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By email: OBR@treasury.gov.au

Open Banking Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir/Madam

Open Banking Review - Issues Paper

Consumer Action Law Centre (**Consumer Action**), Financial Rights Legal Centre (**Financial Rights**) and Financial Counselling Australia (**FCA**) are pleased to make this submission in response to the Open Banking Review Issues Paper.

We acknowledge that increased access for consumers to their own data has the potential to create consumer benefit, as outlined in the Issues Paper. If appropriate safeguards are put in place, Open Banking could make it easier for consumers to find better deals, and reduce the costs and inconvenience of switching financial service providers. It could also make personal budgeting much more straightforward.¹ However, we are concerned that the Issues Paper has focused heavily on the promised 'benefits' of Open Banking, without giving significant weight to the potential costs and risks to consumers. In fact, the 'costs and risks associated with change' outlined in the Issues Paper relate only to potential costs to business.

While Open Banking offers opportunities to consumers, it also poses significant risks. Robust legal frameworks and regulatory oversight will be required to ensure that consumers are adequately protected and able to benefit from the Open Banking regime. Data sharing, competition and innovation in the financial system should be considered a means to deliver benefits to consumers, but not an end itself. We urge the Review to consider the potential costs and risks to consumers, and the regulation needed to mitigate these, in much further detail.

¹ In the United Kingdom, one of the new services that is predicted to emerge as a result of the Open Banking regime is aggregators or 'personal financial management' services that help people manage their money, for example, through digital comparison tools: see Faith Reynolds, *Open Banking: A Consumer Perspective*, January 2017, p. 7, available at:

<https://www.home.barclays/content/dam/barclayspublic/docs/Citizenship/Research/Open%20Banking%20A%20Consumer%20Perspective%20Faith%20Reynolds%20January%202017.pdf>.

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As the Issues Paper has already outlined many of the potential benefits of Open Banking to consumers, we have limited our submission below to some of the potential risks and costs.

About the contributors

Consumer Action Law Centre

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.

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 Rights took almost 25,000 calls for advice or assistance during the 2016/2017 financial year.

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.

Open Banking and consumer trust

We are supportive in principle of a general consumer right that applies broadly across the economy to enable consumers to access and control their data held by businesses and government, as suggested by the Issues Paper. However, this broad consumer right must be supported by a strong regulatory framework, a proactive and adequately resourced regulator,² and accessible avenues for dispute resolution and consumer redress. These protections will be critical to help ensure that people have confidence and trust in the Open Banking regime.

Individuals' confidence and trust in the way data is used, particularly data that is also personal information, is integral to the realisation of economic and social benefits associated with data being more widely available. Despite this, research from the United Kingdom found that there is a 'data trust deficit' whereby trust in institutions to use data appropriately is lower than trust in them in general.³ This is likely to be the case in Australia also. We therefore strongly agree with the Issues Paper that security of data and customer privacy will be 'vital in developing and maintaining customers' trust in the benefits of Open Banking'. We outlined a number of potential threats to consumer trust in Open Banking below for the Review's consideration.

Challenging assumptions about consumer choice

The Issues Paper states that Open Banking is an example of 'the increasing trend by governments around the world to find ways to allow greater choice for customers' and will increase 'the range of products and services available to customers'. The assumption appears to be that greater choice will ultimately benefit consumers. However, there is significant behavioural research that indicates that greater choice can actually hamper decision-making, and lead to poor consumer outcomes.

Professor Amelia Fletcher from the Centre for Competition Policy has found that consumer decision-making may be worsened if consumers perceive that a decision will be an 'especially hard or time-consuming one to make'. Professor Fletcher found that people may be more likely to make mistakes if they are given 'too much information (information overload), too much choice (choice overload) or too little time to make a decision'.⁴ A market with a large number of choices can therefore be just as inefficient as a market with few choices if consumers do not understand what is on offer, cannot easily compare different offers, or are not rewarded for making the effort to search, compare and switch.

We urge the Review to consider whether increased choice from Open Banking will result in improved consumer outcomes, particularly for vulnerable and disadvantaged consumers.

