National Legal Aid Secretariat
GPO Box 1422
Hobart TAS 7001

Executive Officer: Louise Smith

t: 03 6236 3813
f: 03 6236 3811
m: 0419 350 065
e: louise.smith@legalaid.tas.gov.au

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Daniel McAuliffe
Structural Reform Group
The Treasury data@treasury.gov.au

Dear Mr McAuliffe,

Submission to Treasury Laws Amendment (Consumer Data Right) Bill 2018

About National Legal Aid and legal aid commissions

National Legal Aid (NLA) represents the Directors of the eight state and territory legal aid commissions (LACs) in Australia. The LACs are independent statutory authorities established under respective state or territory enabling legislation. They are funded by state or territory and Commonwealth governments to provide legal assistance to disadvantaged people.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the federal and state and territory legal systems; or
- obtain adequate information about access to the law and the legal system.

Legal Aid Queensland submission

All LACs, other than Legal Aid NSW, have had the opportunity to consider the attached submission by Legal Aid Queensland's (LAQ) Consumer Protection Unit and generally endorse its contents.

Further information

Please do not hesitate to contact Loretta Kreet on 07 5477 4702 or Fiona Muirhead on 07 3917 0557 if you require any further information.

Yours sincerely,

Dr John Boersig PSM
Chair

Submission by Legal Aid Queensland

Legal Aid QUEENSLAND

Treasury Law Amendment (Consumer Data Right) Bill 2018

Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission to the Treasury Consultation on Treasury Laws Amendment (Consumer Data Right) Bill 2018.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ's Consumer Protection Unit lawyers have extensive experience providing specialist advice and representation to vulnerable clients dealing with financial institutions including banks, regulated and unregulated lenders and insurance companies. The unit provides advice to clients as well as lawyers and financial counsellors throughout Queensland in relation to insurance, mortgage stress, housing repossession, debt, contracts, loans, telecommunications, credit reporting and unsolicited consumer agreements.

LAQ regularly assists and represents clients with complaints about access to credit, debt and privacy issues in relation to credit reporting and access to complaint resolution processes. This submission is informed by that knowledge and experience.

In principle, LAQ supports support a regime that improves outcomes for consumers including allowing consumers to switch financial institutions and access innovative financial services.

We do not intend to provide comprehensive commentary on particular sections of the Exposure Draft but raise the following areas of concern:

- Access;

- Marketing;
- Other forms of accessing financial data; and
- Dispute resolution.

Access

APP 12 already gives consumers the right to access their own information. The Consumer Data Right CDR will make it easier for Fintechs to access data held by entities for the purposes of providing enhanced services to consumers. It is not consumers who will have enhanced access.

Importantly, it is unclear whether consumers will be provided access to CDR information for free. Access does not appear to be limited to defined purposes, nor will consumers have a right to delete the information once it is accessed and provided to the third party entity.

CDR is likely to include highly sensitive financial and personal information. While credit reporting information also contains sensitive financial information, the protections afforded to consumers by Part 111A of the *Privacy Act 1988* (Privacy Act) are not mirrored within the CDR system.

In contrast with the credit reporting regime where there are time limits for the retention of certain data (for example default information, repayment history information), the CDR will not have any legislated time limits for the retention data, nor will consumers have any right to the deletion of CDR, even if a good or service is not provided.

It is recognised that consumers have a right to have information deleted from credit reporting agencies databases after a period of time. This right should be included in CDR. It is unclear what the rationale is for denying consumers a similar right in relation to CDR.

The legislation envisages that access to CDR could be made available to accredited and non-accredited entities.

However accredited and non-accredited entities receiving CDR may not be regulated by the Privacy Act, for example where the third party entity is not a corporate structure or is an individual. In those circumstances the Australian Privacy Principles would not apply to the third party entity.

Below are two examples where the entity may not seek accreditation and is unlikely to be regulated by the Privacy Act, leaving vulnerable consumers without adequate protection:

1. **Access to CDR for landlords**

   Landlords are typically individuals. They might as a condition of assessing an application for tenancy require access to a consumer's CDR. The potential for misuse of information and discrimination in making tenancy decisions is significant, particularly if it is easier to obtain the information using the CDR.

   If the landlord is an individual and did not seek to become an accredited entity, the consumer would not have the protections of the Privacy Act nor access to the OAIC for dispute resolution.

2. **Access to CDR at community stores for book up purposes**

Community stores in indigenous communities could request access to CDR information as part of its application process.

The misuse of information derived from the CDR in those communities could be particularly damaging given the size of the community and the interrelationship between the store and the community members. If the community store was not an accredited entity and was not operating as a corporate structure, the consumer would not have the protections of the Privacy Act nor access to the OAIC for dispute resolution.

