



**Submission by the
Financial Rights Legal Centre**

Productivity Commission

Draft Report: Data Availability and Use, October
2016

December 2016

About the Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumer's understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. Financial Rights took over 25,000 calls for advice or assistance during the 2015/2016 financial year.

Financial Rights also conducts research and collects data from our extensive contact with consumers and the legal consumer protection framework to lobby for changes to law and industry practice for the benefit of consumers. We also provide extensive web-based resources, other education resources, workshops, presentations and media comment.

This submission is an example of how CLCs utilise the expertise gained from their client work and help give voice to their clients' experiences to contribute to improving laws and legal processes and prevent some problems from arising altogether.

For Financial Rights Legal Centre submissions and publications go to www.financialrights.org.au/submission/ or www.financialrights.org.au/publication/

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National Debt Helpline 1800 007 007
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Monday – Friday 9.30am-4.30pm

Introduction

Thank you for the opportunity to comment on the Draft Report on Data Availability and Use. The Financial Rights Legal Centre wishes to comment on:

1. The inadequacy of the current privacy laws
2. Accessing personal information
3. Building trust and acknowledging concern about privacy
4. Statistical Linkage Keys and re-identification
5. Credit Reporting

The current (inadequate) privacy laws

A new Data Sharing and Release Act

A central recommendation of the draft report is to introduce a *Data Sharing and Release Act* (Draft Recommendation 9.11), a new National Data Custodian (Draft Recommendation 9.5) and a suite of Accredited Release Authorities (Draft Recommendation 9.6). We contend that these key recommendations are fundamentally flawed and should be abandoned for the following reasons:

- 1) The emphasis is completely on the release of data with no equivalent acknowledgment of the needs to account for the privacy rights of Australians. Australia already has a *Privacy Act 1988 (Cth)* and any legislation dealing with the release of personal information (privacy) should be included in that Act.
- 2) Individuals will have a lack of confidence and trust in any new Act which is not integrated with balancing an individual's human rights in relation to privacy.
- 3) The central recommendations appear to be creating unnecessary red tape by introducing a new Act when an existing Act could simply be amended

Recommendation

Any new laws relating to data should be included in the Privacy Act. A separate new Act should not be considered.

Inadequate privacy laws

Financial Rights notes that the approach of the Productivity Commission in this draft report has been to shift away from looking at the privacy law as the only lens through which to view the use of data but to see it as an opportunity, not necessarily a threat. However in doing so the Productivity Commission fails to adequately examine the current regime and its failure to fully protect consumer interests with respect to privacy.

Financial Rights believes that the current privacy regime in Australia is inadequate. Several basic privacy protections continue to be missing. These are:

1. Compensation for data breaches and re-identification and a tort for serious invasions of privacy;
2. Easy and free access to justice for breaches including an external dispute resolution scheme that can making binding determinations and investigate systemic issues;
3. An appropriately resourced and empowered regulator.

Without these basic protections, individuals will continue to not have trust and confidence with the access to justice regime when it comes to a privacy breach. Any data sharing regime that has not adequately addressed these basic principles in a thorough and balanced manner should not be introduced.

Recommendation

Any proposal for a new data sharing requires a comprehensive review of Australia's privacy laws with appropriate additions to ensure adequate privacy laws for the protection of all Australians.

Accessing personal information

Another key element of the reforms is to provide individuals greater control over data collected on them. In theory, this proposed reform could benefit consumers. However, we remain concerned that the reform will be generally ineffective.

It is noted that the Privacy Principles already provide individuals a right of access and correction of personal information. The information must be able to be accessed at reasonable cost. Even with these rights already in place, individuals rarely access their own personal information.

In our experience with clients, there are a number of reasons why individuals fail to check what personal information is being held:

1. Privacy policies are buried in fine print and it is difficult to find who to contact.
2. There are often impediments and delays to getting access.
3. Individuals have no real confidence in the integrity of the information being provided. It is easy to exclude information or change it. Of relevance is the decision in *Grubb v. Telstra* in the OAIC on the issue of the meaning of "personal information" which was decided narrowly in *Privacy Act: Telstra Corporation Limited and Privacy Commissioner* [2015] AATA 991 and is now the subject of an appeal.
4. Cost is a barrier and the cause of arguments.
5. The process of correcting information is difficult and a complaint to the Privacy Commissioner may never result in a determination (as the Privacy Commissioner may simply decide not to determine the matter). Even if the matter was determined there is

no compensation for the delay and inconvenience and no incentive for the business to improve practices

6. Individuals care about data breaches but do not want to spend time checking data held. In short most people have more important things to do. Individuals want the government and business to be incentivised through regulation and a compensation regime to ensure data is accurate.

In summary, we do support individuals getting improved rights and access to their data, however, we do not believe the issues raised above have been addressed.

