal against the costs of implementation and existing alternatives available to consumers. Accordingly given the risks of anti-competitive behaviour, the framework is unlikely to pass a rigorous cost-benefit analysis.

An enhanced consumer data right framework

The third option would be to refine the proposed framework to provide explicit protections for consumers’ data. An enhanced framework would include elements such as:

* greater privacy protections;
* strict requirements for consent;
* rights for consumers to request the deletion of their data;
* constraints on the use of CDR data within the accreditation framework and outside the accreditation framework;
* sanctions for use of data outside the accredited system for inappropriate purposes;
* increased powers for the ACCC to monitor market behaviour;
* exceptional penalties for seeking to use or using CDR data for re-identification of individuals;
* exceptional penalties including deregistration of entities that attempt to or use consumer data right information for the purposes of price fixing or cartel formation.

ACCAN considers that refinements of the existing draft legislation are necessary to ensure that the predicted benefits of the framework are achieved, and that consumers have appropriate protections and incentives to engage with the CDR. Should the revisions set out above be adequately implemented into the final CDR framework, it is likely that the CDR would result in net benefits for consumers.

In the absence of these reforms the risk of material detriment to consumers is in excess of the potential benefits. In addition, there is a risk of firms seeking to use CDR data to inform price discrimination strategies and set prices at consumers’ maximum willingness to pay. How this affects vulnerable consumers, including the elderly and low-income groups, is of particular concern to ACCAN.

A comprehensive information regulation framework

A comprehensive information regulation framework would entail the creation of economy wide principle-based regulation of the management of privacy, data collection, transfer and provision for individuals and businesses. A comprehensive framework of regulation, would be akin to the *General Data Protection Regulation* in its scope of application, and provide for the protection of personal information through technical and organisational requirements.

A comprehensive framework may entail the implementation of more prescriptive or specific rules where there is a clear risk of consumer or individual detriment, based on the sensitivity of the data in question or the potential for misconduct.

**Recommendation 4**

*That as part of a rigorous and public cost benefit analysis, Treasury examines the costs and benefits of alternatives to the proposed consumer data right framework, to ensure that the policy option with the greatest net benefits is adopted and implemented.*

**What are the benefits of reform?**

The core benefit that flows from the proposed reforms is a reduction in the transaction costs that consumers face when searching the market for products and services. By reducing the costs associated with communicating their preferences, and usage patterns as well as their price sensitivity, consumers should notionally benefit by being able to elicit offers of services that better reflect their needs and their willingness to pay.

However, the extent of these benefits is unclear, and given that much of the information consumers need (e.g. the maximum discount on offer) is privately held commercial information and not available, consumers may not have sufficient information to maximise their benefits.

The transaction costs associated with the financial, energy and telecommunications sectors have been trending downwards as a result of the advent of more efficient searching platforms over the internet, and the capacity of consumers to transfer the information proposed to be captured within the CDR through simpler, means such as email. There are, however, obvious privacy implications associated with the use of these methods to transfer data, noting that the adoption of uniform privacy protections would address many of these issues. Where the sensitivity and security of the data is paramount, a universal framework of privacy protections would provide incentives for the development of a variety of applications to support the secure transfer of data.

However, the CDR is fundamentally a data portability right – it does not allow for easy and simple switching of providers and as a consequence may yield limited benefits where the cost of switching remains high. ACCAN is, however, positive about the potential for the CDR to be an effective force for change in the telecommunications market, where reforms to number portability make switching easier than in other markets.

Reducing transaction costs does not necessarily resolve information asymmetries

The consumer data right primarily addresses *transaction* costs. However, transaction costs and information asymmetries, though related are fundamentally different problems.[[1]](#footnote-1) Reducing the cost of transferring or communicating data does not imply that consumers will be in a position where:

* they can readily engage with and compare complex and differentiated products;
* they are protected from firms presenting information in an unduly complex way to confuse them;
* they are protected from firms failing to provide information concerning the underlying quality of services.

Although supportive of measures to reduce transaction costs, or address information asymmetries, it is important not to conflate the two related but distinct forms of market failure, as targeted policy interventions are required to address each issue. The development of the CDR may however, be refined to allow for the resolution of specific instances of asymmetrical information to maximize consumer benefits.

In the telecommunications context, recent measures have been implemented to address information asymmetries including:

* *Telecommunications (NBN Consumer Information) Industry Standard 2018*;
* *Telecommunications Service Provider (NBN Service Migration) Determination 2018*;
* Monitoring of broadband performance by the ACCC.

The need for continued policy intervention to address information asymmetries more broadly have been highlighted in the energy sector by the ACCC (2018b), which recommended reforms to allow for consistent comparisons to reduce the information asymmetries that exist between consumer and firms.

