



28 February 2019

Senate Standing Committees on Economics
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Dear Sir/Madam,

Thank you for the opportunity to contribute to the Committee's consultation on the Treasury Laws Amendment (Consumer Data Right) Bill 2018.

Maurice Blackburn recognises that we are at the precipice of an era where ready access to data will be the difference between the success or failure of certain industries, innovations and practices.

There is an inevitability to the introduction of systems and processes which free up the flow of data. It is appropriate, then, in perceiving that inevitability as a positive, that our focus turns to ensuring that sufficient checks and balances are in place to achieve the goals of the bill.

We note the Minister's words from his second reading speech:

"This important reform will provide individuals and businesses with a right to access data relating to them and to authorise secure access to their data by accredited data recipients".¹

To this end, we welcome the intention underpinning the Government's moves toward an 'open banking' data landscape in so far as it enables financial products and services to be better tailored to the specific needs, circumstances and objectives of consumers.

We note specifically the potential benefits of the open banking regime in assisting banks to make better assessing whether applicants are well placed to be able to service loans, being a legislatively mandated process of inquiry and verification².

¹ Senate Hansard Wednesday 13 February 2019.

https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/f45cf053-d00c-473b-88ab-ac7ccd4b00ec/toc_pdf/House%20of%20Representatives_2019_02_13_6912.pdf;fileType=application%2Fpdf#search=%22chamber/hansardr/f45cf053-d00c-473b-88ab-ac7ccd4b00ec/0009%22 (p.2)

As the The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission) has so clearly demonstrated, a combination of banks' relaxed lending standards and brokers' involvement in loan sales has resulted in widespread debt over-commitment.

As you will be aware, a survey of more than 900 home loans conducted by investment bank UBS³ found that around \$500 billion worth of outstanding home loans are based on incorrect statements about incomes, assets, existing debts and/or expenses.

This means 18% of all outstanding Australian credit is based on inaccurate data, often caused by poor advice or misrepresentations by a mortgage broker eager to generate a sale commission. A staggering 30% of loans surveyed had been issued based on understated living costs and around 15% on understated other debts or overstated income.

Our experience in working with clients who are facing difficulty servicing mortgage debt indicates that, until recently, this problem has been contained. Investors who defaulted on their mortgages were often fortunate enough to sell the investment property at a gain or at least break even, clearing the mortgage without too much pain. However, with the housing market softening, and potential changes to the tax laws underpinning investment properties, this easy 'out' is fast becoming a thing of the past.

Additionally, it has been reported that if interest rates rise by 1%, more than 40% of homes would be in mortgage stress (for context, a 4% increase above current rates would bring interest rates roughly in line with the average over the past two decades)⁴. This will further drive up distress sales in a stagnant or contracting market and may leave thousands in financial ruin, staring at the prospect of bankruptcy.

The causes of these problems relating to credit over-commitment facing consumers are multidimensional, and therefore require a multidimensional solution. That must include addressing, among other things, rigid systems for verifying consumer data, and the culture of self-interest and skewed financial incentives that tempt bankers/brokers to get large loans approved even where they are unaffordable.

That is a problem that will not be cured by the mere availability of enhanced data systems. For example, if the lender's system allows for 'low doc' loans, or the loan officer may be less likely to receive a bonus or commission if a loan is rejected, then the loan officer may not utilise the available open banking data that may show the applicant's unreliable income or existing debts.

Notwithstanding that codicil, the availability of timely, thorough and accurate data would be beneficial to both the lender and the consumer if used consistently and responsibly.

The benefits of access to data therefore need to be balanced with adequate consumer protections, which ensure:

- That consumers' right to privacy is protected against unauthorised access to their data,
- That consumers have the capacity to choose what data is released and to whom, and
- That regulatory processes are appropriately resourced to do their job.

