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**Consultation re: An ‘opt-out’ data sharing model for joint accounts in the banking and energy sectors**

This submission by the Australian Privacy Foundation responds to the invitation to comment on the proposed ‘opt-out’ data sharing model for joint accounts in the banking and energy sectors.

In summary, the Foundation considers the ‘opt-out’ proposal to be contrary to the objectives of the Consumer Data Right (CDR) system (and the Privacy Principles). Concerns regarding an egregious disregard of consumer autonomy outweigh supposed benefits to consumers and claims regarding ‘friction’, i.e., inconvenience for entities that expect to gain commercial benefits through data collection/sharing under the CDR.

Privileging those entities erodes the legitimacy of the CDR and is contrary to government expectations about consumer self-help in an environment where data breach is common and Australian business is free of the discipline provided through a readily justiciable cause of action regarding invasions of privacy.

The Foundation strongly endorses other civil society criticisms of the proposal, in particular the Financial Rights Legal Centre submission to the consultation.

**The Foundation strongly opposes the implementation of any opt-out model and the CDR must operate on an opt-in basis to ensure there is informed consent by all account holders.**

**The submission**

The submission is made by the Australian Privacy Foundation. The Foundation is the nation’s preeminent civil society body concerned with privacy. It is independent. Its membership and board feature experts in information technology, health, public administration, marketing and law. Background information about the Foundation is attached.

## **The Proposal is neither necessary nor appropriate**

### Removing consent is wrong

The consultation paper states:

*concerns have been raised that the requirement for each joint account holder to 'opt-in' to sharing before joint account data can be shared will lead to poor consumer outcomes.*

There has been no substantive demonstration of those 'poor consumer outcomes'. In particular outcomes that are clearly so adverse that they justify abandonment of the fundamental principle in Australian law regarding informed consent relating to consumer transactions.

The principle is not trivial. It is evident in common law and equity regarding contracts. It is also reflected in statute law, notably the Australian Consumer Law and the Privacy Act (Cth). Judicial and consumer disquiet about disregard by financial institutions of consumer consent has been highlighted in class actions against leading banks, action by the Australian Competition & Consumer Commission and the Hayne Royal Commission into the finance sector.

### Lack of justification

Any move to disregard consent by enshrining opt-out must be fully justified. That justification requires more than reference to 'friction' experienced by entities that have a commercial basis and ultimately benefit from consumer data.

The consultation paper refers to alignment with 'consumer preferences'. There is no reason to believe that most consumers will be happy to hear that their autonomy has been disregarded.

There really is no justification that is consistent with informed consent that would justify an 'opt-out' model. Privacy is about the control of personal information. An 'opt-out' model removes the persons control of personal information and accordingly breaches their human rights and privacy.

### Extension

The paper states that the proposed changes involve a 'sector-agnostic data sharing model' and will be 'extensible to the future directions and sectors of the CDR'. Consumers and civil society alike are unlikely to be impressed by such changes.

The regime has been marketed as founded on a 'right' for consumers: a right that empowers consumers. It is disquieting that vague references to 'friction' are being used to build a 'right' for fintech and other entities rather than for consumers.

Both the proposed changes and the likelihood of systemic extension in a way that voids consent is akin to the traditional erosion of privacy, where governments offer assurances of respect and trustworthiness before progressively erasing protections through step by step changes that benefit bureaucratic convenience and administrative incapacity.

### The changes address the wrong question

The paper states:

*ADRs have raised concerns that the current approach introduces excessive friction leading to unfulfilled data sharing requests, ultimately discouraging businesses from offering CDR-based services to consumers.*

The Foundation questions whether businesses will indeed be discouraged from offering CDR-based services. ADRs unsurprisingly always seek to reduce administrative inconvenience and more broadly assert that regulation inhibits innovation that would benefit consumers. The Foundation suggests that Treasury should recall Treasury's own experience, and that of the Productivity Commission and Australian Competition & Consumer Commission, regarding special pleading by business – in particular by corporations whose performance (as highlighted by the Hayne Royal Commission) has often been inappropriate.

