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Inquiry into Competition in the Australian Financial System
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Dear Sir/Madam,

Inquiry into Competition in the Australian Financial System – Draft Report

The Consumer Action Law Centre (**Consumer Action**), Financial Counselling Australia (**FCA**) and the Financial Rights Legal Centre (**Financial Rights**) are pleased to provide a submission in response to the Inquiry into Competition in the Australian Financial System Draft Report.

We welcome many of the draft findings and recommendations of the Productivity Commission. We are particularly supportive of findings relating to mortgage brokers, add-on insurance and competition in the payments system.

However, we are concerned about the approach taken in relation to reducing barriers to entry and increasing access to data. In our experience, the 'innovation' touted by new entrants rarely puts downward pressure on prices or genuinely benefits consumers, but rather takes advantage of regulatory loopholes. Our submission has therefore reiterated the pro-competitive benefits of effective regulation and appropriate barriers to entry, and the risks to consumers when necessary safeguards are absent.

Our comments are detailed more fully below.

About the contributors

Consumer Action Law Centre

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just market place for all Australians.

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 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.

1. Competition framework and assessment

In relation to Draft Finding 2.1, we submit that an additional key feature of workable competition should be a robust regulatory regime that provides incentives to firms to compete and empowers consumers to exert competitive pressure in the financial system. As set out in our initial submission, consumers must be empowered to select products that fit their individual needs and assess the features of those products in order to benefit from effective competition in the financial system. Empowered consumers depend on the availability of safe products and fair sales practices. Rather than conceiving regulation as impeding competition or acting as a barrier to entry, regulation can provide incentives to firms to engage in competitive behaviour that ultimately benefits consumers. For example, regulation can be developed to provide incentives to provide clarity about product offerings to consumers, align product features with consumer expectations and professionalise advice and sales practices. There must also be incentives to comply with regulation, namely a well-resourced regulator, significant penalties for misconduct and appropriate compensation for consumers. Such regulation would be pro-competitive.

An additional key feature of workable competition should be a financial system that aims to deliver the benefits of competition to all consumers, not just those who are capable, interested and able to navigate its complexity.[1] Several of the draft recommendations and findings of the Commission focus on providing additional information, disclosure and data to consumers.[2] The effectiveness of these policies relies on consumers being actively engaged and able to protect their own interests. This is an unrealistic and unfair expectation, particularly for vulnerable and disadvantaged consumers who experience significant barriers to this type of engagement. For these consumers, the benefits of 'competition' remain hidden (particularly in the credit market) as lenders tend to compete on price and service for the 'best' customers.[3] The 'worst'

[1] Similar principles have been applied in reviews of competition in electricity and gas markets: see Professor John Thwaites et. al., *Independent Review into the electricity and gas markets in Victoria,* August 2017, available at: https://engage.vic.gov.au/application/files/7415/0267/4425/Retail_Energy_Review_-_Final_Report.pdf p. 51.

[2] For example, Draft Recommendations 8.2, 8.3, 8.4, 11.1 and 11.2.

[3] For example, commentary on the introduction of mandatory comprehensive credit reporting (**CCR**) often emphasises the benefits for 'good' customers. When announcing the Government's commitment to mandatory CCR in November 2017, the Treasurer's office said the regime would 'ensure good customers are rewarded with better deals': http://sjm.ministers.treasury.gov.au/media-release/110-2017/.

customers are charged much higher interest rates and fees,[4] or are denied access to credit or services altogether. These customers have limited choice or bargaining power. It is therefore important that competition policy settings are such that the benefits of competition can be realised by all consumers, not just the wealthiest or most informed.

We are concerned that reducing barriers to entry by new providers has been identified as a key feature of workable competition, without mention of the need for appropriate safeguards. As outlined in our initial submission, removing barriers to entry can lead to predatory players entering the market that are attracted by the lack of consumer protections. Their 'innovative' product offerings are generally designed to exploit regulatory loopholes, rather than genuinely benefit consumers. This has the potential to lead to significant consumer detriment, as the example of debt management firms in our initial submission demonstrated. We have highlighted similar issues in our submissions to the Open Banking Review. Our submissions also considered the risks of encouraging greater corporate access to consumer data.[5]

As noted above, the regulatory regime should provide incentives to firms to compete and empower consumers to exert competitive pressure in the financial system. The key test for competition working in the interests of consumers is whether consumers can switch to a product or service they know is better value for money, and whether firms respond to this by producing products and services that better meet consumers' needs at a competitive price. As stated by the UK's Financial Services Consumer Panel (the **FSCP**), it should be possible to measure consumer outcomes and incentivise firms to behave in ways that support competition. The FSCP recommends the following supply-side metrics[6]—the first aligns with the Commissions' Draft Recommendation 8.4, but needs to be combined with the other metrics to provide the right information:

- <u>Price discrimination</u>: firms should be required to publish the average price for:
    - A representative existing customer and identical new customer
    - Groups of customers of specified types
    - Groups representative of firms' actual customer base.

