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CONSUMER DATA RIGHT REGIME CONSULTATION

This submission by the Australian Privacy Foundation responds to invitation by the Department of the Treasury as part of consultation regarding the *Treasury Laws Amendment (Consumer Data Right) Bill 2018* (Cth) as the basis for establishment of a national Consumer Data Right regime.

The Foundation is the nation's preeminent civil society body concerned with privacy. It is politically non-aligned. Its membership and board encompass information technology, law, health, consumer protection and other specialists alongside people with a broader interest in human rights. Information about the Foundation and copies of submissions and policy documents over the past three decades is available on the Foundation's site at www.privacy.org.au.

The Foundation strongly endorses a coherent national Consumer Data Right that enshrines consumer autonomy founded on both meaningful consent and accountability on the part of entities that collect, process and disseminate information relating to individuals.

That endorsement reflects regard for autonomy as a central value of Australia as a liberal democratic state and the Foundation's view that the Right will foster enhanced national productivity alongside benefits for individual consumers, in particular people who are disadvantaged.

It is axiomatic that consent under the Consumer Data Right must be meaningful (i.e. substantive, on the basis of transparency under e.g. Sch 1 ss 56ED and 56EH that enables informed choice) and that the regime directly addresses criticisms by a wide range of stakeholders regarding serious deficiencies in Australian data protection arrangements in terms of formal legal frameworks, administrative standards and day by day enforcement.

As the following paragraphs note, the Foundation accordingly welcomes Treasury's emphasis on action by the Australian Competition & Consumer Commission (ACCC) rather than by the Office of the Australian Information Commissioner (OAIC). The Foundation considers that the ACCC has both the expertise and culture needed for implementation and ongoing maintenance of the new regime. Regrettably, the OAIC's regulatory incapacity is contrary to the accountability that consumers and business alike will expect in adoption of the Right by the finance, energy and other sectors.

The Foundation notes that the Bill is evolving and that the ACCC will release its framework paper on the Open Banking rules in the near future. The Foundation accordingly envisages providing more detailed comment in future. It particularly commends the effort by Treasury to engage with civil society in development of the Consumer Data Right regime and looks forward to such consultation in future.

The attached comments address specific aspects of the Bill, centred on privacy and informed in particular by the EU General Data Protection Regulation (GDPR) that provides a benchmark for privacy policy development and implementation.

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SPECIFIC COMMENTS: CONSUMER DATA RIGHT BILL

Overall, the Foundation strongly endorses the Bill in moving beyond inadequate protection for Australian consumers (and providing appropriate signals for best practice in the marketplace) by offering stronger formal protection than that in the *Privacy Act 1988* (Cth) and addressing regulatory incapacity through assigning responsibility to the ACCC. The Foundation endorses the Bill's characterisation of 'consumer' (Sch 1 ss 56AF and 56EB), consistent with changes to employment in Australia.

Emphasis in the Bill on consumer autonomy alongside the enhanced privacy framework is fundamentally important and deserving of praise. It is consistent with the GDPR noted above, with emerging perceptions among stakeholders that private/public sector entities should construe their responsibility in terms of personal data custodianship rather than ownership, and more abstractly with dignity as a core value of Australia as a liberal democratic state in a global economy. It is likely to foster innovation and productivity through for example opportunities for new data driven service providers.

The Foundation considers that implementation of the new regime, which will usefully extend in time from banking to several sectors (eg water, telecommunication and other utilities) will be facilitated through both industry-funded community education and exemplary enforcement action by the ACCC. That activity is likely to gain the support of both business and civil society, with individual enterprises seeking competitive advantage by a drive to the top rather than a race to the bottom or expectation – evident in guidance by the OAIC – that 'reasonable practice' is a matter of the lowest common denominator within/across sectors.

Education in particular will offset potential uncertainty among disadvantaged communities about the meaning of consumer data (Sch 1 s 56AF) and its consequences, akin to uncertainties within/outside government about terms such as 'metadata' and personal information under the *Privacy Act 1988* (Cth), contentiously in *Privacy Commissioner v Telstra* [2017] FCAFA 4.

Privacy Safeguards

The Foundation endorses the 12 Privacy Safeguards at Sch 1 ss 56EC through 56EO, subject to scrutiny of the ACCC Open Banking Framework document on publication in the near future and the consultation about the Rules foreshadowed by Treasury.

Standards and Accreditation

The Foundation endorses the establishment of the Data Standards Body (initially Data61) under Sch 1 s 56FA, of significance in giving effect to both privacy safeguards in the Bill and the portability of data regarding businesses and individuals. It looks forward to providing input regarding enforceable standard setting under the Consumer Data Rules (Sch 1 s 56GB) and standard implementation, alongside input about accreditation of entities that participate in what will be recognised as the emerging consumer data right economy.

