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Lodged by email: data@treasury.gov.au

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Dear Mr McAuliffe,

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RE: Exposure Draft Treasury Laws Amendment (Consumer Data Right) Bill 2018

Thank you for the opportunity to comment on the Exposure Draft of the *Treasury Laws Amendment (Consumer Data Right) Bill 2018* (the Bill). As the peak body for the health and community services sector in South Australia, the South Australian Council of Social Service (SACOSS) has an established history of interest, engagement and provision of proposed advice on the necessary market mechanisms for and regulation of essential services.

SACOSS is broadly supportive of the implementation of the Consumer Data Right (CDR) and the accompanying draft Treasury Laws Amendment (Consumer Data Right) Bill 2018.

In particular, SACOSS welcomes:

- Robust Privacy Safeguards which afford a higher level of protection than in the existing *Privacy Act 1998* (Cth);
- The requirement for all CDR participants to have a policy about the management of CDR data, including the scope for a CDR consumer to seek a correction of the CDR data if there are errors;
- Provisions for civil and other penalties for failure to comply with consumer data rules and Privacy Safeguards;
- The requirement for data to be deleted when use permissions are spent; and
- Provisions for external dispute resolution avenues and enforcement arrangements.

SACOSS understands that further work will be required in developing the rules and data standards specific to each designated sector, and looks forward to continue working with Treasury, the ACCC, and the OAIC to inform these processes.

Beyond the implementation of the Bill, SACOSS notes that funding has been provided in the 2018-19 Budget for the ACCC and OAIC to conduct education of consumers, data holders and recipients about the CDR. SACOSS encourages the ACCC and OAIC to prioritise raising consumer awareness about the value of consumer data and associated privacy and data protection rights. As highlighted in a recent paper comparing the Australian CDR with the European Union (EU) General Data Protection Regulation (GDPR),

“[T]hese measures, both implemented and proposed, in Australia and the EU for consumer data rights for the purposes of facilitating switching between providers, raise questions about how efficacious such rights actually are. There is very limited empirical research on the extent to which consumers make use of existing data rights they have regarding providers in some sectors, the extent to which this facilitates competition in practice, and the interplay with data protection frameworks. These rights, both existing and proposed, tend to implicate an idea of consumers who

are pro-active about using and allowing others to use their data, and also, at a more abstract level, imagines data to be an asset rather than a fundamental right to be protected.”¹

Consumer trust, engagement and decision-making

Indeed, research conducted by the Consumer Policy Research Centre (CPRC) point to an erosion of consumer trust in the banking, energy and telecommunications sectors as a key issue preventing consumer engagement in those markets.² We suggest that implementing the CDR in and of itself will not be enough to overcome barriers that prevent consumers from switching between service providers, and that concerted effort will be needed to restore consumer trust. These issues are crucial given the primary policy outcome of the CDR is to enable individuals (and small businesses) to direct that data can be shared with accredited parties to create more choice and competition.

In the energy sector where SACOSS is particularly active, research suggests that between 20-40 per cent of customers have been with their retailer for more than 3-4 years, despite the potential savings associated with switching.³ These trends may be more pronounced for consumers who lack the capacity to engage (e.g. older people, CALD, people living with disability).⁴ SACOSS believes that a community wide effort is needed to make sure that all consumers benefit from the CDR reforms and not just those ‘prosumers’ who are already likely to engage in the consumer market. This aligns with the original intent of the Productivity Commission that access to data should be a comprehensive right.⁵

A poor outcome of the CDR reforms would be for a small number of consumers to benefit from exercising their rights to access and use data. As such, SACOSS is supportive of complementary measures to increase the data literacy of Australians to prevent further entrenchment of disadvantage faced by those who are already vulnerable in our consumer markets. As per recommendations by CPRC, we would welcome specifically designed programs for vulnerable consumers and those experiencing reduced capacity so they can also access the potential benefits of the CDR.⁶

More broadly, SACOSS also supports calls from consumer advocates, including the CPRC, to implement economy-wide data reform similar to the EU’s GDPR.

