



16 December 2016

By email: data.access@pc.gov.au

Data Availability and Use
Productivity Commission
GPO Box 1328
Canberra ACT 2601

Dear Commissioners

Public Inquiry: Data Availability and Use – Draft Report

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the *Data Availability and Use – Draft Report October 2016 (Draft Report)*.

Consumer Action would like to respond to three aspects of the Draft Report:

- the proposed Comprehensive Right (Draft Recommendation 9.2);
- comprehensive credit reporting (Draft Recommendation 4.1);
- new research on the impact of big data on the insurance industry.

Our submission largely focuses on commercial uses of consumer data. Broadly, while we support the increased access to data for consumers, we have concerns that the proposed framework does not incorporate sufficient consumer protections, which will impede trust and confidence in any new data framework. Our extensive casework experience reveals that, without careful safeguards, innovative and predatory business models are quick to emerge and regulation slow to catch up.

For the benefits of increased access to data to be realised by all Australians, further consideration must be given to the likely impact on vulnerable consumers. This will necessitate free and easy access to data and effective dispute resolution.

Increased data availability and use may lead to benefits for some consumers, but will come at a cost for others. For example, new research by the Actuaries Institute released after the Draft Report shows that use of data in insurance risk profiling will likely lead to insurance becoming unaffordable for people with uncontrollable risks, such as genetic conditions.

Our comments are detailed more fully below.

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Summary of recommendations

1. Strengthen consumer protections to increase trust and confidence
 - a) Strengthen consumer protections and apply appropriate penalties for breaches of data privacy and misuse of consumer data.
 - b) The *Australian Consumer Law* should be amended to include a prohibition on unfair trading.
2. Data use in insurance
 - a) The Government reviews the impact of data on both the life and general insurance industries, examining the social impact and developing pre-emptive policy approaches.
3. Data access must be free for consumers
 - a) Data holders should be prohibited from charging consumers for accessing, editing or transferring an individual's consumer data (including personal and associated data).
 - b) Alternatively, this issue should be included in the independent review of pricing of public sector datasets (Draft Recommendation 7.2).
4. Data access must be easy for consumers
 - a) A process for viewing, editing and transferring data that is simple, accessible and fast.
 - b) Appropriate best practice regulatory guidance should be provided to data holders with penalties for non-compliance.
5. Consumers must have access to free and effective dispute resolution
 - a) The Office of the Australian Information Commissioner should be adequately funded to perform its dispute resolution role and dramatically improve resolution times.
6. Comprehensive credit reporting
 - a) The Productivity Commission should not mandate compulsory comprehensive credit reporting.
 - b) During a hardship variation, a credit report:
 - i) should record repayment history information as up-to-date; and
 - ii) should not contain a 'hardship flag'.

About Consumer Action

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.

Strengthen consumer protections to increase trust

Trust is essential to a new data framework, particularly in light of the consumers' current mistrust of companies to use their information appropriately. A recent KPMG survey found that almost one quarter of Australian consumers said they were 'extremely concerned' about how companies handle and use their personal information.¹ The backlash over the 2016 Census and concerns about recent telecommunications data breaches² reflect the lack of community trust. More recently, Yahoo announced a data breach from 2013 affecting one billion accounts.³ Increasing trust will be critical to the success of any new data framework.

To ensure trust and confidence in the commercial use of data, the data access framework must include strong consumer protections. This is necessary to prevent businesses misusing consumer data to unethically boost profits.

The framework proposed in the Draft Report, together with the current state of our privacy and consumer laws, do not provide adequate safeguards against the misuse of data by businesses.

Our Centre sees the consequences of unfair and predatory business models that emerge to profit from the misuse of consumer data. When the Federal Government increased access to VET FEE-HELP loans, a new business model—education brokers—quickly identified a profit opportunity and misused personal information to directly market VET courses to jobseekers. Our Centre received numerous complaints from job seekers who provided their personal details to an employment website in the hope of getting a job, only to receive cold calls from telemarketers using high pressure sales tactics and misleading representations to spruik unsuitable education courses.

