



25 October 2017

By email: OBR@treasury.gov.au

Open Banking Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir/Madam

Supplementary submission to the Open Banking Review - Issues Paper

Consumer Action Law Centre (**Consumer Action**), Financial Rights Legal Centre (**Financial Rights**) and Financial Counselling Australia (**FCA**) are pleased to make this supplementary submission in response to the Open Banking Review Issues Paper.

In September 2017, Consumer Action Law Centre, Financial Rights Legal Centre and Financial Counselling Australia provided a submission to the Open Banking Review that outlined a number of the potential risks and costs that may face consumers in under an Open Banking regime.

This submission supplements that work by making specific recommendations that we believe should be implemented from the start of any Open Banking regime to ensure consumers are adequately protected and able to realise the benefits increased data sharing. In order to do so, we briefly reiterate the key costs and risks to consumers of an Open Banking regime below.

Summary of costs & risks of Open Banking

Increased complexity and choice

It is claimed that Open Banking and increased data access would decrease the barriers to entry for new firms to provide new products and incentivise existing players to innovate, which would lead to increased products and services to meet the needs of customers.

While we acknowledge that greater choice, increased competition and new products may bring some benefits to people, we challenge the assumption that greater choice would necessarily lead to improved consumer outcomes—particularly for vulnerable and disadvantaged consumers. Greater complexity, choice and transaction speeds will likely result in information

Consumer Action Law Centre

Level 6, 179 Queen Street
Melbourne Victoria 3000

Telephone 03 9670 5088
Facsimile 03 9629 6898

info@consumeraction.org.au
www.consumeraction.org.au

overload and too little time to make decisions, less consumer understanding and market inefficiencies.

We also challenge the implied assumption that it is desirable for consumers to have less friction in their transactions. Consumers generally seek convenience and speed over security and suitable products, in many cases to their own detriment. Frictionless transactions are already causing significant consumer harm, for example the ease of accessing payday loans via mobile applications. We note that the Australian Securities and Investments Commission (**ASIC**) is currently developing a delayed sales regime for add-on insurance.¹ Similarly, a delayed opt-in requirement now exists for VET Student Loans which means the application for a VET student loan must not be made until 2 business days after the student enrolls in the course.² These reforms are in recognition of the dangers of frictionless transactions. We strongly believe some friction built into the Open Banking environment would be desirable to enable better consumer decision making, particularly for harmful products.

Further, new entrants and new untested products can, and have in the past, led to significant predatory behaviour. In the financial services sector, we have seen problems arising from credit card balance transfer offers, reward points and loyalty schemes, payday lenders, consumer leases and the development of the exploitative debt management firms sector (or 'debt vultures'). Helping manage money, debt or budgets via access to personal data is desirable in theory, but when done for profit has led to predatory behaviour with excessive fees for poor quality and conflicted advice.

Increased economic inequality and financial exclusion

We have seen industry move towards more 'innovative' approaches to data-led credit scoring and risk profiling in recent years. We are concerned that Open Banking may lead to further risk segmentation, profiling for profit, price discrimination and the delivery of poor, unsuitable products. Those experiencing financial hardship are often very profitable to companies and therefore most vulnerable to exploitation. Those in more precarious financial situations are more likely to be unfairly charged higher amounts or pushed to second tier and high cost fringe lenders.

We are also concerned that Open Data regime may exacerbate the detriment caused by digital exclusion since there remains a significant proportion of the population who are not regularly connected to the internet, including financially vulnerable people, rural and regional Australians and seniors.

Further, we predict significantly increased opportunities for conflicts of interest arising from brokers, services and other new innovations structuring recommendations on commission or the on-selling of data. This may lead to inappropriate churn, product and or provider bias, sale bias, hollowing out and ancillary charging. This ultimately increases costs for consumers, rather than decreasing costs.