The right to opt-out

The original Productivity Commission recommendations included the right for the consumer to opt-out of a data holder to collect information on them. Specifically, the Productivity Commission suggested that

¹ Esayas, S.Y & Daly, A. The proposed Australian Consumer Data Right: A European comparison, *European Competition and Regulatory Law Review*, 2018 [online], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3236020

² CPRC, Five preconditions of effective consumer engagement – a conceptual framework, June 2018, http://cprc.org.au/wp-content/uploads/9336-Preconditions-Report-2018-A4_V7.0-1.pdf

³ AEMC, 2018 retail energy competition review, June 2018, <https://www.aemc.gov.au/sites/default/files/2018-06/Final%20Report.pdf>

⁴ See: AMES Australia, Response to ACCC inquiry into retail electricity supply and pricing, June 2017, <https://www.accc.gov.au/system/files/AMES%20Australia.pdf>; Consumer Utilities Advocacy Centre, Tariff switching among older energy consumers, June 2014, <https://www.cuac.org.au/research/cuac-research/332-tariff-switching-among-older-energy-consumers/file>

⁵ Productivity Commission, Data availability and use inquiry report, March 2017, <http://www.pc.gov.au/inquiries/completed/data-access/report/data-access.pdf>

⁶ CPRC, Five preconditions of effective consumer engagement – a conceptual framework, June 2018, http://cprc.org.au/wp-content/uploads/9336-Preconditions-Report-2018-A4_V7.0-1.pdf

“This capacity to opt out at any time would be subject to a number of exceptions, including that individuals would not be able to have collection cease if the collected information is necessary for public benefit purposes (such as the maintenance of public health and safety, or administrative purposes such as tax collection) or forms part of a National Interest Dataset.”⁷

SACOSS supports the provision of a similar right within the CDR framework.

In regards to specific sections of the Bill, SACOSS would like to offer the following comments -

56AF Meaning of CDR data, directly or indirectly derived, associated with and CDR consumer

SACOSS would welcome the development of clear guidance around what would be considered directly and indirectly derived data.

56BB Matters that the consumer data rules may deal with

We understand that it will be the responsibility of the ACCC to develop sector-specific consumer data rules and welcomes consideration in the rules as to how costs are apportioned across data custodians, data recipients and consumers for each designated sector. Fees should not be prohibitive so as to discourage competition or innovation. SACOSS also supports arrangements that result in low/no cost to consumers to reduce barriers to participation. For example, it is worth considering whether fees would be charged to CDR consumers for directing the deletion of data.

56ED Privacy safeguard 1—open and transparent management of CDR data

SACOSS would welcome the inclusion of a requirement for the CDR policies of CDR participants to be written in Easy English. This draws on research which suggests that the overwhelming majority of Australians do not read privacy policies or terms and conditions for the products and services they sign up to.⁸

56EH Privacy safeguard 5—notifying of the collection of CDR data

SACOSS would welcome the insertion of a clause ensuring that the notification of the collection of CDR data is clear, unambiguous and comprehensible.

56EI Privacy safeguard 6—use or disclosure of CDR data

SACOSS notes that the intention of Treasury is to apply requirements under ACCC rulemaking to ensure that “consent is express, informed, current, clear, specific, unbundled and time limited”⁹, however we would welcome this to be also made explicit in the Bill. Currently this section only makes reference to “valid consent” being received.

⁷ Productivity Commission, Data availability and use inquiry draft report, October 2016, <https://www.pc.gov.au/inquiries/completed/data-access/thedraft/data-access-draft.pdf>, p. 17

⁸ CPRC, Consumer data and the digital economy: Emerging issues in data collection, use and sharing, July 2018, http://cprc.org.au/wp-content/uploads/Full_Data_Report_A4_FIN.pdf

⁹ Treasury, Consumer data right privacy protections summary, August 2018, https://static.treasury.gov.au/uploads/sites/1/2018/08/Consumer_Data_Right_Privacy_T316972.pdf, p. 2

We would like to thank Treasury for the work done to date on developing the framework of the CDR, and for consideration of our comments. If you have any questions relating to the above, please contact SACOSS Senior Policy Officer, Jo De Silva on (08) 8305 4211 or via jo@sacoss.org.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'RW', enclosed in a thin black rectangular border.

Ross Womersley
Chief Executive Officer