The financial services sector has similarly been identified as suffering from rampant information asymmetries, with the Productivity Commission (2018, p. 89-90) noting that providers typically have more information on product differentiation, pricing, risk and quality than consumers. Moreover, the use of disclosure as a tool to resolve information asymmetries was identified as ineffective.

Citing ASIC, the Commission noted the implications of asymmetries for consumers:

The provider of a financial product or service generally has more information than the consumer about the terms and conditions of the product or service. Consumers are generally unable to negotiate more favourable terms or conditions. This information asymmetry creates opportunities for inappropriate or exploitative behaviour by providers. Providers could potentially design products or services that maximise their interests over that of consumers. (ASIC, sub. 40, p. 15)

(PC 2018, p. 89-90)

ACCAN supports the implementation of reforms that address a variety of market failures present in the telecommunications sector, and supports the development of targeted policy interventions to address specific problems. As part of this review, the Treasury should consider the extent to which the CDR may be further refined to address the reduction of transaction costs, and/or information asymmetries within the identified sectors.

**Recommendation 5**

*That Treasury consider the potential for the CDR framework to both reduce transaction costs and resolve information asymmetries as part of a rigorous, and public cost-benefit analysis.*

Who is going to use the CDR?

An assumption should not be made that the CDR will be taken up by the majority of consumers, in order to ensure that the assessment of costs and benefits is suitably robust. The quantum of benefits that flow from the proposed CDR framework is ultimately driven by the extent to which the framework is utilised by consumers to access, transfer and utilise their data to elicit offers or inform their decisions.

If the use of the CDR is limited to those consumers that are already active market participants (insofar that they seek out better offers and discounts) the additional benefits of the CDR may be marginal. Accordingly, which consumers use the CDR, how often and for what purposes will determine the benefits that flow from the proposed reforms.

**What are the costs of reform?**

A rigorous appraisal of the costs of reform is essential in assessing whether a potential policy option provides net benefits to society and consumers. The legislation as drafted, adopts a rule-based approach to regulating individual sectors, which may entail greater costs than an economy-wide principle-based approach. ACCAN considers that a rules-based system may entail greater costs over the longer term due to the need for ongoing regulatory change and regulatory costs, associated with less flexible rules-based frameworks (Kaplow 1992).

**What is the preferred option?**

The first best solution to the policy problems outlined above would be the adoption of a comprehensive economy wide framework for the regulation and management of individual and business data. This approach could be modelled on the *General Data Protection Regulation*, and would provide for a uniform, principles-based regime of data protection.

A universal framework of data protection, does not directly reduce transaction costs in the manner proposed by the CDR. However, in providing consumers and small business clear and unambiguous privacy and data protections, it reduces transaction costs indirectly (e.g. it may provide consumers’ confidence to use existing processes to transfer information). When consumers and small businesses are confident that their data is protected, their willingness to engage with firms and service providers seeking that data will increase.

The adoption of a uniform data protection regime, would provide similar or greater economic benefits than the proposed CDR, noting that the simple measure to communicate data (such as emailing statements) could achieve similar outcomes as a CDR (without industry or regulatory cost), where consumers are provided appropriate privacy protections.

If consumers are confident when engaging with firms seeking their data, the economic gains that will be generated for consumers and industry are likely to exceed those of a narrower industry-based approach. For consumers, the complexity of industry-specific CDR protections and processes, are likely to limit the attractiveness of engaging with the system, while simultaneously increasing the costs for industry to comply.

ACCAN supports the adoption of a best practice regulatory approach, with tiered risk-based regulation, with escalating requirements for firms based on the sensitivity of the information and risk of misconduct in industries. Although a uniform principles-based approach may initially entail higher costs in terms of implementation, over the longer term as a standardised approach to data management and protection becomes common practice, the costs of the framework will fall.

**Recommendation 6**

*That Treasury considers the potential for the adoption of an economy wide principles-based framework for the regulation of consumer data and privacy as part of a rigorous and public cost benefit analysis.*

Privacy

Privacy is an important area for consumers, and a core focus of ACCAN’s advocacy work. We support the protection of consumers’ privacy, as both a matter of principle and on the basis that privacy has a social and economic value to consumers.

Privacy is an essential human right, and when consumers’ privacy is forgone as a result of breach, consumers face significant detriment, through a loss of personal security, direct and indirect economic loss and a sense of exploitation. Individuals are entitled to have their privacy respected and protected, and individuals should have confidence that the use of their personal information should be undertaken in accordance with their wishes.

The current form of the legislation does not however provide a comprehensive framework to address the privacy concerns of consumers. ACCAN has concerns that:

* the current framework of protections only apply when data is transferred;
* the framework provides for limited protections of consumer data once it is transferred out of the system to non-accredited entities;
* the framework does not provide for any penalties for seeking to re-identify consumers;
* the framework creates in effect a two-tiered or possibly three-tiered system of privacy protection.