LAQ submits that:

- Data should not be made available to non-accredited entities and accreditation should not be granted to entities that are not regulated by the Privacy Act;
- Where data is provided for the purpose of the provision of goods and services and there are no goods or services provided, the consumer should have a right to have the information deleted;
- Time limits should be imposed for the retention of CDR depending on the nature of the data and legislative requirements to keep data.

Marketing/On selling of data

There does not appear to be any prohibition on direct or indirect marketing to consumers who have provided CDR information for one purpose and then have additional products marketed to them for another purpose. One of the reasons that direct marketing by credit reporting agencies was specifically prohibited in the credit reporting regime was because of a concern that direct marketing was likely to promote irresponsible lending.

It is not clear why access to CDR will be treated differently to information held by credit reporting agencies.

LAQ is concerned that services provided to consumers derived from CDR data may be refused unless consumers consent to receiving direct marketing. In the legislation there is no prohibition placed on service providers refusing a service if the consumer does not agree to receive direct marketing from them.

The exposure draft does not address the issue of consent for indirect marketing and whether consumers have the right to refuse the use of their information for indirect marketing purposes.

The legislation does not protect consumers from entities who have gained access to CDR information from on selling their data, particularly in de-identified form to a fourth party. Given the relative ease by which the entity that has received on sold data could re-identify the consumer, this is potentially of great concern, as these entities will not be required to comply with the CDR requirements.

LAQ submits that the legislation should include a prohibition on direct and indirect marketing and on sale of CDR.

Other forms of accessing data

In our view the proposed legislation is a missed opportunity to deal with other forms of accessing data. Small amount lenders routinely require consumers to provide their passwords to allow the lender to access the consumer's banking records for application assessment processes. The bill does not prohibit these screen scraping processes and provides no incentives for these entities to move to the CDR system.

LAQ submits that the legislation should include these other forms of accessing data.

Dispute Resolution

The legislation envisages that the OAIC will have a regulatory and complaint handling role. In our view this is inadequate because:

- It is not appropriate for the OAIC to act as regulator and deal with complaints. There is an inherent conflict in these two functions; and
- The OAIC has very limited resources for individual complaint handling. From our experience in the credit reporting area they have very little experience in resolving individual complaints in a timely manner.

LAQ submits that the regulator and complaints handler should be separate

Avenues of Redress

Under the draft bill, the right of a consumer to complain depends on whether:

- The entity is accredited or non-accredited;
- The entity is regulated or not regulated by the Privacy Act;
- The entity belongs to an Ombudsman scheme and the type of complaint is within the jurisdiction of the scheme;
- The entity is a fourth party holder or is the recipient of de-identified data.

OAIC unable to deal with complaints of non-accredited entities who are not regulated by the Privacy Act

If non accredited entities were provided with access to CDR information as envisaged by the exposure draft and they were not regulated by the Privacy Act, then the OAIC would not have power to hear complaints in relation to the misuse of data by the non-accredited entity. A similar issue would exist for fourth party entities.

Accredited entities who are members of an external dispute resolution scheme

For accredited entities who are members of an ombudsman scheme, we presume that the OAIC may authorise them to deal with CDR complaints from consumers and small businesses, similar to how the OAIC has authorised the Australian Financial Complaints Authority, AFCA (and

previously the Credit and Investment Ombudsman and Financial Ombudsman Service), the Telecommunications Industry Ombudsman and the state based Energy Ombudsman to deal with individual complaints arising out of the credit reporting system.

If the OAIC were to provide authorisation to these Ombudsman schemes for CDR purposes, this would provide an avenue for consumers to resolve individual complaints

LAQ supports the OAIC having the power to authorise external dispute resolution scheme/s that meet/s the appropriate benchmarks to resolve these types of complaints.

For current Ombudsman schemes authorised to deal with credit reporting complaints, it might require the Ombudsman schemes to change their terms of reference to consider complaints from consumers in relation to CDR complaints.

Below are two situations where the consumer is not typically able to access the Ombudsman scheme.

- The accredited entity has requested access to the CDR for the purposes of assessing an application but subsequently declined the application and as the person is not a customer of the accredited entity they are unable to access the Ombudsman;

- The accredited entity requests access to the CDR as a condition precedent to the provision of services but the consumer thinks it is unreasonable to provide access to the CDR.

LAQ submits that the OAIC only authorise those entities that can deal with all complaints arising out of the use of CDR information.

If the OAIC were to authorise EDR schemes to deal with CDR complaints, this would deal with the issue of the OAIC acting as both the regulator and complaint handler for accredited entities who are members of these schemes.

However it would not resolve the issue for consumers dealing with:

- Entities who are not accredited and are not regulated by the Privacy Act, as they would not have access to the OAIC or the approved ombudsman scheme; and

- Entities that are accredited but are not members of an authorised EDR scheme as consumers only avenue of complaint would be the OAIC.

LAQ submits that only those entities that belong to an authorised Ombudsman scheme with the appropriate jurisdiction should have access to CDR.