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Mr Peter Harris
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Productivity Commission
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Dear Mr Harris

# Data Availability and Use; Productivity Commission Draft Report: Overview & Draft Recommendations

The Australian Bankers' Association (**ABA**) appreciates the opportunity to provide comments on *Data Availability and Use*: Productivity Commission Draft Report Overview & Draft Recommendations (**Draft Report**).

With the active participation of its members, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services. The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.

The Productivity Commission's (**PC**) Draft Report lays out a forward and long-term approach to expanding data access and availability, and the ABA is generally supportive of the direction the PC has taken. The banking industry has consistently advocated for measures to better inform consumer choices and to boost innovation and productivity in Australia.

The ABA agrees that expanding access to data could enhance consumer outcomes by facilitating better-informed decision-making and more targeted and tailored product and service offerings, as well as allowing customers greater autonomy with their products and services, and promoting innovation and efficiencies in the financial system and across the economy more broadly. Our comments on recommendations affecting the banking industry are below.

## Industry-led reform and solutions

### Draft Recommendation 6.2

The private sector is likely to be best placed to determine sector-specific standards for its data sharing between firms, where required by reforms proposed under the new data Framework.

In the event that voluntary approaches to determining standards and data quality do not emerge or adequately enable data access and transfer (including where sought by consumers), governments should facilitate this, when deemed to be in the public interest to do so.

### ABA response

The ABA strongly endorses Draft Recommendation 6.2.

ABA members broadly support sharing data subject to adequate safeguards around privacy, security and protecting incentives to invest in data. As a principle, ABA members believe that the development of detailed standards for the banking sector should be industry led. Governments should avoid unnecessary regulation and placing greater compliance burdens on an already highly-regulated industry when industry-led reform is achievable.

The ABA notes that the House of Representatives Standing Committee on Economics released its First Report on the *Review of the Four Major Banks* (**Coleman Report**) on the 24 November 2016. This report contained a specific recommendation (Recommendation 4), which would mandate the use of Application Programming Interfaces (**APIs**) for the banking industry by July 2018. The ABA also notes the PC's information request on APIs (page 31).

The ABA appreciates the intent of the Coleman Report but believes the PC's approach outlined in Draft Recommendation 6.2 is the more appropriate pathway to sharing data. Data sharing arrangements should evolve from industries being given the opportunity to develop appropriate solutions for their circumstances supported by an overarching economy-wide regulatory framework.

The ABA especially cautions against an approach that enshrines the use of a specific technology over others. On timing, the European and UK's open bank regime are scheduled to commence in 2018, but have far more advanced legislative frameworks than here, and discussions in the UK commenced a number of years prior.

The three reasons the ABA supports the PC's draft recommendation to allow the private sector to develop sector-specific standards are:

## 1. Encouraging innovation

An important principle taken in the final Financial System Inquiry report was to ensure technology neutrality in all regulation:

> *"Amending unnecessarily technology-specific regulation and removing superfluous regulation can facilitate innovation. Technology-specific regulation can impede innovation by preventing the adoption of best technology or innovative approaches. For example, regulation may entrench the use of cheques or paper-based disclosure documentation, creating inefficient outcomes."*[1]

The ABA believes that introducing a mandatory standard would discourage investment currently underway within the banking sector across a range of emerging technologies. Banks compete when responding to the needs of their customers, driving innovation across products and services, including how data is communicated to customers.

Australia's banks are exploring a range of different technologies and approaches to sharing data, be it direct sharing through APIs, centralised data stores, or distributed ledger technologies. Competition is driving the investment in these technologies and ultimately it is the consumer that will benefit from this process through a wider choice of products and services at a lower cost. The data standard should remain technology neutral, as there may be other more effective mechanisms for data sharing that may evolve over time.

While a mandatory standard would likely lead to an increase in the availability of data in the short-term, ultimately the consumer would miss out over the longer-term. Banks would redirect the innovation currently underway towards implementing the mandatory standard, leading to a reduction in overall innovation and investment and ultimately fewer choices for consumers and potentially at a greater cost to them.

## 2. Cost and commercial considerations

The direct costs of a mandatory data standard would likely include:

[1] Financial System Inquiry Panel, (November 2014), *Financial System Inquiry Final Report*, p. 145. http://fsi.gov.au/files/2014/e12/FSI_Final_Report_Consolidated20141210.pdf

- Organising, checking and aggregating the raw data to be shared.
- Building the necessary technological solutions to share the data and modifying existing IT systems.
- The ongoing operational costs of data sharing and maintaining systems.

Additional indirect costs include the lost benefits to consumers and banks from the innovation opportunities foregone owing to redirecting resources to implementing a mandatory standard.