² As noted by Citizens Advice in the United Kingdom, 'this involves an evolution of what it means to regulate and a shift towards interventions which have a sophisticated understanding of consumer behaviour at their centre': Citizens Advice, *Applying behavioural insights to regulated markets*, 26 May 2016, p. 30.

³ Royal Statistical Society, *New RSS research finds 'data trust deficit', with lessons for policymakers*, 22 June 2014, available at: <https://www.statslife.org.uk/news/1672-new-rss-research-finds-data-trust-deficit-with-lessons-for-policymakers>.

⁴ Professor Amelia Fletcher, Centre for Competition Policy, *The Role of Demand-Side Remedies in Driving Effective Competition: A Review for Which?*, 7 November 2016, p. 17.

Ensuring new entrants and innovation benefit consumers

The Issues Paper also notes the role that increased data sharing could play ‘in the development of alternative business models and products and services’ and suggests it could ‘decrease barriers to entry for new providers’. While we are supportive of innovation and competition in the financial system, we have seen ‘innovation’ used as a guise in the past to justify predatory practices that have led to significant consumer harm. Some ‘innovation’ we have seen include credit card providers competing on balance transfer offers, rewards points and loyalty schemes⁵ while interest rates remain uncompetitive and high, and payday lenders competing on fast online access to expensive cash.⁶

Open Banking will ultimately see third parties with increased access to consumer data. We are concerned that access to banking data by predatory businesses like ‘debt management firms’ will harm consumers, rather than help them navigate the complexity of our financial system.⁷ So-called debt management firms are a clear example of the exploitative behaviour that can emerge in the absence of appropriate consumer protection laws and regulation. These firms target vulnerable people in financial difficulty or concerned about their creditworthiness to sell a range of interconnected services. With few barriers to entry and 2 million Australians in high financial stress,⁸ business is booming for these companies. However, there is a growing body of evidence about the significant consumer detriment caused by these largely unregulated businesses.⁹ While these companies may claim to be able to ‘help’ people manage their money by accessing their data, in reality they charge significant fees for often very poor quality and conflicted advice.

We support new entrants to the financial system, but believe appropriate protections must be put in place for consumers before opening the floodgates. We need only look at the debt management firm sector to see that unlimited new entrants and ‘innovation’ in sales practices can lead to spectacularly poor outcomes for consumers, particularly vulnerable and disadvantaged consumers.

Risks of ‘profiling for profit’

Ultimately, Open Banking will see more consumer data in the hands of business, and will increase firms’ ability to ‘profile for profit’. The growth in data collection by business (especially credit providers) to target products and marketing brings considerable risks for consumers. Target marketing of products to particular groups of consumers is not new.¹⁰ In consumer lending,

⁵ Reserve Bank of Australia, *Submission to the Financial System Inquiry*, March 2014, p.162.

⁶ A study by the Financial Conduct Authority in the UK found that only around 9-12% of people who wanted high-cost short-term credit chose firms on the basis that they are the cheapest, had good interest rates or were the best offer on a price comparison website: Financial Conduct Authority, *High-cost credit including review of the high-cost short-term credit price cap*, July 2017, p. 23, available at: <https://www.fca.org.uk/publication/feedback/fs17-02.pdf>.

⁷ Faith Reynolds report, p 7

⁸ The Conversation, *Two million Aussies are experiencing high financial stress*, 26 August 2016, available at: <http://theconversation.com/two-million-aussies-are-experiencing-high-financial-stress-64367>.

⁹ Australian Securities and Investments Commission, *REP 465 Paying to get out of debt or clear your record: The promise of debt management firms*, January 2016, available at: <http://download.asic.gov.au/media/3515432/rep465-published-21-january-2016.pdf>; Financial Conduct Authority, *Thematic Review TR15/8: Quality of Debt Management Advice*, June 2015, available at: <https://www.fca.org.uk/publication/thematic-reviews/tr15-08.pdf>.