Increased data sharing has also created new concerns for consumers, and new unfair business models targeted at those concerns. Credit reporting, one of Australia's early data sharing systems, has catalysed the growth of the predatory "credit repair" industry. Credit repair businesses target people concerned about their credit report and sell high cost, low value services with misleading promises about what can be achieved. The significant consumer detriment caused by credit repair businesses has been detailed by the Australian Securities and Investments Commission (**ASIC**) in its recent report.⁴

Mere disclosure will not prevent unfair business models or improper conduct. There needs to be clear incentives for good behaviour, and severe penalties for misconduct. The risk of reputational damage alone is not a sufficient incentive or penalty. This is clear from the spate of scandals in the banking,

¹ KPMG, *Creepy or cool? Staying on the right side of the consumer privacy line* (2016), available at <<https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2016/11/creepy-or-cool.pdf>>.

² See e.g. <<http://www.smh.com.au/business/your-mobile-phone-records-and-home-address-for-sale-20161116-gsqkwe.html>>.

³ <http://www.theage.com.au/technology/consumer-security/yahoo-discloses-another-data-breach-affecting-1-billion-accounts-20161214-gtbggy.html?utm_content=buffer707a0&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer>.

⁴ ASIC, *Report 465: Paying to get out of debt or clear your record: the promise of debt management firms* (January 2016).

financial and insurance sectors, where reputational damage was not sufficient incentive for proper behaviour.

Strengthening consumer protections is essential in an environment where the proposed framework does not include the right to delete historical data, only the right to stop collection. While we welcome the proposed right to stop data collection, this alone is an inadequate remedy in cases where data has been collected improperly, either where the consumer did not give full and informed consent, or where the business (or a third party) subsequently uses that data for an unfair or improper purpose.

Disclosure will, on its own, be insufficient to ensure meaningful choice by consumers. It is well understood that disclosure alone does not work, as acknowledged by the Murray Financial System Inquiry.⁵ Of non-European countries, Australians are least likely to read a privacy policy when entering a website.⁶ There is a larger problem, in that consumers cannot meaningfully consent to the collection of data for an unknown use. As noted in the Draft Report, no-one yet knows the future possible uses of data.

We agree with the Productivity Commission's observation that amendments to the *Australian Consumer Law* may be needed to respond to the challenges posed by big data and ensure fairness in consumer markets. One appropriate safeguard that could help to engender trust in the data framework is a prohibition on unfair trading. For more information on the utility of a prohibition on unfair trading, we attach our discussion paper, *Unfair trading and Australia's consumer protection laws (2015)*.⁷ In addition to a prohibition on unfair trading, data-specific laws may be necessary.

Recommendation 1

1 a) Strengthen consumer protections and apply appropriate penalties for breaches of data privacy and misuse of consumer data.

1 b) The *Australian Consumer Law* should be amended to include a prohibition on unfair trading.

Data use in insurance

The increased use of public and private sector data by the insurance industry may benefit some consumers but will disadvantage others, and may lead to underinsurance of people with uncontrollable risks, such as genetic conditions. This is a looming public policy issue that regulators, policy makers and legislators will need to address.

The Draft Report highlights the increasing use of data by insurers in setting premiums, including through fitness wearables and telematics devices in cars. Access to this data will give insurers a better understanding of the insured's behaviour and risk profile—for example, whether they engage in daily

⁵ Australia Government, *Financial System Inquiry: Final Report* (November 2014) 193.

⁶ KPMG, *Creepy or cool? Staying on the right side of the consumer privacy line* (2016), available at <<https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2016/11/creepy-or-cool.pdf>>.

⁷ Consumer Action Law Centre, *Discussion Paper: Unfair trading and Australia's consumer protection laws* (July 2015), available at <<http://consumeraction.org.au/unfair-trading-discussion-paper>>.

exercise, or whether they drive their car above the speed limit. This will enable the insurer to better price risk, and adjust the individual's premium. It will also create a feedback loop that incentivises people to take steps to reduce their risk profile, and thus their premiums.