The cost of implementing a mandatory data standard, by either direct or total costs, is difficult to estimate at this early stage. As noted in our first response to the Issues Paper, overseas comparisons of costs for implementing open banking standards and APIs are not an appropriate or accurate guide for Australian costs. The costs associated with implementing data sharing will be borne by the banks while the initial benefits will accrue to third parties. This is not a commercially sustainable situation in the long run.

Arrangements will need to be developed under a sector-led framework which ensure that incentives to invest in future data assets are not reduced (as they would be under a mandated open access regime).

### 3. Security

Data security is critical and would be one of the focuses of an industry-led approach on data sharing. Banks and their customers will need to be assured that any third party who receives a consumer's data at the consumer's request has data management standards and practices that meet minimum standards set are consistent with banks. The ABA believes the "trusted user" framework proposed in the draft report could potentially be expanded to the third parties accessing data.

Third party breaches of bank-provided customer data are likely to lead to reputational and relationship damage to the bank and loss to customers, rather than the third party responsible for the breach. This is discussed further under Recommendation 9.2.

## Comprehensive Right to data

**Draft Recommendation 9.1**

The Australian Government should introduce a definition of consumer data that includes:

- Personal information, as defined in the *Privacy Act 1988* (Cth)
- All files posted online by the consumer
- All data derived from consumers' online transactions or Internet-connected activity, and
- Other data associated with transactions or activity that is relevant to the transfer of data to a nominated third party.

Data that is transformed to a significant extent, such that it is demonstrably not able to be re-identified as being related to an individual, should not, for the purposes of defining and implementing any Comprehensive Right, be defined as consumer data.

The definition of 'consumer data' should be provided as part of a new Act regarding data sharing and release (Draft Recommendation 9.11). Given the need for this definition to have broad applicability, it should also be included within the *Acts Interpretation Act 1901* (Cth). Consequential amendments to other Commonwealth legislation would ensure harmonisation across federal laws.

### ABA response

The ABA supports the PC's concept that consumers have a 'Comprehensive Right' to access and transfer their 'consumer data'. However, some clarity is required around the new comprehensive right and consideration of whether it should be more specifically defined than it is under the current proposal.

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## 1. Definition is broad

ABA members believe there must be manageable limits to the data that would be subject to this right. If the definition of consumer data is cast too broadly, there is a risk of a substantial compliance burden being placed on the banking sector in exchange for little consumer benefit. For example, it is unclear the extent of work organisations would need to do to determine what metadata actually relates to individuals and how to respond to a customer request for metadata on themselves.

The definition in Draft Recommendation 9.1 would capture data that has been the subject of substantial analytical investment. Requiring banks to transfer such information to a third party could remove incentives for investments in data collection and development.

The ABA believes the definition of consumer data should be limited to raw transaction data only, and that proprietary insights into customers should be beyond the scope of this definition. Such insights should not be subject to the consumer rights on the basis that:

- any insights tend to be on an aggregated level.
- taking an economic lens, insights have value when aggregated and that value rests with the firm generating the insights, rather than with the individual.

## 2. De-identified data

The ABA is concerned that data thought to be de-identified may be easily identified through relatively simple manipulation and analysis. While a custodian may believe that data cannot be re-identified, this may not be the case. Consequently, this definition may not provide the most certain basis for the Comprehensive Right. The ABA notes that parliament is currently considering legislation to manage the re-identification of de-identified government data.

## 3. Legal restrictions

The broad definition contained in Recommendation 9.1 could capture data that data custodians may be legally or practically unable to deliver to the consumer, such as data that is the proprietary information of another entity.

### Draft Recommendation 9.2

Individuals should have a Comprehensive Right to access digitally held data about themselves. This access right would give the individual a right to:

- Continuing shared access with the data holder.
- Access the data provided directly by the individual, collected in the course of other actions (and including administrative datasets), or created by others, for example through re-identification.
- Request edits or corrections for reasons of accuracy.
- Be informed about the intention to disclose or sell data about them to third parties.
- Appeal automated decisions.
- Direct data holders to copy data in machine-readable form, either to the individual or to a nominated third party.

Individuals should also have the right, at any time, to opt out of a data collection process, subject to a number of exceptions. Exceptions would include data collected or used as:

- A condition of continued delivery of a product or service to the individual
- Necessary to satisfy legal obligations or legal claims, and
- Necessary for a specific public interest purpose (including archival)

- Part of a National Interest Dataset (as defined in Draft Recommendation 9.4).

The right to cease collection would not give individuals the capacity to prevent use of data collected on the individual up to the point of such cessation.

