
SUBMISSION

**Business Council response to the
Review of Open Banking in
Australia - Final Report**

March 2018

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The Business Council of Australia draws on the expertise of Australia's leading companies to develop and promote solutions to the nation's most pressing economic and social policy challenges.

ABOUT THIS SUBMISSION

This is the Business Council's response to the *Review of Open Banking in Australia*.

EXECUTIVE SUMMARY

The Australian Government has committed to legislate a Consumer Data Right – a collection of data access and use rights for consumers that includes the right to transfer data from current service providers.

The Government is considering two sets of recommendations about how the Consumer Data Right can be implemented: one from the Productivity Commission's *Data Availability and Use* inquiry, and one from Mr Scott Farrell's *Review into Open Banking in Australia*.

Even though the Open Banking Review is intended to focus on the banking sector, it would have implications across the economy. Some of the recommendations conflict with the Productivity Commission's report. The business community needs much more clarity about how the open banking regime would relate to an economy-wide framework and operate alongside sectors that are not yet subject to the Consumer Data Right.

The Business Council believes consumers will be best served if the Consumer Data Right is implemented in a way that is practical, economically efficient and does not increase the risk to consumers' privacy or security.

Most importantly, implementation of the Consumer Data Right should be carefully sequenced and planned upfront. It would not make sense to proceed with a regulatory regime for the banking sector alone, before settling fundamental aspects of the economy-wide framework. Undue haste risks diminishing the user experience or incurring security risks for customers in the future, if problems arise from retrofitting a banking-specific regime onto other sectors.

We support many of the recommendations in the Open Banking Review, particularly those around the exclusion of value-added and aggregated data from the regime and the proposal for an accreditation regime to manage potential risks to consumers' security or privacy.

The Open Banking Review departs from the Productivity Commission in other areas, such as the scope of data covered under the scheme and pricing regulation. In these instances, we support the recommendations of the Productivity Commission, which reflect an economic, cross-sectoral perspective. Specifically, we recommend that:

- data holders should be permitted to charge reasonable costs of data transfer, with the ACCC monitoring to ensure pricing is not used as a method of discouraging customers from using the Consumer Data Right.

An open banking regime that prohibits charging for data transfer risks stifling the development of a data market in Australia by removing the price signal for investment by businesses. Consumers will receive a better-quality user experience from a vibrant, innovative and competitive data market, driven by business investment and innovation.

- the regulated regime should start with a smaller, more realistic scope in relation to customers and data captured. This maximises the likelihood that companies can deliver a high-quality, seamless data transfer experience for customers within a reasonable timeframe.

KEY RECOMMENDATIONS

1. The Government should establish an immediate consultation process to determine an economy-wide framework (including principles for the intended scope of data that will be subject to the Consumer Data Right) prior to the commencement of the open banking regime.

The Business Council would be happy to assist in convening or facilitating deeper consultation with businesses outside the finance sector, or the development of cross-industry standards.

2. The determination of the scope of data to be shared and data standards for subsequent sectors should be driven by industry-led working groups under the auspices of the Data Standards Body and should comprise key stakeholders in those sectors – as recommended by the Productivity Commission.
3. The Government should allow data holders to charge for the transfer of data, in line with the recommendations of the Productivity Commission. The Australian Competition and Consumer Commission should monitor data transfer fees to ensure they reflect reasonable costs of data transfer.
4. The Government should set the scope of customers and data captured by the Consumer Data Right regime in line with the recommendations of the Productivity Commission.
5. The Government should set a more realistic implementation timeframe for the Consumer Data Right. To assist, the commencement of different customers and data could be phased.

BACKGROUND

The Business Council supports the principle that consumers should have greater access and control over data directly relating to them.

A well-designed regulatory regime could increase consumers' access and control, while preserving incentives for efficient investment and innovation in data, and fostering trust from the community in data use.

The Australian Government initiated two separate, but complementary, processes to develop recommendations for a regulatory regime to govern access and availability of data:

1. the Productivity Commission's *Data Availability and Use* inquiry, which was given to government in March 2017, and
2. the Review into Open Banking in Australia, undertaken by Mr Scott Farrell and given to government in December 2017.

The Government has indicated it will adopt the Commission's central recommendation to create a Consumer Data Right¹, a collection of data access and use rights for consumers, that includes the right to transfer data from one service provider to other parties.

The Government has also indicated it will consider the Open Banking Review in determining both the detail of an economy-wide framework and the specific design of the Consumer Data Right for the banking sector.

The Business Council supports many of the recommendations put forward by the Open Banking Review, such as:

- the requirement for sharing of data to be initiated by the customer
- the establishment of an accreditation regime for organisations that are not Authorised Deposit-taking Institutions and the requirement for data recipients to be subject to the *Privacy Act 1988*, to minimise security and privacy risks
- the confirmation that aggregated and value-added data should not be subject to data sharing
- the reciprocity requirement for any organisations seeking to receive a data subject's information
- the emphasis on the need to educate consumers about data sharing, and
- the initial commentary around allocation of liability for participants (noting that further work is required).