Since the release of the Draft Report, the Actuaries Institute has released a green paper on the use of data in insurance. In *The Impact of Big Data on the Future of Insurance*,⁸ the Actuaries Institute found that:

- Through the better understanding of the consumer's behaviour and risk profile, insurers will be able to provide tailored and more accurately priced products. Insurers will better identify risks that individual customers may be facing and use price signals to change their behaviour.
- However, the insurer's responsibility to disclose risk information to the consumer is unclear and may prove contentious.
- Governments may have a role to play when competitive insurance markets do not deliver adequate cover at an affordable price for all, as is the case today for certain compulsory lines. This is especially so when the underlying risk is beyond the consumer's control. A key issue is whether society wants individuals to pay a price for insurance that reflects their risk or should everyone have access to affordable insurance regardless of the risk? Policymakers will need to consider a balance between these two approaches, and one which will likely vary across different areas of the insurance market.
- Questions for policymakers will arise around privacy issues, who owns the information, what personal data might be used for and to whom it may be passed.
- Improved risk pricing may also include "uncontrollable risks," such as genetic make-up, where "the use of big data will raise unaffordability issues that cannot be mitigated by the individual modifying the risk". These issues have society-wide and public policy implications.

The report also details the trade-off between risk reduction and privacy:

Increased awareness of consumer behaviour, gleaned from the capture and analysis of higher volumes of detailed data, allows service and product providers to improve their offerings to individuals. Individuals will also get the opportunity to receive tailored information from their insurer about the risks they face. Insurers can develop services which give customers signals about how to reduce their risk levels and hence their insurance premiums. This will lead to a society-wide risk reduction benefit.

Nevertheless, the increase in the volume of data held on people and the way it is used (or perceived to be used) may lead to an increase in privacy and discrimination concerns. Government will need to consider the adequacy of currency privacy rules and rules for access, ownership and use of personal data.⁹

Indeed, community concern about discrimination in insurance—for example, mental health exclusions in travel insurance—is already apparent.¹⁰

The Actuaries Institute identified the following potential policy responses to this problem:

⁸ Actuaries Institute, *The Impact of Big Data on the Future of Insurance: Green Paper* (2016), available at < <http://actuaries.asn.au/Library/Opinion/2016/BIGDATAGPWEB.pdf>>.

⁹ Ibid 5.

¹⁰ <http://www.abc.net.au/news/2016-11-25/insurance-industry-in-dark-ages-say-mental-health-advocates/8058244>.

- placing limits on life insurance premiums as currently occurs under compulsory third party and health insurance as a social good;
- the government entering the market as “insurer of last resort” as it currently does in relation to commercial interruptions arising from terrorism;
- restrictions on what information an insurer may seek, require insurers to be more transparent about the use of data and whether it will be sold or passed on, and confirm the consumer's right of to understand whether their social network footprint or internet browsing history is being used.
- restrictions on the use of certain data on uncontrollable risks for pricing;
- requiring the insurer to share knowledge of risk with the consumer, particularly where there is no incentive to do so or a financial interest not to do so.

A broader review of the impact of increased availability and use of private and public data on insurance is needed.

Recommendation 2

2 a) The Government reviews the impact of data on both the life and general insurance industries, examining the social impact and developing pre-emptive policy approaches.

Comprehensive Right

Broadly, we support data transfer for consumers and the right to opt-out of data collection under the proposed Comprehensive Right (Draft Recommendation 9.2).

Access to data in machine-readable format will allow competitors and third parties to create tools that consumers can use to make better choices about the products and services which best suit their needs. This could benefit consumers in markets, particularly in essential services, telecommunications, and banking.

However, the data framework will need to ensure that the benefits flow to all consumers—not just the savvy consumers that have the capacity to take advantage of this sort of information. The Commission should give further consideration to ensuring vulnerable consumers are supported in the new framework, lest price discrimination be exacerbated. Data transfer will only work if it is free and easy for consumers.

Similarly, data transfer can only be free and easy to access if intermediaries are prevented from building business models based on conflicted remuneration structures. To ensure trust and confidence in the commercial use of consumer data by competitors and third parties, stronger consumer protections and adequate remedies will be necessary.

Data access must be free for consumers

The Commission ‘envisages that data holders may levy a fee for providing access and/or limit the number of free access opportunities per year.’ We strongly recommend that data holders be prohibited

from charging for accessing, editing or transferring an individual's consumer data under the proposed Comprehensive Right.

