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

Data Availability and Use
Productivity Commission
GPO Box 1428
Canberra ACT 2601

Dear Commissioners

**Public Inquiry: Data Availability and Use**

Consumer Action Law Centre (**Consumer Action**) is pleased to provide this submission in response to the Productivity Commission's Issues Paper for its inquiry on *Data Availability and Use*.

This submission primarily focuses on clause 5 of the terms of reference for the inquiry, that is, maintaining community trust and confidence in commercial and government use of data.

In our submission, measures to ensure trust and confidence in commercial use of data must go beyond privacy protections, and consider consumer protection settings. This is required to protect against consumer exploitation that might be occasioned by large businesses misusing data to unethically bolster profits, at the expense of consumers' best interests.

In relation to government use of data, we raise concerns about governments reducing privacy and confidentiality of government-funded services.

**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.

**Trust and confidence: profiling and target marketing**

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 UK finds that there is a 'data trust deficit' whereby trust in institutions to use data appropriately is lower than trust in them in general.[1] This is likely to be the case in Australia also.

Given the consumer experience of existing commercial uses of consumer data, (for example, consumer credit reporting data), we are concerned that trust and confidence will be further eroded unless effective consumer protection and other policies are enacted. These policies must include, but go beyond, privacy protections.

The ability of businesses to use data to inform marketing and pricing practices raises risks for consumers, particularly vulnerable and disadvantaged groups. The following discussion focuses mostly on the use of data in relation to consumer credit, but the analysis could equally apply to other markets, including insurance, household retail markets, and markets affected by new disruptive businesses like travel and accommodation.

Target marketing of products to particular groups of consumers is not new. However, advances in information technology permit businesses to access consumers' personal information and use complex systems to predict an individual's behaviour. In consumer lending, this 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.[2] These risks will intensify as markets becomes more 'converged', and large conglomerates combine consumer retail and financial services. To contextualise this risk, it has been reported (somewhat alarmingly) that insurance risks can be identified from the supermarket buying habits of consumers.[3]

It is often argued that data-informed predictive technology creates a win-win: consumers get access to products they want, and business can target their marketing and increase profits. However, the increased use of customer information has coincided with a sharp increase in levels of consumer debt. Over the last 20 years, the level of credit and charge card debt in Australia has

[1] 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
[2] Paul Harrison, Charles Ti Gray and Consumer Action Law Centre (2012) *Profiling for Profit: A Report on Target Marketing and Profiling Practices in the Credit Industry*, Deakin University and Consumer Action Law Centre, pp 5-6.
[3] A senior Woolworths figure has said that 'customers who drink lots of milk and eat lots of red meat are very, very good car insurance risks versus those who eat lots of pasta and rice, fill up their petrol at night and drink spirits. What that means is we're able to tailor an insurance offer that targets those really good insurance risk customers'. Natasha Wallace and Sarah Whyte, September 16 2013, 'Supermarket spies: big retail has you in its sights', *Sydney Morning Herald*, available at: http://www.smh.com.au/digital-life/digital-life-news/supermarket-spies-big-retail-has-you-in-its-sights-20130915-2trko.html

increased from a total of around $5 billion to almost $52 billion. Over 70 per cent of this balance—$33 billion—is accruing interest.[4]

Our 2012 report *Profiling for Profit: A Report on Target Marketing and Profiling Practices in the Credit Industry* produced with Deakin University presented evidence that the two trends are linked. For example, research regarding the US economy found that "the drop in information costs alone explains 37 per cent of the rise in the bankruptcy rate between the years 1983 and 2004".[5] Our report draws on public information about customer management systems, and describes how banks use sophisticated systems to glean intimate personal details in order to predict an individual's behaviour. Information is gathered from spending patterns, call centres, product registration and point-of-sale transactions. A copy of this report is appended to this submission.

It is not in the interests of lenders to extend credit to people who are unable to repay. However, it is well known to our caseworkers (and, we would suggest, to the credit industry) that there are large numbers of consumers who struggle for years at a time to make repayments to their credit accounts without ever reaching the point of default. These customers will be very profitable for lenders, despite the fact that these contracts cause financial hardship.

The Senate Economics Committee Inquiry, *Interest rates and informed choice in the Australian credit card market*, recognised the harm caused by long-term indebtedness, and recommended strengthening responsible lending obligations in relation to credit card lending.[6] A subsequent consultation paper issued by Treasury confirms that consumers exhibit behavioural biases in the credit card market leading to over-borrowing and under-repaying.[7] The availability of transaction and other data enables lenders to exploit these biases by targeting borrowers who exhibit them.