¹ ASIC, 17-280MR ASIC consults on reforms to add-on insurance sales to drive better outcomes for consumers 24 August 2017, <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2017-releases/17-280mr-asic-consults-on-reforms-to-add-on-insurance-sales-to-drive-better-outcomes-for-consumers/>

² see section 10 of the VET Student Loan Rules

Increased information asymmetry and predatory marketing

We are concerned about the rising information asymmetry between consumers and financial firms, and the risk of consumers being aggressively targeted with unsuitable products. As noted by Data Justice in the United States:

'as more of the economy moves online, the importance of data mining and the asymmetry of control of information becomes ever more critical in economic markets. Addressing this change calls for far more active regulatory action to reverse the trends undermining user privacy and increasing economic inequality due to that rising information asymmetry'.³

Access to data and continuous monitoring are likely to lead to predatory practices, for example by payday lenders, to advertise more heavily to vulnerable consumers especially during times of financial stress. Debt collectors may also misuse their access to financial hardship data to prioritise their repayments and leave financially stressed people even more vulnerable.

There is also an increasing asymmetry of power in consent provision and contracting. When consents are sought in a blanket, 'take it or leave it' fashion, people struggle to understand what data they are sharing, the value of their own data and the implications of its use for sales, advertising and exploitation.

Other potential risks and costs for consumers include:

- increased unconscionable practices such as poor debt collection practices. Closed proprietary algorithms too could potentially lead to situations where consumers are denied access to crucial products and services based on inaccurate data without the ability to determine why or to correct underlying assumptions⁴;
- the use of inaccurate or flawed data with few avenues for individuals to correct errors in an efficient and prompt manner;
- increased privacy concerns relating to the security, portability and use of financial and personal data; and
- increased use of non-transparent, black box technology with poor consumer outcomes and potentially biased algorithms.

Regulation and oversight required

We put forward several recommendations below for the development of an Open Banking regulatory framework. We have grouped these recommendations under the following headings:

1. General principles to guide the Open Banking regime
2. Creating a cohesive and fit-for-purpose regulatory framework

³ Data Justice, How Big Data Drives Economic Inequality, <http://www.datajustice.org/site/how-big-data-drives-economic-inequality-0> accessed 23 October 2017.

⁴ p. 25 Consumers International, Banking on the Future: An Exploration of Fintech and the Consumer Interest, July 2017.

3. Empowering well-resourced, proactive regulators
4. Building an appropriate dispute resolution framework that promotes access to justice.
5. Building specific privacy, data quality and security protections
6. Building appropriate disclosure, consent and transparency regimes, including public reporting.

General principles to guide the Open Banking regime

We agree with ASIC that an important starting point in developing an Open Banking regime in Australia is to set a clear list of objectives that the regime is intended to achieve. As set out in our initial submission, we encourage innovation, data sharing and competition not as ends unto themselves, but only to the extent that they are ultimately good for consumers.

In determining the guiding principles for the Open Banking regime, we believe the starting point should be an acknowledgement that data is a public good and any corporate holder of data should be treated like a public utility. Further, consumer access and control over their own data is imperative. The Open Banking regime must be designed to benefit consumers—not only as individuals, but as a society.

We also support ASIC's recommendation for a phased introduction of Open Banking. It goes without saying that Open Banking is a significant shift from the status quo, and that there could be serious negative consequences for consumers and industry if an appropriate regulatory framework is not established before rushing headlong into implementation.

Creating a cohesive and fit-for-purpose regulatory framework

There needs to be a comprehensive, broad, government-led regulatory framework that provides clear oversight powers to ASIC and the Office of the Australian Information Commissioner (**OAIC**) to regulate Open Banking participants. We recommend that ASIC be the lead regulator in relation to the Open Banking regime, with the OAIC providing support and assistance where necessary. To be clear, this framework should not only cover the banking sector (and the burgeoning Open Banking sector) but the financial services and credit sectors more generally including insurance, advice, debt management firms.

We believe that eventually there may need to be an economy-wide regulatory framework for data access protections. In the interim, we recommend a specific framework for the financial services sector because of the uniquely important role financial data plays in people's lives and the disproportionate impact any breach of financial data may have upon an Australian's life.

It is important to note that not all entities seeking access to people's banking data are subject to current ASIC Australian Financial Services (**AFS**) or credit licensing requirements. These entities are therefore not subject to the same regulatory requirements, such as responsible lending requirements, the upcoming product design and distribution requirements, and membership of an external dispute resolution scheme.