  This would alert customers to the different treatment of similar customers in different groups and act as an incentive for firms to reduce price discrimination.

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[4] For example, the Financial Conduct Authority in the United Kingdom has found that there is very little price competition in the payday lending market (where equivalent interest rates can exceed 200% per annum) as consumer demand was less affected by prices and more influenced by other features, such as how soon the money would be available: https://www.fca.org.uk/publications/feedback-statements/fs17-2-high-cost-credit.
[5] Consumer Action, Financial Rights and FCA, *Submission - Open Banking Review Issues Paper*, 22 September 2017, available at: https://policy.consumeraction.org.au/2017/09/26/submission-open-banking-review/; Consumer Action, Financial Rights and FCA , *Supplementary submission - Open Banking Review Issues Paper*, 25 October 2017, available at: https://policy.consumeraction.org.au/2017/10/25/supplementary-submission-open-banking-review/; Financial Rights and Consumer Action, *Submission – Open Banking Review Final Report,* March 2018, available at: http://financialrights.org.au/wp-content/uploads/2018/03/180323_OpenBanking_FinalReport_Sub_FINAL.pdf.
[6] Financial Services Consumer Panel, *Consumer Panel Position Paper – Consumers and Competition,* 17 July 2017, available at: https://www.fs-cp.org.uk/sites/default/files/fscp_consumers_and_competition_position_paper.pdf.

- Reputation measures: composite indices of the reputation of firms, including for example, frequency of complaints as a ratio of customer base[7] and incidence and amount of fines. At a firm level, this would alert customers to firms that do not prioritise customer service and create an incentive for firms to improve. At the market level, it would serve as an indicator of quality.

- Product benchmark: a measure of whether products, at a minimum, match a set of core features. This measure could:

  - Indicate to consumers that their basic needs will be met by this product
  - Incentivise firms to meet this threshold and avoid 'hollowing out'
  - Help regulators and consumers see through spurious product differentiation.

Recommendation 1: Add the following as key features of workable competition in Draft Finding 2.1:

- A strong regulatory regime that provides incentives to firms to compete and empowers consumers to exert competitive pressure in the financial system; and
- A financial system that aims to deliver the benefits of competition to all consumers, not just those who are capable, interested and able to navigate its complexity.

Recommendation 2: Highlight the need for appropriate consumer safeguards when reducing barriers to entry by new providers and increasing access to data in Draft Finding 2.1.

2. The landscape of retail banking

In relation to Draft Recommendation 4.1 on reducing regulatory barriers to entry and expansion, we reiterate our comments above about the significant risks to consumers that can result from removing barriers to entry. Instead, appropriate barriers to entry gives consumers confidence as they are able to choose safe products that perform as they expect, allowing them to exert competitive pressure in the market. Appropriate barriers to entry also serve to level the playing field for business, ensuring that financial institutions that treat customers unfairly or engage in predatory practices are not given an unfair advantage over their more ethical counterparts. In our view, Draft Recommendation 4.1 should be amended to take these considerations into account.

This is not to say that consumers do not welcome new banks or financial services providers that provide genuinely beneficial and competitive services. It is our observation, however, that there is not a lack of banks or financial institutions. As CHOICE states in its submission to the Commission's initial consultation, Australians need better banks, not more banks.[8] To deliver this, the regulatory regime must

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[7] This aligns with the recommendations of the Ramsay Review that financial firms should be required to report to ASIC on the internal dispute resolution (**IDR**) activity, and that ASIC should have the power to publish data on IDR at aggregate and firm level. See Professor Ian Ramsay et. al., *Review of the financial system external dispute resolution and complaints framework – Final Report,* April 2017, p. 190, available at: https://static.treasury.gov.au/uploads/sites/1/2017/06/R2016-002_EDR-Review-Final-report.pdf.