Banks and credit providers are increasingly able to use consumer data and technology to better target particular financial services offers to 'profitable' consumers. Recent credit reporting reforms[8] provide lenders with greater levels of personal information, and are designed to help lenders better assess credit risks. While there is yet to be substantial uptake by lenders of more comprehensive credit reporting, these reforms are likely to lead to an increased use of 'risk-based pricing', and may result in some lenders targeting 'riskier' borrowers with higher interest rates. It appears to us that some lenders already engage in this conduct, causing consumer detriment.

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[4] Reserve Bank of Australia, Credit and Charge Card Statistics, (as updated May 2016), available at: http://www.rba.gov.au/payments-and-infrastructure/resources/statistics/payments-data.html.

[5] Sanchez, J M (2009) *The Role of Information in Consumer Debt and Bankruptcies.* Working Paper Number 09-04, The Federal Reserve Bank of Richmond.

[6] Senate Economics Committee, *Interest Rates and Informed Choice in the Australian Credit Card Market*, December 2015, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Credit_Card_Interest/Report

[7] Treausry, *Credit Cards: improving consumer outcomes and enhancing competition*, May 2016, available at: http://www.treasury.gov.au/~/media/Treasury/Consultations%20and%20Reviews/Consultations/2016/Credit%20card%20reforms/Key%20Documents/PDF/Credit_card_reforms_CP.ashx

[8] The Privacy Amendment (Enhancing Privacy Protection) Act 2012 enacted the 'more comprehensive reporting system', which came into effect on 12 March 2014.

**Case study**

Consumer Action assisted in a matter where a consumer sought a loan for $6,250 from GE Money for the purpose of consolidating her debts. According to the loan documents, approximately $1,280 was for small debts, and an additional $4,700 was for ‘debt consolidation’. The documents showed that $4,700 was in fact used to pay off a single credit card debt with a major bank, which the client then closed.

Loan documents show that GE Money gave the consumer a 5 year loan at an exorbitant 34.95% per annum interest—meaning she was repaying over $14,000 (including interest, fees and charges) for consolidating debts worth approximately $6,000. Given that credit card interest rates are commonly in the vicinity of 20%, it’s likely the GE Money loan put the client into a worse, not better, financial position.

We looked at GE’s Money’s website to see what interest rates were being advertised. Both personal and debt consolidation loans were being advertised as being from 17.49% p.a. for loan amounts less than $20,000. On closer inspection, these rates were asterisked with the fine print stating that these rates were only available to approved customers and subject to lending and approval criteria.

Banks have a commercial interest in sending credit card offers to those who don't pay back their full balance within the interest-free period. Known as 'revolvers', such credit card users are highly profitable compared to 'transactors' or 'convenience users', who generally do not incur interest on purchases.

The group of consumers who have trouble paying off credit card debt may be very large. ASIC reports that 27 per cent of personal credit card holders (being around 2 million people) do not pay off their personal credit card debt in full each month.[9] This finding is supported by a 2002 report by Visa International, *The Credit Card Report: Credit card spending in perspective*, which found that 64% of all households with credit cards in use did not pay credit card interest.

Failing to repay credit card balance every month will not always be an indicator of financial hardship. However, it should be a cause for concern because those on lower incomes are disproportionately burdened with credit card debt.

In its recent consultation paper, Treasury noted that the debt-servicing burden associated with outstanding credit card balances falls more heavily on households with relatively low levels of income and wealth. Households in the lowest income quintile hold, on average, credit card debt equal to 4 per cent of their annual disposable income, while those in the highest income quintile hold debt equal to around 2 per cent of disposable income.[10] Low-income households are also more likely to persistently revolve credit card balances (and, therefore, pay significant amount in interest) than high income households.

These statistics suggest that large credit card debt is harming a good proportion of lower income consumers.

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[9] *Smart people not so smart with their money,* ASIC Media Release 14-041, 12 March 2014, available tat: http://asic.gov.au/about-asic/media-centre/find-a-media-release/2014-releases/14-041mr-smart-people-not-so-smart-with-their-money/.

[10] Treasury, above n 7, page 4.

In a similar vein to credit card marketing, particular mortgage borrowers can be encouraged to redraw additional funds, or to otherwise refinance or increase the amount of their mortgage. We do not mean to say that this is in any way unlawful—the competitive need of corporations to increase their profitability and return to shareholders unsurprisingly drives them to use personal information and new technologies for those ends, rather than to help consumers access the most appropriate products for their needs.