Many businesses, small and large, already collect and store consumer data. This may be due to regulatory requirements or because the business derives value from this data from better targeting of products and services or by on-selling the data. Our joint report with Deakin University, *Profiling for Profit (2013)*,¹¹ details the use of data in consumer lending to better target market products to profitable customers. Given the marginal costs of distribution of data to consumers is low, and maintenance of the dataset is valuable to the business, businesses should not now be given a new income stream in the form of data access fees.

Any charge—even a small charge—will be a barrier to data access and transfer for consumers, particularly for people on low incomes. Indeed, it is people on lower incomes who most need the potential cost savings that data transfer may enable.

Charging for access and data transfer will undermine the utility of a person's right to view and request corrections. The maintenance of an accurate and current dataset is valuable to the data holder, and thus corrections should be encouraged. Given the large number of businesses holding a consumer's data, people will be reluctant to access each dataset when needed if each access involves a fee. Free access will improve transparency and trust. In light of the 'trust deficit', in which people trust organisations to use their data appropriately less than their trust in the organisation as a whole,¹² increasing transparency is essential.

Requiring free access will simplify the proposed monitoring role of the ACCC and reduce regulatory costs. The difficulty in assessing a "reasonable charge" is clear from the outcome of a recent group complaint to the Privacy Commissioner about Veda's charge for access to credit reports.¹³ Under the privacy laws, a person is entitled to a free copy of their credit report once every 12 months. If the person seeks more than one copy within that period, any charge by the credit reporting bureau must not be 'excessive'.¹⁴ More than two years after the group complaint was lodged, the Privacy Commissioner determined that there was insufficient evidence to decide whether a charge of \$79.95 was excessive.

There are numerous examples of businesses using "reasonable" fees to recoup unrelated expenses. The recent decision by the High Court of Australia in the bank fees class action essentially rubber stamped banks passing on the cost of other overheads to customers under the guise of late penalty fees.¹⁵ The Court held that ANZ was entitled to charge customers a \$35 late payment fee on credit cards even though the cost actually incurred by ANZ due to a particular late payment was approximately \$3.

¹¹ Paul Harrison, Charles Ti Gray and Consumer Action Law Centre, *Profiling for profit: A report on target marketing and profiling practices in the credit industry* (February 2012) available at <<http://consumeraction.org.au/wp-content/uploads/2013/01/Profiling-for-Profit-FINAL-1-5-12.pdf>>.

¹² Royal Statistical Society, *Research on trust in data and attitudes toward data use / data sharing* (October 2014), available at <<http://www.statslife.org.uk/images/pdf/rss-data-trust-data-sharing-attitudes-research-note.pdf>>.

¹³ *Financial Rights Legal Centre & Ors and Veda Advantage Information Services and Solutions Ltd* [2016] AICmr 88 (9 December 2016), available at <<http://www.austlii.edu.au/au/cases/cth/AICmr/2016/88.html>>.

¹⁴ *Privacy Act 1998* (Cth) s 20R(6).

¹⁵ *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28.

Recommendation 3

- 3 a) Data holders should be prohibited from charging consumers for accessing, editing or transferring an individual's consumer data (including personal information and associated data).
- 3 b) Alternatively, this issue should be included in the independent review of pricing of public sector datasets (Draft Recommendation 7.2).

Data access must be easy for consumers

The process for accessing data must be easy. The ability to view and correct information held about a person has been a feature of privacy and freedom of information laws since the 1980s. However, the processes for access have been characterised by lengthy delays, bureaucracy, and legalistic dispute resolution. For the benefits of increased data access to be realised by consumers, the process for viewing, editing and obtaining a copy of data must be easy, including standard and accessible processes and short timeframes.

Recommendation 4

- 4 a) A process for viewing, editing and transferring data that is simple, accessible and fast.
- 4 b) Appropriate best practice regulatory guidance should be provided to data holders with penalties for non-compliance.

Effective dispute resolution

Not all data holders are members of industry ombudsman schemes. We note with some concern that the OAIC will be the default dispute resolution forum for data holders that are not members of an approved industry ombudsman scheme. Our casework experience suggests that OAIC is underfunded and often unable to deliver timely decisions on privacy complaints. As noted above, the determination of our group complaint to the Privacy Commissioner about misconduct by Veda took more than two years. If its role is expanded to provide dispute resolution for data complaints, the OAIC will need substantially more funding.