We consider that enterprises which treat consumers with respect (in this instance by gaining consent through opt-in), that offer services which consumers consider to be valuable (not necessarily the same as claims by new Fintech entities and the dominant finance and utilities corporations), and that engage in best practice regarding personal information are likely to be successful.

Reliance on self-interested assertions about 'excessive friction, 'unfulfilled data sharing requests' and lack of competition or innovation is unpersuasive. It serves to erode trust in the overall CDR regime.

### **Poor consumer outcomes**

The Foundation asserts that an "opt-out" model will lead to poor consumer outcomes and harm. A non-exhaustive summary of the harm includes:

1. The joint account holder will be deprived of their right to give informed consent to the data access. This is a harm in itself. A person must have control of their personal information. That right does not disappear because they chose to open a joint account.
2. The data could be misused and the joint account holder would have no knowledge of the risk or use.
3. There is a real risk of misuse for family violence (including financial abuse)
4. If there is misuse of data or the joint account holder wants to opt-out, this may necessitate engagement with the other joint account holder who may be a perpetrator.

The assumption that joint accounts operate well to protect the rights of their users is false. The current system with joint accounts is not working well for people. There are now many documented stories of joint accounts being used to harm people including tracking, social engineering, technology abuse, and most significantly clearing out the account. Using joint accounts as a justification to perpetrate the already obvious problems just exacerbates the harm.

### **Privacy Impact Assessment**

Where is the update on the privacy impact assessment considering the proposed changes?

The Foundation would assert that the lack of PIA update is simply because the PIA would recommend opt-in as a minimum standard. This type of recommendation is inconvenient and as a consequence there is no PIA update.

#### In summary

The CDR regime is already unsafe and privacy abusive. The early promises of a privacy-based regime have long ago been abandoned. The change to opt-out would be the final nail in the coffin and the Foundation recommends that everyone avoid using it as it does not meet even minimum privacy standards.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Roger Clarke', with a large, sweeping flourish above the name.

Roger Clarke  
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## **Australian Privacy Foundation**

### **Background Information**

The Australian Privacy Foundation (APF) is the primary national association dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues that pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions.

The APF's primary activity is analysis of the privacy impact of systems and proposals for new systems. It makes frequent submissions to parliamentary committees and government agencies. It publishes information on privacy laws and privacy issues. It provides continual background briefings to the media on privacy-related matters.

Where possible, the APF cooperates with and supports privacy oversight agencies, but it is entirely independent of the agencies that administer privacy legislation, and regrettably often finds it necessary to be critical of their performance.

When necessary, the APF conducts campaigns for or against specific proposals. It works with civil liberties councils, consumer organisations, professional associations and other community groups as appropriate to the circumstances. The Privacy Foundation is also an active participant in Privacy International, the world-wide privacy protection network.

The APF is open to membership by individuals and organisations who support the APF's Objects. Funding that is provided by members and donors is used to run the Foundation and to support its activities including research, campaigns and awards events.

The APF does not claim any right to formally represent the public as a whole, nor to formally represent any particular population segment, and it accordingly makes no public declarations about its membership-base. The APF's contributions to policy are based on the expertise of the members of its Board, SubCommittees and Reference Groups, and its impact reflects the quality of the evidence, analysis and arguments that its contributions contain.

The APF's Board, Committees and Reference Groups comprise professionals who bring to their work deep experience in privacy, information technology and the law.

The Board is supported by Patrons The Hon Michael Kirby and Elizabeth Evatt, and an Advisory Panel of eminent citizens, including former judges, former Ministers of the Crown, and a former Prime Minister.

The following pages provide access to information about the APF:

- Policy Statements <https://privacy.org.au/policies/>
- Policy Submissions <https://privacy.org.au/publications/by-date/>
- Media Releases <https://privacy.org.au/media-release-archive/>
- Current Board Members <https://privacy.org.au/about/contacts/>
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