In terms of the desired regulatory framework, ASIC has put forward a number of options including:

- new and separate legislation incorporating principles from privacy legislation and financial services legislation with new requirements regarding consumer rights; and

- a new regime created through extending extant legislation and introducing new AFS licence conditions.

The ABA have put forward an accreditation model where data will only be shared with licenced third parties who meet accreditation standards determined by an economy-wide government regulation as well as industry-specific safeguards developed by industry implementation working groups. Westpac have put forward a further idea of Australian Banking Data Licence in addition to the existing AFS licence with a whitelist of accredited participants.

While we do not have specific views as to the best model—accreditation, data specific licencing or extended or new financial services licencing—we believe that robust accreditation or licencing should be a part a comprehensive government-led Open Banking framework that includes specific rules, consumer protections, dispute resolution and obligations upon entities handling personal and financial data with robust ASIC and OAIC oversight.

This regime could be complemented by a FinTech Code of Practice reflecting ASIC RG 183⁵ requirements and similar in form and effect to current financial services sector codes.

Empowering well-resourced, proactive regulators

The Open Banking regime must be supported by well-resourced, proactive regulators. We believe there is merit in considering the establishment of an independent data and privacy regulator if and when an economy-wide regulatory framework for data access protections is established. However, as outlined above, in the interim we recommend ASIC be responsible for regulating Open Banking participants, supported by the OAIC. This should include increased powers and additional resources to the OAIC and ASIC to investigate Open Banking complaints, and take enforcement action. ASIC and OAIC should be resourced and empowered to harness the FinTech revolution and use regulatory technology (or RegTech) to provide more efficient regulation for the regulator and the regulated industry. ASIC and OAIC should also be provided with a full regulatory toolkit including administrative, civil and criminal penalty regimes.

A strong, simple and clear liability regime also needs to be established that avoids buck passing and the contracting out of liability. We have discussed this further below.

Building an appropriate dispute resolution framework that promotes access to justice

We believe a consumer right of action for the misuse of data must be created, with clear liability for data breaches. A critical part of any regime is the need to establish an effective access to justice framework. There is already a strong access to justice regime in the banking and financial services sector, with internal and external dispute resolution regimes that assist people to resolve disputes quickly and free of charge. While not perfect, it is an important regime we believe should be extended to Open Banking participants that fall outside of the scope and remit of the current regime. This is particularly important for a person who moves their data to a new

⁵ ASIC, RG 183 *Approval of financial services sector codes of conduct*, 1 March 2013 <http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-183-approval-of-financial-services-sector-codes-of-conduct/> Also note the current Treasury consultation on industry codes of practice in the financial sector that is currently examining a co-regulatory model requiring all financial services sector participants including those not currently covered by codes to adhere to a code of practice: Treasury, *ASIC Enforcement Review, Position and Consultation Paper 4 – Industry Codes in the Financial Sector*, 28 June 2017 <https://treasury.gov.au/consultation/industry-codes-in-the-financial-sector/>

third party product or service, as under current arrangements, they would likely be stepping outside of this system with its key consumer protections and access to justice.

At a minimum the regulatory framework must include:

- clear internal dispute resolution and external dispute resolution processes and mandatory membership for the latter for all parties utilising Open Banking data;
- mandatory capital requirements and professional indemnity insurance for all parties using personal and financial data; and
- a last resort compensation scheme to deal with the problem of firms without the capital to cover significant breaches and failures.

Building specific privacy, data quality and privacy protections

We recommend that strong authentication standards similar to those under European PSD2 should be introduced.

In addition, the ePayments Code needs to be strengthened and made mandatory as per the Financial System Inquiry recommendations that were supported by Government. Among other things, this would deal with unauthorised transactions. Similarly, a review of the *Privacy Act 1988* must be completed to keep pace with the issues raised by the Productivity Commission and the Open Banking Review.

The Productivity Commission recently proposed a comprehensive right to data. The right would enable consumers to control their data through:

- requesting edits;
- receiving a copy of the data;
- directing data to be transferred;
- being advised if data is traded; and
- being informed of data disclosure.

