23 March 2018

The Treasury
Langton Crescent
Parkes ACT 2600

Via email: data@treasury.gov.au

Re: Review into Open Banking in Australia – Final Report

Introductory

ACCAN thanks the Australian Treasury for the opportunity to contribute to its consultation on the proposed regulatory framework in the Open Banking report (the Report) for the national Consumer Data Right (CDR).

As part of its response to the Productivity Commission's inquiry into data availability and use, the Government announced on 26 November 2017 that the Treasurer would lead the development of the CDR, which will be established first in the banking sector, and then in the energy and telecommunications sectors in late 2018.

ACCAN has an interest in the current consultation as the development of the CDR in banking (open banking) and its rollout will influence the development and establishment of a right to consumer data more broadly, including in the telecommunications sector. It is therefore important for all consumers that the overarching framework includes adequate consumer protections, especially with regard to privacy, and that these protections are appropriately balanced against the need for effective competition.

ACCAN will limit its comments to the broader CDR framework, and will not comment on specifics of open banking. We are across the joint consumer submission by the Financial Rights Legal Centre and broadly support their comments as they relate to the broader CDR and its implementation, particularly:

- The need for a review and modernisation of the *Privacy Act 1988* and its Australian Privacy Principles (APPs) to improve consumer safeguards and consumer control over their data
- A review of consent in the age of data.

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The Proposed CDR Framework

The proposed regulatory framework for open banking is set out in Chapter 2 of the Report. The chapter "…recommends a regulatory framework that allows Open Banking to be implemented smoothly and that can be applied to other sectors."[1]

The Report rejects the Productivity Commission's recommendation to establish a new Data Sharing and Release Act and a National Data Custodian. Instead, it recommends a framework that does not duplicate existing legislation and instead uses existing regulations (including legislation, other legislative instruments and regulations, and guidance such as standards) supplemented by new legislation to fill any gaps.

The Report envisages that the implementation of CDR in open banking will require a framework comprised of a 'hierarchy of legislative instruments': legislation (which creates the CDR and a framework for Rules and Standards); rules (what the sector needs to do, including in relation to privacy and confidentiality, consumer rights and competition); and standards (the way the sector needs to do it).[2] ACCAN is supportive of this layered regulatory approach and implementing the CDR under the *Consumer and Competition Act 2010.*

ACCAN is also supportive of the Report's proposed multi-regulator model, whereby the ACCC will be the lead regulator and the OAIC will regulate on privacy related aspects of the CDR. As the CDR is extended to the telecommunications sector, it will be important for the ACCC and OAIC to work closely with sector specific regulator, the ACMA.

The report notes that the OAIC will have prime responsibility for complaints handling as most complaints will be privacy related. ACCAN submits that before the CDR is established the OAIC must be adequately resourced to resolve individual complaints in a timely, efficient, and transparent manner.

ACCAN is also supportive of the Report's recommendation that the ACCC should have broad research and investigative powers, with a range of remedies to enforce the CDR.

[1] Open Banking Report, p 11.
[2] Open Banking Report pp 12-13.

Other Comments

ACCAN would like to repeat some of the concerns it has raised in previous submissions to the Productivity Commission's inquiry into Data Availability and Use.[3]

Consent and consumer knowledge

Increased availability of consumer data to consumers via the CDR raises issues with consent and explicitly informed consent. Additionally, large gaps in consumer knowledge about privacy make informed consent and decision-making less likely in many instances.

When information is being shared and new datasets are being created, it becomes difficult for a consumer to consent to, or for the collecting entity to provide, all purposes for which the information will be used and all organisations that the information will be provided to, as is currently required by APP 3. The CDR framework must therefore have a clearly defined standard of consent. Consumers who request their data be provided to a third party need to be fully informed of how that information will be used by the third party, and who else it may be shared with. ACCAN submits that the appropriate standard for any sharing of consumer data derived from or containing personal information should be explicitly informed consent. Consumers should also be given more control over the uses their data is put to and who it is shared with when providing it to third parties, such as comparison websites.[4]

Research commissioned by ACCAN clearly demonstrates the lack of knowledge consumers have about privacy risks when they sign contracts for products and services (in the telecommunications sector – but the findings are relevant to all sectors with consumer contracts). The research examined the extent to which consumers understand the information that is given to them by a service provider and found that:[5]

- Having access to the right amount of information consumers are able to understand in the context of the agreement protects consumers from bad outcomes and improves decision making.
- Consumers do not adequately understand contracts when they read them.
- Consumers often skim or do not read contracts at point of purchase or sign up as they often do not have a choice if they want the product, the contracts are long, full of jargon and legalese, and the level of detail is often irrelevant.

[3] http://accan.org.au/ACCAN%20submission%20PC%20Data%20Availability%20and%20Use%20Draft%20Report.pdf

[4] As per Financial Rights' Legal Centre's recommendation to update APP 3.

[5] Dr Paul Harrison, Laura Hill, Charles Gray, and ACCAN, 'Confident, but Confounded: Consumer Comprehension of Telecommunications Agreements' (2016), p 8.

In light of this research, the CDR framework should not be based on the assumption that consumers are fully capable of making informed and responsible choices about the use of their personal information. Before the CDR is fully established, more resources are needed to ensure that consumers are empowered to make fully informed decisions about the use and sharing of their data.

Transparency in security measures and risks

In order to gain and maintain consumer trust in a CDR framework there needs to be maximum transparency over security measures and standards including those relating to the de-identification of personal information and consumer data.

De-identified data runs the risk of being re-identified and this could have serious and life-threatening implications (e.g. for survivors of family violence and other vulnerable groups). Consumer trust in de-identification processes has been eroded by such recent events as, for example, the data breach and re-identification of Red Cross data.[6]

The ACCC and OAIC will need to work closely with other government departments, regulators, industry, and privacy and technology experts to establish best-practice de-identification guidelines. Whether this guidance will be effective without being enforceable should also be explored further, particularly in the absence of disincentives for non-compliance.

Data Standards and Accessibility

Standards surrounding data formats and definitions will be necessary and it is in the best interests of each sector to develop its own standards. Broader standards that cover all sectors should be developed, for example to ensure that data is fully accessible to all consumers. In addition to economy-wide standards, each sector should develop sector-specific standards.

It will be important that the development of data standards takes into account the diverse range of consumers that will be accessing and using their own data. The development of information campaigns and data standards and definitions must involve wide and meaningful consultation with – amongst others – disability advocates, consumer groups, and culturally and linguistically diverse communities to ensure that all resources and data sets are fully accessible. Privacy professionals must also be engaged from the beginning to ensure that consumers are aware of privacy implications and risks.

[6] https://www.smh.com.au/politics/federal/red-cross-data-leak-personal-data-of-550000-blood-donors-made-public-20161028-gscwms.html

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