However, this kind of conduct should be a matter for regulation if it creates elevated risks for consumers. Once it is acknowledged that greater use of predictive technologies can contribute to unsustainable debt, community trust and confidence in the use of data will be impaired. We encourage the Commission to consider in more depth the techniques being used to target marketing of credit through use of consumer data, and whether existing regulation is adequate to counter the risks it creates. Regulatory responses should be informed by an understanding of how marketing is used and how it is received by consumers.

An example may be the 2011 reforms prohibiting unsolicited credit card limit increase offers in written form, unless the customer has consented to receiving such offers.[11] These provisions were designed to address the significant consumer harm caused by the impact on many consumers who are coerced into increasing their levels of debt. Vulnerability to this sort of marketing was described in depth in our 2008 research report, *Congratulations, You're Pre-Approved.*[12] Our recent casework experience is that banks and lenders are avoiding these reforms by offering unsolicited overdrafts on transaction accounts and extensions to existing personal loans, which raise very similar risks. Even in relation to credit cards, lenders have avoided the reforms by offering limit increase offers through online banking or apps. Treasury has indicated an intention to strengthen these protections.[13] The ability of business to avoid protections through technology shows that we need a more comprehensive approach to consumer protections to protect against indebtedness, particularly in light of the increased use of data to inform marketing and profiling by lenders.

**Trust and confidence: price discrimination**

Community trust and confidence in the use of data may not just be impaired by links to unsustainable debt, but may also be impaired by perceived 'unfair' pricing practices.

A 2015 report by US organisation Data Justice concluded that the control of personal data by 'big data' companies is not just an issue of privacy, but an issue of 'economic justice'.[14] The report was particularly concerned about the ability of big data to enable advertisers to offer goods at different prices to different people, (what economists call 'price discrimination'), to extract the maximum price from each individual consumers. The report found that such price discrimination not only raises prices overall for consumers, but particularly hurts low-income and less technologically savvy households.

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[11] *National Consumer Credit Protection Amendment (Home Loans and Credit Cards) Act 2011*.
[12] Paul Harrison and Marta Massi (2008), *Congratulations, You're Pre-approved: An analysis of credit limit upselling offers,* available at: http://consumeraction.org.au/policy-report-an-analysis-of-credit-limit-upselling-letters/.
[13] Treasury, above n 7, page 17-18.
[14] http://www.datajustice.org/blog/data-justice-report-taking-big-data-economic-justice-issue

In the Competition Policy Review Final Report, the authors stated that price discrimination should only be unlawful where it substantially lessens competition.[15] It also stated that pricing according to consumer willingness to pay can result in more consumers being able to obtain the good or service than if a common price were charged and that, in these circumstances, price discrimination can make goods or services more accessible and can enhance consumer choice.

Unfortunately, that review focused primarily on business-to-business transactions and did not consider in-depth the ability of increased use of technology and data to facilitate price discrimination, and what this means for fairness and consumer welfare. In our view, dynamic pricing should be a cause for a concern where it contributes to lower-income people paying higher prices than others, or where pricing discrimination negatively affects particularly marginalised groups.

The Data Justice report made three main recommendations:

a. for regulators to strengthen user control of their own data by both requiring explicit informed consent for all uses of the data and better informing users of how it's being used and how companies profit from that data;
b. for regulators to factor control of data into merger reviews and initiate action against monopoly control of affected sectors like search advertising;
c. for policymakers to restrict practices that harm consumers, including banning price discrimination where consumers are not informed of all discount options.

Further commentary on user control and consent is provided below. In relation to the role of regulators, we suggest that they be given specific control over industry's use of big data, for example, by requiring audits of their practices, to ensure that they are not facilitating unfair price discrimination. Improving transparency about these practices would also contribute to enhanced trust and confidence in industry data collection, use and sharing of information with marketers and other third parties.

The latter recommendation proposes to bring a layer of fairness to price discrimination practices, and we would urge consideration of this or similar measures. Some economists argue that where consumers know all pricing options, they can potentially benefit from price discrimination (for example, when airline passengers choose between a cheap price at an inconvenient time to save money, which can fill seats, increase revenues for airlines and increase options for different customers).[16] But when people do not know about better deals or do not easily have the ability to access them, price discrimination is far more likely to hurt consumers.

Only if the collection, use and sharing of data is seen to be fair will the purported economic benefits follow. As noted above, 'big data' should be a matter for regulation if it creates risks for consumers or impedes consumer trust and confidence in commercial activity.