Recommendation

- **Australians should have comprehensive rights of access to personal information held on them for free.**
- **Access to one's own data needs to be simple and easy.**
- **The law is unclear on the meaning of personal information and personal information should be interpreted broadly.**
- **It must also be acknowledged that providing access does not mean that individuals will access their information and there still need to be processes in place to ensure information is accurate.**

Building trust and acknowledging concern about privacy

Trust needs to be built before any data sharing process can be implemented. Australians need to be confident that:

- they have control over their personal information.
- their privacy is respected.
- only essential information is being collected.
- that de-identified information cannot be re-identified ever.
- the law is adequate and offers real protection to ensure business and government protect information and there is real access to justice for breaches.
- privacy impact assessments are meaningful and contain real detail on any plans for the information held.

If trust is not established, any attempt to enhance data sharing will build distrust and backlash. We contend that the proposed reforms as they stand will not build the required trust for any transformation in data sharing. The starting point must be that the Australian public needs to be involved, have confidence on it being done by a truly independent body (that is tasked ensure adequate privacy laws as well) and be well consulted on any changes.

Recommendation

- **Trust needs to be built in any data sharing process**
- **An independent body (with a clear mandate to balance the privacy of individuals) needs to be tasked with any data sharing proposal**

Credit Reporting

The Draft Report has made a recommendation that Comprehensive Credit Reporting (CCR) be mandated unless voluntary participation is at 40 per cent of accounts by 30 June 2017 (Draft Recommendation 4.1). This can only be described as a reckless recommendation. The recommendation ignores evidence given by consumer advocates and financial services providers that this is simply not workable. The only evidence that appears to have been accepted is from the credit reporting bureaux who all have a clear financial interest in mandatory CCR.

At page 167 the Draft Report states that “[t]here is little doubt that CCR is a desirable reform.” This conclusion exemplifies the problem of drawing conclusions without evidence. The Draft Report asserts a list of benefits (at page 166) of CCR with no independent evidence (that takes into account the current regulatory environment in Australia) to support these claims. The list of benefits were drawn straight from Australian Retail Credit Association (ARCA) submission.

In contrast, there is evidence that CCR does lead to risk based pricing with consumers having to pay more for credit. There is also evidence that there is harm for low income and disadvantaged consumers from CCR in the UK.¹ This evidence appears to have been ignored.

In our previous submission, we outlined a series of arguments on why CCR should not be mandated. In summary:

- There are no jurisdictions using mandatory reporting that we are aware of. Australia would be proceedings with mandatory CCR where there had been no evaluation of how the current system was working or evaluation on possible consequences of mandatory CCR. Mandating CCR (in the current circumstances) would be an example or poor policy decision making without evidence.
- The ALRC did not recommend mandatory CCR.
- There has been no independent review of CCR.
- There has been steady progress towards CCR with delays caused by the implementation of a Code, systems issues and legal interpretation.

¹ *Does increased credit data sharing really benefit low income consumers?*, Centre for Responsible Credit, Damon Gibbons February 2013.

We contend that there is ample evidence provided in the submissions to this review that industry does not want mandatory CCR. Further, the introduction of mandatory CCR is untested internationally and involves risks which are outlined on page 549 and 550 of the Draft Report.

Data Quality

In our previous submission we highlighted the problems that industry has had in recording Repayment History Information (RHI) when a consumer varies the contract (for financial hardship or otherwise) or if the debt is not due and payable due to an agreement.

Financial Rights repeatedly stated in all our submissions and discussions throughout the review of the Privacy Act (to introduce CCR) that RHI must reset to zero if the contract is varied or the debt is otherwise not due and payable. We contend that the law is clear on this point. Our arguments on this point have been confirmed by the Financial Ombudsman Service in determination 422745.²

It has now become clear that all credit providers had misinterpreted the law and were listing RHI for a default regardless of whether the contract was varied or the debt not due and payable. It is noted that only a few credit providers are listing data and most credit providers are collecting data on a “private” basis with the intention to list this data in the future. The implications of this situation are enormous.

This means that *all* RHI default data recorded (privately or publicly) is inaccurate. It is hoped that many credit providers have changed their practice since the FOS decision, however, this is very unclear. As it stands, all RHI default data that has been collected needs to be deleted.

This means from a data quality standard for the CCR, RHI default data is 100 per cent inaccurate and individuals in Australia could have no confidence in that data at all. Of further concern, is that there is no process in place to fix a clearly systemic issue.

These current problems are serious and indicate a need to ensure the current system is working before any further changes can be considered.

Recommendation

The Financial Rights Legal Centre strongly recommends that:

- 1. Mandatory credit reporting not be implemented or considered**
- 2. An independent review is commissioned in 2018 to review the effectiveness of the current laws**
- 3. A review of data quality protections are required given the serious systemic issue with accuracy already identified.**

² FOS, Determination 422745, 21 April 2016
<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/422745.pdf>

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact the Financial Rights Legal Centre on (02) 9212 4216.

Kind Regards,



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