**CDR Privacy Safeguards**

The Bill provides for Privacy Safeguards governing:

* open and transparent management of CDR data;
* optional consumer anonymity and pseudonymity;
* collection of solicited CDR data;
* dealing with unsolicited CDR data, including deletion of this data;
* notification of consumers concerning the collection of CDR data;
* use or disclosure of CDR data, including the need for specific consent for data to be used for the purposes of direct marketing;
* a ban on cross-border disclosures to non-accredited entities;
* a ban on the use of government identifiers as a person’s CDR identifier unless required by law;
* a requirement that data participants comply with the security of CDR data directions provided by regulation;
* a requirement that data participants take reasonable steps to ensure the quality of CDR data;
* a requirement that data participants follow steps (to be set out in regulation) to respond to requests for corrections to CDR data.

The protections provided under the Privacy Safeguards, although in some respects a material improvement on the protections provided under the Australian Privacy Principles, are inadequate. This inadequacy stems from their limited scope of application, and the unclear content of the protections which will be provided to consumers, with much of the protections to be specified through the regulatory rule making process.

The Privacy Safeguards represent the minimum legal protections provided to consumers concerning the use of their data; however, in many instances the legislation provides highly conditional protections. The drafting of the legislation leaves important protections up to the rule making process, with only two of twelve Privacy Safeguards being entirely specified within the Bill. This is of concern, as important privacy protections such as anonymity and pseudonymity may be removed via the regulatory rule making process, to the detriment of consumer privacy.

The protections provided by the Privacy Safeguards, are weak and in some instances the Safeguards do not directly relate to matters of privacy. For example Safeguard 10 imposes requirements on data participants to take reasonable steps to ensure the quality of data, and is primarily a safeguard for commercial users of CDR data, with a tenuous connection to privacy. Although there is merit in promoting quality control of data, the provision is not relevant to matters of privacy.

The protections provided by some Safeguards are no greater than those that are already required at law, for example Safeguard 1 requires entities to development policies and procedures to comply with their existing legal obligations established elsewhere with the Bill. The inclusion of this Safeguard is questionable, as it appears to provide no greater protections to consumers than were it not included, and merely imposes a requirement to have a suitably drawn up and public policy about how a business aims to meet their obligations.

Finally, the drafting of some Safeguards, such as Safeguard 3 appears incompatible with the underlying intent of the Bill. For example, Safeguard 3 bars data participants from collecting CDR data from consumers by soliciting them, unless a valid request has been made by a consumer for the data. However, the drafting of this provision is such, that a literal reading would impose a ban on the collection of CDR data prior to a request being received from a consumer.

As the words ***soliciting*** and ***collect*** are not defined in the Bill, in the absence of a consumer making a request for CDR data the legislation would impose a ban on the collection of any consumer data that may fall within the definition of CDR data, by any accredited data holder, as defined as part of the rule-making process. This ban would be effective over data currently being collected as part of ordinary commercial processes.

**Recommendation 7**

*That s56EF be amended to ensure that it protects consumers from the collection of their data without consent, and that collect and soliciting be appropriately defined so as to not place a general bar on the collection of data.*

In the absence of rules setting out how the Privacy Safeguards will be applied in a telecommunications context it is difficult to draw a favourable conclusion that they will be sufficient to ensure that consumers are protected. ACCAN supports the submission of the Financial Rights Legal Centre, which provides more detailed comments on the drafting of specific aspects of the individual Privacy Safeguards.

**The scope of CDR privacy protections**

The scope of the protections provided under the Bill is exceptionally limited and will only apply when a consumer has requested the transfer of their data. Although the effect of many of the privacy principles outlined within the draft legislation would provide material protections to consumers, the scope of application is too limited for these measures to be effective.

For most consumers, the limited scope of the CDR privacy protections is unlikely to be sufficient to engender confidence in the capacity of the system to protect their personal information. This may result in significantly lower benefits being realised as a consequence.

The circle of trust

The privacy protections set out in the Bill only impose obligations to maintain and protect privacy for accredited data holders and recipients. This in effect creates a community of trusted entities who are required to deal with data that is being transferred and communicated within the system, and are subject to enhanced privacy protections.

These enhanced privacy safeguards will only apply to data within the system that has been transferred as a result of a consumer seeking to exercise their data rights. However, the protections do not apply to data generally held by accredited data holders or recipients of consumer data, which will continue to be protected under the provisions of the *Privacy Act 1988* (Cth) and the comparatively weak provisions of the Australian Privacy Principles.

Beyond the circle of trust

The arrangements set out within the draft legislation, allow for consumer data to be transferred to third parties outside the scope of the accredited system. This data, once transferred out of the CDR system, is provided the limited privacy protections of the Australian Privacy Principles.