[15] Competition Policy Review, *Final Report*, November 2015, available at: http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf, page 349
[16] John Lazarev, The Welfare Effects of Intertemporal Price Discrimination: An Empirical Analysis of Airline Pricing in U.S. Monopoly Markets, Working Paper, 7 January 2013; available: http://faculty.chicagobooth.edu/workshops/marketing/past/pdf/lazarev_jmp.pdf.

**Trust and confidence: privacy and consent**

Australia needs a much stronger privacy regime to maintain consumer trust and confidence in the use of big data. Improvement is needed not only in the substantive privacy protections themselves, but also in the compliance regime.

The Commission's Issues Paper refers to questions around what constitutes an individual's 'consent' for an organisation to collect, use and share data about them—and debate over the distinctions between 'informed consent', 'passive consent', 'unknown consent' and 'non-consent'. For a long time, privacy frameworks have assumed that providers can fulfil their obligations by disclosing full information to consumers about products and services, thus putting the onus on consumers to inform themselves whether to take up the product or service. It is now recognised that disclosure in this way, particularly through terms and conditions or privacy policies, is insufficient. This was acknowledged by the Financial System Inquiry which found that disclosure was not sufficient to deliver fair treatment to consumers.[17]

In recognition of this, and noting the levels of literacy in the community, there is a need to strengthen providers' accountability in this area. Technology, together with behavioural economics principles, can be brought to bear to improve standards for providing consent to sharing of data. In particular, we believe that consumers should be required to specifically opt-in to any agreed secondary use of an individual's data. Information in this context needs to be provided to consumers in the right format, at the right time and in easily understandable language.

The risks to consumers from ineffective consent practices is demonstrated in the following cases relating to sales of vocational education.

> **Case study**
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> Sarah* had been applying online for jobs via an online job advertisement board operated by Acquire Learning. Sarah received a telephone call from an Acquire Learning representative offering to enrol her in a Diploma of Management. The representative sent Sarah an email whilst on the telephone, and told her to click on various links to sign her up to a course that was government funded and would help her obtain a job. Sarah was told by the sales representative not to read the email. Sarah says the sales representative did not ask any questions about her ambitions or capabilities. Sarah did not commence the course, but later received notification of a VET FEE-HELP debt of over $23,000.
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> * Name changed for privacy purposes.

[17] Financial Systems Inquiry, Final Report, December 2014, available at: http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf

> **Case study**
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> Reena* was looking for jobs on a job advertisement board operated by an education broker. After providing her personal information she received a cold call from a representative of the education broker. Although Reena was interested in doing librarianship, the representative convinced her to enrol in a business course. Reena enrolled in the course on the phone while the representative talked her through the enrolment process. Reena raised concerns about lacking the discipline to be able to study online and was told 'not to worry about it'. Reena eventually withdrew from the course.
>
> * Name changed for privacy purposes.

Consumer Action has complained to the Privacy Commissioner about the way in which one education broker purports to obtain consent from jobseekers to receive direct contacts about vocational training courses.[18] However, we consider that these sort of direct marketing practices should be prohibited outright.

It is sometimes suggested that there is a degree of awareness among the community about the sharing of data by various industry participants. Continued use in the wake of this awareness is then interpreted to mean that consumers are comfortable with data-sharing practices. Recent research from the UK, however, suggests that this is not the case. Research published by Citizens' Advice Bureau in July 2016 identified the following themes.

**From 'Fairness and Flexibility: making personal data work for everyone'[19]**

**The digital world for consumers is fun, free, flexible and familiar**
The tantalising upfront offer from digital brands of high quality services at low or no cost, and the familiarisation with smart and speedy processes seem to hold people back from expressing reservations up front. They also create very high expectations of how solutions that might provide more balance and control should be delivered.

**This world can also feel unbalanced, unfair, impervious and unclear**
Consumers expressed reservations about what goes on behind the scenes and a sense that this is all too good to be true. Immediate gripes with invasive marketing are accompanied by deeper seated worries about what might happen in the future with their data, and where technology as a whole is taking society.

This leads to erosion of trust in brands and systems – but despite this, we continue to see strong continued use of such services and brands. This continued use is interpreted by many to mean consumers are comfortable with the way things are, but we found this not to be the case.

**Conditioned not to care?**
When given space to express concerns, consumers have worries about lack of control, privacy and the impact of high use of technology on the next generation and on social or family life. These concerns aren't always readily expressed as people have been so reliant on the way services are delivered for so

[18] Consumer Action Law Centre, *Media release: Acquiring a long list of complaints on privacy*¸ 28 October 2015, available at: http://consumeraction.org.au/acquiring-a-long-list-of-complaints-on-privacy/
[19] Citizens Advice Bureau, *Fairness and Flexibility: making personal data work for everyone,* July 2016, available at: https://blogs.citizensadvice.org.uk/wp-content/uploads/2016/07/Fairness-and-Flexibility-Data-Expectations-Final.pdf.

long that to change or challenge seems both difficult and unlikely to work. In addition, the immediate gratification and convenience of so many services can override these deeper concerns.