In that respect it draws attention to concerns regarding the capacity of the OAIC (in terms of expertise and prioritisation of that agency's resources). The regime implicit in the Bill assumes that the OAIC will be both in a position and choose to provide expert, timely and comprehensive advice to the ACCC. Domestic and international observers over the past two decades consider that the OAIC lacks the necessary culture, skill set and resources for that task.

The Foundation recognises that reinvigoration of the OAIC is outside the remit of Consumer Data Right consultation (and Treasury) but notes that revitalisation is essential for giving effect to both the Consumer Right and other initiatives regarding Open Data.

Pending release of information by the Data Standards Body and publication of the ACCC Open Banking Rules the Foundation has not reached a position on whether a specific standard should cover all sectors, particularly because there are likely benefits in data portability across sectors.

The Foundation endorses establishment of the ACCC as the Data Recipient Accreditor (Sch 1 ss 56CA and 56CB), with scope for random auditing under s 155 of the *Competition & Consumer Act 2010* (Cth). It notes the usefulness for consumers of authorising transfer of derivative data (i.e. based on Consumer Data Right data) such as processed financial reports rather than raw transaction data to non-accredited entities such as accountants on the basis that the activity of those entities is covered by the *Privacy Act 1988* (Cth). Consumer understanding of transfer as movement from the *Treasury Laws Amendment (Consumer Data Right)* statute to the *Privacy* statute will be important; it should underpinned by the consumer education noted above.

The Foundation highlights the need for the Register of Accredited Entities to be readily accessible in machine- and human-readable formats (Sch 1 s 56CK). It envisages providing detailed comment on the Register and on the Consumer Data Rules (Sch 1 s 56BF) once the ACCC Open Banking Framework document has been published. Subject to that comment the Foundation is opposed to transfer of the Registrar responsibility to a non-government entity as provided for under s 56CH. Such a transfer invites regulatory capture and potentially results in concerns such as those expressed by the Department of Communications regarding the governance of the .au ccTLD domain name regime around auDA. The Foundation assumes that applications for accreditation will be published in a timely and readily accessible manner; the ACCC emphasis on transparency in Code approval provides a more effective model than traditional practice of the Therapeutic Goods Administration.

Algorithmic Transparency and Discrimination

The Foundation notes the importance of the ACCC and more broadly the Government in engaging with questions about algorithmic transparency and algorithmic discrimination. Those questions must be addressed on both a competition and inclusive social policy rationale.

It is insufficient to merely give consumers (individuals and small businesses) formal access to data about those entities and assist them to share data with third parties. It is necessary for consumers to be able to gain some sense of how the data is used – in essence determinative information processes – and for governments to thence be in a position to ensure fairness, something that is for example central to the Australian Consumer Law rather than being a novel unviable concept.

Enforcement and Dispute Resolution

The Foundation as noted above endorses establishment of the ACCC as the enforcement body for the Consumer Data Right, noting that agency's expertise, resourcing and culture (including its emphasis on industry and consumer education through communication of action under its compliance pyramid approach). It commends the establishment of a special Consumer Data Right arm within the ACCC and the extension of s 155 of the *Competition & Consumer Act 2010* (Cth).

The Foundation notes with some concern the proliferation of public agencies (and ombudsmen) concerned with data protection, for example regarding health data and government data alongside the Consumer Data Right. It will be important for the various entities to work cooperatively (sometimes a challenge given institutional imperatives and portfolio demarcations). Although this submission

reiterates the Foundation's concerns regarding the performance (a matter of culture, funding and statutory authority) of the OAIC the Foundation cautions that establishment of the Consumer Data Right does not justify an erosion of the OAIC's resourcing. That agency retains key responsibilities and it should be reinvigorated rather than being abolished.

In making that comment the Foundation notes that the then Attorney-General George Brandis sought to abolish the OAIC on the basis that it was unnecessary and that recent funding of the OAIC is inadequate for the agency's operation. The OAIC is now 'off death row' but needs to be adequately resourced in order to undertake its responsibilities. The Foundation is thus wary about use of the scope under Sch 1 s 26 for delegation by the ACCC of powers or functions to the OAIC.

The Foundation notes the expectation that existing alternative dispute resolution mechanisms such as the AFCA and TIO will under Sch 1 s 56BH play an important part in addressing consumer complaints that may arise under s 56EM. The Foundation notes substantive criticism, evident in for example the current Hayne royal commission, regarding the performance of a range of regulators such as APRA and ASIC.

Building an effective Consumer Data Right regime in an environment where there is disquiet about sector-specific government agencies and industry ombudsmen and where recurrent recommendations by law reform commissions for introduction of a cause of action for serious invasion of privacy (aka the privacy tort) have been disregarded means that civil society expects timely action by the ACCC.