¹⁰ 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*, 2012, pp 5-6, available at: <http://dro.deakin.edu.au/eserv/DU:30064922/harrison-profilingfor-2012.pdf>.

technology can be used to identify consumers who are likely to be profitable, tailor and price products that the most profitable customers are likely to accept, and develop strategies to reduce the likelihood that the most profitable customers will close their accounts.¹¹

Consumers struggling with debt are often the most profitable customers for banks and lenders. It is often argued that it is not in the interests of lenders to extend credit to people who are unable to repay. However, our casework experience suggests that many consumers struggle for years at a time to make repayments to their credit accounts without ever reaching the point of default, but paying significant amounts of interest. These customers are very profitable for lenders, despite the fact that repayments are causing financial hardship. We are concerned that we will see increasing occurrences of consumers being ‘profiled for profit’ in the Open Banking regime, which will see more people being offered unsuitable (but highly profitable) products.

Another example of profiling for profit is the practice of some pay day lenders whereby customers are asked to provide access to their bank statements via third party account aggregation software for responsible lending assessment purposes. Providing access to this ‘screen scraping’ technology can amount to a breach of the terms and conditions of a customer’s bank account, and can put customers at risk of losing their protections under the E-Payments Code.¹² We are concerned that some lenders may be keeping these links open after the initial lending assessment has been completed, so that they can direct their marketing of further loans to consumers specifically when their account is empty and their need for cash is likely to be at a high point. Concerns about account monitoring have been echoed by consumer advocates in the United Kingdom, who have raised fears that ‘Open Banking enables lenders to continually monitor accounts and take repayment as soon as income is detected.’¹³ These are real risks that are poorly understood by consumers and unlikely to be dealt with by disclosure and consent because of the take it or leave nature of the service.

Seemingly ‘free’ business models could also see an increase in the onward sale of transactional data or the commission-based selling of unsuitable financial products, because it is a way for firms to monetise what they do without requesting a fee upfront.¹⁴ These practices will eventually erode community trust and confidence in the Open Banking regime.

The impact of price discrimination on low-income households

The Issues Paper touts the ability of Open Banking to lower fees or loan interest rates for banking customers. However, the flip side to lower fees and interest rates for some is that costs will increase for others. These ‘others’ will undoubtedly be Australia’s most vulnerable, disadvantaged and financially stressed households. Inextricably linked to Open Banking will be the new comprehensive credit reporting regime, which has already reportedly caused harm to low income and disadvantaged consumers in the United Kingdom.¹⁵

¹¹ Ibid.

¹² See discussion in the Final Report of the Small Amount Credit Contract Review, March 2016, at p. 76-77, available at https://static.treasury.gov.au/uploads/sites/1/2017/06/C2016-016_SACC-Final-Report.pdf.

¹³ Faith Reynolds, *Open Banking: A Consumer Perspective*, January 2017, p. 20, available at: <https://www.home.barclays/content/dam/barclayspublic/docs/Citizenship/Research/Open%20Banking%20A%20Consumer%20Perspective%20Faith%20Reynolds%20January%202017.pdf>.

¹⁴ Ibid p. 18.

¹⁵ Centre for Responsible Credit, *Does increased credit data sharing really benefit low income consumers?*, February 2013.

Those in more precarious financial situations will likely be unfairly charged higher amounts for credit, or be pushed to second-tier and high cost fringe lenders. There are serious fairness considerations at play here. As banks and credit providers are increasingly able to use consumer data and technology to better target particular financial services offers to ‘profitable’ consumers, we will likely see an increased use of ‘risk-based pricing’ that may result in ‘riskier’ borrowers paying higher interest rates. It appears to us that some banks already engage in this conduct.

A 2015 report by United States organisation Data Justice has previously raised concerns about big data enabling advertisers to offer goods at different prices to different people to extract the maximum price from each individual consumer. The report found that such price discrimination not only raised prices overall for consumers, but particularly hurts low-income and less technologically savvy households.¹⁶ The ability to segment the market further will mean that firms can ‘cherry pick’ the most commercially viable consumers and exclude others (or charge them more).¹⁷

Price discrimination should be a cause for concern where it contributes to lower-income people paying higher prices than others, or where pricing discrimination negatively affects particularly marginalised groups. These are key issues of fairness and equity. We urge the Review to consider the implications of increased risk-based pricing as a result of Open Banking, particularly for vulnerable and disadvantaged groups.