**Knowing less and trusting more**
Consumers feel that the data monetisation business models of many online businesses are shrouded in mystery and poorly understood. They are aware of some kind of data exchange but are not clear how it works. However, being aware, or making an effort to understand the exchange doesn't bring much clarity or confidence.

**Backed into a corner: consumer choice and control**
People feel their choices online are limited in two ways: firstly, to participate at all in the digital world as it is so integral to society, secondly, the limited choices they have when interacting with brands. They feel they have an all or nothing choice to make when accepting the terms of the relationship.

**Who to trust?**
Trust was talked about in two ways, firstly there was high trust in online brands to deliver quality, reliable service and to keep payment details safe. However, there was lower trust in use of other personal data, and in whether they are acting in consumers' best interest. Without fully understanding the terms of the terms of exchange, they cannot make a judgement call on whether it is fair or not.

The practice of bundling consent 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.

In considering this issue, the Commission should review the 2012 US Federal Trade Commission report, *Protecting Consumer Privacy in an Era of Rapid Change*. That report included proposals such as 'do not track' rules for web browsers, data portability measures to allow users to switch between email and social networking services and take their data with them, and greater transparency and choice by consumers on where and how they share their data with companies.[20] For these measures to be effective, we need to consider default settings—for example, if 'do not track' and other privacy measures requires users to opt-in, then only savvy consumers will take up this option. The most marginalised will still have their privacy infringed.

Finally, we believe that much greater resourcing and power must be provided to the Privacy Commissioner to ensure compliance with privacy protections in Australia. We are very concerned by how long it takes for privacy complaints to be dealt with, reducing community trust in our privacy regimes. For example, in August 2014, a number of consumer advocacy organisations (including Consumer Action) made representative complaints about Veda's compliance with privacy laws, particularly those that relate to credit reporting.[21] It has been almost two years since those complaints have been made, but there has been no final outcome from the Privacy Commissioner.

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[20] Federal Trade Commission, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers*, March 2012, available at: http://www.ftc.gov/os/2012/03/120326privacyreport.pdf.

[21] Consumer Action Law Centre, *Media release—Credit reporting agency accused of breaching new credit reporting rules*, available at: http://consumeraction.org.au/media-release-credit-reporting-agency-accused-of-breaching-new-credit-reporting-rules/.

Consumer Action has made a number of other representative complaints to the Privacy Commissioner about commercial use of personal data or information. These complaints have also been subject to lengthy delays. These delays are not acceptable from a modern, effective regulator. For Australians to have confidence in greater commercial use of data, we need a much stronger regulator to ensure compliance with privacy protections.

**Government collection of data**

Governments are increasingly seeking access to personal information in the delivery of services. The controversy over the provision of names in relation to the 2016 census is an example.[22]

The concern that we raise relates to government funders requiring personal information to be provided as conditions of funding agreements. Consumer Action provides financial counselling and legal services to Victorians, and these services are provided on a confidential basis. In 2014, the Commonwealth Department of Social Services proposed new data requirements as part of funded financial counselling services, which required funded agencies to provide data including family names, date of birth, gender, residential address, and a number of demographic details and program and service types. This requirement created significant concerns for us, including the possibility of breaching our ethical duty of confidentiality to our clients.

In 2015, together with Financial Rights Legal Centre, we provided a submission to the Senate Standing Committee of Community Affairs' *Inquiry into the impact on service quality, efficiency and sustainability of recent Commonwealth community service tendering processes by the Department of Social Services.* Rather than repeat our concerns in detail in this submission, we append a copy of that submission.

We would be happy to speak with the Commission further about these issues.

Please contact me if you have any questions about this submission.

Yours sincerely
**CONSUMER ACTION LAW CENTRE**

Gerard Brody
Chief Executive Officer

[22] Peter Martin, 'The Bureau of Statistics endangers the census by asking for names', *The Age*, 20 July 2016, available at: [http://www.smh.com.au/comment/the-bureau-of-statistics-endangers-the-census-by-asking-for-names-20160719-gq9crr.html](http://www.smh.com.au/comment/the-bureau-of-statistics-endangers-the-census-by-asking-for-names-20160719-gq9crr.html).