There is, however, a need for greater consultation with stakeholders outside the finance sector on the governance arrangements, the operation of the reciprocity requirement for non-banking dataholders, and the feasibility of implementation costs and timeframes.

There are also some areas where the Open Banking Review takes a different perspective to the Productivity Commission. These are discussed in more detail below.

KEY ISSUES

Development of cross-industry framework

Although notionally focussed on banking, the recommendations of the Open Banking Review would have significant implications for the implementation of the Consumer Data Right in other sectors.

Under the Review's recommendations, the cross-economy framework would be set through the following two actions:

- The open banking requirements would gradually be extended to products and businesses unrelated to banking, through the "equivalent data" determinations made

¹ The Hon A Taylor MP (then Assistant Minister for Digital Transformation), *Australians to own their own banking, energy, phone and internet data*, media release, 26 November 2017.

by the Australian Competition and Consumer Commission (ACCC) for the purposes of reciprocal data sharing.

This would have the likely effect of binding non-banking dataholders to open banking regulations (potentially in relation to data unrelated to banking), with the scope of data subject to transfer determined by the ACCC instead of industry.

- The open banking regime would also lock in the fundamental elements of the economy-wide framework (such as governance and regulatory arrangements) before other sectors are formally required to participate. This would bind dataholders in other sectors to a regulatory regime on which they have not been consulted.

The Open Banking Review was not charged with developing an economy-wide framework, and there has not been a significant amount of engagement outside of the finance sector. It provides detailed lists of banking products to indicate data that would be within scope of the regime, which does not assist stakeholders in other sectors to assess what data may be in scope.

If economy-wide regulation is extended out from the banking sector, Australia risks establishing a piecemeal data sharing regulatory regime that is driven by ad hoc ACCC determinations instead of industry leadership. The open banking regime has been designed with the banking sector in mind, and may be problematic when retrofitted to other sectors.

Instead, we recommend taking a strategic approach and determining the ideal cross-economy governance, scope of data shared, and principles for standards – before any government decision on open banking. At a minimum, before deciding the open banking regime, we would suggest the Government should determine and announce the following elements of a cross-economy framework:

- principles for the scope of data to be captured, the principles of determining ‘equivalence’ across multiple sectors and the protocols for transferring data between sectors. This could then be used to guide the industry process covered under our proposed Recommendation 2 (noting there may be a small amount of derogation across sectors).

The Business Council has previously advocated for the scope of data transfer regulation to be limited to personally identifiable transactional data.

- the process for how the scope of data will be monitored, reviewed or adjusted once the Consumer Data Right has been implemented in a sector
- the criteria to be used by the ACCC and OAIC in recommending future sectors for inclusion
- principles for how the timeframe and implementation approach will be determined in each sector
- the intended compliance and enforcement approach
- how the Government will progress further thinking on liability.

The Open Banking Review provides a sensible starting point and should be used as the basis for deeper consultation with firms in other sectors. As an industry body that covers all sectors of the economy, the Business Council would be happy to assist in convening or facilitation further consultation and development.

It would also be an opportune time for the Government to undertake proper consultation and testing of data transfer models directly with consumers. This would assist in designing a genuinely customer-focussed system that is built on an understanding of genuine consumer demand for data transfer, and how the system may be used.

We understand the view that work should continue concurrently and Australia should capitalise on momentum; however, once a sub-optimal regime is in place, it would be difficult to unpick. Undue haste risks unintended consequences, costs or security risks – all of which are borne by consumers.

Recommendation 1: The Government should establish an immediate consultation process to determine an economy-wide framework (including principles for the intended scope of data that will be subject to the Consumer Data Right) prior to the commencement of the open banking regime.

The Business Council would be happy to assist in convening or facilitating deeper consultation with businesses outside the finance sector, or the development of cross-industry standards.

Determining the design for future sectors

Once the economy-wide framework has been determined, there is a natural question of how the scope of data in each sector is determined at the same level of detail as the Open Banking Review (for example, determination of products in scope or designation of firms that are compelled to participate).

It is clearly not practical to replicate a review as detailed as the Open Banking Review for energy, telecommunications and following sectors.

Nor is it desirable for these decisions to be made – in effect – by the ACCC on an ad hoc basis, through its determination of what data in each sector represents “equivalent data” to the open banking regime.

We agree with the Productivity Commission’s proposal for determining the scope of data to be shared: that is, that *industry* should determine the scope of data to be shared, to minimise the risk of chilling incentives for investment and innovation.²

It is essential that these discussions are led by key industry representatives – with consultation and representation from consumer groups, regulators, experts and potential data recipients. These could occur under the auspices of the new Data Standards Body.

Recommendation 2: The determination of the scope of data to be shared and data standards for subsequent sectors should be driven by industry-led working groups under the auspices of the Data Standards Body and should comprise key stakeholders in those sectors – as recommended by the Productivity Commission.