It also means that there should be scope for class action by consumers whose privacy has been disregarded. Such action will be appropriate in complementing enforcement by the ACCC and offsetting regulatory incapacity on the part of the OAIC. The Foundation is of the view that the regime should accommodate compensation for distress rather than merely for financial loss.

Consideration by the ACCC under Sch 1 s 56DA of the appropriateness of external dispute resolution mechanisms is endorsed.

Sector Designation

In considering designation by the Minister of a sector under Sch 1, on the advice of the ACCC (Sch 1 s 56AD), the Foundation notes the significant role to be played by the OAIC (s 56A). The legitimacy and substantive base of advice to the Minister by the OAIC will be meaningfully increased if the advice is founded on a public consultation (offsetting the OAIC's lack of expertise and past instances in which it has been captured by entities it regulates) and the advice is made public on a timely basis prior the Minister making the decision.

Given that sectors will be designated on a progressive basis, rather than at once, that transparency will not impose inordinate costs. The Foundation notes paras 1.35 and 1.36 in the Explanatory Memorandum; it seeks openness on the part of the OAIC, which has traditionally not engaged with civil society and has historically not provided information about how policy/administrative decisions were reached.

Consumer Data Rules

The Foundation notes the scope for tailoring of the Rules under Sch 1 s 56BA to reflect different characteristics across sectors, with some sectors for example having greater potential than others for entry to existing markets, some consumers being differently placed and from a privacy perspective some consumer data being more sensitive (in isolation or when integrated with other data sets) than other (Sch 1 s 56BA and 56BB-56BD). The Foundation is broadly supportive of the flexibility available

to the Minister and ACCC in relation to such Rule making, given the emphasis in the consultation documentation and the Bill (for example Sch 1 s 56BO) regarding consultation, and the disallowability of the Rules.

The Foundation is supportive of extending the new regime to cover insurance data and retail loyalty cards; a staged extension has the potential to minimise confusion, increase efficiencies and gain the support of both consumers and larger businesses (for example because a multi-sector regime offers certainty for businesses that are based and/or operate in Australia, as per Sch 1 ss 56CE and 56AH).

Consent and Compliance

In initial comment to Treasury the Foundation noted the importance of meaning rather than merely formal consent, pointing to the GDPR as a point of reference and noting criticism in Australia and overseas about the emphasis of many data collectors on a 'tick and flick' approach that undermines autonomy and that does not give data providers an informed choice. The Foundation endorses the requirement that consent be express, as per Sch 1 ss 56BB and 56EI (and more broadly s 56BC), and that consumers be able to withdraw consent to data disclosure/use. The latter is foreseeable as consumers become more aware of both the regime and risks (for example regarding data breach). It should be facilitated through user friendly mechanisms that avoid traditional problems with data collectors, including governments, substantively inhibiting people who wish to opt out of collection schemes. The Foundation notes and endorses Treasury's recognition of questions about informed consent via mobile phones and other digital devices.

As part of that informed consent it is fundamental that consumers have ready access to information about the Rules for the particular sector and a mechanism for review of how the custodian has disclosed the consumer's data. The Foundation endorses the approach in Sch 1 s 155(9AA) regarding bases for enforcement and s 56BG regarding reporting to the ACCC and OAIC. In relation to the latter agency it is important that in the Commissioner – consistent with Sch 1 s 56EQ – publish on a timely basis reports that are sufficiently detailed to permit independent assessment of its functioning and the performance of the overall regime. That requires for example public disclosure that goes beyond the customary statement that the OAIC received a complaint and has moved on. It will be assisted by a positive interpretation of the requirement for reporting by data custodians under Sch 1 s 56BH. The Foundation cautions against an overly liberal use of the 'relief' provided under Sch 1 s 56BH(b) and a narrow designation in the banking or other sectors as per s 56BJ.

The ACCC has persuasively argued over the past five years that penalties provided under the *Competition & Consumer Act 2010* (Cth) are inadequate to deter corporate misbehaviour. The Foundation concurs with that analysis and further considers that setting penalties too low under the Consumer Data Right regime will send an inappropriate signal to both consumers and major corporations. The current Hayne royal commission has highlighted problems with leading lending and insurance enterprises that contrary to public trust have engaged in egregious abuses that have been undiscovered or disregarded by key regulators such as APRA. More substantial penalties will, in the view of the Foundation, alert all stakeholders that the regime is to be taken seriously. On that basis it is appropriate to weight penalties towards 10% of the turnover of the entity breaching the Rules.

The Foundation endorses the extension of the penalty and discovery provisions in the *Competition & Consumer Act 2010* (Cth), for example ss 82 and 155. Penalties should be based on that Act rather than the *Privacy Act 1988* (Cth); the latter has proved to be ineffective in terms of signalling and deterrence.