² NATIONAL CONSUMER CREDIT PROTECTION ACT 2009 (NO. 134, 2009) - SECT 130

³ *Australian Banking Sector Update. UBS Evidence Lab - \$500 billion in 'Liar Loans'? (September 2017):* <https://webcache.googleusercontent.com/search?q=cache:PhkZ9vGUMU0J:https://thejollyswagmen.com/s/UBS-LIAR-LOANS.pdf+&cd=9&hl=en&ct=clnk&gl=au>

⁴ See for example <http://www.abc.net.au/news/2017-08-21/how-interest-rate-rises-could-Seeffect-home-loan-stress/8798274>

We note the spirit and intention of the Minister's words from his second reading speech:

"Consumers will determine which data is shared under the right, on what terms and with whom" (p.2).

As touched upon above, an unfortunate downside of the Royal Commission is that the standing and trustworthiness of banks and financial institutions to collect and appropriately use consumer data has been severely tarnished, in the eyes of the general public.

An important part of instigating an open data regime will be in restoring the reputation of financial entities as worthy stewards of the data.

A number of safeguards will need to be imposed for this trust to be instilled:

- consistency across industry, by ensuring that all licensees conduct certain checks and verification steps,
- Consumers must have control over what data is available, and who gets to see it,
- Strong penalties would have to be enforced for breaches of the consumers' will, and
- Education processes must be adequate such that consumers understand the ramifications of being part of the regime,

Maurice Blackburn is concerned that the instigation of the above safeguards requires a degree of awareness, literacy and understanding of the system. This is a reasonable assumption under an opt-in regime – as the financial service recipient has made an informed decision about their participation. Under an opt-out system, a disengaged consumer could inadvertently fail to set up appropriate safeguards, and not know until after information has been shared.

Maurice Blackburn believes that the best way to mitigate the risk of unauthorised access is to prioritise the need for **informed and deliberate consent**.

If the system has default settings which place the consumer's consent at the centre of decision making, many concerns related to inappropriate access will be negated.

We refer the Committee to the findings of the various inquiries into the My Health Record system, for direction in making recommendations related to the issues associated with the collection and use of sensitive consumer data.

In relation to breaches of that trust, we note the Minister's commitment that:

"Consumers will have a range of avenues to seek remedies for breaches of their privacy or confidentiality including access to internal and external dispute resolution and direct rights of action".⁵

Maurice Blackburn welcomes this commitment. We strongly encourage the Committee to satisfy itself that this 'range of avenues' is clearly spelled out in the legislation, and that financial service institutions are aware of their duties.

Maurice Blackburn further notes the Minister's words that:

"Only trusted and accredited third parties will be able to access data from data holders at the customer's direction."⁶

⁵ Minister's second reading speech, Senate Hansard Wednesday 13 February 2019 (p.3)

⁶ Ibid, p.3

Whilst acknowledging that a consumer-driven process is implicit in this commitment, we remain concerned that data collected could, without appropriate safeguards in place, be used for unintended purposes. The data would be much sought after by those looking to market or cross-sell products.

The commercialisation of consumers' data would be contrary to the intention of the bill. Given the Royal Commission's findings in relation to the forces which inform financial institutions' decision making, they have not proven themselves incapable of profiting from access to data which was intended for other purposes.

Maurice Blackburn further notes the Minister's words that:

"The ACCC will be the primary regulator of the consumer data right. In addition to advising what sectors should be added and writing rules, the ACCC will be responsible for accrediting new participants, overseeing a new data standards body, and enforcing serious and systemic breaches of consumers' rights".⁷

Whilst agreeing that the ACCC is the appropriate body to oversee the new regime, Maurice Blackburn submits that the Committee should satisfy itself that the ACCC must be appropriately resourced to perform this oversight function.

As media commentators have correctly stated⁸, it is important that the move to an open data regime, and its administration, does not become the basis for a future Royal Commission.

We would be pleased to discuss our concerns in more detail with the Committee, if it would further the Committee's important work.

Yours faithfully,

Josh Mennen
Principal Lawyer
Maurice Blackburn

⁷ Ibid, p.3

⁸ See for example: <https://www.afr.com/business/banking-and-finance/open-banking-consumer-data-rights-a-doubledged-sword-for-financial-sector-20181220-h19bgw>