[8] CHOICE, *Submission – Productivity Commission Inquiry Into Competition in the Australian Financial System Draft Report,* March 2018, available at: http://www.pc.gov.au/__data/assets/pdf_file/0018/222174/sub042-financial-system.pdf.

provide incentives for firms to compete around measures that benefit consumers, not to compete in ways that take advantage of consumers or regulatory loopholes.

In relation to Information Request 4.1 on expanding the fintech licensing exemption under the regulatory sandbox, we refer the Commission to our joint submission to The Treasury on the *Treasury Laws Amendment (Measures for a Later Sitting) Bill 2017: FinTech Sandbox Regulatory Licensing Exemptions.*[9] We submitted that rather than watering down consumer protections, the finance industry needs much higher standards to prevent the scandals that have drained consumer savings and investments. We also submitted that the Australian Securities and Investments Commission (**ASIC**) should be required to grant regulatory exemptions under the regulatory sandbox regime, as is required in comparable jurisdictions such as the United Kingdom. We remain concerned about the risk of consumer detriment under the regulatory sandbox regime, and therefore do not support extending the exemptions to retail deposits and other banking services.

Recommendation 3: Amend Draft Recommendation 4.1 to highlight the need for appropriate consumer safeguards when reducing barriers to entry by new providers.

Recommendation 4: Do not expand the regulatory sandbox fintech licensing exemptions further and require ASIC to approve applicants who seek to rely on the exemption.

3. The residential home loan market

Best interests duty

We support Draft Recommendation 8.1 to impose a clear legal duty on mortgage aggregators to act in the consumer's best interests. However, we recommend that the best interests duty apply to all mortgage brokers, not just mortgage aggregators owned by lenders. There is no clear policy reason for the duty to only to apply to brokers owned by lenders. In our view, the best interests duty should apply to all brokers, who purport to be advising customers about a complex purchase. In practice, we rarely if ever see a broker add value to a purchase decision, but are instead used to find unaffordable credit.

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Sector (**the Royal Commission**) recently heard overwhelming evidence about the consumer harm that can result from inappropriate conduct by mortgage brokers. The evidence before the Commission suggested that brokers did not act in the best interests of consumers, but were instead driven by sales incentives such as upfront or trail commissions. Consumers also generally have a poor understanding of the role of brokers and lack awareness of any conflicting incentives, such as commissions, which might distort the broker's advice.

The current 'not unsuitable' standard in the *National Consumer Credit Protection Act 2009* (**National Credit Act**) is arguably not in line with community expectations about how they will be treated by their finance broker. Particularly in the mortgage broking market, consumers often expect that brokers are acting as trusted advisers and helping them to get the best deal. This perception is promoted by the

[9] CHOICE, Consumer Action and Financial Rights, *Treasury Laws Amendment (Measures for a Later Sitting) Bill 2017: FinTech Sandbox Regulatory Licensing Exemptions,* 3 November 2017, available at: http://financialrights.org.au/wp-content/uploads/2018/01/171106_Consumer-group-comments-Treasury-Laws-Amendment-Bill-2017-FinTech-Sandbox-Regulatory-Licensing-Exemptions.pdf

industry itself. For example, the Mortgage and Finance Association of Australia website claims that 'Finance Brokers have a duty of care to provide the best possible advice to clients' and that 'finance brokers often can offer you the best option'.[10] However, the reality is that mortgage brokers are not required by law to act in a borrower's best interests. This mismatch in expectations is problematic and poses a risk of consumer harm.[11]

In relation to Information Request 8.1, we submit that a best interests obligation for mortgage brokers could be implemented under the current regulatory and licensing regime for consumer credit. Alternatively, the current best interests duty that applies to personal financial advice in Division 2 of Part 7.7A of the *Corporations Act 2001* (**Corporations Act**) could be extended to home lending. There must also be significant penalties and appropriate access to redress for consumers when breaches of the best interests duty occur. The current penalties and civil liability provisions for financial advice are set out in sections 961K-961P of the Corporations Act.

Recommendation 5: Amend Draft Recommendation 8.1 to extend the proposed best interests duty to all mortgage brokers.

Recommendation 6: Implement the best interests duty for mortgage brokers via the current regulatory and licensing regime for consumer credit, or by amending Division 2 of Part 7.7A of the *Corporations Act 2001.*

Recommendation 7: Introduce significant penalties and access to redress for consumers for breaches the best interests duty.

Conflicted remuneration

We support the Commission’s Draft Finding 13.1 that mortgage broker commission structures weaken competition and discourages switching. While industry have proposed some changes through the Combined Industry Forum, these changes have not gone far enough. The problem of trail commission remains and upfront commissions continue to encourage brokers to sign up consumers to larger loans.