Once data moves beyond the circle of trust, the privacy protections available to consumers diminish considerably, as too do the remedies made available to them. There is accordingly considerable risk that once consumer data has exited the CDR system, for this data to be misappropriated, leaked or stolen to the detriment of consumers.

The incentives for firms to aggregate consumer data are material, and the benefits that may flow to an individual firm operating in what are highly concentrated markets are significant. In the telecommunications market, if one of the three major participants were able to engage in price discrimination to raise prices by 1% the additional revenue (and implicit consumer loss) would be between between $39.6 million to $103.4 million.[[2]](#footnote-2)The material gains to be made by firms by violating consumers’ privacy, means that it is extremely likely that a firm not subject to the constraints of the Privacy Safeguards, will engage in misconduct to the detriment of consumers.

ACCAN has concerns that the current narrow drafting of the legislation provides limited protections to the privacy of consumers, and that given the incentives in place in the identified markets, that there is a material prospect of harm. To this end we support the adoption of comprehensive privacy protections for consumer data, to apply at all times that this data is being held on behalf of consumers.

Reciprocity

ACCAN supports the implementation of reciprocal obligations on data recipients, as data recipients often derive material benefit from access to the forms of data that would be within the scope of CDR data.

Where consumer data is transferred to a third party, under the terms of the consumer data right the privacy protections and obligations set out under the CDR should be extended to the third party. The CDR framework provides benefits to both consumers and third party service providers (e.g. search engines for communications services). Accordingly, it is appropriate that the obligations of compliance be extended to third party providers.

In the absence of reciprocity arrangements being put in place, consumers face material risks to their privacy and the security of their personal information. The default rule should be that the privacy safeguards apply.

**Recommendation 8**

*That the Bill be amended to impose requirements for compliance with the Privacy Safeguards under the principle of reciprocity,*

The current drafting of section 56BC(a) does not unambiguously provide for the extension of consumer data right obligations to third parties receiving data from an accredited data holder. Accordingly, there is a need for the scope of s56BC(a) to be refined to explicitly provide for the creation of regulations as part of the ACCC’s rule making process.

**Recommendation 9**

*That the Bill be amended to allow for the ACCC to develop regulations for the imposition of reciprocal duties for data recipients.*

**Anonymity and re-identification**

Consumer data can be used to identify individuals, violate their privacy and allow for profiling of individuals and groups. Transactional data from financial institutions can be used to provide detailed information concerning an individual’s purchasing habits, geographic locations and can be used for profiling of real-time behaviour. The current protections outlined within the draft legislation do not explicitly bar the use of consumer data for this purpose, and are inadequate.

Although transactional data may merely be a record of spending activities, for consumers who transact with geographically specific retailers, a failure to anonymise this data provides information to malicious parties about an individual’s daily life. At a practical level this data may provide insights into an individual’s location at various times by reference to a series of data points including small purchases such as a cup of coffee, or where they withdraw funds from ATMs.

For individuals and organisations who are maliciously inclined, this would allow for the targeting of vulnerable individuals based on their habits and movements at various times of day. This may create material risks to personal safety, or a significant personal loss of privacy.

The re-identification of individuals with the forms of data that may become available under the CDR framework is a risk (Su et al. 2017). Although ACCAN considers that the designation of technical measures to address this risk is appropriately addressed through the rule making process, a clear and unambiguous ban should be included in the Bill.

ACCAN considers that there are sufficient grounds for banning the re-identification of individuals using consumer data, and that re-identification should be made a criminal act subject to exemplary penalties under the *Competition and Consumer Act 2010* (Cth).

**Recommendation 10**

*That attempts to use CDR data for the purposes of re-identifying individual consumers be explicitly banned, with criminal penalties imposed for attempted and successful re-identification of individuals.*

**Privacy safeguards**

ACCAN supports the protection of consumer privacy and data and supports the implementation of stronger privacy protections including those set out in the safeguards for all consumer data held by accredited entities in the Bill. Accordingly, we support the extension of all the privacy safeguards set out within the draft legislation to data holders, noting the significant limitations of the Privacy Safeguards set out in detail in the submission of the Financial Rights Legal Centre.

In the absence of robust protections, consumers are unlikely to engage with the proposed framework which will result in minimum consumer and economic benefits, whilst entailing considerable regulatory and industry costs. Moreover, consumers will continue to have poor privacy protections and continue to face detriment through the loss, theft or leakage of their data.

**Recommendation 11**

*That all of the Privacy Safeguards set out within the draft legislation are applied to data holders.*

**Parallel or substitute privacy obligations?**

ACCAN supports economy-wide reform to privacy and data protection for consumers. However, in the absence of such reform, steps should be taken to provide the greatest possible privacy protections to consumers.

The Privacy Safeguards are an additional layer of privacy protection for consumers, in addition to the more limited protections provided under the Australian Privacy Principles. As neither framework provides for the comprehensive protection of consumer privacy, we consider that it is appropriate that the systems be operated in parallel, with tiered obligations for consumer data under the CDR, and more general uniform protections under the Australian Privacy Principles.

