Law Council
OF AUSTRALIA

Office of the President

27 February 2019

Senator the Hon Jane Plum
Chair
Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Chair

Treasury Laws Amendment (Consumer Data Right) Bill 2018

Thank you for the opportunity for the Law Council to provide a submission to the Senate Standing Committees on Economics' (**the Committee**) inquiry into the Treasury Laws Amendment (Consumer Data Right) Bill 2018 (**the Bill**).

The Law Council acknowledges the assistance of the Privacy Law Committee of the Law Council's Business Law Section and the Australian Consumer Law Committee of the Law Council's Legal Practice Section in the preparation of this submission.

The Law Council provided a submission to the Treasury on 7 September 2018 regarding the Exposure Draft of the Bill. In the timeframe available in which to prepare submissions to the inquiry, the Law Council has not been able to comprehensively examine the Bill. This submission highlights what the Law Council considers to be the key concerns with the Bill, as identified to date.

Reciprocity

The legislative objective is stated to be to improve the availability, quality and range of data that informs selection by customers of products and services to meet their needs and requirements, and if a customer makes a switching decision, to reduce friction and inconvenience experienced by the customer in shifting the customer's business. As well, empowering bank customers through data may affect supply-side market dynamics and lead to changes in the structure of the financial services sector. In particular, suppliers of services enabling comparison of financial products, and some smaller financial service providers, are likely to be beneficiaries of introduction of a consumer right. However, the Law Council understands the Government's objective is to benefit consumers, by facilitating consumers to be better informed and making it easier for them to move between providers, not effecting supply-side structural reform in provision of financial services.

The distinction between facilitating customer choice and effecting supply-side market restructuring is fundamental in addressing confusion that has arisen as to 'reciprocity'. A 'principle of reciprocity' is not intended to give effect to market restructuring, or to implement

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639 • *Email* mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra • 19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

a new principle of fairness or equal treatment as between service providers. Reciprocity is intended to be for the consumer's benefit: namely, to ensure that a customer that takes the benefit of exercising the Consumer Data Right (**CDR**) in favour of a customer's nominated accredited data recipient (**ADR**) can in the same way conveniently exercise a corresponding CDR to require that ADR to transfer specified data (within the same classes of data as specified for the CDR as applicable to the 'big four' banks, although not only that same data) to the customer, or to any another intermediary ADR or another financial services provider which might or might not be another Authorised Deposit-taking Institution (**ADI**) (and would be an ADR in relation to its handling of that received data). The right remains subject to consumer consent as provided. For example, a customer may have requested two 'big four' banks to each provide customer data to a comparison service provider (itself an ADR), which then collates that information with customer volunteered data and provides comparisons to the customer. The customer may wish to act upon that comparison and take their business, including that data, to another financial service provider. A CDR exercisable by that customer in relation to the comparison service provider ADR enables the customer to conveniently and safely cause that data to be moved to the new financial services provider.

Accordingly, 'reciprocity' should mean no more than the customer enjoying the right to exercise a CDR in relation to the same categories of data 'down the chain' of ADRs, to the extent (and only to the extent) that customer data within those categories was derived from CDR data as disclosed by a 'big four' bank at the customer's request at the head of the chain and there is clear consumer consent in relation to each downstream disclosure.

The Law Council reiterates that this raises a question as to whether 'reciprocity' need be an element of the initial Open Banking framework, or whether any need and specification for reciprocity might be better understood when the market dynamics as to inter-ADR transfers become clearer. There clearly is complexity in implementing reciprocity, as data sets that evolve and transform downstream become more complex and more difficult to track and identify as CDR data, and the cost burden of imposing that obligation upon ADRs may be prohibitive and result in less comparisons being available to consumers. This concern should promote caution in implementing reciprocity as an initial requirement universally imposed on ADRs: there may be a case for a sandbox or other reasoned and controlled differential treatment of some ADRs.

Broad Ministerial Discretion

Under proposed paragraph 56AC(2)(a), the Minister may, by legislative instrument, designate a sector by specifying (among other things) classes of information. The Law Council reads the Bill as imposing no limitations by nature (i.e. basic transnational, value-added, etc.) as to what can be specified as within those classes.

Proposed paragraph section 56AI(1)(a) provides that CDR data is information that is within designated class, as described in the Ministerial instrument or data, that is not so covered but is wholly or partly derived from information covered by paragraph (a) of this subsection. There is no limit specified as to the extent of derivation. The Law Council considers that there must be some class-closing rules: otherwise there may be the risk that distant derivations, such as bank divisional reports and other aggregations and transformations of data, could be subject to the CDR.