In relation to Information Requests 8.2 and 13.2, we recommend that the ban on conflicted remuneration introduced under the Future of Financial Advice reforms be extended to home loan products. The structure of mortgage broker commissions indicates reverse competition, rather than any rationale based on improving outcomes for consumers. The Royal Commission recently heard evidence of the consumer harm caused by conflicted remuneration in the home loan sector. The incentives for brokers and bank staff to engage in irresponsible lending were particularly perverse. The evidence also suggested a systemic failure of lenders to manage the resulting conflicts of interest effectively.

As flagged by the Commissioner during the Royal Commission hearings, currently there is 'nothing in it' for a broker to ensure the customer is facing the truth of his or her expenditure, or to 'interrogate the

[10] See https://www.mfaa.com.au/ and https://www.mortgageandfinancehelp.com.au/first-home-buyer-news/can-finance-broker-get-you-better-deal/.
[11] For further information, see Consumer Action Law Centre’s submissions to the Royal Commission: https://policy.consumeraction.org.au/2018/02/05/royal-commission-into-misconduct-in-the-banking-superannuation-and-finance-sector-consumer-action-submission-part-2/ and https://policy.consumeraction.org.au/2018/04/03/summary-rc-submission-lending/.

customer when the customer reports living expenses as X dollars a month'.[12] This is because the broker is instead focussed on writing the loan. The Commission also heard evidence that CBA's former CEO Ian Narev admitted that upfront and trailing commissions for mortgage brokers can lead to poor customer outcomes, yet CBA failed to disclose these commissions to consumers or change to a fee-for-service model.[13] Documents produced by NAB relating to its scandal-plagued home loan introducer program summed up the problem as follows[14]*: "The risk and reward equation for bankers was unbalanced in favour of sales over keeping customers and the bank safe."* The Royal Commission identified a 'first mover' problem in the market, indicating that legislative intervention would be required to change conflicted remuneration practices.

The cost of commissions and other benefits being paid to mortgage brokers is ultimately being borne by consumers, and is reducing price transparency. Mortgage brokers do not appear to promote effective competition in the home loan market but rather add to distribution costs and pricing opacity. This was confirmed by the recent interim report from the Australian Competition & Consumer Commission (**ACCC**) that revealed "less-than-vigorous" mortgage price competition, especially between the big four banks.[15] That report identified a troubling irony: banks do not publish the rates at which mortgages can be obtained (but instead publish "standard rates" with substantial discretionary and no-transparent discounts), meaning that many consumers consider that they need to engage a broker to find a good deal, only to be charged additional amounts through opaque means by the broker. In our view, if mortgage brokers are providing a valuable service then consumers would be willing to pay for that service under a fee-for-service model.

We also recommend that the Commission further investigate the role of unregulated entities, and the conflicted remuneration being paid by financial institutions for sales and referrals. These entities include introducers, vendor introducers, and car dealerships.

Recommendation 8: The ban on conflicted remuneration introduced under the Future of Financial Advice reforms be extended to home loan products.

Recommendation 9: The Commission further investigate the role of unregulated entities, and the conflicted remuneration being paid by financial institutions for sales and referrals. These entities include introducers, vendor introducers, and car dealerships.

Disclosure

The Commission has made several recommendations relating to disclosure, online tools and data collection.[16] While increased transparency is welcome, structural change is needed to remove conflicts of interest and professionalise the standards of advice being provided by mortgage brokers. Additional information alone will not achieve this.

[12] Transcript of Proceedings (Day 6, 19 March 2018), 467 and 476.
[13] Transcript of Proceedings (Day 4, 15 March 2018), 259.
[14] Transcript of Proceedings (Day 10, 23 March 2018), 974.
[15] Australian Competition and Consumer Commission, *Media release – Mortgage pricing not strongly competitive,* March 2018, available at: https://www.accc.gov.au/media-release/mortgage-pricing-not-strongly-competitive.
[16] For example, Draft Recommendations 8.2-8.4.