This is not, by any reckoning, an ideal framework for the management of privacy and accordingly we support the adoption of a uniform economy-wide framework for the regulation of data and privacy. ACCAN does not support substitution of either the CDR Privacy Safeguards with the Australian Privacy Principles, or vice versa.

**Recommendation 12**

*That the Privacy Safeguards apply in parallel, or addition to the Australian Privacy Principles.*

**The economic value of privacy**

Consumers’ privacy has important economic value, insofar as it promotes consumer confidence and as a good in and of itself. Although the inherent value of privacy cannot be reduced to a mere figure, there is merit in estimating its value in economic terms to ensure that any cost-benefit analysis fully considers its value when considering reform.

Available estimates indicate the value of privacy is material for consumers. For a given transaction, it has been estimated that the value of an individual’s privacy or the non-sharing of their information is between $15 - $60 AUD per transaction (Acquisti, John & Loewenstein 2013, p. 255-256).

This valuation is important, because it indicates that the economic and social value for consumers associated with maintaining the privacy of their consumer data may in many instances materially outweigh the potential reduction in transaction costs associated with the CDR. The expected benefits of the CDR framework must be at a minimum in excess of the total expected costs associated with the potential loss of privacy per transaction, and the regulatory costs associated with reform.

The inclusion of the value of privacy is essential for a fully informed cost-benefit analysis to be performed as part of the regulatory impact assessment process. A failure to adequately consider the economic and social impact associated with risks to consumers’ privacy would be a serious omission in a regulatory impact assessment.[[3]](#footnote-3)

The protection of individuals’ privacy is more than a mere matter of principle, and the potential for poor regulatory design to diminish consumer confidence and trust is significant. If consumers lose confidence in the capacity of the proposed framework to provide adequate protections for their private information, the potential benefits of the reforms will be lost.

**Recommendation 13**

*That Treasury takes steps to quantify the potential costs of, or risks to consumers in economic and social terms, of as a result of losses of privacy as part of a rigorous and public regulatory impact assessment.*

Consent

In order for the proposed framework to be fit-for-purpose it is essential that the primary means through which consumers can influence their privacy, namely consent, is defined in accordance with best practice. To this end consent must be genuine and be:

* Explicit;
* Specific to purpose;
* Unbundled;
* Easy to understand;
* Revocable;
* Freely given

ACCAN supports the adoption of a definition of consent that draws upon existing regulatory best practice, and acknowledges the significant challenges that consumers can face when seeking to actively engage with their privacy. The challenges faced by consumers have been documented in the research of the Consumer Policy Research Centre (CPRC) (2018) that indicates that the vast majority of Australians do not engage with their privacy. Relevant findings are:

* 33% of individuals surveyed indicated they never read a privacy policy;
* 67% of consumers signing up for policies did not feel comfortable as it was a pre-condition of accessing a service;
* the vast majority of consumers are not comfortable with companies sharing their information for a variety of secondary purposes.

Despite significant discomfort and concern over engaging with their privacy, survey results indicate that consumers want their privacy dealt with fairly, and for government regulation to ensure that they can have better control over their privacy, through genuine consent and control (CPRC 2018).

In practice this would require consumers to unambiguously or explicitly consent to the use of their information for nominated or specific purposes, with a ban on alternative uses. It would also require consent to be unbundled from product or service offerings, with a ban on consumer information being a contractual requirement except where the information is essential to the provision of the service (e.g. insurance).

Where consent is sought, businesses should be required to provide clear and easy to understand information so that consumers can readily engage with their privacy and be informed as to the extent of the consent and implications of consent. As part of this, consent processes need to be designed to preclude businesses from using complexity, to deter consumers from engagement to their detriment (Ayres & Schwartz 2014; Ben-Shahar 2009).

Consent should also be revocable. Consumers should be able to withdraw their consent to the use or sharing of their data, by providing notice to firms of the withdrawal of their consent. Moreover consent should be freely given, and consumers’ should not be subjected to pressure to provide consent in order to access services.

In order for consumers to be adequately protected, and obtain benefits through the sharing of data, the process of giving consent must be commensurate with best practice. To this end, consumers should be in control of their personal data. If consumers lose confidence in the management and protection of their data they are likely to disengage and the benefits of the CDR framework are likely to be lost.

**Consent underpins the economics of the CDR**

The fundamental economic basis of the proposed CDR framework rests on the principle that freely negotiated agreements made between parties only occur when it is to the benefit of both parties. The core barrier to the development of mutually beneficial agreements is the existence of transaction costs – that is the costs associated with developing, making and enforcing agreements.

The absence of genuine consent undermines the fundamental economic premise of the proposed reform, and consequently without this core assumption being met, it is reasonable to conclude that the expected economic benefits will not flow.