We support the development of these rights. We also support the implementation of the following further three rights that the European General Data Protection Regulation (**GDPR**) includes. These are:

- Data erasure right, which would apply when:
 - the data is no longer necessary in relation to the purposes for which it was collected;
 - the individual withdraws consent or the relevant storage period has expired;
 - the individual objects to the processing of data; or
 - the data was unlawfully processed.
- Data portability right.
- Rights for consumers to object at any time to the processing of their data.

These three rights are critical for consumers to protect and control their sensitive financial data. Without these, consumers face a significant risk of exploitation and data misuse. Further, we believe that people should have the right to freely and promptly obtain or access their data in an accessible, readable format. Businesses should not be able to charge people to exercise these rights, or to correct their data.

We also support requiring “privacy by design” for all who access financial data to ensure that privacy concerns are prioritised from the start when designing a new product or service, rather than added on as an afterthought. Minimum and consistent standards for the handling of data must be developed for accuracy, timeliness and quality of the data.

We also believe there needs to be consideration of responsible product and suitability requirements in the same way responsible lending and suitability test work in financial services. The product or service should be suitable to the needs of the user and the company should have a responsibility to ensure that the product or service is not unsuitable to the needs of the person seeking to use the service. This requirement could complement the proposed product intervention power for ASIC and design and distribution obligations.

Ethical standards should also be developed and imposed upon the FinTech sector including monitoring and prohibition of conflicts of interest and, specifically, commission-based business models. We also believe consumers should be provided with a genuine ‘do not track option’, and that services should not be provided on a ‘take it or leave it’ basis. Ultimately, we do not want basic financial products and services only available to those who consent to sharing their personal transaction data.

A mandatory breach notification and rectification scheme based on the development of the current OAIC notification scheme must be extended to cover the Open Banking regime.

Specific data, privacy and security regulations also need to be developed for specific high-risk financial sectors, including:

- budgeting advice and/or services
- debt negotiators
- debt agreement brokers
- debt advice and/or services
- small amount credit contract providers
- consumer leases
- no-interest payment services such as AfterPay and Certegy

These are required urgently to address the specific harms that are currently caused by these services, which often include frictionless data transactions, blanket consents, and screen-scraping practices.

We are also supportive of ASIC’s call for financial institutions and third-party service providers to have a clear understanding about their responsibilities when managing, sharing and using data. This would include organisational competence and training requirements, plus:

“introducing mandatory requirements for managing operational and security risks, including system performance monitoring, contingency measures for unplanned unavailability or a systems breakdown, and incident management and reporting.”⁶

Building appropriate disclosure, consent and transparency regimes

Disclosure, consent and financial literacy will play an important role in empowering consumers in the Open Banking regime. All parties, including government, regulators, and Open Banking participants, should promote ethical financial literacy initiatives. We also support ASIC’s recommendation for public reporting of some private sector data, that would help the public and regulators to assess emerging trends and product suitability issues, among other things.

However, as a wealth of consumer behaviour research has long demonstrated, there are limits to the extent to which education and disclosure regimes can play. A reliance on mere disclosure, education and financial literacy programs will not avoid consumer harms.

A mandatory informed consent regime must be established. The current tick-a-box, blanket, ‘take it or leave it’ consent forms are no longer appropriate. A mandatory informed consent regime should include the follow principles:

- third party access to consumer data must be given only at the explicit or express consent of the customer and data should not be used, accessed or stored for any purpose other than the service the user explicitly requested;
- consent can be on an ongoing basis, but where there is a long-term relationship there should be mandated, periodic re-consent;
- consent should also be able to be given for one-off, time limited, access in order to enable, for example, an affordability check to be carried out when applying for a loan;
- the European GDPR’s new definition of consent should be adopted, whereby consent must be ‘freely given, specific, informed and unambiguous’. Consent is not freely given if the individual has no genuine or free choice or is unable to refuse or withdraw consent at any time;
- the European GDPR requirement that businesses make the withdrawal of consent as easy as giving consent, and, before individuals give consent, must inform individuals about this right to withdraw consent, should be included. In addition, individuals must be provided with a range of prescribed information about the processing of their personal data;
- there should be a monitoring regime that prohibits firms from penalising people for withdrawing consent;
- there should be a prohibition of blanket, take it or leave it consents. Consents should be appropriately broken down for different types of data (bank account, transactional, credit card, repayment history, social, imputed and other general data), and uses (credit checks, advertising etc);