² Productivity Commission, *Data Availability and Use*, p 219

Charging models of data transfer

The Review recommends regulation to prohibit charging for data transfers.

This is based on a view in the Report that the costs of establishing a data transfer mechanism, operating the system, or maintaining and protecting the data would be “small” (or negative, when compared to the costs of data transfer under bilateral agreements).

Prohibiting charging models would risk stifling a data market in Australia. At the same time as stimulating demand from intermediaries and data recipients by underpricing the data, it would inhibit the incentives for dataholders to invest in data collection and maintenance in the first place. If data collectors or holders cannot generate a competitive advantage from data collection and would incur a regulatory requirement to transfer data at a loss, the incentives to invest or innovate in data would be diminished.

As data-related innovation becomes increasingly important for business models to succeed, we need to ensure Australia has the policy settings that encourage internationally competitive and innovative data-related goods and services.

Ultimately, consumers will receive a better-quality user experience from a vibrant and innovative data market, driven by investment and innovation by businesses.

- When businesses invest in new data-related goods or services, consumers benefit through lower prices, access to benefits often at no cost, more convenience, greater personalisation and reduced information asymmetry. The benefit to customers could be more than double the benefit to organisations.³

The Productivity Commission took the same view, on the basis that “the ability of entities to charge consumers for transferring data should curb spurious or time-wasting requests on businesses”.

If the Open Banking Review’s recommendation was adopted, it could set a potentially concerning precedent relating to government intervention in existing business investments in innovative areas. It could represent an intervention that is neither economically efficient, nor based on terms that are fair or reasonable.

As well as overlooking the economic costs, the Review also understates the financial costs of establishing a data transfer mechanism and maintaining compliance with open banking.

Firstly, it does not include a range of foreseeable costs faced by firms, such as:

- potentially altering existing data standards or adopting new data standards, including new iterations and ongoing assessment of whether future products would be captured
- monitoring to ensure compliance with the system
- increased demand for customer service (responding to consumer queries relating to the system)
- increased need for cyber security-related monitoring of the transfer mechanism and interaction with systems
- labour cost of being involved in the development of relevant standards.

³ BCG, *The Value of Our Digital Identity*.

Secondly, it is not correct that the initial costs of implementing data transfer systems would be small. The Productivity Commission also indicated that the data transfer components were the costliest component of the Consumer Data Right: “The additional compliance costs to business and government agencies of the Comprehensive Right compared to the status quo (individuals’ access rights under privacy legislation) would most likely be primarily associated with the new right for consumers to transfer their data to a third party.”

Thirdly, this view does not account for the maintenance of a data transfer mechanism. As there are changes to technology, products and (possibly) the scope of data captured, the open banking regime will likely become iterative and regularly updated. Depending on future decisions, this could come at significant cost, ultimately borne by consumers.

Recommendation 3: The Government should allow data holders to charge for the transfer of data, in line with the recommendations of the Productivity Commission. The Australian Competition and Consumer Commission should monitor data transfer fees to ensure they reflect reasonable costs of data transfer.

Scope and timeframe

The scope of customers and data captured by a data transfer regime fundamentally determines the costs and benefits of the regime.

The Open Banking Review’s proposed scope is excessively broad, in particular, in the following two ways.

1. While the Productivity Commission recommended establishing a Consumer Data Right for consumers and small businesses, the Review has recommended all business customers should be included.

This is on the basis that exempting medium or large enterprises “could prove to be an additional cost, not a cost-saving”.

There is no evidence presented to support this view. Feedback from Business Council members suggests this is not the case.

This perspective also does not take into account the possible economic costs of government intervention in business-to-business relationships, including potential unintended consequences.

2. The Review also recommends that the outcomes of identity verification assessments are required to be shared, at a customer’s request, at no cost.

This would represent an intervention into an existing commercial market, and cuts across the consultation process that AUSTRAC and the Attorney-General’s Department are conducting on a proposed legislative model for identity verification, which is currently underway.

The Review also differs from the scope proposed by the Productivity Commission in recommending that non-digitally active customers should be able to take advantage of the data transfer regime. We understand the equity reasons put forward by the Review and we

believe the design of the Consumer Data Right should take care not to exclude vulnerable customers.

However, considering the immense complexity associated with implementing a Consumer Data Right for non-digitally active customers (by requiring adjustment to non-digital channels and a separate approach to consumer education), it would be reasonable to allow for a slightly longer implementation timeframe.

Recommendation 4: The Government should set the scope of customers and data captured by the Consumer Data Right regime in line with the recommendations of the Productivity Commission.

The review has set a very ambitious product scope and timeframe.

Meeting the recommended product scope within the recommended timeframe could incur unintended consequences, risks to the security and protection of data, or significant costs that would have to be passed onto consumers.

In considering a possible implementation timeframe, the Government should set a more realistic timeframe that minimises the risks to consumers. This could involve phasing the commencement of different product types.

Recommendation 5: The Government should set a more realistic implementation timeframe for the Consumer Data Right. To assist, the commencement of different customers and data could be phased.