The definition of consent is therefore essential to the operation of the proposed CDR framework, and accordingly a best practice definition should be adopted. In the absence of an appropriate definition of consent and substantive requirements surrounding the way in which consumers may consent to the use, sharing and transfer of their data it is unlikely that the potential benefits of reform will be realised.

**Recommendation 14**

*That the Bill be amended to require genuine consent from consumers for the transfer of their data under the CDR framework.*

**Transfer of data concerning consumer consents**

ACCAN supports the implementation of measures that reduce the complexity of consumers engaging with their data and privacy. Accordingly we support the adoption of measures that would allow consumers to port their privacy preferences to potential service providers. As part of this process consumers should be reminded of their existing setting, as this may prove an effective nudge for greater consumer engagement in the management of their privacy.

**Recommendation 15**

*That s56BG(a) be amended to allow for the transfer of data concerning consumer consents, and to require that consumers be notified of their existing consents when such information is to be transferred.*

Competition

The consumer data right has the potential to spur an increase in competition in the telecommunications market. However, alongside this potential to promote competition is the risk that leakages of data or theft may allow for data aggregators to support anti-competitive practices.

This section briefly examines the relationship between concentration and competition within the telecommunications sector, before moving on to potential risks and issues associated with the proposed consumer data right.

**Price discrimination**

The leak of consumer data right information in sufficient quantities would allow for the detailed profiling of consumer groups. As a consequence, there is the prospect that for many consumers currently purchasing services at prices below their maximum willingness to pay will face increases in the prices that they face.

Price discrimination, in and of itself may lead to improvements in total welfare if, and only if it increases total output – that is, services are offered that match the needs of underserved groups (Schmalensee 1981; Varian 1985, p.2). ACCAN has concerns, however, that models of price discrimination may be developed, not with a view to providing services to underserved consumers (that is the marginal consumer) but rather to extract maximum rents from all consumers.

For consumers, price discrimination may be subtle, targeted to vulnerable groups, or across the general consumer population (e.g. through the offering of below average discounts to individuals in wealthier postcodes, or whether an individual is at pension age). The data requirements for refined discrimination models are significant, and although some discrimination is likely to be present within the marketplace, increases in the total volume of data being shared increases the scope for price discrimination.

Where price discrimination occurs there is the potential for exploitation to occur. Price discrimination may net significant gains to business, to the material detriment of consumers who may see either reduced savings or increases in prices for services. If these changes occur incrementally (e.g. 0.25% increase every quarter), many consumers may not notice or indeed realise the losses that they are facing.

Price discrimination can only occur when three conditions are met (Varian 1989, p. 1-2):

* A business has market power;
* A business has the ability to sort consumers;
* A business must be able to prevent resale.

The sectors identified as priorities for implementation of the CDR framework, are characterized by high levels of concentration, and rates of return in excess of normal market levels (Grattan 2017, p. 31), which is common among markets with significant scale and network economies. These characteristics are consistent with some element of market power, and the telecommunications and energy markets could reasonably be described as having oligopolistic competition.

The financial services sector is characterized by low levels of competition, oligopolistic market structures and a tendency for firms to avoid intense price competition in order to enhance profitability. This has resulted in firms setting prices at similar levels or cluster, in order to maximize their potential margins (PC 2018, p. 8), rather than seek to attract new customers through aggressive discounting.

As noted by the Productivity Commission, this type of behavior is reflective of the major banks having market power (2018, p. 9), and therefore the ability to set prices. Such conduct, indicates an uncompetitive marketplace and that a precondition for price discrimination is met in the largest market identified for reform.

In order for major banks to increase their overall revenue through discounting, the ACCC concluded that there would need to be a significant expansion in the number of loans offered (2018, p. 12). This indicates that the price-quantity trade-off is such that any reduction in price is not offset by a sufficient increase in quantity of customers.

In the banking and financial services context, this means that the fundamental criterion for there being an increase in welfare as a result of price discrimination – that such discrimination increases total output to underserved groups, cannot be met (Schmalensee 1981; Varian 1985, p.2).

As the major banks can constrain resale through contractual provisions and have the ability to sort customers to some extent, it is feasible for welfare reducing price discrimination to occur. The capacity for this to occur is likely to be enhanced as a consequence of increased data transfers and sharing through the CDR.

ACCAN notes that firms within the identified markets have:

* some element of market power;
* some capacity to distinguish between consumers, that will be enhanced through CDR data;
* the capacity to limit or preclude resale.

The energy and telecommunications industries similarly face price-quantity trade-offs that may make it more profitable to adopt price discrimination strategies, rather than seek to address underserved markets.