⁶ para 93, Review into Open Banking in Australia: Submission by the Australian Securities and Investments Commission, September 2017, https://static.treasury.gov.au/uploads/sites/1/2017/09/c2017-t224510_ASIC.pdf

- a prohibition on secret price and other unlawful discrimination in black box technologies—acknowledging that transparency and consent will not solve problems inherent in opaque and complex digital products and services;
- specific rules relating to disclosure to third parties, including prohibition of on-selling consumer data. Responsible product and suitability requirements should also be applied;
- people should be provided with prominent information with respect to rights and remedies and dispute resolution;
- consents should be in plain English;
- there should be consumer testing, monitoring and oversight of these consent processes and material; and
- government and regulators must embrace the concept of positive friction to create a pause to enable the consumer to better consider the implications of any use of data.

We also support ASIC’s call for rules regarding sales, distribution and pricing practices to address issues of price discrimination, segmentation, behavioural exploitation and the failures of disclosure. There are serious ethical considerations here, as further granularity of data will ultimately see marginalised groups charged more for essential financial services such as credit.

Regulatory sandboxes

The consumer movement is wary of the operation of so-called “sandboxes” that exempt certain companies from regulation—such as the current FinTech sandbox allowing eligible businesses to test certain specified services for up to 12 months without an AFS or credit licence. If regulatory sandboxes are to be used to facilitate Open Banking innovation,⁷ we believe that they should at the very least meet high consumer protection standards including that they should be:

- highly limited in time and scope;
- demonstrate genuine innovations;
- deliver clear benefits to consumers;
- take steps to address any risks to consumers including data breaches;
- be able to exit the market without any harm to consumers; and
- meet the principles outlined above.

Final comments

We commend the following papers to the Review Panel to further inform the review:

- Centre for Responsible Credit, Does increased credit data sharing really benefit low income consumers?, February 2013, <https://www.responsible-credit.org.uk/wp-content/uploads/2016/03/Does-Increased-Credit-Data-Sharing-Benefit-Low-Income-Consumers-final.pdf>.

⁷ We note that exposure draft legislation to broaden the regulatory sandbox was recently released: see <https://treasury.gov.au/consultation/c2017-t230052/>.

- Adi Osovsky, The Misconception of the Consumer as Homo Economicus: A behavioural economic approach to consumer protection in the credit reporting system, 2012, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2146659.
- Consumers International, Banking on the Future: An Exploration of FinTech and the Consumer Interest, July 2017 <http://www.consumersinternational.org/media/154710/banking-on-the-future-full-report.pdf>
- OECD, G20 High-level principles on financial consumer protection, October 2011 <https://www.oecd.org/g20/topics/financial-sector-reform/48892010.pdf>
- G20 High Level Principles for Digital Financial Inclusion, 2016 <https://www.gpfi.org/sites/default/files/G20%20High%20Level%20Principles%20for%20Digital%20Financial%20Inclusion.pdf>

Please contact Katherine Temple, Senior Policy Officer on 03 9670 5088 or at katherine@consumeraction.org.au or Drew MacRae, Policy and Advocacy Officer on 02 8204 1386 or at drew.macrae@financialrights.org.au if you have any questions about our comments on the review.

Yours sincerely



Gerard Brody
Chief Executive Officer
Consumer Action Law Centre



Karen Cox
Coordinator
Financial Rights Legal Centre



Fiona Guthrie
Chief Executive Officer
Financial Counselling Australia

About the contributors

Consumer Action Law Centre

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

Financial Rights Legal Centre

Financial Rights is a community legal centre that specialises in helping consumers 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 almost 25,000 calls for advice or assistance during the 2016/2017 financial year.

Financial Counselling Australia

FCA is the peak body for financial counsellors. Financial counsellors provide information, support and advocacy for people in financial difficulty. They work in not-for-profit community organisations and their services are free, independent and confidential. FCA is the national voice for the financial counselling profession, providing resources and support for financial counsellors and advocating for people who are financially vulnerable.