## ABA response

### Impact on consumer choice, costs of services and usefulness of data

The ABA notes that a consumer opting out of data collection may mean that a product/service cannot be provided to that consumer. The PC should consider how a consumer should be informed about the purposes of data collection and the possible consequences of opting out of data collection.

The ABA also notes the challenge whereby if enough consumers opt out of data collection, it could reduce the utility of any analysis of the data set. Consideration should be given as to how to ensure data sets remain useful.

The ABA notes that the right to appeal automated decisions could actually limit price efficiency and increase the costs of an automated model.

### Managing risk

The right to transfer data to third parties introduces risk for consumers who may not understand their rights and the hazards posed by releasing data to non-verified third parties, or conversely, may not appreciate that data provision to some trusted third parties (for example, a “trusted user”) is relatively low risk. Any disclosure of data must be accompanied by a clear consumer understanding of the potential risks and measures to protect consumers as much as possible from potential harm.

The ABA believes it is important that the Comprehensive Right is part of a broader economy-wide regulatory framework governing data frameworks including, who are deemed authorised data recipients. These data recipients should meet minimum standards for data security and privacy, as well as standards for systems, governance frameworks and financial viability and that these standards should be made publicly available. This would ensure consumers are protected and that they can be confident their data is protected.

Consideration should also be given as to which party (e.g. data transferor or recipient) has liability in the event of any data loss that occurs during the transfer of data, or whether liability is governed under existing legal frameworks. In particular, the recipients of data under a consumer’s request should be required to meet minimum standards to ensure they can adequately protect the consumer’s data while also compensating them for any loss. Regulations such as the ePayments Code would also need to be revisited.

### Clarity required

The banking industry has a responsibility to safeguard customer data, so clarity on whether there is any right of refusal would be an important consideration to any reform, particularly if it is believed to be in the customer’s best interest not to disclose information. The customer may not be in a position to make an informed decision about the security of their data. If there is no certainty over data security and no right of refusal, this may create issues surrounding liability, given the decision to disclose is out of an organisation’s hands.

Regarding the right to be informed about an intention to disclose/sell data to third parties, the ABA notes this requirement goes beyond the Australian Privacy Principles, which primarily relate to overseas disclosures only. Clarity is need as to whether it would be necessary to proactively notify a customer and the detail required. For example, the purposes of the disclosure only, or to which specific suppliers the data will be disclosed. The extent of this right should be carefully considered and the likely impact on commercial activity weighed against potential benefits to consumers.

Further, regarding the right to opt out of the collection process, clarity is required about what is meant by collection, noting the *Privacy Act* definition is extremely broad, going beyond data collected directly from the individual to data collected from any source. If the same definition is adopted under the proposed regime, organisations would need to create and maintain 'opt out lists' (similar to 'do not market' lists) and constantly refer to these. This could give rise to practical issues and operational costs while not achieving the goal of giving individuals greater control over their own data. Clarity would also be needed on whether a partial opt out would be available or whether a consumer can only choose to completely opt out of data collection.

The ABA also believes that consideration could be given to rationalising and clarifying the operation of the proposed new framework against existing las, such as how the new Comprehensive Right overlaps with rights under privacy law.

### Draft Recommendation 9.3

The Australian Government should provide for broad oversight and complaints handling functions within a reformed framework for individual data access. Key roles should be accorded to the Australian Competition and Consumer Commission (**ACCC**) the Office of the Australian Information Commissioner (**OAIC**), and to existing industry ombudsmen.

Any charging regimes, policies or practices introduced to address costs associated with data access, editing or transferability should be transparent and reasonable. The ACCC should be responsible for monitoring and assessing the reasonableness of charges applied. The ACCC, supported by state and territory Fair Trading offices, should also educate and advise consumers on their new rights in regard to data access and collection.

For specified datasets (such as in banking) the relevant ombudsman scheme would need to be expanded to deal with disputes.

## ABA response

Existing regulators do not have the mandate or the expertise to easily adopt the role of arbitrating complaints in this area. For instance, the existing Financial Ombudsman Service (**FOS**), ASIC and the OAIC all have limitations in terms of their current capacity to perform this function. This will need to be considered when determining an appropriate forum to have broad oversight and complaints handling functions within the proposed framework for individual data access, and being able to give consumers the comfort that they are sufficiently protected under such a framework.

### Draft Recommendation 9.4

The Australian Government, in consultation with state and territory governments, should establish a process whereby public and private datasets are able to be nominated and designated as National Interest Datasets (**NIDs**). Datasets (across the public and private sector) designated as NIDs would satisfy an underlying public interest test and their release would be likely to generate significant community-wide net benefits. Designation would occur via a disallowable instrument on the recommendation of the National Data Custodian.