There are particular risks when disclosing vertical and horizontal integration, as outlined in our initial submission:[17]

> *Even if the disclosure is noticed by consumers, it may have the effect of increasing trust in advisers rather than making consumers more wary.[18] Skilled salespeople will also be able to deflect concerns about vertical integration. Peter White of the Finance Brokers' Association of Australia said that finance brokers can use disclosure obligations to their advantage:*
>
> > "I actually believe that if a broker is upfront about ownership—let's say they are owned by Commonwealth Bank, for example—then they can sell that as a positive. It can allow them to change the discussion around bank ownership—isn't it a good thing that they have somebody so strong sitting behind them that has enabled them to grow as a brokerage and a business?
> >
> > ..now they have opened up the discussion with their client and they are able to explain what bank ownership really means and how the [National Consumer Credit Protection Act] governs a broker's independence."[19]
>
> *These arguments may make clients more comfortable, but they do not address the conflicts of interest and competition concerns that are raised by vertical integration.*
>
> *Problems with horizontal integration, whereby financial firms acquire similar companies in the same industry, also cannot be fixed by disclosure alone. Appropriate supervision of mergers and acquisitions by the Australian Competition and Consumer Commission (**ACCC**) is critical to ensure that consumer interests are protected.*

We agree with the Commission that any additional disclosure needs to be consumer tested to ensure that it is as effective as possible. However, the reality is that even consumer-tested disclosure is only likely to reach consumers who are willing and able to engage.

Recommendation 10: Require any additional disclosure, information or online tools to be consumer tested to ensure that they are effective as possible.

Lender's mortgage insurance

In relation to Information Request 8.3, we support the concerns raised by CHOICE regarding the lack of competition and consumer choice in the lender's mortgage insurance market. We also support the

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[17] Consumer Action, Financial Rights and FCA, *Submission – Inquiry into Competition in the Australian Financial System, September 2017,* pp, 9-10, available at: https://www.pc.gov.au/__data/assets/pdf_file/0008/221867/sub023-financial-system.pdf.
[18] James Lacko and Janis Pappalardo, *The effect of mortgage broker compensation disclosures on consumers and competition: A controlled experiment*, Federal Trade Commission Bureau of Economics Staff Report, 2008 referenced in Financial Services Authority, *Financial Capability: A Behavioural Economics Perspective*, 2008.
[19] 'Disclosure can work in Brokers' favour', *Broker News*, January 2015, p 17.

recommendations made by CHOICE designed to improve competition and consumer outcomes in this market.[20]

4. Competition in the payments system

We support strong consumer protections for payments, including Draft Recommendation 10.2 to make the ePayments Code mandatory.

We also recommend that the liability arrangements for ePayments Code be maintained and extended to Open Banking. The ePayments Code includes the long-standing principle of banking law that a financial services provider requires the mandate of its customer to validly debit an account, and that only in exceptional circumstances can a customer be held liable for unauthorised transactions on their account. While Open Banking participants would not initially have authority to debit accounts as the regime is currently 'read only' access, we anticipate this will become an issue when the regime is extended to 'write' access. It is also important that we embed principles of who is best placed to manage risk in this regime early in the process, rather than later.

We are concerned about the potential for new payment systems and Open Banking to push risk onto customers, where they are not well placed to bear this risk. In our view, there is a case for the bank to be liable where funds are transferred to third parties which don't have sufficient security arrangements.[21] Banks are in a position of trust, and can play an important role in maintaining security of funds and data going to third parties.

We also suggest that customer consent needs to be fundamentally revisited.[22] It is time to realise that including consents in terms and conditions or pre-ticked boxes is failing the community. The Open Banking Review said that express customer consent should be explicit, fully informed and able to be permitted or constrained according to the customer's instructions. However, in our view it has to go further.

Consumer Action recently published a report examining the burgeoning online lead generation industry, *Dirty leads: consumer protection in online lead generation.*[23] That report noted that the framework for consent is inconsistent between privacy legislation, the *Spam Act 2003*, and the *Do Not Call Register Act 2006*, which all require different forms of consent. Further, industry practices have evolved in the digital environment since these frameworks were established, meaning that it is often less clear that personal information is in fact being obtained for the purpose of finding a sales lead. In the United States, new rules have been established which require marketers to identify each specific company to whom consent is being provided, and consumers are not required to provide consent as a condition of purchasing goods

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[20] CHOICE, *Submission – Productivity Commission Inquiry Into Competition in the Australian Financial System Draft Report,* March 2018, available at: http://www.pc.gov.au/__data/assets/pdf_file/0018/222174/sub042-financial-system.pdf

[21] Similar obligations would be imposed on banks under the proposed mandatory comprehensive credit regime - see the information security requirements in Part 3-2CA of the *National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018*.

