



Australian Banking
Association

19 September 2019

Mr Hamish McDonald
Structural Reform Division
Department of Treasury

By email: DPIConsultation@treasury.gov.au

Re: Treasury Consultation on the Digital Platforms Inquiry 2019

Dear Mr McDonald,

The ABA thanks you for the opportunity to make a submission to the Treasury Consultation on the ***Digital Platforms Inquiry Report 2019*** (the report).

The ABA acknowledges the breadth of the report and supports initiatives to improve privacy protections for banking customers. The ABA makes several points in this submission which warrant further review of recommendations 16-17 with respect to privacy, and also recommendations 20-21 with respect to unfair contract terms and unfair practices, and data portability.

The ABA looks forward to continued contribution to the future discussions on privacy and other reforms and is willing to facilitate a session to discuss the matters raised in this submission with Treasury and the ACCC.

Kind regards,

Emma Penzo
Policy Director – ABA
Emma.Penzo@ausbanking.org.au



1. Recommendations 16 & 17

The ABA supports initiatives to further enhance the privacy of banking customers. The ABA is mindful, however, that privacy reforms need to consider the centrality of data to modern commerce. The key challenge with the reforms being put forward by recommendations 16 and 17 is to achieve an appropriate balance of individual rights, customer experience and the social and economic utility of data. The ABA would encourage a further period of consultation to address the overall policy objectives of proposed changes to the Australian privacy regime, which takes into account the potential impacts on competition and innovation and the Australian economy generally.

Recommendation 16(a) update 'personal information' definition

The ABA would support the further clarification of what constitutes 'personal information' under the *Privacy Act 1988* (Cth) ('Privacy Act'). Any redrafting of the definition would ideally proceed with the objective of being clear when information will fall under the protections of the Privacy Act and should be subject to broad public consultation.

The ABA notes that if the definition of 'personal information' is broadened to include technical information, such information should only fall within the scope of the Privacy Act to the extent that it in fact identifies, or reasonably identifies, a natural person.

Recommendation 16(c) strengthen consent requirements and pro-consumer defaults

The ABA appreciates that consent is an important mechanism for building trust into the processing of electronic transactions and communications. The ABA would ask Treasury to consider, however, the additional utility to the economy of a basis of information use which is grounded in the 'legitimate interests' of the entity. For example, processing personal information for the 'legitimate interest' of a bank could allow for credit stress modelling and security monitoring techniques. Without this basis, consumers may be asked to consent to a number of uses, only some of which will appear directly relevant to the consumer. This may either lead to the degradation of socially and economically useful datasets or consumer 'consent' fatigue as they are asked to approve laundry lists of uses. It is therefore foreseeable that changes to consent and notification processes proposed by recommendation 16(c) may in certain instances have the unintended impact of undermining the utility or effectiveness of techniques such as those noted here.

Recommendation 16(d) Enable the erasure of personal information

The ABA notes that there are existing requirements on APP entities to erase personal information under APP11.2 and requests further details as to how this proposed right in 16(d) would operate alongside the requirements of APP 11.2 and the CDR Rules relating to the deletion of data. We note that the overlap of these principles will lead to added regulatory complexity for member banks. The ABA questions and seeks guidance what additional requirements 16(d) would introduce that are not currently covered under the APPs.

The ABA notes the exception contained within recommendation 16(d) 'unless the retention of information is necessary for the performance of a contract to which the consumer is a party, is required under law, or is otherwise necessary for an overriding public interest reason.' These will be important exceptions, particularly within the banking context where several data retention requirements and obligations apply. For example, data retention is mandated in the responsible lending provisions contained in s95 of the National Consumer Credit Protection Act, 2009.

Inferred information

The ABA recognises the need to provide customers with control over sensitive information relating to health, religious beliefs, and political affiliations. However, the ABA requests further clarity and consultation in respect to what would constitute inferred information and clarity regarding what additional protections would be required in respect of such information.



Further, the drafting of the recommendation requires clarity regarding the nature of action to be taken. Would the 'protections' concern procedural actions to be followed or would they apply substantive limitations on the use of such information?

2. Recommendations 20-21: Unfair contact terms and trading practices

The ABA notes the proposals regarding unfair contract terms and unfair trading practices (recommendations 20 and 21 respectively). If these recommendations were applied to financial services, the ABA would encourage Treasury to review existing obligations and current policy developments on these topics, including the success of enforcement action in respect of the former and initiatives such as the product intervention power in respect of the latter. In particular:

- Unfair contract terms have been the subject of significant industry and regulator attention since their introduction. The ABA requests Treasury to seriously consider whether the shift from such terms being voidable to being prohibited would result in a material change in compliance through the financial industry.
- The production intervention power is predicated upon 'significant consumer detriment' which could well be the touchstone for any prohibition on unfair trading practices. Treasury may like to consider how any prohibition interrelated with the product intervention power and/or whether considering the power such a prohibition is required

If Treasury agrees that unfair trading practices should be prohibited, then there will be a need for further guidance (or more detailed prescriptions beyond the term 'unfair') is needed to give industry participants clarity on when terms would expose them to a risk of penalty.

3. Direction for future ACCC work: Data portability

The ABA notes that the ACCC will revisit the question of designation of the digital platforms into the Consumer Data Right (CDR). The ABA agrees that 'digital platforms may deliver significant benefits to current and potential future markets including through innovation and the development of new services' (p70). The ABA strongly encourages Treasury and the ACCC to consider prioritising the building out the CDR ecosystem. A CDR which is data rich will have positive network effects and be a regime which will fully be capable of delivering economy-wide innovation. As a principle, considerations for the designation of future sectors to the CDR should also look beyond a cost-benefit consideration (which is substantially grounded in the 'known present') and could also include an assessment on the potential of the data to contribute to future competition and innovation in the Australian economy.