

26 March 2018

Mr Scott Farrell
Banking and Finance
The Treasury
Langton Crescent
PARKES ACT 2600

By email: data@treasury.gov.au

Dear Mr Farrell

Final Report of the review into Open Banking

Thank you for the opportunity to make a submission in relation to the recommendations made in the Final Report of the Review of Open Banking in Australia (**Final Report**).

The Law Council offers the following comments for your consideration which are largely based on material provided to it by the Law Society of New South Wales, including its Privacy and Data Law Committee. The Law Council is also grateful for the assistance of its Privacy Law Committee and Financial Services Committee of the Business Law Section in the preparation of this submission.

Multiple Regulator Model (Recommendation 2.2)

The Final Report recommends that multiple regulators oversee Open Banking, led by the Australian Competition and Consumer Commission (**ACCC**). The ACCC will be primarily responsible for competition and consumer issues and standards setting. Under the proposed multiple regulator model, the Office of the Australian Information Commissioner (**OAIC**) will remain primarily responsible for privacy protection while the Australian Securities and Investments Commission (**ASIC**), Australian Prudential Regulation Authority (**APRA**), the Reserve Bank of Australia (**RBA**), and other sector-focused regulators as applicable, will be consulted where necessary.¹

Currently, relevant complaints in relation to banking are split between the Australian Communications and Media Authority (**ACMA**) for digital marketing, the OAIC for other direct marketing and privacy complaints, the Financial Ombudsman Service (FOS) for disputes on financial services or products and ASIC for other consumer protection issues involving the financial services industry. There is some duplication in this arrangement (for example, FOS can also hear a privacy complaint if that complaint is part of a broader dispute between the financial services provider and the complainant). Under the proposed multiple regulator model, the ACCC will have an additional role overseeing Consumer Data Right complaints where a complaint relates to Open Banking. Such a complex regulatory scheme will require a clear delineation of responsibilities between agencies and public education,

¹ "Review into Open Banking in Australia – Final Report", December 2017, Recommendation 2.2.

particularly to ensure that consumers understand the difference between privacy and Consumer Data Right complaints and where complaints should be directed to.

Given the risk of duplication of work between regulators and confusion for consumers, the Law Council considers that further detail should be provided on the proposed multiple regulator model before recommendation 2.2 is formally proposed for implementation. Careful attention will be needed in clearly delineating the roles and responsibilities to individual regulators and planning appropriate strategies to educate the public about where to go to make their complaint.

The Law Council notes that once the framework is built for the implementation of the Consumer Data Right in Open Banking, it will be applied to other sectors.² Those other sectors, which include utilities and telecommunications, currently have their own dispute resolution bodies. The Final Report's proposal to impose the ACCC as a Consumer Data Right regulator and dispute resolution body should be considered in the context of those other sectors to determine whether the ACCC could be effectively incorporated in those regulatory and dispute regulation regimes.

Proposed amendments to the Australian Privacy Principles (Recommendation 4.2)

The Law Council notes that the Final Report recommends that data recipients under Open Banking be subject to the *Privacy Act 1988* (Cth) (**Act**).³ To most effectively facilitate this, the Final Report proposes a number of modifications to Australian Privacy Principles (**APPs**) 3-8. However, the Final Report does not set out precisely how such modifications would be made to the APPs. While the proposed amendment to APP 3 states that there should be an exception for Open Banking, the discussion of the other APPs makes it less clear exactly how the relevant provision would be amended and whether the amendment would apply only in the Open Banking context or more generally.

The Law Council considers that further detail should be provided regarding the nature of these proposed amendments before recommendation 4.2 is formally proposed for implementation.

Given that the proposed framework set out in the Final Report is intended to be used as a model for the implementation of a national Consumer Data Right in other sectors, the Law Council considers that any proposed amendments to the Act (including the APPs) need to be carefully considered. The Law Council strongly cautions against a model that would impose various exceptions to the APPs for different sectors, which the Law Council considers may lead to confusion among consumers and difficulties for businesses that service more than one sector. To that end the Law Council notes that the regime, once implemented would facilitate data sharing arrangements amongst very different organisations and industry segments. A regime, free from exemptions and inconsistent application is required to protect all data related rights and avoid regulatory arbitrage. The Law Council further notes the international nature of many data transfers and calls for careful consideration of similar or comparable rights in other jurisdictions. To that end, the Law Council notes the pending changes under the *EU General Data Protection Regulation* (**GDPR**)⁴, especially the right to data portability which, subject to important qualifications,

² "Review into Open Banking in Australia – Final Report", December 2017, pp v, 11.

³ "Review into Open Banking in Australia – Final Report", December 2017, Recommendation 4.1.

⁴ EU General Data Protection Regulation 2016/679, Effective 25 May 2018, and subject to Article 3 of the GDPR, may apply to Australian entities that offer goods and services to individuals in the EU or monitors the behaviour of individuals on the EU.

entitles an individual to receive and instruct one entity to transmit personal data to another entity where the data is concerning that individual and has been provided by him or her.⁵

If changes are to be made to the APPs, the Law Council recommends careful consideration be given to the transition periods for these changes. Changes of the nature proposed may trigger a round of privacy assessments, statements and policy updates within affected organisations. In some cases, these will have an impact well beyond Open Banking participants. For example, the proposed amendments to APP 7 may also impact on marketing companies that provide services to financial institutions. These organisations will need sufficient time to fully implement any changes required as a result of the amendments to the Act.

Application of the Consumer Data Right to other sectors

While the Law Council notes that comment has only been sought by the Australian Government in relation to Open Banking, the Productivity Commission recommended broader adoption of the Consumer Data Right.

The Law Council notes that the potential scope and impact of the Consumer Data Right is very broad. As such, the Law Council would be grateful for the opportunity to comment further on proposals going beyond Open Banking to ensure that any reforms adequately balance the rights of consumers and the interest of protected businesses. This will particularly be the case in considering circumstances where the consent of the consumer may be required for dealings in relation to their data.

Thank you for the opportunity to provide a submission on these matters.

Should you have any queries, please contact Dr Natasha Molt, Deputy Director of Policy, Policy Division ((02) 6246 3754 or Natasha.molt@lawcouncil.asn.au).

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Jonathan Smithers', with a long horizontal line extending to the right.

Jonathan Smithers
Chief Executive Officer

⁵ Article 20, GDPR.