[22] Dr Katharine Kemp has written extensively about the flawed customer consent model and privacy. For example, K Kemp and R P Buckley, "Protecting Financial Consumer Data in Developing Countries: An Alternative to the Flawed Consent Model" (2017) 18(3) Georgetown Journal of International Affairs 35.

[23] Consumer Action Law Centre, *Dirty Leads: Consumer protection in online lead generation,* March 2018, available at: https://consumeraction.org.au/new-report-uncovers-murky-world-online-marketing/.

and services.[24] This level of detail is absent in Australia's consent framework. That report considered consent must be separate, voluntary, clear, specific and time-limited. We recommend developing a standard relating to consent to ensure this is achieved.

Recommendation 11: Amend the ePayments Code to make subscription to the code mandatory for any entity that intends to send or receive electronic payments, as recommended in Draft Recommendation 10.2.

Recommendation 12: Maintain and extend the liability arrangements under the ePayments Code to Open Banking.

Recommendation 13: Require customer consent in the Open Banking regime to be separate, voluntary, clear, specific and time-limited. This should be incorporated into a standard relating to consent.

5. Improving outcomes for consumers – data access to enable switching

Draft Recommendation 13.1 proposes that the Open Banking regime be implemented in a manner that enables the full suite of rights for consumers to access and use digital data (as set out in the Productivity's inquiry report, Data Availability and Use.

As outlined in the Productivity Commission's Data Availability and Use Inquiry Report,[25] the right would enable consumers to control their data by allowing them to:

- share in perpetuity joint access to and use of their consumer data with the data holder
- receive a copy of their consumer data
- request edits or corrections to it for reasons of accuracy
- be informed of the trade or other disclosure of consumer data to third parties
- direct data holders to transfer data in machine-readable form, either to the individual or to a nominated third party.

We support the creation of the Consumer Data Right and these general rights as outlined. However, we strongly disagree with the Productivity Commission not including the right to erasure – a right that will be available to consumers in Europe under the General Data Protection Regulation (**GDPR**) from May 2018. The inclusion of data erasure amongst the bundle of rights that make up the Consumer Data Right is critical if the Open Banking Regime is to be effective and gain the confidence of consumers.

GDPR Article 17 provides for the "Right to Erasure" where an individual will hold the right to request the erasure, without undue delay, of any links to, copy or replication of the data in question, under the circumstances where:

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[24] Association of Corporate Counsel, *They're Here: The FCC's New Regulations Under the TCPA — Now What?*, accessed 10 April 2018, available at: http://www.acc.com/accdocket/onlineexclusives/tcpa.cfm.
[25] Productivity Commission, *Data Availability and Use – Productivity Commission Inquiry Report*, 31 March 2017, p. 35, available at: https://www.pc.gov.au/inquiries/completed/data-access/report/data-access.pdf

- the data is no longer necessary in relation to the purposes for which it was collected: Article 17(1)(a)
- the individual withdraws consent or the relevant storage period has expired and the data holder doesn't need to legally keep it (such as banking records for a seven time period): Article 17(1)(b)
- the individual objects to the processing of data – including direct marketing purposes and profiling: Article 17(1)(c) & Article 21
- the data was unlawfully processed: Article 17(1)(d)
- there is a legal requirement for the data to be erased: Article 17(1)(e)
- the consumer is a child at the time of collection: Article 17(1)(e) & Article 8

There are exceptions to this right, which include:

- exercising the right of freedom of expression and information: Article 17(3)(a)
- for compliance with a legal obligation, e.g. again as mentioned above a bank keeping data for seven years: Article 17(3)(b)
- for reasons of public interest in the area of public health: Article 17(3)(c)
- for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes: Article 17(3)(d)
- for the establishment, exercise or defence of legal claims: Article 17(3)(e)

We note that the Productivity Commission's Data Availability and Use Inquiry Report does not refer to the data erasure right when detailing its model for a comprehensive right, only mentioning it in a case study at the back of the report.[26] The Productivity Commission's discussion of this right is far from comprehensive. There was no discussion in the Report on the policy and consumer protection rationale behind the EU taking this step, which is disappointing.

The arguments put forward against the right to erasure by the Productivity Commission are:

- the "right to be forgotten" is misleading as "information cannot be made deliberately forgotten – at best… information can be made less readily accessible"
- exercising the right to be forgotten may have the opposite effect by raising awareness of the information that the subject wishes to be forgotten
- a takedown system may have an "undesirably chilling effect on online freedom of expression and any such power would need to balance the interests of the complainant against the interests of the party in publishing the material and broader public interests"

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[26] Productivity Commission, *Data Availability and Use – Productivity Commission Inquiry Report*, 31 March 2017, pp. 592-594, available at: https://www.pc.gov.au/inquiries/completed/data-access/report/data-access.pdf.