Recommendation 5

- 5 a) The Office of the Australian Information Commissioner should be adequately funded to perform its dispute resolution role and dramatically improve resolution times.

Comprehensive Credit Reporting (CCR)

We agree with the Productivity Commission that comprehensive credit reporting should not be mandated at this stage (Draft Recommendation 4.1).

However, we are concerned by the Draft Report's apparent position on the potential inclusion of a flag on credit reports during hardship. The Draft Report stated:

Greater clarity on how the hardship provisions should interact with CCR could help pave the way for greater industry participation in the scheme. Alternatively, the inclusion of a hardship flag in credit reports could address the concerns expressed by participants to this Inquiry. Evidence from submissions indicates that this issue should be resolved to enable the benefits of CCR to be realised.¹⁶

We have serious concerns about the operation of a hardship flag, and there remains considerable debate about the merits of a hardship flag. If a hardship variation has a perceived or actual adverse impact on a credit report, many people will be dissuaded from accessing timely and beneficial hardship arrangements. An in-depth policy discussion informed by behavioural science is necessary before any such suggestion is adopted.

Consumer advocates, supported by principles of contract law and by a recent determination of the Financial Ombudsman Service (**FOS**), recommend that repayment history information on credit reports should be recorded as up to date during a hardship variation. FOS determined that credit reports should not record RHI as in arrears if the parties have agreed to vary the contract following an application for a hardship variation, and the consumer complies with the arrangement.¹⁷ This is because repayments under the initial contract are not 'due and payable'. Rather, according to the agreed variation, the consumer is up-to-date with their obligations. This is a sensible and reasonable decision.

A hardship flag may give lenders a more accurate understanding of a person's financial position. However, in most cases a credit report will show payments as overdue in the period leading up to the hardship variation, signalling financial stress. Importantly, the unsuitability of a new credit facility for a person in financial hardship will be apparent to the lender if it complies with its legal obligations to undertake an assessment of suitability under the *National Consumer Credit Protection Act 2009* (Cth). Lenders must do more than simply glance at a credit report in order to comply with responsible lending obligations under that Act. Lenders must make reasonable enquiries about the person's financial situation, and take steps to verify that information. If a person is in hardship, this will be apparent from the lender's actual enquiries and verification. For example, if a person is in hardship due to loss of employment, and she applies for a new credit product, the hardship will be apparent from the lender's enquiries about her current income.

A significant downside of the proposal for a hardship flag is that it will discourage those experiencing financial difficulty to seek a hardship variation in the first place. Consumer Action's team of financial counsellors receive more than 20,000 calls from Victorians each year with money, debt and credit concerns. From experience, we know that most consumers in financial difficulty are very concerned about their credit report and their ability to obtain credit in the future. Indeed, the desire to have a good credit report is so strong that it has enabled a predatory "credit

¹⁶ At 169.

¹⁷ Financial Ombudsman Service, Determination, Case number 422745 (21 April 2016), available at <<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/422745.pdf>>.

repair" industry, which profits from promising to remove adverse credit report listings. ASIC has described in some detail the significant consumer detriment caused by credit repair businesses in a report published earlier in 2016.¹⁸

Temporary hardship variations can reduce financial stress, enabling the consumer to stabilise their finances, get back on track and maintain a good relationship with their lender. Hardship arrangements benefit both consumer and the credit provider. The comprehensive credit reporting system must not discourage this useful tool.

Recommendation 6

6 a) The Productivity Commission should not mandate compulsory comprehensive credit reporting.

6 b) During a hardship variation, a credit report:

- i) should record repayment history information as up-to-date; and
- ii) should not contain a 'hardship flag'.

We would be pleased to discuss these issues further with the Commission. Please contact Policy Officer Cat Newton on 03 9670 5088 or at cat@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

CONSUMER ACTION LAW CENTRE



Gerard Brody
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¹⁸ ASIC, *Report 465: Paying to get out of debt or clear your record: the promise of debt management firms* (January 2016).