ACCAN is supportive of the proposed reforms and would support additional measures being included within the draft legislation to curtail the potential for CDR data to be used for the purposes of price discrimination, where such discrimination is to the detriment of consumers. Although we do not consider such behaviour a likely outcome in the telecommunications context, in other sectors the risk of such conduct is greater.

**Recommendation 16**

*That Treasury takes steps to quantify the potential costs of, or risks to consumers in economic and social terms, of as the use of CDR data to engage in price discrimination as part of a rigorous and public regulatory impact assessment.*

**Creating a sustainable cartel**

The core barrier to the creation of a price fixing cartel is the incentive that exists for firms within the cartel to defect from the agreement in order to capture greater market share than that allocated under the terms of the cartel. The inability of firms within a cartel structure to effectively monitor their counterparties prevents them from taking actions to punish or deter defection, and as a consequence in the absence of a credible threat of loss, defection inevitably occurs.

The creation of the consumer data right, establishes a framework where information concerning the offerings being made to a consumer and their characteristics are inevitably made available between a small number of competitors. As a consequence businesses will have detailed information concerning the pricing and discounting strategy of their competitors and be able to assess and gauge competition within definable consumer segments or sub-markets.

For the would-be cartel the availability of this information allows for both effective monitoring of the state of compliance with an existing cartel agreement, and for the identification of defection within specific submarkets. This allows for the implementation of pricing and discounting strategies that punish non-compliance for defective behaviour and to effectively deter conduct, in a targeted, proportionate and effective fashion without undermining the stability of the cartel.

Within the telecommunications market there are considerably lesser incentives to engage in such behaviour, given existing transparency concerning the pricing and characteristics of service offerings. However, there is a need to put in place appropriate regulatory restrictions on the use of CDR data, including the aggregation of data where such aggregation may facilitate the formation and continuation of cartels.

**Recommendation 17**

*That Treasury takes steps to quantify the potential costs of, or risks to consumers from firms using consumer data to engaging in anti-competitive or collusive conduct within the identified markets.*

What is at risk?

The consumer losses associated with anti-competitive conduct can often be significant and immediate, particularly for consumers on low incomes. This means consumers face higher prices than necessary and increased financial pressure (or a loss of consumer surplus).

The costs borne by consumers as a result of anti-competitive conduct are often inadequately recognized as the losses are spread across the consumer population and at an individual level may be small. However, the true losses experienced by consumers can be significant given the pervasive use of communications services and the significant revenue generated by the sector.

*Risks in the communications sector*

The revenues of the communications sector have been estimated at a value of $22 billion for mobile or wireless services and $10.3 billion for fixed line services for 2015-16 (BCAR 2017, p. 11-14). Given the size of industry revenues, a pricing distortion on the order of 0.5% would result in consumer losses of $110 million for the mobile market and $51.5 million for the fixed line market.

Such a distortion is not difficult to envisage, and although in many instances the detriment associated with anti-competitive conduct may be limited by the market share of an entity, the communications market is exceptionally concentrated (Grattan Institute 2017, p. 14). This means that even if only one entity engages in anti-competitive conduct that a material number of consumers will be affected, and losses will be significant.

For example, a unilateral 1% increase in price in the mobile market by one of the three major operators would result in consumer losses of between $39.6 million to $103.4 million.[[4]](#footnote-4) These losses may be greater where unilateral anti-competitive conduct leads other service providers to increase their prices or dissuades price competition.

Given that the identification of a cartel typically takes several years and often only occurs where a party to the cartel defects the potential losses to consumers for a 1% increase in relative prices over a 5-year period would be:

* For fixed line services $515 million
* For mobile services $1.1 billion

For consumers, anti-competitive conduct can also create longer term losses with resources being allocated to offending firms, rewarding and incentivizing their conduct when consumers purchase their services and compliant firms being discouraged from market participation due to forgone sales. This is particularly important in a marketplace where consumers may sign up to contracts for long periods of time and therefore suffer ongoing detriment due to anti-competitive conduct.

*Risks to vulnerable consumers*

The impacts of anti-competitive behavior are disproportionately felt by those consumers on the lowest incomes, and with the least capacity to avoid costs. ACCAN has concerns that for vulnerable consumers the leakage of data will allow for the development of models targeted at extracting the maximum possible charges from them.

Consumers on low incomes typically spend a significant proportion of their income on telecommunications services. Households in the first and second lowest income deciles on average pay just under 10% and 6% of their disposable income on communication services respectively (BCAR 2017, p.27). This is well in excess of average household expenditure on communications, which accounts for approximately 3.5% of disposable income (BCAR 2017, p. 27).

These households are characterized by high levels of financial stress, which continues to be experienced by consumers on low incomes, with 15.6% of consumers in the lowest income quintile indicating they had been unable to pay their utility bills on time in the twelve months leading up to the census (ABS 2017).

*Risks more broadly*

The risks of anti-competitive conduct within the identified markets are material and demonstrable. In the banking and financial services market, the potential for anti-competitive conduct is significant, and recent conduct indicates that this risk is real and material.