- a take down mechanism may be ineffective, particularly if located overseas.

In our view, these arguments do not stand under scrutiny, and apply to a limited understanding or conception of what the right to erasure applies to – that is the context of taking down defamatory material from search engines – and not personal information and data gathered by companies using digital applications.

With respect to the "at best - information can be made less readily accessible" argument, this may be the case with respect to defamatory material placed up on the web, but it is not the case with respect to financial information provided to an accredited entity under an Open Banking regime. Accredited entities can retain full control, and if there are appropriate restrictions on selling or sharing this data to third or fourth parties (as the EU Right foresees: cf Article 21), then this control can be maintained.

Similarly, in the context of defamatory material, exercising the right to be forgotten may indeed have the opposite effect by raising awareness of the information that the subject wishes to be forgotten. This however has not resulted in defamation laws being removed from the common law and statutes. This argument also does not apply to consumer data used in an Open Banking context, or any number of contexts and uses in the current environment.

The chilling effect on broader public discussion also does not apply to data in the Open Banking context, nor does a take-down notice, which can be easily implemented in the Open Banking and Consumer Data Right environment.

There are many clear arguments for a right to erasure. These mainly relate to the privacy and security benefits it affords consumers increasingly concerned and impacted by data breaches and the increasingly unscrupulous and unbounded use of personal data. Objecting to your own personal data's use in direct marketing, being subject to the potential for identity theft or being subject to actual material theft through breaches of financial details are all clear reasons for the right to erasure to be included under a Consumer Data Right.

More pertinent though is that the right to deletion is integral for the Open Banking regime to work as proposed. If consumers are to have confidence in the Open Banking regime, they must have real control over their own data and know that if they withdraw consent at any time that data will be deleted.

Consumers do not want the situation where their data has been used by a company – with or without consent – and that company retains that data to use for secondary purposes, either in aggregated or de-identified form where there is any possibility of re-identification. We discuss this issue further under *Recommendation 3.5 – aggregated data*. The recent news[27] that UK company Cambridge Analytica legitimately gathered some personal data from Facebook accounts and concurrently illegitimately gathered other people's data (and failed to delete data when requested) has raised public consciousness over the potential for data to be misused. Combined with the never-ending list of significant and high profile data breaches at Equifax, Ashley Madison, Yahoo and more, the desire of consumers to control their data via strengthened regulations is becoming stronger every day.

[27] 'I made Steve Bannon's psychological warfare tool': meet the data war whistleblower, *The Guardian*,18 March 2018 https://www.theguardian.com/news/2018/mar/17/data-war-whistleblower-christopher-wylie-faceook-nix-bannon-trump

The Government will be opening consumers up to serious consequences if the right to erasure is not embedded within the regime from the very beginning. It risks undermining trust and confidence in a system it is promoting as the future. Without a right of erasure, future headlines might include the names of accredited Open Banking entities rather than Facebook and Cambridge Analytica.

Furthermore, if the Consumer Data Right and the Open Banking regime does not include a right similar or the same to the EU GPDR, then Australian accredited entities with any interest in working internationally will need to create dual data handling protocols applying to competing jurisdictions. This is a burden on innovation and would place Australian firms at a distinct disadvantage to international competitors.

For further information with respect to consumer views on the Open Banking regime, please see Financial Rights and Consumer Action's most recent submission to the Open Banking Review.[28]

Recommendation 14 – A right to data erasure modelled on the EU GPDR should be included in the general Consumer Data Right empowering individuals to request the erasure of any links to, copy or replication of the data in question, where:

- 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;
- the data was unlawfully processed;
- there is a legal requirement for the data to be erased
- the consumer is a child at the time of the collection.

6. Improving outcomes for consumers – add on insurance

We support Draft Recommendation 14.1 as an important first step to improving consumer outcomes in the add on insurance market. However, in our view the recommendation it does not go far enough to address the widespread and severe problems with add-on insurance mis-selling. It is clear from the work of ASIC and evidence recently heard by the Royal Commission that this is a failed market which offers consumers little or no benefit.[29]

Consumer Action's DemandARefund.com website continues to assist people to obtain refunds on add-on insurance which they were mis-sold. To date we have seen around 400 people claim more than $1 million for mis-sold Consumer Credit Insurance (**CCI**), Guaranteed Asset Protection (**GAP**) insurance and extended warranties. We continue to encourage people to use DemandARefund.com to ensure they can obtain the full refunds they are entitled to. Remediation schemes through ASIC, while important to achieve large-scale refunds, are limited to certain classes of customers and in some cases do not provide the full refund that a person is entitled to. There is still a need for assistance in many cases of mis-sold add-on insurance.