## ABA response

Australia's banks are already subject to significant data requirements from regulators, most of which is publicly available. Looking ahead, appropriate care and balance must be applied when defining data sets as being in the public interest to release, given the significant cost associated with meeting reporting requirements, and ensuring that any regime does not create a disincentive to invest in data. The resources required in many cases would be better deployed elsewhere to meet customer needs. Due care must also be taken in their release to avoid re-identification of individuals.

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# Design of the new framework

**Draft Recommendations 9.5, 9.6, 9.7 and 9.11**

## ABA Response

Our broad comments on the design of the new framework are:

### 1. Limit growth in bureaucracy and regulation

The ABA would caution against creating new bodies such as the National Data Custodian and expanding the bureaucracy widely. The ABA believes using existing bodies and regulators should be the first preference to expanding the number of government entities dealing with the private sector.

### 2. Provide a regulatory framework that safeguards data

Expanded data access should be supported by an economy-wide regulatory framework that ensures participants meet minimum data security and privacy requirements. One possible option for consideration is the regulatory model established by the European Commission's 2015 *Revised Directive on Payment Services* (**PSD2**) which provides an example of such a framework.[2]

### 3. Acknowledge and factor the cost of and investment in data

Any data access regime must acknowledge and compensate participants for the considerable cost of each step of data collection, storing, updating etc. (and so be factored into the pricing of data transferred, particularly to third parties), as well as the build and management of APIs.

# Comprehensive credit reporting

**Draft Recommendation 4.1**

The Australian Government should adopt a minimum target for voluntary participation in Comprehensive Credit Reporting of 40% of accounts. If this target is not achieved by 30 June 2017, the Government should circulate draft legislation to impose mandatory reporting by 31 December 2017.

## ABA response

Australia's Comprehensive Credit Reporting (**CCR**) regime, is a voluntary scheme with information to be shared on a reciprocal basis, and is intended to "enhance the decision-making capabilities of businesses in the industry".[3]

The ABA believes that a compulsory scheme would not be in the best interests of the industry or consumers, and it would be premature for the Government to mandate CCR for a number of reasons. This is also the view of the Australian Retail Credit Association (**ARCA**) in their submission, which the ABA supports.

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2 *Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on Payment Services in the Internal Market, Amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and Repealing Directive 2007/64/EC (PSD2).*

3 Productivity Commission, (April 2016), *Data Availability and Use Inquiry – Issues Paper,* p. 17 http://www.pc.gov.au/inquiries/current/data-access/issues/data-access-issues.pdf

Firstly, there has been a significant amount of investment by industry in CCR. This investment should be allowed to come to bear before mandates are considered. A mandatory system has the potential to increase implementation costs and could also cause institutions to scale back their current CCR implementation projects in order to meet a mandatory compliance date. A hard compliance deadline could mean customers do not experience the full benefits from the CCR system.

The ABA agrees with comments made in Appendix E of the PC's Draft Report that mandatory participation would likely require a high level of prescription for reporting data. The high level of prescription might not keep pace with the changing consumer and industry requirements. The ABA also supports the PC's comments that compulsory reporting could also create data quality issues given the significant increase in the amount of data required to be reported. It will be important to ensure that consumers are protected from any potential harm caused by an increase in the quantity of data about them being used and shared.

The ABA's second reason for not supporting mandating CCR is that significant regulatory uncertainty has overshadowed the voluntary regime which is likely to have hindered its adoption. Any framework, regardless of whether it is voluntary or mandatory, should minimise unnecessary cost by providing clarity.

The FOS determination in April 2016 on the reporting of repayment history information for customers under payment arrangements continues to cast uncertainty over the scheme and the necessary reporting requirements for such customers under CCR. This uncertainty means differing requirements could impact the internal technology and systems already developed by banks to facilitate full CCR participation and the integrity of this key element of CCR.

In addition, while CCR was legislatively enabled in early 2014, and as the PC notes, the frameworks required to facilitate CCR participation (the Principles of Reciprocity & Data Exchange) were only completed in December 2015.

Given these reasons, and putting aside the merits or demerits of mandating CCR, having a benchmark assessment date of mid-2017 as the PC has proposed in Draft Recommendation 4.1, does not provide sufficient time to assess whether voluntary participation has been successful, and whether the existing regulatory uncertainty has been resolved to the credit industry's satisfaction. The ABA is happy to work with government to assess progress and the ongoing need for a mandatory CCR process.

The ABA looks forward to further engagement with the PC on the issues raised and by others through the consultation process. If you have further inquiries, please contact Pip Freebairn, Associate Director, Economics and Industry Policy on Pip.Freebairn@bankers.asn.au or 02 8298 0414.

Yours sincerely

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