



12<sup>th</sup> September 2018

Ms Kathryn Wardell

Structural Reform Group

The Treasury, 1 Langton Cres, Parkes, ACT 2603

Dear Ms Wardell,

**Re: Treasury Laws Amendment (Consumer Data Right) Bill 2018**

Thank you for the opportunity to review and provide feedback on the draft Treasury Laws Amendment (Consumer Data Right) Bill 2018.

We are broadly supportive of the draft Bill, but we have some concerns which we have set out below.

Given the backdrop of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, the recent findings of the Productivity Commission Inquiry into Competition in the Australian Financial System and the Australian Competition and Consumer Commission's report on Restoring electricity affordability & Australia's competitive advantage there has never been a greater need for the implementation of the Consumer Data Right.

We remain convinced that the Consumer Data Right is critically important to increasing competition and efficiency in Australia and will provide significant benefits for consumers.

**The Review into Open Banking got things off to a good start**

In our view, the development of the Open Banking regime got off to a good start with the findings and recommendations of the Review into Open Banking completed in December 2017. This review struck the right balance across the key dimensions of customer focus, competition, innovation, efficiency and fairness.

In particular, we believe that recommended scope, time frames and proposed costs for customers to access their data were appropriate and would deliver significant benefit to consumers, businesses and the broader economy.

## **A broader and more comprehensive Consumer Data Right regime is appropriate**

We believe that the inclusion of the proposed Open Banking regime within a broader Consumer Data Right regime is appropriate. Consumers and businesses operating in many industries face similar issues accessing consumer data and consumer data should generally be managed and protected consistently across different industries.

## **However, significant concerns and uncertainties remain**

A number of significant uncertainties and concerns about the implementation of the Consumer Data Right and Open Banking still remain. Some of these relate to the proposed draft legislation and others are yet to be addressed at all. We have set out these concerns below.

## **Feedback on the draft legislation**

### **The inclusion of “derived data” will create significant problems**

We note that the draft legislation includes “derived data” within the Consumer Data Right regime. This is despite the Review into Open Banking clearly recommending that derived data or value add data be excluded from the scope of Open Banking.

The inclusion of derived data will cause significant problems and may stifle innovation and competition. We expect that most participants in the Consumer Data Right regime will be “data based” businesses. That is, they will be businesses that generate value for stakeholders through the use of data. Including derived data within the scope of the Consumer Data Regime will result in virtually everything these businesses create being subject to the Consumer Data Right. Given the current definitions in s56AF, this would even include data that has been created using unique and valuable intellectual property and proprietary algorithms.

We are concerned that the Consumer Data Right regime may inadvertently become a cumbersome and overly restrictive governor of a new data economy and limit innovation and international competitiveness.

The ability to charge a fee for access to this derived data, contemplated in s56BC, provides little comfort given the fee may be set and regulated by the ACCC. Businesses are unlikely to invest in data based innovation if the result of their investment is subject to fee setting discretion of a regulator.

In our view, a more sensible approach would be to go back to the approach recommended by the Review into Open Banking which excluded derived and value added data from the regime.

An alternative may be to establish a default position of excluding derived or value added data, except where rules specifically include it rather than include all derived and value added data.

## **Charging fees for CDR data**

We note that the draft legislation allows rules to be developed to allow data holders to charge for access to CDR data. This is despite clear recommendations in the Review into Open Banking that data should be made available to consumers free of charge.

Our view is that the requirement for data holders to charge a fee for CDR data is partly a consequence of including derived data within the scope of the regime. Excluding derived data from scope could remove the need to charge fees, or at least make it less important.

We believe that consumers should be able access their data free of additional charges because consumers own the data. If consumers own the data they have already paid for it to be captured and they shouldn't be required to pay for it again.

Further, we see the ability for data holders to charge customers fees for accessing their data as a right that may easily be abused by data holders to inhibit adoption of the Consumer Data Right regime by consumers and/or competitor businesses.

Finally, charging fees for access to consumer data will also introduce significant complexity for regulators who will be required to review, approve or set appropriate fees. Given the enormous differences of opinion about the cost of Open Banking disclosed in submissions from different financial institutions we expect significant variation in what different organisations believe to be an appropriate CDR data access fee. In normal markets we would expect price competition to prevent over charging, at least in the medium to long term. In this case over charging would likely result in large incumbent organisations that are data holders frustrating competition.

## **Concept of Reciprocity**

We appreciate that some concept of reciprocity is important to help maintain fairness and competition under the CDR regime. However, we are concerned that the concept of reciprocity may result in a "daisy chaining" effect requiring data recipients to disclose CDR data, that they did not originally create or capture, to downstream data recipients. Our view is this will become unwieldy and unmanageable.

Eventually consumers and data holders will lose track of who has their data, making maintenance of consents, correction of and deletion of data almost impossible.

We suggest that the concept of reciprocity be refined to ensure it only includes data that is originally created and captured by the data recipient.

## **Accreditation regime and transfer of data outside the regime**

We appreciate the importance of building and maintaining confidence in the Consumer Data Right regime but we believe that requirements for transferring of data outside the regime are too restrictive and will significantly constrain benefits to consumers and efficiency of the economy.