[28] Financial Rights and Consumer Action, *Submission – Open Banking Review Final Report,* March 2018, available at: http://financialrights.org.au/wp-content/uploads/2018/03/180323_OpenBanking_FinalReport_Sub_FINAL.pdf.
[29] See Consumer Action Law Centre, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry: Submission on Round 1 Hearings*, 3 April 2018, paras 5.1-5.32, https://policy.consumeraction.org.au/2018/04/03/submission-on-round-1-hearings/.

It is not clear that a deferred sales model would resolve the widespread problems of add-on insurance mis-selling in every case. In many instances, withdrawal of this product from sale would be the preferable approach. It is low-value, sold to many people who are ineligible to claim and/or replicates cover which people have under other insurance, such as life insurance in superannuation.

In our view, some deferred sales models, such as the model announced by the Australian Bankers Association (**ABA**) in late 2017, would not achieve the aim of curbing mis-selling. To ensure a deferred sales model is effective, it must, at a minimum align with the following key principles:

- Comprehensive: The model must apply to sales of add-on insurance through every channel, to ensure that consumers are equally protected from pressure-selling and paying for products they do not understand or need. This must include sale with all credit and finance products and online sales, which are a significant channel for ADIs.
- Consistent: The same model should apply to the various distribution channels and products. This would enable consistent regulation and compliance and set industry and consumer expectations of what an appropriate add-on insurance sale looks like.
- Customer opt-in: The customer must be required to pro-actively contact the insurer if they wish to purchase the insurance, after the deferral period. This is a critical element, as without this pressure-selling will continue to take place at some point in the sale.
- A 30-day 'break' in the sale: The model should clearly separate the sale of a car, finance or credit from the sale of add-on insurance by 30 days. The ABA's proposed deferred sales model for CCI will allow ADIs to sell CCI with credit cards four days after the credit *application* in a bank or over the telephone. This would enable CCI to be sold prior to credit approval, which is when the risk of mis-selling remains high. The ABA's model is materially different to a model which prevents the add-on insurance sale until after the primary transaction—that is, after credit or finance has been approved, or the car has been delivered.
- Monitoring and evaluation: Insurers and distributor should maintain robust data on who they are selling add-on insurance to, and how these sales take place. This process should involve record keeping, shadow shopping and other means, and insurers must report this information regularly to ASIC.[30] ASIC must also take a proactive role in monitoring add-on insurance sales, particularly where high risks are identified. High-risk sales would include sales through car yards, or sales to classes of people who are more likely to be ineligible to claim (for example, a wide range of people who are not in full-time employment).

Recommendation 15: The deferred sales model for add-on insurance in Draft Recommendation 14.1 follow the key principles outlined above to improve effectiveness.

7. The financial system regulators

In relation to Draft Recommendation 17.1, we support the proposal for a competition champion. We recommend that the ACCC play this role as it is well-placed to focus on competition.

We support ASIC been given competition among its objectives, but we do not consider that competition should be its main focus. Instead, ASIC should continue to prioritise ensuring fair markets and promoting

[30] Note that ASIC has proposed stricter monitoring and supervision of car yard distributors by insurers due to the current 'manifestly inadequate' arrangements: ASIC, *Consultation Paper 294: The sale of add-on insurance and warranties through caryard intermediaries*, August 2017, paras 245-259.

consumer confidence and wellbeing. ASIC should also retain its focus on enforcement to ensure compliance with the law, and deal with harms that are not illegal (for example, persistent credit card debt). Part of its role is to eliminate perverse dynamics of the market, and this is where consideration of effective competition is beneficial. It will also be important when using its product intervention powers.

Recommendation 16: ACCC take the lead on matters related to competition in the financial system.

Recommendation 17: Include competition among ASIC's objectives, but ASIC's main focus remain on ensuring fair markets and promoting consumer confidence and wellbeing (including enforcement and market analysis).

Please contact Katherine Temple on 03 9670 5088 or at katherine@consumeraction.org.au if you have any questions about this submission.

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