Moreover, the size of this sector increases the level of risk to consumers and the economy, with the sector accounting for 9% of GDP in 2016-17, or $149 billion (PC 2018, p. 57). The size of the sector means, that as with the telecommunications and energy sectors that the potential implications of anti-competitive conduct are significant and will result in material detriment to consumers.

In the light of recent misconduct by major financial institutions in Australia, reflected both in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, and in recent court action and settlements for fixing systemically important interest rates in key wholesale markets, it is clear that there is continued risk of misconduct. There is accordingly the need for serious consideration of the potential for misconduct, and what policy measures may be put in place to mitigate these risks.

Questions raised at roundtables

To the extent that these questions are not addressed in the above material.

Defining data

The drafting of s56AF(1) should be further refined to ensure the coverage of a variety of categories of data, noting that the scope of application of the CDR can be narrowed further through the rule making process. ACCAN believes that it is important to provide broad powers to the ACCC and ensure that it has the ability to make rules to cover a variety of potential contingencies.

The scope of application of the privacy safeguards should be broad, to ensure that consumers have appropriate privacy protections and an incentive to engage with the CDR framework. Clear processes should be set out for exempting entities or categories of data from protection, with the basis for doing so outlined in a public and rigorous regulatory impact assessment.

ACCAN believes that further refinements must be made to the definition of derived data to ensure that it adequately encapsulates all data that is derived, that pertains to consumers. A broad definition of derived data is preferable, as further refinements may be made to the scope of the data under the regulation making process, whereas an unduly restrictive definition within the legislation would preclude further refinements.

Class actions

The current drafting of provisions do not appear to be class action friendly, when read in the context of the relevant division.[[5]](#footnote-5) Although, the individual text of the provisions is appropriate when read individually, the interaction of s82, with the jurisdictional limitations set out in s86AA may preclude a class of applicants obtaining damages in excess of $750,000, noting that the current drafting of s86AA is ambiguous as to whether regulation may operate to set a higher cap.

**Recommendation 18**

*That Treasury amend the Treasury Laws Amendment (Consumer Data Right) Bill 2018 to facilitate the initiation of class actions, by removing any potential cap on damages.*

Non-economic loss

ACCAN supports a broad definition of non-economic loss, that both reflect the material detriment that an individual may face at a personal level as a result of a breach of their privacy. Although not a penalty, and therefore not intended to deter, it is important that custodians of data are aware of the material losses that flow from data breaches for individuals, and therefore inclusion of a person’s feelings or sense of loss is appropriate.

It is also appropriate that consumers have access to exemplary or treble damages within the framework given the significant costs that consumers may face when seeking redress. In the absence of triple or exemplary damages consumers may suffer material loss, but be rationally apathetic and fail to seek compensation as the costs of doing so may exceed the compensation they may receive (Kaplow 1986; Shavell 1982).

Civil penalty provisions

ACCAN generally supports the civil penalty provisions set out within the draft legislation. However, we believe that there is a need for the legislation to incorporate exemplary penalties, where a party seeks to use consumer data for the purposes of collusion or targeted price discrimination against vulnerable populations, or where data is used to re-identified individuals.

Standards

Although supportive of regulatory flexibility with respect to voluntary and mandatory standards, ACCAN believes that further information is required with respect to the characterisation of standards as forming a multi-lateral contract. The protections, remedies and penalties that may flow from a multi-party contractual structure are distinct from those that would otherwise flow from regulatory, administrative or criminal processes.

There is therefore a need for clarity concerning how standards are intended to operate, noting that these complexities may have a material bearing on how these standards practically operate.

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1. . Insofar as the cost of information may be a driver in the emergence of information asymmetries, noting that an analysis of disaggregated costs of observation, communicating and interpreting information amongst others. A reduction in the costs of communicating information, does not necessarily result in a reduction in information asymmetries where consumers are not in a position to observe all product or service characteristics (at reasonable cost) or where a counterparty may raise the costs of transacting through complex contracts, or creating barriers to enforcement. [↑](#footnote-ref-1)
2. . This calculation is based on market share as calculated by the Grattan Institute, and ACCC industry revenue figures. [↑](#footnote-ref-2)
3. (Cecot et al. 2008; Hahn & Hird 1991; Hahn 1998; Hahn et al. 2000; Hahn & Dudley 2007; Hahn & Tetlock 2008) and in Australia (PC 2012, p. 11). [↑](#footnote-ref-3)
4. . Estimated based on market share figures (Grattan 2017), known industry revenue figures (BCAR 2017, p. 11-14) and assuming a revenue split approximately in line with market share. [↑](#footnote-ref-4)
5. . *Competition and Consumer Act 2010* (Cth) s. 82, s. 87. [↑](#footnote-ref-5)