Further, the more restrictive and difficult it is to use data from the Consumer Data Right regime the more consumers and businesses will be encouraged to use parallel data access methods.

Fundamentally, consumers should have the right to transfer their data to whomever they decide – it is after all, their data.

Our fear is that the current legislation and the accreditation requirements (which are yet to be seen) will create a multi-level playing field where only big businesses will be able to work within the Consumer Data regime and small businesses will be left behind.

Given the enormous number of legitimate users of consumer data who operate in small businesses such as financial planning businesses, mortgage broking businesses, tax advisory businesses and accounting businesses we think the rules for transferring data outside the regime should be clear and simple and reasonably consistent with common practice today. In addition, the accreditation regime should provide for relatively easy entry into the regime for small businesses with legitimate use for CDR data.

## **Processes for correcting data**

We believe that approach to correcting erroneous consumer data proposed by s56EO is impractical. We appreciate the importance of consumers being able to correct erroneous data and the need for data recipients to have access to and use correct data. But we believe the legislation should require consumers to request the original data holder to correct erroneous data and for that corrected data to be made available to relevant data recipients in accordance with any ongoing consent arrangements the consumer has with the data recipients.

Requiring, or providing for the consumer to approach the original data holder and any downstream data recipient to have data corrected will be impractical.

## **Other matters**

### **Further refinement of scope**

We are encouraged by the pace at which the government has signalled the inclusion of banking, energy and telecommunications in the Consumer Data Right regime. However, we think it is vital for the government to increase the scope to include other related financial services sectors including superannuation and insurance.

## **Timing**

We continue to hear suggestions from some stakeholders that timeframes for the implementation of the Consumer Data Right are unrealistic.

Our view is that the time frames proposed for banking are somewhat aggressive, but achievable.

Further, we would like to highlight that despite these implementation timeframes it will be several years before consumers will be able to access the majority of their financial information through the Consumer Data Right regime.

This is due to the staged implementation of different product sets, the staged inclusion of different financial institutions and the fact that some sectors of the financial services industry have not yet been included.

We encourage the government and regulators to continue to consider the Consumer Data Right regime from the consumer perspective and press on with its implementation.

## **Continued support for existing data access mechanisms**

In the absence of a mandatory or regulated data access regime businesses have developed their own approaches to accessing data to provide valuable services to consumers. It should be noted that many of these mechanisms are secure, highly functional, comprehensive solutions for accessing consumer data.

Despite periodic criticism of these data access methods by some large financial institutions (some of whom have actually used these services themselves and/or invested in business that provide them) they are widely used. It is estimated that well over 1 million Australians make use of these alternative data access services.

Even with the timeframes proposed for the implementation of the Consumer Data Right regime it will be many years before the Consumer Data Right regime offers a comparable alternative to these existing mechanisms and the transition from existing data access mechanisms to the CDR regime will need to be carefully managed over several years.

We strongly believe that some direction should be provided on the requirement for data holders to continue to support these alternative data access mechanisms. Any significant issues or uncertainty would cripple hundreds of existing Fintech businesses in Australia and result in a significant period of reduced competition and innovation.

## **Design of the consent regime**

We understand that the design of the consent regime will be undertaken in the rules and standards work to support the CDR. However, we would like to highlight the absolute importance of the design of this to support adoption of the CDR.

We continue to hear suggestions that large incumbent data holders are lobbying strongly for them to control the consent mechanism. We believe this approach will be problematic for the overall CDR regime and may stifle competition and introduce friction into the consent process.

Consumers should be able to interact with their data and provide consent through either a holder of their data or through a trusted data recipient. Ultimately it should be the consumers choice about the approach they take and it is our strong belief that technology and security standards can adequately accommodate both approaches.

## **Inclusion of product data**

We continue to hear suggestions that proposed data holders are resisting providing the product data required under the proposed legislation. Our view is that data holders are presenting an overly complex view of these requirements.

In reality, there are numerous businesses who use financial services product data to compare financial services products operating in the market today. These providers make use of data that is already provided by financial services businesses under proprietary agreements – so the data required to provide the comparison services envisaged by the government is well understood and could easily be provided within the proposed timeframes.

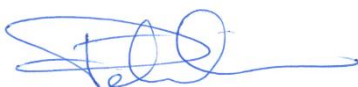
Further, we believe a staged approach where the vast majority of product data could be provided quickly and easily and more complex or nuanced product data could be provided later would seem sensible, achievable and still satisfy the objectives for which this data is sought.

Having access to clear, concise product data is incredibly important to ensure the CDR regime achieves its objectives. This is best demonstrated in the Productivity Commission Inquiry into Competition in the Australian Financial System. The report stated that the ability of financial institutions to exercise market power over competitors and consumers was in part due to persistently opaque pricing and a lack of easily accessible information which induced customers to maintain loyalty to unsuitable products.

We encourage Treasury and the ACCC to remain committed to having product data available within the CDR regime within the current proposed timeframe.

We trust that this feedback is helpful and look forward to continued progress and consultation on this incredibly important initiative.

Yours Sincerely,



Peter Lalor  
Chief Executive Officer