By current provisions of the Bill it is left to the Ministerial designation to create class closing rules, or to the CDR Rules as promulgated by the Australian Competition and Consumer Commission (**ACCC**) to describe what the Minister intended (noting, however, the ACCC

can't override the Minister). The Bill places a number of obligations on the Minister, the ACCC and the Commissioner of the Office of Australian Information Commission (**OAIC**) about factors that must be considered prior to the designation instrument being made. The closest reflection to submissions raising concerns about value added data being included is that one factor the Minister must consider is the impact on the intellectual property rights of participants in the CDR of designating a data set and the likely impact of making the instrument on the public interest under subparagraphs 56AD(1)(a)(vi) and 56AD(1)(a)(vii). However, the Minister may elect to include data that is subject to intellectual property rights within a designation. The Minister might or might not allow a charge for provision of that data.

The Law Council submits that it is contrary to good legislative practice for Ministerial discretion to effectively determine the nature of a right that should be appropriately stated in the statute.

The potential scope of the right that can be created by Ministerial fiat goes substantially beyond the legislative objective.

Moreover, the default is set to very wide (capturing all derivations of relevant data through however many transformations may have occurred), rather than the default being set having regard to achievement of the legislative objective.

In particular, and having regard to possibly unintended potential effects on the structure of competition on the supply-side of the financial services sector, the Law Council submits that the statute should not leave open the possibility of a CDR extending to all derived data if the Minister fails to foresee the extent of that default and fails to take active steps to appropriately circumscribe the CDR to its intended scope of enabling consumers to make better informed decisions and making it easier for consumers to switch between providers.

The default position should not leave a substantial risk that the Minister by default or inadvertence strips incentives from financial service providers to know their customers better and to tailor services to their needs and preferences. The CDR should promote better and smarter banking services, not continuing homogeneity of offerings.

The Bill as drafted creates the substantial risk that (through default or intentionally) the Minister includes within the CDR substantially value-added, valuable and business confidential transformations and analytically derived insights from transactional data. The Law Council recommends that the Minister's discretion be appropriately confined, preferably by exclusion of value-added data from being within scope of possible designation, or less preferable by ensuring that any designation of value added data is only after consideration of objectively stated factors to be taken into account by the Minister, with possibility of independent review.

Privacy safeguards and interaction with the Privacy Act

The Law Council considers that it remains unclear as to how the privacy safeguards division of the Bill will interact with the provisions of the *Privacy Act 1988* (Cth) (**the Privacy Act**). The Law Council remains concerned that the provisions of the Bill will create:

a) unnecessary complexity, through the establishment of a second legislative regime of privacy requirements (through provisions of the CCA as well as the provisions of the Privacy Act), in addition to the provisions of any State or Territory legislation that may also apply (such as when organisations hold contracts with State or Territory agencies which compel them to also comply with State laws);

b) different classes of privacy protection depending on whether the relevant data is CDR data under the privacy safeguards or only personal information under the Australian Privacy Principles of Schedule 1 of the Privacy Act (**APPs**);
c) a situation where the same data may be both CDR data and personal information and consequently must be dealt with under separate, and potentially in inconsistent, privacy regimes;
d) confusion as to the operation of Part IIIA of the Privacy Act;
e) additional uncertainty as to what is covered as personal information and what is covered as CDR data; and
f) unnecessary complexity as to the available remedies under the working combinations of the regimes.

In the Law Council's view, the proposed privacy safeguards are not adequate as currently drafted. In particular, the Law Council is concerned about the potential misuse of CDR data, including de-identified aggregated CDR data, for direct marketing purposes. The proposed privacy safeguard in proposed section 56EJ is not sufficient to cover this risk. One measure that could address that risk would be to legislate a definition for 'valid consent' – for example, consent must be current (no less than 12 months old etc.), expressly provided and relevant to the service provided by the access seeker to the consumer. The Bill could also prohibit holders of de-identified CDR data from cross-matching that information with other databases in a manner that would allow a de-identified, aggregated data set to be re-associated with a particular identifiable individual.

The Law Council further considers that segregating the regulation of privacy (including the APPs and privacy safeguards) between the OAIC and the ACCC in relation to CDR data and personal information will likely result in confusion for consumers. The Law Council is of the view that if the structure of the Bill remains in its current form, a comprehensive public education campaign will need to be conducted to minimise that likely confusion.

Yours sincerely

Arthur Moses SC
President