We note that it is unclear the extent to which Open Banking data will be subject to Australia’s credit reporting regulations under Part IIIA of the *Privacy Act 1988*. Credit reporting is regulated by fairly prescriptive legislation that attempts to balance the desire of credit providers to have information about a borrower’s credit history with protections for consumers. This includes requirements for ensuring data accuracy and currency, plus limitations on the time data can be retained for, what it can be used for, and the notices consumers must receive before certain negative information is reported. We are concerned that without an adequate regulatory framework Open Banking could effectively circumvent credit reporting regulation, without any consideration of the competing policy imperatives.

Limitations of disclosure and consent

According to the Issues Paper, the Review will ‘consider how to ensure that the customer should become properly aware of the terms access and use of their shared data’. This approach is in line with traditional privacy frameworks that have assumed providers can fulfil their obligations by disclosing full information to consumers about product and services, thus putting the onus on consumers to inform themselves.

However, it is now recognised that disclosure and tick box consents (particularly through terms and conditions or privacy policies) are an ineffective form of consumer protection. Blanket terms and conditions in lengthy legalese can maximise what a business can do with someone’s data,

¹⁶ Data Justice, *Data Justice Report: Taking on Big Data as an Economic Justice Issue*, 2 October 2015, available at: <http://www.datajustice.org/blog/data-justice-report-taking-big-data-economic-justice-issue>.

¹⁷ Faith Reynolds, *Open Banking: A Consumer Perspective*, January 2017, p. 23, available at: <https://www.home.barclays/content/dam/barclayspublic/docs/Citizenship/Research/Open%20Banking%20A%20Consumer%20Perspective%20Faith%20Reynolds%20January%202017.pdf>.

whilst minimising their responsibility.¹⁸ The practice of bundling consent is particularly problematic, as it removes choice and control for consumers. These practices effectively mean that there is no meaningful choice – either give up privacy and control through accessing the service, or don't use the service at all.

'Tick box' compliance and disclosure, including privacy consents, have long been criticised as an ineffective way to protect consumers. In fact, one of the defining features of the Financial System Inquiry panel's final report was an explicit shift in focus from consumer protection regulation based on disclosure to one focusing on fair treatment of consumers. Implicit in that change is an acceptance that consumers are not necessarily capable of absorbing all of the information presented to them and, even if they do, various cognitive limitations and biases limit the ability of people to make rational choices. As noted in Faith Reynold's report on Open Banking in the United Kingdom, 'People already struggle to understand what data they are creating as part of daily life, let alone who owns it or how it's being used by digital companies.'¹⁹

Stronger privacy regulatory regime

There are clear limitations to the effectiveness of disclosure as a consumer protection tool.²⁰ We therefore caution against a narrow focus on disclosure, as opposed to broader regulation that requires business to access and use consumer data fairly. We note the amendments to the *Privacy Act 1988* which came into effect in 2014 were based on an Australian Law Reform Commission review in 2008. The rapidly evolving data capture and use landscape has undergone enormous change in the period since that review. Australia needs a strong, modern and future-proofed privacy regime to maintain consumer trust and confidence in the use of data. Improvement is not only needed in the substantive privacy protections themselves, but also the compliance and enforcement regime.

If disclosure is to form a useful part of the regime, its design should start with a consideration of how consumers actually use disclosure and how they make decisions, rather than a focus on compliance and risk avoidance. It should be designed with an understanding of what kind of information will be useful to consumers, and when and how to present it for maximum effect. Consumer testing of any proposed disclosure or consent process will be critical.²¹ Effective consumer protection, and resulting consumer confidence, cannot rely on disclosure alone.

¹⁸ Ibid p. 18.

¹⁹ Ibid p. 17.

²⁰ For example see: Omri Ben-Shahar and Carl E. Schneider, *More Than You Wanted To Know: The Failure of Mandated Disclosure*, Princeton, Princeton University Press, 2014.

²¹ For more information on performance-based consumer law regulation, see Lauren Willis, *Performance-Based Consumer Law*, 82 University of Chicago Law Review 1309 (2015), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2485667.

Please contact Katherine Temple, Senior Policy Officer on 03 9670 5088 or at katherine@consumeraction.org.au if you have any questions about our comments on the review.

Yours sincerely



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